

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)	
)	Docket No. 40-38367-ML
RARE ELEMENT RESOURCES, LLC)	
)	ASLBP No. 16-945-01-MLA-BD01
(Bear Lodge Project))	

NRC STAFF RESPONSE TO DEFENDERS OF THE BLACK
HILLS PETITION TO INTERVENE AND REQUEST FOR HEARING

INTRODUCTION

Pursuant to 10 C.F.R. § 2.309(i)(1), the U.S. Nuclear Regulatory Commission (NRC) staff (Staff) files this response to the petition to intervene and request for hearing filed by the Defenders of the Black Hills (Petitioner) on January 14, 2016 (Petition). Defenders of the Black Hills requests a hearing on an NRC license application (Application) filed by Rare Element Resources, LLC (RER or Applicant) to possess and process source material in connection with a proposed rare earth element mining project to be located in Crook and Weston Counties, Wyoming (Bear Lodge Site).¹ Because the Petitioner has not demonstrated standing to intervene, nor proffered an admissible contention, the Board should deny the Petition.

BACKGROUND

On May 4, 2015, RER submitted an application for a source materials license under 10 C.F.R. Part 40 to possess and process source material in conjunction with RER's processing of rare earth elements in Northeastern Wyoming.² The operation will consist of two processing facilities requiring an NRC license: a physical upgrade (PUG) plant for mineral pre-concentration

¹ Defenders of the Black Hills' Request for Hearing [hereinafter Petition] at 1.

² RER Application for Source Material Possession License [hereinafter Application], 1 at § 5.0, 2 at § 6.0 (ADAMS Accession No. ML15134A434).

(processing by filtering and gravity separations to isolate the desired minerals from the ore) located adjacent to the Bull Hill mine approximately 12 miles north of Sundance, Wyoming in central Crook County; and a hydrometallurgical (hydromet) plant located approximately 40 miles away in Weston County, (two miles northwest of the Town of Upton) for further concentration and recovery of the rare earth elements into a rare earth carbonate concentrate product.³ The ore processed in the two facilities will have a source material content that exceeds the regulatory threshold requiring an NRC license under 10 C.F.R. §§ 40.3 and 40.4.⁴

On January 21, 2016, RER submitted a request for NRC staff to temporarily suspend work on the RER License Application review, including NRC's technical review.⁵ Citing financial difficulties, the company has decided to suspend all permitting and licensing efforts, and estimates that the suspension will last for approximately 12 months.⁶ In response to RER's January 21, 2016 requests, the NRC Staff has suspended all work on the application review.⁷ RER additionally requested the Commission suspend any adjudicatory proceedings related to the project until the licensing review process resumes.⁸

³ Application at 4, § 7.1.

⁴ *Id.* at 23, § 9.1.1. The average source material content of the processed ore leaving the PUG plant ranges between 0.055 percent by weight and 0.068 percent by weight. 10 C.F.R. § 40.3 requires licensing of any source material after removal from its place of deposit in nature. Source material is defined by 10 C.F.R. § 40.4 as "ores which contain by weight one-twentieth of one percent (0.05%) or more of: (i) uranium, (ii) thorium or (iii) any combination thereof."

⁵ Letter from RER to Andrew Persinko, Deputy Dir., Div. of Decommissioning, Uranium Recovery, & Waste Programs, U.S. Nuclear Regulatory Comm'n (Jan. 21, 2016) (ADAMS Accession No. ML16022A191).

⁶ *Id.*

⁷ See Letter from Michael A. Norato, Acting Deputy Director, Div. of Decommissioning, Uranium Recovery, and Waste Programs, U.S. Nuclear Regulatory Comm'n to Jaye Pickarts, Chief Operating Officer, Rare Element Resources (Feb. 1, 2016) (ADAMS Accession No. ML16032A140).

⁸ Letter from RER to Chairman Stephen Burns and Commissioners, Nuclear Regulatory Comm'n (Jan. 21, 2016) (ADAMS Accession No. ML 16021A468).

DISCUSSION

1. Legal Requirements

In order for a hearing request to be granted, the petitioner must demonstrate that it has standing to intervene in the proceeding and submit at least one admissible contention.⁹ The Commission's regulations in 10 C.F.R. § 2.309(d)(1) provide that to establish standing, a request for hearing or petition to intervene must state:

- (i) The name, address and telephone number of the 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
- (iv) The possible effect of any decision or order that may be issued in the proceeding on the requestor's/petitioner's interest.

The Commission has long applied contemporaneous judicial concepts of standing to determine whether a party has a sufficient interest to intervene as a matter of right.¹⁰ Thus, to establish judicial standing, the burden rests on the Petitioner¹¹ to show (1) a distinct harm that constitutes an injury-in-fact, (2) that the injury can be traced to the challenged action; and (3) that the injury is likely to be redressed by a favorable decision.¹² Petitioners are required to show some form of substantiating evidence for factual assertions regarding standing.¹³

⁹ 10 C.F.R. § 2.309(a).

¹⁰ See *Calvert Cliffs 3 Nuclear Project, LLC & Unistar Nuclear Operating Services, LLC* (Combined License Application for Calvert Cliffs, Unit 3), CLI-09-20, 70 NRC 911, 915 (2009); *Yankee Atomic Elec. Co.* (Yankee Nuclear Power Station), CLI-98-21, 48 NRC 185, 195 (1998); *Portland General Electric Co.* (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 616 (1976).

¹¹ See, e.g., *Entergy Nuclear Generation Co. & Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-12-15, 75 NRC 704, 714 (2012).

¹² See *Calvert Cliffs*, CLI-09-20, 70 NRC at 915 (citing *Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Unit 1), CLI-93-21, 38 NRC 87, 92 (1993) (internal quotations omitted)); see also *Dellums v. NRC*, 863 F.2d 968, 971 (D.C. Cir. 1988) (outlining traditional judicial standing test).

¹³ See *Shieldalloy Metallurgical Corp.* (Cambridge, Ohio Facility), CLI-99-12, 49 NRC 347, 356 (1999).

The “injury-in-fact” must be “concrete and particularized,” not “conjectural” or “hypothetical.”¹⁴ Standing will be denied when the threat of injury is too speculative.¹⁵ Furthermore, the alleged “injury-in-fact” must lie within the “zone of interests” protected by the statutes governing the proceeding: the Atomic Energy Act, the National Environmental Policy Act (NEPA), or the National Historic Preservation Act (NHPA).¹⁶ A petitioner must also establish a causal nexus between the alleged injury and the challenged action.¹⁷ The nexus depends, in part, on whether the chain of causation is “plausible.”¹⁸ Finally, the petitioner must demonstrate that the claimed injury could be redressed by some action of the decisionmaker.¹⁹ The Commission has denied standing on redressability grounds where the relief sought exceeds the scope of the NRC’s authority.²⁰ When an organization petitions to intervene, it must demonstrate either “representational standing” or “organizational standing.”²¹ To assert “representational standing” on behalf of one or more of its members, an organization must demonstrate that the interests of at least one of its members will be harmed, identify that

¹⁴ *Florida Power and Light Co.* (Turkey Point Nuclear Generating Units 3 and 4), CLI-15-25, 82 NRC ___, ___ (Dec. 17, 2015) (slip op. at 6); *Cogema Mining, Inc.* (Irigaray and Christensen Ranch Facilities), LBP-09-13, 70 NRC 168, 176 (2009) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)).

¹⁵ See *Sequoyah Fuels Corp. & General Atomics* (Gore, Oklahoma Site), CLI-94-12, 40 NRC 64, 72 (1994).

¹⁶ See *U.S. Enrichment Corp.* (Paducah, Kentucky Gaseous Diffusion Plant), CLI-01-23, 54 NRC 267, 272-72 (2001) (citing *National Credit Union Administration v. First National Bank*, 522 U.S. 479, 492 (1998)).

¹⁷ See *Turkey Point*, CLI-15-25, 82 NRC at ___ (slip op. at 6) (citing *Sequoyah Fuels*, CLI-94-12, 40 NRC at 71).

¹⁸ *Id.* at 7 (citing *Sequoyah Fuels*, CLI-94-12, 40 NRC at 71-72).

¹⁹ See *id.*

²⁰ See *Shieldalloy*, CLI-99-12, 49 NRC at 355 (denying standing on redressability grounds because scope of proceeding was limited to permitting on facility’s site, and did not extend offsite to Petitioners’ allegedly injured property).

²¹ See *Crow Butte Resources, Inc.* (Marsland Expansion Area), CLI-14-2, 79 NRC 11, 17-18 (2014); *International Uranium (USA) Corp.* (White Mesa Uranium Mill), CLI-01-21, 54 NRC 247, 252 (2001).

member's name and address, and show, preferably by affidavit, that the organization is authorized to request a hearing on that member's behalf.²² "Organizational standing" requires the petitioner to demonstrate discrete institutional injury to the organization itself.²³ General environmental or policy interests are insufficient to establish organizational standing.²⁴

Even when a petitioner demonstrates that it has standing to intervene in a proceeding, it cannot be admitted as a party unless it has proffered at least one contention that is admissible under the requirements of 10 CFR §2.309(f). A proposed contention is admissible under 10 C.F.R. § 2.309(f) only if it:

- (i) Provide[s] a specific statement of the issue of law or fact to be raised or controverted . . . ;
- (ii) Provide[s] a brief explanation of the basis for the contention;
- (iii) Demonstrate[s] that the issue raised in the contention is within the scope of the proceeding;
- (iv) Demonstrate[s] 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[s] 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 references to the specific sources and documents on which the requestor/petitioner intends to rely to support its position on the issue;
- (vi) . . . provide[s] 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. . .²⁵

²² *GPU Nuclear, Inc. Jersey Central Power & Light Co. and Amergen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-00-06, 51 NRC 193, 194 (2000); *Cogema Mining*, LBP-09-13, 70 NRC at 189.

²³ See *White Mesa*, CLI-01-21, 54 NRC at 252.

²⁴ *Id.*

²⁵ 10 C.F.R. § 2.309(f)(1).

The contention admissibility requirements of 10 C.F.R. § 2.309(f) “are designed to ensure that only focused, well supported issues are admitted for hearing.”²⁶ The Commission has stated that contentions “must be set forth with particularity and must meet all six contention admissibility factors.”²⁷ The Commission “should not have to expend resources to support the hearing process unless there is an issue that is appropriate for, and susceptible to, resolution in an NRC hearing.”²⁸ The “contention admissibility ‘requirements are deliberately strict, and [the Commission] will reject any contention that does not satisfy the requirements.’”²⁹ Attempting to satisfy these requirements by “[m]ere ‘notice pleading’ does not suffice.”³⁰

2. Petitioner Has Not Demonstrated Standing

The Petition does not articulate a basis to establish the three elements of judicial standing or representational or organizational standing. First, Defenders of the Black Hills does not sufficiently identify a “concrete and particularized” injury.³¹ The Petition makes the generalized statement that “our right to religious freedom will be denied with the approval of Rare Element Resources, Inc., Bear Lodge Project as the project will destroy a sacred mountain (hill) in the process of mining,” and continues that “Bull Hill...has been held as sacred by the Sioux (Oceti Sakowin) People and others for millennia.”³² However, the Petition has not

²⁶ *DTE Electric Company* (Fermi Nuclear Power Plant, Unit 2), CLI-15-18, 82 NRC __, __ (2015) (slip op. at 3).

²⁷ *Id.*

²⁸ Changes to Adjudicatory Process, 69 Fed. Reg. 2182, 2202 (Jan. 14, 2004) (Final rule).

²⁹ *Progress Energy Carolinas, Inc.* (Shearon Harris Nuclear Power Plant, Units 2 & 3), CLI-10-09, 71 NRC 245, 253 (2010) (quoting *USEC, Inc.* (American Centrifuge Plant), CLI-06-9, 63 NRC 433, 437 (2006)).

³⁰ *Amergen Energy Co., L.L.C.* (Oyster Creek Nuclear Generating Station), CLI-06-24, 64 NRC 111, 119 (2006) (quoting *Exelon Generating Co., L.L.C.* (Early Site Permit for Clinton ESP Site), CLI-05-29, 62 NRC 801, 808 (2005)).

³¹ See *Turkey Point*, CLI-15-25, 82 NRC at __ (slip op. at 6); *Cogema Mining, Inc.*, LBP-09-13 70 NRC at 176.

³² Petition at 1.

particularized the impact of NRC action on the Bull Hill site and has not identified how the NRC's proposed action would impact the Petitioner. Further, the contention does not specify what sacred purpose Bull Hill serves for the Sioux and others' religious expression. Without more information on the site's religious significance, to state that its destruction will affect or deny Tribes' religious freedom is speculative. Thus, the Petitioner has not established an injury-in-fact with sufficient specificity to grant standing.

Second, the Petition does not provide sufficient facts to establish a nexus between the alleged injury and challenged NRC action.³³ It states that "the project will destroy a sacred mountain...in the process of mining," but does not cite any information, such as the Application or Environmental Report, to specify the impacts of the proposed NRC-licensed activity on the sacred site.³⁴ Although an open pit mine would likely alter the surrounding landscape, the mine itself does not require an NRC license, as the raw ore taken from the mine does not meet the threshold for source material content requiring a license.³⁵ As such, the mine is not part of RER's Application.³⁶ On the other hand, the PUG plant for mineral processing, which is located at the Bull Hill site,³⁷ does require NRC licensure because the process of concentrating the ore raises the percentage by weight of source material above the regulatory threshold.³⁸ The NRC

³³ See *Turkey Point*, CLI-15-25, 82 NRC at ___ (slip op. at 8) (citing *Sequoyah Fuels*, CLI-94-12, 40 NRC at 75).

³⁴ Petition at 1.

³⁵ See 10 C.F.R. § 40.3 (requiring a license for "any source material after removal from its place of deposit in nature") and § 40.4 (defining source material as "ores which contain by weight one-twentieth of one percent (0.05%) or more of: (i) uranium, (ii) thorium or (iii) any combination thereof"). See also Application at 23, § 9.1.1.

³⁶ See Application at 47, § 11.0.

³⁷ See *id.* at 2, § 7.0.

³⁸ See *id.* at 23, § 9.1.1.

license would allow RER to possess the product that results from processing in the PUG plant.³⁹ The PUG plant consists of three buildings, the largest of which is 180 feet long by 180 feet wide, and various ore stockpiles.⁴⁰ The Petition does not explain how the PUG plant will specifically impact Bull Hill nor provide information on the extent to which the area surrounding Bull Hill is culturally significant. The assertion that “the project” will destroy the sacred mountain, without more, is “conjectural” or “hypothetical” instead of “concrete and particularized.”⁴¹

Third, the Petition has not shown how the actual or threatened injuries could be redressed by an action of the tribunal.⁴² The bare contention, “that our right to religious freedom will be denied with the approval of Rare Element Resources, Inc., Bear Lodge Project,”⁴³ does not supply enough information to determine what relief is sought. Assuming, *arguendo*, that Defenders of the Black Hills seeks denial of RER’s application, the contention still does not demonstrate that denying RER’s license application will redress the injury that the operation’s construction could allegedly cause. Although the Petition states that “the process of mining” will destroy Bull Hill, the ore from the mine falls below the regulatory source term concentration limits requiring an NRC license.⁴⁴ Therefore, construction and operation of the mine itself does not require an NRC license; only the PUG and hydromet plants require NRC approval.⁴⁵ Because the Bull Hill mine could be constructed regardless of the NRC’s licensing decision,

³⁹ See *id.* at 2, § 6.0 (“The purpose for which licensed material will be used is for possession of source material incident to the processing of rare earth elements . . .”).

⁴⁰ See *id.* at 25, § 9.1.3. See also *id.* at 24, Figure 9.1-1 (PUG plant site layout).

⁴¹ Petition at 1; *Cogema Mining*, LBP-09-13, 70 NRC at 176 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. at 560).

⁴² See *Turkey Point*, CLI-15-25, 82 NRC at ___ (slip op. at 7) (citing *Sequoyah Fuels*, CLI-94-12, 40 NRC at 71-72).

⁴³ Petition at 1.

⁴⁴ See 10 C.F.R. §§ 40.3, 40.4. Source material is defined as ore containing 0.05% by weight or greater of uranium, thorium, or a combination thereof.

⁴⁵ See Application at 4 (explaining site layout).

denying RER's license would not guarantee the Petitioner relief.⁴⁶ Ultimately, without any information to support that the Board could redress Defenders of the Black Hills' alleged injury, the Petition has not satisfied the redressability element of judicial standing.

Further, the Petition does not demonstrate representational or organizational standing. Although the Petition is signed by Charmaine White Face, Coordinator of Defenders of the Black Hills, the Petition contains no affidavit or other information to demonstrate that the organization is authorized to represent her interests or show how her interests are harmed by the licensing action.⁴⁷ Therefore, the Petition has not established representational standing. The Petition also does not show a discrete institutional injury to Defenders of the Black Hills' interests to establish organizational standing. Although Native American tribes have a protected interest in cultural resources on their aboriginal land, Defenders of the Black Hills itself is not a federally recognized tribe.⁴⁸ Rather, it defines itself on its website as "a group of volunteers without racial or tribal boundaries."⁴⁹ Thus the organization must additionally provide information sufficient to establish how the proposed operation would injure Defenders of the Black Hills' institutional mission or demonstrate how its mission represents its tribal members' interests.⁵⁰ For example, in *Puget Sound*, organizational petitioner Columbia River Inter-Tribal Fish Commission filed their constitution and bylaws in order to demonstrate that its mission was

⁴⁶ See *Shieldalloy*, CLI-99-12, 49 NRC at 355.

⁴⁷ See Petition at 1; *GPU Nuclear*, CLI-00-06, 51 NRC at 194.

⁴⁸ Compare *Crow Butte Marsland*, CLI-14-2, 79 NRC at 19 (granting standing to the Oglala Sioux Tribe based on the federally-recognized tribe's interest in protecting cultural resources on the site of proposed facility), with *Cogema Mining, Inc.* LBP-09-13, 70 NRC 168, 184-85 (distinguishing between a federally recognized Indian tribe and the Oglala Delegation of the Great Sioux Nation Treaty Council).

⁴⁹ See Defenders of the Black Hills, About Us: Mission, http://www.defendblackhills.org/index.php?option=com_content&view=article&id=30:mission&catid=18:about-us&Itemid=28. This information is available online and was not included in the Petition.

⁵⁰ See *Puget Sound Power and Light Co.* (Skagit/Hanford Nuclear Power Project, Units 1 & 2), ALAB-700, 16 NRC 1329, 1333-34 (1982).

sufficiently tied to the tribal interests it asserted to represent in its petition.⁵¹ These documents properly established the organization's standing as a representative of its tribal members.⁵² Unlike the information provided by the organizational petitioner in *Puget Sound*, the Petition here does not sufficiently cite the Petitioner's authority to represent tribal interests.⁵³ Simply put, it does not discuss Defenders of the Black Hills' mission nor does it explain how the proposed mining operation injures the organization.⁵⁴ Instead, the Petition merely asserts that the project will destroy a sacred mountain, and thus "our right to religious freedom will be denied."⁵⁵ Because the Petition does not demonstrate how the project will injure the organization's interests, Defenders of the Black Hills has not established organizational standing.

In sum, Defenders of the Black Hills' Petition has not demonstrated the three elements of judicial standing nor representational or organizational standing. Therefore, the petition should be denied.

3. Petitioner's Contentions are Inadmissible under 10 C.F.R. § 2.309(f)(1)

The Contention states as follows:

Our contention is that our right to religious freedom will be denied with the approval of Rare Element Resources, Inc., Bear Lodge Project as the project will destroy a sacred mountain (hill) in the process of mining.

Defenders of the Black Hills claims in its sole contention that if the Bear Lodge Project is approved, the religious freedom of the Sioux (Oceti Sakowin) People will be denied. The only

⁵¹ See *id.*

⁵² See *id.*

⁵³ See *id.* at 1333.

⁵⁴ Petitioner's mission is stated in three slightly different ways on its website, but primarily entails protecting the "environment of" or "area of the 1851 and 1868 Fort Laramie Treaties." See Defenders of the Black Hills, *supra* note 49. Even if the Board were to accept the organization's mission as stated on its website, the Petition nonetheless requires many assumptions to support an assertion that the proposed project injures that mission: it does not explain that Bull Hill is within the area covered by the Fort Laramie Treaties, nor does it rely on any of the Applicant's information to show that the mine will indeed destroy the sacred land.

⁵⁵ Petition at 1.

information provided in support of this claim is the statement that a sacred mountain (identified later as Bull Hill) will be destroyed by the Bear Lodge Project contemplated by RER. For the reasons set forth below, the contention fails to meet the requirements of 10 C.F.R. § 2.309(f)(1) and is, therefore, inadmissible.

First, the Petitioner has not provided sufficient information to show that a genuine dispute exists regarding a material issue of law or fact by referencing specific portions of the application.⁵⁶ The Commission has stated that applicants must identify the nexus between the contention and the alleged deficiency in the application⁵⁷ and are obligated to “review the [a]pplication thoroughly and to base their challenges on its contents.”⁵⁸ The Petitioner states that Bull Hill is sacred to the “Sioux (Oceti Sakowin) People and others,”⁵⁹ but does not provide any explanation of the alleged destruction of the site, nor does it identify any omission or deficiency in the Application or Environmental Report. The Commission has stated that a nexus between the issue identified by the Petitioner and a deficiency in the challenged application is “necessary to establish a genuine dispute for an admissible contention.”⁶⁰ Here, the Petitioner does not provide a sufficient explanation of the nexus between the stated destruction of the Bull Hill site and RER’s Application or Environmental Report. The unsupported statements that

⁵⁶ See 10 C.F.R. § 2.309(f)(1)(vi). See also *Crowe Butte Resources, Inc.* (North Trend Expansion Project), CLI-09-12, 69 NRC 535, 557 (2009) (“ . . .Petitioner’s proposed challenge to the restoration value of the water returned to the Basal Chadron fails to controvert the application, and therefore is not admissible.”); *Strata Energy, Inc.*, (Ross In Situ Recovery Uranium Project), LBP-12-3, 75 NRC 164, 205 (2012) (rejecting a contention that the applicant’s ER must consider the reasonably foreseeable environmental impacts of its potential failure to adequately finance decommissioning activities on the grounds that the petitioner’s expert did not allege any specific deficiencies in the applicant’s calculation of the amount of its decommissioning bond).

⁵⁷ See *DTE Electric Company*, CLI-15-18, 82 NRC at ___ (slip op. at 8).

⁵⁸ *Nextera Energy Seabrook, LLC* (Seabrook Station, Unit 1), CLI-12-5, 75 NRC 301, 312 (2012).

⁵⁹ See Petition at 1.

⁶⁰ *DTE Electric Company* (Fermi Nuclear Power Plant, Unit 2), CLI-15-18, 82 NRC ___, ___ (2015) (slip op. at 8) (rejecting contention that a severe accident at Fermi Unit 2 would impact Fermi Unit 3 operation because petition did not identify a nexus between the issue as stated and any deficiency in DTE’s Severe Accident Mitigation Alternatives analysis).

approval of the project will infringe on the Petitioner's religious freedom and destroy Bull Hill are insufficient to establish a genuine dispute of law or fact for an admissible contention under 10 C.F.R. § 2.309(f)(1)(vi).

Second, the bare assertion that the Bear Lodge Project will "destroy" Bull Hill does not provide facts, expert opinions, or references to the specific sources and documents on which the petitioner intends to rely to support its position. Neither mere speculation nor conclusory assertions satisfy the requirements to admit a proposed contention.⁶¹ The Commission has also stated that a petitioner's unsupported belief is insufficient to satisfy the requirement of 10 C.F.R. § 2.309(f)(1)(v).⁶² Petitioner states its belief that the project will "destroy" Bull Hill, but does not articulate with specificity the impact of the PUG plant on Bull Hill. The Petition does not provide sufficient information to determine whether the Bull Hill site referenced in the Application is the same physical location as the alleged sacred tribal site, nor does it provide any support for how the NRC-licensed activity will impact the site. The contention is merely a conclusory assertion and, therefore, does not meet the requirement of 10 C.F.R § 2.309(f)(1)(v).

Third, the Petitioner has not demonstrated that the issue is material to the findings that the NRC must make to support the requested licensing action as required by 10 C.F.R § 2.309(f)(1)(iv). The materiality requirement in this case is closely related to the redressability prong of standing. As noted in the discussion of standing above, the Petition does not demonstrate that the Board has the ability to redress the alleged harm because NRC's licensing jurisdiction is limited to the processing facilities, not to the mine itself. Because RER could

⁶¹ See *USEC, Inc. (American Centrifuge Plant)*, CLI-06-10, 63 NRC 451, 472 (2006); *Fansteel, Inc. (Muskogee, Oklahoma Site)*, CLI-03-13, 58 NRC 195, 203 (2003).

⁶² See *Crowe Butte*, CLI-09-12, 69 NRC at 561 (rejecting a contention regarding adverse health effects from exposure to arsenic despite the fact that the petitioners cited several reports linking arsenic exposure to health risks and provided an affidavit stating that incidents of those particular health issues were higher in areas surrounding ISR operations); *Strata Ross*, LBP-12-3, 75 NRC at 205 (rejecting a contention that no facility for disposal of byproduct material will be available at the time of disposal on the grounds that "[p]etitioners provide no information to suggest that these facilities will be unavailable").

construct the mine without licensing or oversight by NRC, a favorable decision from the Board does not guarantee relief to Defenders of the Black Hills.⁶³ The Commission has stated that to satisfy the requirements of 10 C.F.R § 2.309(f)(1)(iv), the dispute raised by a proposed contention “must make a difference in the outcome of the licensing proceeding so as to entitle the petitioner to cognizable relief.”⁶⁴ Because the Petitioner has not identified the specific impacts of the NRC-licensed activities at Bull Hill, the Petitioner has not established how a favorable Board decision provides them with relief. Therefore, the contention is inadmissible under the requirement of 10 C.F.R § 2.309(f)(1)(iv).

CONCLUSION

The Petitioner has not provided sufficient information to demonstrate standing, nor proffered an admissible contention under 10 C.F.R. § 2.309(f)(1). For those reasons, as stated above, the Board should deny the Petition.

Respectfully submitted,

/Signed (electronically) by/

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Executed in Accord with 10 CFR 2.304(d)

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⁶³ See discussion *supra* Section 2.

⁶⁴ *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 179 (1998), *reconsid. granted in part on other grounds*, LBP-98-10, 47 NRC 288 (1998). See also Rules of Practice for Domestic Licensing Proceedings – Procedural Changes in the Hearing Process, 54 Fed. Reg. 33, 168, 33, 168 (Aug. 11, 1989) (Final rule) (“[A]dmission of a contention may also be refused . . . if it is determined that the contention, even if proven, would be of no consequence in the proceeding because it would not entitle the petitioner to relief.”).

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Executed in Rockville, MD
9th day of February, 2016

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NOTICE OF APPEARANCE FOR LORRAINE BAER

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:

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NOTICE OF APPEARANCE FOR ROBERT CARPENTER

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Executed in Rockville, MD
9th day of February, 2016

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of)
) Docket No. 40-38367-ML
RARE ELEMENT RESOURCES, LLC)
) ASLBP No. 16-945-01-MLA-BD01
(Bear Lodge Project))

CERTIFICATE OF SERVICE

I hereby certify that copies of the **NRC STAFF RESPONSE TO DEFENDERS OF THE BLACK HILLS PETITION TO INTERVENE AND REQUEST FOR HEARING, NOTICE OF APPEARANCE OF LORRAINE BAER, and NOTICE OF APPEARANCE OF ROBERT CARPENTER** in the above-captioned proceeding have been served via the Electronic Information Exchange this 9th day of February 2016. In addition, copies have been served on Charmaine White Face by email at bhdefenders@msn.com.

U.S. Nuclear Regulatory Commission
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/Signed (electronically) by/
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Dated at Rockville, Maryland
This 9th day of February, 2016