UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Oglala Sioux Tribe and Western Nebraska Resources Council, et al., Petitioners,	)	
v.	)	No. 09-2262 and 09-2285 (Consolidated)
U.S. Nuclear Regulatory Commission and the United States of America, Respondents.	)	

CONSOLIDATED PETITIONERS' OPPOSITION TO FEDERAL RESPONDENTS' MOTION TO DISMISS

Pursuant to FRAP 27 and the Clerk's Order dated July 6, 2009, Consolidated Petitioners[1] hereby file this response opposing Federal Respondents' Motion to Dismiss dated June 25, 2009.

BACKGROUND

Applicant/Intervenor Crow Butte Resources, Inc. is a wholly-owned subsidiary of a Canadian company named "Cameco, Inc." which purports to be the largest Uranium company in the World. There is no dispute that Applicant is 100% foreign owned, controlled and dominated.[2]

[1] Joe American Horse Sr., Beatrice Long Visitor Holy Dance, Loretta Afraid of Bear Cook, Thomas Kanatakeniate Cook, Owe Aku - Bring Back the Way, The Afraid of Bear/Cook Tiwahe, The American Horse Tiospaye, Western Nebraska Resources Council and Debra White Plume are collectively referred to herein as, "Consolidated Petitioners" and individually referred to herein as a "Petitioner." The "Indigenous Petitioners" are all the Consolidated Petitioners except Western Nebraska Resources Council. The "Oglala Petitioners" are all the Indigenous Petitioners except for Thomas Kanatakeniate Cook.

[2] Cameco acquired 32% of Crow Butte in 1995 or 1996 by purchasing Geomex, and Cameco acquired another 58% of Crow Butte in 1998 by purchasing Uranerz. After Cameco had acquired a 90% controlling interest in Applicant, it reported it to the NRC. Upon information and belief, in

Crow Butte submitted an application for a 10-year renewal of Source Materials License SUA-1534, which licenses *in situ leach* mining of uranium from the Chadron aquifer in Crawford, Nebraska. Consolidated Petitioners and the Oglala Sioux Tribe (the "Tribe") submitted timely petitions to intervene and requests for hearing. The NRC's Atomic Safety and Licensing Board found that the Tribe and the Consolidated Petitioners had demonstrated standing and admitted certain contentions.[3] Because of its timely filing of an application to renew its license, Crow Butte continues to operate the Crawford uranium mine under an automatic extension of the 1998 license.

On May 18, 2009, the Nuclear Regulatory Commission (the "Commission")[4] issued CLI-09-09 which, among other things, overruled the Board's decision to admit Consolidated Petitioners' Environmental Contention E (failure to consider economic value of wetlands), Miscellaneous Contention K (lack of authority of the Commission to issue a source materials license to a foreign owned company), and Safety Contention A (concerning Arsenic contamination from the Uranium mine and related human health impacts such as diabetes and pancreatic cancer) and ordered the Board to dismiss Miscellaneous Contention G (failure to disclose foreign ownership in the Application) as moot due to Applicant's amendment to its Application to disclose foreign ownership.

The four political appointees comprising the Commission found a way to dismiss the foreign ownership contentions and overrule the well-reasoned and supported decision

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2000, Cameco purchased the remaining 10% of the Crow Butte mine from KEPCO, the South Korean state-owned utility.

[3] See LBP-08-24, ___ NRC ___ (Nov. 21, 2008).

[4] Acting by four members due to one vacancy at the Commission.

of the Licensing Board without making any citations to any cases.[5] This is despite the fact that there is at least one case from the Court of Appeals for the Second Circuit finding that "**the internal evidence of the [Atomic Energy] Act is that Congress was thinking of keeping such materials [including Uranium] in private hands secure against loss or diversion; and of denying such materials and classified information to persons whose loyalties were not to the United States.**" Siegel v. Atomic Energy Commission, 400 F.2d 778, 784 (DC Cir. 1968) (Emphasis added). It was clearly arbitrary and capricious and an abuse of discretion for the Commission in CLI-09-09 to contravene the intentions of Congress, and ignore relevant federal caselaw, as well as valid concerns raised by the Consolidated Petitioners related to inimicality and lack of authority to issue licenses to foreign owned companies.

The September 11, 2001 attacks demonstrated the extent of US vulnerability to the terrorist threat. The proliferation of nuclear weapons starts with Uranium mining.[6] Applicant is licensed by Source Materials License SUA-1534 to mine up to 1,000,000 pounds per year of U308 Yellowcake Uranium from the Crawford, NE mine. Petitioners have not suggested that Applicant is one of such bad actors or that Applicant itself is involved in an illicit procurement network. Rather, Petitioners have argued that the "Cameco Loophole", whereby foreign ownership is not required to be disclosed and is not mitigated by any negation plan in the issuance of the source materials license leads to the undisclosed and unmitigated foreign control and domination of Yellowcake mined

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[5] CLI-09-09 at 38 ("As for Consolidated Petitioners' Miscellaneous Contention K, there is no statutory or regulatory bar on a foreign ownership or control of a source materials license, whether as a licensee or as a parent entity.")

[6] Building a Corporate Nonproliferation Ethic, D. Albright and P. Gray (June 1993), at http://isis-online.org/publications/expcontrol/isisrpt693.html, Paths to the Bomb diagram at http://isis-online.org/publications/expcontrol/oldpaths.jpg.

inside the US and is ripe for abuse by such bad actors. Concealment of the foreign ownership (Petitioners Miscellaneous Contention G; LBP-08-24 at 62-68) evidences a corporate culture of resistance to making full disclosures or to conducting a complete analysis of materiality in order to enable disclosures of all material facts. Such conduct is not consistent with corporate responsibility to support international non-proliferation efforts and the agency that permits such conduct as part of its official policy has exceeded the Congressional mandate to protect the common defense and security and the health and safety of the public. Such conduct is contrary to the national interest and is inimical to the common defense and security and to the health and safety of the public. By ordering that Miscellaneous Contention G is moot, the Commission has created a final, unreviewable order. By unequivocally finding that foreign ownership is not barred, the Commission has created a final, and effectively unreviewable order that has widespread impacts in other proceedings.

Nuclear Security is defined by the International Atomic Energy Agency ("IAEA") as "the prevention and detection of, and response to, theft, sabotage, unauthorized access, illegal transfer or other malicious acts involving nuclear material, other radioactive substances or their associated facilities."[7] The 2008 WMD Commission Report notes that there are several areas where the United States can improve its nonproliferation efforts specifically including strict compliance with the terms of the Atomic Energy Act.[8] A full and complete analysis of the nuclear security risks requires strict compliance with

[7] Anita Nilsson, IAEA Office of Nuclear Security, Combating Illicit Nuclear Trafficking: Global Perspective (February 14-18, 2008) at 9, at http://cstsp.aaas.org/files/nilsson.pdf.

[8] See WMD Commission Report at 92 discussing failure of nonproliferation assessments that are required under the AEA; failure to hold hearings regarding Turkey or Saudi Arabia; failure to properly review the nuclear cooperation agreements between Russia or India.

the "disclosure of citizenship" requirements of AEA Section 182 and disclosure of "ultimate parent" and control information as well as a complete analysis of the implications of foreign ownership, control and influence ("FOCI")[9] on the common defense and security and on the health and safety of the public. As a matter of pure legal analysis, however, there is absolutely no distinction between the ability to use the Cameco Loophole by legitimate Canadian business people and the same ability to use the Cameco Loophole by enemies of the United States to perpetrate horrible wrongdoing. Under the Cameco Loophole, such enemies would have legal grounds to acquire US based uranium and nuclear assets through a complex of subsidiary companies that conceal the true beneficial owners and control persons until it is too late. These technical legal grounds could enable the creation and use of weapons of mass destruction or of mass disruption by enemies of the United States because Americans, including state and federal regulators, would be unwittingly assisting such enemies.

APPEALABILITY

There is no dispute that the Hobbs Act gives this Court jurisdiction over "final" orders in "any proceeding under [the Atomic Energy Act] for the granting, suspending, revoking, or amending ... of any license[,]" such as the present administrative

[9] See, e.g., 1993-June-06 DOE Order 5634.3 re Foreign Control (ML081570141) - Department of Energy implementation of a Foreign Ownership, Control, or Influence (FOCI) program designed to obtain information that indicates whether DOE offerors/bidders or contractors/subcontractors are owned, controlled, or influenced by foreign individuals, governments, or organizations, and whether that foreign involvement poses an undue risk to the common defense and security. DOE Order 5634.3 at ¶1. The DOE requires that if the "ultimate parent" and any intervening levels of ownership, of the entity is controlled by another organization, to submit complete, current, and accurate information, certification and explanatory documentation which define the extent and nature of any relevant FOCI over the offeror/bidder and tier parents for use by DOE in determining the risk presented by that FOCI. DOE Order 5634.3 at ¶5. Another example of a common "ultimate parent" analysis can be found in the antitrust rules for pre-merger notifications under 15 USC §18a, which is part of the Hart-Scott-Rodino Antitrust Improvements Act of 1976.

proceeding.[10] There is, however, a dispute as to whether there is 'finality' to certain of the Commission's actions in CLI-09-09, particularly its decisions concerning the failure to disclose foreign ownership (Miscellaneous Contention G), and lack of the authority of the Commission to issue a source materials license to a foreign owned company under the relevant provisions of the Atomic Energy Act of 1946 and the Atomic Energy Act of 1954 (Miscellaneous Contention K).[11]

When there are disputes as to the finality of a decision to determine the jurisdiction of the appellate court, this Court is guided by the rulings of the United States Supreme Court in Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949), and progeny, concerning the 'collateral order' exception and also Gillespie v. United States Steel Corp., 379 US 148 (1964) and progeny, concerning the situations involving the 'twilight zone of finality'. In both lines of cases, the United States Supreme Court has held that the "requirement of finality is to be given a 'practical rather than a technical construction.' Gillespie at 150. This Court has applied these cases as well as Coopers & Lybrand v. Livesay, 437 U.S. 463 (1978), regarding the collateral order exception. See Farmland Industries Inc. v. Frazier-Parrott Commodities Inc., 806 F.2d 848 (8th Cir. 1986) ("to come within the 'small class' of decisions excepted from the final judgment rule by Cohen, the order must conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment."), citing Coopers & Lybrand at 468. The Commission's

[10] See Federal Respondents' Motion to Dismiss at 6; Intervenor Response at 4.
[11] CLI-09-09 at 34-39.

rulings concerning foreign ownership conclusively determine the issue, which is completely separate from the merits of the licensing action and which is effectively unreviewable on appeal from the final renewal or non-renewal of Source Materials License SUA-1534.

This Court has long "recognized that whether a ruling is "final" ...is frequently so close a question that decision of that issue either way can be supported with equally forceful arguments, and that it is impossible to devise a formula to resolve all marginal cases coming within what might well be called the "twilight zone" of finality. Because of this difficulty this Court has held that the requirement of finality is to be given a "practical rather than a technical construction." ... [T]he most important competing considerations are "the inconvenience and costs of piecemeal review on the one hand and the danger of denying justice by delay on the other." Barnes v. Bosley, 790 F.2d 718 (8th Cir. 1986), citing Gillespie v. United States Steel Corp., 379 U.S. 148, 152-53 (1964) (citations omitted). The Collateral Order Doctrine recognizes that a limited class of prejudgment orders is sufficiently important and sufficiently separate from the underlying dispute that immediate appeal should be available. J.B. Stringfellow, Jr. v. Concerned Neighbors in Action, 480 U.S. 370 (1987), citing Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 546 (1949). There would be no additional inconvenience or cost associated with taking the foreign ownership issues up on appeal at this time whereas there is a danger of denying justice by the delay because foreign ownership of licensees is ongoing.

The Consolidated Petitioners cited many problems with foreign ownership of

source material licensees including lack of jurisdiction over foreign decisionmakers, lack of jurisdiction over records located outside of the United States, and lack of authority to issue source materials licenses to entities wholly owned, dominated and controlled by foreign interests. The national security and nuclear security implications clearly show that the foreign ownership issues are important 'completely separate from the merits of the action." The foreign ownership ruling in CLI-09-09 has been cited in at least one other source materials licensing proceeding as being '*stare decisis*'.[12] These factors support a finding in favor of jurisdiction under the collateral order doctrine and/or the twilight zone of finality doctrine.

RESPONDING TO THE CASES CITED BY THE US AND APPLICANT

None of the cases cited by the Federal Respondents or by Applicant require that this Court grant the Motion to Dismiss. In contrast, the trust responsibility and the Canons of Interpretation do require that any ambiguities or 'close calls' be resolved in favor of the Tribe and the Indigenous Petitioners.[13] Further, because the issues associated with foreign ownership of uranium source materials licenses and the concealment (and/or requirement to make disclosure) thereof implicate national security and the health and safety of the public under the Atomic Energy Act of 1946 and the Atomic Energy Act of

[12] See In re Cogema Renewal, NRC Docket No. 040-08502; ASLBP No. 09-887-01-MLR-BD01; Hearing Transcript at page 43, lines 10-12, ML 091680287 at http://www.nrc.gov/reading-rm/adams/web-based.html.

[13] The US Supreme Court has emphasized 'the distinctive obligation of trust incumbent upon the US Government in its dealings with these dependent and sometimes exploited people.'" US v. Mitchell, 463 U.S. 206, 225 (1983) citing Seminole Nation v. United States, 316 U.S. 286, 296 (1942). This principle has long dominated the US Government's dealings with Indians. Id. citing, *inter alia*, United States v. Mason, 412 U.S. 391, 398 (1973); Minnesota v. United States, 305 U.S. 382, 386 (1939); United States v. Shoshone Tribe, 304 U.S. 111, 117-118 (1938); United States v. Candelaria, 271 U.S. 432, 442 (1926); McKay v. Kalyton, 204 U.S. 458, 469 (1907); Minnesota v. Hitchcock, 185 U.S. 373, 396 (1902).

1954, this case fits within the "'small class of decisions' excepted from the final judgment rule by Cohen." See, e.g., Farmland Industries Inc. v. Frazier-Parrott Commodities, Inc., 806 F.2d 848 (8th Cir. 1986).

In City of Benton v. NRC, 136 F.3d 824 (D.C. Cir. 1998), the action in question was an informal letter issued by the Director of the Office of Nuclear Reactor Regulation that there were no significant changes warranting an antitrust review. As such, the case is highly distinguishable from the instant case which involves a lengthy order by the Commission itself definitively disposing of the foreign ownership issues in a manner that may give rise to *stare decisis* as has been argued in other NRC proceedings. In Dickinson v. Zech, 846 F.2d 369 (6th Cir. 1988), the action involved a denial by an NRC Office Director of a request for emergency relief where "the letter issued by the NRC [did] not fix any legal relationship or permanently deny any rights." Id. at 372. In contrast, this case involves the Commission's order permanently foreclosing a hearing on the issues related to foreign ownership, concealment thereof and lack of authority to issue source materials licenses to foreign entities. In Ohio Citizens for Responsible Energy v. NRC, 803 F.2d 258 (6th Cir. 1986), the action was by the Commission to vacate a Licensing Board's order issued after the occurrence of an earthquake setting an exploratory hearing concerning whether to reopen a nuclear power plant hearing on the issue of seismic design. Id. at 259-260. The Court of Appeals for the Sixth Circuit discussed the ruling in Thermal Ecology Must be Preserved v. Atomic Energy Commission, 433 F.2d 524 (D.C. Cir. 1970), and noted that interlocutory review may be appropriate under certain circumstances and the exception 'should be limited to cases where the [interlocutory] ruling is so flagrantly wrong and demonstrably critical as to

make it apparent that the agency is not merely courting the possibility of reversal but is running into the certainty of it." Id. at 260. Consolidated Petitioners submit that such is the case here. In Natural Resources Defense Council v. NRC, 680 F.2d 810, 815 (D.C. Cir. 1982), the action involved a procedural ruling by the Commission concerning a 'military functions' rule being promulgated by the Commission. The instant case is highly distinguishable because there is no rulemaking in this case and the Commission's rulings in CLI-09-09 were substantive.

Contrary to the assertion of the Federal Respondents, Thermal Ecology is not directly on point. In Thermal Ecology, the action involved procedural and evidentiary rulings by the Commission. The Court in Thermal Ecology stated "[a]n agency's procedural or evidentiary rulings in the course of a proceeding do not constitute a final order justifying judicial review except in extreme circumstances where the action is held to constitute an effective deprivation of appellant's rights." Id. at 526. Nothing in Thermal Ecology requires this Court to treat the Commission's foreign ownership rulings as being merely procedural. The other cases cited by Federal Respondents similarly do not support granting the Motion to Dismiss: Community Broadcasting of Boston, Inc. v. FCC, 546 F.2d 1022, 1024 (D.C. Cir. 1976) (involving FCC denial of petition to disqualify law firm); Environmental Law and Policy Center v. NRC, 470 F.3d 676, 681 (7th Cir. 2006) (in allowing the appeal, the Court found in favor of the Environmental Groups, "this Court has noted that, in determining the finality of an order, the relevant considerations include "whether the process of administrative decisionmaking has reached a stage where judicial review will not disrupt the orderly process of adjudication

and whether rights or obligations have been determined or legal consequences will flow from the agency action.") Catlin v. United States, 324 U.S. 229 (1945) is a condemnation case pre-dating the Atomic Energy Act and bearing no resemblance to the present case; and Cunningham v. Hamilton County, Ohio, 527 U.S. 198 (1999) involved an order imposing sanctions on an attorney and finding that such an order was not covered by the collateral order doctrine.

None of the cases from this Circuit cited by Federal Respondents require that the Motion to Dismiss be granted. Dieser v. Continental Casualty Co., 440 F.3d 920, 923 (8th Cir. 2006) involved an order partially granting summary judgment of an action under ERISA; and Borntrager v. Cent. States, Southeast & Southwest Areas Pension Fund, 425 F.3d 1087, 1091 (8th Cir. 2005) involved an ERISA action and contains a general reference to the collateral order doctrine which was found not to be applicable in the case of an order remanding to an ERISA plan administrator even though the district court clerk had entered judgment. In Miller v. Special Weapons, L.L.C., 369 F.3d 1033, 1034 (8th Cir. 2004), the case involved an order granting summary judgment on plaintiffs claims but not on defendant's counterclaim which was still pending ("the final judgment rule is designed to insure that the scarce resources of litigants and the courts are not wasted in interlocutory appeals that impede the flow of litigation making it difficult and expensive to reach final resolution of issues.") Parke v. First Reliance Standard Life Ins. Co., 368 F.3d 999, 1002 n.2 (8th Cir. 2004), is an ERISA case involving a district court order awarding attorneys' fees and reserving its determination of the amount. Lee v. LB Sales, Inc., 177 F.3d 714, 717-18 (8th Cir. 1999), involved a district court order awarding sanctions against attorneys but reserving the determination of the amount of the sanction;

and Auto Services Company, Inc. v. KPMG, LLP, 537 F.3d 853, 856 (8th Cir. 2008), involved the question of what is a final judgment for purposes of determining whether a motion for reconsideration was timely filed under FRCP 59(e).

None of the cases cited by Intervenor Crow Butte require the Motion to Dismiss be granted: West v. Bergland, 611 F.2d 710, 715 (8th Cir. 1979), is an exhaustion of administrative remedies case involving an administrative complaint brought against an individual who had been convicted of mis-branding meat and causing gifts to be made to a federal meat grader. After discussing whether administrative remedies should have been exhausted, the court found that where, as here, the issue requires "no application of special agency competence and, while not manifestly compelling on its merits, is not frivolous. It presents a question of first impression and is not easily rejected. We doubt, then, that early review of questions of this sort will induce litigious interruption of the agency's enforcement program." Id., citing Abbott Laboratories v. Gardner, 387 U.S. 136, 154-55 (1967). The court further noted that where, as here, an agency is acting *Ultra Vires* because it has transgressed clearly marked boundaries to their jurisdiction, early judicial review is justified. Id., citing Oestereich v. Selective Service System, 393 U.S. 233 (1968) and Leedom v. Kyne, 358 U.S. 184, 79 S.Ct. 180, 3 L.Ed.2d 210 (1958). Those cases, like this case, involved "an attempted exercise of power that had been specifically withheld depriving persons of a 'right assured to them by Congress." West at 715. This is similar to the rights of the Consolidated Petitioners assured to them by Congress in the 1946 Act and the 1954 Act to not have radioactive source materials licenses in the hands of persons having no loyalty to the United States.

Federal Trade Comm'n. v. Standard Oil Co. of California, 449 U.S. 232, 242 (1980), supports Consolidated Petitioners. The Supreme Court found that the FTC's issuance of a complaint against certain major oil companies was found to be an "agency action" but not to be a "final" agency action. The Supreme Court noted that "the cases dealing with judicial review of administrative actions have interpreted the 'finality' element in a pragmatic way." Id. at 239. The Court referred to Abbott Laboratories v. Gardner, 387 U.S. 136, 149 (1967), which found a 'final agency action' where the Commissioner of Food and Drugs had published regulations which were "definitive statements of the Commission's position and had a direct and immediate effect on the day-to-day business of the complaining parties. They had 'the status of law' and 'immediate compliance with their terms was expected." Id. at 239-240. The Court then distinguished the FTC's complaint as being not "definitive" in a manner comparable to Abbott Laboratories because the respondent was going to have opportunities to challenge the complaint and its charges. Id. at 241. In this case, the NRC's findings on foreign ownership are "definitive" in a manner comparable to Abbott Laboratories and do have a direct and immediate effect on the day-to-day business of foreign owned uranium miners and people living near the mines in the United States controlled by the foreign owners. Unlike Socal, Consolidated Petitioners are not going to have further opportunities to effectively challenge the foreign ownership rulings. In Stringfellow v. Concerned Neighbors in Action, 480 U.S. 370, 377-378 (1987), the order involved was a denial of intervention as a matter of right and grant of permissive intervention. The Supreme Court found that the collateral order doctrine covers a "limited class of prejudgment orders ... sufficiently

important and sufficiently separate from the underlying dispute that immediate appeal should be available," citing Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 546 (1949). Because the Court found that the party, as a permissive intervenor, could obtain effective review of its claims on appeal from the final judgment, it declined to apply the collateral order exception in that case. Id. at 377. In our case, the foreign ownership issue has been completely eliminated from the licensing proceeding and may have been eliminated from all similar licensing proceedings and, accordingly, there is no effective review forthcoming when the licensing proceeding concludes. In fact, in this case, the hearing set for oral argument on the foreign ownership issues was cancelled due to CLI-09-09.

APPLICABLE LAW: THE ATOMIC ENERGY ACTS OF 1946 AND 1954

The United States Supreme Court has stated that a regulation "is not a reasonable statutory interpretation unless it harmonizes with the statute's 'origin and purpose.'" US v Vogel Fertilizer Co., 455 US 16, 26 (1982). Further, this Court "must give effect to the unambiguously expressed intent of Congress."[14] Congress has unambiguously expressed its intent that atomic energy and source material be regulated in the US national interest, to assure the common defense and security and to protect the health and safety of the

[14] See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-44 (1984) ("Chevron"). Under the Chevron analysis, judicial review of an agency's interpretation of a statute under its administration is limited to a two-step inquiry. At the first step, we inquire into "whether Congress has directly spoken to the precise question at issue." Id. at 842. If we can come to the "unmistakable conclusion that Congress had an intention on the precise question at issue," State of Ohio v. United States Dep't of Interior, 880 F.2d 432, 441 (D.C.Cir.1989), our inquiry ends there; this Court naturally "must give effect to the unambiguously expressed intent of Congress." Chevron, 467 U.S. at 843. The NRC's actions must be reviewed under the *Chevron* rubric. Nuclear Information Resource Serv. V. NRC, 969 F.2d 1169, 1173 (DC Cir. 1992).

public.[15] Federal courts have recognized that Congress' intent was to deny source materials and classified information to persons whose loyalties were not to the United States. Siegel v. Atomic Energy Comm'n, 400 F.2d 778, 784 (D.C. Cir. 1968) ("the internal evidence of the Act is that Congress was thinking of keeping such materials in private hands secure against loss or diversion; and of denying such materials and classified information to persons whose loyalties were not to the United States.").[16]

Therefore, Chevron requires the implementation by this Court of Congressional intentions concerning foreign ownership, control and/or domination over source materials licenses. The Atomic Energy Act of 1954 (the "AEA" or the "1954 Act") expressly provides that:

> "the Congress of the United States hereby makes the following findings concerning the development, use and control of atomic energy:....[t]he development, utilization, and control of atomic energy for military and for all other purposes are vital to the common defense and security, [t]he processing and utilization of source material must be regulated in the national interest and in order to provide for the common defense and security and to protect the health and safety of the public, and [s]ource ...material ...are affected with the public interest, and regulation by the United States of the production and utilization of atomic energy and of the facilities used in connection therewith is necessary in the national interest to assure the common defense and security and to protect the health and safety of the public. AEA Section 2012(a), (c)(d)(e); 42 USC §2012.

Further evidence of Congressional intent is found in the Atomic Energy Act of 1946 (the "1946 Act"):

> The significance of the atomic bomb for military purposes is evident. The effect of the use of atomic energy for civilian purposes upon the social, economic and political structures of today cannot now be determined. It is a field in which unknown factors are involved. Therefore, any legislation will necessarily be subject to revision from time to time. It is reasonable to anticipate, however, that tapping this new source of energy will cause profound changes in our present way of life. Accordingly, it is hereby declared to be the policy of the people of the United States that, subject at all times to the paramount objective of assuring the common defense and security, the development and utilization of atomic energy shall, so far as

[15] AEA Section 2012(a), (c)(d)(e); 42 USC §2012.
[16] See also LBP-08-24 at 72, footnote 345.

> practicable, be directed toward improving the public welfare, increasing the standard of living, strengthening free competition in private enterprise and promoting world peace. 1946 Act, §1(a).
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> Section 7(c) of the 1946 Act provides that:
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> [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 person would be inimical to the common defense and security.

Unlike many provisions of the 1946 Act that were superseded by the 1954 Act,[17] Section 7(c) quoted above was not amended by the 1954 Act and remains in full force and effect. Section 69 of the AEA supplements Section 7(c) of the 1946 Act with an emphasis on the last type of person described in Section 7(c).

AEA Section 69 provides that "[t]he Commission shall not license any person to transfer or deliver, receive possession of or title to, or import into or export from the United States any source material if, in the opinion of the Commission, the issuance of a license to such person for such purpose would be inimical to the common defense and security or the health and safety of the public.[18]

AEA Section 182 provides that in order to obtain a source materials license from the NRC, an applicant must file a license application.[19] Each application 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

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[17] See, e.g., Section 5(b)(7) of the 1946 Act, which was superseded by Section 68(c) of the AEA.
[18] 42 USC §2099.
[19] 42 USC §2232.

appropriate for the license.[20] Further, licenses issued under the AEA are not transferable, directly or indirectly, through transfer of control or otherwise unless full disclosure is made to the NRC and the NRC "after securing full information" finds that the transfer is in accordance with the provisions of the AEA.[21]

A full and complete analysis of the nuclear security risks in each case requires strict compliance with the "disclosure of citizenship" requirements of AEA Section 182 as well as a complete analysis of the implications of foreign ownership, control and influence ("FOCI") on the US national interest, common defense and security and on the health and safety of the public. The AEA, pursuant to Section 7(c) of the 1946 Act, bars the issuance of a source materials license to any foreign-owned and controlled entity because its decision-makers are outside the jurisdiction of the United States. Further, even if there were no absolute bar, in light of current nuclear threats and in light of nuclear smuggling and illicit procurement networks, any issuance to a foreign-owned and controlled applicant is currently inimical to the common defense and security.

Where is the US national interest served? Consolidated Petitioners submit that the general US interest in allowing benign foreign investment in the United States is subject in all cases to the interests of national security. Here, the licenses in question are for radioactive source material which is the primogenitor of nuclear reactions, nuclear power and nuclear weapons. As discussed above, the best way to ensure that nuclear weapons do not fall into the wrong hands is to tightly restrict access to natural uranium – especially concentrated Yellowcake. Three main nuclear threats have been identified by the IAEA:

1. Acquisition by non--State actors or State actors of nuclear material for

[20] Id. (Emphasis added).
[21] 42 USC §2234.

an improvised nuclear explosive device or an existing device

2. Acquisition of radioactive material to construct a radiological dispersal device ("RDD" or "Dirty Bomb")

3. Sabotage of installations, locations or transport for dispersal of radioactivity.[22]

Consolidated Petitioners submit Congress has never expressed any intent to allow foreign interests to control source materials licenses.[23] There is substantial Congressional intent to disallow foreign control of source materials, nuclear materials and power plants.

Further, there is no support for the proposition that Congress intended source materials licenses to be issued to companies controlled by persons outside of US regulatory jurisdiction. NRC regulations in Part 40 apply to all persons in the United States.[24] There is no regulation that extends jurisdiction to persons outside of the United States. Consolidated Petitioners submit that when the activities of an applicant are controlled by decision-makers who are "not under or within the jurisdiction of the United States" such activities are likewise not "under or within the jurisdiction of the United States" for purposes of Section 7(c) of the 1946 Act. As a result, the AEA bars the issuance of any license to any person who is controlled by persons that are not "under or within the jurisdiction of the United States." Further, it is not in the US national interest for US people to be saddled with pollution caused by a mine where the results – the Yellowcake – is exported, sold and used outside the US for foreign profit. How has the United States become a "raw materials colony" for other countries and how can that be in the US national interest?

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[22] Anita Nilsson, IAEA Office of Nuclear Security, Combating Illicit Nuclear Trafficking: Global Perspective (February 14-18, 2008) at 3, at http://cstsp.aaas.org/files/nilsson.pdf.
[23] Of course, when the AEA was adopted, Congress had no way of knowing that Uranium would be mined out of drinking water aquifers using the *in situ leach* process.
[24] 10 CFR § 40.2.

One example of the negative impact of foreign ownership, control and domination on the operation of an ISL uranium mine is 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 the ISL mining. Such activities could result in environmental damage or loss of drinking water resources in the aquifers that would be equivalent as if a WMD or RDD had been used against the United States. In addition, a foreign controlled uranium mining company would be more inclined to suppress relevant geologic data that shows probabilities of structural control and mineralization (and related groundwater flows and contamination risks) or even forge compliance documents in favor of profit taking in what is often known as "cut and run" mining operations. The foreign ownership and control of a US mine creates a culture of recklessness at the foreign headquarters for the health and safety of the people living near the mine because the decision-makers do not live near the mine and do not drink the water there. This is why Section 7(c) of the 1946 Act prohibits licenses to be issued when the decision-makers are located outside the United States.

For example, it is inimical to the public health and safety to allow corporate recordkeeping practices whereby records are maintained at the foreign parent's offices and outside the jurisdiction of the United States and NRC Regulations. To what extent are meeting minutes at that Canada meeting available for discovery in this US NRC proceeding? If Cameco resists lawful discovery requests concerning Cameco's corporate minutes related to any issue related to public health and/or safety, then enforcement of the AEA, National Environmental Protection Act ("NEPA") (or other relevant statute such as antitrust, export control, etc.) would be frustrated. Accordingly, to the extent that

the enforcement of the AEA and NRC Regulations is made more difficult by one iota, such is an indication that foreign ownership of Applicant is inimical to the public health and safety. It is inimical to the public health and safety to fail to monitor Arsenic or to intentionally not filter Arsenic out of the mined aquifer, as Applicant does. The ultimate parent's non-US assets are beyond the reach of US jurisdiction and may not be used to satisfy restoration and decommissioning liabilities to the extent that such liabilities exceed the amount recovered under any surety bond or letter of credit. This creates financial insecurity for the payment of restoration costs creating contingent liabilities for the local, state and federal budgets that would be used to pay for the shortfall. Such is inimical to the health and safety of the public.

CONCLUSION

For the foregoing reasons, the Court should deny the Federal Respondents' Motion to Dismiss. If the Court is inclined to grant the Motion to Dismiss, then Consolidated Petitioners respectfully request oral argument on the Motion.

Dated this 20th day of July, 2009.

Respectfully submitted,

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