May 5, 2009

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of	)	
	)	
COGEMA MINING, INC.	)	Docket No. 40-8502-MLA
	)	
(Christensen & Irigaray Ranch Facilities)	)	
	)	

NRC STAFF'S RESPONSE TO REQUEST FOR HEARING AND PETITION TO INTERVENE OF THE OGLALA DELEGATION OF THE GREAT SIOUX NATION TREATY COUNCIL

INTRODUCTION

Pursuant to 10 C.F.R. § 2.309(h), the NRC staff ("Staff") hereby responds to the "Request for Hearing and Petition for Leave to Intervene" ("Petition") filed by the Oglala Delegation of the Great Sioux Nation Treaty Council ("Delegation") on April 10, 2009. The Staff submits that the Petition should be denied for (a) failing to comply with the standing requirements set forth in 10 C.F.R. § 2.309(d) and (b) failing to satisfy the contention admissibility requirements set forth in 10 C.F.R. § 2.309(f)(1). Additionally, the Staff respectfully submits that the Petitioner's request for additional time to comply with 10 C.F.R. § 2.309(d)(1) should be denied.

BACKGROUND

COGEMA Mining, Inc. ("COGEMA" or "Applicant') is licensed to operate an in-situ leach ("ISL") operation at the Irigaray / Chrsitensen Ranch facilities located in Johnson and Campbell Counties, Wyoming.[1] On May 30, 2008, COGEMA filed with the NRC a license amendment application ("Application") (ADAMS Accession Package No. ML081850689), requesting renewal

[1] COGEMA possesses a source material license, SUA-1341.

of its source materials license for the standard 10-year period.[2] In a letter to COGEMA dated December 29, 2008, the NRC Staff stated that it had found, per its administrative review, the Application acceptable to begin a technical review.[3] On February 9, 2009, a notice of opportunity to request a hearing or petition to intervene was published in the Federal Register.[4] On April 10, 2009, the Delegation filed its Petition.

DISCUSSION

I. Standing

A. Legal Requirements for Standing

Any person or organization that requests a hearing or seeks to intervene in a Commission proceeding must demonstrate standing to intervene in the proceeding.[5] Section 189a of the Atomic Energy Act requires that the NRC provide a hearing "upon the request of any person whose interest may be affected by the proceeding, and shall admit any such person as a party to such a proceeding."[6] The Commission has implemented the mandate of section 189a in 10 C.F.R. § 2.309(d)(1), which provides, in relevant part, that a request for hearing or petition to intervene must state:

> (i) The name, address and telephone number of the requestor or petitioner;
> (ii) The nature of the requestor's/petitioner's right under the Act to be made a party to the proceeding;
> (iii) The nature and extent of the requestor's/petitioner's property, financial or other interest in the proceeding; and

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[2] Letter from Tom Hardgrove to William von Till (dated May 30, 2008).

[3] Letter from William von Till to Tom Hardgrove (dated December 29, 2008).

[4] Notice of Request to Renew Source Materials License SUA-1341, COGEMA Mining, Inc., Christensen and Irigaray Ranch Facilities, Johnson and Campbell Counties, WY, and Opportunity to Request a Hearing, 74 Fed. Reg. 6,436 (Feb. 9, 2009).

[5] 10 C.F.R. § 2.309(a).

[6] 42 U.S.C. § 2239(a)(1)(A).

> (iv) The possible effect of any decision or order that may be issued in the proceeding on the requestor's/petitioner's interest.[7]

In determining whether a petitioner has established the requisite "interest" to manifest standing under the Commission's regulations, the Commission has directed licensing boards to apply, as guidance, contemporary judicial concepts of standing.[8] "Under this authority, in order to qualify for standing a petitioner must allege '(1) a concrete and particularized injury that is (2) fairly traceable to the challenged action and (3) likely to be redressed by a favorable decision'…"[9] The shorthand by which the Commission has referred to the foregoing three criteria is, respectively, "'injury in fact,' causality, and redressability."[10] "Injury in fact" must be actual or threatened.[11] It cannot be "conjectural" or "hypothetical."[12] Nor can the threat of injury be speculative.[13] Additionally, the "injury in fact" alleged by a petitioner must lie within the "zone of interests" protected by the statutes governing the proceeding: either the AEA or the National

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[7] 10 C.F.R. § 2.309(d)(1).

[8] *See e.g., Entergy Nuclear Generation Co. and Entergy Nuclear Operations. Inc.* (Pilgrim Nuclear Power Station), LBP-06-23, 64 NRC 257, 270 (2006) (*citing Yankee Atomic Elec. Co.* (Yankee Nuclear Power Station), CLI-98-21, 48 NRC 185, 195 (1998) ("When determining whether a petitioner has established the necessary 'interest' under subsection (d)(1), the Commission has long looked for guidance to judicial concepts of standing.") *and Quivira Mining Co.* (Ambrosia Lake Facility), CLI-98-11, 48 NRC 1, 5-6 (1998) *and Georgia Institute of Technology* (Georgia Tech Research Reactor, Atlanta, Georgia), CLI-95-12, 42 NRC 111, 115 (1995)).

[9] *Id.* (*citing* Yankee, CLI-98-21, 48 NRC at 195).

[10] *Id.* (*citing Yankee*, CLI-98-21, 48 NRC at 195 (*citing Wilderness Society v. Grills*, 824 F.2d 4, 11 (D.C. Cir. 1987)).

[11] *Yankee*, CLI-98-21, 48 NRC at 195.

[12] *Sequoyah Fuels Corp. & Gen. Atomics* (Gore, Oklahoma Site), CLI-94-12, 40 NRC 64, 72 (1994) (*citing O'Shea v. Littleton*, 414 U.S. 488, 494 (1974)).

[13] *Id.* at 72 (*citing Los Angeles v. Lyons*, 461 U.S. 95, 105 (1983)).

Environmental Policy Act of 1969 ("NEPA") (as amended) 42 U.S.C. §§ 4321, *et seq.* (2000).[14]

A petitioner must also establish a "casuation link" between the alleged "injury in fact" and the challenged action.[15] A determination that this causal link exists, that the injury alleged is fairly traceable to the challenged action does "not depend on whether the cause of the injury flows directly from the challenged action, but whether the chain of causation is plausible."[16] Nonetheless, the Commission has required that there be a "realistic threat … of direct injury."[17] Finally, as to the element of redressability, "it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision."[18]

1. "Proximity Plus" Presumption of Standing

Although the Commission has historically presumed standing in power reactor construction permit and operating license proceedings based on a petitioner's proximity to the facility,[19] a presumption of standing based on geographic proximity alone is not applied in materials licensing cases. Rather, in materials cases, a presumption of standing based on geographical proximity "rests on the presumption that an accident associated with the nuclear facility could adversely affect the health and safety of people working, living, or regularly

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[14] *Quivira Mining*, CLI-98-11, 48 NRC at 6 ("Consistent with an additional, so-called 'prudential' requirement of standing, the Commission has also required the petitioner's interests to fall, arguably, within the 'zone of interests' protected or regulated by the governing statute(s)—here, the AEA and NEPA.").

[15] *See Florida Power & Light Co.* (Turkey Point, Units 3 and 4), LBP-01-06, 53 NRC 138, 147 (2001) *aff'd on other grounds*, CLI-01-17, 54 NRC 3 (2001).

[16] *See Commonwealth Edison Co.* (Zion Nuclear Power Station, Units 1 & 2), LBP-98-27, 48 NRC 271, 276 (1998) (*quoting Sequoyah Fuels*, CLI-94-12, 40 NRC at 74).

[17] *Int'l Uranium (USA) Corp*. (White Mesa Uranium Mill), CLI-01-21, 54 NRC 247, 254 (2001) (*quoting Sequoyah Fuels*, CLI-94-12, 40 NRC at 74).

[18] *Sequoyah Fuels*, CLI-94-12, 40 NRC at 76 (*internal quotation marks omitted*) (*quoting Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992)).

[19] *See*, *e.g.*, *Virginia Elec. Power Co.* (North Anna, Units 1 and 2), ALAB-522, 9 NRC 54, 56 (1979).

engaging in activities offsite but within a certain distance of that facility."[20] Whether and at what distance a petitioner can be presumed to be affected must be determined on a case-by-case basis; "proximity standing" is determined by identifying "the radius beyond which it is believed "there is no longer an 'obvious potential for offsite consequences' by 'taking into account the nature of the proposed action and the significance of the radioactive source.'"[21] "Where there is no obvious potential for radiological harm at a particular distance frequented by a petitioner, it becomes the petitioner's burden to show a specific and plausible means of how the challenged action may harm him or her."[22]

2. "Organizational" and "Representational" Standing

In order for an organization to establish standing, it must show "either immediate or threatened injury to its organizational interests or to the interests of identified members."[23] An organization attempting to assert standing on behalf of one or more of its constituent members ("representational" standing) "must demonstrate how at least one of its members may be affected by the licensing action . . . must identify that member by name and address, and must show . . . that the organization is authorized to request a hearing on behalf of that member."[24] An organization attempting to assert standing on its own behalf ("organizational" standing)

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[20] *Amergen Energy Co., LLC* (Three Mile Island, Unit 1), CLI-05-25, 62 NRC 572, 574-75 (2005) (*citing Virginia Electric*, ALAB-522, 9 NRC at 56; *Florida Power & Light*, LBP-01-6, 53 NRC at 146-147 *and Pacific Gas & Electric Co*. (Diablo Canyon ISFSI), LBP-02-23, 56 NRC 413, 426-27 (2002), *petition for review denied*, CLI-03-12, 58 NRC 185 (2003)).

[21] *Id*. at 575 (*quoting Georgia Institute of Technology*, CLI-95-12, 42 NRC at 116; *Florida Power & Light Co*. (St. Lucie, Units 1 and 2), CLI-89-21, 30 NRC 325, 329-30 (1989)).

[22] USEC, CLI-05-11, 61 NRC at 311-12.

[23] *Georgia Institute of Technology*, CLI-95-12, 42 NRC at 115.

[24] *N. States Power Co.* (Monticello; Prairie Island, Units 1 & 2; Prairie Island ISFSI) CLI-00-14, 52 NRC 37, 47 (2000).

"must demonstrate a palpable injury in fact to its organizational interests that is within the zone of interests protected by the AEA or NEPA."[25] General environmental and policy interests are insufficient to confer organizational standing.[26]

B. Petitioner's Claim of Standing Pursuant to 10 C.F.R. § 2.309(d(1).

1. Petitioner's Argument.

It is unclear from the Petition whether or not the Petitioner is making a claim of standing pursuant to 10 C.F.R. §§ 2.309(d)(1), 2.309(d)(2)(i), or both.[27] In light of this ambiguity, the Staff treats the Petition as making a claim of standing pursuant to both 10 C.F.R. §§ 2.309(d)(1) and 2.309(d)(2)(i). As to the former, in an attempt to qualify for organizational standing, the Petitioner raises, on behalf of the Oglala Lakota, the following interests: (1) an interest in the quality and water available to the Oglala Lakota, (2) an interest in the health of livestock and wildlife used as food by the Oglala Lakota, (3) an interest in the health of eagles sacred to the Oglala Lakota, and (4) an interest in any cultural resources / artifacts linked to the Oglala Lakota in the vicinity of the facility's proposed operations.[28]

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[25] *Hydro Resources, Inc.* (2929 Coors Road, Suite 101, Albuquerque New Mexico 87120) LBP-98-9, 47 NRC 261, 271 (1998).

[26] *White Mesa*, CLI-01-21, 54 NRC at 252.

[27] The Petitioner discusses several of its interests that would be negatively affected, according to the Petitioner, by the operation of the facilities. *See* Petition at 7-11. In addition, the Petitioner states that it "*also* asserts standing under 10 CFR § 2.309(d)(2)(1)," implying that it is asserting standing under 10 C.F.R. § 2.309(d)(1). *See id.* at 11 (*emphasis added*). However, the Petitioner requests that if "the Commission [were to] rule that 10 CFR § 2.309(d)(2) is inapplicable to the Oglala Delegation, the Oglala Delegation [be permitted] a reasonable time from the notice of that decision to submit additional information in satisfaction of 10 CFR § 2.309(d)(1)." *Id.* at 12.

[28] *Id.* at 7-11. In the course of establishing its interests that, as the Petitioner alleges, will be negatively impacted as a result of the renewal of the license, the Petitioner raises several contentions. *See id.* As the majority of these contentions are identical in focus and substance to those raised later in the Petition, the Staff analyses these contentions in conjunction with those later contentions. *See id.* at 7-11, 23-124. One contention, however, will be analyzed separately. *See id.* at 10.

According to the Petitioner, the facility somehow "spills into the Willow Creek which flows into the Power River, West, towards Pine Ridge Indian Reservation."[29] The operation of the facility, the Petitioner avers, "not only depletes the [groundwater] aquifers used by the Oglala Lakota so that less water is available, but also negatively affects the quality of water."[30] Thus, "[if] the license renewal is granted, the Oglala Lakota will continue to be negatively and irreparably affected by the ISL mining operations."[31] The operation of the facility not only negatively effects the Oglala Lakota, but also, the Petitioner argues, "impacts live stock and other animals using well water or the Willow Creek or the Power River, and its tributaries as their source of water, which other animals are prey for raptors in the region, including sacred Eagles."[32]

The Petitioner posits that wildlife, including eagles sacred to the Oglala Lakota, are also "adversely affected by the operation of the [facilities] through the bioaccumulation of radioactive materials form the surrounding environment."[33] In support of this proposition, the Petitioner cites an article by Diane D'Arrigo, Radioactive Waste Project Director of Nuclear Information and Resource Service.[34] In regards to bioaccumulation, the article states the following:

> With increased uses of radioactive material, more radionuclides have been and continue to be released to the environment. Once released, they can circulate through the biosphere, ending up in drinking water, vegetables, grass, meat, etc. The higher an animal eats on the food chain, the higher the concentration of radionuclides. This is

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[29] *Id.* at 7. The Petitioner does not specify what "spills" into the White Creek however.

[30] *Id.*

[31] *Id.* at 7-8.

[32] *Id.* at 8.

[33] *Id.* at 8-9.

[34] *Id.* (*citing* "Ionizing Radiation for Nuclear Power and Weapons and its Impacts on Animals," Diane D'Arrigo, Nuclear Information and Resource Service, (June 2004) ("NIRS Article").

> bioaccumulation. The process of bioaccumulating radionuclides can be especially harmful to animals at the top of the food chain because the concentrations of radionuclides are much higher. Radionuclides can concentrate in various kinds of tissue. For example, strontium 90, which mimics calcium, concentrates in bones causing bone cancer or leukemia. Cobalt mimics vitamin B-6 thus concentrates in the same places in the body that B-6 would go.[35]

The Petitioner further asserts that "[w]hatever ancient camps or artifacts that may be found in the area of the [facility] are likely to have been left by … Oglala Lakota."[36] Thus, it has a "vested interest in any artifacts or historical evidence that has been, or may be discovered, in the permit area."[37] The Petitioner specifically asserts that "artifacts and evidence of ancient aboriginal occupancy in the [facility] area [are] not being adequately investigated or addressed."[38] As to this assertion, the Petitioner claims that "the Application is silent on the matter of the cultural impact of the proposed operations."[39]

2. Staff's Response.

The Petitioner does not demonstrate standing pursuant to 10 C.F.R § 2.309(d)(1). The Petitioner fails to manifest with respect of any of the organizational interests raised in the Petition a concrete and particularized injury sufficient to support a claim of standing.[40] Instead, the Petitioner only offers a short series of "conjectural" or "hypothetical" statements that fail to establish a plausible chain of causation between the operation of the facilities and potential

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[35] NIRS Article at 3.

[36] Petition at 5.

[37] *Id.* at 5-6.

[38] *Id.* at 6.

[39] *Id.*

[40] *See Consumers Energy Co., Nuclear Management Co., LLC, Entergy Nuclear Palisades, LLC, and Entergy Nuclear Operations, Inc.* (Palisades Nuclear Power Plant), CLI-07-08, 65 NRC 399, 408-09 (2007).

harm.[41]

The Petitioner baldy alleges, without any explanation, that the operation of the COGEMA facility has affected the quantity and quality of its water supply, and affects negatively the health of its people and livestock. The Petitioner does not specify the location(s) of wells, the aquifer in which such wells operate, or the frequency that such wells are used and for what purposes. The Petitioner also fails to provide similar information with respect to its claim regarding surface water resources. The Petitioner fails to show a causal relationship between the alleged injury and the proposed licensing action.[42] The Petitioner does not establish a pathway or mechanism by which the operation of the facility could negatively impact the water resources cited by the Petitioner. In absence of such a chain of causation, the Petitioner raises only "unfounded conjecture."[43]

Likewise, the Petitioner does not articulate the specific means by which identified wildlife, including eagles sacred to the Oglala Lakota, will be negatively impacted by the operation of the facility. The NIRS Article cited by the Petitioner does not remedy this defect in the Petitioner's argument. The NIRS Article only generally discusses the concept of bioaccumulation; it cannot substitute for the site-specific information needed to sufficiently particularize the Petitioner's claim of injury. Neither the Petitioner nor the cited NIRS Article establishes what radiological contaminants are at issue, the relevant ingestion pathways to those contaminants, and, furthermore, as to the identified wildlife, the potentiality that the Oglala Lakota actually eat animals contaminated with the identified radiological contaminants. The

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[41] *See Sequoyah Fuels,* CLI-94-12, 40 NRC at 72.

[42] *See N. States Power Co.* (Pathfinder Atomic Plant), LBP-90-3, 31 NRC 40, 43-44 (1990).

[43] See *Int'l Uranium (USA) Corp.*, CLI-01-21, 54 NRC at 252-53 (*compare with Sequoyah Fuels,* CLI-94-12, 40 NRC at 72).

Petitioner's claim of injury regarding bioaccumulation cannot be said to be concrete and particularized.[44] With further information, the Petitioner's interest in the welfare of identified wildlife said to be consumed constitutes nothing more than a generic policy interest insufficient to support organizational standing.[45]

The Petitioner incorrectly asserts that the Application does not include a discussion of cultural resources.[46] Regardless of such, Petitioner's claim that cultural resources are not being adequately investigated and addressed is not a concrete and particularized injury-in-fact.[47] The Petitioner does not specify what cultural resources in the vicinity of the facilities are being inadequately investigated, nor does the Petitioner indicate in what manner the investigation is materially inadequate. As such, the Petitioner does not demonstrate that this harm sufficiently concrete so as to demonstrate standing. Without any indication of what manner in which Applicant's investigation of cultural resources is materially inadequate, it cannot be assessed whether Petitioner's claim can be redressed by this proceeding.[48]

In light of the foregoing, the Petitioner, as an organization, has failed to demonstrate standing in this proceeding pursuant to 10 C.F.R. § 2.309(d)(1).[49]

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[44] *See Consumers Energy*, CLI-07-08, 65 NRC at 408-09.

[45] *See White Mesa*, CLI-01-21, 54 NRC at 252.

[46] *See* Application at Section 2.4. Section 2.4 of the Application addresses "Regional Historical, Archeological, Architectural, Scenic, Cultural Regional and National Landmarks."

[47] *See Consumers Energy*, CLI-07-08, 65 NRC at 408-09.

[48] *See Sequoyah Fuels*, CLI-94-12, 40 NRC at 76.

[49] Given the inclusion of Chief Red Cloud's affidavit, it could be stated that the Petitioner is also making a claim of representational standing based on Chief Red Cloud's interest in the license renewal. *See* Affidavit of Chief Oliver Red Cloud (April 2009). However, Chief Red Cloud's affidavit fails to allege a concrete and particularized interest sufficient to support a claim of representational standing. *See Consumers Energy Co.*, CLI-07-08, 65 NRC at 408-09.

C. Petitioner's Claim of Standing Pursuant to 10 C.F.R. § 2.309(d)(2).

1. Petitioner's Argument.

The Petitioner contends that, "as a local governmental body and as an affected Indian tribe," the Petitioner is able to assert standing in this proceeding pursuant to 10 C.F.R. § 2.309(d)(2).[50] According to the Petitioner, "[b]ecause the Oglala Delegation is filing this Petition and wishes to be a party in the proceeding for a facility located within its boundaries, i.e., the treaty territory, the Oglala Delegation need not address the standing requirements under 10 C.F.R § 2.309(d)(1)."[51]

2. Staff's Response.

10 C.F.R. § 2.309(d)(2)(i) provides:

> A State, local governmental body (county, municipality or other subdivision), and any affected Federally-recognized Indian Tribe that desires to participate as a party in the proceeding shall submit a request for hearing/petition to intervene. The request/petition must meet the requirements of this section (including the contention requirements in paragraph (f) of this section), *except that a State, local governmental body or affected Federally-recognized Indian Tribe that wishes to be a party in a proceeding for a facility located within its boundaries need not address the standing requirements under this paragraph.* The State, local governmental body, and affected Federally-recognized Indian Tribe shall, in its request/petition, each designate a single representative for the hearing.

The Staff argues that the Petitioner cannot take advantage of the foregoing exemption because the Petitioner is not, for the purpose of this provision, a qualifying local governmental body of a Federally-recognized Indian tribe.[52] Furthermore, even if the Petitioner were to be recognized as a local governmental body of the Oglala Sioux Tribe, no part of the facilities is within the legal

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[50] Petition at 11.

[51] *Id.*

[52] It is unclear whether the Petitioner is claiming to constitute the government of the Oglala Sioux Tribe itself or a local governmental body of such. However, the Petitioner, by its own admission, is a separate entity from the Federally-recognized tribal government. *See id.* at 5. The Staff discuss whether the Petitioner qualifies, for the purpose of 10 C.F.R. § 2.309(d)(2)(i), as a local governmental body.

boundaries of the Oglala Sioux Tribe.

According to the Commission:

> [n]ot all organizations with governmental ties are entitled to participate in our proceedings as a 'local governmental body (county, municipality, or other subdivision)' under section 2.309(d)(2), in much the same way not all organizations with governmental ties were entitled to participate in our proceedings as governmental agencies under our former regulation, 10 C.F.R. § 2.715(c), regarding participation by nonparties. Under that former section, an *advisory body that lacked executive or legislative responsibilities was determined by the Commission to be 'so far removed from having the representative authority to speak and act for the public that [it did] not qualify' as a governmental entity for the purpose of section 2.715(c).*[53]

The Petitioner claims that "[t]he Oglala Delegation of the Great Sioux Nation Treaty Council is the only entity selected and maintained through the traditional governing mechanisms of the Oglala Lakota."[54] The Petitioner is also "the only body appointed directly by the Oglala Lakota to decide treaty matters, including most importantly, land claims."[55] However, "[w]hereas the Oglala Sioux Tribe … is a creation of the U.S. Indian Reorganization Act of 1934, and as such, is, by definition, beholden to the laws of the United States, the [Petitioner] is beholden only to the traditions of the Oglala Lakota and to the treaties."[56] While seemingly, according to the Petitioner's own admission, occupying a quasi-governmental advisory position with the Tribe, the Delegation, nonetheless, does not purport to hold executive or legislative authority over the Oglala Sioux Tribe, nor does it purport to have the representational authority to speak and act

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[53] *Consumers Energy*, CLI-07-08, 65 NRC at 408-09. (*emphasis added*) (*quoting Yankee*, CLI-98-21, 48 NRC at 202-203 ("Not all organizations with governmental ties are entitled to participate in our proceedings as governmental 'agencies.' The Federal, state and local governments are all replete with numerous boards, commissions, advisory committees, and other organizations-all of which have governmental or quasi-governmental responsibilities. … We conclude that advisory bodies, by their very nature, are so far removed from having the representative authority to speak and act for the public that they do not qualify as governmental entities for purposes of section 2.715(c).")).

[54] Petition at 5.

[55] *Id.*

[56] *Id.*

on behalf of the Oglala Sioux Tribe before the NRC.[57] Furthermore, the Delegation does not indicate that it has been delegated this authority by the Tribal government. Therefore, the Petitioner does not qualify as a governmental entity for the purposes of section 2.309(d)(2)(i).

Even if the Petitioner were found to constitute a qualifying governmental body of a affected Federally-recognized Indian tribe, no part of the facilities is within the legal boundaries of land held by the Oglala Sioux Tribe. The Petitioner claims that the facility is within the "recognized territory" of the Sioux Nation according to both the Fort Laramie Treaty of 1851 and land held as "unceded Indian territory" for the Sioux Nation according to the Fort Laramie Treaty of 1868.[58] The Staff assert that these facts are irrelevant with respect to any present claim to land within the state of Wyoming because the Tribe's rights to such land were extinguished by a subsequent Congressional act. Thus, the Oglala Sioux Tribe has no legal claim to the land upon which the facilities are located in Wyoming.

The Fort Laramie Treaty of 1851 ("1851 Treaty") was a treaty between several Indian tribes, including the Sioux, and the United States.[59] Pursuant to Article 5 of the 1851 Treaty, the Sioux territory included land in northwestern Nebraska, north of the North Platte River.[60] The 1851 Treaty recognized the title[61] of each of the participating tribes to the lands described in the

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[57] *See Consumers Energy*, CLI-07-18, 65 NRC at 412 n.37.

[58] Petition at 3-5.

[59] 11 Stat. 749 (1851); Kappler, 2 Ind. Aff. L. & Treaties, 594 (1904) ("Kappler"). According to Kappler, the Indian tribes signatories to the 1851 Treaty included "the Sioux or Dahcotahs, Cheyennes, Arrapahoes, Crows, Assinaboines, Gros Ventres Mandans and Arrickaras." Kappler at 594.

[60] Kappler at 594.

[61] "Indian title," or "aboriginal land," refers to the right of Indian tribes to occupy and use land. *Northwestern Bands of Shoshone Indians v. United States*, 324 U.S. 335, 339 (1945). "Recognized title" is "Indian title" that has been recognized by the United States pursuant to a treaty, statute, or agreement. *Id.* Indian title is derived from an Indian tribe's exclusive use and occupancy of a portion of land for a (continued. . .)

treaty.[62] The Supreme Court has acknowledged that the 1851 Treaty "recognized as Sioux territory" all of present-day South Dakota and parts of present-day Nebraska, Wyoming, North Dakota, and Montana.[63] However, as is important to note, the 1851 Treaty did not create reservations for the participating tribes.[64]

The Fort Laramie Treat of 1868 ("1868 Treaty") was made between several tribes of the Sioux Nation, including the Oglala Sioux, and the United States.[65] Article 2 of the 1868 Treaty created a reservation for the "absolute and undisturbed use and occupation" of the Sioux.[66] The reservation was situated such that the southern boundary of the reservation was the northern border of the state of Nebraska from the Missouri River "to the one hundred and fourth degree of longitude west from Greenwich."[67] In consideration for the creation of the reservation in the

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(. . .continued)

significantly long period of time. *Id.* at 338-39. When the United States recognizes Indian title to a portion of land, the Federal Government, nonetheless, still retains fee title to the land. *Oneida Nation v. County of Oneida*, 414 U.S. 661, 667 (1974); *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 270 (1955). Thus, recognition of Indian title to a portion of land by the United States does not alter or expand upon the tribe's right of occupation and use, or, inversely, alter or diminish the Federal government's power to extinguish the Tribe's right. *See Oneida Nation*, 414 U.S. at 670; *Northwestern Bands of Shoshone Indians*, 324 U.S. at 338-39. Recognition of Indian title is important, though, because if the Federal government does extinguish a Tribe's right to some or all of a portion of land, only land held as recognized by the United States is compensable as a takings under the Fifth Amendment to the Constitution. *Tee-Hit-Ton Indians*, 348, U.S. at 281-82.

[62] *See, e.g., Crow Tribe of Indians v. United States*, 284 F.2d 361, 367-68 (Ct. Cl. 1960).

[63] *United States v. Sioux Nation of Indians*, 448 U.S. 371, 374 n.1 (1980).

[64] *See* Kappler at 595 (in recognizing the territorial boundaries, the tribes did not "abandon or prejudice any rights or claims" to other lands, and each tribe retained "the privilege of hunting, fishing, or passing over" the territories of any of the other tribes).

[65] 15 Stat. 635, 641 (Apr. 29, 1868).

[66] *Id.* at 636; *see also Sioux Nation*, 448 U.S. at 374.

[67] 15 Stat. at 636.

1868 Treaty, the Sioux agreed to relinquish "all claims or right in and to any portion of the United States or Territories, except such as is embraced within the limits [of the reservation], and except as hereinafter provided."[68] In Article 11 of the 1868 Treaty, the Sioux agreed to relinquish "all right to occupy permanently the territory outside [the newly created] reservation as defined [in Article 2 of the 1868 Treaty]," but, nonetheless, reserved the right "to hunt on any lands north of the North Platte River … so long as the buffalo may range thereon in such numbers as to justify the chase."[69] Pursuant to Article 16 of the 1868 Treaty, the United States agreed to hold and consider as "unceded Indian territory" the "country north of the North Platte river and east of the summits of the Big Horn mountains," such that "no white person or persons" would be allowed to settle in or occupy that territory, or pass through it without the consent of the Sioux.[70] However, the lands held and considered under Article 16 to be unceded Indian territory were not treated as lands part of the reservation to which the Sioux would have the right of "absolute and undisturbed use and occupation."[71]

On February 28, 1877, the United States Congress enacted a statute that ratified a purported agreement between the Sioux Nation, to which the Oglala Sioux Tribe was a part, and the United States.[72] Pursuant to Article 1 of the statute, the northern and western boundaries of the Sioux reservation set out in Article 2 of the 1868 Treat were changed, taking some 7,000,000 acres from the Sioux, and, in addition, the Sioux were said to have agreed to

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[68] *Id.*

[69] *Id.* at 639.

[70] *Id.* at 640.

[71] *See United States v. Sioux Tribe*, 616 F.2d 485, 489 (Ct. Cl. 1980).

[72] Act of Feb. 28, 1877, 19 Stat. 254, 257 (1877).

relinquish and cede to the United States "all the territory outside the said reservation … including all privileges of hunting."[73]

So long as Congressional intent to do so is unambiguous, Congress has the power to abrogate Indian treaties.[74] Even if they contravene "express stipulations in an earlier treaty," Federal courts are required to uphold statutory provisions clear and explicit as to such contravention.[75] Thus, the 1877 Act, set out in clear and unambiguous language, extinguished all of the Sioux Nation's rights to land, including the rights reserved under Articles 11 and 16 of the 1868 Treaty, outside of the reservation boundaries, as revised by the 1877 Act.[76] Thus, as the reservation was set entirely within the state of South Dakota, the 1877 Act extinguished any right the Oglala Sioux had to land within the state of Wyoming.

As the Oglala Sioux Tribe has no legal claim to any land in the state of Wyoming, in which the facilities are located, the facilities are not within the legal boundaries of the Tribe. In light of this and the foregoing, Petitioner's claim of standing pursuant to 10 C.F.R. § 2.309(d)(2) should be denied and the Petition should be rejected.

D. Petitioner's Request for Additional Time to Comply with 10 C.F.R. § 2.309(d)(1).

The Petitioner requests that "[i]n the event that the Commission … rule[s] that 10 CFR § 2.309(d)(2) is inapplicable to the Oglala Delegation, the [Petitioner] respectfully requests a reasonable time from notice of that decision to submit additional information in satisfaction of 10

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[73] *Id.* at 255; *Sioux Nation*, 448 U.S. at 383 n.14.

[74] *Mille Lacs Band*, 526 U.S. at 202; *see also Sioux Nation*, 448 U.S. at 410-11.

[75] *United States v. Dion*, 476 U.S. 734, 738 (1986) (*quoting Fong Yue Ting v. United States*, 149 U.S. 698, 720 (1893)).

[76] 19 Stat. at 255; *see also Sioux Nation*, 448 U.S. at 382-83 (stating that the effect of the 1877 Act was to abrogate the 1868 Treaty).

CFR § 2.309(d)(1)."[77] The Petitioner appears to have already made a claim to standing pursuant to 10 C.F.R. § 2.309(d)(1) in the Petition. Furthermore, the Petitioner gives no reason why it could not have included such a claim in the Petition. Absent any reason why this claim could not have been tendered as part of the instant Petition, the Staff argues that this request for additional time should be denied.

II. Contention Admissibility

A. Legal Standards for Contention Admissibility

In addition to a show of standing, a petitioner, in order to gain admission to a hearing as a party, must submit at least one contention that meets the admissibility requirements of 10 C.F.R. § 2.309(f)(1).[78] For each contention a petitioner wishes to have admitted at hearing, the petitioner must:

> (i) Provide a specific statement of the issue of law or fact to be raised or controverted;
> (ii) Provide a brief explanation of the basis for the contention;
> (iii) Demonstrate that the issue raised in the contention is within the scope of the proceeding;
> (iv) 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;
> (v) Provide a concise statement of the alleged facts or expert opinions which support the requestor's/petitioner's position on the issue and on which the petitioner intends to rely at hearing, together with refereces to the specific sources and documents on which the requestor/petitioner intends to rely to support its position on the issue; and
> (vi) Provide sufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact. This information must include references to specific portions of the application (including the applicant's environmental report and safety report) that the petitioner disputes and the supporting reasons for each dispute, or, if the petitioner believes that the application fails to contain information on a relevant matter as required by law, the identification of each failure and the supporting reasons for the petitioner's belief.[79]

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[77] Petition at 12.

[78] *See* 10 C.F.R. § 2.309(a).

[79] *Id.* at § 2.309(f)(1).

The foregoing contention admissibility requirements are strictly applied.[80] They operate as a "[t]hreshold standard … necessary to ensure that hearings cover only genuine and pertinent issues of concern and that the issues are framed and supported concisely enough at the outset to ensure that the proceedings are effective and focused on real, concrete issues."[81] As to that, the Commission has recently stated:

> To intervene in a Commission proceeding, including a license renewal proceeding, a person must file a petition for leave to intervene. In accordance with 10 C.F.R. § 2.309(a), this petition … must proffer at least one admissible contention as required by 10 C.F.R. §§ 2.09(f)(1)(i)-(vi). The requirements for admissibility set out in 10 C.F.R. §§ 2.309(f)(1)(i)-(vi) are 'strict by design,' and we will reject any contention that does not satisfy these requirements. Our rules require 'a clear statement as to the basis for the contentions and the submission of…supporting information and references to specific documents and sources that establish the validity of the contention.' *'Mere 'notice pleading' does not suffice.'* Contentions must fall within the scope of the proceeding – here, license renewal – in which the intervention is sought.[82]

As such, failure to comply with any of the foregoing elements of 10 C.F.R. § 2.309(f)(1) is grounds for a contention's dismissal.[83] Commission practice does not permit the "filing of vague, unparticularized contention[s]."[84] A petitioner may not rely on mere speculation nor bald allegations as support for the admission of a proffered contention.[85] If a petitioner fails to provide sufficient support for proffered contentions, it is not within the authority of a board to

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[80] *See Amergen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-06-24, 64 NRC 111, 118-119 (2006).

[81] Changes to Adjudicatory Process, 69 Fed. Reg. at 2,182, 2,189-90 (Jan. 14, 2004).

[82] *Amergen Energy*, CLI-06-24, 64 NRC at118-119 (*footnotes omitted*; *emphasis added*).

[83] *Private Fuel Storage* (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 325 (1999); *Arizona Pub. Serv. Co.* (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), CLI-91-12, 34 NRC 149, 155-56 (1991); *Louisiana Energy Servs.* (National Enrichment Facility), LBP-04-14, 60 NRC 40, 54 (2004).

[84] *N. Alt. Energy Serv. Corp.* (Seabrook Station, Unit 1), CLI-99-6, 49 NRC 201, 219 (1999) (*quoting Baltimore Gas & Elec. Co.* (Calvert Cliffs Nuclear Power Plant), CLI-98-25, 48 NRC 325, 349 (1998)).

[85] *See Fansteel, Inc.* (Muskogee, Oklahoma Site), CLI-03-13, 58 NRC 195, 203 (2003).

construct assumptions of fact to shore up those deficiencies.[86] Similarly, a petitioner must provide sufficient explanation as to the significance of materials and documents referenced in support of the contention.[87] Furthermore, a contention will be rejected if:

> (1) it constitutes an attack on applicable statutory requirements;
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> (2) it challenges the basic structure of the Commission's regulatory process or is an attack on the regulations;
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> (3) it is nothing more than a generalization regarding the petitioner's view of what applicable policies ought to be;
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> (4) it seeks to raise an issue which is not proper for adjudication in the proceeding or does not apply to the facility in question; or
>
> (5) it seeks to raise an issue which is not concrete or litigable.[88]

B. Petitioner's Proposed Contentions

1. Generic Issues.

Before addressing each of the Petitioner's proposed contentions, the Staff discusses several generic issues which pervade many of the Petitioner's proposed contentions: the meaning and function of (1) 10 C.F.R. § 40.9, (2) 10 C.F.R. § 51.45(e), and the trust responsibility owned by the Federal government, its subsidiaries, and agents to the Oglala Sioux, as a Federally-recognized Indian tribe, and its people.

i. 10 C.F.R. § 40.9

The Petitioner reads 10 C.F.R. § 40.9(a), requiring "all information provided to the Commission by the Application shall be complete and accurate in 'all material respects," to

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[86] *See Georgia Institute of Technology* (Georgia Tech Research Reactor, Atlanta, Georgia), LBP-95-6, 41 NRC 281, 305 (1995).

[87] *See Fansteel, Inc.*, CLI-03-13, 58 NRC at 204.

[88] *Private Fuel Storage, LLC* (Independent Spent Fuel Storage Installation), CLI-04-22, 60 NRC 125, 129 (2004) (*citing Philadelphia Electric Co.* (Peach Bottom, Units 2 and 3), ALAB-216, 8 AEC 13, 20-21, *aff'd in part on other grounds*, CLI-74-32, 8 AEC 217 (1974)).

mean that the Applicant must disclose in the Application "all information that a reasonably prudent regulator would consider important in making a licensing decision."[89] Petitioner's interpretation of 10 C.F.R. § 40.9(a) is, however, incorrect. In the context of an application for a source material license,10 C.F.R. § 40.9(a) only encompasses the completeness and accuracy of information that is otherwise required to be submitted to the NRC or is provided as additional supplementary information in the application.[90] That section does not create an independent obligation for the submission of certain information by the Applicant. Thus, if there is no requirement in NRC regulations that requires the Applicant to disclose information regarding a particular issue in its Application, 10 C.F.R. § 40.9(a) does not require the submission of information on that particular topic in the Application.

Additionally, while the Petitioner is correct that 10 C.F.R. § 40.9(b) "requires the Applicant to notify the Commission if Applicant has identified information having a significant implication for public health and safety or common defense and security," that section makes specifically clear that it does not apply to information that is otherwise required to be submitted to the NRC.[91] As that regulation states:

> An applicant or licensee violates this paragraph only if the applicant or licensee fails to notify the Commission of information that the applicant or licensee has identified as having a significant implication for public health and safety or common defense and security. … This requirement is not applicable to information which is already required to be provided to the Commission by other reporting or undating requirements.

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[89] Petition at 21-22.

[90] *See* 10 C.F.R. § 40.9(a). That section provides that:

> Information provided to the Commission by an applicant for a license or by a licensee or information required by statute or by the Commission's regulations, orders, or license conditions to be maintained by the applicant or the licensee shall be complete and accurate in all material respects.

[91] See Petition at 22.

Thus, 10 C.F.R. § 40.9(b) only applies to information the Applicant is not required to submit as part of the Application. As the Petitioner can only contest the omission of information required to be submitted by the Applicant as part of the Application, within the scope of this proceeding, 10 C.F.R. § 40.9(b) is categorically unavailable to the Petitioner as cause for the materiality of an omission.

ii. 10 C.F.R. § 51.45(e)

In several instances, the Petitioner claims that 10 C.F.R. § 51.45(e) mandates that the Applicant disclose and discuss in the Application specific historical events, such as spills, excursions, and leaks.[92] 10 C.F.R. § 51.45(e) provides that with regard to the information required by the other paragraphs of section 51.45 to be included in an environmental report, such information "should not be confined to [that] supporting the proposed action but should also include adverse information." However, 10 C.F.R. 51.45(e) does not mandate the form or specificity of the adverse information to be included. Further, the scope of the information for which adverse information is required to be discussed is limited to the scope of 10 C.F.R. §§ 51.45(b)-(d). Thus, 10 C.F.R. § 51.45(e) does not by itself require the Applicant to discuss the specific historical events, as the Petitioner would have discussed.

iii. Trust Responsibility.

The Petitioner states that "[t]he United States Supreme Court has recognized that the trust duty owed by the United States Government to Indian tribes and tribal members, who it characterizes as 'dependent and sometimes exploited people,' is the highest legal duty."[93]

> In carrying out its treaty obligations with the Indian tribes, the United States Government is something more than a mere contracting party. Under a humane and self imposed

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[92] *See id.* at 14-15, 18, 54, 74, 76-77, 96, 110-11.

[93] *Id.* at 6.

> policy which has found expression in many acts of Congress and numerous decisions of the United States Supreme Court, it has charged itself with moral obligations of the highest responsibility and trust. *Seminole Nation v. United States*, 316 U.S. 286, 296-297 (1942). Any action taken by the Nuclear Regulatory Commission, a federal agency, must be done with consideration of this duty owed to the Oglala Delegation. It must be recognized that this duty is higher than that owed to the American people as a whole. As trustee for the Oglala Delegation, the NRC has an affirmative duty to ensure that any action it takes, including granting a renewal license, will not negatively impact the Oglala Lakota.[94]

The Petitioner cites to the trust responsibility in support of several of its proposed contentions.[95]

The Petitioner mischaracterizes the trust responsibility held by the NRC, as a Federal agency, on behalf of Indian Tribes. The NRC, as a Federal agency, owes a fiduciary duty to the Oglala Sioux Tribe and its members.[96] However, the NRC exercises its fiduciary duty in the context of its governing statues (*i.e.*, the AEA and NEPA) and is not required to afford the member of a Tribe rights under these statues and implementing regulations that are different from what it would afford to any other person.[97] The Commission has often stated that its contention rule is "strict by design"[98] and, thus, a contention, in order to be admissible, must meet all of the requirements of 10 C.F.R. § 2.309(f)(1).[99] This standard applies equally to all petitioners.[100] In light of the foregoing, the Petitioner's arguments regarding the NRC's trust responsibility, and its citations thereto, are without merit and should be rejected.

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[94] *Id.* at 6-7.

[95] *See id.* at 58-59, 79, 83, 89-90, 94, 97.

[96] *See United States v. Mitchell*, 463 U.S. 206, 224 (1983); *Seminole Nation v. United States*, 316 U.S. 286, 296-97 (1942).

[97] *See Skokomish Indian Tribe v. FERC*, 121 F.3d 1303, 1308-09 (9th. Cir. 1997).

[98] *See Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3) CLI-01-24, 54 NRC 349, 358 (2001).

[99] See *Private Fuel Storage*, CLI-99-10, 49 NRC at 325.

[100] *See* 10 C.F.R. § 2.309(a).

2. Contention – Foreign Governmental Ownership Bars Issuance of the License.

This contention is comprised principally of the following arguments:

1. The NRC lacks the authority to issue a license to a U.S. Corporation that is, in fact, "owned, controlled and dominated by foreign interests—in this case the Government of France."[101]

2. In violation of AEA Section 182 and 10 C.F.R. § 40.9, the Applicant failed to disclose matters related to its foreign ownership by the Government of France.[102]

3. Even if the proposed license is not absolutely barred due to the Applicant's corporate foreign ownership, the grant of the license should nonetheless be barred because to do so would be inimical to the common defense and security of the United States.[103]

Each of the foregoing arguments is addressed in turn.

The Petitioner erroneously argues that the NRC lacks the authority to issue a license to a U.S. corporation owned, control and dominated by foreign interests.[104] While it is unclear in the Petition how the Petitioner specifically arrives at this argument, the Petitioner does mistakenly suggest that AEA Section 103(d) should be applied as guidance for AEA Section 69.[105] AEA Section 103(d), which prohibits the Commission from granting a license to any corporation or other entity if the Commission knows or has reason to believe it is owned, controlled, or dominated by an alien, a foreign corporation, or a foreign government, only applies to production and utilization facilities.[106] COGEMA's facilities are neither. The prohibition in AEA Section 103(d) is not present in AEA Section 69, which is applicable to in situ

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[101] Petition at 23.

[102] *See id.* at 21-26.

[103] *See id.* at 39-53.

[104] *See id.* at 23-53.

[105] *Id.* at 19-20.

[106] 42 U.S.C. § 2133(d).

leach facilities.

The Petitioner also references Section 7(c) of the 1946 version of the AEA. That section provided that:

> [n]o license may be given to any person for activities which are not under or within the jurisdiction of the United States, to any foreign government, or to any person within the United States if, in the opinion of the Commission, the issuance of a license to such persons would be inimical to common defense and security.

The Petitioner asserts that section 7(c) "was not amended by the 1954 Act and remains in full force and effect."[107] However, the specific language of Section 7(c) quoted by the Petitioner does not appear in any provisions of the 1954 AEA, as amended, that pertains to source material licenses.[108]

The Petitioner also suggests that 10 C.F.R. § 40.38 prohibits foreign ownership, control, or domination of in situ leach recovery facilities.[109] That is simply incorrect. Section 40.38 was promulgated to implement the USEC Privatization Act ("Act"), which amended the AEA, and applies exclusively to uranium enrichment facilities.[110] "Corporation", as used in Section 40.38, refers exclusively to the "licensing of the Corporation (USEC) or its successor for operation of the AVLIS facility."[111] In conclusion, nothing in the AEA or the Commission's regulations *per se* prohibits the licensing of an in situ leach recovery facility owned, controlled, or dominated by a foreign entity.

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[107] Petition at 35.

[108] *See* AEA § 61-69.

[109] Petition at 35-36.

[110] *See* USEC Privatization Act: Certification and Licensing of Uranium Enrichment Facilities, 62 Fed. Reg. 6,664, 6,666 (Feb. 12, 1997).

[111] *Id*. at 6,664, 6,666.

The Petitioner argues that, in violation of 10 C.F.R. § 40.9 and AEA Section 182, the Applicant failed to disclose in the Application information concerning the Applicant's foreign ownership.[112] There is no provision in 10 C.F.R. Part 40 which necessitates that the Applicant specifically include information regarding foreign control or ownership. As already noted, 10 C.F.R. § 40.9(a) does not establish an independent obligation to submit information not already required to be submitted by NRC's regulations. The Petitioner also avers that AEA Section 182 "*requires* the citizenship of the license applicant to be disclosed."[113] Rather, that section states, in pertinent part:

> Each application for a license hereunder shall be in writing and shall specifically state such information as *the Commission, by rule or regulation, may determine to be necessary* to decide such of the technical and financial qualifications of the applicant, the character of the applicant, the citizenship of the applicant, or any other qualifications of the applicant as the Commission may deem appropriate for the license.[114]

As such, absent any requirement in 10 C.F.R. Part 40 requiring the Applicant to affirmatively disclose information regarding its foreign ownership upon submission of its Application, Section 182 does not necessitate that Applicant include information regarding its foreign ownership in the Application.

The Petitioner argues that even if the NRC is not per se barred from granting a license to the Applicant due to its foreign ownership, the license should be nonetheless denied. According to the Petitioner, pursuant to 10 C.F.R. § 40.32(d), due to the foreign ownership of the Applicant, the granting of the license would be inimical to the common defense and security of the United States. 10 C.F.R. § 40.32(d) states that an application will be approved if "[t]he issuance of [a 10 CFR Part 40] license will not be inimical to the common defense and security

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[112] *See* Petition at 21-26.

[113] *Id.* at 21 (*emphasis added*).

[114] 42 U.S.C. § 2232(a) (*emphasis added*).

or to the health and safety of the public…" The Commission has held that the phrase "inimical to the common defense and security" refers to, among other things, "the absence of foreign control over the applicant."[115] Thus, the foreign ownership of the Applicant, in terms of its impact and significance, is one potential factor the Staff may consider in its analysis of "inimicality to common defense and security."

With regard to the inimicality of foreign control or ownership, the Petitioner argues that "foreign owners and control persons who are not US persons have no loyalty to prevent the reckless, negligent or intentional contamination of the environment by ISL mining."[116] The Petitioner states that "there is no incentive for Applicant's parent/decisionmakers to ensure compliance with US and NRC regulations."[117] The Petitioner also asks "how NRC regulations can be enforced against a foreign government?"[118] Petitioner's assertions raise only generic issues concerning potential problems associated with regulating foreign-controlled licensees. The Commission's practice does not evidence that the very fact of foreign ownership or control is enough to render the grant of a license inimical to the common defense and security of the United States. Indeed, the Commission has licensed facilities with foreign ownership or control.[119] A petitioner needs to raise something more—some material allegation of inimicality in

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[115] *Florida Power & Light Co.* (Turkey Point Nuclear Generating Units No. 3 and No. 4), 4 AEC 9, 12 (1967)). Additionally, the required finding of non-inimicality to the common defense and security may be based, in part, on the nation involved…" Final Standard Review Plan on Foreign Ownership, Control, or Domination, 64 Fed. Reg. 52,355, 52,357 (Sept. 28, 1999).

[116] Petition at 45.

[117] *Id.* at 53.

[118] *Id.* at 21.

[119] For example, Cameco Corporation, a Canadian corporation, is the ultimate owner of the Smith Ranch – Highland Project in Wyoming. Smith Ranch – Highland holds NRC License No.SUA-1548.

addition and in relation to the fact of foreign ownership—so as to tender an admissible contention. Thus, the Petitioner does not sufficiently articulate a claim of inimicality associated with the Applicant's foreign ownership to raise such a contention.

In light of the foregoing, the Petitioner fails to comply with 10 C.F.R. §§ 2.309(f)(1)(i), (iii), and (iv). As such, this contention should be rejected.

3. Contention – Failure to Disclose Cultural Resources in the Permit Area.

The Petitioner avers that "[t]he Application omits any discussion of cultural resources or artifacts, or burial grounds or remains in the mining area."[120] The Petitioner finds this "puzzling" because, as it claims, cultural resources were discussed in the Environmental Assessment for the previous license renewal in 1998.[121] According to the Petitioner, there are burial remains at the Pumpkin Buttes, which are protected by the Native American Graves Protection and Repatriation Act ("NAGPRA").[122] The Petitioner indicates that "these are important cultural resources that must be evaluated by the Oglala Delegation and the failure of the Applicant to make disclosures in the Application concerning such cultural resources constitutes a genuine dispute between Petitioner and Applicant."[123]

The Applicant did submit as part of the instant Application information regarding cultural resources. That information, found in Section 2.4 of the Application, was redacted from the

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[120] Petition at 54. Earlier, the Petitioner "makes an environmental contention that artifacts and evidence of ancient aboriginal occupancy in the Mine area is not being adequately investigated or addressed." *Id.* at 6.

[121] *Id.* at 54 (*citing* Environmental Assessment for Renewal of Source Material License No. SUA-1341 (June 1998)).

[122] *Id.* at 56. The Petitioner offers no basis for its assertion that burial remains of the Oglala Sioux exist at the Pumpkin Buttes.

[123] *Id.*

public ADAMS version of the Application as SUNSI at Staff's request since the Staff considered information in Section 2.4 to reveal the location of sensitive archeological sites. The Staff has re-evaluated that determination and is in the process of making portions of Section 2.4 publicly available in ADAMS. Because the Applicant did include information relating to cultural resources in the Application, Petitioner's claim is rendered moot and, as such, lacking a dispute with the Applicant,[124] this contention should be rejected. The hearing notice for this proceeding sets out procedures for a potential party to gain access to SUNSI.[125] The Petitioner could have requested access to Section 2.4, but the Petitioner failed to do so. As this contention fails to present a material issue in genuine dispute with the Applicant, this contention should be rejected.[126]

5. Contention – Failure to Engage in Meaningful Consultation

The Petitioner asserts that it is "a federally recognized tribal governmental organization, entitled to all the rights under Federal law that such tribes are entitled to, including consultation under Section 106 of [the National Historic Preservation Act]."[127] The Petitioner claims that it has never been consulted regarding the cultural resources that may be in the vicinity of the facilities.[128]

Section 106 of the NHPA requires the NRC, as a Federal agency, before the issuance of the subject renewal license, to "take into account the effect of the [issuance of the license] on

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[124] *See* 10 C.F.R. § 2.309(f)(1)(iv).

[125] Notice of Request to Renew Source Materials License SUA-1341, 74 Fed. Reg. at 6,437.

[126] *See* 10 C.F.R. §§ 2.309(f)(1)(iv), (vi).

[127] Petition at 58.

[128] *Id.* at 56.

any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register."[129] Pursuant to Section 101(d)(6)(B) of the NHPA, the NRC is required to consult with any Indian Tribes which "attach[] religious and cultural significance to historic properties that may be affected" by the issuance of the renewal license.[130] The NRC must ensure consultation in the Section 106 evaluation process provides to such interested Tribes "a reasonable opportunity to identify its concerns about historic properties, advise on the identification and evaluation of historic properties, including those of traditional religious and cultural importance, articulate its views on the [effect of the issuance of the license] on such properties, and participate in the resolution of adverse effects."[131]

As Section 106 of the NHPA imposes this responsibility on the NRC, not the Applicant in the preparation of the subject Application, Petitioner's claim against the Applicant's failure to consult is misdirected and, at this time, unripe (as the NRC has not yet even begun the required Section 106 evaluation process). As such, claiming that the Applicant has not satisfied the NHPA consultation duty, the Petitioner does not present with this contention an issue material to the findings the NRC must make in support of the action involved in this proceeding.[132]

Also, as part of this contention, the Petitioner provides citations to a variety of documents, including treaties, statues, and United Nation documents, but fails to discuss any, with the exception of the United Nation Declaration on the Rights of the World's Indigenous

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[129] 16 U.S.C. § 470f (2008).

[130] 36 C.F.R. § 800.2(c)(2)(ii).

[131] 36 C.F.R. § 800.2(c)(2)(ii)(A).

[132] *See* 10 C.F.R. § 2.309(f)(1)(iv).

Peoples.[133] The U.N. Declaration is a non-binding resolution.[134] As such, it provides no right of action in United States courts.[135] The U.N. Declaration, like other General Assembly resolutions, is not a treaty, an international agreement, a statement of law, or a legal obligation.[136] Thus, the U.N. Declaration's requirements are not binding on the NRC and the document has no legal status in the instant case. As such, the Petitioner does not present with that a issue within the scope of this proceeding.[137]

In light of the foregoing, this contention should be rejected.

6. Contention – International Obligations of the United States to the Oglala Delegation as Indigenous People.

The Petitioner's contention does not satisfy the contention pleading requirement that a contention pose a dispute with the Application. Rather, the Petitioner instead sets forth recommendations on how the Commission may better protect "internationally recognized human

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[133] *See* Petition at 59-61. It is the obligation of an intervenor to clearly identify and summarize the documents and materials being relied upon and identify and append specific portions of documents. *See Commonwealth Edison Co.* (Braidwood Nuclear Power Station, units 1 and 2), LBP-85-20, 21 NRC 1732, 1741 (1985), *rev'd and remanded on other grounds*, CLI-86-8, 23 NRC 241 (1986) (*citing Tennessee Valley Authority* (Browns Ferry Nuclear Plant, Units 1 and 2), LBP-76-10, 3 NRC 200, 216 (1976)).

[134] Press Release, General Assembly, "General Assembly Adopts Declaration on Rights of Indigenous Peoples; 'Major Step Forward' Towards Human Rights for All, Says President," U.N. Doc. GA/10612 (Sept. 13, 2007).

[135] *Haitian Refugee Ctr., Inc. v. Gracey*, 600 F.Supp. 1396, 1406 (D.D.C. 1985), *aff'd*. 809 F.2d 794 (D.C. Cir. 1987); *see also Sosa v. Alvarez-Machain, 542 U.S. 692, 734-35 (2004)* (the U.N. Declaration of Human Rights is a non-binding resolution that "does not of its own force impose obligations as a matter of international law").

[136] *In re Alien Children Education Litigation*, 501 F.Supp. 544, 593 (D. Tex. 1980) (quoting statement of Mrs. Franklin Roosevelt, then-U.S. representative in the General Assembly, concerning adoption of the U.N. Declaration of Human Rights in 1948); *see also Flores v. So. Peru Copper Corp*., 414 F.3d 233, 259 (2d Cir. 2003) (General Assembly resolutions are "aspirational" and not intended to be binding on member states).

[137] *See* 10 C.F.R. § 2.309(f)(1)(iii).

rights and fundamental freedoms."[138] In this regard, the Petitioner advocates that the Commission adopt the United Nation Declaration on the Rights of the World's Indigenous Peoples. As has been already stated, the U.N. Declaration's requirements are not binding on the NRC and the document has no legal status in the instant case. Regardless of that fact, this contention, being composed only of recommendations, constitutes a challenge to the Commission's regulations—improper in this forum.[139] The Petitioner, in essence, is attempting to substitute a licensing process they find more favorable than the one the Commission has actually set in place. In light of the foregoing, this contention should be rejected.

7. Contention "A" – Water Restoration Values.

Referencing Section 6.1.1 of the Application, the Petitioner avers that "It is misleading to state that the primary goal [of water restoration] is to return the quality of the groundwater to baseline when it has failed to do so in the prior restoration and decommissioning and in fact no ISL operation has ever returned the groundwater to baseline levels."[140] According to the Petitioner, "[t]he failure to return groundwater to baseline constitutes an irretrievable commitment of resources which is required to be discussed in the Application in detail in accordance with 10 C.F.R. § 51.45(b)(5)," and, as such, the Applicant should have disclosed

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[138] *See* Petition at 61-70.

[139] *See* 10 C.F.R. § 2.335)(a); *see also Private Fuel Storage, LLC* (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 180 (1998) ("The bald assertion that a matter ought to be considered or that a factual dispute exists so as to merit further consideration of a matter is not sufficient.").

[140] Petition at 70-71. Section 6.1.1 of the Application provides:

> COGEMA's primary goal for restoration has been to return the quality of groundwater at the Irigaray and Christensen Ranch sites to baseline concentrations, using the best practicable technology and economic reasonableness. If the primary goal cannot be achieved, the groundwater, at a minimum, will be returned to the pre-mining use category.

this fact in the Application.[141] The Petitioner also "believes that the Mine's operations have lowered the water table."[142] Furthermore, the Petitioner argues that the Application "describes excursions, spills and leaks in theory without reference to actual excursions, spills and leaks at the mine site, in violation of [10 C.F.R. § 51.45(e)."[143]

While the Petitioner states that "no ISL operation has ever returned the groundwater to baseline levels," the Petitioner provides no corroboration or support for that statement.[144] Nor does the Petitioner provide any evidence that, as claimed by the Petitioner, it is near impossible to return groundwater to baseline levels. The Petitioner also fails to demonstrate the materiality of its claims.[145] Even if it were impossible to restore groundwater to baseline levels as the Petitioner alleges, the Petitioner does not indicate in what manner such claim challenges or invalidates the Applicant's proposed groundwater restoration goal.[146]

Furthermore, the Petitioner is mistaken with regard to 10 C.F.R. § 51.45(e)—the Applicant need not recount in the Application actual excursions or spills. As mentioned previously, section 51.45(e) states only that as to the information required by the other paragraphs of 10 C.F.R. § 51.45 to be included in an environmental report, such information "should not be confined to [that] supporting the proposed action but should also include adverse information." It does not specify a level of detail regarding adverse information. As the

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[141] Petition at 71.

[142] *Id.* at 74.

[143] *Id.*

[144] *See* 10 C.F.R. 2.309(f)(1)(v).

[145] *See id*. at § 2.309(f)(1)(iv).

[146] *See id*. at 2.309(f)(1)(vi).

Petitioner notes, the Applicant does discuss the potential effects of spills, leaks, and excursions in the Application.[147] The Petitioner does not claim that, aside from level of detail, that such discussions are materially inaccurate or incomplete.

In light of the foregoing, this contention should be rejected.

8. Contention "B" – Impacts to Water Resources.

The Petitioner avers 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.'"[148] With respect to the water exposure pathways outlined by Section 7.2.3 of the Application, the Petitioner argues that the Application:

> fails to disclose the instances in which human error at Applicant's operations resulted in major spills. Section 51.45(e) requires disclosure of adverse information. The Application fails to disclose adverse information needed to make the information that was disclosed not misleading. Just because the mining solutions will be monitored does not mean that there will not be excursions and spills.[149]

With respect to Section 7.4 of the Application, discussing non-radiological effects, the Petitioner claims that the Section:

> fails to disclose the potential for faults, fractures and artesian pressures as well as the impacts from CBM projects and oil drilling and from nearby water wells (irrigation, livestock and domestic uses) make the system not fully self-contained. Further, it is misleading to say that the possible occurrences of non-radiological effects are small and that no long-term irreversible effects are anticipated.[150]

With respect to Section 7.5.1.2 of the Application, discussing detection and response to pipe failures, the Petitioner avers that:

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[147] *See* Petition at 74.

[148] *Id.* (*citing* Application at Section 7.2.3).

[149] *Id.* at 75-76.

[150] *Id.* at 76.

> Section 7.5.1.2 fails to comply with Section 51.45(e) by failing to disclose adverse information related to the 100,000 gallon leak by leaving a pump on for 16 days until discovered. The foregoing section also fails to disclose the risks associated with using longer trunklines as described in the Applicatin relative to potential pipe failures.[151]

The Petitioner also asserts that "the Ground Water Monitoring described in the Application does not indicate that the monitoring wells are tested for uranium whether radioactive or depleted, and other heavy metals known to be toxic and linked to the development of cancer if ingested over time."[152] Regarding the development of cancer, the Petitioner asserts that "[t]he NRC must not ignore the connection between higher cancer rates at Pine Ridge Reservation and current practices of ISL mining that produce cancer causing agents."[153]

As already noted, 10 C.F.R. § 51.45(e) does not obligate the Applicant to disclose and discuss specific instances of spills, excursions, or leaks. The Petitioner otherwise fails to demonstrate why Applicant's discussion of such matters without the inclusion of historical records of events is materially insufficient or inadequate.

With regard to Petitioner's claim that the Application "fails to disclose the potential for faults, fractures and artesian pressures as well was the impacts from coal bed methane ("CBM") projects and oil drilling and from nearby water wells … make the system not fully self-contained,"[154] the Petitioner fails to provide any support or corroboration for this argument. A petitioner may not rely on mere speculation nor bare assertions as support for the admission of a proffered contention.[155] Furthermore, the Application, in several instances, references

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[151] *Id.* at 77.

[152] *Id.* at 77-78.

[153] *Id.* at 80.

[154] *Id.* at 76.

[155] *See Fansteel, Inc.,* CLI-03-13, 58 NRC at 203.

Appendix D6 of the 1988 Christensen Ranch license amendment request. Appendix D6 contains comprehensive cross sections and reports on hydrology that were previously reviewed by the NRC staff and found to be sufficient. Likewise, Appendix B to the Application contains information regarding CBM, including the relationship between CBM and ISL.[156] The Petitioner does not specify why these analyses are incorrect.

The Petitioner incorrectly asserts that Applicant's discussion of groundwater monitoring does not indicate whether monitoring wells are tested for uranium or other toxic heavy metals. Section 5.8.2.2 of the Application clearly states that uranium, as well as other constituents, are tested in groundwater monitoring wells. "[A] contention that fails directly to controvert the license application at issue or that mistakenly asserts the application does not address a relevant issue is subject to dismissal."[157]

With regard to Petitioner's claim that cancer rates at the Pine Ridge Reservation are linked to "current practices of ISL mining that produce cancer casing agents," the Staff asserts that the Petitioner has not made even the slightest attempt as part of this contention to establish an exposure pathway by which supposed contaminants would come in contact with persons located at the Pine Ridge Reservation in such a manner as to manifest the harms alleged by the Petitioner. Absent such, it is unclear how the Petitioner can argue that supposedly harmful products of ISL operations are the causing factor of cancer rates at Pine Ridge Reservation.

As the contention fails all of the elements of 10 C.F.R. § 2.309(f)(1), it should be rejected.

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[156] Information on CBM was not considered during initial commercial-scale licensing and license renewal in 1998 because it was not occurring at or near the site.

[157] *Private Fuel Storage, LLC*, LBP-98-7, 47 NRC at 181.

9. Contention "C" – Environmental Harm to Willow Creek and Power River, Groundwater and Surface Water.

The Petitioner contends that "COGEMA will negatively impact ground and surface water quality."[158] According to the Petitioner, "[t]he mined aquifer (the Wasatch aquifer) provides water for local and domestic and stock wells … and mining activities may endanger these water resources."[159]

The foregoing contention must be rejected because the Petitioner has not satisfied any of the elements of 10 C.F.R. § 2.309(f)(1). It is unclear from the text of the contention what issue the Petitioner is raising with the Application—in what manner the Application is either incorrect or incomplete with regard to impacts to water resources. Further, the Petitioner provides no basis for the issue it raises with the contention. The Petitioner does not proffer any factual discussion or expert opinion in support of its contention, nor does it provide any information to evaluate whether it has a genuine dispute with the Applicant. Commission practice does not "permit 'notice pleading,'"[160] and, therefore, the Commission does not permit the "'filing of vague, unparticularized contention[s],' unsupported by affidavit, expert, or documentary support."[161] A petitioner may not rely on mere speculation nor bare assertions as support for the admission of a proffered contention.[162] As all the Petitioner has proffered consists of is unsupported conclusory remarks, this contention should be rejected.

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[158] Petition at 83.

[159] *Id.*

[160] *N. Alt. Energy Serv. Corp.*, CLI-99-6, 49 NRC at 219.

[161] *Id.* (*quoting Baltimore Gas & Elec. Co.*, CLI-98-25, 48 NRC at 349).

[162] *See Fansteel, Inc.,* CLI-03-13, 58 NRC at 203.

10. Contention "D" - Impacts of CBM on Planned ISL Operations.

The Petitioner tenders the following as Contention D:

> 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 operations.[163]

Referencing several sections of Appendix B to the Application, which pertain to with the relationship between CBM coal seams and the uranium production seams,[164] the Petitioner argues that the "Applicant provides no scientific data to support its claim that the CBM … has no material impact on the ISL operations."[165] According to the Petitioner:

> [i]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.[166]

The Petitioner's contention must be rejected because the Petitioner has not satisfied any of the elements of 10 C.F.R. § 2.309(f)(1). Nowhere is it claimed in the Application, as the Petitioner states, that CBM has "no material impact" on ISL operations. Appendix B to the Application, cited by the Petitioner in connection with this contention, discusses and analyses the relationship between the CBM coal seams and the uranium production seams. The Petitioner does not indicate what scientific data is necessary beyond that already included in Appendix B. Nor does the Petitioner provide factual documentation or expert corroboration to demonstrate that the analysis in Appendix B is incorrect in any manner. The Petitioner also fails to cite to any support for its claim that CBM contamination could be transferred through the

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[163] Petition at 90.

[164] *Id.* at 91-94 (*citing* Application at B.3, B.6, B.7).

[165] *Id.* at 94.

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

various means identified by the Petitioner. Commission practice does not "permit 'notice pleading,'"[167] and, therefore, the Commission does not permit the "'filing of vague, unparticularized contention[s],' unsupported by affidavit, expert, or documentary support."[168] A petitioner may not rely on mere speculation nor bare assertions as support for the admission of a proffered contention.[169] Therefore, as the Petitioner has only provided baseless allegations and speculation, this contention should be rejected.

11. Contention "E" – Communication Among Aquifers.

The Petitioner tenders as Contention E the following:

> The Application incorrectly states that there is no communication among the aquifers, when in fact, 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.[170]

With regard to Contention E, the Petitioner references Section B.5, paragraph 3, of the Application, which pertains to the propagation of CBM drawdown to overlying layers.[171] The Petitioner argues that "[t]he aquifers do communicate, and therefore there is the potential for contamination of the domestic water supply by Applicant's activities."[172] The Petitioner also asserts that "[t]he Powder River Basin already has severe problems with adequate potable water to meet the needs of its residents, including human and wildlife. Continued and increased mining of these communicative aquifers poses a serious health and safety risk to the

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[167] *N. Alt. Energy Serv. Corp.*, CLI-99-6, 49 NRC at 219.

[168] *Id.* (*quoting Baltimore Gas & Elec. Co.*, CLI-98-25, 48 NRC at 349).

[169] *See Fansteel, Inc.,* CLI-03-13, 58 NRC at 203.

[170] Petition at 95.

[171] *Id.* (*citing* Application at Section B.5, ¶ 3).

[172] *Id.* at 97.

residents."[173]

The foregoing contention must be rejected because the Petitioner has not satisfied any of the elements of 10 C.F.R. § 2.309(f)(1). The portion of the Application the Petitioner references with regard to this contention deals with the relationship between CBM and ISL operations—it does not discuss the issue of connection between ISL and aquifers used for drinking water and other purposes. Further, no factual discussion or expert opinion is provided in support of Petitioner's purported argument. Commission practice does not "permit 'notice pleading,'"[174] and, therefore, the Commission does not permit the "'filing of vague, unparticularized contention[s],' unsupported by affidavit, expert, or documentary support."[175] A petitioner may not rely on mere speculation nor bare assertions as support for the admission of a proffered contention.[176] As all the Petitioner has proffered is unsupported assertions and speculation, this contention should be rejected.

12. Contention F – Arsenic Contamination.

The Petitioner asserts that:

> [t]he issue raised by this contention is that Arsenic [is] being released by the oxidizing of Uranium due to Applicant's injection of lixiviant and that such levels of Arsenic (even if within US drinking water standards) constitutes ongoing low-level exposure to Arsenic which causes failures in the pancreas to people drinking water affected into which the Arsenic flows. Such pancreatic failures result in diabetes and pancreatic cancer.[177]

The Petitioner posits that the "Applicant acknowledges that Arsenic is produced by the oxidation

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[173] *Id.* at 98.

[174] *N. Alt. Energy Serv. Corp.*, CLI-99-6, 49 NRC 201, at 219.

[175] *Id.* (*quoting Baltimore Gas & Elec. Co.*, CLI-98-25, 48 NRC at 349).

[176] *See Fansteel, Inc.*, CLI-03-13, 58 NRC at 203.

[177] Petition at 102; *see also id.* at 8, 10-11.

of uranium ore that is the substance of in-situ leach mining, but does not address its eventual disposition nor any procedures to ensure that Arsenic is contained in the aquifer or elsewhere in the waste stream."[178] According to the Petitioner, "[a]rsenic laden water may travel from the Mine location to the populated areas and wildlife habitats via the Willow Creek alluvium or underground faults and/or fractures, artesian pressures and impacts from Coal Bed Methane … and/or oil drilling operations in the area immediately adjacent to the permit area."[179]

In support of this contention, the Petitioner references an article in the Journal of the American Medical Association regarding the potential association between inorganic arsenic exposure and type 2 diabetes.[180] While the Study finds "a positive [statistical] association between total urine arsenic, likely reflecting inorganic exposure from drinking water and food, with the prevalence of type 2 diabetes in a population with low to moderate arsenic exposure,"[181] the Study, nonetheless, indicates that "[p]rospective studies in populations exposed to a range of inorganic arsenic levels are needed to establish *whether this association is causal*."[182] Thus, Petitioner's assertion that the Study finds a causal relationship between exposure to low level arsenic and type 2 diabetes is erroneous. A licensing board is "not to accept uncritically the assertion that … an expert opinion supplies the basis for a contention … the board should

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[178] *Id.* at 98-99.

[179] *Id.* at 99.

[180] *Id.* (*citing* "Arsenic Exposure and Prevalence of Type 2 Diabetes in US Adults," JAMA, Vol. 300, No. 7, 814 (Aug. 20, 2008)). As several of the authors of the study are affiliated with the Johns Hopkins Bloomberg School of Public Health, the Petitioner refesr, in shorthand, to the study as the "Johns Hopkins Study." *See id.* The Staff adopts the same shorthand for the purpose of its response herein.

[181] Johns Hopkins Study at 821.

[182] *Id.* at 814.

review the information provided to ensure that it does indeed supply a basis for the contention."[183] In this instance, the Petitioner's claims about the Johns Hopkins Study do not correspond with what the Study actually states.

Even if the Johns Hopkins Study were to stand for the conclusion of causality, the Petitioner makes no attempt to correlate the findings of the Study with the conditions present at the Pine Ridge Indian Reservation. The Petitioner does not offer any data to support the proposition that individuals in that area are exposed through drinking water to inorganic arsenic in such quantities to suggest similar total arsenic content in urine as found to have a positive association with type 2 diabetes in the Study. The Petitioner does not even specify the drinking water source for those unidentified persons it purports suffer from pancreatic cancer caused by exposure to arsenic. Without such necessary supporting data, the Petitioner's assertion that the findings of the Study are relevant to and explanatory of the alleged prevalence of diabetes at such locale amounts to nothing more than a bald and impermissible allegation.[184]

As the Johns Hopkins Study does not stand for the conclusion upon which the Petitioner relies in support of its contention and, in the alternative, the Petitioner does not proffer any data to link the supposed findings of the Study with the conditions present at the relevant locales, the Petitioner does not supply any support for its assertion regarding the causal connection between exposure to low level arsenic in drinking water and type 2 diabetes.[185]

While the Petitioner asserts that "exposures to Arsenic from the Applicant's mine are

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[183] *Private Fuel Storage*, LBP-98-7, 47 NRC at 181.

[184] *See Fansteel, Inc.*, 58 NRC at 204.

[185] *See* 10 C.F.R. §§ 2.309(f)(1)(ii), (v).

related to the high incidence of … pancreatic cancer and appear to be a causal and contributing factor to such disease[],"[186] the Petitioner does not provide any expert support for such purported causal relationship. The Petitioner cites to a study for the proposition that there is a link between diabetes and pancreatic cancer, and, as it appears, the Petitioner suggests by such link that diabetes causes or is a contributing factor to pancreatic cancer, but that is not at all the conclusion of the cited study.[187] Rather, the Study, in light of "increasing evidence to support the notion that diabetes *may be a consequence* of pancreatic cancer,"[188] attempts to evaluate through statistical analysis the "value of new-onset diabetes as a marker of underlying pancreatic cancer."[189] With the exception of the Pancreatic Cancer Study, the Petitioner provides no factual or export support for their proposition that there is a causal link between exposure to arsenic and the development of pancreatic cancer. Again, a licensing board is "not to accept uncritically the assertion that … an expert opinion supplies the basis for a contention … the Board should review the information provided to ensure that it does indeed supply a basis for the contention."[190]

In light of the foregoing, this contention should be rejected.

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[186] Petition at 103.

[187] *Id.* (*citing* "Probability of Pancreatic Cancer Following Diabetes: A Population-Based Study," Gastroenterology, Vol. 129, No. 2, 504 (August 2005)). Staff was unable to obtain the article as published in Gastroenterology (the journal of the Institute of the American Gastroenterology Association). Staff was, however, able to obtain the author manuscript thereof. *See* "Author Manuscript of Probability of Pancreatic Cancer Following Diabetes: A Population-Based Study," ("Pancreatic Cancer Study") http://www.pubmedcentral.nih.gov/articlerender.fcgi?tool=pubmed&pubmedid=16083707 (downloaded on May 5, 2009).

[188] Pancreatic Cancer Study at *2 (*emphasis added*).

[189] *Id.* at *1.

[190] *Private Fuel Storage*, LBP-98-7, 47 NRC at 181.

13. Contention "G" – Failure to Update Research and Make Required Disclosures.

The Petitioner asserts that 10 C.F.R. § 51.60(a) requires the Applicant to "update research and analysis and not merely incorporate the old 1996 data without verifying that there have been no changes in geologic interpretations or hydrologic circumstances."[191] The Petitioner indicates that it was unable to locate within ADAMS the 1996 data referenced in Sections 2.5, 2.6 and 2.7 of the Application.[192] According to the Petitioner,

> [t]he Application is lacking a complete description of local hydrogeology including groundwater flow direction and speed, confining layers, porosity, fractures, and fissures. The [A]pplication fails to discuss analysis of fracturing and faulting which may contribute to cross-contamination of underground aquifers. The Application needs to disclose how the integrity of the confining layer has been assessed.[193]

The Petitioner incorrectly contends that 10 C.F.R. § 51.60(a) prohibits the incorporation of past data. That section does not require the Applicant to document in the Application the process by which it verified that the data did not need to be updated or revised. Section 2.6 of the Application discusses geology and seismology; Section 2.7 discusses hydrology. The Petitioner fails to assert why the data relied upon in the Application regarding hydrogeology is incorrect or incomplete without being updated or revised. The Petitioner simply speculates that there are fractures and fissures without any support or corroboration of those claims.

While the Petitioner may have been unable to obtain1996 data referenced in Sections 2.5, 2.6 and 2.7 of the Application within public ADAMS, the Petitioner could have obtained such information from the NRC's Public Document Room. The publicly-available electronic version of ADAMS accessible through the NRC's website simply does not contain all of public documents

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[191] Petition 110.

[192] *Id.* at 111.

[193] *Id.*

within the NRC's possession. The Petitioner identifies no reason why it could not have obtained this information from the Public Document Room and, furthermore it asserts no requirement that the information be placed into public ADAMS.

As part of this contention, the Petitioner also offers a collection of issues otherwise raised in different contentions.[194] As these issues are raised in other contentions, the Staff does not address them as part of this contention.

The Petitioner argues that "[t]he Application does not contain a description of baseline (e.g. pre-mining) groundwater quality. In particular, baseline data for new mine fields should be disclosed in the application."[195] However, the Applicant provided estimates of baseline groundwater quality in the original licensing document for Christensen Ranch.[196] Furthermore, the Petitioner raises an issue (baseline data for new mine fields) that is not within the scope of these proceedings.[197] Insofar as the Contention questions the proper disclosure of baseline data for new mine fields, these issues are outside the permissible scope of this license renewal proceeding. The scope of the proceeding is defined by the Commission in its initial hearing notice and order referring the proceedings to the Licensing Board.[198] As stated in the Notice of Opportunity to Request a Hearing, this proceeding covers the license renewal application

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[194] *See* Petition at 116.

[195] *Id.* at 116.

[196] Application at Section 2-13 (referencing Appendix D6 of the January 5, 1988 Christensen Ranch license amendment application).

[197] *See* 10 C.F.R. § 2.309(f)(1)(iii).

[198] *Tennessee. Valley Auth*. (Watts Bar, Unit 1; Sequoyah, Units 1 and 2; Browns Ferry, Units 1, 2, and 3), CLI-04-24, 60 NRC 160, 204 (2004).

submitted on May 30, 2008.[199] The Application does not discuss new mine fields and as such, a discussion of baseline data for these "new mine fields" is outside the proper scope of this proceeding.

The Petitioner argues that the Application should contain an alternative analysis for groundwater restoration methods and, as part of such, a determination of best available technology.[200] However, the Petitioner presents no legal basis to support the assertion that such an analysis is required, nor can any support for that interpretation be found in the Petition.

The Petitioner contends that the "Application needs to disclose the effectiveness of evaporation ponds as a waste disposal method."[201] As to this claim, the Petitioner provides no legal basis, facts, or expert opinion to support its assertion or to demonstrate that a genuine dispute exists on a material issue of law or fact as required by 10 C.F.R. § 2.309(f)(1)(v)-(vi).

The Petitioner claims that the "Application lacks an analysis of whether the Pathfinder Mines Corporation Shirley Basin tailings facility will be available … for byproduct waste disposal."[202] The Petitioner does not explain why this analysis is required to be in the Application.

The Petitioner also argues that the "Application should disclose whether operating permit OP-254 for the dryer facility [needs to] be modified to comply with current air quality regulations…"[203] As to this issue, the Petitioner fails to identify any omission in the Application,

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[199] *See* Notice of Request to Renew Source Materials License SUA-1341, 74 Fed. Reg. at 6,436.

[200] Petition at 116.

[201] *Id.* at 117.

[202] *Id.*

[203] *Id.*

presents no material issue of fact, and offers no factual or expert support. Specifically, the Petitioner does not identify any legal support for the claim. Furthermore, the Petitioner fails to establish how modifications to operating permit OP-254, a permit issued by the State of Wyoming, relate to this license renewal proceeding.

A petitioner may not rely on mere speculation nor bare assertions as support for the admission of a proffered contention.[204] As all the Petitioner proffers is unsupported assertions and speculation, this contention should be rejected.

14. Contention "H" – Failure to Include Economic Value of Environmental Benefits of Willow Creek.

The Petitioner contends that the "cost and benefits discussion in the Application omits any discussion of the economic value [of] environmental benefits of the 18 watersheds associated with the Willow Creek." [205] To this end, the Petitioner cites to a University of Adelaide study that places an economic value on wetlands.[206] The Petitioner asserts that since watersheds have a recognized economic value based on the environmental benefits they provide, this economic value should have been considered in the Application.[207]

The Staff does not dispute that if an impact to the identified watersheds in the area were found, the Staff would conduct a value assessment of such as part of the Staff's NEPA analysis. However, this contention should not be admitted since the Petitioner does not allege any impacts to the watersheds that would degrade their quality by COGEMA's continued operation. Therefore, this contention fails the factual basis requirement of 10 C.F.R. §

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[204] *See Fansteel, Inc.*, CLI-03-13, 58 NRC at 203.

[205] *Id.* at 117.

[206] *Id.*

[207] *Id.* at 118.

2.309(f)(1)(ii) and should be rejected.

15. Contention "I" – Surety Bond.

The Petitioner argues that Applicant's calculation of the bond "fails to consider post-restoration, post-decomissioning monitoring, or related ecological monitoring."[208] According to the Petitioner,

> COGEMA underestimates the length of operations, including restoration and reclamation activities. This allows them to underestimate the financial assurance calculation and also allows them to underestimate environmental impacts, including the length of time of surface disturbance and groundwater consumption during restoration. The Application needs to be amended to fully reflect past experiences with restoration, which will allow COGEMA to more accurately predict future activity.[209]

The Petitioner fails to demonstrate why the Applicant would be required to allocate for post-restoration, post-decommissioning monitoring. The Petitioner also fails to proffer any factual or expert support for its claim that the Applicant would underestimate the cost of restoration and environmental cleanup. Because the Petitioner fails to do these things, the contention should be rejected.

16. Contention "J"– Water Consumption.

With respect to this contention, the Petitioner alleges the following,

> 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.[210]

The foregoing contention must be rejected because the Petitioner has not satisfied any of the elements of 10 C.F.R. § 2.309(f)(1). The Petitioner fails to allege with specificity the issues it

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[208] Petition at 120.

[209] *Id.*

[210] *Id.* at 120-21; *see also id.* at 10-11 ("Petitioner[] make[s] technical contention that the Mine facilty intends to consume billions of gallons of fresh water over its 10-year license…").

intends to raise with this contention, citing only baseless speculations. Correspondingly, the Petitioner offers no basis for its contention. The Petitioner provides no information to assess whether the contention is within the scope of this proceeding or relates to a material finding the NRC must make. The Petitioner gives no factual argument or expert opinion as to the amount of water it alleges the Applicant actually consumes as part of operations or as to the alleged contamination of the re-injected water. Also, the Petitioner does not offer sufficient information to assess whether it has a genuine dispute with the Applicant as to the issues raised by this contention. Commission practice does not "permit 'notice pleading,'"[211] and, therefore, the Commission does not permit the "'filing of vague, unparticularized contention[s],' unsupported by affidavit, expert, or documentary support."[212] A petitioner may not rely on mere speculation nor bare assertions as support for the admission of a proffered contention.[213] Given that all Petitioner has provided is baseless allegations and speculation, this contention should be rejected.

17. Contention "K" – Wildlife Impacts.

The Petitioner avers that "COGEMA's operations will negatively impact wildlife populations which are of major importance to the Oglala Delegation, other local residents, and visitors to the area."[214] According to the Petitioner, the "[m]ining activities, including fencing, surface disturbing activities, use of overhead power lines, noise and access roads, will

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[211] *N. Alt. Energy Serv. Corp.*, CLI-99-6, 49 NRC at 219.

[212] *Id.* (*quoting Baltimore Gas & Elec. Co.*, CLI-98-25, 48 NRC at 349).

[213] *See Fansteel, Inc.,* CLI-03-13, 58 NRC at 203.

[214] Petition at 121.

negatively impact wildlife species including the greater sage-grouse."[215] The Petitioner also argues that "COGEMA fails to disclose and analyze impacts to wildlife and livestock habitat that will occur during mining operations and after surface reclamation" and, further, that "COGEMA does not discuss the loss of brush density or other irreversible impacts of mining operations."[216] The Petitioner also argues that wildlife is affected by the bioaccumulation of radioactive materials from the surrounding environment.[217] In support of this claim, the Petitioner references the NIRS Article.[218]

The foregoing contention must be rejected because the Petitioner has not satisfied any of the elements of 10 C.F.R. § 2.309(f)(1). Simply alleging that wildlife is adversely affected by the mine's operations is not sufficiently particularized to raise a specific issue of fact to be litigated in this proceeding. While the Petitioner suggests that some aspects of the mine's operations will negatively affect the wildlife, the Petitioner does not proffer any factual discussion or expert opinion in support of its allegations. The NIRS Article only generally addresses the concept of bioaccumulation and, therefore, cannot act as sufficient factual support for the Petitioner's claim that wildlife in the locale is affected by bioaccumulation of radioactive contaminants. The Petitioner fails to provide any information to evaluate whether it has raised a genuine dispute with the Applicant. Commission practice does not "permit 'notice pleading,'"[219] and, therefore, the Commission does not permit the "'filing of vague,

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[215] *Id.*

[216] *Id.* at 122.

[217] *See id.* at 8-9.

[218] *Id.* at 8. The NIRS Article is described *supra* in section I.B.1.

[219] *N. Alt. Energy Serv. Corp.*, CLI-99-6, 49 NRC at 219.

unparticularized contention[s],' unsupported by affidavit, expert, or documentary support."[220] A petitioner may not rely on mere speculation nor bare assertions as support for the admission of a proffered contention.[221] Since this contention is based only on speculations and conclusory assertions, this contention should be rejected.

18. Contention "L" – Air Contamination.

The Petitioner contends that "COGEMA's operations will release radioactive materials into the air. Radon gas will be released directly into the atmosphere from lixiviant makeup tanks … ion exchange facilities … evaporation ponds, and other facilities."[222] According to the Petitioner:

> While the Application discusses past air quality monitoring activities, 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. The Application should include a map of air quality monitoring stations that will be active for this project. Additionally, the stations at Irigaray monitor both radon and particulate matter whereas the Christensen stations only monitor radon … The Application should detail an appropriate monitoring plan for particulate matter at the Christensen project.[223]

The foregoing contention must be rejected because the Petitioner has not satisfied any of the elements of 10 C.F.R. § 2.309(f)(1). The Petitioner fails to allege with specificity the issues it intends to raise with this contention, citing only baseless speculations. Correspondingly, Petitioner offers no basis for its contention. Petitioner gives no factual argument or expert opinion regarding its allegations. The Petitioner does not explain why, given the processes located at the Christensen stations, there needs to be particulate matter

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[220] *Id.* (*quoting Baltimore Gas & Elec. Co.*, CLI-98-25, 48 NRC at 349).

[221] *See Fansteel, Inc.,* CLI-03-13, 58 NRC at 203.

[222] Petition at 124.

[223] *Id.*

monitoring. The Petitioner does not offer sufficient information to assess whether it has a genuine dispute with the Applicant as to the issues raised by this contention. Commission practice does not "permit 'notice pleading,'"[224] and, therefore, the Commission does not permit the "'filing of vague, unparticularized contention[s],' unsupported by affidavit, expert, or documentary support."[225] A petitioner may not rely on mere speculation nor bare assertions as support for the admission of a proffered contention.[226] Given that all Petitioner has provided is baseless allegations and speculation, this contention should be rejected.

19. Miscellaneous Contention – Insufficiency of Resources / Compliance.

The Petitioner "makes miscellaneous contention that the safety procedures imposed upon Applicant by the [NRC], and Applicant's efforts at compliance with said procedures, are insufficient to adequately protect the land and water resources in the region, as evidenced by the current state of degradation."[227] The Petitioner also states that "[t]he Oglala Lakota Delegation of the Great Sioux Nation Treaty Council … disputes the sufficiency of the resource protections afforded by the United States and its sub-agencies, specifically the Nuclear Regulatory Commission."[228]

The foregoing miscellaneous contention must be rejected because the Petitioner has not satisfied any of the elements of 10 C.F.R. § 2.309(f)(1). The Petitioner fails to allege with specificity the issues it intends to raise with this contention: it makes no reference to the specific

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[224] *N. Alt. Energy Serv. Corp.*, CLI-99-6, 49 NRC at 219.

[225] *Id.* (*quoting Baltimore Gas & Elec. Co.*, CLI-98-25, 48 NRC at 349).

[226] *See Fansteel, Inc.,* CLI-03-13, 58 NRC at 203

[227] Petition at 10.

[228] *Id.*

safety procedures upon with which it directs its challenge, nor does it state what is meant by the "current state of degradation." The Petitioner offers no explanation or basis for its contention. Petitioner provides no information to assess whether the contention is within the scope of this proceeding or relates to a material finding the NRC must make. To the extent that the Petitioner is challenging the adequacy of NRC's safety regulations, such challenge in this proceeding is impermissible.[229] Citing to no portion of the Application, Petitioner does not demonstrate that it has a genuine dispute with the Applicant as to the issue raised by this contention. Commission practice does not "permit 'notice pleading,'"[230] and, therefore, the Commission does not permit the "'filing of vague, unparticularized contention[s],' unsupported by affidavit, expert, or documentary support."[231] A petitioner may not rely on mere speculation nor bare assertions as support for the admission of a proffered contention.[232] As all the Petitioner offers is speculation, this contention should be rejected.

CONCLUSION

For the reasons set forth above, Staff submits that the Petition should be denied for failing to comply with the standing requirements set forth in 10 C.F.R. § 2.309(d) and failing to satisfy the contention admissibility requirements set forth in 10 C.F.R. § 2.309(f)(1). Additionally, the Staff respectfully submits that the Petitioner's request for additional time to comply with 10 C.F.R. § 2.309(d)(1) should be denied.

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[229] *See* 10 C.F.R. § 2.335(a); *see also Private Fuel Storage*, LBP-98-7, 47 NRC at 180.

[230] *N. Alt. Energy Serv. Corp.*, CLI-99-6, 49 NRC at 219.

[231] *Id.* (*quoting Baltimore Gas & Elec. Co.*, CLI-98-25, 48 NRC at 349).

[232] *See Fansteel, Inc.,* CLI-03-13, 58 NRC at 203.

Respectfully submitted,

Executed in Accord with 10 CFR 2.304(d)

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Dated at Rockville, Maryland
This 5th day of May, 2009

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of	)	
	)	
COGEMA MINING, INC.	)	Docket No. 40-8502-MLA
	)	
(Christensen & Irigaray Ranch Facilities)	)	
	)	

NOTICE OF APPEARANCE

Notice is hereby given that the undersigned attorney enters an appearance in the above-captioned matter. In accordance with 10 C.F.R. § 2.314(b), the following information is provided:

Name:	Brett Michael Patrick Klukan
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Name of Party:	NRC Staff

Executed in Accord with 10 CFR 2.304(d)
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	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "NRC STAFF'S RESPONSE TO REQUEST FOR HEARING AND PETITION TO INTERVENE OF THE OGLALA DELEGATION OF THE GREAT SIOUX NATION TREATY COUNCIL" and Notice of Appearance for Brett Michael Patrick Klukan in the above captioned proceeding have been served via the Electronic Information Exchange ("EIE") this 5th day of May 2009, which to the best of my knowledge resulted in transmittal of the foregoing to those on the EIE Service List for the above captioned proceeding.

Executed in Accord with 10 CFR 2.304(d)

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