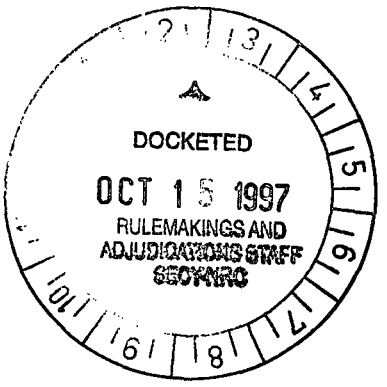

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD PANEL

Before Administrative Judges:
Peter B. Bloch, Presiding Officer
Charles N. Kelber, Special Assistant

In the Matter of	)	Docket No. 40-8681-MLA
	)	
INTERNATIONAL URANIUM (USA) CORPORATION	)	Re: License Amendment
	)	ASLBP No. 97-726-03-MLA
(White Mesa Uranium Mill; Alternative Feed Material)	)	

RESPONSE OF INTERNATIONAL URANIUM (USA) CORPORATION TO APPEAL OF NATIVE AMERICAN PETITIONERS

I. DECISION BEING APPEALED.

On July 23, 1997, the Presiding Officer issued a Memorandum and Order (the "Decision") (LBP-97-12) in this case denying the petition for hearing filed by the Native American Petitioners holding that the Native American Petitioners failed to establish their standing to challenge an amendment to the Source Material License of International Uranium (USA) Corporation ("IUSA").

On July 30, 1997, the Native American Petitioners faxed a pleading (the "July 30 Pleading") to the Commission. By Memorandum and Order dated August 11, 1997 (the "August 11 Order"), the pleading was designated as a Petition for Reconsideration, a Motion To Reopen the Record and an Appeal.

SECY-EHD-006

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On September 4, 1997, the Hearing Officer issued a Memorandum and Order (the "Reconsideration Order") (LBP-97-14) denying the Petition for Reconsideration and Motion to Reopen the Record.

On September 10, 1997, the Secretary of the Commission issued a scheduling order (the "Scheduling Order") for the pleadings regarding the Decision or the Reconsideration Order. Under the terms of the Scheduling Order, the Native American Petitioners were given until September 25, 1997 to file additional pleadings regarding their appeal. No additional pleading has been filed by the Native American Petitioners.

IUSA was given until October 15, 1997 to file any response to the July 30 Pleading insofar as it was deemed to constitute an Appeal. IUSA hereby submits its Response in Opposition to the Appeal.

II. Procedural History.

This proceeding involves an amendment to Source Materials License No. SUA-1358 (Docket No. 40-8681) (the "White Mesa Source Materials License") allowing the receipt and processing of uranium bearing materials commonly referred to as the "Cotter Concentrates".[1] The amendment (the "Cotter Concentrates Amendment") was granted by the Nuclear Regulatory Commission ("NRC") staff on April 2, 1997.

Letters requesting a hearing on the Cotter Concentrates Amendment were submitted in late April, 1997 to the NRC by the Native American Peoples Historical Foundation/Great Avikan House, Mr. Norman Begay and Ms. Lula Katso (collectively, the "Native American Petitioners").

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[1] As noted in prior filings by IUSA, the Department of Energy, Nevada Operations Office, began shipping the Cotter Concentrates to the White Mesa Mill subsequent to the approval of the amendment to the Source Material License. All of the Cotter Concentrates have been received at the White Mesa Mill and processing of the Cotter Concentrates has been initiated.

IUSA was granted party status in this proceeding by a Memorandum and Order issued by the Presiding Officer on June 25, 1997.

The original filings by the Native American Petitioners did not demonstrate the standing of the Petitioners to challenge the Cotter Concentrates Amendment because they failed to show (i) either representational or organizational standing, (ii) injury in fact from the specific actions to be taken under the Cotter Concentrates Amendment or (iii) a "plausible mechanism for injury".[2] See Memorandum and Order issued by the Presiding Officer on May 27, 1997 (the "May 27 Order"). However, the May 27 Order provided the Native American Petitioners with specific guidance on the form and content necessary to demonstrate that the requirements for standing had been met and gave the Native American Petitioners an additional opportunity to submit a filing that cured the deficiencies of the original petitions.[3]

A Supplemental Petition was filed by the Native American Petitioners and responses thereto were filed by IUSA and the NRC Staff. However, the deficiencies identified by the Presiding Officer in the May 27 Order remained uncured and resulted in the entry of the Decision denying the request of the Native American Petitioners for a hearing.

The Native American Petitioners faxed the July 30 Pleading to the Commission and the August 11 Order designated the July 30 Pleading as an Appeal, a Petition for Reconsideration and a Motion to Reopen the Record. The Commission directed the Hearing Officer to consider the Petition for Reconsideration and Motion to Reopen the Record and held the Appeal in abeyance pending that consideration. The Reconsideration Order denied the Petition for Reconsideration and the Motion to Reopen the Record and the Scheduling Order on the Appeal was issued.

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[2] See page 4 of the May 27 Order.

[3] See pages 4 and 5 of the May 27 Order.

III. The Appeal.

Standards to be Applied. 10 CFR Section 2.1253 authorizes an appeal of a decision of the Presiding Officer and directs that 10 CFR §§ 2.786 and 2,763 shall be followed. Section 2.786 provides the factors to be considered by the Commission in considering whether to exercise its discretion to grant or deny review of a decision. Specifically, §2.786(b)(4) provides as follows:

> (4) The petition for review may be granted in the discretion of the Commission, giving due weight to the existence of a substantial question with respect to the following considerations:
>
> (i) A finding of material fact is clearly erroneous or in conflict with a finding as to the same fact in a different proceeding;
>
> (ii) A necessary legal conclusion is without governing precedent or is a departure from or contrary to established law;
>
> (iii) A substantial and important question of law, policy or discretion has been raised;
>
> (iv) The conduct of the proceeding involved a prejudicial procedural error; or
>
> (v) Any other consideration which the Commission may deem to be in the public interest.

The July 30 Pleading does not specifically identify which, if any, of the four standards set forth in §2.786 apply to this case. It is submitted that there is no substantial question under any of the considerations.

(i) Clearly Erroneous Finding or Conflict with Other Decided Case. There are no findings of material fact in the Decision that are "clearly erroneous". To meet this standard, the party seeking the appeal must demonstrate that the findings were not even plausible in light of the record viewed in its entirety.[4] The July 30 Pleading asserts that the Hearing Officer made erroneous findings. However, the July 30 Pleading merely identifies which of the allegations of the Native American Petitioners conflict with the findings. These allegations are not supported by any evidence and the Hearing Officer appropriately characterized the allegations as "conjecture".

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[4] See Kenneth G. Pierce 41 NRC 381 (1995), at page 382, citing Anderson v. Bessemer City 470 U.S. 564 (1985).

The findings of the Hearing Officer are consistent with and supported by the evidence contained in the record as a whole in this proceeding and, accordingly, there is no basis for appeal under this consideration.

There are no other proceedings concerning the processing of the Cotter Concentrates by IUSA and therefore there is no conflict between the Decision and any finding in any other proceeding.

(ii) Legal Conclusion without Governing Precedent. The legal conclusion in this case is that the Native American Petitioners did not demonstrate standing. There is clear precedent on the issue of standing and it was thoroughly reviewed and applied by the Presiding Officer in the May 27 Order as well as the Decision.

(iii) Substantial Question Raised. While the Native American Petitioners have alleged that there are highly significant questions at issue in their view of this matter, it is important that the Staff determination, accepted by the Presiding Officer in the Decision, was that "this amendment makes very little substantive change in the milling or tailing-disposal operations..."[5] There is no significant question of law or policy at issue in this case.

(iv) Prejudicial Procedural Error. There were no procedural errors in the proceeding as conducted by the Presiding Officer. In fact, the Presiding Officer offered (i) guidance to the Native American Petitioners on the requirements to be met to achieve standing and (ii) opportunity to meet those requirements. The Native American Petitioners chose not to follow the guidance or utilize the opportunity.

(v) Public Interest. It is respectfully submitted that there is nothing in this case which would justify the Commission granting an appeal due to a consideration of public interest. Other

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[5] See pages 3-4 of the Staff Technical Evaluation Report for the Cotter Concentrate Amendment and Page 5-6 of the Decision.

than the unsupported allegations of the Native American Petitioners, there is nothing in the record to show that the processing of the Cotter Concentrates by IUSA is anything more than the processing of an alternate uranium feedstock in accordance with existing mill procedures.

Other Considerations for the Determination of an Appeal. 10 CFR Section 2.786(b)(5) directs that a petition for review will not be granted if it relies on matters that could have been but were not raised before the presiding officer. In this case, the Presiding Officer gave the Native American Petitioners the opportunity to supplement their allegations with the support necessary to demonstrate that the Native American Petitioners had standing. The July 30 Pleading did nothing more than reassert the same allegations that had been previously asserted. Accordingly, the July 30 Pleading, insofar as it is an Appeal, relies entirely on matters that not only could have been raised before the Presiding Officer but which in fact were raised and considered.

Summary. IUSA submits that there the Native American Petitioners have not established the existence of any substantial question with respect to the considerations set forth in 10 CFR § 2.786(b)(4) and therefore the Appeal should be denied.

Respectfully submitted this 15th day of October, 1997.

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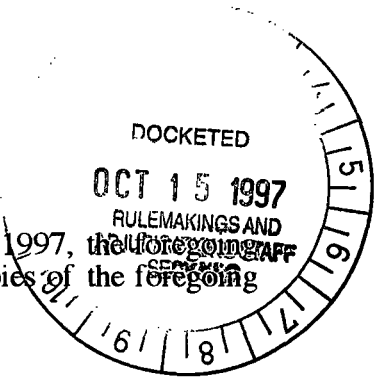

CERTIFICATE OF SERVICE

I, Rich A. Munson, hereby certify that on this 15th day of October, 1997, the foregoing PLEADING was sent by facsimile, and the original and two conformed copies of the foregoing PLEADING were mailed, postage prepaid, addressed to the following:

Office of the Secretary
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
Attention: Rulemakings and Adjudications Staff
Facsimile Number: (301) 415-1101
Verification No.: (301) 415-1966

I, Rich A. Munson, hereby certify that on this 15th day of October 1997, the foregoing PLEADING was sent by facsimile, and a conformed copy of the foregoing PLEADING was mailed, postage prepaid, addressed to the following:

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I, Rich A. Munson, hereby certify that on this 15th day of October, 1997, copies of the foregoing PLEADING have been served upon the following persons by U.S. mail, first class, postage prepaid, in accordance with the requirements of 10 C.F.R. § 2.712.

Office of Commission Appellate Adjudication
Mail Stop: 0-16 G15
U.S. Nuclear Regulatory Commission
Washington, DC 20555

President
Energy Fuels Nuclear, Inc.
1515 Arapahoe Street, Suite 900
Denver, CO 80202

I, Rich A. Munson, hereby certify that on this 15th day of October, 1997, copies of the foregoing PLEADING have been served upon the following persons by U.S.EXPRESS MAIL, postage prepaid, in accordance with the requirements of 10 C.F.R. § 2.712.

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