UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of	)	Docket No. 040-08502
COGEMA MINING, INC.	)	License No. SUA-1341
(Irigaray & Christensen Ranch Facilities)	)	May 5, 2009

COGEMA'S ANSWER OPPOSING OGLALA DELEGATION OF THE GREAT SIOUX NATION TREATY COUNCIL REQUEST FOR HEARING AND PETITION FOR LEAVE TO INTERVENE

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I. INTRODUCTION

In accordance with 10 C.F.R. § 2.309(h), COGEMA Mining, Inc. ("COGEMA" or "Applicant"), hereby files its Answer to the Request for Hearing and Petition for Leave to Intervene ("Petition") filed on April 10, 2009 by the Oglala Delegation of the Great Sioux Nation Treaty Council ("Petitioner"). The Petition responds to the U.S. Nuclear Regulatory Commission ("NRC" or "Commission") "Notice of License Renewal Request and Opportunity to Request a Hearing," published in the *Federal Register* on February 9, 2009 (74 Fed. Reg. 6436) ("Hearing Notice") concerning COGEMA's application to renew Source Material License SUA-1341 ("Application") for the Irigaray and Christensen Ranch Facilities in Johnson and Campbell Counties, Wyoming ("Facilities").

To be admitted as a party to this proceeding, the Petitioner must demonstrate standing and submit at least one admissible contention.[1] The Petitioner has done neither. As discussed in Section III below, the Petitioner has not demonstrated standing. Additionally, as discussed in

[1] *See* 10 C.F.R. § 2.309(a).

Section IV below, the Petitioner has not submitted any admissible contentions. Therefore, pursuant to 10 C.F.R. § 2.309, the Petition should be denied in its entirety.

II. BACKGROUND

COGEMA has a 10 C.F.R. Part 40 materials license to operate the Irigaray and Christensen Ranch in situ leach ("ISL") mining facilities in Johnson and Campbell Counties, Wyoming.[2] The original license dates from August 1978, and ownership has passed through various companies over the past 30 years.[3] On March 29, 2001, the license status changed from operating to decommissioning and restoration.[4] In April 2007, however, COGEMA requested that the NRC amend the license from decommissioning status to an operational status.[5] The NRC approved this amendment in September 2008.[6] COGEMA has not yet recommenced production activities.

On May 30, 2008, COGEMA submitted its Application to the NRC to renew Source Material License SUA-1341 for the Facilities.[7] The Application consists of a single document addressing both technical and environmental topics, as the NRC Staff recommends in Regulatory Guide 3.46, which provides guidance for ISL applications.[8] The NRC accepted the Application

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[2] Briefly, ISL mining involves the injection of an oxygen enriched solution, or "lixiviant," into wells drilled into the ore. The solution captures uranium as it flows through the ore, and the uranium is then removed from the solution via ion exchange. *See generally Crow Butte Res., Inc.* (License Renewal for the In Situ Leach Facility, Crawford, Nebraska), LBP-08-24, 68 NRC __, slip op. at 4 (Nov. 21, 2008).

[3] *See* Application at 1-1 to 1-2.

[4] Safety Evaluation Report, License No. SUA-1341, COGEMA Mining, Inc., Irigaray and Christensen Ranch Facilities at 2 (Sept. 29, 2008) ("2008 SER").

[5] Application at 1-2.

[6] *See generally* 2008 SER.

[7] Hearing Notice, 74 Fed. Reg. at 6436.

[8] *See* Regulatory Guide 3.46, Standard Format and Content of License Applications, Including Environmental Reports, for In Situ Uranium Solution Mining, at vi (June 1982) ("In view of the nature of an in situ uranium solution mining operation, where the major consideration of both an applicant's submittal and the staff's review is the assessment of environmental impacts of the proposed activity, it appears reasonable that an application and environmental report for an in situ uranium solution mining license should consist of a single document . . . containing the information discussed herein.").

for docketing on December 29, 2008, and published the Hearing Notice on February 9, 2009.[9] The Hearing Notice stated that any person whose interest may be affected by the proposed license renewal and desires to participate as a party in an NRC adjudicatory proceeding must file a request for hearing by April 10, 2009.[10] Any such request was required to be filed in accordance with the NRC's E-filing rule, 10 C.F.R. § 2.304, and the applicable provisions of 10 C.F.R. § 2.309.[11]

Contrary to these requirements, the Petitioner transmitted the Petition to COGEMA by facsimile on April 10, 2009, and, as of this date, still has not properly filed the Petition in accordance with Section 2.304.[12] At the end of the Petition, the Petitioner provides a "Motion for E-mail Filings."[13] This motion is deficient because the Petitioner did not consult with COGEMA to attempt to resolve this issue as required by 10 C.F.R. § 2.323(b) prior to submitting this motion. As stated in Section 2.323(b), the motion "must be rejected."[14] Therefore, the Motion does not cure the improper service of the Petition.[15]

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9 Hearing Notice, 74 Fed. Reg. at 6436.

10 *Id*. at 6437.

11 *Id*. In addition, the Hearing Notice imposed procedures for access to sensitive unclassified non-safeguards information ("SUNSI") and safeguards information ("SGI") for purposes of contention preparation. *Id*. at 6438-39. However, no one requested access to such information within the deadline set forth in the Hearing Notice.

12 The Presiding Officer, therefore, can reject the Petition in its entirety for this reason alone.

13 Petition at 125.

14 *See, e.g.*, Order (Denying Motion for Extension of Time), Docket No. 63-001-HLW (Feb. 27, 2009) (unpublished) (rejecting motion for failing to comply with 10 C.F.R. § 2.323(b)), *available at* ADAMS Accession No. ML090580441.

15 If this proceeding is to continue, then COGEMA would not oppose the Presiding Officer granting the Petitioner's request for e-mail filings in the future, as long as COGEMA can continue using the E-filing system and the Petitioner accepts full responsibility for proper service by e-mail, including all risks that might be associated with service in this manner.

III. THE PETITIONER HAS NOT DEMONSTRATED STANDING

A. Applicable Legal Standards and NRC Precedent

The NRC regulations require that a petitioner provide certain basic information to support its claim of standing.[16] This required information includes: (1) the nature of the petitioner's right under the Atomic Energy Act of 1954, as amended ("AEA"), to be made a party to the proceeding; (2) the nature and extent of the petitioner's property, financial, or other interest in the proceeding; and (3) the possible effect of any decision or order that may be issued in the proceeding on its interest.[17] In Part 40 materials license proceedings like this one, the NRC has not applied a presumption of standing based on proximity to a facility that has received an NRC materials license.[18]

Thus, in this proceeding, the Petitioner must demonstrate that it satisfies the elements of standing set forth in 10 C.F.R. § 2.309(d)(l)(ii)-(iv). These concepts, as well as organizational standing, are discussed below.[19]

1. Traditional Standing

The NRC has stated that it generally follows contemporary judicial concepts of standing.[20] Thus, to demonstrate standing, a petitioner must show: (1) an actual or threatened,

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[16] *See* 10 C.F.R. § 2.309(d)(l).

[17] *See id.* § 2.309(d)(l)(ii)-(iv).

[18] *See, e.g.*, *Hydro Res.* (2929 Coors Road, Suite 101, Albuquerque, NM 87120), LBP-98-9, 47 NRC 261, 272 n.16 (1998) (citing Informal Hearing Procedures for Materials Licensing Applications, 54 Fed. Reg. 8269 (Feb. 18, 1989)); *Crow Butte*, LBP-08-24, slip op. at 10 ("In cases involving ISL uranium mining . . . the Board's analysis of each petitioner's claim in . . . [the] proceeding must be assessed on a case by case basis.").

[19] The NRC regulations, 10 C.F.R. § 2.309(e), also allow a petitioner to request discretionary intervention in its initial petition. Section 2.309(e) states: "a petitioner who wishes to seek intervention as a matter of discretion in the event it is determined that standing as a matter of right is not demonstrated *shall* address the following factors in his/her *initial petition*." (Emphasis added). The Petitioner did not request discretionary standing in its initial Petition in accordance with Section 2.309(e), nor did it address the relevant factors. The Petitioner, therefore, cannot obtain discretionary intervention. *See Babcock & Wilcox* (Apollo, Pennsylvania Fuel Fabrication Facility), LBP-93-4, 37 NRC 72, n.66 (1993) ("it is not necessary to determine whether they could be afforded such intervention").

[20] *See, e.g.*, *Nuclear Mgmt. Co., LLC* (Monticello Nuclear Generating Plant), CLI-06-6, 63 NRC 161, 163 (2006).

concrete and particularized injury that is (2) fairly traceable to the challenged action and (3) likely to be redressed by a favorable decision.[21] These three criteria are commonly referred to, respectively, as injury-in-fact, causality, and redressability.

First, a petitioner's injury-in-fact showing "requires more than an injury to a cognizable interest. It requires that the party seeking [to participate] be himself among the injured."[22] The injury must be "concrete and particularized," not "conjectural" or "hypothetical."[23] "As a result, standing [will] be denied when the threat of injury is too speculative."[24] Additionally, the alleged "injury-in-fact" must lie within "the zone of interests" protected by the statutes governing the proceeding—either the AEA or the National Environmental Policy Act of 1969, as amended ("NEPA").[25] The injury-in-fact, therefore, must generally involve potential radiological or environmental harm.[26]

Second, a petitioner must establish that the injuries alleged are fairly traceable to the proposed action—in this case, the issuance of a renewed license to continue uranium production operations at the Facilities.[27] Although a petitioner is not required to show that the injury flows directly from the challenged action, it must nonetheless show that the "chain of causation is

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[21] *See Yankee Atomic Elec. Co.* (Yankee Nuclear Power Station), CLI-96-1, 43 NRC 1, 6 (1996).

[22] *Sierra Club v. Morton*, 405 U.S. 727, 734-35 (1972).

[23] *Sequoyah Fuels Corp*. (Gore, Okla. Site), CLI-94-12, 40 NRC 64, 72 (1994).

[24] *Id.*

[25] *Quivira Mining Co.* (Ambrosia Lake Facility, Grants, N.M.), CLI-98-11, 48 NRC 1, 5 (1998), *aff'd sub nom.*, *Envirocare of Utah, Inc. v. NRC*, 194 F.3d 72 (D.C. Cir. 1999).

[26] *See Pac. Gas & Elec. Co.* (Diablo Canyon Nuclear Power Plant, Units 1 & 2), CLI-02-16, 55 NRC 317, 336 (2002).

[27] *See Sequoyah Fuels*, CLI-94-12, 40 NRC at 75.

plausible."[28] The relevant inquiry is whether a cognizable interest of the petitioner might be adversely affected by one of the possible outcomes of the proceeding.[29]

Finally, each petitioner is required to show that "its actual or threatened injuries can be cured by some action of the tribunal."[30] In other words, "it must be likely, as opposed to merely speculative that the injury will be redressed by a favorable decision."[31]

2. Standing of Organizations

An organization that wishes to intervene in a proceeding may do so either in its own right (by demonstrating injury to its organizational interests), or in a representative capacity (by demonstrating harm to the interests of its members).[32] To intervene in a proceeding in its own right, an organization must allege—just as an individual petitioner must—that it will suffer an immediate or threatened injury to its organizational interests that can be fairly traced to the proposed action and be redressed by a favorable decision.[33]

General environmental or public policy interests are insufficient to confer organizational standing. In *Sierra Club v. Morton*, the U.S. Supreme Court held that a "special interest in the conservation and the sound maintenance of the national parks, game refuges, and forests of the country" was insufficient to provide organizational standing to a petitioner.[34] The Court stated that:

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28 *Id.*

29 *Nuclear Eng'g Co., Inc.* (Sheffield, Ill., Low-Level Radioactive Waste Disposal Site), ALAB-473, 7 NRC 737, 743 (1978).

30 *Sequoyah Fuels Corp*. (Gore, Okla. Site Decommissioning), CLI-01-2, 53 NRC 9, 14 (2001).

31 *Sequoyah Fuels*, CLI-94-l2, 40 NRC at 76 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (internal quotations omitted)).

32 *Yankee Atomic Elec. Co.* (Yankee Nuclear Power Station), CLI-98-21, 48 NRC 185, 195 (1998) (citing *Georgia Inst. of Tech.* (Georgia Tech Research Reactor, Atlanta, Ga.), CLI-95-12, 42 NRC 111, 115 (1995)).

33 *See Georgia Tech*, CLI-95-12, 42 NRC at 115.

34 405 U.S. at 730, 741.

> [A] mere 'interest in a problem,' no matter how longstanding the interest and no matter how qualified the organization is in evaluating the problem, is not sufficient by itself to render the organization 'adversely affected' or 'aggrieved' . . . . [I]f a 'special interest' in this subject were enough to entitle the [petitioner] to commence this litigation, there would appear to be no objective basis upon which to disallow a suit by any other bona fide 'special interest' organization however small or short-lived.[35]

Similarly, an organization's assertion "that it has an interest in state and federal environmental laws and in the land, water, air, wildlife, and other natural resources that would be affected" is insufficient to establish standing.[36] Equally insufficient for standing purposes is a petitioner's mere academic interest in a proceeding,[37] in presenting "sound science" to a licensing board,[38] in disseminating information on nuclear non-proliferation,[39] in environmental and consumer protection,[40] in promoting compliance with federal and state laws and regulations,[41] and in promoting the "development of sound energy policy."[42]

To invoke representational standing, an organization must: (1) show that at least one of its members has standing in his or her own right (*i.e.*, by demonstrating injury-in-fact within the zone of protected interests, causation, and redressability, or by demonstrating geographic

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[35] *Id.* at 739; *see U.S. Dep't of Energy* (Plutonium Export License), CLI-04-17, 59 NRC 357, 363-64 (2004) (quoting *Sierra Club v. Morton*, 405 U.S. at 739).

[36] *Int'l Uranium (USA) Corp.* (White Mesa Uranium Mill), CLI-01-21, 54 NRC 247, 251-52 (2001).

[37] *Puget Sound Power & Light Co.* (Skagit/Hanford Nuclear Power Project, Units 1 & 2), LBP-82-74, 16 NRC 981, 983-84 (1982).

[38] *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 176, *aff'd*, CLI-98-13, 48 NRC 26 (1998).

[39] *Transnuclear, Inc.* (Export of 93.15% Enriched Uranium), CLI-94-1, 39 NRC 1, 5-6 (1994).

[40] *See Consumers Energy Co.* (Palisades Nuclear Power Plant), CLI-07-18, 65 NRC 399, 411-12 (2007) (finding that petitioner's interest in promoting the "economic use of energy, including nuclear energy, and to promote the public interest, environmental protection, and consumer protection" was insufficient to provide standing).

[41] *Int'l Uranium (USA) Corp.* (White Mesa Uranium Mill), LBP-02-3, 55 NRC 35, 46-47 (2002).

[42] *Edlow Int'l Co.* (Agent for the Government of India on Application to Export Special Nuclear Material), CLI-76-6, 3 NRC 563, 572 (1976); *see also Sacramento Mun. Util. Dist.* (Rancho Seco Nuclear Generating Station), CLI-92-2, 35 NRC 47, 59 (1992) (finding that petitioner's institutional interest in disseminating information "regarding the need for future energy sources in California" is insufficient for standing purposes).

proximity in cases where the presumption applies); (2) identify that member by name and address; and (3) show, "preferably by affidavit," that the organization is authorized by that member to request a hearing on behalf of the member.[43] Indeed, the Commission has held that "[t]he failure both to identify the member(s) [that the petitioners] purport to represent and to provide proof of authorization therefore precludes [the petitioners] from qualifying as intervenors."[44]

3. Standing of Indian Tribes

To participate in a proceeding before the NRC, an affected Federally-recognized Indian Tribe must submit a petition to intervene.[45] An Indian Tribe must meet the generally applicable requirements, including those for standing,[46] except that, if the facility to be licensed is located within the boundaries of the Indian Tribe, then pursuant to 10 C.F.R. § 2.309(d)(2)(i) the tribe only has to show that it has an admissible contention and is not required to further demonstrate standing.

B. <u>The Petitioner Has Not Demonstrated Standing to Intervene</u>

1. Contrary to the Petitioner's Claims, 10 C.F.R. § 2.309(d)(2) Is Not Applicable and the Petitioner Must Demonstrate Standing

The Petitioner claims that, pursuant to 10 C.F.R. § 2.309(d)(2), it does not have to demonstrate that it is entitled to standing because the "facility [is] located within its boundaries,

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43 *Consumers Energy Co.*, CLI-07-18, 65 NRC at 408-10; *see also N. States Power Co.* (Monticello Nuclear Generating Plant, Prairie Island Nuclear Generating Plant, Units 1 & 2; Prairie Island Independent Spent Fuel Storage Installation), CLI-00-14, 52 NRC 37, 47 (2000); *see also Gen. Pub. Util. Nuclear Inc*. (Oyster Creek Nuclear Generating Station), CLI-00-6, 51 NRC 193, 202 (2000).

44 *Consumers Energy Co.*, CLI-07-18, 65 NRC at 410.

45 10 C.F.R. § 2.309(d)(2)(i).

46 *Id.*; *Hydro Res.*, 47 NRC at 272 ("While Native Americans have a unique relationship with the federal government, they must satisfy NRC requirements for standing in order to be admitted as a party to an NRC proceeding.").

i.e. the treaty territory."[47] The Petitioner is mistaken. The presumption of standing afforded if the facility is located within the Indian Tribe's boundaries only applies to "Federally-recognized" Indian Tribes.[48] The Petitioner is not a Federally-recognized Indian Tribe. The Bureau of Indian Affairs recently published a list of "recognized" Indian entities.[49] That list includes the "Oglala Sioux Tribe of the Pine Ridge Reservation," but does not include the Petitioner's organization, the "Oglala Delegation of the Great Sioux Nation Treaty Council."[50] The Petitioner admits as much in the Petition by distinguishing its organization from the "Oglala Sioux Tribe."[51] Thus, the Petitioner cannot be granted standing under this provision.

Even if the Petitioner were found to represent the Federally-recognized Indian Tribe at the Pine Ridge Indian Reservation—the Oglala Sioux Tribe—standing still must be denied because it is contrary to United States Supreme Court precedent in *United States v. Sioux Nation of Indians*.[52] The Petitioner claims that it is not required to demonstrate standing because the Facilities are within lands that were ceded to it by the 1851 and 1868 Fort Laramie Treaties.[53] Only five months ago in *Crow Butte*, a board squarely rejected this very same argument as a basis for standing.[54] In any case, while the Petitioner argues that the Facilities are located within

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[47] Petition at 11.

[48] 10 C.F.R. § 2.309(d)(2)(i).

[49] *See* Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 73 Fed. Reg. 18,553 (Apr. 4, 2008) (list of 562 federally recognized tribal entities maintained by the Bureau of Indian Affairs).

[50] *Id.* at 18,555.

[51] Petition at 5 (stating that the Petitioner's organization is not "beholden to the laws of the United States").

[52] 448 U.S. 371, 410-11 (1980).

[53] Petition at 2-5.

[54] *Crow Butte*, LBP-08-24, slip op. at 18-21. Although the argument was already rejected by another board, the Petition repeats this argument and requests that if the argument is again rejected, it be given "reasonable time from notice of that decision to submit additional information in satisfaction of 10 C.F.R. § 2.309(d)(1)." Petition at 12. The Petitioner may not "cure" this or any other defect in its Petition at a later time, because 10 C.F.R. § 2.309(d)(1) requires standing to be demonstrated in the initial petition. Thus, the Petitioner cannot cure this defect in any Reply that it submits pursuant to 10 C.F.R. § 2.309(h)(2). *See Entergy Nuclear*

lands ceded to the Tribe by the 1851 and 1868 Fort Laramie Treaties, this argument is inconsequential because, as confirmed by the Supreme Court, those treaties were abrogated by the Fort Laramie Treaty of 1877, which Congress enacted into law in 1877.[55]

As the Petitioner admits, the Facilities are not located within the territory that remained in its ownership after the 1877 Treaty.[56] Therefore, as in *Crow Butte*, "any claims to ownership of the land upon which the . . . mining site sits cannot support standing here."[57] Because, assuming the Petitioner were a Federally-recognized Indian Tribe, the Facilities are not located within its current territory, the Petitioner is required to demonstrate that it is entitled to standing in this proceeding.[58]

2. The Petitioner Has Not Demonstrated Organizational Standing

In order to demonstrate that it is entitled to standing, an organization must show a "discrete institutional injury to itself."[59] The Petition is an amalgamation of arguments made by it and the Oglala Sioux Tribe in *Crow Butte*. In that case, the board found that the Oglala Sioux Tribe had standing, but that the Petitioner did not.[60] Here, the Petitioner has submitted a Petition that is nearly identical to what it submitted in *Crow Butte*; the only difference is that it has attempted to make arguments similar to those the Oglala Sioux Tribe used to successfully demonstrate standing—regarding damage to cultural resources and contamination of water used

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Operations, Inc. (Palisades Nuclear Plant), CLI-08-19, 68 NRC __, slip op. at 9-12 (Aug. 22, 2008) (finding that the authorization affidavit for representational standing cannot be filed with the reply, but must be filed with the initial petition to intervene). This principle is particularly applicable here, where the Petitioner is aware that its argument, as presented, is inadequate.

55 *Sioux Nation of Indians*, 448 U.S. at 410-11; *Crow Butte*, LBP-08-24, slip op. at 20-21 (citing 19 Stat. 254 (1877)).

56 *See* Petition at 5 ("Nothing about the 1877 act undermines the fact that the Mine site is within the 1851 Treaty Territory and the 1868 Treaty Territory.").

57 *Crow Butte*, LBP-08-24, slip op. at 21.

58 *See* 10 C.F.R. § 2.309(d)(2)(i).

59 *White Mesa*, CLI-01-21, 54 NRC at 252.

60 *Crow Butte*, LBP-08-24, slip op. at 3.

by residents of the Pine Ridge Reservation.[61] But those arguments fail here because the Petitioner has not provided any support for its assertions, which is a sharp contrast to the support that the successful petitioners in *Crow Butte* provided to establish their standing.

a. The Petitioner Has Not Shown any Alleged Damage to Cultural Resources that Entitles It to Standing

The Petitioner claims to have standing based on "artifacts or historical evidence that has been, or may be discovered, in the permit area."[62] It goes on to claim that "[w]hatever camps or artifacts that may be found in the area of the Mine are likely to have been left by Red Cloud's people, or other Oglala Lakota."[63] In *Crow Butte*, the board granted the Oglala Sioux Tribe's claim of standing in part based on "an interest in identified cultural resources and artifacts at the Crow Butte mining site."[64] The *Crow Butte* board concluded that "there are cultural resources on the Crow Butte site that have not been properly identified and may be harmed as a result of the mining activities."[65]

In contrast to the Oglala Sioux Tribe's claims in *Crow Butte*, in which the Tribe claimed standing based on "identified cultural resources and artifacts," the Petitioner has not identified any specific cultural resources that are located at the Facilities to support its standing. COGEMA's license requires it to perform cultural resource evaluations only on the parts of the Facilities that it will disturb.[66] In 1986, in an effort that went beyond its duties under the license,

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[61] *Id.* at 13-18, 21-25.

[62] Petition at 5-6.

[63] *Id*. at 5.

[64] *Crow Butte*, LBP-08-24, slip op. at 19, 21.

[65] *Id*. at 24.

[66] Environmental Assessment for the Renewal of Source Material License No. SUA-1341, at 16 (1998) ("1998 EA"), *available at* ADAMS Accession No. ML081060063. These requirements are discussed in the NRC's environmental assessment ("EA") prepared in 1998 for the licensee's last license renewal request for the Facilities. In preparing the 1998 EA, the NRC Staff contacted the Wyoming State Historic Preservation Officer and the Bureau of Land Management regarding any other cultural resources on the site. *Id.* The NRC also

the licensee for the Facilities hired a contractor to conduct a study of the parts of the Christensen Ranch facility[67] that are on state and federal lands.[68] As the NRC noted in its 1998 EA, that study found two historic sites, sixty-one prehistoric sites and five sites with both prehistoric and historic components.[69] Only one of those sites is within the area being mined and it is surrounded by an exclosure fence to prevent any disturbance within 100 feet of that site.[70] The Petitioner does not claim that the exclosed site or any other identified sites would be affected by license renewal; it also does not identify other cultural resources that COGEMA has not already identified. The Petitioner's failure to identify any cultural resources that would potentially be affected by license renewal make its claim of injury "conjectural" and "hypothetical."[71] As a result, the Petitioner's reliance on potential cultural resource impacts as a basis for standing should be rejected.

In any event, the Petitioner cannot show that the granting of the license renewal will threaten as yet unidentified cultural resources because COGEMA is limited by its license to mining areas of the Facilities that have already been evaluated for cultural resources.[72] If COGEMA desires to expand operations to areas that have not already been evaluated by the NRC, then it is required, by License Condition 9.9, to conduct a cultural resource inventory of

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consulted with 11 Indian Tribes, including the Oglala Sioux Tribal Council (which like the Petitioner is located at the Pine Ridge Reservation), when it prepared an EA in 2008 for COGEMA's license amendment request. Environmental Assessment Regarding the License Amendment Request to Return to Operating Status from Decommissioning Status, at 10 (2008) ("2008 EA"), *available at* ADAMS Accession No. ML082110026. The Oglala Sioux Tribal Council did not, however, respond to the NRC Staff's inquiry. *Id.* at 11.

67 The Irigaray site is relatively small in size and does not support any archeological sites. 1998 EA at 16.

68 *Id*. The licensee went beyond its license obligations because the mining areas are a small part of the area that was actually surveyed.

69 *Id*.

70 *Id*.

71 *See Sequoyah Fuels*, CLI-94-12, 40 NRC at 72.

72 2008 EA at 10-11.

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those new areas.[73] Furthermore, if cultural resources are discovered in areas in which work is being conducted, then all work must cease until the artifacts are evaluated and resumption of the work is approved by the NRC.[74] COGEMA's requested license renewal will not change any of those conditions. Because the license conditions imposed by the NRC will continue to apply to activities under the renewed license, the Petitioner cannot show that license renewal will result in damage to cultural resources. As a result, the Petitioner cannot show injury-in-fact and causation, and consequently, this basis for standing must fail.

Because it cannot show that there will be a threat to cultural resources if COGEMA's license renewal application is granted, the Petitioner's situation is akin to that of the Indian Tribe in *Crow Creek Sioux Tribe v. Brownlee*,[75] rather than the Oglala Sioux Tribe in *Crow Butte*. In *Brownlee*, the D.C. Circuit found that an Indian Tribe did not have standing merely because of statutory rights to burial remains and cultural artifacts on land that was being transferred to South Dakota from the federal government.[76] Rather, the court found that in order to demonstrate standing, the Indian Tribe was required to show that the action causes it some actual or imminent injury.[77] Here, the Petitioner has failed to make that showing; it has not identified any specific artifacts or cultural resources at the Facilities, or demonstrated (because it cannot) that by allowing mining operations to continue there will be an actual or imminent injury to cultural resources at the site.

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[73] *Id.*

[74] *Id.*

[75] 331 F.3d 912, 916 (D.C. Cir. 2003).

[76] *Id.*

[77] *Id.*

b. The Petitioner Has Not Shown It Is Entitled to Standing Based on Contaminants from the Facilities in Water Used at the Pine Ridge Indian Reservation

The Petitioner appears to claim standing because the water at the Pine Ridge Indian Reservation allegedly will be affected by mining at the Facilities.[78] Specifically, the Petitioner states: "The Mine spills into the Willow Creek which flows into the Powder River, West, towards the Pine Ridge Indian Reservation."[79] Thus, the Petitioner apparently claims that contaminants from the mine will travel long distances—approximately 150 miles to the east—and damage water at the Reservation. The Petitioner, however, provides no evidence to support this bare assertion that water at the Pine Ridge Indian Reservation will be negatively affected.

The Petitioner has not provided even provisional or preliminary information to attempt to show that water from the Facilities could reach the Reservation under any circumstances. With regard to the aquifer used for mining, the NRC Staff concluded that "aquifer testing indicates that groundwater flow should be contained by the confining strata and concentrated within the production or ore zone."[80] Furthermore, with regard to surface water, Willow Creek is the only surface water in the Irigaray permit area.[81] Eighteen of Willow Creek's watersheds flow through the Christensen Ranch.[82] However, Willow Creek and its watersheds are "ephemeral" as described by the NRC in its 1998 EA.[83] Due to Willow Creek's "ephemeral" nature, it is highly unlikely that contaminants could travel any significant distance through Willow Creek and its

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78 Petition at 7-8, 10-11.

79 *Id.* at 7.

80 1998 EA at 15.

81 2008 EA at 8; Application at 2-15.

82 1998 EA at 13-14.

83 *Id.*

watersheds.[84] In any event, contrary to the Petitioner's claim that the Powder River flows west toward the Reservation, the Powder River actually flows north (where it connects to the Yellowstone River and eventually the Missouri River).[85] The White River, which runs through the Reservation, also flows to the Missouri River, but significantly downstream of the Yellowstone River.[86] In other words, there are no connections between water sources at the license site and the Reservation.[87] Moreover, the NRC Staff concluded, as recently as September 2008, that any impacts to water resources, both surface and subsurface, are expected to be low.[88]

The failure of the Petitioner to provide evidence of any connection between surface or subsurface water at the Facilities and the Reservation is a key distinction between the Petitioner's claims in this proceeding and the Oglala Sioux Tribe's claims in *Crow Butte*. In *Crow Butte*, the Oglala Sioux Tribe, along with other petitioners, claimed that it would be injured because of interconnections between the aquifer used for ISL mining and the aquifer used by the Sioux Tribe for drinking and other purposes. The *Crow Butte* board noted that if a petitioner can show that contaminants can plausibly migrate to the aquifer from which the petitioner obtains water, then the petitioner has a cognizable injury and is entitled to standing.[89] The board further stated that it had "a number of expert opinions alleging a sufficient link to find requisite standing."[90] The board concluded that it could "grant standing to those petitioners with claims based on use

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[84] *See id*.

[85] U.S. Dep't of Interior Geological Survey, Map of Wyoming (1980), ISBN No. 0-607-61511-7.

[86] U.S. Dep't of Interior Geological Survey, Map of South Dakota, Map No. 44100-C3-ST-500 (1984).

[87] *Compare id*. *with* U.S. Dep't of Interior Geological Survey, Map of Wyoming, ISBN No. 0-607-61511-7.

[88] 2008 EA at 9.

[89] *Crow Butte*, LBP-08-24, slip op. at 12 ("On the other hand, if it were not plausible for contaminants to leave the area that is being mined, petitioners generally could have no cognizable injury, and hence could not be accorded standing."). Thus, to be entitled to standing, a petitioner must show that there is some plausible connection between water sources it uses and water sources at the Facilities.

[90] *Id.* at 13.

of well water . . . [because the] petitioners . . . have demonstrated that some level of interconnection between aquifers is possible."[91] In contrast, the Petitioner does not provide any support, expert or otherwise, for its claim that water, either surface[92] or aquifer,[93] from the mine area will reach the Pine Ridge Reservation. Thus, it has failed to show that it is entitled to standing on this basis.

c. The Petitioner Has Not Shown that It Is Entitled to Standing Based on Its Position as Steward of Land, Water, and Wildlife

In a further attempt to establish a basis for standing, the Petitioner makes the following vague assertion:

> Wildlife, including antelope, deer, elk and fish provide food for a number of Oglala Lakota, including members of the petitioning Oglala Delegation of the Great Sioux Nation, who currently reside within the treaty territory. Petitioner makes environmental contention that these animals are adversely affected by the operation of the Mine . . . .[94]

This assertion is far too general to be a basis for standing. First, the Petitioner has not provided any evidence that animals will be negatively affected by the granting of a renewal license. Second, the treaty territory is huge, so in the absence of any specific information supplied by the Petitioner, it is impossible to know where its members reside in relation to the Facilities and if any of the wildlife such individuals might use would have any contact with the mine. Third, and

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[91] *Id*. at 17.

[92] A review of a map shows that neither Willow Creek or the Powder River flow towards or through the Pine Ridge Reservation. U.S. Dep't of Interior Geological Survey, Map of Wyoming, ISBN No. 0-607-61511-7.

[93] Unlike the petitioners in *Crow Butte*, who provided evidence showing a plausible connection between the aquifer used for mining and their own aquifer, the Petitioner failed to provide any evidence that it uses the same aquifer as the Facilities. Furthermore, the mine in *Crow Butte* was about 30 miles from the Reservation, *Crow Butte*, LBP-08-24, slip op. at 16 n.70, compared to the approximately 150 miles that separate the Facilities here from the Reservation. The petitioners in *Crow Butte* had the burden to show that it was plausible for contaminants to travel 30 miles; similarly, the Petitioner here bears the burden of showing that contaminants can travel approximately 150 miles.

[94] Petition at 8.

most crucially, the Petitioner *has not identified a single member* who will be injured by the continued operation of the Facilities.

d. The Petitioner also Has Not Shown that It Is Entitled to Standing Because of Alleged Spills and License Violations

In an additional attempt to show that it is entitled to standing, the Petitioner recites alleged spills and license violations that have occurred over the past few years.[95] But it does not allege, let alone show, that it was harmed by any of those spills.[96] According to the Petitioner, the furthest that any of the spills traveled is 400 feet in the northeast direction—which is less than 0.05% of the distance (and in the wrong direction) necessary to reach the Pine Ridge Reservation—which is approximately 150 miles away.[97] The mention of spills at the site appears to be another attempt to mimic the strategy of successful petitioners in *Crow Butte*. In *Crow Butte*, an expert opined that contaminants from surface spills could enter the White River, which runs through the Pine Ridge Reservation and is used by some of the other petitioners in *Crow Butte*.[98] The mention of spills in *Crow Butte* is relegated to a footnote and does not appear to be one of the main bases for the board's finding of a plausible connection between water at the Crow Butte site and the Reservation and granting standing.[99] Nonetheless, because the Petitioner has failed to demonstrate that the alleged spills caused or could cause it any injury, this basis for standing fails.

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95 *Id.* at 13-16.

96 *Id*.

97 *See id*. at 14.

98 *Crow Butte*, LBP-08-24, slip op. at 14 n.58.

99 *Id*.

The Petitioner also cites other alleged license violations, but does not show that any of the other violations cited have caused or could cause any injury to it or its members. The failure to demonstrate any injury from the alleged violations means this basis for standing also fails.

3. The Petitioner Has Not Demonstrated Representational Standing

To demonstrate representational standing, the Petitioner is required to identify one member by name and address that has authorized it to represent him or her, and show that the member is entitled to standing in the proceeding on his own. The Petitioner submitted a declaration from only one member—Chief Oliver Red Cloud. Chief Red Cloud does not give his address or identify how far he lives from the Facilities. His declaration recites the history of interaction between Native and non-Native Americans—it does not demonstrate that he will suffer an injury-in-fact caused by the licensing action at issue that can be redressed in this proceeding. Thus, the Petitioner has not demonstrated that Chief Red Cloud is entitled to standing as an individual in this proceeding. The Petitioner did not submit any other declarations or even mention any other members who may suffer an injury.[100] Because it has not presented a single member who is entitled to standing on his or her own, the Petitioner has failed to demonstrate it is entitled to representational standing.

IV. <u>THE PETITIONER HAS NOT PROFFERED AN ADMISSIBLE CONTENTION</u>

A. <u>Applicable Legal Standards and Relevant NRC Precedent</u>

As explained above, to intervene in an NRC licensing proceeding, a petitioner must submit at least one admissible contention. Under 10 C.F.R. § 2.309(f)(1), a hearing request "must set forth with particularity the contentions sought to be raised." In addition, that section

[100] The Petitioner cannot remediate its failure to submit a sufficient authorization affidavit by filing additional affidavits with its reply. *See Entergy Nuclear Operations, Inc.*, CLI-08-19, slip op. at 9-12 (finding that the authorization affidavit for representational standing cannot be filed with the reply, but must be filed with the initial petition to intervene).

specifies that each contention must: (1) provide a specific statement of the legal or factual issue sought to be raised; (2) provide a brief explanation of the basis for the contention; (3) demonstrate that the issue raised is within the scope of the proceeding; (4) demonstrate that the issue raised is material to the findings the NRC must make to support the action that is involved in the proceeding; (5) provide a concise statement of the alleged facts or expert opinions, including references to specific sources and documents that support the petitioner's position and upon which the petitioner intends to rely; and (6) provide sufficient information to show that a genuine dispute exists with regard to a material issue of law or fact.[101]

The purpose of these six criteria is to "focus litigation on concrete issues and result in a clearer and more focused record for decision."[102] The NRC will deny a petition to intervene and request for hearing from a petitioner who has standing but has not proffered at least one admissible contention.[103] The Commission has stated that it "should not have to expend resources to support the hearing process unless there is an issue that is appropriate for, and susceptible to, resolution in an NRC hearing."[104]

This results in rules on contention admissibility that are "strict by design."[105] The rules were further "toughened . . . in 1989 because in prior years 'licensing boards had admitted and

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[101] *See* 10 C.F.R. § 2.309(f)(1)(i)-(vi). The seventh contention admissibility requirement—10 C.F.R. § 2.309(f)(1)(vii)—is only applicable in proceedings arising under 10 C.F.R. § 52.103(b) and, therefore, has no bearing on the admissibility of the Petitioner' proposed contentions in this proceeding.

[102] Final Rule, Changes to Adjudicatory Process, 69 Fed. Reg. 2182, 2202 (Jan. 14, 2004).

[103] *Fla. Power & Light Co.* (Turkey Point Nuclear Generating Power Plant, Units 3 & 4), CLI-01-17, 54 NRC 3, 26 (2001).

[104] Final Rule, Changes to Adjudicatory Process, 69 Fed. Reg. at 2202.

[105] *Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Units 2 & 3), CLI-01-24, 54 NRC 349, 358 (2001) (citing *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, & 3), CLI-99-11, 49 NRC 328, 334 (1999)).

litigated numerous contentions that appeared to be based on little more than speculation.'"[106] Thus, failure to comply with any one of the six admissibility criteria is grounds for rejecting a proposed contention.[107]

The legal standards governing each of the six pertinent criteria from 10 C.F.R. § 2.309(f)(1) are discussed below.

1. Petitioners Must Specifically State the Issue of Law or Fact to Be Raised

A petitioner must provide "a specific statement of the issue of law or fact to be raised or controverted."[108] The petitioner must "articulate at the outset the specific issues [it] wish[es] to litigate as a prerequisite to gaining formal admission as [a party]."[109] Namely, an "admissible contention must explain, with specificity, particular safety or legal reasons requiring rejection of the contested [application]."[110] The contention rules "bar contentions where petitioners have only 'what amounts to generalized suspicions, hoping to substantiate them later.'"[111]

2. Petitioners Must Briefly Explain the Basis for the Contention

A petitioner must provide "a brief explanation of the basis for the contention."[112] This includes "sufficient foundation" to "warrant further exploration."[113] The petitioner's explanation serves to define the scope of a contention, as "[t]he reach of a contention necessarily hinges upon

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[106] *Id.* The Commission has also stated that its practice does not permit "notice pleading." *N. Atlantic Energy Serv. Corp.* (Seabrook Station, Unit 1), CLI-99-6, 49 NRC 201, 219 (1999).

[107] *See* Final Rule, Changes to Adjudicatory Process, 69 Fed. Reg. at 2221; *see also Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 325 (1999).

[108] 10 C.F.R. § 2.309(f)(1)(i).

[109] *Oconee*, CLI-99-11, 49 NRC at 338.

[110] *Millstone*, CLI-01-24, 54 NRC at 359-60.

[111] *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 & 2; Catawba Nuclear Station, Units 1 & 2), CLI-03-17, 58 NRC 419, 424 (2003) (quoting *Oconee*, CLI-99-11, 49 NRC at 337-39).

[112] 10 C.F.R. § 2.309(f)(1)(ii); *see* Final Rule, Rules of Practice for Domestic Licensing Proceedings – Procedural Changes in the Hearing Process, 54 Fed. Reg. 33,168, 33,170 (Aug. 11, 1989).

[113] *Pub. Serv. Co. of N.H.* (Seabrook Station, Units 1 & 2), ALAB-942, 32 NRC 395, 428 (1990) (citation omitted).

its terms coupled with its stated bases."[114] Licensing boards, however, must determine the admissibility of the contention itself, not the admissibility of individual "bases."[115]

As the Commission has observed, "[i]t is the responsibility of the Petitioner to provide the necessary information to satisfy the basis requirement for the admission of its contentions and demonstrate that a genuine dispute exists within the scope of [the] proceeding."[116] In other words, "[a] contention's proponent, not the licensing board, is responsible for formulating the contention and providing the necessary information to satisfy the basis requirement for the admission of contentions."[117]

3. Contentions Must Be Within the Scope of the Proceeding

A petitioner must demonstrate "that the issue raised in the contention is within the scope of the proceeding."[118] The scope of the proceeding is defined by the Commission's notice of opportunity for a hearing.[119] Moreover, contentions are necessarily limited to issues that are germane to the specific application pending before a board.[120] Any contention that falls outside the specified scope of the proceeding must be rejected.[121]

The scope of this license renewal proceeding is limited to the issue identified in the Hearing Notice, which is COGEMA's "proposal to *continue* uranium production operations at its

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114 *Pub. Serv. Co. of N.H.* (Seabrook Station, Units 1 & 2), ALAB-899, 28 NRC 93, 97 (1988), *aff'd sub nom.*, *Massachusetts v. NRC*, 924 F.2d 311 (D.C. Cir. 1991).

115 *See La. Energy Servs., L.P.* (Nat'l Enrichment Facility), LBP-04-14, 60 NRC 40, 57 (2004) ("licensing boards generally are to litigate 'contentions' rather than 'bases'") (citation omitted).

116 *Balt. Gas & Elec. Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 & 2), CLI-98-14, 48 NRC 39, 41 (1998).

117 *Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18, 22 (1998).

118 10 C.F.R. § 2.309(f)(1)(iii).

119 *See Duke Power Co.* (Catawba Nuclear Station, Units 1 & 2), ALAB-825, 22 NRC 785, 790-91 (1985).

120 *See Yankee Atomic Elec. Co.* (Yankee Nuclear Power Station), CLI-98-21, 48 NRC 185, 204 (1998).

121 *See Portland Gen. Elec. Co.* (Trojan Nuclear Plant), ALAB-534, 9 NRC 287, 289-90 n.6 (1979).

facilities in Johnson and Campbell Counties, Wyoming."[122] For environmental issues, "the supplement to an applicant's environmental report may be limited to incorporating by reference, updating or supplementing the information previously submitted to reflect any significant environmental change . . . ."[123] Thus, this proceeding is limited to consideration of any "significant environmental change" that would be caused by the continued operation of the Facilities, as opposed to the environmental impacts of current operations.[124] Environmental contentions that do not allege a significant change that is new or different from impacts previously considered are therefore outside the scope of this proceeding.[125]

For all issues, the limited nature of this license renewal review under Part 40 is in some respects analogous to the renewal of an operating reactor license under Part 54. The "first principle" of operating reactor license renewal is that the existing regulatory process is adequate to provide reasonable assurance of safety, so reviews of license renewal applications are generally limited to issues that are unique to the period of extended operation.[126] One board has explained the analogy between license renewal under Part 54 and Part 40 as follows:

> Much like the situation in a reactor operating license proceeding in which issues litigated in the earlier construction permit proceeding cannot be revisited absent changed circumstances, a license renewal proceeding [under Part 40] cannot be used to relitigate issues from the initial licensing proceeding absent some material change in circumstances affecting the original determinations."[127]

[122] 74 Fed. Reg. at 6437 (emphasis added).

[123] 10 C.F.R. § 51.60(a).

[124] *See id*.

[125] *See also Sys. Energy Res., Inc.* (Early Site Permit for Grand Gulf ESP Site), CLI-05-4, 61 NRC 10, 13 (2005) ("At NRC licensing hearings, petitioners may raise contentions seeking correction of significant inaccuracies and omissions in the [ER or EIS]. Our boards do not sit to 'flyspeck' environmental documents or to add details or nuances.") (citations and quotations omitted).

[126] *See* Final Rule, Nuclear Power Plant License Renewal, 60 Fed. Reg. 22,461, 22,464 (May 8, 1995).

[127] *Hydro Res., Inc.* (Crownpoint, New Mexico), LBP-03-27, 58 NRC 408, 416 (2003). Although the *Hydro Resources* decision rejected the admissibility of certain issues that had been raised in litigation during the

The Staff's guidance for reviewing applications for renewed ISL mining licenses similarly specifies a limited review. The Standard Review Plan [("SRP")] for In Situ Leach Uranium Extraction License Applications, NUREG-1569, Appendix A, "Guidance for Reviewing Historical Aspects of Site Performance for License Renewals and Amendments" summarizes eleven specific items that the Staff must review.[128] The guidance specifies that if:

> the staff concludes that the site has been operated so as to protect health and safety and the environment and that no *unreviewed* safety-related concerns have been identified, then only those changes proposed by the license renewal or amendment application should be reviewed using the appropriate sections of this standard review plan. *Aspects of the facility and its operations that have not changed since the last license renewal or amendment should not be reexamined*.[129]

Thus, the scope of this proceeding is generally limited to changes in the operation of the Facilities since the earlier proceedings, which have not been reviewed in previous licensing proceedings.[130]

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original licensing proceeding, *see id*., the petitioner in the renewal proceeding had not been a party to the original proceeding. *Id*. at 410-11. Similarly here, although no party, including the Petitioner, sought to intervene in any previous proceeding on the instant license, issues that were resolved during the Staff's review of the original license, its amendments, and its previous renewal should not be litigable now.

128 These eleven items are: (1) NRC inspection reports and license performance reports; (2) amendments and changes to operating practices or procedures; (3) license violations identified during inspections; (4) excursions, incident investigations, or root cause analyses; (5) exceedances of any regulatory standard or license condition pertaining to radiation exposure, contamination, or release limits; (6) exceedances of any non-radiation contaminant exposure or release limits; (7) updates or changes to site characterization information; (8) environmental effects of site operations; (9) updates and changes to factors that may cause reconsideration of [environmental] alternatives; (10) updates and changes to the environmental costs and benefits; (11) the results and effectiveness of any mitigation proposed and implemented in the original license. NUREG-1569 at A-1.

129 *Id.* (emphasis added).

130 The narrow scope of this proceeding also serves to avoid significant prejudice to the Applicant. In making considerable investments in the Facilities over time, COGEMA has relied upon prior NRC determinations with respect to foreign ownership, site suitability, the generic impacts of uranium mining, and other matters. The NRC reached these determinations in the course of various licensing actions over some 30 years. To reopen all of these established determinations now, in the context of a narrow request to continue existing activities, would prejudice COGEMA and produce significant and unnecessary uncertainty in the domestic and international uranium mining industry.

In addition to the limited scope of license renewal reviews, a contention that challenges an NRC rule is outside the scope of the proceeding because, absent a waiver, "no rule or regulation of the Commission . . . is subject to attack . . . in any adjudicatory proceeding."[131] A contention that raises a matter that is, or is about to become, the subject of a rulemaking, is also outside the scope of this proceeding.[132] This includes contentions that advocate stricter requirements than agency rules impose or that otherwise seek to litigate a generic determination established by a Commission rulemaking.[133]

Furthermore, any contention that collaterally attacks applicable statutory requirements or the basic structure of the NRC regulatory process must be rejected by a board as outside the scope of the proceeding.[134] Accordingly, a contention that simply states the petitioner's views about what regulatory policy should be does not present a litigable issue.[135]

Finally, challenges to the NRC Staff's safety review are outside the scope of this proceeding because "[t]he adequacy of the applicant's license application, not the NRC staff's safety evaluation, is the safety issue in any licensing proceeding, and under longstanding decisions of the agency, contentions on the adequacy of the [content of the] SER are not cognizable in a proceeding."[136]

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[131] *See* 10 C.F.R. § 2.335(a).

[132] *See Oconee*, CLI-99-11, 49 NRC at 345 (citing *Potomac Elec. Power Co.* (Douglas Point Nuclear Generating Station, Units 1 & 2), ALAB-218, 8 AEC 79, 85 (1974)).

[133] *See Fla. Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 & 4), LBP-01-6, 53 NRC 138, 159, *aff'd*, CLI-01-17, 54 NRC 3 (2001).

[134] *Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant), LBP-07-11, 65 NRC 41, 57-58 (citing *Phila. Elec. Co.* (Peach Bottom Atomic Power Station, Units 2 & 3), ALAB-216, 8 AEC 13, 20 (1974)).

[135] *See Peach Bottom*, ALAB-216, 8 AEC at 20-21.

[136] Final Rule, Changes to the Adjudicatory Process, 69 Fed. Reg. at 2202 (citations omitted). Although the adequacy of the NRC Staff's environmental review may be within the scope of this proceeding, a petitioner is initially required to base its environmental contentions on the applicant's ER. *See* 10 C.F.R. § 2.309(f)(2).

4. Contentions Must Raise a Material Issue

A petitioner must demonstrate "that the issue raised in the contention is material to the findings the NRC must make to support the action that is involved in the proceeding."[137] To issue this renewed license under Part 40, the NRC must make the following four findings: (1) that the application is for a purpose authorized by the AEA; (2) that the applicant is qualified by reason of training and experience to use the source material for the purpose requested in such a manner as to protect health and minimize danger to property; (3) that the proposed equipment, facilities and procedures are adequate to protect health and minimize danger to life or property; (4) the issuance of the license will not be inimical to the common defense and security or to the health and safety of the public.[138] The remaining provisions of 10 C.F.R. § 40.32 do not apply to this uranium mining license.[139]

Throughout the Petition, the Petitioner alleges violations of 10 C.F.R. § 40.9 or suggests that the NRC must make explicit findings under this regulation.[140] This regulation requires information in the Application to be "complete and accurate in all *material* respects."[141] However, an alleged violation of this regulation, standing alone, is not material to the required findings in this proceeding. To issue the renewed license, the NRC is not required to make an explicit finding that the Application is complete and accurate. To show materiality, an allegation that the Application is incomplete or inaccurate must also allege and properly support the further claim that the missing or inaccurate information is material; *i.e.*, that it is essential to one of the required findings in Section 40.32.

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[137] 10 C.F.R. § 2.309(f)(1)(iv).

[138] *See* 10 C.F.R. § 40.32(a)-(d); *see also* 2008 SER at 1.

[139] *See* 2008 SER at 1.

[140] Petition at 16, 18, 21-22, 24, 26-27, 47, 54, 78, 88, 93, 96-97, 110.

[141] 10 C.F.R. § 40.9 (emphasis added).

As the Commission has observed, "[t]he dispute at issue is 'material' if its resolution would 'make a difference in the outcome of the licensing proceeding.'"[142] In this regard, each contention must be one that, if proven, would entitle the petitioner to relief.[143] Additionally, contentions alleging an error or omission in an application must establish some significant link between the claimed deficiency and protection of the health and safety of the public or the environment.[144]

5. Contentions Must Be Supported by Adequate Factual Information or Expert Opinion

A petitioner bears the burden to present the factual information or expert opinions necessary to support its contention adequately and failure to do so requires a board to reject the contention.[145] The petitioner's obligation in this regard has been described as follows:

> [A]n intervention petitioner has an *ironclad obligation* to examine the *publicly available documentary material pertaining to the facility in question* with sufficient care to enable [the petitioner] to uncover any information that could serve as the foundation for a specific contention. Stated otherwise, neither Section 189a. of the Act nor Section [2.309] of the Rules of Practice permits the filing of a vague, unparticularized contention, followed by an endeavor to flesh it out through discovery against the applicant or staff.[146]

Where a petitioner neglects to provide the requisite support for its contentions, the board may not make assumptions of fact that favor the petitioner or supply information that is

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142 *Oconee*, CLI-99-11, 49 NRC at 333-34 (citing Final Rule, Rules of Practice for Domestic Licensing Proceedings – Procedural Changes in the Hearing Process, 54 Fed. Reg. at 33,172).

143 *See Duke Energy Corp.* (McGuire Nuclear Station, Units 1 & 2; Catawba Nuclear Station, Units 1 & 2), CLI-02-26, 56 NRC 358, 363 n.10 (2002).

144 *Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Units 2 & 3), LBP-04-15, 60 NRC 81, 89, *aff'd*, CLI-04-36, 60 NRC 631 (2004).

145 *See* 10 C.F.R. § 2.309(f)(1)(v); *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-06-24, 64 NRC 111, 118-19 (2006); *Yankee Atomic Elec. Co.* (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 262 (1996).

146 *Duke Power Co.* (Catawba Nuclear Station, Units 1 & 2), ALAB-687, 16 NRC 460, 468 (1982), *vacated in part on other grounds*, CLI-83-19, 17 NRC 1041 (1983) (emphasis added).

lacking.[147] The petitioner must explain the significance of any factual information upon which it relies.[148]

With respect to factual information or expert opinion proffered in support of a contention, "the Board is not to accept uncritically the assertion that a document or other factual information or an expert opinion supplies the basis for a contention."[149] Any supporting material provided by a petitioner, including those portions thereof not relied upon, is subject to board scrutiny, "both for what it does and does not show."[150] The board will examine documents to confirm that they support the proposed contentions.[151] A petitioner's imprecise reading of a document cannot be the basis for a litigable contention.[152] Moreover, vague references to documents do not suffice—the petitioner must identify specific portions of the documents on which it relies.[153] The mere incorporation of massive documents by reference is similarly unacceptable.[154]

In addition, "an expert opinion that merely states a conclusion (*e.g.*, the application is 'deficient,' 'inadequate,' or 'wrong') without providing *a reasoned basis or explanation* for that conclusion is inadequate because it deprives the Board of the ability to make the necessary,

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[147] *See Ariz. Pub. Serv. Co.* (Palo Verde Nuclear Generating Station, Units 1, 2, & 3), CLI-91-12, 34 NRC 149, 155 (1991).

[148] *See Fansteel, Inc.* (Muskogee, Oklahoma, Site), CLI-03-13, 58 NRC 195, 204-05 (2003).

[149] *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 181, *aff'd on other grounds*, CLI-98-13, 48 NRC 26 (1998).

[150] *See Yankee Atomic Elec. Co.* (Yankee Nuclear Power Station), LBP-96-2, 43 NRC 61, 90, *rev'd in part on other grounds*, CLI-96-7, 43 NRC 235 (1996).

[151] *See Vt. Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), ALAB-919, 30 NRC 29, 48 (1989), *vacated in part on other grounds and remanded*, CLI-90-4, 31 NRC 333 (1990).

[152] *See Ga. Inst. of Tech.* (Georgia Tech Research Reactor, Atlanta, Ga.), LBP-95-6, 41 NRC 281, 300 (1995).

[153] *Pub. Serv. Co. of N.H.* (Seabrook Station, Units 1 & 2), CLI-89-3, 29 NRC 234, 240-41 (1989). At the start of each contention, the Petitioner states that all previous sections of the Petition "are hereby incorporated by reference." This practice is impermissible. *See id.* Below, COGEMA responds to the allegations in each of Petitioner's contentions in the corresponding sections of this Answer.

[154] *Id.*; *see also Tenn. Valley Auth.* (Browns Ferry Nuclear Plant, Units 1 & 2), LBP-76-10, 3 NRC 209, 216 (1976).

reflective assessment of the opinion" as it is alleged to provide a basis for the contention.[155] Conclusory statements cannot provide "sufficient" support for a contention, simply because they are made by an expert.[156] In short, a contention "will be ruled inadmissible if the petitioner 'has offered no tangible information, no experts, no substantive affidavits,' but instead only 'bare assertions and speculation.'"[157]

6. Contentions Must Raise a Genuine Dispute of Material Law or Fact

With regard to the requirement that a petitioner "provide sufficient information to show . . . a genuine dispute . . . with the applicant . . . on a material issue of law or fact,"[158] the Commission has stated that the petitioner must "read the pertinent portions of the license application . . . state the applicant's position and the petitioner's opposing view," and explain why it disagrees with the applicant.[159] If a petitioner believes the license application fails to adequately address a relevant issue, then the petitioner is to "explain why the application is deficient."[160] A contention that does not directly controvert a position taken by the applicant in the application is subject to dismissal.[161]

Similarly, a petitioner's oversight or mathematical error does not raise a genuine issue. For example, if a petitioner submits a contention of omission, but the allegedly missing information is indeed in the license application, then the contention does not raise a genuine

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[155] *USEC, Inc.* (American Centrifuge Plant), CLI-06-10, 63 NRC 451, 472 (2006) (emphasis added) (quoting *Private Fuel Storage*, LBP-98-7, 47 NRC at 181).

[156] *See USEC*, CLI-06-10, 63 NRC at 472.

[157] *Fansteel*, CLI-03-13, 58 NRC at 203 (quoting *GPU Nuclear Inc.* (Oyster Creek Nuclear Generating Station), CLI-00-6, 51 NRC 193, 207 (2000)).

[158] 10 C.F.R. § 2.309(f)(1)(vi).

[159] Final Rule, Rules of Practice for Domestic Licensing Proceedings – Procedural Changes in the Hearing Process, 54 Fed. Reg. at 33,170; *see also Millstone*, CLI-01-24, 54 NRC at 358.

[160] Final Rule, Rules of Practice for Domestic Licensing Proceedings – Procedural Changes in the Hearing Process, 54 Fed. Reg. at 33,170; *see also Palo Verde*, CLI-91-12, 34 NRC at 156.

[161] *See Tex. Utils. Elec. Co.* (Comanche Peak Steam Electric Station, Unit 2), LBP-92-37, 36 NRC 370, 384 (1992).

issue.[162] Further, an allegation that some aspect of a license application is "inadequate" or "unacceptable" does not give rise to a genuine dispute unless it is supported by facts and a reasoned statement of why the application is unacceptable in some material respect.[163]

B. The Petitioner's Proposed Contentions Are Inadmissible

Applying the legal standards summarized above, each of the Petitioner's 16 proposed contentions is deficient on one or more grounds, as demonstrated below. As a result, the Petition should be denied for failure to proffer an admissible contention in accordance with 10 C.F.R. § 2.309(f).

1. Contention IV – Foreign Ownership

In support of Contention IV, the Petition sets forth lengthy and diverse arguments that essentially constitute the following three claims: (1) alleged failure of COGEMA to disclose that an entity of the French Government (the Commissariat à l'Énergie Atomique ("CEA")), holds a controlling interest in the ultimate parent of COGEMA, AREVA NC, a French corporation (AREVA NC was formerly known as AREVA S.A. and COGEMA S.A.); (2) nuclear proliferation concerns that the Petitioner alleges are linked to renewal of COGEMA's source material license; and (3) a failure by COGEMA to comply with the requirements of the Exon Florio Act and the rules of the Committee on Foreign Investment in the United States ("CFIUS").[164]

For the reasons discussed below, the Petitioner's claims in support of its Contention IV are (1) outside the scope of this proceeding; (2) not material to this license renewal proceeding;

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162 *See Millstone*, LBP-04-15, 60 NRC at 95-96; *Crow Butte*, LBP-08-24, slip op. at 67.

163 *See Turkey Point*, LBP-90-16, 31 NRC at 521, 521 n.12.

164 Petition at 23-53.

(3) not properly supported; and (4) do not demonstrate a genuine dispute of fact or law, contrary to 10 C.F.R. § 2.309(f)(1)(iii), (iv), (v), and (vi). Accordingly, Contention IV is inadmissible.

First and foremost, the Petitioner's claims regarding foreign ownership and control are not properly within the scope of a license renewal proceeding, such as the matter at hand, where a change of ownership is not involved.[165] As is clearly stated in its Application, COGEMA will continue to be the holder of its source material license, which it has held since 1993.[166]

Other than suggesting that indirect French Government control of yellowcake produced at the Facilities is undesirable and speculating that the policies of the French Government may change with respect to nuclear power and uranium mining, the Petitioner does not attempt to support its assertion that such indirect involvement may be inimical to the common defense and security of the United States. Moreover, the Petitioner does not even attempt to explain why French Government policies regarding these matters have undergone changes that are adverse to U.S. interests over the past decade, following the Commission's 1998 renewal. The NRC approved the 1998 renewal of the license (SUA-1341) for the Facilities based on a "non-inimicality" finding[167] with a full understanding of foreign ownership of COGEMA.[168] Since it is not pertinent to the matters that are properly before the NRC in this license renewal proceeding, the Petitioner's foreign ownership contention is not admissible.

The Petitioner's attempt to incorporate, within the AEA's "non-inimicality" standard, its multi-faceted foreign ownership and control arguments also does not support an admissible

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[165] *See generally* Section IV.A.3, *supra*.

[166] Application Sections 1.1 and 1.2.1; *see also* Memorandum from G. Konwinski, NRC, COGEMA Mining, Inc., Formerly Total Minerals Corporation (TMC) License Update (Jan. 14, 1994), *available at* ADAMS Accession No. 9402220155.

[167] *See* COGEMA Mining, Inc.; Environmental Statements; Availability, etc, 63 Fed. Reg. 34,942, 34,943 (June 26, 1998) (determining that the renewal would "not be inimical to the public health and safety").

[168] 1998 EA at 3.

contention. For the reasons set forth below, the "non-inimicality" basis for issuing a license cannot cause contentions that are otherwise inadmissible to be transformed into admissible contentions. Since this proceeding does not involve issuance of an export license, the Petitioner's detailed discussion of concerns about export or possible unauthorized use of the yellowcake produced at COGEMA's Facilities is manifestly outside the scope of the proceeding. Furthermore, as shown below, the Petitioner's claims in Contention IV are not supported by the AEA and the NRC's rules, which do not provide or imply that source material license renewal proceedings are to serve as forums for a wide-ranging inquiry into the Petitioner's hypothetical questions concerning foreign ownership or control, security, and nuclear proliferation.

Simply stated, Contention IV is inadmissible because it is beyond the scope of this proceeding and does not state a genuine dispute with COGEMA's Application. While these deficiencies plainly cause Contention IV to be inadmissible, the sheer volume of speculative, irrelevant, and erroneous material that the Petitioner presents is addressed in the following detailed refutation.

a. Foreign Ownership, Control, or Influence Arguments Are Not Admissible

The Petitioner's argument that "foreign governmental ownership bars issuance of the license"[169] is premised upon a fundamental misunderstanding of the AEA and the NRC's rules "regarding foreign ownership, control and domination" ("FOCD") and the AEA's requirement that licenses not be "inimical" to the common defense and security of the United States. In advancing these unfounded arguments, the Petitioner overlooks the fact that many companies that have received NRC licenses to possess and process source material, or special nuclear

[169] Petition at 23.

material, are indirectly owned or controlled by foreign interests, including foreign entities that are owned or controlled by foreign governments.[170]

(i) COGEMA's Application Disclosed Its Indirect Ownership by French Entities

Citing Section 182 of the AEA,[171] the Petitioner contends that COGEMA's application for license renewal is inconsistent with the AEA requirement that an applicant disclose its "citizenship," as well as other qualifications. As shown below, the Petitioner's contention ignores the plain text of the AEA and the well-established requirement of the NRC with respect to the "citizenship" of applicants for NRC licenses.

A fundamental flaw in the Petitioner's "citizenship" argument is that COGEMA is incorporated in the state of Delaware.[172] Therefore, COGEMA is a U.S. entity (not a "foreign person") and thus meets the AEA's requirement that an applicant must be a U.S. person in order to hold an NRC license.

The Commission's public records also refute the Petitioner's argument[173] that COGEMA has failed to disclose to the Commission pertinent information concerning its indirect ownership by AREVA NC S.A., a French corporation in which the CEA of France, an entity of the French Government, has a 78.96% shareholding interest.[174] Moreover, in its renewal application,

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[170] For example, AREVA NP Inc., a U.S. company that is controlled by AREVA NC S.A., holds an NRC license for its nuclear fuel fabrication facility at Richland, Washington. On April 24, 2009, the NRC granted a 40-year license renewal for the Richland facility. NRC News Release 2009-076. During the 1980s, the fuel fabrication facility at Richland was owned by a U.S. subsidiary of Siemens Corporation, a German corporation. Recently, the Commission issued a license to Louisiana Energy Services ("LES"), allowing it to construct and operate a gas centrifuge uranium enrichment plant at a site near Hobbs, New Mexico. LES, a U.S. entity, is indirectly owned by British, Dutch, and German entities. *LES* (Claiborne Enrichment Center), LBP-96-25, 44 NRC 331, 379-80 (1996), *rev'd on other grounds*, CLI-97-15, 46 NRC 294 (1997).

[171] Petition at 20.

[172] *See* State of Delaware, Department of State: Division of Corporations, https://sos-res.state.de.us/tin/GINameSearch.jsp (File Number 0840273).

[173] Petition at 26.

[174] Shareholder Information, *available at* http://www.areva.com/servlet/finance/stockmarket/shareholding-en.html.

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COGEMA fully disclosed the history of the company, including the above-referenced NRC-approved transfer of the license to COGEMA.[175] Indeed, in earlier communications with the Commission regarding the licensee name change to COGEMA, COGEMA even identified its indirect ownership by CEA.[176]

In support of its contention that COGEMA's application improperly omitted "any reference to COGEMA Mining Resources, Inc. (US), its parent, Areva NC, Inc. (US); its parent, Areva NC (FR), its parent Areva, as its controlling shareholder,"[177] the Petitioner sets forth a portion of Section 5.0 of that Application. On the contrary, however, the Application expressly identifies many of the companies that the Petitioner claims COGEMA has failed to mention in its Application, and discloses COGEMA's foreign ownership.[178] Moreover, as discussed above, the NRC has long been aware of COGEMA's chain of corporate ownership, having approved the transfer to COGEMA of the NRC source material license for ISL mining at the same properties in Wyoming (Irigaray and Christensen Ranch) that are the subjects of the Application.

The Petitioner also argues that COGEMA's Application is deficient because it fails to disclose the "identity of the persons making the decisions as to who the General Manager is and making the decision affecting the health and safety of the public as well as those having the authority to hire and fire such individuals and the nature and extent of United States and NRC jurisdiction over such persons and their assets."[179] This contention fails to recognize that COGEMA's Application identifies the senior officials of COGEMA who are responsible for the

[175] Application at 1-1 to 1-2.

[176] *See* Letter D. Wichers, Total Minerals Corp., to R. Hall, NRC, Total Minerals Name Change (Dec. 10, 1993), *available at* ADAMS Accession No. 9402250079.

[177] Petition at 24-25 (footnotes omitted).

[178] *See, e.g.*, Application Cover Page; *id*. at 1-2, 5-1 ("COGEMA Mining, Inc. (COGEMA) is a subsidiary of COGEMA Resources, Inc., a wholly owned subsidiary of AREVA NC, Inc. AREVA NC, Inc. is a United States subsidiary of COGEMA, S.A.E. located in France."), 5-2.

[179] Petition at 26.

safe operation of the Facilities.[180] Furthermore, as the Petitioner concedes, COGEMA's Application "mentions the President of COGEMA Mining Inc. in Bessines Sur Gartempe, France."[181]

The Petitioner contends that COGEMA, in its Application, was required to provide information regarding "the nature and extent of United States and NRC jurisdiction over such persons and their assets."[182] This allegation ignores the fact that COGEMA is a U.S. corporation with assets in the United States (including NRC-licensed facilities). Its officers and employees who have responsibility for the safe operation of the Facilities in accordance with the requirements of the license, as well as all other applicable Federal and State requirements, reside in the United States.[183] As such, the Applicant and its key officers and employees who are responsible for operation of the Facilities clearly are subject to the NRC's jurisdiction. Contrary to the Petitioner's contention, the NRC's rules do not require applicants for source material licenses to establish that all of their officers and directors reside in the United States and are "subject to U.S. jurisdiction." If the Petitioner believes that the NRC should establish such a requirement, the proper forum in which to do so is a petition for rulemaking rather than a proceeding, such as this, that is governed by the Commission's current rules.

Since the Petitioner's allegations concerning COGEMA's "concealment" of its indirect French ownership lack any basis in fact and fail to recognize the Commission's approval of the

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[180] *See generally* Application Section 5.1 (identifying personnel responsible for development, review, implementation and adherence to, among other things, operating procedures and radiation safety programs).

[181] Petition at 26.

[182] *Id.* Although the Petitioner claims that the failure to disclose this information violates 10 C.F.R. § 40.9, as explained in Section IV.A.4, above, such an allegation, standing alone, does not raise a material issue, because Section 40.9 requires the Application to be "complete and accurate in all *material* respects." (Emphasis added).

[183] *See generally* Application at 5-1 to 5-8.

transfer of the license to COGEMA, these arguments are immaterial, unsupported by facts or expert opinion, and fail to raise a genuine dispute on a material issue of fact or law.

(ii) Indirect French Government Control of COGEMA Is Fully Consistent with AEA and NRC Requirements for a License for an ISL Mining Facility

The Petitioner also claims that indirect French Government control, through the CEA's shareholding interest in AREVA NC S.A., of COGEMA is inconsistent with the AEA or is "inimical" to the common defense or security.[184] This claim lacks any factual basis and is inconsistent with numerous U.S. Government statements that emphasize the importance of U.S.-French collaboration. As shown below, France and the United States cooperate extensively in the fields of peaceful uses of nuclear energy, nuclear nonproliferation and mutual defense. This extensive cooperation between the French Government and the United States clearly demonstrates that the French Government is a trusted ally of the U.S. Government and a highly valued partner in the U.S. effort to prevent the spread of nuclear weapons and devote nuclear energy to peaceful uses as provided in the Treaty on the Nonproliferation of Nuclear Weapons.

In 1995, when transmitting the Agreement for Cooperation in the Peaceful Uses of Nuclear Energy Between the United States of America and the European Atomic Energy Community ("EURATOM"),[185] President Clinton praised the "impeccable non-proliferation credentials" of the EURATOM countries, which include France.[186] In the same transmission, the

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[184] *See, e.g.*, Petition at 34-35.

[185] Agreement for Cooperation in the Peaceful Uses of Nuclear Energy Between the United States of America and the European Atomic Energy Community (EURATOM), U.S.-EURATOM, April 12, 1995, H.R. DOC. 104-138 at 154 (1995).

[186] President's Message to the Congress Transmitting the EURATOM—United States Nuclear Energy Cooperation Agreement, 31 Weekly Comp. Pres. Doc. 2077 (Nov. 29, 1995). U.S. peaceful nuclear cooperation with France has occurred primarily within the scope of the U.S.-EURATOM Agreement for Cooperation. The Commission has recognized that "the U.S. has a long history of reciprocal trust and cooperation with EURATOM on physical security, safeguards, and other matters relevant to the prevention of nuclear proliferation." *U.S. Dep't of Energy* (Plutonium Export License), CLI-04-17, 59 NRC 357, 369 (2004). According to the Commission, "France, a member of EURATOM, has a long and solid history of commitment to nuclear nonproliferation,

NRC also recognized the "strong nonproliferation credentials of EURATOM and its member states."[187] Furthermore, for over 50 years, the United States and France have cooperated on mutual defense matters, pursuant to the U.S.-France Mutual Defense Agreement,[188] which was authorized by Sections 91 and 144(c) of the AEA.

The United States and France have long cooperated in the field of peaceful nuclear energy and the NRC has issued a large number of export licenses authorizing the export to France of nuclear material to produce nuclear fuel for power reactors and major components for power and research reactors. Such cooperation is pursuant to the U.S.-EURATOM Agreement for Cooperation Concerning Peaceful Uses of Nuclear Energy.

The U.S.-EURATOM Agreement is an executive-legislative agreement, that was approved by the President and submitted to Congress in accordance with Section 123 of the AEA, 42 U.S.C. § 2153.[189] It is clearly a "treaty" within the meaning of international law and, as such, constitutes the "supreme law" of the United States.[190] Sections 121 and 122 of the AEA,

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including reciprocal cooperation with the U.S. under the U.S-EURATOM Agreement for Cooperation with respect to physical security and safeguards. As a nuclear weapons state, France has a long history of securing nuclear-weapons-grade material . . . . This experience, along with France's assurances, the great weight given to Executive Branch views, and information obtained in a classified briefing of the NRC Staff by the Executive Branch, allows the Commission to conclude that French physical security arrangements will be adequate in the current environment." *Id.* at 376.

[187] Proposed Agreement for Cooperation in the Peaceful Uses of Nuclear Energy Between the United States of America and the European Atomic Energy Community (EURATOM), U.S.-EURATOM, April 12, 1995, H.R. DOC. 104-138 at 154 (1995).

[188] Agreement for Cooperation in the Operation of Atomic Weapons Systems for Mutual Defense Purposes, July 27, 1961, U.S.-Fr., 12 U.S.T. 1423.

[189] In Section 123, Congress articulated the standards that govern such agreements, including physical protection requirements, and provided procedures for Congress' review of such agreements. 42 U.S.C. § 2153. Section 124 of the AEA expressly authorized the President to enter into multilateral agreements, either in the form of treaties or congressional-executive agreements for cooperation in the peaceful use of atomic energy. *Id*. § 2154.

[190] *U.S. v. Belmont*, 301 U.S. 324, 330-32 (1937); *U.S. v. Pink*, 315 U.S. 203, 223 (1942). In exercising their adjudicatory functions, all U.S. courts and agencies must take judicial notice of and be governed by a treaty of the United States. *U.S. v. Rauscher*, 119 U.S. 407, 418-19 (1886). Just as they would refer to a governing statute, such courts and agencies must apply a treaty or other U.S. international agreement that governs matters brought before them. *Maiorano v. Baltimore & Ohio R.R. Co.*, 213 U.S. 268, 272-73 (1909). A treaty, to the extent that it is self-executing, as is the U.S.-EURATOM Agreement, has the force and effect of a legislative

42 U.S.C. §§ 2151 and 2152, clearly recognize the primacy of international arrangements such as the U.S.-EURATOM Agreement.

The substantial and long-standing cooperation between the U.S. and French Governments, pursuant to agreements for cooperation that are authorized by the AEA, represents a conclusion by the U.S. Government that French Government involvement in peaceful nuclear cooperation with the United States strongly supports – and is not inimical to – the common defense and security of the United States. In approving the U.S.–France Mutual Defense Agreement and peaceful cooperation with France pursuant to the U.S.–EURATOM Agreement, the President found that such cooperation was not inimical to the common defense and security of the United States. Admitting a contention for the purpose of probing whether the French Government's indirect ownership interest in COGEMA is inimical to the common defense and security would be contrary to the repeated U.S. Government non-inimicality findings by several U.S. Presidents in support of U.S. agreements for cooperation with France. Indeed, the NRC itself has entered into safety-related agreements with the French CEA.[191]

The above-mentioned peaceful nuclear and mutual defense cooperation between the U.S. and French Governments clearly refutes the Petitioner's unsupported contention that the CEA's indirect control of COGEMA requires the Commission to determine that granting the Application would be inimical to the common defense and security of the United States.

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enactment and is binding upon all courts as the supreme law of the land. *Asakura v. City of Seattle*, 265 U.S. 322, 341 (1924). The courts have stated that treaties are to be observed with "entire good faith and scrupulous care." *Marianna Flores*, 24 U.S. 148 (1825).

[191] *See, e.g.*, Technical Exchange and Cooperation Arrangement Between the United States Nuclear Regulatory Commission and the Institut de Protection et de Surete Nucleaire of the Commissariat a L'Energie Atomique of France in the Field of Light Water Reactor Safety Research, April 25 and May 22, 1995, NRC-CEA, 1995 U.S.T. LEXIS 142; Technical Exchange and Cooperation Arrangement Between the United States Nuclear Regulatory Commission and the Commissariat a L'Energie Atomique of France in the Field of Light Water Reactor Safety Research, November 28 and December 31, 1986, NRC-CEA, 1986 U.S.T. LEXIS 94; Technical Exchange and Cooperation Arrangement Between the United States Nuclear Regulatory Commission and the Commissariat a L'Energie Atomique of France in the Field of Safety of Radioactive Waste Management, January 3 and 10, 1984, NRC-CEA, 35 U.S.T. 4203.

Admitting such a contention and conducting a hearing to probe whether indirect CEA control of COGEMA violates the "non-inimicality" standard for NRC licenses would require the Presiding Officer to address national security and foreign policy matters that are primarily within the jurisdiction of the Executive Branch.[192] Furthermore, admitting the Petitioner's foreign ownership and control contention essentially would constitute a finding by the Presiding Officer that there is a "genuine issue" of fact as to whether such indirect CEA control of COGEMA presents an "exceptionally grave risk" to the common defense and security of the United States. Substantial foreign policy issues manifestly would be presented if the Presiding Officer admitted this contention and thus opened a debate about whether the French Government's indirect ownership of COGEMA presents a genuine "inimicality" issue.[193]

In summary, the Petitioner has not presented any information that raises a genuine contention that indirect French Government control of COGEMA could properly be considered to be "inimical to the common defense and security of the United States." Since the Petitioner's unsupported contention regarding indirect French Government control does not concern a matter within the scope of this proceeding and is directly contrary to the conclusions reached by several Presidents in authorization of peaceful nuclear and mutual defense cooperations with France, it cannot be admitted.

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[192] As the Commission has recognized, "judgments of the Executive Branch regarding the common defense and security of the United States involve matters of its foreign policy and national security expertise and the NRC may properly rely on those conclusions." *Transnuclear Inc.* (Export of 93.3% Enriched Uranium), CLI-99-20, 49 NRC 469, 477 (1999). In support of its conclusion, the Commission cited *Natural Res. Def. Council v NRC*, 647 F.2d 1345, 1364 (D.C. Cir 1981).

[193] In reversing a licensing board's denial, based on the board's finding of "foreign ownership, control or domination," of an application for a permit to construct a research reactor, the Commission noted that the "Department of State has filed a statement of its views, and has strongly expressed the view that to allow the decision of the board to stand would be inimical to the national interest and to the common defense and security." *Gen. Elec. Co. & S.w. Atomic Energy Assocs.*, 3 AEC 99, 103 (1966). Citing U.S. Supreme Court precedents, the Commission recognized "the responsibilities of the Department, acting on behalf of the President, in the conduct of foreign affairs" and noted that "we would give considerable weight to its views in any matter affecting our international relationships." *Id.* at 103.

(iii) The AEA Does Not Prohibit Foreign Ownership or Control of ISL Uranium Mines

The Petitioner quotes from Section 103(d) of the AEA, 42 U.S.C. § 2133(d), which expressly prohibits the issuance of a license to an alien or "any corporation or other entity" that is "owned, controlled or dominated by an alien, a foreign corporation or a foreign government."[194] Additionally, the same section prohibits the NRC from issuing a license to any person or entity if, in the opinion of the NRC, doing so would be "inimical to the common defense and security."

Of critical importance is the Petitioner's failure to mention that Section 103(d) of the AEA is applicable only to licensees of "utilization facilities" and "production facilities."[195] Uranium mines, including ISL mines, are neither.[196] Therefore, these sections do not support the Petitioner's arguments in Contention IV.[197]

By citing and discussing Section 103(d) of the AEA, the Petitioner has identified the statutory basis for the Commission's longstanding distinction between FOCD of (1) "utilization facilities" (power reactors and research reactors) as well as "production facilities" (reactors devoted to producing plutonium and facilities for the reprocessing of spent or "used" reactor

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194 Petition at 37.

195 42 U.S.C. § 2133(a). In *Crow Butte Resources, Inc*. (License Amendment for the North Trend Expansion Project), LBP-08-06, 67 NRC __, slip op. at 121 (2008), the board found that Section 103(d) may apply to a license for an ISL mine. Part of the board's reasoning was based on the lack of a definition of "Commercial License" in the AEA. Section 103 governs Commercial Licenses. Regardless of the definition of Commercial License, Section 103 explicitly states that it applies to "utilization and production facilities." AEA § 103a. As described above, a mine is not a utilization or production facility, which means Section 103 does not apply.

196 42 U.S.C. § 2014(v), (cc) (defining "production facility" and "utilization facility"). Regarding the term "production facility," the Tenth Circuit Court of Appeals found that the term references the manufacture of special nuclear material not the extraction of source material like uranium. *Barnson v. United States*, 816 F.2d 549, 554 (10th Cir. 1987) ("Nowhere in the [Atomic Energy] Act are the terms 'produce' or 'production' used in the mining context. Those terms are used only in conjunction with post-extraction aspects of the nuclear power industry.").

197 The NRC's "Final Standard Review Plan on Foreign Ownership, Control, or Domination," 64 Fed. Reg. 52,355, 52,357 (Sept. 28, 1999) also plainly states that it is applicable only to licensees of "production" and "utilization facilities."

fuel), which are licensed under 10 C.F.R. Parts 50 and 52; and (2) facilities, such as ISL uranium mines (licensed under 10 C.F.R. Part 40), nuclear fuel fabrication facilities and uranium enrichment facilities (both licensed under 10 C.F.R. Part 70); and uranium hexafluoride conversion facilities (licensed under 10 C.F.R. Part 40). NRC licensees of utilization and production facilities, as listed under (1) above, are subject to the AEA's prohibition of direct foreign ownership as well as foreign "influence control or domination." In marked contrast, facilities that are not "production" or "utilization" facilities, as listed in (2) above, are not subject to Section 103's prohibition on FOCD.[198] Therefore, the AEA does not prohibit FOCD of holders of source material licenses, including licenses to operate ISL uranium mines.

Instead of applying the FOCD prohibition to licensees of facilities other than production or utilization facilities, Congress limited the NRC's consideration of any foreign ownership or control of such facilities to the AEA's required finding, for all licenses, that issuance of the license would not be "inimical to the common defense and security."[199]

The Petitioner also relies upon 10 C.F.R. § 40.38 to make essentially the same argument.[200] This claim overlooks the fact that Section 40.38 deals solely with the United States Enrichment Corporation ("USEC").[201] As used in Section 40.38, "Corporation" is a defined term, as follows:

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[198] 42 U.S.C. § 2133(a).

[199] The Petitioner's lengthy quotations from the Atomic Energy Act of 1946 do not support its contentions. While certain sections of the 1946 Atomic Energy Act were incorporated into the Atomic Energy Act of 1954, the 1954 Act completely supplanted the 1946 Act. Atomic Energy Act of 1954, Pub. L. No. 83-703, 68 Stat. 919 (codified at 42 U.S.C. § 2011, et seq.) ("The Atomic Energy Act of 1946 . . . is amended to read as follows: 'Atomic Energy Act['] of 1954 . . . ." Moreover, the 1954 Act, unlike the 1946 Act, expressly provided for U.S. entry into peaceful nuclear cooperation agreements with other countries. Because the 1954 Act provided a new basis for international cooperation, the Petitioner's reliance on provisions and legislative history of the 1946 Act concerning foreign ownership of Commission licenses is inapposite.

[200] Petition at 35-36.

[201] In *Crow Butte*, the board found that the definition of "Corporation" in Section 40.38 is ambiguous. *Crow Butte*, LBP-08-06, slip op. at 121. However, the same board later acknowledged that the term does not apply to ISL

> Corporation means the United States Enrichment Corporation (USEC), or its successor, a Corporation that is authorized by statute to lease the gaseous diffusion enrichment plants in Paducah, Kentucky, and Piketon, Ohio, from the Department of Energy, or any person authorized to operate one or both of the gaseous diffusion plants, or other facilities, pursuant to a plan for the privatization of USEC that is approved by the President.[202]

Therefore, Section 40.38 does not support the Petitioner's contention.

The NRC's repeated issuance of Part 40 and Part 70 licenses to U.S. companies, including AREVA NP, that are indirectly owned by French, British, and other foreign entities confirm that the Commission does not bar indirect foreign ownership of such licenses.[203]

Consequently, the Petitioner's argument that the Applicant does not meet applicable qualification requirements, because of its indirect foreign ownership, is an impermissible collateral attack on the AEA and the NRC's rules, and is contrary to the Commission's long-standing practice. Thus, this aspect of the contention is outside scope, immaterial, and fails to raise a genuine dispute on a material issue of law or fact.

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mining. *See Crow Butte Res.* (License Amendment for the North Trend Expansion Project), LBP-09-01, 69 NRC __, slip op. at 20 n.71 (Jan. 27, 2009).

[202] 10 C.F.R. § 40.4; *see also* Final Rule, USEC Privatization Act: Certification and Licensing of Uranium Enrichment Facilities, 62 Fed. Reg. 6664, 6665 (Feb. 12, 1997) (explaining that 10 C.F.R. § 40.38 implements provisions of the USEC Privatization Act, Pub. L. 104-134, addressing Congressional concerns about the "maintenance of a reliable and economical domestic source of enrichment services").

[203] The Petitioner's citations (Petition at 32-33) of the National Industrial Security Program Manual ("NISPOM") and DOE's rules regarding foreign ownership, control and influence ("FOCI") do not support its contention that indirect foreign control of COGEMA is contrary to the AEA and the NRC's rules. The NISPOM and DOE's FOCI rules are concerned solely with controlling Restricted Data ("RD"), as defined by 11y of the AEA and National Security Information ("NSI"). The technical data needed to construct and operate an ISL uranium mining facility does not fall within the defined scope of RD or NSI. *See* NISPOM, DoD 5220.22-M (Feb. 28, 2006). Furthermore, COGEMA's NRC license does not authorize possession of RD or NSI. Therefore, the Petitioner's arguments based on RD and NSI are unfounded.

(iv) The Petitioner's Arguments Concerning Indirect French Government Control of COGEMA Are Not Within the Scope of this License Renewal Proceeding and, in any Event, Such Control Is Obviously Not "Inimical" to the U.S. Common Defense and Security

As the Commission concluded, "inimicality" denotes circumstances that constitute an extreme threat to the common defense and security: "The NRC views actions as being inimical to the common defense and security where there is an unacceptable likelihood of grave or exceptionally grave damage to the United States."[204] The Petitioner's speculative observations and questions regarding the "internal policies of France" or the possibility that France may "change its national policy concerning uranium and nuclear power"[205] manifestly fall far short of specific allegations, along with sufficient supporting information, that indirect French Government control of COGEMA raises a risk of "unacceptably grave damage to the United States."[206]

As is clear from the AEA and relevant NRC decisions, the AEA's requirement that a license "not be inimical to the common defense and security" does not suggest that the Commission should impose, with respect to a license for an ISL uranium facility, the same detailed FOCD requirements that are applicable to "utilization facilities" and "production facilities." The AEA's specification, in Section 103(d), of stringent FOCD requirements for particular types of facilities that were precisely defined by Congress may not properly be expanded to all facilities without destroying the very distinction among facilities, with respect to FOCD, that Congress expressly established in that section. The Petitioner's reliance on the 1946 AEA, which was superseded upon enactment of the current AEA in 1954, is misplaced, since in

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[204] *Plutonium Export*, CLI-04-17, 59 NRC at 375.

[205] Petition at 21.

[206] *Plutonium Export*, CLI-04-17, 59 NRC at 375.

AEA § 103(d) Congress did not prohibit FOCD of uranium mining, UF6 conversion, fuel fabrication and other facilities that do not constitute "production facilities" or "utilization facilities."

Under its "non-inimicality" review, the NRC may, of course, consider the citizenship of the persons or entities who have direct or indirect ownership or other interests in a licensee of a facility that is not a "production facility" or "utilization facility." For example, "inimicality" questions may well be presented if an NRC licensee of such a facility is indirectly owned or controlled by a citizen or corporate entity of a country that is the subject of U.S. embargos or sanctions administered by the U.S. Department of the Treasury.[207] However, as numerous NRC decisions make clear, the Commission has concluded that "inimicality" concerns are not raised in circumstances where corporations indirectly owned or controlled by the Governments of France, the United Kingdom, and Canada have applied for licenses (or the NRC's approval of license transfers) with respect to nuclear fuel fabrication facilities and other facilities that do not constitute production or utilization facilities.

A recent example of this Commission's position on this matter is the Commission's issuance, on June 23, 2006, of a license to LES. As the Commission noted, LES was indirectly owned by corporate entities in the United Kingdom, the Netherlands, and Germany.[208] Because LES's proposed National Enrichment Facility ("NEF") does not constitute a "production facility" or a "utilization facility," the AEA's prohibition on FOCD was not applicable to LES's application for an NRC license to construct and operate the NEF.[209] The Commission concluded that issuance of the license would not be inimical to the common defense and security;

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[207] *See* Regulations Relating to Money and Finance, Office of Foreign Assets Control, Dep't of the Treasury, 31 C.F.R. Part 500.

[208] *LES*, CLI-97-15, 46 NRC at 303 n.9.

[209] *Id.* at 296-97.

notwithstanding the fact that LES was indirectly owned and controlled by British, German, and Dutch entities.[210]

Aside from speculating that French policies or laws regarding nuclear power and uranium mining may change in the future, the Petitioner does not provide any concrete basis for its contention that indirect French Governmental ownership of COGEMA could raise an "unacceptable likelihood of grave or exceptionally grave damage to the United States,"[211] and therefore an inimicality concern. In view of the long-standing U.S. Government collaboration with the French Government regarding peaceful uses of nuclear energy and their continued cooperation to combat proliferation of nuclear weapons and assure physical protection of nuclear material, the Petitioner's speculation to the contrary clearly lacks credibility.

In summary, the Petitioner's arguments regarding foreign ownership and control of COGEMA lack adequate basis, are unsupported by facts or expert opinion, and fail to raise a genuine dispute on a material issue of law or fact.

b. The Petitioner's Arguments Regarding Alleged Nuclear Proliferation Risks Are Not Admissible

The Petitioner's various unfounded allegations concerning nuclear proliferation risks do not constitute an admissible contention. First, the Petitioner's lengthy recitation of its nuclear proliferation concern regarding yellowcake to be produced in the future at COGEMA's Facilities, pursuant to a renewed term of source material license, SUA-1341, are very similar to arguments that the Commission has repeatedly rejected in export license proceedings. Second, the Petitioner ignores the distinction between the activities that would be authorized under a

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[210] *LES*, LBP-96-25, 44 NRC at 379-80.

[211] *Plutonium Export*, CLI-04-17, 59 NRC at 375.

renewed source material license and the separate requirement for an export license to export nuclear material abroad.

The Petitioner's arguments about the possibility that the yellowcake produced at COGEMA's Facilities could be used by terrorists or other "bad actors"[212] does not state an admissible contention. Precisely such general arguments were raised by a petitioner who sought unsuccessfully to intervene in the NRC's license proceeding on USEC's application to build the American Centrifuge Plant ("ACP"): "PRESS's generalized concerns about national security and nonproliferation do not amount to an admissible contention. The Board concluded that PRESS offered no facts or expert opinion to support its claim that the proposed ACP would be inimical to the common defense and security, and that PRESS's policy reference for a ban on uranium enrichment does not raise a litigable issue in this proceeding."[213] Furthermore, the Commission recently upheld a board's refusal to admit a contention that focused on general "non-proliferation goals and concerns" that the Commission found to be beyond the scope of a proceeding regarding an application by USEC for a license to construct and operate the ACP:

> Potential nuclear non-proliferation initiatives depend upon the actions and decisions of the President, Congress, international organizations, and officials of other nations. As such, non-proliferation goals and concerns span a host of factors far removed from the licensing action at issue.[214]

Nuclear nonproliferation concerns that are similar to the Petitioner's contentions were also rejected by the Commission as a basis for an admissible contention in connection with the NRC's licensing of the LES centrifuge enrichment plant at Hobbs, New Mexico:

> Nuclear nonproliferation concerns span a host of factors far removed from the licensing action at issue. Any potential effects

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[212] Petition at 31, 47.

[213] *USEC*, CLI-06-10, 63 NRC at 470.

[214] *Id.* at 463 (citations and quotations omitted).

> of the LES facility on nonproliferation policies and programs are speculative, and far afield from our decision whether to license the facility, given that achieving nonproliferation goals depends on independent future actions by third parties, including the President, Congress, and officials of other nations.[215]

Similarly, in *Plutonium Export*, the Commission denied a petition by Greenpeace International, Charleston Peace, and Blue Ridge Environmental Defense League to intervene and for a hearing on an application by the U.S. Department of Energy ("DOE") for a license to export up to 140 kilograms (kg) of weapons-grade plutonium oxide to France.[216] The plutonium that DOE sought to ship to France was to be fabricated into mixed oxide fuel lead test assemblies at "COGEMA's fuel fabrication facility in Cadarache, France, and then sent to the United States for irradiation in Duke Power's Catawba reactor."[217]

In support of its claims, Greenpeace International submitted detailed affidavits by Dr. John Large, who recited a lengthy record of experience on nuclear security matters. Based in part on Dr. Large's affidavits, the petitioners in *Plutonium Export* argued that the "potential for a successful terrorist attack and radiation release is 'obvious'" during transport of the plutonium.[218] Notwithstanding the petitioner's detailed alleged threat scenarios, the Commission concluded that the "Petitioners fail to provide any evidence of a specific credible threat and do not go beyond mere speculations about an unsupported and undefined potential threat."[219]

In this proceeding, the Petitioner raises similar unsupported general concerns about the possibility that the "yellowcake uranium" produced at COGEMA's facilities in Wyoming could

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215 *LES* (National Enrichment Facility), CLI-05-28, 62 NRC 721, 724 (2005).

216 CLI-04-17, 59 NRC at 357.

217 *Id*. at 361. Following a corporate restructuring in 2006, Compagnie Generales des Matieres Nucleaires S.A. ("COGEMA S.A.") became AREVA S.A., which is the indirect parent of COGEMA.

218 *Id.* at 365.

219 *Id*.

fall into the hands of "bad actors" who could use that uranium to make nuclear weapons.[220] Because natural uranium (source material) rather than plutonium is the subject of this Application, the Petitioner's arguments concerning nuclear proliferation are significantly less substantial than the unsupported concerns that the Commission rejected in *Plutonium Export* and other Commission decisions.[221]

In support of "nuclear proliferation" and "inimicality" arguments, the Petition also asserts that exports of yellowcake from COGEMA's Facilities will pass beyond U.S. control. However, the export provisions of the AEA and the NRC's rules plainly refute the Petitioner's unsupported claim that the NRC's issuance to "a foreign company [of] a license to mine and export yellowcake uranium" is "inimical to the common defense and security of the United States" because "it takes the yellowcake uranium outside of U.S. legal restrictions."[222]

The Petitioner incorrectly assumes that a "license to mine" is also a license to "export yellowcake uranium."[223] As stated in the NRC's rules regarding "Export and Import of Nuclear Equipment and Material" (10 C.F.R. Part 110), "no person may export any nuclear equipment or material listed in § 110.8 and § 110.9, . . . unless authorized by a general or specific license issued under this part."[224] "Source material," which is defined by the NRC to include "natural or

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220 Petition at 31.

221 *See, e.g.*, *Transnuclear Inc*. (Export of 93.15% Enriched Uranium), CLI-94-1, 39 NRC 1, 5 (1994) (denying a petition by Nuclear Control Institute to intervene in opposition to an export license application, based primarily on general nuclear proliferation concerns). Notably, the Commission has repeatedly denied standing to public interest groups who sought to intervene, as of right, in export license proceedings, to advance nonproliferation concerns that were far more specific than the very general assertions of risk raised by the Petitioner. *See, e.g.*, *Edlow*, CLI-76-6, 3 NRC at 572-78; *Transnuclear, Inc*. (Ten Applications for Low Enriched Uranium Exports to EURATOM Member Nations), CLI-77-24, 6 NRC 525, 529-32 (1977); *Westinghouse Elec. Corp*. (Export to South Korea), CLI-80-30, 12 NRC 253, 257-60 (1980); *Gen. Elec. Co*. (Exports to Taiwan), CLI-81-2, 13 NRC 67, 70 (1981).

222 Petition at 46.

223 *Id*.

224 10 C.F.R. § 110.5.

depleted uranium"[225] is within the scope of "nuclear material under NRC's export licensing authority." [226] Hence, COGEMA or any other person or entity that desired to export uranium produced at the Facilities would be required to obtain a specific NRC export license, by filing an application in accordance with 10 C.F.R. § 110.32.

The detailed process for the Executive Branch review of such applications is set forth in 10 C.F.R. § 110.41 and the applicable NRC "export licensing criteria" are specified in 10 C.F.R. § 110.42. Among other criteria, the exported material must be subject to a peaceful use commitment, International Atomic Energy Agency ("IAEA") safeguards, adequate security measures, and a commitment from the recipient government that "no such material . . . proposed to be exported, and no special nuclear material produced through the use of such material, will be retransferred to the jurisdiction of any other country or group of countries unless the prior approval of the United States is obtained for such retransfer."[227]

Therefore, under the AEA, the NRC's rules, and an Agreement for Cooperation between the United States and the recipient country or group of nations (such as EURATOM), the peaceful use and other comprehensive commitments imposed by statute[228] are specifically applicable to uranium exported from the United States. The Petitioner's claim that such uranium will be "outside of U.S. legal restrictions"[229] is therefore unsupported by fact or expert opinion. Claims regarding the potential "inimicality" of nuclear material exports are properly raised only in the context of proceedings on export license applications.

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225 *Id*. § 110.2.

226 *Id*. § 110.9. Exports of very small amounts of uranium or material containing uranium at a very low concentration may be made to certain countries, under the general license set forth at 10 C.F.R. § 110.22. However, the quantities of uranium referred to by the Petitioner are vastly in excess of the amounts that could be exported under an NRC general license.

227 *Id*. § 110.42(4).

228 *See* AEA §§ 123, 126, 127, 128 and 131.

229 Petition at 46.

(i) The Petitioner's Arguments Concerning Section 721 of the Defense Production Act Do Not Constitute an Admissible Contention

In the wide-ranging dissertation that is Contention IV, the Petitioner quotes statements by the Director General of the IAEA and cites to various proposed investments in the United States that were reviewed by the CFIUS. CFIUS is an inter-agency committee, headed by the U.S. Department of Treasury, that was established over 50 years ago, pursuant to Section 721 of the Defense Production Act of 1950 (commonly known as the Exon Florio Act), as amended by the Foreign Investment and National Security Act of 2007. CFIUS functions under Executive Order 11858, as amended, and regulations promulgated by the Department of Treasury (31 C.F.R. Part 800).

While the Petitioner devotes over ten pages to its contention that renewal of COGEMA's source material license would be contrary to the Exon Florio Act and CFIUS, this contention rests entirely upon its false statement that "there is no evidence that the 1990 transaction was subject to scrutiny under Exon-Florio."[230] In fact, COGEMA submitted its proposed investment to CFIUS for review. In 1993, COGEMA[231] acquired all of TOTAL Mineral Corp.'s uranium properties, including the Facilities. This transaction was also reviewed and approved by CFIUS.[232] CFIUS concluded that "there are no issues of national security sufficient to warrant an investigation."[233] The CFIUS review concluded without any objections. Therefore, CFIUS

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[230] *Id*. at 39.

[231] As previously noted, the French government is a majority shareholder of COGEMA's ultimate parent company—AREVA NC S.A. *See* http://www.areva.com/servlet/finance/stockmarket/shareholding-en.html. With knowledge of the French government's controlling interest, CFIUS approved the transaction in which COGEMA began operation of the Facilities. Letter from D. Crafts, Department of Treasury, CFIUS Case No. 93-39: Cogema (France)/Total American (Total Minerals Corporation) (July 21, 1993) ("Attachment 1"). Similarly, CFIUS approved a previous transaction from Malapai Resources Company to Fuel International Trading Corporation, a wholly-owned subsidiary of Électricité de France. Letter from S. Canner, Department of Treasury, CFIUS Case #90-133 (June 14, 1990) ("Attachment 2").

[232] *See* Attachment 1.

[233] *Id.*

did not identify any aspects of the proposed investment by COGEMA that could adversely affect the national security of the United States. The CFIUS review that the Petitioner submits should have been conducted was in fact carried out. Since the Petitioner's contention based on CFIUS depends upon an erroneous factual assumption (absence of CFIUS review), it is not admissible.

Moreover, the detailed recitation by the Petitioner of other situations in which CFIUS has reviewed proposed foreign investments in other U.S. industries is simply inapplicable. Since the Petitioner assigns considerable weight to the importance of a CFIUS review with respect to a foreign investment in a U.S. uranium mining facility, the fact that COGEMA's investment was in fact the subject of a favorable CFIUS review should respond fully to the Petitioner's argument and render it moot.

In support of its baseless argument that a CFIUS review should have been conducted, the Petitioner repeats its contention that COGEMA's Application failed to satisfy the requirements of 10 C.F.R. § 40.9 because it did not disclose "ownership, control or foreign domination by the Government of France."[234] This assertion ignores the fact that CFIUS expressly considered that the French CEA held an interest in COGEMA S.A. (the predecessor to AREVA S.A. and AREVA NC S.A.), which was the ultimate parent of COGEMA.[235]

By arguing that CFIUS should have reviewed COGEMA's proposed investment to assess whether the transaction would be "contrary to the national interest" or "inimical to the common defense and security,"[236] the Petitioner admits that broad determinations such as these are primarily within the statutory jurisdiction of CFIUS. In the Exon Florio Act, Congress established CFIUS and charged it with the responsibility to assess the impact of foreign

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[234] Petition at 47.

[235] *See* Attachment at 1.

[236] Petition at 48.

investment on U.S. national security. Therefore, the NRC is not required, under the AEA's "non-inimicality" standard for reviewing license applications, to make a national security determination with respect to matters that Congress entrusted to CFIUS and CFIUS has expressly reviewed, as a result of COGEMA's submission of its proposed investment to CFIUS for review.

In summary, the Petitioner's argument concerning COGEMA's alleged non-compliance with CFIUS is not within the scope of this proceeding. Moreover, the contention is based on false speculation rather than fact or expert opinion because COGEMA did submit its investment in the Facilities for CFIUS review and the CFIUS process was completed without objection.

2. Contention V – Cultural Resources

This contention alleges that the Application "omits any discussion of cultural resources or artifacts, or burial grounds or remains in the mining area."[237] According to the Petitioner, the Application fails to "identify cultural resources . . . that were [previously] identified in the 1998 EA . . . ."[238] The 1998 EA indicates that "there are cultural resources represented by at least 61 prehistoric sites and 5 sites with both prehistoric and historic elements."[239] The contention also claims that the NRC Staff failed to consult with the Petitioner and the Oglala Sioux Tribe regarding cultural resources; both entities allegedly "must be consulted with [sic] regarding any cultural resources in the area whenever there is a major federal action, i.e. the NRC granting a mining permit to the Applicant."[240] This contention is inadmissible, however, because it is

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237 *Id.* at 54.

238 *Id.* at 56. The Petitioner fails to mention that the 2008 EA, prepared for the license amendment request, also contained a discussion of cultural resources almost identical to the 1998 EA.

239 *Id.*

240 *Id.* at 56.

outside the scope of this proceeding, does not address a material issue, and fails to raise a genuine dispute on a material issue of fact or law.

a. This Contention Is Outside the Scope of this Proceeding

This contention is outside the scope of this proceeding because it does not allege that continued operation of the Facilities will result in any significant environmental changes. The contention alleges that discussion of certain cultural resources or artifacts is omitted from the Application. The Petitioner does *not* allege, however, that COGEMA's proposal to *continue* the operation of the Facilities will result in a *significant change* to the potential impacts to those artifacts during the period of the renewed license, as distinct from impacts under the current term of operations under the most recent license amendment.[241] Nor does it carry its burden of explaining how such a significant change to impacts could take place. The contention is therefore inadmissible under 10 C.F.R. § 51.60(a) and the Hearing Notice.

b. This Contention Is Not Material

The Petitioner incorrectly claims that it "has a right of consultation when there is a major federal action that affects its interests."[242] Citing 36 C.F.R. § 800.4(f)(2), the Petitioner admits that "[f]ederal agencies are required to consult with *federally recognized Indian tribes* that may attach religious or cultural significance to the project area."[243] The Petitioner is not a federally recognized Indian Tribe, however.[244] Thus, the NRC Staff is not required to consult with the Petitioner under the NHPA. Because the NRC Staff is not required to consult with the Petitioner,

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[241] *See generally id.* at 54-58.

[242] *Id.* at 57.

[243] *Id.* at 58 (emphasis added); *see* Protection of Historic Properties, Final Rule, 65 Fed. Reg. 77,698, 77,702 (Dec. 12, 2000) ("[t]he Council believes that . . . the NHPA [National Historic Preservation Act] clearly gives federally recognized tribes . . . a right to be consulted regarding historic properties of religious and cultural significance to them.").

[244] 73 Fed. Reg. 18,553 (Apr. 4, 2008) (list of 562 federally recognized tribal entities maintained by the Bureau of Indian Affairs).

this basis cannot entitle the Petitioner to any relief and is therefore not an issue that is material to the outcome of this proceeding.[245]

The Petitioner also incorrectly claims that the Oglala Sioux Tribe "has [not] been consulted with [sic] regarding the cultural resources that may be in the license renewal area."[246] The NRC has consistently consulted with the Oglala Sioux Tribe in the past, and there is no reason to believe that the NRC Staff will not consult with the Oglala Sioux Tribe again when it prepares the EA for this license renewal. For example, when the NRC Staff prepared the 2008 EA, which identifies the exact same cultural resources as the Application, the NRC Staff consulted with the Oglala Sioux Tribe of the Pine Ridge Reservation.[247] In fact, the NRC wrote to the Oglala Sioux historic preservation officer on February 13, 2009 concerning this license renewal proceeding.[248] The Oglala Sioux Tribe is, unlike the Petitioner, a federally recognized Indian tribe.[249] By sending a Section 106 letter to the leadership of the federally recognized Indian tribe, the Oglala Sioux, the NRC Staff satisfied its NHPA obligation to consult regarding cultural resources at the Facilities.

In these respects, the Petitioner's contention is quite different from a similar contention admitted in *Crow Butte*. In that proceeding, the board admitted a contention from the Oglala

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[245] *See Duke Energy Corp.*, CLI-02-26, 56 NRC at 363 n.10 ("a factual or legal issue is material to a proceeding only if it would entitle petitioner to relief.").

[246] Petition at 56.

[247] *See* Letter from NRC to the Tribal Preservation Officer of the Oglala Sioux Tribe (Feb. 27, 2008) (addressed to the Oglala Sioux Tribal Council at P.O. Box 2070, Pine Ridge, South Dakota), *available at* ADAMS Accession No. ML080560323. The Bureau of Indian Affairs maintains a Tribal Leaders Directory for all federally recognized tribal entities. A copy of the Directory is available at http://www.doi.gov/bia/docs/TLD-Final.pdf. According to the Directory, which was last updated on February 3, 2009, the representative of the Oglala Sioux Tribe is the Oglala Sioux Tribal Council located at P.O. Box 2070, Pine Ridge, South Dakota 57770. *Id*. at Section 2, p. 55. The Oglala Sioux Tribal Council did not respond to the letter seeking its input. 2008 EA at 11.

[248] Letter from A. Kock, NRC, to J. Whiting, Oglala Sioux, Initiation of Section 106 Process for Environmental Review of COGEMA Mining Inc.'s License Renewal Request for the Irigaray and Christensen Ranch Projects (Feb. 13, 2009), *available at* ADAMS Accession No. ML090400273.

[249] 73 Fed. Reg. at 18,555.

Sioux Tribe alleging that it had not been consulted regarding cultural resources at that site.[250] That contention was admitted in part because "[t]he Board must afford the [Oglala Sioux] Tribe a way to ensure its interests [in consultation] are protected."[251] Here, as explained above, the Petitioner is not entitled to consultation, so there is no such interest requiring protection. Additionally, in *Crow Butte*, the Oglala Sioux Tribe alleged that the NRC had improperly failed to consult with it for over 13 years.[252] Here, as also explained above, relevant entities have been consulted as recently as February 2009, so there is no reason to initiate a hearing based only on speculation that the Staff will not carry out its responsibilities in the future.[253] This contention, therefore, is subject to dismissal for lack of materiality.

Furthermore, the Petitioner claims that there are "burial remains at the permit area that are protected by NAGPRA [Native American Graves Protection and Repatriation Act]."[254] "Under NAGPRA, consultation and concurrence of the affected [Indian] tribe take place prior to the 'intentional removal from or excavation of Native American cultural items from Federal or tribal lands."[255] Therefore, NAGPRA does not apply to the Petitioner, because it is not an affected Indian tribe.[256] Additionally, like the applicant in *Hydro Resources*, COGEMA does not

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[250] *See Crow Butte*, LBP-08-24, slip op. at 30-36.

[251] *Id*. at 31.

[252] *See id*. at 32-36.

[253] *See Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-01-9, 53 NRC 232, 234 (2001) (rejecting a contention based on speculation that an applicant might fail to meet binding license commitments). If the Staff fails to consult with a required entity, then that entity could submit a late-filed contention. *See USEC Inc*. (American Centrifuge Plant), LBP-05-28, 62 NRC 585, 626-27 (2005).

[254] Petition at 56.

[255] *Hydro Res., Inc*. (2929 Coors Road Suite 101, Albuquerque, NM 87120), CLI-99-22, 50 NRC 3, 14 (1999) (quoting 25 U.S.C. § 3002(c)).

[256] Under NAGPRA, an Indian Tribe is defined the same way it is under the NHPA—as a federally-recognized Indian Tribe. 25 U.S.C. § 3001(7). As previously discussed, the Petitioner is not a federally-recognized Indian Tribe. 73 Fed. Reg. 18,553 (list of 562 federally-recognized tribal entities maintained by the Bureau of Indian Affairs).

plan any intentional removal or excavation of cultural items.[257] Thus, the Applicant is not required to consult with the affected tribe under NAGPRA.

c. This Contention Does Not Demonstrate a Genuine Dispute

The Petitioner's claim that cultural resources were not discussed in the Application is also wrong. Cultural resources are discussed in Section 2.4 of the Application, which is titled "Regional Historical, Archaeological, Architectural, Scenic, Cultural and National Landmarks."[258] At the NRC's request, the information was redacted from the publicly-available Application because of fears that the information could be used to pilfer cultural resources on federal land. The NRC considers this information to be SUNSI, and the Hearing Notice set forth the procedures that a potential party must follow to request SUNSI.[259] Among other things, such a request must be filed within ten days of the publication of the Hearing Notice.[260] The Petitioner does not assert that it requested the relevant SUNSI, and in fact, it is clear that it did not do so. The redacted section of the Application contains information about cultural resources similar to the 2008 EA as well as the 1998 EA. The Petitioner does not allege that the cultural resource information in either of those documents is in any way inadequate.[261] Because, contrary to the Petitioner's claim, the information is in the Application, the Petitioner has failed to demonstrate that there is a genuine dispute of law or fact.

[257] CLI-99-22, 50 NRC at 14.

[258] Application, Table of Contents.

[259] 74 Fed. Reg. 6436.

[260] *Id*. Thus, it is too late for the Petitioner to request that it be provided SUNSI. *See Detroit Edison Co.* (Fermi Unit 3), CLI-09-04, 69 NRC __, slip op. at 5 (2009) ("The Commission remains convinced that ten days from the publication of the Federal Register notice is a reasonable amount of time to request access to SUNSI . . . given the public availability of applications well before the ten-day period starts and the relatively minimal effort necessary to file a request for SUNSI . . . .").

[261] *See* Petition at 54-58.

3. Contention VI – Failure to Engage in Meaningful Consultation

This contention alleges that the "Applicant has failed to take reasonable steps to ensure meaningful consultation with the Lakota elders, or the Oglala Delegation."[262] In support of this contention, the Petitioner recites a litany of treaties[263] and statutes[264] that it claims confer rights on the Petitioner to be consulted by COGEMA.[265] The contention concludes with a statement that "[t]o date, no opportunity has been provided . . . for the Oglala Lakota people, to analyze this Application or its affect [sic] on lands, territories and resources."[266] This contention is inadmissible because the Petitioner fails to raise a material dispute and fails to provide adequate factual or expert support.

This contention is immaterial for the reasons set forth in response to Contention V, above. Additionally, in this contention the Petitioner cites numerous statutes and treaties for the proposition that it has a right to be consulted by COGEMA.[267] One of the statutes cited is the NHPA.[268] The NHPA requires consultation, but it only applies "to federal agencies such as the NRC, not to license applicants."[269] For additional support, the contention specifically discusses

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262 *Id.* at 60.

263 Specifically, the Petitioner cites the Fort Laramie Treaties of 1851 and 1868 (which as previously discussed have been abrogated), the U.N. Declaration on the Rights of the World's Indigenous People, and the International Covenant on Civil and Political Rights. *Id.* at 59.

264 The Petitioner cites the following statutes: American Indian Religious Freedom Act, Religious Freedom Restoration Act, Native American Graves Protection and Repatriation Act, Government-to-Government Relations with Native American Tribal Governments, and Executive Order No. 13175. *Id.* at 59.

265 *Id*. at 59-60.

266 *Id*. at 60-61.

267 *Id.* at 59-61.

268 *Id*.

269 *USEC*, LBP-05-28, 62 NRC at 627; *see USEC Inc*. (American Centrifuge Plant), CLI-06-9, 63 NRC 433, 437 ("Section 106 of the NHPA requires licensing agencies like the NRC to 'take into account the effect' of the licensed undertaking on historic properties . . . ."). Because the Petitioner is not a federally recognized Indian tribe, the NRC Staff is not required to consult with it pursuant to the NHPA. *USEC Inc*. (American Centrifuge Plant), CLI-06-9, 63 NRC at 437.

the Declaration on the Rights of the World's Indigenous Peoples ("Declaration").[270] Pursuant to the language quoted by the Petitioner, the Declaration requires "States . . . [to] consult and cooperate . . . with the indigenous peoples . . . ."[271] Furthermore, in *Crow Butte*, the petitioners supported their failure to consult contention by citing to the Declaration.[272] When it admitted the contention, the *Crow Butte* board cited the consultation requirements of the NHPA and ignored the Declaration.[273] The Declaration is not binding on the NRC and does not establish any cognizable rights for the petitioners in NRC proceedings.[274] Thus, the *Crow Butte* board was correct in ignoring such claims. Similarly, COGEMA is not required to consult with the Petitioner under either the NHPA or the Declaration. Therefore, the Petitioner's citations of the NHPA and the Declaration do not raise a material issue.

With regard to the remaining statutes and treaties that it cited, the Petitioner failed to explain how they impose a duty on COGEMA to consult with the Petitioner. 10 C.F.R. § 2.309(f)(1)(iv) requires a *demonstration* by a petitioner that "the issue raised in the contention is material to the findings the NRC must make to support the action that is involved in the proceeding," not merely a citation of the alleged relevant requirements. Because the Petitioner failed to meet its burden to explain the cited statutes and their relevance to this proceeding, it has failed to show that the issue that they have been cited to support—failure to consult—is material to this proceeding.[275]

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[270] Petition at 60.

[271] *Id*.

[272] *Crow Butte*, LBP-08-06, slip op. at 106-10.

[273] *Id*. at 107-10.

[274] *See* General Assembly Resolution 61/295 (Sept. 13, 2007) (adopting the Declaration).

[275] *See Duke Energy Corp.*, CLI-02-26, 56 NRC at 363 n.10 ("a factual or legal issue is material to a proceeding only if it would entitle petitioner to relief"). The Petitioner also claims that COGEMA failed to consult with the Lakota elders. Petition at 60. First, the Petitioner does not explain to whom the phrase "Lakota elders" refers. Second, and more importantly, the Petitioner does not identify which statute requires COGEMA to consult with

The Petitioner does not provide any support, factual or otherwise, to support the various assertions made to support this contention. For example, it does not provide any support for its assertion that the Oglala Lakota people have not been given an opportunity to "analyze the Application or its affect [sic] on lands, territories and resources."[276] Thus, the contention should be denied because it is devoid of any factual information or expert opinion to support the bases for the contention.

4. Contention VII – International Obligations to the Petitioner

The Petitioner's contentions regarding "human rights" are beyond the scope of this license renewal proceeding, and thus do not constitute an admissible contention. Notably, only through a few passing references does the Petitioner attempt to link its general observations regarding human rights to this license renewal proceeding.

The Petitioner asserts that "[i]t is highly likely than [sic] that this uranium mining operation will be found to violate the rights of the Indigenous Peoples in this area, including the Oglala Delegation."[277] Contention VII does not specifically describe the "rights of the Indigenous People" that are the basis of this contention. However, the Petitioner elsewhere asserts that it is "tasked with protecting the land, water, resources, health and well-being of the Oglala Lakota," with respect to its "aboriginal territory in the area of the renewal permit."[278]

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the Lakota elders. Thus, this basis, like the bases above, fails to raise an issue that is material to the outcome of this proceeding.

276 Petition at 60-61. In fact, as explained above, the evidence is demonstrably to the contrary. The NRC has consistently consulted with the federally recognized Indian Tribe of which the Oglala Lakota are members—the Oglala Sioux Tribe.

277 *Id.* at 63.

278 *Id.* at 7-8.

Further, the "Petitioners claim aboriginal title to all the land, water and mineral resources occupied and extracted by the Mine."[279]

To the extent that Contention VII seeks to have the NRC recognize or enforce such "aboriginal" land rights, the contention is outside the scope of this proceeding and does not present a genuine issue of fact or law. The Petitioner discusses the 1851 Fort Laramie Treaty and the 1868 Fort Laramie Treaty. According to the Petitioner, COGEMA's Facilities are "within the 1868 Treaty territory, i.e., unceded Lakota lands."[280] However, as the Petition expressly notes, in "the Act of February 28, 1877," Congress ratified "the cession of over 7 million acres of territory in the western part of the Great Sioux Reservation, including the Black Hills."[281] As the Petitioner acknowledges, the area of Wyoming that includes COGEMA's Facilities is within the 7 million acres of Oglala Lakota lands whose cession was approved by Congress in the 1877 Act.

The Petitioner acknowledges, as it must,[282] that the U.S. Supreme Court upheld the authority of Congress to ratify and endorse the cession of such land, *United States v. Sioux Nation of Indians*, 448 U.S. 371 (1980). Despite the fact that the Supreme Court has ruled conclusively on the Sioux Nation's claims to territory that includes the Facilities, the Petitioner asks the NRC to address those same claims under the rubric of "human rights." Since the Congress and the Supreme Court have conclusively determined the "rights" that the Petitioner presents as a basis for its Contention VII, the NRC lacks jurisdiction to address such claims, even

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[279] *Id.* at 6.

[280] *Id.* at 4.

[281] *Id.*

[282] *Id.*

though the Petitioner now presents such claims in the guise of "international human rights" claims.

In Contention VII, the Petitioner argues that "Indigenous Peoples and individuals, are best served by a proper and continuing identification of transnational alien corporations wishing to do business, particularly dangerous business, such as uranium mining in the United States."[283] Although the Petitioner points to various international conventions and general "principles of international human rights law,"[284] it does not establish how these principles and conventions have any relevance to the license renewal proceeding at hand. Contention VII fails to raise a genuine dispute concerning matters of fact or law that are within the scope of this proceeding. Therefore, Contention VII is not admissible.

5. Contention VIII.A – Water Restoration Values

This contention alleges that COGEMA's goal of returning the quality of the groundwater to baseline is "misleading" because COGEMA has failed to accomplish that in the prior restoration and decommissioning.[285] In support, the contention claims that "no ISL operation has ever returned the groundwater to baseline levels."[286] As a result, the Application "should have disclosed the irretrievable commitment of groundwater resources to the project."[287] This contention is inadmissible because the Petitioner fails to provide any factual or expert support and fails to demonstrate that there is a genuine dispute of law or fact. It is also outside the scope of this proceeding.

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[283] *Id.* at 69.

[284] *Id.* at 66.

[285] *Id.* at 70-71. COGEMA notes that the Application states that the primary goal for restoration is to return the quality of the groundwater to baseline. Application Section 6.1.1. However, if that goal cannot be achieved, then the groundwater will be returned, at a minimum, to pre-mining use. *Id*.

[286] Petition at 71.

[287] *Id*.

Instead of providing facts or expert opinions to support the claims in this contention, the Petitioner first recites certain sections of the Application that refer to water resource impacts.[288] Next, the Petitioner announces "that the Mine's operations have lowered the water table."[289] Finally, the Petitioner admits that this announcement and its supporting letter do not relate to this contention and instead "support Petitioner's contention that the mine's operations consume large amounts of water and reduce the water table."[290]

Thus, this contention is completely unsupported. The Petitioner provides only bare assertions that COGEMA has failed in any prior restoration efforts and that "no ISL operation has ever returned the groundwater to baseline levels."[291] As a result, this contention is inadmissible under 10 C.F.R. § 2.309(f)(1)(v) and (vi).

Moreover, this contention is outside the scope of this proceeding because it does not allege that continued operation of the Facilities will result in any significant environmental changes. The contention alleges that operation of the Facilities has lowered the water table. The Petitioner does *not* allege, however, that COGEMA's proposal to *continue* the operation of the Facilities will result in a *significant change* to the potential environmental impacts of the Facilities under the renewed license, as distinct from impacts under the current term of operations under the most recent license amendment.[292] Nor does the Petitioner carry its burden

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[288] *Id*. at 71-74.

[289] *Id.* at 74.

[290] *Id*. This letter, although it appears in this contention, relates to Contention VIII.J, addressed below. Because Contention VIII.J, however, does not reference this information, it cannot be relied upon to support Contention VIII.J. 10 C.F.R. § 2.309(f)(1)(v) (requiring, for each contention, "a concise statement . . . with references to the specific sources and documents on which the requestor/petitioner intends to rely"). The Petitioner's statement that all previous sections of the Petition are incorporated into Contention VIII.J, Petition at 120, is insufficient. *See Seabrook*, CLI-89-3, 29 NRC at 240-41. In any event, because Contention VIII.J does not articulate a legal or factual issue to be litigated, the letter referenced in Contention VIII.A is irrelevant.

[291] Petition at 70-71.

[292] *See generally id.* at 70-74.

of explaining how such a significant change to impacts could take place. The contention is therefore inadmissible under 10 C.F.R. § 51.60(a) and the Hearing Notice.

6. Contention VIII.B – Impacts to Water Resources

This contention asserts that "[t]here is no evidence based science for the Applicant's conclusion that 'these potential impacts to water resources in the area of the Irigaray/Christensen Ranch area are expected to be minimal'. Application 7.2.3."[293] Under this contention, the Petitioner provides a series of quotations from the Application, and comments about them:[294]

- 7.2.4 ECOLOGICAL IMPACTS – "implies that there will be no other material ecological impacts from the mine"
- 7.3.1 Exposure Pathways – "ignores the impacts of Arsenic"
- 7.3.2 Exposures from Water Pathways – "fails to disclose the instances in which human error at Applicant's operations resulted in major spills [and] the operation of the mine concentrates Arsenic"
- 7.4 NON-RADIOLOGICAL EFFECTS – "fails to disclose the potential for faults, fractures and artesian pressures . . . CBM projects and oil drilling and . . . nearby water wells [to] make the system not fully self contained [and] it is misleading to say that the . . . effects are small"
- 7.5.1.2 Pipe Failure "fails . . . to disclose adverse information related to the 110,000 gallon leak by leaving a pump on for 16 days [and] fails to disclose the risks associated with using longer trunklines"
- 9.2 QUANTIFIABLE BENEFITS AND COSTS – [no comment provided]

In addition, the Petitioner states that:[295]

- the Application should have disclosed actual leaks and spills pursuant to 10 C.F.R. § 51.45(e).
- the monitoring wells should be tested for uranium and other heavy metals.
- there are studies indicating that exposure to low levels of uranium is harmful.
- higher cancer rates at Pine Ridge Reservation are connected to current practices of ISL mining.
- the U.S. Government has not addressed the health impacts of uranium mining adequately.

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[293] *Id.* at 74.

[294] *Id.* at 75-77.

[295] *Id.* at 77-82.

As a threshold matter, this contention is outside the scope of this proceeding because it does not allege that continued operation of the Facilities will result in any significant environmental changes. The contention seeks to dispute the Application's conclusions regarding impacts to water resources from the Facilities. The Petitioner does *not* allege, however, that COGEMA's proposal to *continue* the operation of the Facilities will result in a *significant change* to the potential impacts to water resources during the period of the renewed license, as distinct from impacts under the current term of operations under the most recent license amendment.[296] Nor does the Petitioner carry its burden of explaining how such a significant change to impacts could take place. The contention is therefore inadmissible under 10 C.F.R. § 51.60(a) and the Hearing Notice.

Contention VIII.B also does not identify an issue that is material to any finding that must be made in this proceeding. With respect to the leaks and spills, the Petitioner asserts that certain parts of the Application should include information about leaks and spills. In fact, the Application does address leaks and spills by discussing the procedures to prevent, detect, and correct such events. For example, the Application states:

> Any irregularities will initiate inspection of the trunklines, feeder lines, or individual wells. Upon identification of a *leak*, relevant operations are curtailed until a repair is completed. A significant spill (>420 gallons if not into a draw or drainage) associated with a line leak of injection or recovery solution is documented regarding date of *spill*, nature and estimated quantity of lost fluid, soil sample results (if taken), results of any post remediation surveys (if taken), and posting on a map showing the spill location and impacted area. Any free standing fluid is contained and retrieved when feasible for proper disposal. Contaminated soils are excavated for proper disposal. The above documentation/steps are taken regarding a *spill* of any quantity of injection or recovery solution that enters a draw or drainage, or regarding a *spill* of any quantity of a solution other than recovery or injection solution. Documented spills are

[296] *See generally id.* at 75-82.

> reported by telephone to -the Wyoming DEQ and USNRC within 48 hours of the event.[297]

Although the Petitioner apparently believes that the Application must include discussion of specific leaks/spills that occurred in the past,[298] there is no requirement for such information in a license renewal application, which is focused on the activities that will be conducted under the requested license renewal.[299] The provisions of NUREG-1569 that specifically provide for consideration of the license renewal applicant's past performance are not focused on 10 C.F.R. § 51.45(e), and do not cite that section. The NRC receives prompt reports on significant spills and leaks, and during its onsite inspections the NRC reviews the detailed records of all leaks and spills of licensed material or process chemicals maintained by the licensee.[300] For example, as discussed further below, the NRC received timely notice of the "110,000 gallon spill" cited by the Petitioner[301] along with an analysis of its cause, environmental impacts, and corrective actions.[302] Such information does not need to be recapitulated in a license renewal application, and certainly no regulation requires that such information be provided in a license renewal application. Consequently, this aspect of Contention VIII.B does not raise a material issue.

The comment that arsenic is not mentioned in sections 7.3.1 and 7.3.2 is not meaningful. Section 7.3 is entitled "Radiological Effects" and is not intended to discuss the control of non-radiological constituents, such as arsenic. Section 7.4 provides a brief discussion of non-

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[297] Application at 3-25 (emphasis added).

[298] Petition at 76 ("fails to disclose the incidents").

[299] *See* 10 C.F.R. § 51.45(b)(1).

[300] For example, COGEMA License Condition 12.2, "Spill, Leak, Excursion, and Incident/Event Reporting," requires COGEMA to maintain detailed records and to report significant events to the NRC. Materials License No. SUA-1341, Amendment No. 14 (Feb. 24, 2009), *available at* ADAMS Accession No. ML090210506.

[301] Petition at 77.

[302] Letter from T. Nicholson to G. Mooney, Groundwater Spill Christensen Ranch Monitor Well 3MW53D (Oct. 2, 2003), *available at* ADAMS Accession No. ML032870415 ("Nicholson Letter").

radiological impacts. More specific information about arsenic is provided in Section 3.3.3.2 "Anticipated Geochemical Reactions" and Table 3-2.[303] The comments about arsenic in Contention VIII.B do not suggest, either directly or indirectly, that any regulatory requirement is not being met with respect to the control of arsenic, or that restoration activities are not successful in returning groundwater arsenic concentrations to levels at or close to the baseline concentrations. Consequently, this aspect of Contention VIII.B does not raise a material issue.

Similarly, no issue of significance is raised by the Petitioner's comment that Section 7.4 does not mention the possibility of faults, fractures, CBM projects, etc.[304] The Petitioner's list of possible causes of excursions is entirely encompassed within the statement in Section 7.4 that "[t]he potential non-radiological effects of the operation include the possibility of lixiviant excursion."[305] A list of possible causes of excursions is simply not germane to a section that focuses on effects, rather than causes. Consequently, this aspect of Contention VIII.B does not raise a material issue.

The Petitioner's comment that monitoring wells should be tested for uranium and other heavy metals[306] erroneously assumes that such testing is not done. As shown clearly in Tables 5-23 and 5-24 (footnotes 1 and 2), samples from the groundwater monitoring wells are analyzed for a broad suite of potential constituents, including uranium and numerous other heavy metals such as arsenic. Consequently, this aspect of Contention VIII.B does not raise a material issue.

The Petitioner's remaining comments under Contention VIII.B focus on the alleged health effects of uranium, and more generally on the public health issues at the Pine Ridge

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303 Application at 3-22 to 3-24.

304 Because CBM development in the area is relatively recent, and represents a change from the circumstances addressed in the previous NRC reviews, it is actually discussed at some length in appropriate parts of the Application. *Id.* at 2-4, 2-14 and Appendix B.

305 *Id.* at 7-20.

306 Petition at 77-78.

Reservation. Such comments do not raise any question about whether the Application meets the applicable NRC regulatory requirements. In fact, the Petitioner does not identify any connection between those comments and any of the activities to be conducted at the Facilities under the renewed license. Consequently, these aspects of Contention VIII.B do not raise any issues that are within the scope of this proceeding or material to any finding the NRC must make to approve license renewal.

7. Contention VIII.C – Environmental Harm to Willow Creek and Powder River, Groundwater, and Surface Water

This contention claims that the Application "does not accurately address the potential for environmental harm to the Willow Creek and Powder River."[307] In support, the Petitioner offers three allegations: (1) that "mining activities *may* endanger" surface and groundwater resources, including Willow Creek, Powder River, and the Wasatch aquifer;[308] (2) that "COGEMA may inject hydrogen sulfide (H2S) to clean-up some of the heavy metals mobilized during mining operations," which "*may* produce health and safety impacts";[309] and (3) that the "Applicant ignores the Willow Creek and Powder River as a potential surface water that is affected in the event of an accident."[310] This contention is inadmissible, however, because it raises issues that are outside the scope of this proceeding and are not material to the NRC's required findings, is unsupported by facts or expert opinion, and fails to raise a genuine dispute on a material issue of fact or law.

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[307] *Id.* at 83.

[308] *Id*. (emphasis added).

[309] *Id*. at 83-84 (emphasis added).

[310] *Id.* at 88. Later, the Petitioner appears to acknowledge that this statement is untrue, because the Application does not "ignore" potential accident impacts on Willow Creek. *See id.* at 89 ("Applicant provides no scientific data to support its claim that an accident would have no impact on surface waters of the Willow Creek or the Powder River.").

a. This Contention Is Outside the Scope of this Proceeding

The Petitioner is mistaken about the scope of environmental issues in this proceeding. Under 10 C.F.R. § 51.60(a) and the Hearing Notice, and as explained in Section IV.A.3, above, this proceeding is confined to a review of *significant environmental changes* associated with COGEMA's proposal to *continue* uranium production operations at the Facilities. In accordance with NUREG-1569 and Regulatory Guide 3.46, COGEMA's Application contains a great deal more information than is absolutely necessary to support the Staff's review of the Application. This is primarily because COGEMA understands that the Staff will perform an initial review of certain aspects of the operation of the Facilities, and perform a more comprehensive review *only* if the Staff concludes that the Facilities have not been operated so as to protect health and safety and the environment, or that there are unreviewed safety-related concerns.[311] Thus, contrary to the Petitioner's assertion, "information contained in [the] application" is not necessarily within the scope of this proceeding.[312]

This contention is outside the scope of this proceeding because it does not allege that continued operation of the Facilities will result in any significant environmental changes. The contention alleges that certain impacts to groundwater and surface water from the operation of the Facilities are unaddressed in the Application. The Petitioner does *not* allege, however, that COGEMA's proposal to *continue* the operation of the Facilities will result in a *significant change* to groundwater and surface water impacts, as distinct from impacts under the current term of operations.[313] The contention is therefore inadmissible under 10 C.F.R. § 51.60(a) and the Hearing Notice.

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[311] NUREG-1569 at A-1.

[312] Petition at 88.

[313] *See generally id.* at 83-90.

b. This Contention Is Not Material

The Petitioner has failed to demonstrate that this contention is material to the NRC's required findings in this proceeding because, although the contention identifies various regulations, it fails to explain how or why COGEMA's Application is deficient under those regulations. First, the Petitioner identifies 10 C.F.R. § 40.32(c) and (d), as within the scope of this proceeding,[314] but fails to explain why or how the Application fails to provide sufficient information for the NRC to make these findings. Second, although the Petitioner passively and vaguely asserts that "the accuracy and completeness of the application is called into question under 10 C.F.R. § 40.9(a) and (b),"[315] it fails to explain why it believes that the Application is not complete and accurate in all *material* respects, or what information with "significant implication for public health and safety or common defense and security" it believes COGEMA has withheld from the NRC.[316] Third, the Petitioner cites 10 C.F.R. §§ 51.71 and 51.90, in the apparent assumption that these regulations are applicable. Both of these regulations, however, apply only to environmental impact statements ("EISs"), and there is no requirement that an EIS be prepared for this license renewal.[317] Finally, the Petitioner vaguely suggests that the

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314 *Id.* at 88.

315 *Id.*

316 10 C.F.R. § 40.9. In a separate "Background" section of the Petition, the Petitioner describes three incidents that COGEMA allegedly failed to adequately disclose, "in violation of 10 CFR §51.45(e)." Petition at 13-15. The Petitioner does not plead these allegations as a separate contention or contentions, so COGEMA does not respond to them as such. To the extent these allegations are (vaguely) referenced in support of this contention, COGEMA responds in Section c, below. Moreover, COGEMA reported all of these events to the NRC in accordance with its obligations under the applicable regulations and its license. As explained in response to Contention VIII.B, above, there is no requirement to reiterate each of these reports in the Application.

317 *See* 10 C.F.R. §§ 51.20 (identifying specific major NRC actions requiring an EIS, and omitting uranium mining licenses under Part 40); 51.21 (providing for an EA in this proceeding). The Staff, of course, may ultimately determine, through its EA, that an EIS is required. *See* 10 C.F.R. § 51.14 (defining "Environmental Assessment" as a public document intended to analyze whether a finding of no significant impact is appropriate or an EIS is required). In the recent license amendment to resume operations at the Facilities, the Staff found that there would be no significant impact. Notice of Availability of Environmental Assessment and Finding of No Significant Impact for License Amendment Request to Revert to Operating Status From Restoration and Decommissioning Status, COGEMA Mining Inc., Christensen and Irigaray Ranch Facilities, Johnson and

Application must "disclose what amounts of H_2S [hydrogen sulfide] will be injected" and "how the injected H_2S will be removed after operations" in order to comply with unspecified provisions of the "Environmental Planning and Community Right-to-Know Act" and NEPA.[318] It does not, however, identify what provisions of these statutes require this precise information to be included in COGEMA's Application.[319]

c. *This Contention Is Unsupported by Facts or Expert Opinion and Fails to Identify a Genuine Dispute*

This contention is also inadmissible because it is unsupported by references to facts or expert opinion and therefore fails to raise a genuine dispute. Indeed, as explained below, the Petitioner presents absolutely no expert opinion, and only one "fact," and this "fact" is actually a misleading and incorrect statement. Each of the three bases of this contention are deficient in these respects, so the contention must be rejected under 10 C.F.R. § 2.309(f)(1)(v) and (vi).

First, the Petitioner alleges that "mining activities *may* endanger" surface and groundwater resources, including Willow Creek, Powder River, and the Wasatch aquifer.[320] The Petitioner does not assert that mining activities "do" or "will" endanger these resources, but only speculates that mining "may" do so. Aside from the completely speculative nature of its statement, the Petitioner provides absolutely no facts or expert opinions to substantiate the suggestion that surface and groundwater resources will be affected by the continued operation of the Facilities. Instead, the Petitioner improperly seeks to shift its burden, under Section 2.309(f)(1), to demonstrate the admissibility of its contentions to COGEMA:

Campbell Counties, WY, 73 Fed. Reg. 53,052 (Sept. 12, 2008). Thus, the Petitioner's apparent assumption that an EIS will be required is baseless.

[318] Petition at 84 & n.99.

[319] Nor does the Petitioner explain why the license condition associated with the Facilities' NRC- and WDEQ-approved hydrogen sulfide program is insufficient under these statutes. *See* Application at 6-7.

[320] Petition at 83 (emphasis added).

> Until there is conclusive proof that the in situ leach mining of uranium at the Mine does not affect the quality of the surface water and the ground water of the immediate surrounding area, the Application should be denied and uranium mining operations at the Mine should not be renewed.[321]

COGEMA, however, has presented its evaluation of the impacts of continued mining operations on groundwater and surface water resources.[322] The Application provides detailed information on COGEMA's ground and surface water monitoring program, including data from monitored stock wells in the immediate area, with no indication of impacts that might "endanger" such resources.[323] The Petitioner does not recognize this information in the Application, and provides no explanation, through facts or expert opinion, of why or how COGEMA's Application is incorrect or insufficient. This aspect of the contention therefore fails to raise a genuine dispute.

Second, the Petitioner claims that hydrogen sulfide, which may be used as part of the aquifer restoration process following mining operations,[324] "*may* produce health and safety impacts."[325] Again, this claim is completely speculative, as the Petitioner does not even allege that the use of hydrogen sulfide in aquifer restoration will produce health or safety impacts. Moreover, the Petitioner again fails to present facts or expert opinion to substantiate its speculation about the possible health and safety effects of the use of hydrogen sulfide at the Facilities.

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[321] *Id.* at 11. Aside from its incorrect assignment of the contention pleading burden to COGEMA, this passage in the Petition also mischaracterizes NEPA, which does not mandate outcomes but instead is a procedural statute whose principal purpose is to "insure a fully informed and well considered decision" with respect to the environmental impacts of agency actions. *See, e.g.*, *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council*, 435 U.S. 519, 558 (1978).

[322] *See* Application Section 7.2.3.

[323] *See id.* Section 5.8.2; *see also id*. Tables 5.23 (showing groundwater monitoring results) and 5.25 (showing surface water monitoring results).

[324] *See id.* at 6-6.

[325] Petition at 83-84 (emphasis added).

COGEMA and the NRC, moreover, have considered the potential risks and benefits of using hydrogen sulfide in the restoration process, and COGEMA has implemented a program to address potential safety risks. As the Application explains:

> When using hydrogen sulfide gas as well as any other sulfur-based reductants that could result in some release of hydrogen sulfide gas, COGEMA will institute proper safety precautions. In April 1991, a hydrogen sulfide safety program was submitted to the WDEQ [Wyoming Department of Environmental Quality] and NRC, and was approved by the NRC through license condition.[326]

The Petitioner fails to explain why it believes that the existing, approved hydrogen sulfide safety program is inadequate to protect health and safety. Indeed, it does not even acknowledge that such a program exists.[327] The Petitioner has failed to meet its "ironclad obligation to examine the publicly available documentary material" and explain why, considering the available information, it believes that the Application is insufficient.[328] Thus, it does not raise a genuine dispute on a material issue of law or fact.

Finally, the Petitioner claims that the "Applicant ignores the Willow Creek and Powder River as a potential surface water that is affected in the event of an accident."[329] The Petitioner later acknowledges that this potential issue was not ignored: "Applicant provides no scientific data to support its claim that an accident would have no impact on surface waters of the Willow Creek or the Powder River."[330] In support of its desire for additional "scientific data," beyond

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326 Application at 6-7.

327 The Petitioner also fails to explain why, after 18 years, it is now an appropriate time to challenge this existing program. Given that the Facilities' hydrogen sulfide safety program has been in place for nearly two decades, and that no change is proposed in the Application, the Petitioner has also failed to carry its burden of showing or even alleging that this issue represents a significant environmental change that would be caused by the continued operation of the Facilities. *See* Section IV.A.3, above. Challenges to the hydrogen sulfide safety program are therefore outside the scope of the proceeding.

328 *Duke*, ALAB-687, 16 NRC at 468.

329 Petition at 88.

330 *Id.* at 89. COGEMA makes no such sweeping assertion in the Application.

the hydrological analysis and description of empirical information already contained in Application Sections 5.8.2 and 7.2.3.3, the Petitioner offers only one "fact": a misleading and vague reference to a "110,000 gallon spill."[331]

This reference is misleading for two reasons. The Petitioner argues that "surface water would be affected in the event of an accident," but its own description of the incident shows that the water in question *never reached Willow Creek*: "the 110,000 gallon spill was soaked into a draw *adjacent* to Willow Creek."[332] More importantly, however, contrary to the Petitioner's claims, the incident in question was not an "accident" involving radiologically or otherwise contaminated water. The Petitioner describes this September 2003 incident as a "discharge of 110,160 gallons of radioactive groundwater" from a deep monitoring well.[333] This description is disingenuous and incorrect.

In reality, the September 2003 incident involved the inadvertent discharge of *naturally existing* groundwater from a deep monitoring well that was isolated from the mining zone.[334] Although, upon discovery, COGEMA immediately reported the event to the WDEQ, as required, the water ultimately did not qualify as a hazardous substance.[335] Contrary to the Petitioner's assertion, there is no evidence that the water was "radioactive" or otherwise contaminated.[336] Thus, the incident provides no evidence to suggest any deficiency in COGEMA's assessment of potential groundwater and surface water impacts in the event of an accident.[337]

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[331] *Id.* at 88.

[332] *Id.* (emphasis added); *see also id*. at 14 (discussing the same incident, and acknowledging that "[w]ater reached a dry draw near the Willow Creek but did not reach Willow Creek itself.").

[333] *Id.* at 14.

[334] Nicholson Letter at 1 (emphasis added).

[335] *Id.* at 1-2

[336] *Id.* at 2.

[337] *See* Application at 7-5 to 7-6.

Aside from the misleading discussion of the 2003 incident, the contention is not supported by any further facts or expert opinion explaining why the Petitioner believes that the information in the Application is incorrect or otherwise insufficient under the regulations. In this respect, the contention is quite different from the Oglala Sioux Tribe's Environmental Contention C, admitted in *Crow Butte*. The *Crow Butte* board found that contention to be supported by documented excursions and leaks which demonstrated the potential for contamination of water resources, and found three expert reports had provided sufficiently reliable opinions showing that further investigation might be necessary.[338] In contrast, this contention is based on mere speculation that the Application does not "accurately" address the potential for environmental harm to Willow Creek and Powder River. Also, in contrast to the *Crow Butte* board's understanding of that application, COGEMA does not "bank[] on its ability to prevent accidental releases from ever reaching surface waters."[339] COGEMA's Application recognizes that this is a theoretical possibility, but explains the natural features and operations procedures that make this unlikely, and that no previous spills have impacted Willow Creek.[340] The Petitioner fails to carry its burden of presenting *any* facts or expert opinion suggesting that this information is incorrect, much less that it is *significantly* inaccurate.[341]

8. Contention VIII.D – Impacts of Coal Bed Methane

Contention VIII.D is inadmissible. It asserts that "the Application does not accurately address the potential for environmental harm from the relationship between known Coal Bed Methane (CBM), described in Appendix B to the Application, and the planned ISL

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[338] *See* LBP-08-24, slip op. at 36-37, 37 n.175.

[339] *Id.* at 36.

[340] Application at 7-6.

[341] *See Sys. Energy Res., Inc.*, CLI-05-4, 61 NRC at 13.

operations."[342] The only explanations of the inaccuracy that this contention alleges are (1) a statement that:

> In Appendix B of the Application, Applicant ignores the impacts on the environment that is affected in light of existing and planned CBM operations. The river alluvium can receive contaminants from three sources 1) from surface spills at the mine site 2) from water transmitted through the artesian pressures and/or CBM or oil wells, where it is exposed at the land surface, and 3) through faults.[343]

and (2) a statement that:

> Applicant provides no scientific data to support its claim that the CBM has no material impact on the ISL operations.[344]

The remainder of the Petition's discussion of Contention VIII.D consists of legal arguments or quotations from the Application, and does not shed any light on the nature of the contention.[345]

The Application addresses the environmental impacts of the ISL operations in various places, and does not purport to do so in Appendix B. Portions of the Application that address water quality include Section 7.2.3 "Impacts to Water Resources," which discusses the potential impacts of the ISL operations on water quality; and Section 5.8.2 "Groundwater and Surface Water Monitoring Program," which discusses both the results of monitoring the impacts of past ISL operations, and the program for monitoring future activities. The latter includes a description of a system used to monitor groundwater quality in areas adjacent to ISL operations

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[342] Petition at 90.

[343] *Id.* at 90-91.

[344] *Id.* at 94.

[345] *Id.* at 90-96.

and to take corrective action in the event there is an excursion.[346] The Application provides information relevant to the potential for contamination of surface water due to spills or leaks.[347]

Contention VIII.D does not challenge, or even reference, the discussions of water quality in the Application. Instead, the contention cites and quotes extensively from Appendix B, which does not purport to examine the environmental impacts of ISL operations. Rather, Appendix B addresses potential CBM impacts on Christensen Ranch ISL operations. In particular, Appendix B considers whether CBM water use could cause vertical excursion by drawing down the aquifer immediately below the ISL operations. Appendix B explains that CBM uses water from an aquifer that is some 800 to 1000 ft or more below the region affected by ISL operations, and that there are numerous intervening stratigraphic layers that act as aquitards and prevent CBM drawdown from significantly affecting ISL operations.[348] Appendix B concludes that "the CBM induced drawdown will not have a measurable impact on ore sand water levels unless there is an artificial connection through an improperly completed well or improperly abandoned bore hole."[349] Appendix B also includes a detailed discussion of the locations of known deep wells in the region surrounding the ISL operations, and shows that the only known deep drillholes in the areas of proposed ISL operations have been or will be sealed.[350] In any event, as mentioned above, the Application describes the system that is used to detect and correct excursions, including vertical excursions.[351]

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346 Application at 5-74.

347 *Id.* at 4-7, 5-13, and 7-5.

348 *Id.* at B-1, B-5.

349 *Id.* at B-6.

350 *Id.* at B-1, B-2; *see also* Figure B.1.

351 *Id.* at 5-13.

Contention VIII.D does not: (1) explain the nature of any environmental harm that the Petitioner foresees; (2) identify any statement in Appendix B that the Petitioner believes to be inaccurate; (3) identify any information the Petitioner believes Appendix B improperly omits; or (4) explain how the CBM activities can result in the ISL operations causing an environmental impact that is not adequately addressed in the Application. Because it does not provide such specific information, Contention VIII.D does not satisfy any of the six contention admissibility criteria in 10 C.F.R. § 2.309(f)(1).

Contention VIII.D refers generally to Appendix B, which comprises 34 pages, including various tables and figures with literally hundreds of data points. Nothing in Contention VIII.D identifies which, if any, statements the Petitioner challenges, be it the location of a drillhole on Figure B.1, the depth of a drillhole in Table B.1, or the elements of the model described in Section B.5. In this regard, Contention VIII.D is quite similar to the very general contention that the Commission rejected in *Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-01-17, 54 NRC 3 (2001). There, the Commission held that broad-brushed references to the Application were not sufficient to meet the specificity requirement of 10 C.F.R. § 2.309(f)(1)(i).[352]

Contention VIII.D does not state what information leads the Petitioner to conclude that Appendix B is not accurate. In particular, the section entitled "Basis for Contention" consists of random extracts from Appendix B without any explanation of how these extracts constitute a basis for Contention VIII.D.[353] The Petitioner has highlighted some of the quoted statements with bold typeface, but does not explain the significance of the highlighting. In this respect, as well, Contention VIII.D is similar to the contention rejected in CLI-01-17. The NRC noted that

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[352] *Turkey Point*, CLI-01-17, 54 NRC at 19.

[353] Petition at 90-93.

the contention there did "nothing more than quote select passages which in themselves indicate no deficiency in [the] application . . . ."[354] Similarly, Contention VIII.D does not cite any evidence that the Application is inaccurate or incomplete in any respect. Consequently, like the contention at issue in CLI-01-17, Contention VIII.D does not satisfy the requirements of 10 C.F.R. § 2.309(f)(1)(ii) that a petitioner provide a brief explanation of the basis for the contention.

Contention VIII.D is also outside the scope of this proceeding because it does not allege that continued operation of the Facilities will result in any significant environmental changes. The contention seeks to litigate the potential for environmental harm from the relationship between CBM and ISL operations. The Petitioner does *not* allege, however, that COGEMA's proposal to *continue* the operation of the Facilities will result in a *significant change* to such potential impacts during the period of the renewed license, as distinct from impacts under the current term of operations under the most recent license amendment.[355] Nor does the Petitioner carry its burden of explaining how such a significant change to impacts could take place. The contention is therefore inadmissible under 10 C.F.R. § 51.60(a) and the Hearing Notice.

The Petition also does not satisfy the other requirements of 10 C.F.R. § 2.309(f)(1). The Petitioner's discussion of the scope of the hearing[356] does not show that the contention raises an issue concerning compliance with 10 C.F.R. § 40.32(c) or (d), and provides no basis for concluding that the scope of the hearing includes any question about the Applicant's compliance with 10 C.F.R. § 40.9. The Petitioner's discussion of materiality[357] does not show that resolution

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354 *Turkey Point*, CLI-01-17, 54 NRC at 20.

355 *See generally* Petition at 90-96.

356 *Id.* at 93-94.

357 *Id.* at 94.

of the issue would make a difference in the outcome of this proceeding. The Petitioner's discussion of statement of facts or opinions[358] does not cite any facts or opinions in support of the Petitioner's position. Finally, the Petitioner ignores the requirements of 10 C.F.R. § 2.309(f)(1)(vi), which requires a petitioner to demonstrate the existence of a genuine dispute by citing specific portions of the application that the petitioner disputes and the supporting reasons for each dispute.

The failure to meet any one of the six requirements of 10 C.F.R. § 2.309(f)(1) is an adequate independent reason for rejecting a contention. Contention VIII.D does not meet any of those requirements, and must be rejected.

9. Contention VIII.E – Communication Among Aquifers

Contention VIII.E "Communication Among Aquifers" is not admissible. The contention asserts that the Application incorrectly states there is no communication among the aquifers, claiming that the aquifer, where mining occurs, and the aquifer, which provides drinking water, communicate with each other, resulting in the possibility of contamination of the potable water.[359] The apparent basis for Contention VIII.E is a quotation from a portion of the Application that describes a model developed to evaluate the potential hydrologic impacts of CBM production on the uranium ore-bearing sands.[360]

The Application discusses the ISL operations in Section 3.0 and potential impacts on water quality in Section 7.2.3 "Impacts to Water Resources." Contrary to the suggestion in Contention VIII.E, the Application does not rely solely on lack of communication among aquifers to prevent adverse impacts on drinking water due to the ISL operations. Rather, the

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[358] *Id.* at 94-95.

[359] *Id.* at 95.

[360] *Id.*

Application also relies on a system of operation that confines the lixiviant through the arrangement and operation of the injection and recovery wells.[361] As explained in the NRC's 1998 EA:

> During production, there is constant movement of lixiviant through the aquifer from outlying injection wells to internal recovery wells. Monitoring wells, which are screened in appropriate stratigraphic horizons, surround the wellfield pattern area to detect any lixiviant that may migrate out of the production zone, either vertically or horizontally. In a properly designed and operated system, these "excursions" of ISL solutions should be rare due to the confining layers above and below the ore zone, and the continuous movement of lixiviant toward the centrally-located recovery wells.
>
> At Irigaray and Christensen Ranch, lateral confinement of mining fluids is accomplished by maintaining a 1 percent bleed from the recovery wells, resulting in slightly more water being extracted from the wellfields than is injected. This procedure maintains a net inflow of surrounding groundwater to the wellfield. To ensure that lixiviant does not travel to areas of the formation where it would be considered to have caused an excursion, COGEMA is required by license condition to install monitor wells above, below, and around the perimeter of the MUs. Additionally, COGEMA is required to have a set of corrective action and reporting procedures that can be implemented in the event an excursion is detected.[362]

Despite the Application's reliance on confinement, monitoring, and corrective action to protect water quality, Contention VIII.E is premised on its assertion that the Application relies on lack of communication among aquifers for this purpose. Contention VIII.E does not cite any basis for that assertion. The only reference cited in connection with Contention VIII.E, the quotation from Appendix B "Coal Bed Methane Water Production" at page 95 of the Petition, does not mention contamination or drinking water. In fact, those subjects are not discussed in Appendix B.

[361] *See* Application at 3-26.

[362] 1998 EA at 17-18.

Since the quotation from Appendix B does not discuss contamination, it also does not provide a colorable basis for the apparent assertion in Contention VIII.E that contamination may be communicated from the ISL operations zone to the aquifer associated with CBM activities. In fact, Appendix B also does not provide any support for an assertion that there is any communication between the two aquifers. To the contrary, it states that "the uranium production sand/sandstones . . . are separated from the CBM production coal seams by a substantial thickness of sand/sandstone and silt/shale sequences [that] act as aquitards and greatly restrict or preclude the vertical movement of ground water."[363] The quotation comes from the description of the MODFLOW model developed to evaluate the potential hydrologic impacts of CBM production on the uranium ore-bearing sands.[364] The model confirmed even repeated large drawdowns over the course of 20 years would not produce significant changes for model layers 1 through 6 (*i.e.*, almost half of the stratigraphic column separating the ore sands from the CBM production coal seam).[365] Thus, even if the quotation did have a bearing on the transport of contaminants, it would not provide a basis for this contention.

The only other references under Contention VIII.E are to regulations, not to any source of facts. Nothing in the Petitioner's discussion of this contention identifies a real basis for the contention, demonstrates that the issue raised is material to any finding the NRC must make, or identifies any supporting evidence or references to specific portions of the Application that the Petitioner disputes. Consequently, Contention VIII.E does not meet the requirements of 10 C.F.R. § 2.309(f)(1)(ii, iv, v or vi).

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[363] Application at B-5.

[364] *Id.*

[365] *Id.* at B-6.

10. Contention VIII.F – Arsenic Contamination

Contention VIII.F "Arsenic Contamination" is not admissible. In this contention, the Petitioner "contends that in-situ leach mining operations at the Mine will cause an increase in the natural level of Arsenic in the water of the target aquifer," and that such Arsenic leaks into drinking water sources and causes diabetes.[366] In discussing Contention VIII.F, the Petition quotes and characterizes portions of the Application, and 10 C.F.R. Part 40, Appendix A,[367] and then states: "**Dispute:** By failing to test for or monitor or filter Arsenic, the mine poses a threat to the public health and safety as well as the health of the environment and wildlife, including prey for sacred Eagles. Such failures make it impossible for the Applicant to comply with Criterion 5A, 5B, 5C and 5D and 7A of the Appendix A to Part 40; therefore the renewal must fail."[368]

The Petition provides no basis for the assertions that: (1) the ISL operations leak arsenic into drinking water; (2) the Application does not provide for filtering or monitoring for arsenic; or (3) COGEMA does not or will not comply with Appendix A to Part 40. Contention VIII.F ignores the basic regulatory approach to ISL operations, which treats the production zone as a milling activity and applies the regulatory limits to the areas outside the production zone. Within the production zone, it relies on restoration of the groundwater to assure that there is no significant adverse effect on groundwater quality.[369]

As discussed further below, the NRC has previously correctly determined and confirmed that the processes described in the Application restore groundwater to the baseline use

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366 Petition at 98.

367 *Id.* at 99-102, 104-09.

368 *Id*. at 109-10.

369 *See* NUREG-1910 "Generic Environmental Impact Statement for In-Situ Leach Uranium Milling Facilities," at 2-26 (stating that before production activities the groundwater is exempted from regulation, and the requirements of 10 C.F.R. Part 40, Appendix A are applied as restoration standards).

classification and does comply with Appendix A to Part 40. In its EA in connection with license renewal in 1998 the NRC determined that:

> Based on NRC's previous approval of the restoration program for Irigaray Units 4 through 9, and COGEMA's commitment in the LRA to pursue restoration as necessary to restore the groundwater to baseline, or at a minimum to Class of use, NRC through this renewal, approves this groundwater restoration program for the remaining Irigaray and Christensen MU's. Thus, by license condition, COGEMA Mining will be required to perform groundwater restoration in accordance with the groundwater restoration plan proposed in the January 5, 1996 LRA. NRC's approval of this proposed restoration program will allow COGEMA to proceed with the restoration process as described in the LRA for any wellfields scheduled for restoration.[370]

Since the Application provides for continued application of the restoration process previously approved,[371] the restoration process is not affected by license renewal and therefore, is not subject to challenge in this proceeding, except to the extent the Application proposes changes to the restoration process.[372] In any event, nothing in Contention VIII.F identifies a basis for challenging the NRC's previous finding or the effectiveness of the restoration process. Similarly, nothing in Contention VIII.F identifies a basis for its claim that COGEMA's ISL operations result in any increase in arsenic levels in drinking water. In fact, the groundwater in the ore zone at Irigaray and Christensen Ranch is not potable and there is only very limited domestic use of groundwater in the general vicinity.[373] Moreover, contrary to the Petition's baseless assertion, COGEMA's monitoring does test for arsenic concentrations.[374]

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[370] 1998 EA at 53.

[371] *See* Application at 6-6, *see also generally id.* Sections 6.1 and 6.2.

[372] *See* Section IV.A.3, above.

[373] Application at 2-14; *see also* Letter from COGEMA to the NRC (July 28, 2008) (providing confirmation of water use classification by WDEQ), *available at* ADAMS Accession No. ML082140063.

[374] Application at 5-68 to 5-69 (Table 5.24, footnotes 1, 2).

The Petition notes the statement in the Application about the mobilization of arsenic in the production zone and resulting increased concentrations and then states that no data is provided to demonstrate the current arsenic level in the restored mine units.[375] Such information is not required for a renewal application; the water quality in restored mine units pertains to past activities, not the proposed activities. Information about the effectiveness of restoration is already available in ADAMS.[376]

The Petition next asserts that the Application "does not address . . . any procedures to ensure that Arsenic is contained" and that COGEMA's "claim of 'restoration' [ ] assumes 'secondary' standards that are not articulated and that do not address Arsenic levels."[377] Contrary to this assertion, the Application discusses such procedures in Section 4.0 "Effluent Control Systems," and the Petition does not reference Section 4.0 or identify any deficiencies in those procedures, or their adequacy for controlling any arsenic that may be present in the waste streams. Additionally, Section 6.1.1 of the Application provides COGEMA's restoration goals and explains that if the primary goal for restoration cannot be achieved, "then restoration will meet an alternate standard approved by the NRC, consistent with the requirements of Criterion 5B(5) of Appendix A to 10 CFR Part 40."[378] The Petitioner has not explained why any additional information is necessary or material. More importantly, any challenge to the alternate standard set forth in Criterion 5B(5) is an impermissible challenge to this regulation, contrary to

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375 Petition at 98.

376 *See* 1998 EA at 52 (Table 4.1).

377 Petition at 98-99.

378 Application at 6-1 (October 2008 Update). This position is supported by the existing materials license. *See* Materials License No. SUA-1341, Section 10.16. Additionally, the NRC recently recognized that the standards in Criterion 5B are appropriate for groundwater restoration at ISL facilities. *See* RIS 2009-05, Uranium Recovery Policy Regarding: (1) the Process for Scheduling Licensing Reviews of Applications for New Uranium Recovery Facilities and (2) the Restoration of Groundwater at Licensed Uranium In Situ Recovery Facilities, at 3 (Apr. 29, 2009).

10 C.F.R. § 2.335. The Petition asserts that "[a]rsenic laden water may travel from the Mine location to the populated areas,"[379] but does not identify any basis for this assertion. This amounts to pure speculation, and the Commission has cautioned that:

> Petitioners must do more than merely make unsupported allegations. . . . Contentions must specifically state the issues a petitioner wishes to raise and, in addition to providing support in the form of expert opinion, document(s), and/or a fact-based argument, a petitioner must provide reasonably specific and understandable explanation and reasons to support its contentions. If a petitioner in a contention "fail[s] to offer any specific explanation, factual or legal, for why the consequences [the petitioner fears] will occur," the requirements of the contention rule are not satisfied.[380]

Here, the Petitioner does not provide any explanation for how such exposure to arsenic contamination may occur. As a result, not only is this assertion baseless, but the Petitioner's references to the potential health effects of arsenic[381] are irrelevant.[382]

Moreover, this contention is outside the scope of this proceeding because it does not allege that continued operation of the Facilities will result in any significant environmental changes. The contention seeks to litigate the potential environmental impacts of arsenic contamination. The Petitioner does *not* allege, however, that COGEMA's proposal to *continue* the operation of the Facilities will result in a *significant change* to such potential impacts during the period of the renewed license, as distinct from impacts under the current term of operations

[379] Petition at 99.

[380] *Duke Energy Corp.* (Catawba Nuclear Station, Units 1 and 2), LBP-04-4, 59 NRC 129, 146 (2004) (citing *Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 359 (2001)).

[381] Petition at 99, 103.

[382] The NRC has established specific arsenic limits in 10 C.F.R. Part 40, Appendix A. The Petitioner does not claim that any arsenic releases would exceed the Appendix A limits, instead arguing that even exposures within U.S. drinking water standards cause adverse health effects. Petition at 102. Such a contention is not admissible because they challenge NRC regulations in contravention of 10 C.F.R. § 2.335. *See Dominion*, CLI-01-24, 54 NRC at 364.

under the most recent license amendment.[383] Nor does the Petitioner carry its burden of explaining how such a significant change to impacts could take place. The contention is therefore inadmissible under 10 C.F.R. § 51.60(a) and the Hearing Notice.

In short, Contention VIII.F does not provide a sufficient basis, is outside scope, and does not demonstrate that there is a genuine dispute regarding a material issue of fact or law, and for these reasons is not an admissible contention.

11. Contention VIII.G – Failure to Update Environmental Report

Contention VIII.G claims that the Application fails to update research and analysis pursuant to 10 C.F.R. § 51.60(a) and fails to make required disclosures of environmental impacts pursuant to 10 C.F.R. § 51.45.[384] The Petitioner asserts that various topics are omitted from the Application. This contention is inadmissible because it makes unsupported claims that information is missing, while ignoring the scope of this proceeding. Additionally, this contention fails to satisfy the standard for asserting contentions of omission and the requirements for demonstrating materiality and a genuine dispute and for providing adequate support. Based on these failures, Contention VIII.G does not satisfy the admissibility requirements of 10 C.F.R. § 2.309(f)(1)(iii)-(vi).

a. This Contention Is Outside the Scope of this Proceeding

Aside from the contention's failure to satisfy other admissibility criteria, which are discussed below, the contention incorrectly claims that certain information that is outside the scope of this proceeding is omitted from the Application. As discussed above, the scope of this license renewal proceeding is limited to the issue identified in the Hearing Notice, which is COGEMA's "proposal to *continue* uranium production operations at its facilities in Johnson and

383 *See generally* Petition at 99-109.

384 *Id.* at 110-17.

Campbell Counties, Wyoming."[385] Additionally, under 10 C.F.R. § 51.60(a), the scope of this proceeding is "limited to incorporating by reference, updating or supplementing the information previously submitted to reflect any *significant environmental change*."[386] Thus, the information required to be provided in the Application on environmental issues is very limited, and certainly does not equate to the amount of information that must be provided in the original application.[387]

Moreover, the acceptability of materials license renewal applications relying upon earlier applications is explained in the SRP for ISL mining applications, which states that "[f]or amendment or renewal of an existing license, the original Environmental Report is supplemented, as necessary."[388] This is exactly what COGEMA has done in its Application. The Petitioner's desires, as expressed in Contention VIII.G, go well beyond this standard. The Petitioner ignores the Application's incorporation of other information that addresses the alleged missing information and it does not identify any "significant" environmental changes that have not been addressed by the Application.

Furthermore, NRC guidance clarifies that the impacts of the proposed action (*i.e.*, license renewal) should be discussed "in proportion to their significance."[389] Thus, the Application need not discuss every conceivable environmental impact in expansive detail, but must discuss the impacts in proportion to their significance. The SRP further explains that "[a]spects of the

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[385] 74 Fed. Reg. at 6437 (emphasis added); *see also Catawba*, ALAB-825, 22 NRC at 790-91.

[386] 10 C.F.R. § 51.60(a) (emphasis added).

[387] While the Petitioner argues that 10 C.F.R. § 51.60(a) supports its claims that certain information is omitted from the Application, this regulation actually cuts against Petitioner's arguments because the Petitioner has failed to show that this information was not provided in earlier applications for the site and that there have been *any* environmental changes, much less significant environmental changes.

[388] NUREG-1569, at 1.

[389] 10 C.F.R. § 51.45(b)(1).

facility and its operations that have not changed since the last license renewal or amendment should not be reexamined."[390]

Thus, because there have not been any significant environmental changes that would require the allegedly omitted information to be provided, Contention VIII.G falls outside the scope of this proceeding and must be rejected.[391]

b. This Contention Does Not Satisfy the Standard for Contentions of Omission

Contention VIII.G also does not satisfy the requirements for contentions of omission. NRC precedent states that, to be material, contentions alleging an omission in an application must establish some significant link between the claimed deficiency and protection of the health and safety of the public or the environment.[392] Not only has the Petitioner not demonstrated a significant link between the claimed omissions and the protection of the health and safety of the public or the environment, it has not identified *any* link.

The NRC regulations regarding admissibility of contentions state that "if the petitioner believes that the application fails to contain information on a relevant matter as required by law, [then the contention must provide] the identification of each failure and the supporting reasons for the petitioner's belief."[393] The Petitioner has not explained why the alleged omissions are required by law, has not specifically identified what information is missing, and has not provided any supporting reasons for its belief that there are omissions.

NRC precedent also holds that if a petitioner submits a contention of omission, but the allegedly missing information is indeed in the license application, then the contention does not

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[390] NUREG-1596, at A-1.

[391] *See Portland Gen. Elec. Co.* (Trojan Nuclear Plant), ALAB-534, 9 NRC 287, 289 n.6 (1979).

[392] *Millstone*, LBP-04-15, 60 NRC at 89.

[393] 10 C.F.R. § 2.309(f)(1)(vi).

raise a genuine issue.[394] In many cases, the Petitioner alleges omission of information that is either directly in the Application or is found in another document that is incorporated by reference. Based on the failure to satisfy the standard for contentions of omission alone, Contention VIII.G should be rejected.

c. The Alleged Omissions Do Not Satisfy the Other Contention Admissibility Requirements

In addition to being outside of the scope of this proceeding and failing to satisfy the standard for contentions of omission, as discussed above, the individual alleged omissions also do not satisfy the other contention admissibility criteria.

Local Hydrogeology

The Petition claims that the Application's discussion of certain site characterization topics is incomplete, such as "local hydrogeology, including groundwater flow direction and speed, confining layers, porosity, fractures, and fissures," "fracturing and faulting," and "integrity of the confining layer."[395] However, this claim must fail, because these topics are fully addressed by the Application. Geology and seismology are discussed in Section 2.6 of the Application and hydrology is discussed in Section 2.7 of the Application.[396] Although these sections reference earlier application documents from 1996 and 1997, this practice is allowed by 10 C.F.R. § 51.60(a), as discussed above.

Using the same format of the Application, geology and seismology are addressed in detail in Section 2.6 of the earlier license renewal application documents, and hydrology is discussed in

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[394] *See, e.g.*, *Crow Butte*, LBP-08-24, slip op. at 67.

[395] Petition at 111.

[396] The Petitioner's complaint that it was unable to locate a copy of the 1996 data referred to in Sections 2.5, 2.6, and 2.7 of the Application in ADAMS is unavailing. This information is public and on the NRC's docket for the Irigaray and Christensen Ranch facilities. The Petitioner could have obtained it from the NRC's Public Document Room or could have requested it from COGEMA. The website version of ADAMS does not contain all of the public historical information. The Petitioner has identified no requirement that the information be placed into ADAMS.

detail in Section 2.7. Specifically, fracturing and faulting are discussed in Section 2.6.3, the integrity of the confining layer is discussed in Section 2.7.1, and as stated in the 2008 Application, groundwater hydrologic characteristics are discussed in Appendix D6 of the Irigaray and Christensen license applications.[397] Thus, the Application provides the information that the Petitioner claims is omitted. Additionally, the Petition provides no basis to dispute the discussions of geology, seismology, or hydrology in the Application or to explain why any of these site characteristics have changed significantly since the last license renewal. In fact, the Petitioner has identified no specific problems with these site characteristics.

Similarly, the Petitioner claims that the Application "does not contain a complete impacts analysis of cumulative impacts of uranium operations relative to other past, current, and reasonably foreseeable development activities, including other uranium operations, coalbed methane (CBM) development, other oil and gas operations, and abandoned exploration wells."[398] The Petitioner provides absolutely no support for this claim. While claiming that the cumulative impacts analysis is incomplete, the Petitioner does not identify any past, current, or reasonably foreseeable development activities that it believes should be evaluated. Therefore, the contention is not adequately supported because it does not provide the "alleged facts . . . which support the . . . petitioner's position," contrary to 10 C.F.R. § 2.309(f)(1)(v).

Legally Enforceable Mitigation Measures

The Petitioner asserts that "[i]f a license renewal is granted in this matter . . . the NRC must require legally enforceable mitigation measures to minimize impacts to surface, air, and water resources."[399] This assertion is exceptionally vague, and cannot support the admissibility

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[397] Application at 2-13.

[398] Petition at 111.

[399] *Id.*

of this contention.[400] To the extent this statement addresses "measures" that the Petitioner seeks to impose to address other allegations in this contention, such measures are unwarranted for the reasons set forth in this Answer.[401]

Compliance History

The Petition next states that "[t]he Application lacks a complete disclosure of COGEMA's compliance history."[402] This information already exists on the NRC docket for the Facilities.[403] There is no requirement that the information be provided in the Application itself, and the Petitioner has identified no such requirement. Furthermore, the Petitioner has not identified any issues concerning COGEMA's compliance history that would contradict the information found in the Application.

Groundwater Consumption

The Petition alleges that "[t]he Application fails to fully document the amount of groundwater, including Class I groundwater supplies, that will be consumed during mining operations and wellfield restoration activities."[404] This claim simply ignores the Application, which states in Section 7.2.3.1: "At Christensen Ranch, the maximum total consumptive use of groundwater as a result of mining and restoration of one mine unit is estimated to range from 70

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400 *See, e.g.*, *Crow Butte*, LBP-08-24, slip op. at 69 ("General statements that a matter ought to be considered . . . are insufficient to support a contention.").

401 This aspect of the contention is quite unclear. If the Petitioner is seeking to impose requirements in addition to those imposed by the AEA and NEPA, then it is an impermissible challenge to a governing statute. *Shearon Harris*, LBP-07-11, 65 NRC at 57-58 (holding that contentions that attack the statutes that govern the NRC are inadmissible). If the Petitioner is challenging the NRC regulations, then this challenge is also impermissible. 10 C.F.R. § 2.335 (stating that "no rule or regulation of the Commission . . . is subject to attack," unless certain requirements are met).

402 Petition at 116.

403 *See also id.* at 3-25 (explaining that COGEMA provides prompt reports on any significant spills and leaks, and during its onsite inspections the NRC reviews the detailed records of all leaks and spills of licensed material or process chemicals maintained by the licensee).

404 *Id.* Although the Petitioner specifically mentions Class I groundwater supplies, it does not explain why this is material.

million gallons to 150 million gallons or 215 to 460 acre-feet."[405] Groundwater consumption at the Irigaray facility will be minimal because future mine development will not occur for years.[406] Because the allegedly missing information is actually in the Application, the Petitioner fails to identify a genuine dispute.[407]

Baseline Water Quality

The Petition further alleges that "[t]he Application does not contain a description of baseline (*e.g.*, pre-mining) groundwater quality."[408] This claim is incorrect. Section 5.8.2.1 addresses regional groundwater monitoring, including historical results and the proposed program for future operations.[409] Section 5.8.2.2 addresses mine unit groundwater monitoring, also including historical results and plans for future wellfields.[410] Table 5.23 provides a listing of historical regional groundwater monitoring results and Table 5.24 lists the groundwater monitoring program.[411] The Petition fails to identify this information, does not dispute this information, and does not provide support for why any additional information is required or material.

Similarly, the Petition claims that "[t]he Application must fully disclose the likelihood of returning water to baseline characteristics."[412] There is no requirement for COGEMA to speculate as to what may happen in the future. Section 6.1.1 of the Application provides

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[405] Application at 7-4.

[406] *Id.* at 1-2.

[407] *See Crow Butte*, LBP-08-24, slip op. at 67.

[408] Petition at 116.

[409] Application at 5-61.

[410] *Id.* at 5-61 to 5-72. Consistent with the Application, the baseline data for new mine wellfields will be provided in wellfield data packages submitted to the WDEQ for approval prior to wellfield development.

[411] *Id.* at 5-63 to 5-69.

[412] Petition at 116.

COGEMA's restoration goals and explains that if the primary goal for restoration cannot be achieved, "then restoration will meet an alternate standard approved by the NRC, consistent with the requirements of Criterion 5B(5) of Appendix A to 10 CFR Part 40."[413] The Petitioner has not explained why any additional information is necessary or material. Additionally, to the extent the Petitioner is seeking information different than what is found in Criterion 5B(5) of Appendix A to 10 C.F.R. Part 40, this is an impermissible challenge to the regulations, contrary to 10 C.F.R. § 2.335.

These allegations regarding missing information on baseline groundwater quality also fail to recognize the legal obligations already imposed on COGEMA by its materials license.[414] For example, License Condition 10.3 states: "The licensee shall establish pre-operational baseline water quality data for all production units. Baseline water quality sampling shall provide representative pre-mining ground water quality data and restoration criteria as described in the approved license application." Thus, COGEMA is already obligated to provide the information claimed to be omitted by the Petitioner. But that information does not need to be provided in the Application; instead, the information must be provided before well operation.

Evaporation Ponds

The Petition claims that the Application must "disclose the effectiveness of evaporation ponds."[415] The Petitioner has identified no requirement to provide the "effectiveness" of evaporation ponds. Additionally, Section 4.2 of the Application discusses the existing and planned evaporation ponds. The combination of evaporation ponds and two existing deep disposal wells already has been demonstrated to be an effective means of waste water disposal.

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413 Application at 6-1 (October 2008 Update). This position is supported by the existing materials license. *See* Materials License No. SUA-1341, Section 10.16.

414 *See* Materials License No. SUA-1341.

415 Petition at 117.

The Petitioner has not disputed this information, thus failing to provide adequate support for the contention and to demonstrate a genuine dispute.

Tailings Disposal

The Petition states that "[t]he Application lacks an analysis of whether the Pathfinder Mines Corporation Shirley Basin tailings facility will be available throughout the lifetime of COGEMA's facilities for byproduct waste disposal."[416] However, the Petitioner identifies no legal requirement for providing this information and demonstrating a disposal arrangement for the life of the project. Additionally, this topic is already addressed by a license condition, which states:

> The licensee shall dispose of 11e.(2) byproduct material, including evaporation pond residues, from the Irigaray and Christensen Ranch Satellite facilities at a site licensed by the NRC or an NRC Agreement State to receive 11e.(2) byproduct material. The licensee shall identify the disposal facility to the NRC in writing. The licensee's approved waste disposal agreement must be maintained onsite. In the event the agreement expires or is terminated, the licensee shall notify the NRC in writing, in accordance with License Condition 9.2, within 7 days after the date of expiration or termination. A new agreement shall be submitted for NRC approval within 90 days after expiration or termination, or the licensee will be prohibited from further lixiviant injection. If the licensee is not able to secure this agreement, then the licensee must increase the surety to include disposal at a commercial 11e.(2) disposal facility.[417]

This license condition already imposes strict requirements on COGEMA prohibiting operation unless a disposal facility is available. The Petitioner has not explained why anything else is required, thus failing to provide adequate support for this contention and to demonstrate a genuine dispute.

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[416] *Id.*

[417] Materials License No. SUA-1341, Section 9.7.

OP-254

The Petition states that "[t]he Application should disclose whether operating permit OP-254 for the dryer facility be modified to comply with current air quality regulations." The Petitioner fails to identify any requirement to provide this information. COGEMA, of course, cannot operate the dryer facility unless it has a valid operating permit. Additionally, this claim ignores Section 10.0 of the Application, which states that "[a]ll other required permits for the project were obtained prior to commencement of activities." The table in Section 10.0 lists OP-254 as one of those existing permits. Moreover, OP-254 does not have an expiration date. COGEMA is unaware, and the Petitioner has not identified, any changes to the applicable regulations that would affect the permit. Thus, once again, the Petitioner has not provided adequate support for the contention and has not demonstrated a genuine dispute.

In summary, Contention VIII.G is inadmissible for numerous reasons. It identifies various alleged omissions from the Application; however, the Petitioner seeks information that is either outside the scope of this proceeding or already has been provided in the Application. Additionally, the Petitioner does not satisfy the standard for contentions of omission, and otherwise does not demonstrate that the alleged omissions are material, are adequately supported, or raise a genuine dispute.

12. Contention VIII.H – Failure to Include Economic Value of Willow Creek

This contention alleges: "the Application omits any discussion of the economic value environmental benefits [sic] of the 18 watersheds associated with Willow Creek."[418] In support, the Petitioner cites to various generic studies of *wetlands*, purportedly showing that wetlands

[418] Petition at 117.

"have a recognized economic value."[419] The Petitioner concludes, based on this allegation, that the *watersheds* located in the area must be assigned an economic value and be considered in a quantitative manner in Section 9 of the Application.[420]

This contention is fundamentally based on the Petitioner's confusion about (or misleading attempt to conflate) two entirely different geographical concepts: wetlands and watersheds. For this reason, and for the additional reasons set forth below, this contention lacks adequate basis, is outside the scope of this proceeding, fails to raise a material issue, is unsupported by facts or expert opinion, and fails to raise a genuine dispute on a material issue of law or fact. It is therefore inadmissible.

This contention is inadmissible because it lacks adequate basis, contrary to 10 C.F.R. § 2.309(f)(1)(ii). As explained above in Section IV.A.2, this requirement is intended to ensure that an admissible contention is supported by sufficient foundation to warrant further inquiry. This contention, however, is completely unsupported because of the Petitioner's conflation of watersheds with wetlands. The Petitioner correctly states that the Application identifies 18 watersheds for Willow Creek.[421] The contention statement alleges that these watersheds must be assigned an economic value for NEPA purposes.[422] But *all* of the supporting references that the Petitioner cites address *wetlands, not watersheds*.[423] None of the cited references has any relevance to COGEMA's Facilities; instead, the first addresses wetlands in Australia and the

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[419] *Id*. at 118.

[420] *Id*.

[421] *Compare id.* at 117 *with* Application at 2-15.

[422] Petition at 117.

[423] These terms are not synonymous. A watershed can be generally defined as: "a region or areas bounded peripherally by a divide and draining ultimately to a particular watercourse or body of water." http://www.merriam-webster.com/dictionary/watershed. In contrast, the State of Wyoming defines wetlands as "those areas in Wyoming having all of the following characteristics: (A) hydrophytic vegetation; (B) hydric soils; and (C) wetland hydrology." Ch. 1 of Wy. Water Quality Rules and Regs. § 2(a)(xiii).

second estimates the generic value of wetlands throughout the world.[424] Neither document establishes that there are wetlands present on the Irigaray or Christensen Ranch sites.[425] Nor does either document address the possibility or necessity of estimating economic value of the Willow Creek watersheds, so they provide no support for their allegation that "[w]atersheds have a recognized economic value."[426] As a result, this contention lacks sufficient foundation to warrant further exploration and is inadmissible.

This contention is also outside the scope of this proceeding, contrary to 10 C.F.R. § 2.309(f)(1)(iii), because it fails to allege a significant environmental *change* that would be caused by the *continued* operation of the Facilities. Specifically, the Petitioner alleges that the economic value of (unspecified) environmental benefits from Willow Creek is not addressed in the Application.[427] The contention does *not* allege, however, that COGEMA's proposal to *continue* the operation of the Facilities will result in a *significant change* to any assessment of such environmental benefits, as distinct from any assessment under the current term of operations.[428] The contention is therefore inadmissible under 10 C.F.R. § 51.60(a) and the Hearing Notice.

Further, the Petitioner has failed to demonstrate that this contention is material to the NRC's required findings in this proceeding because it fails to articulate any connection between, on one hand, its desire for an assessment of the economic value of the Willow Creek watersheds, and on the other, any regulatory requirement for such an assessment. In other words, the

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[424] Petition at 117.

[425] The watersheds located at the Facilities are ephemeral and therefore do not constitute what would generally be considered a wetland. *See* Application at 2-15; *see also id*. at 2-11 (explaining that the climate at the site is "semi-arid continental"). The Petitioner presents no information even suggesting that there is any wetland, as defined under the Wyoming rules, that is located on the site or in the vicinity of the Facilities.

[426] Petition at 118.

[427] *Id.* at 117.

[428] *See generally id.* at 117-19.

Petitioner has failed to carry its burden of demonstrating that there is any regulatory requirement to quantify the economic value of the Willow Creek watersheds. This contention is therefore subject to dismissal under 10 C.F.R. § 2.309(f)(1)(iv).

Finally, for the reasons identified immediately above, this contention is also unsupported by facts or expert opinion and fails to raise a genuine dispute on a material issue of law or fact, so it is also inadmissible under 10 C.F.R. § 2.309(f)(1)(v) and (vi). Specifically, the contention references no relevant facts or expert opinion, other than the Petitioner's misunderstandings about the Application, and irrelevant generic studies of wetlands. The Petitioner presents no facts or expert opinion explaining why it believes that valuable wetlands might be located on or near the Irigaray and Christensen Ranch sites or in any way potentially affected by the Facilities.[429] As a result, and because the Petitioner fails to explain why the environmental cost-benefit analysis must quantify the economic value of the Willow Creek watershed, the contention also fails to raise a genuine dispute.

13. Contention VIII.I – Surety Bond

This contention alleges that "the surety bond [identified in Application Section 6.4.2 as maintained in compliance with 10 C.F.R. Part 40, Appendix A] was issued by a French bank which may be ordered by the Government of France not to pay under the letter of credit thereby frustrating the purpose of the cleanup bond. COGEMA underestimates the financial cost of restoration and environmental clean-up."[430] Thus, the contention contains two allegations: (1) the Petitioner speculates that the French Government *may* order USA Crédit Industriel et

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[429] In this respect, this contention is different from "Consolidated Petitioner's Environmental Contention E" in the *Crow Butte* proceeding, where the parties did not appear to dispute the possibility that significant wetlands might be located near the mining site. *See* LBP-08-24, slip op. at 49-52. The Petitioner here also presents no facts or opinion suggesting that there might be significant environmental impacts to Willow Creek, such that it would even be a relevant exercise to attempt to quantify the value of its watersheds. Absent such factual predicates, the Petitioner's contention merely expresses the desire for an additional theoretical exercise.

[430] Petition at 119.

Commercial ("CIC") not to pay the surety bond; and (2) the Petitioner alleges that the amount of the bond, is insufficient. This contention, however, is inadmissible because it is outside the scope of this license renewal proceeding, is immaterial, and is supported solely by speculation rather than facts or expert opinion, and therefore also fails to raise a genuine dispute on a material issue of law or fact.

a. This Contention Is Outside the Scope of this Proceeding

This contention is outside the scope of the proceeding because it addresses an issue that is separately subject to periodic evaluation by the NRC, outside of this license renewal proceeding. The adequacy of COGEMA's surety bond is subject to annual review under 10 C.F.R. Part 40, Appendix A, which states: "The licensees's surety mechanism will be reviewed annually by the Commission to assure, that sufficient funds would be available for completion of the reclamation plan if the work had to be performed by an independent contractor."[431] Thus, COGEMA's surety for the Facilities is not reviewed every ten years in this license renewal proceeding, but every year, in an entirely separate regulatory process.[432] The NRC completed its most recent review on February 24, 2009, and concluded that COGEMA had provided adequate justification for the current surety amount of $9,714,299.[433] The NRC approved a license condition requiring COGEMA to maintain, with CIC, a surety for that amount.[434]

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[431] 10 C.F.R. Part 40, App. A, Criterion 9.

[432] *See also* NUREG-1569 at A-1 (identifying specific areas of review for license renewal and amendment applications, and omitting the adequacy of financial surety arrangements).

[433] Letter from K. McConnell to T. Hardgrove, COGEMA Mining, Inc., Irigaray and Christensen Ranch Project, Campbell and Johnson Counties, Wyoming, Source Materials License SUA-1341, Amendment No. 14 – Annual Surety Estimate Adjustment (TAC N. J00578) (Feb. 24, 2009), *available at* ADAMS Accession No. ML090210506.

[434] *Id.*, Encl. at 4. As explained in Section IV.B.7 above, simply because a topic, such as surety, is described in the Application does not bring the adequacy of that topic within the scope of this proceeding.

b. This Contention Is Based Solely on the Petitioner's Speculation and Failure to Review Available Information

The Petitioner's first allegation, that the French government "may" order the surety not to be paid, is simply bare speculation. The Petitioner offers absolutely no facts or evidence to support this claim. It also points to no regulation prohibiting the use of foreign financial institutions for an NRC-approved surety. This aspect of the contention is therefore unsupported by an adequate basis or by facts or expert opinion.

Moreover, even if we assume that this speculation will ultimately prove valid, and, at a time when payment of the surety is required, the French government will order CIC not to pay the WDEQ, then the Petitioner would still need to explain: (1) how the French government would effectively exercise such authority over CIC, which is a private corporation; and (2) why, if the surety is not paid, the WDEQ would not be able to obtain a legal judgment against CIC. The Petitioner does not provide such explanations, nor has it explained, with reference to any facts or expert opinion, why the surety issuer, approved by the NRC only two months ago, cannot be relied upon. For this additional reason, the contention is unsupported by facts or expert opinion and must be rejected.

As to the second assertion, that the current surety amount is inadequate, the Petitioner again presents absolutely no facts or expert opinion in support. Instead, it offers only two vague criticisms: (1) that "COGEMA underestimates the length of operations, including restoration and reclamation activities"; and (2) that COGEMA "fails to consider post-restoration, post-decommissioning monitoring, or related ecological monitoring."[435]

The Petitioner's first allegation—that COGEMA underestimates the time that restoration activities will take—is completely unsupported. The Petitioner alleges, that "based on past

[435] Petition at 120.

experience, it is *unlikely* that 'Restoration of each mine unit is designed to be accomplished within a two to three year period.'"[436] It is clear from this statement that the Petitioner is engaging in speculation, and the Petitioner offers no further explanation or support for this statement. The contention pleading rules, however, require rejection of this type of "vague, unparticularized contention."[437] The Petitioner's claim that "past experience" suggests a longer restoration time than COGEMA's estimates is therefore inadmissible under 10 C.F.R. § 2.309(f)(1)(v).

The Petitioner's second claim—that the "financial surety calculation fails to consider post-restoration, post-decommissioning monitoring, or related ecological monitoring"[438]—is equally infirm. The Petitioner does not identify the regulatory requirement to include these specific costs in the Facilities' surety estimate. Nevertheless, COGEMA's surety estimate, approved by the NRC only two months ago, *does* account for these categories of costs,[439] to the extent such costs are applicable to the ISL uranium mining operations at the Facilities. Thus, the Petitioner, like the petitioners in *Crow Butte*, has failed to identify any specific inadequacies [in the applicant's] surety bond estimates that would be sufficient to warrant further inquiry."[440]

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[436] *Id.* (quoting Application at 6-8) (emphasis added).

[437] *Duke Power Co.*, ALAB-687, 16 NRC at 468 (1982); *see also* Rules of Practice for Domestic Licensing Proceedings – Procedural Changes in the Hearing Process, 54 Fed. Reg. at 33,170-171 (explaining that the pleading rules "preclude a contention from being admitted where an intervenor has no facts to support its position and . . . contemplates using discovery . . . as a fishing expedition.").

[438] Petition at 120.

[439] Letter from T. Hardgrove to K. McConnell, Docket No. 40-8502, License No. SUA-1341 (Sept. 11, 2008), Encl. at 1, *available at* ADAMS Accession No. ML083650167 (including line items for "On-site monitoring," "Longterm Administration," and "Contingency" costs; the enclosure is Attachment 6.1 to the Application).

[440] LBP-08-24, slip op. at 77.

Therefore, the Petitioner's allegation that COGEMA "fails to consider" these costs fails to raise a genuine dispute under 10 C.F.R. § 2.309(f)(1)(vi).[441]

14. Contention VIII.J – Water Consumption

This contention alleges that: "COGEMA operations will consume vast amounts of groundwater. This consumption will have negative impacts on local and regional groundwater supplies used by residents, including Oglala Lakota, for domestic and stock purposes. Groundwater consumption may directly impact current uses of the aquifer, especially artesian wells, and will likely impact future uses of the aquifer."[442] The Petitioner does not articulate an issue of law or fact to be raised or controverted. The Petitioner does not reference any specific information in the Application, and provides no further information or supporting bases for this contention, other than its inadequate boilerplate reference to all of the other preceding sections of its Petition. Nor does the Petitioner further address the required pleading standards under 10 C.F.R. § 2.309(f)(1). As explained below, this contention is therefore inadmissible under each of the six standards in Section 2.309(f)(1).

a. This Contention Is Completely Unsupported

This contention is vague, speculative, and utterly lacking in support. Section 7.2.3.1 of the Application provides estimates of how much groundwater will be consumed by mining operations and restoration, and explains that the impacts of such withdrawals are mitigated "by the withdrawal of groundwater over the extended period of approximately twenty five years."[443]

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[441] *See, e.g.*, *Millstone*, LBP-04-15, 60 NRC at 95-96 (rejecting a contention that incorrectly alleged an omission, because "Petitioner's assertion that the applications are deficient is simply based upon a failure to read or perform any meaningful analysis of the applications"). Similarly, the contention also fails to raise a genuine dispute because the Petitioner has failed to allege or explain why COGEMA's estimates for long-term site surveillance are inadequate.

[442] Petition at 120-21.

[443] Application at 7-4.

The Application further explains that such consumptive uses are ultimately temporary.[444] The Petitioner's characterization of the amount of water as "vast" is of no consequence.[445] Neither is its bare assertion that the use of this water will have "negative impacts on local and regional groundwater supplies," as this statement does not specifically dispute the discussion of such impacts throughout Section 7.2.3 of the Application.[446] The contention is therefore inadmissible because it lacks adequate basis, is unsupported by facts or expert opinion, and fails to raise a genuine dispute on a material issue of law or fact, contrary to 10 C.F.R. § 2.309(f)(1)(ii), (iv), (v), and (vi).

b. This Contention Is Outside the Scope of this Proceeding and Immaterial

Moreover, the contention is also outside the scope of this proceeding because it fails to allege a significant environmental *change* that would be caused by the *continued* operation of the Facilities, as opposed to activities that are authorized under the existing license. The contention fails to challenge any proposed changes, in the Application, to the rate or manner in which the ultimately temporary consumption of groundwater is to take place. The contention, therefore, is also subject to dismissal under 10 C.F.R. § 2.309(f)(1)(iii) and (iv).

15. Contention VIII.K – Wildlife Impacts

Contention VIII.K challenges the adequacy of the Application's discussion of the impacts to wildlife, particularly sage-grouse.[447] This contention is inadmissible because, contrary to 10 C.F.R. § 2.309(f)(1)(iii)-(vi), it is outside the scope of this proceeding, it is not material, it is not properly supported, and it does not demonstrate a genuine dispute.

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[444] *Id*.

[445] Petition at 120.

[446] *Id*. at 121.

[447] *Id*. at 121-24.

The Petition argues that "the application lacks a substantive discussion about possible sage-grouse impacts. Mining activities, including fencing, surface disturbing activities, use of overhead power lines, noise, and access roads, will negatively impact wildlife species including the greater sage-grouse."[448] This allegation ignores information in the application regarding wildlife, including substantial information regarding sage-grouse.

The wildlife at the site is discussed throughout the Application. For example, Section 2.8.1 of the Application describes the terrestrial ecology at the site, including discussion of sage-grouse. This section appropriately describes the sage-grouse as a species with "some recreational value." This section also discusses wildlife surveys at the site, including monitoring of sage-grouse leks, and concludes that "[t]he accumulated data showed no impacts attributable to the mine operations." Additionally, Section 7.2.4 of the Application describes the ecological impacts at the site, but accurately does not list impacts to sage-grouse, because the existing monitoring data do not support any negative impacts to sage-grouse from operations. The NRC regulations for renewal of a materials license only require information to be updated or supplemented if there is a "significant environmental change."[449] The Petition does not identify any such changes for sage-grouse or other wildlife, and therefore is outside the scope of this proceeding.

Appendix C of the Application also provides a detailed study of wildlife at the site.[450] This study was completed just a few months prior to submission of the Application, and therefore provides very current information. The study provides extensive information on wildlife at the site, including much information on sage-grouse, and goes well beyond the legal

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[448] *Id*. at 121.

[449] 10 C.F.R. § 51.60(a).

[450] Irigaray and Christensen Ranch 2007 Wildlife Monitoring (Mar. 2008).

requirements for providing this information. Furthermore, as allowed by 10 C.F.R. § 51.60(a), Section 2.8.1 of the Application references Appendix D9 of the Christensen Ranch amendment to the permit application. The Petitioner's failure to dispute any of this information in the Application does not support admission of this contention, because there is no genuine dispute.[451]

Moreover, the information in the Application actually demonstrates minimal impacts to the sage-grouse. For example, Figure 3 in the wildlife study in Appendix C of the Application generally shows an increase in the cumulative peak male counts at sage-grouse leks, thus demonstrating no significant impacts.[452] The Petitioner has not even challenged this information, and therefore has not provided adequate factual information to dispute the Application.[453]

Additionally, the NRC recently discussed the impacts on sage-grouse during the license amendment to resume operational status at the site. In its EA for the amendment, the NRC stated:

> Since Sage Grouse has not been identified by the FWS as an endangered, threatened, or candidate species, COGEMA's latest Threatened and Endangered Species Report did not discuss potential Sage Grouse habitat or strutting grounds. However, NRC staff has reviewed Sage-Grouse Habitat Management Guidelines dated July 24, 2007 and the Northeast Wyoming Sage-Grouse Conservation Plan dated August 15, 2006. NRC staff is aware that Sage-Grouse habitat has become a concern throughout Wyoming. Consequently, NRC staff will request that if evidence of Sage Grouse or its strutting grounds is found at the site, COGEMA will consult with the FWS or the BLM for possible mitigative measure that may be taken to avoid negative impacts.[454]

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[451] *See, e.g.*, *Comanche Peak*, LBP-92-37, 36 NRC at 384 (holding that a contention that does not directly controvert a position taken by the applicant is subject to dismissal); *Millstone*, LBP-04-15, 60 NRC at 95-96.

[452] Application, Appendix C, at 9. The Application notes that the dip in the male counts during 2000-2002 is attributable to only sporadic monitoring of the leks. *Id.* at 8.

[453] *See, e.g.*, *Fansteel*, CLI-03-13, 58 NRC at 203.

[454] 2008 EA at 15.

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Thereafter, the NRC added a new license condition to COGEMA's materials license to require monitoring of sage-grouse. Specifically, License Condition 9.13 states: "Sage Grouse leks at the Irigaray and Christensen Ranch sites shall be monitored on an annual basis. The licensee shall consult with the Fish and Wildlife Service or the Bureau of Land Management for mitigative measures to reduce potential impacts."[455] This license condition already provides for sufficient controls for a species that the NRC acknowledges is not an endangered, threatened, or candidate species.[456] The Petitioner has not acknowledged this license condition and has not explained why it is insufficient to protect sage-grouse at the site.

The Petition also asserts that "recent scientific studies have shown that one of the leading causes for this decline [of sage-grouse populations in the Powder River Basin] is mineral development."[457] As the title and content of the Petitioner's reference make clear, this study addresses impacts of oil and gas development, not ISL uranium mining, so it does not contradict any information in the Application.[458] The Petitioner attempts to draw a connection between this study and this proceeding, but only through argument of counsel, not through fact or expert opinion.[459] As a result, the contention remains unsupported.[460] More importantly, the Petitioner

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[455] Materials License No. SUA-1341, Amendment No. 13, Section 9.13 (Sept. 30, 2008).

[456] The Petition also states that sage-grouse is a "Special Status Species." Petition at 123. But the Petitioner does not explain how any additional mitigation is necessary, especially given License Condition 9.13.

[457] *Id.* at 122-23 (citing "Memorandum from Tom Christiansen and Joe Bohne, Wyoming Game and Fish Department, to Terry Cleveland and John Emmerich (Jan. 29, 2008), with attached report *Using the Best Available Science to Coordinate Conservation Actions that Benefit Greater Sage-Grouse Across States Affected by Oil & Gas Development in Management Zones I-II (Colorado, Montana, North Dakota, South Dakota, Utah, and Wyoming)*").

[458] *See Private Fuel Storage, L.L.C.*, LBP-98-7, 47 NRC at 181 ("the Board is not to accept uncritically the assertion that a document or other factual information or an expert opinion supplies the basis for a contention").

[459] Petition at 8 n.4.

[460] *See, e.g.*, *Palo Verde*, CLI-91-12, 34 NRC at 155 (holding that, where a petitioner neglects to provide the requisite support for its contentions, the board may not make assumptions of fact that favor the petitioner or supply information that is lacking); *Ga. Tech.*, LBP-95-6, 41 NRC at 300 (holding that a petitioner's imprecise reading of a document cannot be the basis for a litigable contention).

fails to explain, with any specificity, why the cited study directly contradicts the information on impacts to wildlife in general—or impacts to sage-grouse in particular—contained or referenced in the Application or previous environmental assessments and license conditions and summarized above.[461] As a result, the contention remains unsupported by facts or expert opinion and fails to raise a genuine dispute.

The Petition also incorrectly claims that "[t]he Application does not contain results and analysis from recent wildlife surveys and does not disclose whether wildlife surveys will be conducted prior to installation of new well fields."[462] Such a claim is especially confusing because the wildlife study provided in Appendix C of the Application, which was prepared just a few months prior to submission of the Application, provides a recent wildlife study. Additionally, the report in Appendix C explains that "[i]n preparation for renewed operations, COGEMA . . . renew[ed] wildlife monitoring efforts at both properties in 2007, with full reinstatement of the annual monitoring program by 2008."[463] These wildlife surveys already cover the entire permit area and are not tied to specific wellfields. Thus, COGEMA has already taken the actions requested by the Petitioner, and the Petitioner's arguments are not material and do not demonstrate a genuine dispute.[464]

The Petition further claims that the Application does not "disclose and analyze impacts to wildlife and livestock habitat," including loss of brush density.[465] These arguments also ignore

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[461] *See, e.g.*, *USEC, Inc.*, CLI-06-10, 63 NRC at 472 (requiring expert opinion evidence to be supported by a "reasoned basis or explanation" supporting an alleged deficiency in an application).

[462] *Id*. at 122.

[463] Application, Appendix C, at 1.

[464] *Crow Butte*, LBP-08-24, slip op. at 67 (holding that a contention that incorrectly claims that information is missing from an application does not raise a genuine issue).

[465] Petition at 122.

the Application. COGEMA evaluated the ecological impacts from operating the site, and concluded:

> Principal impacts on terrestrial biota will be caused by the disturbance of soils and vegetation during construction of the facilities. The greatest effects by this disturbance will be the setting back of plant succession within the area of disturbance. This impact is only temporary and disturbances will be reclaimed using state of the art surface reclamation practices to reestablish the native plant community giving consideration to forage production, ground cover and species diversity.[466]

The Petition is unsupported because it has not disputed this conclusion or explained what impacts exist that have not been discussed. Similarly, the Petition has cited no legal authority for discussing this information in any more detail.

The Petition also states that "[t]he application needs to detail surface reclamation plans for the future well fields, not just reference reclamation for past well fields. Application at 6-13."[467] The portion of the Application referenced by the Petitioner states that "[t]he reader is referred to Section 6.3 (pages 6-35 to 6-54) of the January 5, 1996 Irigaray-Christensen Ranch license renewal application (as revised in August, 2002) for a full discussion of surface reclamation for the sites."[468] This reference to information in the earlier application is permitted by 10 C.F.R. § 51.60(a). The information on future surface reclamation plans is discussed in great detail in this reference. These plans apply to all wellfields, including those developed in the future. Thus, the Petitioner's argument is unsupported and does not demonstrate a genuine dispute.

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[466] Application at 7-6.

[467] Petition at 122.

[468] Application at 6-13.

Finally, the Petition states that the facility is located within the "Central Flyways" and that a criminal prosecution took place in connection with a uranium mill in Colorado.[469] However, the Petition does not demonstrate how this information is material to this proceeding and does not identify a genuine dispute with the Application. Additionally, a contention of omission must establish some significant link between the claimed deficiency and protection of the health and safety of the public or the environment, but the Petitioner has not done this.[470] The Petition also claims that "the application must analyze impacts to migratory birds."[471] The Application already evaluates ecological impacts and did not identify any impacts to migratory birds.[472] The NRC contention admissibility regulations, 10 C.F.R. § 2.309(f)(1)(vi), state that "if the petitioner believes that the application fails to contain information on a relevant matter as required by law, [then the contention must provide] the identification of each failure and the supporting reasons for the petitioner's belief." The Petitioner has not identified what types of impacts are missing and supporting reasons for that belief; thus, these unsupported statements do not support admission of a contention.[473]

In summary, this contention is not admissible because it seeks information that is outside the scope of this renewal proceeding, it does not show how its arguments are material, it provides inadequate justification, and it ignores information already provided in the Application, thus failing to present a genuine dispute of a material issue of fact or law.

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[469] Petition at 123-24.

[470] *Crow Butte*, LBP-08-24, slip op. at 67.

[471] Petition at 123.

[472] Application at 7-6.

[473] Additionally, earlier amendment applications discuss wildlife. For example, Section 2.8.1 of the Application states: "Wildlife species at the Irigaray project site are very much the same as found on the Christensen project site, and are described in detail in Appendix D9 of the Irigaray permit application." The NRC regulations, 10 C.F.R. § 51.60(a), only require a license renewal application to update or supplement information to reflect a "significant environmental change." COGEMA did not, and the Petitioner has not, identified any such change.

16. Contention VIII.L – Air Contamination

Contention VIII.L challenges the adequacy of the discussion of air quality monitoring activities in the Application for monitoring radon and particulate matter that are released from the facilities.[474] This contention is inadmissible because, contrary to 10 C.F.R. § 2.309(f)(1)(iv)-(vi), it is not material, it is not properly supported, and it does not demonstrate a genuine dispute.

The Petitioner argues that "the Application needs to discuss whether new air quality monitoring stations will be added and whether previously used stations are active and ready to be used for the re-start of operations."[475] This statement ignores the Application. Section 5.8.1 of the Application provides an Airborne Effluent and Environmental Monitoring Program to be used during operation of the facilities, including Tables 5.21 and 5.22, which provide detailed information on the monitoring stations.[476] This monitoring program is identical to the program approved in the past and was re-activated upon approval of the amendment to the license to return to an operational status. The Petitioner has not claimed that this information is deficient or shown why other information is required.[477]

The Petitioner also states that "[t]he Application should include a map of air quality monitoring stations that will be active for this project."[478] The Petitioner again ignores information that is already provided in the Application. Figure 5.5 of the Application shows the

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[474] Petition at 124.

[475] *Id.*

[476] Application at 5-58 to 5-60.

[477] Additionally, COGEMA recently submitted its 2008 Annual Effluent and Monitoring Report. 2008 Annual Effluent and Monitoring Report (Feb. 2009), *available at* ADAMS Accession No. ML090910574. Section 4.5.1 of this report explains that "[e]nvironmental monitoring of radon was restarted in the fourth quarter of 2008 with the change of the NRC license to operational status." It is clear from this statement that the monitoring stations are active and ready to be used. *See Catawba*, ALAB-687, 16 NRC at 468 ("[A]n intervention petitioner has an ironclad obligation to examine the publicly available documentary material pertaining to the facility in question.").

[478] Petition at 124.

location of the air quality monitoring stations.[479] Additionally, Tables 5.21 and 5.22 list all of the monitoring stations, including their locations.[480] Because the Application already provides the information sought by the Petitioner, this argument does not create a genuine dispute of a material fact.

Additionally, consistent with Tables 5.21 and 5.22 of the Application, the Petitioner notes that the monitoring stations at Irigaray monitor both radon and particulate matter, while the monitoring stations at Christensen Ranch only monitor radon.[481] But the Petition incorrectly concludes that "[t]he Application should detail an appropriate monitoring plan for particulate matter at the Christensen project." This argument ignores the explanation in the Application for why particulate matter is monitored at Irigaray, but not at Christensen Ranch. For example, Section 4.1 of the Application explains: "Because the Christensen Ranch satellite plant is strictly an ion exchange (IX) facility and will have no precipitation of uranium, the only significant radioactive airborne effluent will be Radon-222 gas."[482] Particulate monitoring is necessary at Irigaray due to the yellowcake drying/packaging circuit of the process facility.[483] Christensen Ranch does not have a similar processing facility that could result in radioactive particulate emissions, because all processes at Christensen Ranch are wet in nature. The Petitioner has not disputed this information and has provided no justification for its claim that particulate monitoring is necessary at Christensen Ranch.

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479 Figure 5.5, Irigaray and Christensen Ranch Environmental Monitoring Station Locations (May 2, 2008), *available at* ADAMS Accession No. ML081850709.

480 Application at 5-59 to 5-60.

481 Petition at 124.

482 Application at 4-1.

483 *Id.* at 4-2.

In summary, Contention VIII.L suffers from numerous deficiencies. The Petitioner has not demonstrated that its complaints about the Application's discussion of air quality monitoring are material,[484] but has made unsupported conclusions that certain items should be provided in the Application. As a licensing board recently explained, "[g]eneral statements that a matter ought to be considered without an explanation of how the application is deficient or how it should be changed are insufficient to support a contention."[485] As demonstrated above, the Petitioner has also ignored information already in the Application or on the NRC docket that addresses alleged missing information, thus failing to support the contention and demonstrate a genuine dispute with the Applicant.[486]

[484] *Millstone*, LBP-04-15, 60 NRC at 89 (stating that contentions alleging an error or omission in an application must establish some significant link between the alleged deficiency and protection of the health and safety of the public or the environment).

[485] *Crow Butte*, LBP-08-24, slip op. at 69.

[486] *See Catawba*, ALAB-687, 16 NRC at 468; *Crow Butte*, LBP-08-24, slip op. at 67 (holding that if a petitioner submits a contention of omission, but the allegedly missing information is indeed in the license application, then the contention does not raise a genuine issue).

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V. <u>CONCLUSION</u>

For the foregoing reasons, the Petitioner has not demonstrated standing and has submitted no admissible contentions. Accordingly, the Petition must be denied.

Respectfully submitted,

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Dated in Washington, D.C.
this 5th day of May 2009

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of	)	Docket No. 040-08502
COGEMA MINING, INC.	)	License No. SUA-1341
(Irigaray & Christensen Ranch Facilities)	)	May 5, 2009

CERTIFICATE OF SERVICE

I hereby certify that on May 5, 2009 a copy of "COGEMA's Answer Opposing Oglala Delegation of the Great Sioux Nation Treaty Council Request for Hearing and Petition for Leave to Intervene" was served by the Electronic Information Exchange on the following recipients:

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