UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD PANEL
Before Administrative Judges:
Ann Marshall Young, Chair
Dr. Richard F. Cole
Dr. Fred W. Oliver

In the Matter of CROW BUTTE RESOURCES, INC. (In Situ Leach Facility, Crawford, NE)	Docket No. 40-8943 ASLBP No. 07-859-03-MLA-BD01 May 23, 2008

PETITIONERS' BRIEF CONCERNING CONTENTION E AND SUBPART G

Petitioners[1] hereby respectfully submit this Brief, pursuant to Judge Young's Order dated May 14, 2008. Specifically, Judge Young requested that this Brief address the question of "what standards should be applied, and what are the sources for any standards to be applied, in determining which criteria set forth in 10 CFR Section 40.32 are "applicable" in deciding whether to amend a license under Section 40.45, particularly in light of the principle that the standards for amendment of a license are generally the same as those for issuance of an original license. *See* 10 CFR Section 50.92." Id. at Paragraph 1. The first section of this Brief addresses Contention E and the foregoing issues and the second section of this Brief addresses the Subpart G issues pursuant to the Board's Memorandum and Order dated April 29, 2008 (corrected May 21, 2008) in LBP-06-08 ("Memorandum") at 129.

[1] By email dated May 23, 2008, Bruce Ellison, Attorney for Petitioners Owe Aku and Debra White Plume, approved of this Memorandum and authorized the undersigned to sign it on his behalf and to file it on behalf of his clients as well as WNRC represented by the undersigned.

INTRODUCTION

The Petitioners have repeatedly challenged the legitimacy of the Applicant's license amendment on the grounds that the Applicant's status as a foreign corporation violates the explicit terms of the Atomic Energy Act of 1954, as amended (AEA), and the rules and regulations promulgated by the Commission thereunder. In order to assess the admissibility of the Petitioners' contentions with respect to the Applicant's ownership structure, and, specifically, whether the Applicant's complete ownership and domination by foreign interests violates applicable U.S. law, the Board, in the Memorandum and Order, requested that the parties As noted by the Board, "minimally, the regulations under 10 CFR Part 40 for "Domestic Licensing of Source Material" clearly require, at Section 40.32(d), that the "issuance of the license will not be inimical to the common defense and security or to the health and safety of the public." Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-84-45, 20 NRC 1343 , 1400 (1984), Memorandum at 122.

As noted by the Board, "previous Commission decisions regarding foreign ownership or control did not appear to turn on which particular nation the applicant was associated with." Id. Two key questions were posed by the Board: "(1) does Section 40.38 apply to bar issuance of a license amendment in this case; and (2) if not restricted under Section 40.38, does Section 40.32(d) bar issuance of the sought license amendment?" Id. For the reasons stated below, the AEA, and Section 40.32(d) clearly bar the issuance of the sought license amendment. Further, a fair reading of Section 40.38 also supports a bar to the issuance of the sought license amendment due to the

admitted foreign ownership and control of the licensed uranium mining activities by Cameco Corporation, a Canadian corporation ("Cameco").

The issue of CBR's foreign ownership, raised by Petitioners throughout this proceeding and repeated by the Board in slightly revised form in the Memorandum and Order, raises important questions with respect to the Applicant's compliance, both presently and in the past, with federal statutory law and the rules and regulations of the NRC.

Given the importance of the AEA as means of ensuring nuclear security in the post-9/11 world, it is critically important that the issue of the Applicant's foreign ownership be assessed in light of the Congressional mandate that nuclear material 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."[2] As discussed herein, Applicant's ownership and complete domination by a Canadian corporation, and previous to that by undisclosed foreign interests through a complex partnership structure described below, violates the applicable regulatory scheme and flaunts laws specifically enacted by the U.S. Congress to ensure the health, security and safety of U.S. citizens. No less important is the Applicant's consistent failure to make adequate disclosures and its flagrant, ongoing pattern and practice of disrespect for and noncompliance with NRC regulations.

Set forth below is an overview of the Applicant's relevant corporate history, which has been gleaned from the limited public record. As noted below, Applicant has been embroiled in past legal battles with Petitioner WNRC respect to the illegal foreign

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[2] See U.S.C. § 2133(d).

ownership, domination and control of Applicant in violation of Nebraska's Alien Ownership Act at Neb.Rev.Stat. 476-02. The Petitioners believe that, taken together, the Applicant's history and current actions before the Board demonstrate a disturbing pattern of violations which harm the national interest and are clearly contrary to the public health and welfare of the People of the United States. This must not be allowed to continue.

The upshot of all of this is that Cameco was able to acquire *de facto* ownership of a uranium mine and NRC source materials license when such acquisition could not have been accomplished by Cameco's direct purchase of the Applicant's common stock under applicable law, at the very least without a substantial Negation Plan (discussed below). Had Cameco sought to acquire the Applicant through the outright purchase of all of the Applicant's equity securities, it would have faced extensive security from the NRC, not to mention the public outcry that certainly would have followed. To allow the Applicant and Cameco do indirectly what they would have been prohibited from doing directly would be a travesty and would require an Act of Congress because no such authority is granted under the AEA. We note with interest the public and Congressional outcry several years ago that followed the proposed acquisition of several U.S. ports by a Dubai-based company. One can only imagine the outcry that would be triggered by a foreign company gaining access to America's uranium reserves. Ultimately, that acquisition of such ports by a foreign company was blocked on the grounds that it was inimical to national security. A much stronger case can be made with respect to mining, processing, transporting, marketing and exporting material as sensitive as uranium which is an obvious pre-cursor to weapons grade uranium.

Finally, due to the unclean hands of Applicant and its control persons and intentional disregard for applicable disclosure requirements, the proposed loopholes by Applicant (collectively, the "Cameco Loophole"), to the effect that a foreign person may secretly acquire ownership and control of a NRC licensed uranium mine in a staged corporate stock acquisition without public notice, hearings or disclosures[3] as to foreign affiliations, must be permanently closed. While we are thankful that Cameco is a real corporation run by recognized business professionals, Petitioners share the Board's concerns that "previous Commission decisions regarding foreign ownership or control did not appear to turn on which particular nation the applicant was associated with."

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[3] Hearing Transcript from January 16, 2008 Chadron Hearing, at 350-351:

20 MR. SMITH: Well, if it helps shorten this
21 conversation a bit, there has never been a license
22 transfer in Crow Butte Resources. The operator has
23 stayed the same throughout the history of the project.
24 JUDGE YOUNG: So the ownership of the
25 operator changed?

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1 MR. SMITH: And I don't believe that
2 that's necessarily changed either. Maybe the owner of
3 the owner.
4 JUDGE YOUNG: Oh, well maybe -- well,
5 okay.
6 MS. JONES: That's part of what I was
7 going to say.
8 JUDGE YOUNG: In any event it's --
9 MR. SMITH: There's never been a need for
10 a license transfer.
11 MR. FRANKEL: Is that a legal opinion?
12 MR. SMITH: Yes.
13 JUDGE YOUNG: Okay.

Petitioners note that Mr. Smith's legal opinion on behalf of Applicant CBR that "there has never been a need for a transfer" directly conflicts with AEA Section 184 which provides that **"[n]o license granted hereunder…shall be transferred, assigned or in any manner disposed of, either voluntarily or involuntarily, directly or indirectly, <u>through transfer of control</u> of any license to any person, unless the Commission shall, <u>after securing full information</u>, find that the transfer is in accordance with the provisions of this Act, and shall give its consent in writing.** 42 USC 2234 (emphasis added.) NRC Regulations Sections 40.41(b) and 40.46 also prohibit such transfers and show that Applicant's legal position as expressed by Mr. Smith above is indefensible.

Memorandum at 122. In addition, such prior Commission decisions must be evaluated in the context of the post-9/11 World in which we live.

In this case, we have the luxury of addressing these issues before a tragic incident occurs that is traceable to this Cameco Loophole. 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 by enemies of the United States because Americans, including state and federal regulators, would be unwittingly assisting such enemies due to the secrecy of the foreign control. Then the Cameco Loophole and its proponents would be responsible for massive groundwater contamination and consequential injury to innocent Americans – how can that be in the national interest? How can that not be inimical to the common defense and security or to the health and safety of the public?

Even if such dire events never come to pass, and Petitioners sincerely hope and pray that they do not, it is clearly inimical to the common defense and security or to the health and safety of the public for foreign persons to be in control of US uranium mines because it encourages the operation of the mining operation itself in reckless disregard for the probability of ground water contamination to the surrounding aquifers and

communities. As described below, this is precisely what has happened in the case of the Crow Butte mine.

In addition, as described below, Applicant and its related persons have engaged in such an ongoing pattern and practice of deception, failure to disclose, reckless disregard for water quality and the probability of groundwater contamination and intentional failures to disclose material information to regulators including the NDEQ, NRC and Nebraska Attorney General so that the true foreign ownership could be concealed in violation of applicable law and NRC regulations. It is incumbent on the Board and the NRC in discharging their duties and responsibilities to immediately commence an investigation with the help of the US Department of Justice and FBI as needed to ascertain the true nature of the transactions described herein. The NRC should further exercise its discretion to suspend all of Cameco's licenses and license applications pending resolution of these important issues that go right to the integrity of the entire NRC and ASLB licensing process.

APPLICABLE STANDARDS

The Board conducted substantial analysis in the Memorandum regarding the applicability of AEA Section 103(d) and the defined term "Corporation" from NRC Regulations Section 40.4. While we agree with the Board's basic conclusions that such sections would logically and could legally be found to apply to bar the sought amendment in this case, there are other provisions of the AEA, NRC regulations thereunder and legal precedent in this area which all delineate applicable standards that bar issuance of the

sought after amendment without any expansion of any existing interpretations of AEA Section 103(d) which by its terms applies to utilization facilities and not to source material licensing.[4]

The NRC itself lacks authority under the AEA to grant a license or amendment where, as here, there is no benefit to the US national interest, common defense or security and there are clear detriments to the health and safety of the public. Mere technical compliance with NRC disclosure regulations does not in and of itself satisfy the purposes stated in the Atomic Energy Act, as amended. 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). Accordingly, it is incumbent upon the NRC to evaluate the US national interest or common defense and security, or lack thereof, as well as the protection of public health and safety, or failure thereof in NRC's evaluation of whether to issue a license. Furthermore, the NRC is required to deny a license amendment that would not serve the US national interest or common defense and security or would fail to protect public health and safety. Since the purposes of the AEA would not be served by honoring the Cameco Loophole or granting any license or amendment to a foreign owned, controlled and dominated applicant, this Contention E must be admitted and determined upon a proper record.

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[4] Petitioners note that in a post-9/11 World and especially in light of certain antiquated provisions such as those related to the now privatized USEC, a thorough re-examination of the regulatory framework applicable to source material licensing is required and the NRC would be authorized to suspend all source material licensing proceedings for a two year period in order to properly study the matter and make appropriate policy determinations and rulemaking. See, e.g., Westinghouse Electric Corp. v. NRC, 598 F.2d 759 (3rd Cir. 1979)(NRC authorized to impose two year moratorium on decision-making process on spent nuclear fuel and use in nuclear reactors of recovered plutonium).

A. Chevron Analysis Requires Following Expressed Congressional Intent and a Reasonable Interpretation Consistent with AEA

Any court reviewing this issue will be required to apply the standards set forth by the Supreme Court in 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. However, if the statute before us is "silent or ambiguous with respect to the specific issue," before us, we proceed to the second step. *Id.* At this stage, we "defer to the agency's interpretation of the statute if it is reasonable and consistent with the statute's purpose," Chemical Manufacturers Ass'n v. EPA, 919 F.2d 158, 162-63 (D.C.Cir.1990); we are not free to "impose [our] own construction on the statute, as would be necessary in the absence of an administrative interpretation." Chevron, 467 U.S. at 843 (footnote omitted). The NRC's regulations must be reviewed under the *Chevron* rubric. Nuclear Information Resource Serv. V. NRC, 969 F.2d 1169, 1173 (DC Cir. 1992).

B. Unambiguous Congressional Intent Expressed in AEA

In this case, 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 public. The AEA 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 and special nuclear material, production facilities, and utilization facilities 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.

Significantly, the national interest and common defense aspects include protecting the health and safety of the public, including the environment and water resources.

> "The Atomic Energy Act was passed years before broader environmental concerns prompted enactment of the Environmental Protection Policy Act. Yet many of those same concerns permeated provisions of the first-mentioned legislation and the regulations promulgated in accordance with its mandate. To say that these must be regarded independently of the constantly increasing consciousness of environmental risks reflected in proceedings with reference to NEPA, would make for neither practicality nor sense. Nor can AEA requirements be viewed separate and apart from NEPA considerations. Especially in view of NEPA, it also is unreasonable to suppose that risks are automatically acceptable, and may be imposed upon the public by virtue of AEA, merely because operation of a facility will conform to the Commission's basic health and safety standards. The weighing of risks against benefits in view of the

> circumstances of particular projects is required by NEPA in view of AEA. The two statutes and the regulations promulgated under each must be viewed in *para material."* Citizens for Safe Power, Inc. v. NRC, 524 F.2d 1291, 1299 (DC Cir. 1975).

C. AEA Sections 62 and 69 Directly Apply To Bar Foreign Ownership of Applicant

AEA Sections 62 and 69 are the most directly applicable as they expressly govern source material. This matter may be resolved without a new interpretation of AEA Section 103(d). Additional guidance from AEA Section 103(d) is allowable due to the operation of Section 2012(f) quoted above that **"source…material…and utilization facilities 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**." 42 USC §2012 (e) (emphasis added). Under Vogel, infra, any NRC Regulations must be interpreted consistently with these Congressionally expressed purposes in order to be effective under Chevron.

AEA Section 61 provides that the Commission may make certain determinations concerning source material provided that before making such determination, the Commission must "find that the determination that such material is source material is in the interest of the common defense and security. 42 USC 2091. AEA Section 62 provides that "no person may transfer or receive in interstate commerce, transfer, deliver,

receive possession of or title to, or import into or export from the United States any source material after removal from its place of deposit in nature. 42 USC 2092. 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**. 42 USC 2099 (emphasis added). As a result, AEA Section 69 contains the dispositive rule.

For additional guidance, we may look to AEA Section 103(d), which states "[n]o license [for a utilization facility] may be issued to an alien or 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. In any event, no license may be issued 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 or to the health and safety of the public." 42 USC 2133(d). Similarly, AEA Section 126, concerning export licensing, provides that no export license may be issued for source material until the Commission has been notified by the Secretary of State that it is the judgment of the executive branch that the proposed export or exemption will not be inimical to the common defense and security, and would not be inimical to the common defense and security because it lacks significance for nuclear explosive purposes. 42 USC 2155.

In order to obtain a source materials license from the NRC, an applicant must file a license application under AEA Section 182. 42 USC 2232. 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 appropriate for the license. Id. (emphasis added.) 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. 42 USC 2234.

In order to find that the transfer is in accordance with the AEA, the NRC would have to make a determination under AEA Section 69 that the transfer is not inimical to the common defense and security or the health and safety of the public. 42 USC 2099. Since AEA Section 182 requires the citizenship of the license applicant to be disclosed and evaluated in connection with making a determination under AEA Section 69 as to whether granting the request would be inimical to the common defense and security or the health and safety of the public, it is clear that the determination of foreign ownership, control and domination is a statutory requirement that transcends all of the applicable NRC regulations concerning the issuance and transfers of various kinds of licenses.

D. AEA Section 103(d) Is Very Influential and Persuasive.

Since the Congressional purposes stated in AEA Section 2 are the same for source material as for utilization facilities, the guidance provided by AEA Section 103(d) is highly persuasive. Further, Petitioners submit that the additional specificity in Section 103(d) beyond the general "inimical" standard found elsewhere in the AEA is simply a function of the greater quantum of funds and litigation involved in nuclear power plants. The fact that Section 103(d) expressly prohibits the issuance of a license to a foreign owned, controlled or dominated applicant should support a logical conclusion and reasonable interpretation under AEA Section 69 that foreign ownership, control and domination, particularly when undisclosed as in the present case, is a bar to the issuance of a license (and by extension of the principle through 10 CFR Section 50.92) to Applicant CBR.[5] See Section I below for a discussion of influential and persuasive Commission precedent under AEA Section 103(d).

E. Applicable NRC Rules and Regulations.

The NRC Regulations are for the most part consistent with the Congressional intent discussed above. Significantly, under Regulations Section 40.2, the regulations in Part 40 apply to all persons in the United States. 10 CFR § 40.2. In this case, if the Applicant's position were to be accepted, how would the control persons of the parent company of Applicant be made subject to NRC Regulations if Section 40.2 makes them

[5] Petitioners note that Section 50.92 provides that in determining whether an amendment to a license will be issued to the applicant, the Commission will be guided by the considerations which govern the issuance of initial licenses, to the extent applicable and appropriate and that the Commission will be particularly sensitive to a license amendment request that involves irreversible consequences, such as the irreversible use of water in Applicant's ISL mine. 10 CFR50.92.

applicable only to persons in the United States? If Applicant's corporate shares are secretly acquired, at what point in the process does NRC have an opportunity to secure full information and obtain sufficient assurances in a "Negation Plan" (through contracts, corporate restructuring, such as a "spin-off" of US assets to public shareholders, or otherwise) to neutralize the risks associated with foreign ownership, control and domination of an NRC licensee.

As discussed above, AEA Section 189 requires a written license application which states the citizenship of the applicant, all information required by NRC regulations and regulators. NRC Regulation Section 40.9 provides that all information provided to the Commission by Applicant shall be complete and accurate in "all material respects" which can be read to mean that the Applicant has disclosed all information that a reasonably prudent regulator would consider important in making a licensing decision.[6] 10 CFR 40.9(a). Further, Section 40.9(b) requires Applicant to notify the Commission if Applicant has identified information having a significant implication for public health and safety or common defense and security. Accordingly, the Cameco Loophole must be rejected because it would conflict with the disclosure requirements of Section 40.9. Petitioners note that there is a private cause of action for violations of the AEA, including

[6] Rules for establishing materiality under federal law are well-established by the Supreme Court under the securities laws, see TSC Industries, Inc. v. Northway, Inc., 426 U.S. 438 (1976), concluding in the proxy-solicitation context that "[a]n omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote." Id., at 449. Acknowledging that certain information concerning corporate developments could well be of "dubious significance," id., at 448, 96, the Court was careful not to set too low a standard of materiality; it was concerned that a minimal standard might bring an overabundance of information within its reach, and lead management "simply to bury the shareholders in an avalanche of trivial information-a result that is hardly conducive to informed decisionmaking." Id., at 448-449. It further explained that to fulfill the materiality requirement "there must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available." *Id.*, at 449. We now expressly adopt the TSC Industries standard of materiality for the § 10(b) and Rule 10b-5 context. Basic Inc. v. Levinson, 485 US 224, 231-232 (1988).

violations of the disclosure requirements therein. Drake v. Detroit Edison, 443 F.Supp. 833, 837 (WD Mich. 1978).[7] Petitioners further assert that the same type of due diligence obligations apply to professionals in preparing and filing NRC applications as are applicable to professionals preparing and filing SEC documents. See, e.g., Escott v. BarChris Const. Corp., 283 F.Supp. 643 (S.D.N.Y. 1968) (finding lawyer among others did not have benefit of due diligence defense when he had knowledge that information in forms submitted to SEC, which were themselves treated as revisions to previously filed documents, contained false information. The court held that in the case of company counsel, Birnbaum, he could not claim a due diligence defense because he should have known better as lawyer for the company involved.)

Once the Commission has received full disclosure in an application, it may approve the sought after source materials license in accordance with Section 40.32 if: (a) The application is for a purpose authorized by the Act; (b) The applicant is qualified by reason of training and experience to use the source material for the purpose requested in such manner as to protect health and minimize danger to life or property; (c) The applicant's proposed equipment, facilities and procedures are adequate to protect health

[7] The court stated, "[i]t is necessary to consider one more extremely important point: does a private cause of action exist under the Atomic Energy Act? For the reasons discussed below, I conclude that a private cause of action does exist. Id. In its discussion based on Cort v. Ash, 422 U.S. 66 (1975),, the Court referred to other areas where the Supreme Court has implied private causes of action including the Securities Act of 1933 and the Securities Exchange Act of 1934. Id. at 838 (J. I. Case Co. v. Borak, 377 U.S. 426 (1964) re: 1933 Act and Superintendent of Ins. v. Bankers Life & Casualty Co., 404 U.S. 6 (1971) re: 1934 Act.) In short, plaintiffs are members of the public, for the protection of whom the Atomic Energy Act expressly provides. There is no indication that private suits will be detrimental to the purpose of the Act; to the contrary, those purposes will be furthered by permitting the class in which the statute creates a federal right to seek judicial relief for alleged unlawful conduct. Such actions will not intrude upon administrative licensing procedures, nor will they tend to abrogate the NRC's statutory authority. When, as here, administrative remedies are insufficient to adequately protect the public, and the legislation in question mandates such protection, it is the duty of the courts to make judicial relief available "where necessary to achieve that result."(J. I. Case Co. v. Borak, infra, 377 U.S. at 432.) Id. at 840.

and minimize danger to life or property; and

(d) **The issuance of the license will not be inimical to the common defense and security or to the health and safety of the public.** 10 CFR 40.32 (emphasis added.)

F. Foreign Ownership of US Uranium Mines Is Inimical to US Common Defense and Security and to Public Health and Safety.

Due to Applicant's intentional failures to disclose material information concerning its foreign ownership, control and domination, Applicant has "unclean hands" in this proceeding and may not receive the benefits of any presumptions or assumptions. As the Supreme Court has stated in Precision Inst. Mfg. Co. v. Automotive M.M. Co., 324 U.S. 806 (1945), the doctrine of "unclean hands" requires:

> that 'he who comes into equity must come with clean hands.' This maxim is far more than a mere banality. It is a self-imposed ordinance that closes the doors of a court of equity to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief, however improper may have been the behavior of the defendant. That doctrine is rooted in the historical concept of court of equity as a vehicle for affirmatively enforcing the requirements of conscience and good faith. This presupposes a refusal on its part to be 'the abetter of iniquity.' Bein v. Heath, 6 How. 228, 247, 12 L.Ed. 416. Thus while 'equity does not demand that its suitors shall have led blameless lives,'Loughran v. Loughran, 292 U.S. 216, 229, 54 S.Ct. 684, 689, 78 L.Ed. 1219, as to other matters, it does require that they shall have acted fairly and ***815** without fraud or deceit as to the controversy in issue.Keystone Driller Co. v. General Excavator Co., 290 U.S. 240, 245, 54 S.Ct. 146, 147, 78 L.Ed. 293;Johnson v. Yellow Cab Transit Co., 321 U.S. 383, 387, 64 S.Ct. 622, 624, 88 L.Ed. 814; 2 Pomeroy, Equity Jurisprudence (5th Ed.) ss 397-399.
>
> This maxim necessarily gives wide range to the equity court's use of discretion in refusing to aid the unclean litigant. It is 'not bound by formula or restrained by any limitation that tends to trammel the free and just exercise of discretion.'Keystone Driller Co. v. General Excavator Co., supra, 290 U.S. 245, 246, 54 S.Ct. 147, 148, 78 L.Ed. 293. Accordingly one's misconduct need not necessarily have been of such a nature as to be

> punishable as a crime or as to justify legal proceedings of any character. **Any willful act concerning the cause of action which rightfully can be said to transgress equitable standards of conduct is sufficient cause for the invocation of the maxim by the chancellor**.
>
> **Moreover, where a suit in equity concerns the public interest as well as the private interests of the litigants this doctrine assumes even wider and more significant proportions. For if an equity court properly uses the maxim to withhold its assistance in such a case it not only prevents a wrongdoer from enjoying the fruits of his transgression but averts an injury to the public. The determination of when the maxim should be applied to bar this type of suit thus becomes of vital significance**. See Morton Salt Co. v. G. S. Suppiger Co., 314 U.S. 488, 492-494, 788,62 S.Ct. 402, 405, 406, 86 L.Ed. 363.

Id. at 814-815 (emphasis added.) Because of Applicant's intentional violations of disclosure regulations which amount to a frustration and mockery of the entire NRC licensing process, the doctrine of "unclean hands" should be applied by the Board to suspend Applicant's license and amendment until a full and complete record can be assembled which is based on sworn testimony from credible witnesses and authenticated documentation and data. This is directly relevant to Petitioners' request for Subpart G procedures discussed below. In addition, due to the public interests involved (including those purposes expressed in AEA Section 2), equitable principles require that this Board prevent Applicant from "enjoying the fruits of his transgression but averts an injury to the public." Precision at 815. Applicant must be held to the highest standards for the protection of the US national interest, common defense and security and health and safety of the public and anything less falls short of legal compliance.

One example of the 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. For example, 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) in favor of profit taking in what is often known as "cut and run" mining operations. As a result, lack of foreign ownership, control and domination is required in order to properly preserve the health and safety of the public as required by the AEA and NRC Regulations. In the absence of any Negation Plan, Applicant's license amendment for the benefit of foreign Cameco would be inimical to the public health and safety and, therefore, must be denied.[8]

The Court of Appeals recognized the problems associated with allowing non-US persons to control nuclear materials, "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. In the case of the latter standard of 'the public health and safety,' the Congressional preoccupation was with industrial accidents and the dangers they presented to employees and the neighboring public….In short, Congress appears to expect that an applicant for a license should bear the burden of proving the security of his

[8] Had Applicant made full disclosures of the foreign ownership and control issues, the NRC would have been able to evaluate such issue and make license conditions if possible that might allow for licensing in accordance with the AEA under NRC Regulation Section 40.41, which contemplates special requirements or conditions that it deems necessary to promote the common defense and security, protect health or minimize danger to life or property, protect restricted data, and require reporting and recordkeeping to effect the purposes of the AEA. A Negation Plan could be properly delineated and adopted under such Regulation 40.41. 10 CFR 40.41.

proposed facility as against his own treachery, negligence, or incapacity. Siegel v. Atomic Energy Commission, 400 F.2d 778, 784 (DC Cir. 1968).

Another example of how it may be inimical to the common defense and security of the United States to grant a foreign company a license to mine and export yellowcake uranium, is that takes the yellowcake uranium outside of US legal restrictions. Cameco is aware of this and makes the statement on pages 12-13 of its 2007 Annual Information Form dated Marcy 28, 2008, attached hereto, that: [t]he US restrictions have no effect on the sale of Russian uranium to other countries. About 70% of the world uranium requirements arise from utilities in countries unaffected by the US restrictions. **In 2007, approximately 48% of Cameco's sales volume was to countries unaffected by the US restrictions.** (Emphasis added.) This shows that while Canada is subject to the Non-Proliferation Treaty, there are other aspects of US legal control over source and nuclear materials that can be avoided by foreign owners of US uranium mines such as Cameco.

Yet another example of how this is inimical to the common defense and security is that key documents and information concerning Applicant and its operations are kept outside of the United States and, therefore, arguably outside of the jurisdiction of the NRC under 10 CFR Section 40.2. This raises the question that if all key executive of Applicant attend a strategy meeting at their parent's headquarters in Canada, then to what extent is restricted data being compromised? To what extent are meeting minutes at that Canada meeting available for discovery in this US NRC proceeding. If Cameco resists Petitioners discovery requests concerning Cameco's corporate minutes related to the acquisitions of Geomex Minerals, Inc. and UUS, Inc. from Uranerz and Cameco's

awareness of any arrangement to shift a percentage of equity to KEPCO to preserve it's 10% hidden equity interest, then enforcement of the AEA 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 common defense and security and public health and safety.

G. Special Case of USEC and 10 CFR 40.38

While not directly applicable, and frought with some interpretative difficulties having to do with the unique legislative history of the AEA, the USEC Privatization and the possibility that NRC Regulations have not been updated to be consistent, NRC Regulation Section 40.38 provides some helpful guidance. Section 40.38 provides that a license may not be issued to the "Corporation" if it is owned, controlled or dominated by an alien, a foreign corporation or foreign government, or the issuance of the license would be inimical to the common defense and security of the US or maintenance of a reliable and economical domestic source of enrichment services. 10 CFR 40.38. Petitioners submit that Section 40.38 shows important factors to be considered in the analysis such as whether the licensee entity is owned, controlled or dominated by an alien, a foreign corporation or a foreign government. This provides some distinctions between ownership of the US uranium mine by foreign individuals, foreign corporation or foreign governments and might lead to slightly different conclusions. For example, Petitioners note that in the case of a foreign government, AEA Section 123 provides mechanisms for nation-to-nation agreements on source and nuclear materials and the

development of atomic energy which involves consultation with the President of the United States, among other things. 42 USC 2073. Section 40.38 also makes reference to the importance of a reliable and economical domestic source of enrichment services, which itself is a public policy goal that would be frustrated by allowing America's uranium assets to be owned, licensed and mined by foreign companies.

H. Department of Energy Implementation of Foreign Ownership, Control or Influence (FOCI) Program

Further guidance may be taken from the Department of Energy implementation of a Foreign Ownership, Control, or Influence (FOCI) program which is 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 may pose an undue risk to the common defense and security. DOE Order 5634.3 at Paragraph 1, attached hereto.

In the DOE Order, the DOE established a Departmental policy to require the "ultimate parent"[9] and any intervening levels of ownership, if 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. Id. at Paragraph 5. Under the DOE Order, the tier parents of an entity must submit to the DOE:

[9] For another example of a common "ultimate parent" analysis, see the anti-trust rules for pre-merger notifications under 15 USC s18a, which was part of the Hart-Scott-Rodino Antitrust Improvements Act of 1976

(1) Written notification of anticipated changes which include, but are not necessarily limited to, the following:

(a) Action to terminate the contractor organization or any of its parents for any reason.

(b)Imminent adjudication of or reorganization in bankruptcy of the contractor organization or any of its tier parents.

(c)Discussions or consultations with foreign interests which may reasonably be expected to lead to the introduction or increase of FOCI.

(d)Negotiations for the sale of securities to a foreign interest which may lead to the introduction or increase of FOCI.

(2)Written notification of a change in the extent and nature of FOCI which affects the information in the FOCI representations and certification(s) previously provided.

(3)Complete, current, and accurate information, certification(s), and explanatory documentation which define the extent and nature of any relevant FOCI whenever:

(a) There is any change in ownership or control.

(b) Five years have elapsed since the previously provided FOCI representations and certification(s) were executed.

(c)A DOE Headquarters or field safeguards and security office advises that it considers that a relevant change in the nature of the FOCI has occurred.

(4) Notwithstanding anything to the contrary contained in this Order, DOE reserves the right and has the obligation to impose any security method or requirement it believes necessary to ensure that unauthorized access by foreign interests to classified information and/or SNM is effectively precluded.

Id. at Paragraph 5(d) and 5(g).

Further, under Paragraph 8 of the Order, A U.S. organization effectively owned or controlled by a foreign government is ineligible for a facility approval or a safeguards

and security activity unless the Secretary of Energy determines that a waiver is essential to the national security interest of the U.S. Id. at Paragraph 8(a)(1). A U.S. organization effectively owned, controlled, or influenced by a foreign interest from a sensitive country identified in DOE 1500.3 shall not be eligible, in some cases, for a facility approval or safeguards and security activity. Id. at Paragraph 8(a)(2). An entity that is owned, controlled, or influenced by a foreign interest from a nonsensitive country, like Canada, shall be eligible for a facility approval or safeguards and security activity provided action can be taken to effectively negate or reduce associated FOCI risk to an acceptable level. Id. at Paragraph 8(a)(3). The chairman of the board and all principal officers of the U.S. organization(s) to be cleared for a facility approval or safeguards and security activity must be U.S. citizens residing within the limits of the U.S. Id. at Paragraph 8(a)(4).

Under the DOE Order, an entity will be considered under FOCI when a reasonable basis exists to conclude that the nature and extent of FOCI over the management or operations of the entity may result in the compromise of classified information or unauthorized access to special nuclear materials. The following factors will be considered in determining whether an organization is under FOCI or has FOCI involvement:

(1) Foreign interest ownership or beneficial ownership of 5 percent or more of the organization's securities.

(2) Ownership by the organization of any foreign interest in whole or in part.

(3) Foreign interest representation in one or more management positions such as directors, officers, or executive personnel.

(4)Foreign interest in a position to control or influence the

election, appointment, or tenure of one or more of the directors, officers, or executive personnel of the organization.

(5) Contract(s), agreement(s), understanding(s), or other arrangement(s) with a foreign interest.

(6) Indebtedness, actual or potential (unused lines of credit), to a foreign interest.

(7) Any revenue derived from a sensitive country.

(8) Revenue in excess of 10 percent of total revenue from foreign interest(s).

(9)Five percent or more of any class of the organization's securities held in "nominee shares," "street names," or some other method which does not disclose the beneficial owner of equitable title.

(10) Interlocking directors with foreign interests.

(11) Any citizen(s) of a foreign country(ies), whether an employee or visitor, who may have access to classified information and/or SNM.

(12) Any other factor that indicates or demonstrates a capability on the part of a foreign interest to control or influence the operations, management, or business of the organization.

Under Paragraph 10 of the DOE Order, acceptable methods to include in a Negation Plan consisting of one or more insulating measures prescribed in paragraph 11 or any combination of those measures, as appropriate. It may also consist of other measures employed in conjunction with, or apart from, these methods, such as:

a. Physical or organizational separation of the component performing the work requiring access authorization(s).

b. Modification or termination of agreements with foreign interests.

c. Diversification or reduction of agreements with foreign interests.

d. Diversification or reduction of income from foreign interests.

e. Assignment of specific security duties and responsibilities to selected officials of the organization.

f. Creation of special executive-level committees to consider and oversee classified information and/or SNM.

Under Paragraph 11 of the DOE Order, foreign ownership of a U.S. organization under consideration for a facility approval or safeguards and security activity becomes a concern to DOE when the amount of foreign-owned stock is at least sufficient to elect representation to the U.S. organization's board of directors or a foreign interest(s) is in a position to select such representatives. Foreign ownership which cannot be so manifested is not, in of itself, considered significant. Instances involving insignificant foreign stockholdings are, nonetheless, analyzed to assess the ownership source and to determine the possible significance when considered in conjunction with other aspects of foreign involvement which may be present in a particular case.

EXCERPTED DEFINITIONS for DOE Order 5634.3

For purposes of the DOE Order, the following definitions apply:

FOREIGN INTEREST. A foreign interest is defined as any of the following:

a. Any foreign government, agency of a foreign government, or representative of a foreign government;

b. Any form of business enterprise or legal entity organized under the laws of any country other than the U.S. or its possessions;

b. Any person who is not a U.S. citizen or national of the U.S. (An "intending citizen" and a foreign-owned U.S. company are excluded from the definitions of a foreign interest).

FOREIGN NATIONAL. Any person who is not a U.S. citizen or a U.S. national.

FOREIGN OWNERSHIP, CONTROL OR INFLUENCE (FOCI). FOCI exists when an offeror/bidder or contractor proposing to performing work for DOE involving access to classified information and/or a significant quantity of SNM has an institutional or personal relationship with a foreign interest(s). An offeror/bidder or contractor is considered to be under FOCI when the degree of interest as defined above is such that a reasonable basis exists for concluding that compromise of classified information and/or a significant quantity of SNM may result.

REPRESENTATIVE OF FOREIGN INTEREST (RFI). A citizen or national of the U.S., or an intending citizen to the U.S., who is acting as a representative of a foreign interest.

TIER PARENT. A corporation or other entity that controls another corporation or other entity by the power to elect its management. The control may exist by direct ownership of the corporation or other entity or by indirect ownership through one or more levels of ownership of corporation(s) or other entity(ies).

U.S. ORGANIZATION. Any individual, corporation, or organization located in the U.S. or its territorial areas which is organized, chartered, or incorporated under the laws of the U.S.

I. Discussion of Influential Prior Commission Decisions

To the extent that AEA Section 103(d) and related interpretations are deemed to be relevant to foreign ownership of an Applicant for a source materials license, there are a handful of prior Commission decisions that merit consideration.[10] There are several instructive Commission decisions in this area.[11] These help convey an understanding of

[10] As discussed in Section D above, Petitioners believe that AEA Section 103(d) regarding utilization facilities and related interpretations are extremely influential because the purposes for the AEA described in AEA Section 2 mentions both source materials and utilization facilities in the same breath.

[11] These are well surveyed in two articles, Palmer, Comment: The Nuclear Regulatory Commission and Foreign Ownership of Commercial Nuclear Power Plants in the United States, 28 Duq. L. Rev. 295 (1990) and Malsch, The Purchase of U.S. Nuclear Power

the various indicia of control that have been evaluated in the context of making a determination as to whether foreign ownership is "inimical."[12]

The first Commission decision construing the "foreign ownership, control, or domination" provision was *the General Electric Company and Southwest Atomic Energy Associates case ("SEFOR")*. In *SEFOR*, the Atomic Energy Commission ("AEC") permitted a foreign interest to indirectly participate in the construction of a US commercial nuclear power plant through a contractual arrangement. The AEC found that Congress intended to prohibit situations in which a foreign entity would have the power to direct the actions of a United States licensee. The AEC interpreted the phrase "owned, controlled, or dominated" to mean a situation where "**the will of one party was subjugated to the will of another" with potential adverse implications "toward safeguarding the national defense and security."** (Emphasis added.) Palmer Comment at 298-300.

In contrast, in the case of Cintichem, Applicant was a Delaware corporation whose ultimate parent was F. Hoffman-LaRoche and Co., Ltd., a Swiss corporation. The Commission concluded that it "has reason to believe" that the proposed transferee was owned, controlled, or dominated by an alien or foreign corporation and that the transfer

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Plants by Foreign Entities, 20 Energy L.J. 263 (1999); both of these must be viewed through the lens of living in a post-9/11 World.

[12] In addition, the legislative history indicates that an original proposal to limit foreign ownership to 5% was rejected as being too difficult to attain. Palmer Comment at 298. Of course, with modern, computerized stock transfer practices it would be quite simple for the stock ownership of a public company to be limited effectively. Petitioners note that Cameco itself, as a Canadian company is under substantial restrictions including that it must be majority owned by Canadian citizens and there are limits on the percentage ownership by non-Canadians. See generally, *Investment Canada Act*; Cameco 2007 Annual Information Form, attached hereto, at p. 28

would therefore be barred, without any need to consider whether the foreign ownership, control, or domination would be inimical to the common defense or security. Id. at 300-301. In response to the Commission's adverse decision, Congress added a rider to the NRC's 1984 Authorization Bill permitting the NRC to transfer this specific license to an entity owned or controlled by a foreign corporation if:

> (a) the NRC could find that the transfer would not be inimical to the common defense and security, and
>
> (b) the NRC included in the license such conditions as it deemed necessary to ensure that the foreign corporation could not direct the actions of the licensee in ways that would be inimical to the common defense and security.

After the special legislation was passed, the NRC conditionally approved the *Cintichem* transfer. The transfer was subject to General Atomic type conditions, with the additional requirement that: (1) all of the directors of Cintichem had to be United States citizens unless otherwise approved by the NRC; (2) any actions by Switzerland or changes in Swiss law which would affect ownership or control of Cintichem had to be reported immediately to the NRC; and (3) only individuals with security clearances were permitted to have access to Restricted Data.

The *Cintichem* case illustrates solution for Applicant – it can seek special congressional legislation. Palmer notes that "although the statutory prohibition on foreign ownership and control in Section 103(d) is closely related to with the separate statutory requirement in Section 103(d) relating to the common defense and security, the *Cintichem* case demonstrates that, even in situations where foreign ownership and control is permissible, the Commission will still examine whether license issuance will be

inimical to the common defense and security and may impose additional conditions to satisfy this requirement." Id. at 302.

In 1977, Babcock & Wilcox ("B&W"), the NRC held that a transfer of "effective control" of a licensee does constitute a transfer of a license within the meaning of AEA Section 184. The NRC indicated that its three major concerns in connection with the grant of a license or a license transfer were: (1) whether the applicant is financially stable and responsible, (2) whether the applicant will employ technically competent personnel, and (3) whether the applicant is under foreign domination or control or whether the common defense or security might otherwise be harmed. Id. at 303. Palmer notes that "[w]hile refusing to take action in the B&W/United litigation, the NRC requested to be kept informed of its progress. The NRC subsequently notified United:

> Obviously, you may reach the conclusion that United will be able to exercise effective control over B&W even without having acquired a fifty percent stock interest in the operation. Our firm expectation is that you will take no step to implement any such conclusion before seeking the necessary authorization from the Commission.[13]

This indicates that the NRC is aware that there are attributes of control that are acquired at less than 50% which convey "effective control".

In a more recent decision, the NRC approved the proposed transfer of a controlling interest in Exxon Nuclear, a Delaware corporation, to Kraftwerk Union AG ("KWU") and a wholly-owned subsidiary of Siemans AG, two corporations organized under the laws of the Federal Republic of Germany. Since the NRC licenses held by Exxon Nuclear were for nuclear materials, and not for a production or utilization facility,

[13] Letter from Nuclear Regulatory Commission to United Technologies Corporation, re: NRC approval necessary before any transfer in ownership from B&W to United may occur (June 7, 1977) (emphasis added); Palmer Comment, FN 37.

the statutory prohibition against foreign ownership, control, or domination was not involved, but the license transfer still had to satisfy the not "inimical to the common defense and security" requirement.

This is similar to the instant case where AEA Sections 62 and 69 control and the license issuance/amendment (as well as the transfer of the license to Cameco when it did occur) had to satisfy the not "inimical" requirement. Exxon Nuclear took great measures in a "Negation Plan" to make sure that control by KWU would not be inimical to the common defense and security because, among other things, prior to the closing date, Exxon Nuclear would divest itself of all interests in DOE classified contracts and would transfer to another entity all of its intellectual property rights in various types of Restricted Data. In addition, Exxon Nuclear would remain a Delaware corporation and indicated that the current directors and principal operating officers, all of whom were United States citizens, would remain in office; that there would be no change in the fundamental materials control program or in the plans for physical security of the facilities or for the physical protection of Special Nuclear Materials in transit. Exxon Nuclear also noted that the Federal Republic of Germany is a signatory of the Nuclear Non-Proliferation Treaty and is a member of Euratom. The NRC approved the transfer without comment or imposition of additional conditions. The NRC thus permitted two foreign entities to obtain a controlling interest over NRC issued nuclear materials licenses.

It is important to note the substantial analysis and regulatory oversight that goes into the creation and acceptance of a Negation Plan under very limited circumstances and

on a case-by-case basis. Applicant should have given proper notice of the transfer of effective control of itself to foreign interests and allowed for the preparation and imposition of an appropriate Negation Plan if, in fact, a fully informed finding shall have been made that the licensing/transfer would not be "inimical."

Malch writes "[t]hus, in these cases the NRC allowed the establishment of foreign legal rights, beyond the first tier, of the kind generally associated with legal ownership of business entities, and in effect treated both cases as presenting a foreign-control-and-domination question rather than a foreign-ownership question. **The "control-and-domination" question was then resolved by appropriate conditions which preserved U.S. control over common defense and security matters. Thus, *General Atomic Company* and *McDermott/B&W* both stand for the proposition that the foreign ownership restriction does not apply beyond the direct or immediate owner of the licensee. [FN38] Foreign ownership interests higher up in the corporate chain are not disallowed per se, provided there is no foreign domination and control problem under the statute.** Malch, at 271 (emphasis added.) Malch's footnote is important:

> [FN38]. One could make an exception to this principle if the circumstances of a particular corporate structuring would permit a "piercing of the corporate veil," and a look through the direct ownership of a company all the way to the ultimate foreign parent. However, this would need to be justified in the particular case. In this regard, it is worth noting that U.S. courts of appeal have twice refused to pierce the corporate veil of companies holding NRC licensees. Lowell Staats Mining Co. v. Pioneer Uravan, Inc., 878 F.2d 1259 (10th Cir. 1989). Moreover, there would seem to be no good reason to do such an analysis since whatever insights might be gleaned from a corporate veil-piercing analysis could be gleaned more easily from a thorough analysis of foreign domination and

control. [14]

The NRC has a "Standard Review Plan on Foreign Ownership, Control or Domination" (the SRP), published for interim use and comment on March 2, 1999, which adopts the fundamental approach in SEFOR, and declines to offer a stock percentage threshold above which foreign control would be conclusive, in favor of an analysis of "all the information that bears on who in the corporate structure exercises control over what issues and what rights may be associated with certain types of shares." Malch at 272. However, the SRP also provides that an applicant will be ineligible for a license if it is seeking to acquire a 100% interest in a license and is wholly owned by a U.S. company, where such company is wholly owned by a foreign corporation, unless the foreign parent's stock is largely owned by U.S. citizens. Id. at 273. In the instant case, such would be impossible due to the legal requirement imposed on Cameco limiting the percentage ownership of non-Canadians and requiring at least a majority of the shares to be held by Canadians.

The SRP goes on to state that "an applicant that is partially owned by a foreign entity, for example, partial ownership of 50 percent or greater, may still be eligible for a license if certain conditions are imposed, such as requiring that officers and employees of the applicant responsible for special nuclear material must be U.S. citizens. These conditions, which will be necessary whenever the NRC reviewer believes that the applicant may be considered to be owned, controlled, or dominated by foreign interests, or that additional action would be necessary "to negate the foreign ownership, control, or

[14] Where, as here, the corporate form is being used to perpetrate an inequitable result, and the factors are present for piercing the corporate veil, it would be appropriate to do so. See Associated Vendors, Inc. v. Oakland Meat Co., 210 Cal.App.2d 825 (Cal. App. 1962), discussed below.

domination," are called a "Negation Action Plan." The SRP also makes clear that factors not related to foreign ownership must also be considered, such as contracts and loan agreements. Finally, "further consideration is required" if a foreign applicant is seeking to acquire less than a 100% interest in the facility. Id. Of course, if the company secretly acquires control of the licensee, there is no opportunity for an NRC reviewer to craft a Negation Action Plan as contemplated by the SRP. Once again, this indicates the need for greater regulatory oversight.

In the AmerGen case, the application proposed various controls designed to ensure that the matters of interest to the NRC would be within the control of U.S. citizens. These were similar to the kinds of controls proposed and adopted in the prior cases. However, they specifically included safety matters in addition to common defense and security matters. Among other things, the AmerGen CEO and Chief Nuclear Officer, and a majority of the AmerGen management committee, with the power to direct the affairs of the company, would be U.S. citizens. Also, U.S. interests would appoint and remove half of the members of the management committee, and on specific matters concerning public health and safety, common defense, and security, the Chairman of the management committee (a U.S. citizen) would exercise a tie-breaker vote. Thus, U.S. citizens controlled decisions on matters of interest to the NRC. Malch at 275.

The NRC approved the transfer with the conditions described above. Those conditions could not be changed without the NRC's approval. In doing so, the NRC stated that it had followed the provisions of the SRP relating to partial foreign ownership. Only one prior case, General Atomic Company, was cited as "somewhat

analogous," and the application was considered acceptable because of the conditions that would be imposed. Thus, in effect, the application in AmerGen was analyzed as presenting a foreign control rather than a foreign ownership question. No effort was made to separate common defense and security issues from safety issues in the formulation of the conditions. However, only "primarily" safety issues were within U.S. control. Decisions whether to spend money to extend the economic life of the plant or improve economic performance were specifically not included in this safety category.

Finally, the NRC analysis agreed with the applicant that the United Kingdom was a close ally of the United States and had excellent non-proliferation credentials. These factors were considered relevant to the common defense and security finding, and "consistent with" but "not dispositive" of the "foreign ownership, control, and domination finding," given the latter's "orientation toward safeguarding the national defense and security." Accordingly, contrary to Applicant's assertions in this case, and consistent with the Board's ruling in the Memorandum at p. 122, the mere fact that Canada is an ally of the US and has excellent non-proliferation credentials is not dispositive. The AmerGen treatment of foreign ownership above the first tier (a foreign "grandfather" – or "ultimate parent" analaysis) as done as presenting a foreign control and domination issue rather than a foreign ownership.

J. Piercing the Corporate Veil.

Many of the same factors that indicate a need to pierce the corporate veil also are indicative that the corporate entity involved is abusing the corporate form to evade legal requirements. Such would require "piercing the corporate veil" in order to look beyond

the Applicant to its owners/shareholders for performance of legal requirements. One of the seminal cases on the issue of piercing the corporate veil is Associated Vendors, Inc. v. Oakland Meat Co., 210 Cal.App.2d 825 (Cal. App. 1962). In that case, the court found that:

> It is a fundamental rule that "[t]he conditions under which the corporate entity may be disregarded, or the corporation be regarded as the alter ego of the stockholders, **[210 Cal.App.2d 837]** necessarily vary according to the circumstances in each case inasmuch as the doctrine is essentially an equitable one and for that reason is particularly within the province of the trial court. Only general rules may be laid down for guidance." *[citations omitted.]*
>
> The basic rule stated by our Supreme Court as a guide in the application of this doctrine is as follows: The two requirements are (1) that there be such unity of interest and ownership that the separate personalities of the corporation and the individual no longer exist, and (2) that, if the acts are treated as those of the corporation alone, an inequitable result will follow. (*Automotriz etc. De California v. Resnick*, supra, 47 Cal.2d 792, 796; *Stark v. Coker*, supra, 20 Cal.2d 839, 846; *Watson v. Commonwealth Ins. Co.,* 8 Cal.2d 61, 68 [63 P.2d 295]; *Minifie v. Rowley*, 187 Cal. 481, 487 [202 P. 673].)
>
> …
>
> It should also be noted that, while the doctrine does not depend on the presence of actual fraud, it is designed to prevent what would be fraud or injustice, if accomplished. Accordingly, bad faith in one form or another is an underlying consideration and will be found in some form or another in those cases wherein the trial court was justified in disregarding the corporate entity. (See *Talbot v. Fresno-Pacific Corp*., supra, 181 Cal.App.2d 425, 431; *Hollywood Cleaning & Pressing Co. v. Hollywood Laundry Service, Inc*., 217 Cal. 124, 129 [17 P.2d 709]; *Carlesimo v. Schwebel*, supra, 87 Cal.App.2d 482, 491; *Erkenbrecher v. Grant*, 187 Cal. 7 [200 P. 641].)
>
> A review of the cases which have discussed the problem discloses the consideration of a variety of factors which were pertinent to the trial court's determination under the particular circumstances of each case. Among these are the following:
>
> the failure to maintain minutes or adequate corporate records, and the

> confusion of the records of the separate entities **[210 Cal.App.2d 839]** [citations omitted];
>
> the identical equitable ownership in the two entities; the identification of the equitable owners thereof with the domination and control of the two entities;
>
> identification of the directors and officers of the two entities in the responsible supervision and management; sole ownership of all of the stock in a corporation by one individual or the members of a family [citations omitted];
>
> the use of the same office or business location; the employment of the same employees and/or attorney [citations omitted];
>
> the use of a corporation as a mere shell, instrumentality or conduit for a single venture or the business of an individual or another corporation (*McCombs v. Rudman*, supra, 197 Cal.App.2d 46; *Asamen v. Thompson*, supra, 55 Cal.App.2d 661; *Engineering etc. Corp. v. Longridge Inv. Co*., supra*; Pan Pacific Sash & Door Co. v. Greendale Park, Inc*., supra);
>
> the concealment and **[210 Cal.App.2d 840]** misrepresentation of the identity of the responsible ownership, management and financial interest, or concealment of personal business activities (*Riddle v. Leuschner, supra, 51 Cal.2d 574; Shafford v. Otto Sales Co., Inc., supra)*;
>
> the disregard of legal formalities and the failure to maintain arm's length relationships among related entities (Riddle v. Leuschner, supra, 51 Cal.2d 574; McCombs v. Rudman, supra; Wheeler v. Superior Mortgage Co., supra; Pan Pacific Sash & Door Co. v. Greendale Park, Inc., supra);
>
> the use of the corporate entity to procure labor, services or merchandise for another person or entity (*Temple v. Bodega Bay Fisheries, Inc*., supra; *Pan Pacific Sash & Door Co. v. Greendale Park, Inc.*, supra; *Engineering etc. Corp. v. Longridge Inv. Co*., supra);

A review of the types of corporate malfeasance that may be encountered in the piercing the corporate veil cases above shows how corporate entities may be manipulated to the detriment of the public and to the chagrin of regulators. This list can be compared

against Applicant's conduct in this matter and be judged whether it is more like a responsible company deserving of a license, even if it were not foreign owned, and a scofflaw front company for foreign joint venture partners mining uranium with reckless disregard for geologic data concerning vertical faults and fractures that make groundwater contamination probable if not likely. See Whistleblower Letter discussed below.

APPLICATION OF STANDARDS TO CONTENTION E

When the foregoing standards are applied to Contention E, in light of the Board's finding that Contention E is not outside the scope of this proceeding, require a finding that the Petitioners' concerns related to the Applicant's foreign ownership are material to the safety and environmental requirements of 10 CFR Part 40. See Memorandum at 119.

Petitioners' Contention E in the Reference Petition is that:

(1) CBR is owned by Cameco, Inc., a Canadian corporation which purports to be the largest Uranium producer in the World with operations in Canada, the US and Kazakhstan. See www.cameco.com. Cameco acquired CBR in 2000.

(3) Foreign owned CBR is using up and contaminating vital water supplies in a time of drought for its profit to the detriment of the people, wildlife and land in Crawford, NE, surrounding areas including Chadron, NE, and Pine Ridge Indian Reservation and other users of the High Plains aquifer in Colorado, Kansas, New Mexico, Oklahoma, South Dakota, Texas and Wyoming. Most of such persons are unaware of CBR's operations or Application.

(11) There is no assurance that Yellowcake Uranium products from the CBR operation goes to US nuclear power plants and such Uranium may be sold by CBR's Canadian parent company to buyers in China, India, Pakistan, Russia and/or to the highest bidder.

(12) There is no assurance that Yellowcake Uranium products from the CBR operation will not be used for nuclear weapons of a foreign country or terrorists.

E. CBR Fails to Mention It is Foreign Owned by Cameco, Inc. So All The Environmental Detriment and Adverse Health Impacts Are For Foreign Profit and There Is No Assurance The CBR Mined Uranium Will Stay In US for Power Generation

(i) CBR fails to mention in the Application that it was acquired in 2000 by a Canadian corporation named Cameco.

(ii) The basis for the contentions is that CBR has omitted references to foreign ownership in order to give the mis-impression that CBR's Uranium mining operations are somehow profitable to US interests when in fact they are profitable to Canadian and other foreign interests to the detriment to US persons' health and safety.

(iii) The issue is in the scope of the proceeding because CBR seeks to expand its operations on the basis that the Uranium it produces is needed to fulfill US demand for power generation when its Canadian owners may divert the Uranium products to non-US customers such as China, India, Pakistan, North Korea or possibly Iran.

(iv) The issue is material to the findings of the NRC which is required to determine whether CBR's current operation and proposed operation is in the best interests of the US general public; understanding the foreign ownership of CBR is key to that determination.

(v) Alleged Facts: The Relevant Facts are hereby incorporated by reference. In addition, as noted below, CBR has described its ownership history to omit the 2000 acquisition of CBR by Cameco.

(vi) CBR's Application states that its history without reference to Cameco and gives the impression that CBR's operations are for the profit of US interests when they are clearly for the profit of foreign interests.

Please see the following citations to the Application (TR means Technical Report and ER means Environmental Report) and points of contention:

TR 5 OPERATIONS
Crow Butte Resources, Inc. (CBR) operates a commercial scale in-situ leach uranium mine (the Crow Butte Uranium Project) near Crawford, Nebraska.

CBR testified in the Nebraska NRC Hearing that it is wholly owned by Cameco, Inc. (www.cameco.com) which lists CBR as one of its assets together with operations in Canada and Kazahstan. Cameco's website touts possible new deals to sell Uranium to Russia.

ER 1.1.1 Crow Butte Uranium Project Background
The original development of what is now the Crow Butte Uranium Project was performed by Wyoming Fuel Corporation, which constructed a research and development (R&D) facility in 1986. The project was subsequently acquired and operated by Ferret

Exploration Company of Nebraska until May 1994, when the name was changed to Crow Butte Resources, Inc. (CBR). This change was only a name change and not an ownership change. CBR is the owner and operator of the Crow Butte Project.

**** <u>Contention:</u> CBR is owned by Cameco since 2000. Cameco also runs operations in Canada and Kazahstan and which sells Uranium products to other non-US buyers which may include China, India, Pakistan, North Korea and possibly Iran unless there are Canadian regulations which restrict such sales.**

ER 1.2 & ER 2.1.2 - In addition to leaving a large deposit of valuable mineral resources untapped, failure to develop the North Trend Expansion Area would result in the loss of a large investment in time and money made **by** CBR for the rights to and the development of these valuable deposits. Denial of the amendment request would also have an adverse economic effect on the individuals that own the mineral rights in the North Trend Expansion Area.

ER 1.2 & 2.1.2 - The Crow Butte Project (including the North Trend Area) represents an important source of new domestic uranium supplies that are essential to provide a continuing source of fuiel to power generation facilities.

**** <u>Contention</u>: It is material that CBR is owned by a Canadian company that will make profits or lose on its investments. Petitioner submits that we, as US persons, care less about the profits of a Canadian company than for the health and safety of our environment. The Application makes no reference to the chain of possession of this nuclear source material or who the buyers are and where it may end up or how it may be ultimately used.**

A cursory comparison of Applicant's disclosures concerning its ownership in Applicant's TR 5, ER 1.1.1, ER 1.2, and ER 2.1.2 with the applicable standard for disclosures of material facts under Section 40.9, requires a conclusion that there are gross omissions to disclose material facts that are necessary to make the Application itself, in light of the circumstances, not misleading. For example, ER 1.1.1 states that the project was developed by Wyoming Fuel Corporation. "The project was subsequently acquired and operated by Ferret Exploration Company of Nebraska until May 1994, when the name was changed to Crow Butte Resources, Inc. (CBR). This change was only a name

change and not an ownership change. CBR is the owner and operator of the Crow Butte Project." There are no additional disclosures concerning ownership in the Application.

In fact, a brief review of Cameco's website reveals a much different story of foreign ownership, control and domination of the Crow Butte uranium mine, and concealment thereof from regulators, since the inception of the project.[15] In fact, the project was developed by a 50/50 joint venture of Wyoming Fuel Co. and Ferret Exploration Company of Nebraska, Inc. ("FEN"), which later changed its name to Crow Butte Resources, Inc., and recently to "Cameco Resources, Inc." ("Applicant"). At various relevant times, Applicant has concealed its true foreign ownership in order to avoid legal problems associated with the Nebraska Alien Ownership Act, Neb.Rev.Stat. 76-400 to 76-415 prohibits corporations organized under the laws of any state or country outside Nebraska from acquiring title to, or taking or holding, any land or real estate.[16] In addition, alien corporations holding or owning real estate in Nebraska were prohibited from (i) electing aliens as members to its board of directors in sufficient number to constitute a majority, or (ii) issuing to or otherwise allowing aliens to own a majority of its capital stock.[17]

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[15] By way of example of the concealment of Applicant's ownership as a function of its corporate culture and relationship with regulators, the NRC Staff is unsure of exactly when Cameco acquired control of Applicant CBR. The NRC Staff states in its Brief Accompanying Notice of Appeal to the Commission dated May 9, 2008 ("NRC Appeal Brief) that "in reality Cameco, Inc., has been an owner of CBR since at least 1998 (Accession No. 9805260014), at p.27.

[16] See Neb.Rev.St §76-402 "Aliens and corporations not incorporated under the laws of the State of Nebraska are prohibited from acquiring title to or taking or holding any land, or real estate, or any leasehold interests extending for a period for more than five years or any other greater interest less than fee in any land, or real estate, in this state by decent, devise, purchase or otherwise, except as provided in Sections 76-403 to 66-405."

[17] See Neb.Rev.St §76-406 "No corporation organized under the laws of this state and no corporation organized under the laws of any other state or country, doing business in this state, which was organized to hold or is holding real estate, except as provided in Section 76-404 and 76-412 to 76-414, shall elect aliens as members of the board of directors or board of trustees in number sufficient to constitute a majority of such board, nor elect aliens as executive officers or manager not have a majority of its capital stock owned by aliens."

In 1989, Petitioner WNRC investigated and made public disclosures concerning Applicant's illegal foreign ownership in violation of Neb.Rev.Stat. Section 76-402 due to its uranium mineral leases in Dawes County, Nebraska. As in this case, almost 20 years later, WNRC was then asserting that Applicant made false statements at public hearings concerning faulting or fracturing that may be occurring in the rock formation that contains the uranium bearing ore. As a direct result of WNRC's investigation, the Nebraska Attorney General investigated and ruled that Applicant was in violation of the alien ownership prohibition. See Press Release dated September 18, 1989, attached hereto.

While declining to criminally prosecute Applicant due to a lack of expertise or statutory authority to conduct a geologic investigation, the NE Attorney General: (1) caused the Dawes County Attorney to commence forfeiture proceedings where the mineral leases were located pursuant to Neb.Rev.Stat. Section 76-408; (2) caused the NE Secretary of State to commence an action to forfeit Applicant's corporate charter and dissolve Applicant and its subsidiary; and (3) caused the Nebraska Department of Environmental Control ("NDEC") to cease any processing of Applicant's permits related to the then-proposed ISL mine in Crawford, NE. [18] WNRC later commenced litigation against the Nebraska Secretary of State to cause it to follow through with the forfeiture and dissolution of Applicant. See State of Nebraska, ex rel. WNRC v. Beermann, (No. 451-098) (District Court of Lancaster County, Nebraska 1989). At some point after the commencement of such litigation, Applicant and its shareholders changed the share

[18] See September 19, 1989 Letter from NE Attorney General Robert M. Spire to NDEC, attached hereto.

ownership structure to satisfy the expressed concerns of the NE Attorney General. See November 7, 1989 Letter from Applicant's Counsel Mark D. McGuire to NE Attorney General Robert M. Spire, attached hereto. According to Mr. McGuire's November 7, 1989 Letter, the following was Applicant's share ownership, as of a February 1987 recapitalization, and as reported to NRC on June 2, 1989[19], FEN's corporate shares were owned as follows:

Shareholder	Percentage
[Imperial Metals Group ("IMC") Undisclosed Parent]	
Ferret Exploration Company, Inc. ("FEC")	28.304%
First Holding Company	8.196%
Geomex Minerals, Inc.	28.500%
Uranerz USA, Inc.	25.000%
Korea Electric Power Corp. ("KEPCO")	10.000%
TOTAL:	100.000%

Applicant's June 2, 1989 Letter to NRC further states:

> "**The first three are Delaware corporations, Uranerz, USA is a Colorado corporation** and Korea Electric Power is a South Korean corporation….Those five companies are also all of the Participants which, along with FEN, have financial interests in the Crow Butte Project under the Production Venture and Operating Agreement dated February 25, 1987, as amended, to which the companies are parties…..The Agreement provides a management structure similar to that of a typical US corporation, which is also typical for mining projects in the US. There is a Management Committee whose role is similar to a corporate board of directors….The present members of the Management Committee for the commercial production venture are as follows:

Participant	Primary	Alternate

[19] June 2, 1989 Letter from Applicant's President Thor Gjellsteen to Edward F. Hawkins, NRC Denver, attached hereto.

Ferret (DDR/CDN/Korea) (DDR)	Ralph Barnard (US)	Dr. Peter Geib
First Holding (DDR/CDN) (DDR)	Gene Webb (US)	Dr. Peter Geib
Geomex (DDR)	Dr. Hugh Morris	Pierre Lebel
Uranerz (DDR) (DDR)	Karl-Ernst Kegel	Hikmet Akin
Kepco (Korea) (Korea)	S.M. Chang (Korea)	E.W. Kim

> "….FEN performs these activities through its management, which continues to include myself as president, Steve Collings as vice president and all of the other employees you are familiar with from the past…."
>
> "FEN believes that the commercial production Venture structure makes it clear that FEN has and will continue to control all activities and materials and the Crow Butte Project which are subject to licensing requirements under the Atomic Energy Act of 1954. Therefore, FEN is the proper applicant and licensee for the project." (Emphasis added.)

Significantly, Applicant's letter omits to state that the three Delaware corporations and the Colorado corporation were themselves owned and controlled by foreign interests. Applicant's letter also omits to state that one of the Alternates to the Management Committee, Peter Geib (W. German Citizen), was the controlling party of the "ultimate parent" at the top of Applicant's complex corporate structure.[20] Also omitted was that Applicant was essentially a joint venture of Imperial Metals Group ("IMC"), Uranerz and KEPCO. It would be impossible to conclude that these disclosures pass muster under NRC Regulations Section 40.9.

In Mr. McGuire's November 7, 1989 Letter and the attached Memorandum dated November 3, 1989, Applicant's then-corporate assistant secretary refers to a February 1987 recapitalization and the share ownership at certain times. Significantly, the

[20] See July 22, 1989 and August 11, 1989 Letters from WNRC Counsel to NE Assistant Attorney General Steven J. Moeller, attached hereto.

November 3, 1989 Memorandum states with respect to the recapitalization that occurred two years earlier:

> [t]he shareholders realized at the time of this recapitalization that a further change in share ownership might be necessary in the future in order to bring the project more in line with the way U.S. mining operations are held when there are multiple participants. Such a change has now been agreed to in principle by the shareholders, and the necessary documents are being circulated for review and final approval. When the change is finalized, the share ownership of FEN will be as follows:

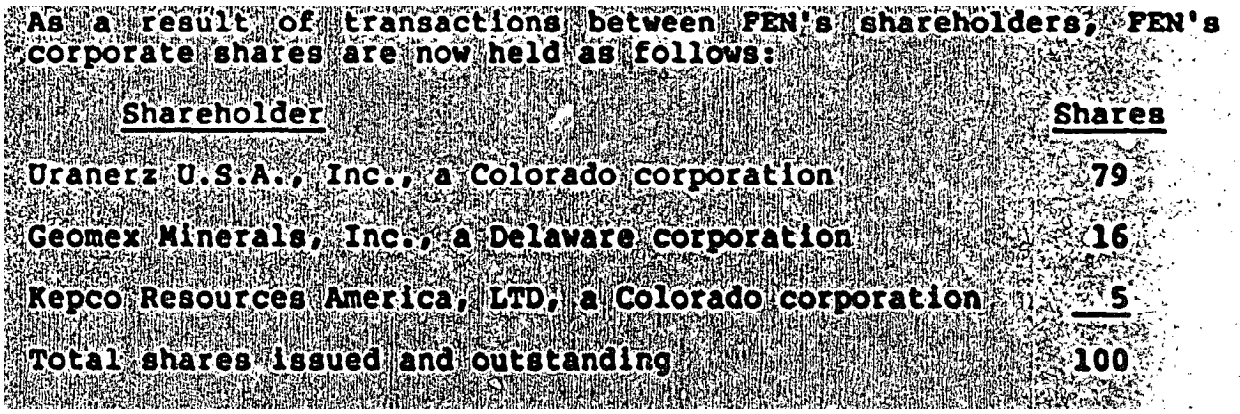
Ferret Exploration Company, DE Corp	96 %
Geomex Minerals, Inc., DE Corp	1 %
First Holding Company, CO Corp[21]	1 %
Uranerz USA, Inc., CO Corp	1 %
Korea Electric Power Corp., Republic of Korea Corporation	1 %
TOTAL:	100 Shares

Although the change was required because of the threatened dissolution of FEN after the NE Attorney General ruled that FEN was illegally owned in violation of Neb.Rev.Stat. 76-402, Memorandum dated November 3, 1989 makes it seem like this was contemplated at the time of the February 1987 recapitalization. This is yet again evidence of the Applicant's sophistry when communicating its ownership information to regulators. And it makes no sense. Why would Uranerz USA give up 24% of Applicant and why would the Korea Electric Power Corp. give up 9% of its interest for the benefit of the IMC companies getting 33% more? Such would not be the indicated in an arms-length transaction by rational economic actors. Rather, it seems, that this was a

[21] First Holding holds 100% of Ferret Exploration Company; see Page 2, Paragraph 3(c) of Letter dated January 4, 1990 from Mark D. McGuire to NE Attorney General Robert M. Spire.

temporary ploy to assuage the concerns of the NE Attorney General but which lacked real economic substance. Applicant and the same foreign beneficial owners, IMC, Uranerz and KEPCO, continued to hold their equity in the Crow Butte mine despite the prohibition on alien ownership in Neb.Rev.Stat. 76-402.

On March 16, 1994, by letter from Stephen P. Collings, President of FEN, the NRC was notified that:



As a result of transactions between FEN's shareholders, FEN's corporate shares are now held as follows:

Shareholder	Shares
Uranerz U.S.A., Inc., a Colorado corporation	79
Geomex Minerals, Inc., a Delaware corporation	16
Kepco Resources America, LTD, a Colorado corporation	5
Total shares issued and outstanding	100

Perhaps, since four years had elapsed since the NE Attorney General's office had threatened to terminate Applicant's charter, it felt safe to allow the creeping acquisition of its shares by foreign interests. Since the Alien Ownership restrictions of Neb.Rev.Stat. 76-402 had not changed, as of 1994 and is still on the books, FEN's shares were once again illegally held by foreign controlled, US-chartered corporations. One must ask whether this is part of a concerted effort to avoid NRC regulations on foreign ownership by all the shareholders of FEN and related officers, directors, affiliates and attorneys. One must also ask how Mr. Collings can make disclosures like this without violating

NRC Regulation 40.9.

In 1994, a 49% interest in the Crow Butte mine was shifted from the IMC group to Uranerz, paving the way for Cameco's purchase of Geomex. 1994 was also the year that recently retired NRC Commissioner and new Winston & Strawn (now retired) Partner James R. Curtiss joined Cameco's Board of Directors for the last 14 years of continuous board service. This would have given Cameco the expertise to navigate the gray areas and loopholes in the AEA and NRC Regulations and help them articulate the "Cameco Loophole."

Geomex was acquired by Cameco in 1995 or 1996[22] and Uranerz was aquired by Cameco in 1998. As discussed below, Geomex and Uranerz were Canadian-based subsidiaries of West German backed companies. See Cameco Press Release dated April 17, 1998, attached hereto (Uranerz Exploration and Mining Limited (UEM) and Uranerz USA, Inc., being purchased from parent company, Uranerzbergbau GmbH (UEB) which is jointly owned by Preussag AG and Rheinbraun AG (itself wholly owned by RWE AG, Germany's largest electrical utility, "[w]ith the acquisition of UUS's 57.69% interest in the Crow Butte in-situ leach (ISL) production centre in Nebraska, Cameco's ownership increases to 90%. As a result of this purchase, Cameco also adds about 23 million pounds U308 to its US reserve and resource base.").

[22] See October 14, 1996 Cameco Press Release concerning acquisition of Power Resources, Inc., "Cameco presently owns about 32% of the Crow Butte ISL mine in Nebraska through its wholly owned subsidiary Geomex Minerals, Inc.", at p. 2., attached hereto

Once again in 1998, since Cameco had acquired a 90% controlling interest in Applicant, it reported it to the NRC[23]. See NRC Appeal Brief at 27. However, it is not clear whether in its report to the NRC concerning the purchase of Uranerz, whether the NRC was informed that KEPCO's ownership would be restored to its original 10% interest. Somehow, between the time of Steve Colling's 1994 report to the NRC that Uranerz had 79%, Geomex had 16% and KEPCO had 5%, the shares were shifted around again in 1995 so that when Cameco bought Geomex it acquired just shy of a 1/3 interest (32.304%) of the Crow Butte mine. At that level, it appears that the transaction was specifically structured to avoid the appearance of the characteristics of control and that the other shareholders cooperated in the intra-shareholder transfers, possibly without any consideration, to shift an additional 16.304% to Geomex and an additional 5% to KEPCO in 1995.

These kinds of deceitful practices are contrary to Section 40.9, undermine the purposes of the AEA for the safe utilization of atomic energy and are grounds for denial of the sought after amendment and revocation of the Applicant's license under AEA Section 186[24] and NRC Regulations 40.71(b).

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[23] (Accession No. 9805260014) re: purchase of Uranerz USA, Inc. report to Staff, June 5, 1998; the NRC Staff consented to the proposed change and determined that no license amendment was necessary. (Accession No. 9806120319).

[24] **Sec. 186. Revocation**.

a. **Any license may be revoked for any material false statement in the application or any statement of fact required under section 182, or because of conditions revealed by such application or statement of fact** or any report, record, or inspection or other means which would warrant the Commission to refuse to grant a license on an original application, or for failure to construct or operate a facility in accordance with the terms of the construction permit or license or the technical specifications in the application, or for violation of, or failure to observe any of the terms and provisions of this Act or of any regulation of the Commission.

b. The Commission shall follow the provisions of section 9(b) of the Administrative Procedure Act in revoking any license.

c. Upon revocation of the license, the Commission may immediately

Petitioners note that Cameco explains the staged acquisition of the Crow Butte mine in its Prospectus dated June 21, 1999, attached hereto, at page 7:

> *Crow Butte*
> Crow Butte is an in-situ leach uranium operation near Crawford, Nebraska which has been in production since 1991. **Cameco holds a 90% interest in Crow Butte through two wholly-owned subsidiaries, UUS Inc. (57.691%) and Geomex Minerals, Inc. (''Geomex'') (32.309%). The remaining 10% share is owned by KEPCO Resources America, Ltd., a subsidiary of Korea Electric Power Company.** In 1998, Cameco's share of Crow Butte production was 655,000 pounds U3O8. At December 31, 1998 Cameco's share of reserves and resources was 10.2 million pounds and 25.0 million pounds, respectively. (emphasis added.)

Upon information and belief, in 2000, Cameco purchased the remaining 10% of the Crow Butte mine from KEPCO.

SUBPART G PROCEDURES IN THIS MATTER

As noted on Page 126 of the Memorandum, Petitioners have properly requested that the Board apply Subpart G hearing procedures to this proceeding, pursuant to 10 CFR Section 2.310(d) because these contentions necessitate resolution of issues of material fact relating to the occurrence of past events, i.e., whether CBR disputes any of the Relevant Facts. Memorandum at 126; Reference Petition at 2, 5. Specifically, Petitioners have requested discovery and expert testimony. Reference Petition at 5.

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retake possession of all special nuclear material held by the licensee. In cases found by the Commission to be of extreme importance to the national defense and security or to the health and safety of the public, the Commission may recapture any special nuclear material held by the licensee or may enter upon and operate the facility prior to any of the procedures provided under the Administrative Procedures Act. Just compensation shall be paid for the use of the facility. 42 USC 2236 (emphasis added).

Discovery should include depositions, documents requests, interrogatories and any other discovery allowed under the Federal Rules of Evidence.

As noted at the oral argument, Entergy Nuclear Vermont Yankee et al. (Vermont Yankee Nuclear Power Station), LBP-06-20, 64 NRC 131, 201 (2006), stands for the proposition that the word "may" in 10 CFR Section 2.310(a) indicates that the Board has discretion in determining whether to hgold hearings under Subpart L or Subpart G.

Where, as here, the Applicant has intentionally concealed material information from all of its Applications going back 20 years concerning the foreign ownership of Applicant, in clear violation of 10 CFR Section 40.9, the Board should exercise such discretion and grant Petitioners' request for Subpart G hearing procedures.

The nature of the technical issues of geologic formations, intermixing of aquifers as well as the cultural issues, on the one hand, and the failure of the Applicant to be forthcoming and make appropriate disclosures even when required under the regulations, call for Subpart G in order to have a proper and accurate record.

The various characterizations and concealment of the identity and ownership and persons having control over this licensed uranium mine is astonishing. It gives rise to a presumption that every material statement of this Applicant must be tested as to its veracity. Material witnesses need to be examined to determine whether an ongoing fraud has been perpetrated on the People of the State of Nebraska due to intentional and long-term violations of the Alien Ownership Act at Neb.Rev.Stat. 76-402 and the restrictions on foreign ownership, control and domination under the AEA.

1. True Beneficial Ownership and Nature of Crow Butte Mine Was Intentionally Concealed From Regulators

From the beginning, the Crow Butte mine was a foreign owned and controlled joint venture between W. Germany and S. Korea – both of whom at that time shared (and Korea still shares) divided borders with communist nations viewed as enemies of the US. The corporate structure is complicated and difficult to understand and gives rise to a need for Subpart G discovery simply to ascertain what has transpired.

Based on publicly available information, it appears that in the late 1970s, when the citizens of West Germany were allowed to write off over 200% of income against taxes for funds invested in overseas mineral exploration, a number of West German mineral drilling partnerships, mostly in uranium, known as the "Sedimex Partnerships" founded E&B Canada Resources Ltd. ("E&B"), a private Canadian company to manage their investments. In May of 1983, E&B acquired a Canadian holding corporation known as Imperial Metals Corporation ("IMC"). The Sedimex Partnerships own approximately 36.5% of the IMC stock through 14 Colorado limited partnerships known as the "Sedex Partnerships" and including two entities known as "Sedex Securities Sixth Partnership and Sedex Securities Seventh Partnership. The Sedex Partnerships have as limited partners 14 other limited partnerships which are wholly-owned and managed by IMC. IMC is fifty percent (50%) owned by the West German investors through the Sedimex and Sedex Partnerships which are themselves managed and controlled by Novis Investitions GmbH which is controlled by **Dr. K. Peter Geib, Citizen of West**

Germany.[25]

In May 1978, it was the West German investors who organized FEN to acquire, develop and operate mining projects in the United States, Canada and elsewhere as general partner of Geomex Development Sixth Partnership and Geomex Development Seventh Partnership. In 1978, First Exploration Company, Inc. ("FEC") entered into a 50/50 joint venture with Wyoming Fuel Company for the exploration and development of the Crow Butte Uranium Project. In January 1986, FEC and affiliates acquired Wyoming Fuel Company's 50% joint venture interest. Accordingly, in reality Applicant gives the impression that it is a US company it has always been an instrument of foreign interests.

In 1987, First Holding Company was organized to hold the stock of FEC and affiliates. FEC is wholly owned by First Holding Company which is held by shareholders including **William E. Grafham (CDN; Caymans Resident) (15.77%), W. Gene Webb (US) (5.26%), K. Peter Geib (DDR) (4.16%), Sedex Securities Sixth Partnership (12.99%) (DDR), Sedex Securities Seventh Partnership (24.93%) (DDR), Sedex Securities Ninth Partnership (2.67%) (DDR), E&B Mines (CDN)(1.27%), Geomex Minerals, Inc. (DDR) (1.11%) and FEC (2.00%).**

In May 1987, First Holding Company sold an interest in the Crow Butte Project to Uranerz USA, Inc., a wholly owned subsidiary of a West German mineral development corporation. In August of 1987, First Holding Company sold a 10% interest in the Crow Butte Project to the Korea Electric Power Company ("KEPCO"). This is the restructuring referred to in the Memorandum dated November 3, 1989, which is attached to Mark D. McGuire's Letter dated November 7, 1989. In late 1989, due to the NE

[25] We note that Mr. Geib appears to control Geomex but is an "Alternate" for FEN and First Holding which indicates control attributes.

Attorney General ruling discussed above to the effect that FEN was in violation of the Alien Ownership Act at Neb.Rev.Stat. Section 76-402, FEN redistributed its stock as described above. As discussed above, these transactions indicate a willingness to enter into sham stock transfers and equity shifts, without consideration, simply to give the appearance of regulatory compliance.

In connection with this matter, and particularly in light of the fact that these sham equity transfers in 1989 caused prejudice to Petitioner WNRC's rights and its Nebraskan members' rights to compliance with the rulings of the NE Attorney General and with the Alien Ownership Law of Neb.Rev.Stat. 76-402, Petitioners under Subpart G procedures reasonably request complete discovery including answers to interrogatories similar to the ones propounded in WNRC's 1989 case in Lancaster County Court, attached hereto. Further discovery should include the deposition of Mark D. McGuire as to non-attorney-client privileged communications as well as any communications exempted therefrom by the crime/fraud exception[26] should it be found that there was a conscious arrangement to

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[26] According to the Supreme Court in US v. Zolin, 491 U.S. 554, 563j (1989), "questions of privilege that arise in the course of the adjudication of federal rights are "governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." Fed.Rule Evid. 501. We have recognized the attorney-client privilege under federal law, as "the oldest of the privileges for confidential communications known to the common law." *Upjohn Co. v. United States,* 449 U.S. 383, 389, 101 S.Ct. 677, 682, 66 L.Ed.2d 584 (1981). Although the underlying rationale for the privilege has changed over time, see 8 J. Wigmore, Evidence § 2290 (McNaughton rev. 1961),[FN6] courts long have viewed its central concern as one "to encourage****2626** full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." *Upjohn,* 449 U.S., at 389, 101 S.Ct., at 682. That purpose, of course, requires that clients be free to "make full disclosure to their attorneys" of past wrongdoings, *Fisher v. United States,* 425 U.S. 391, 403, 96 S.Ct. 1569, 1577, 48 L.Ed.2d 39 (1976), in order that the client may obtain "the aid of persons having knowledge of the law and skilled in its practice,"*Hunt v. Blackburn,* 128 U.S. 464, 470, 9 S.Ct. 125, 127, 32 L.Ed. 488 (1888).

> FN6. See also Hazard, An Historical Perspective on the Attorney-Client Privilege, 66 Calif.L.Rev. 1061 (1978); Developments in the Law-Privileged Communications, 98 Harv.L.Rev. 1450, 1455-1458 (1985).

The attorney-client privilege is not without its costs. Cf. *Trammel v. United States,* 445 U.S. 40, 50, 100 S.Ct. 906, 912, 63 L.Ed.2d 186 (1980). "[S]ince the privilege has the effect of withholding relevant information from the factfinder, it applies only where necessary to achieve its purpose." *Fisher,* 425 U.S., at 403, 96 S.Ct., at 1577. The attorney-client privilege must necessarily protect the confidences of wrongdoers, but the reason for that protection-the

shift equity in sham transactions to evade regulatory requirements. Of course, if Mr. McGuire is found to be a material witness, he should withdraw as Applicant's counsel in this matter.

The deposition of Applicant's President Steve Collings should also be taken concerning all these matters. Depositions should be accompanied by appropriate deliveries of relevant documents.

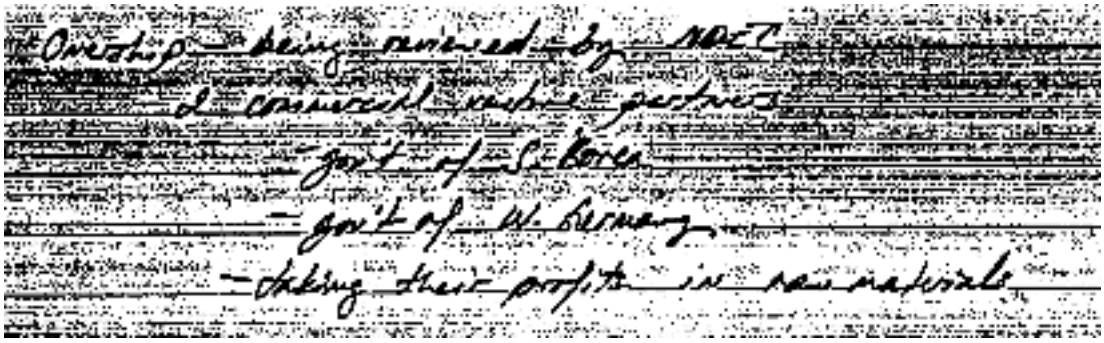
In addition, Petitioners would like discovery concerning a meeting that took place on April 5, 1988, "State Briefing of RA & Staff" that involved the NDEC and Applicant's personnel. The copy of the notes that we have, attached hereto, states:

p.2 –

"Ownership – being reviewed by NDEC
- **2 commercial venture partners**
- **"Gov't of S. Korea"**
- **"Gov't of W. Germany"**
- **"taking their profits in raw materials"**

…

"Region VI – Stephanie Johnson 219-665-7160"



centrality of open client and attorney communication to the proper functioning of our adversary system of justice-"ceas[es] to operate at a certain point, namely, where the desired advice refers *not to prior wrongdoing,* but ***563** to *future wrongdoing*." 8 Wigmore, § 2298, p. 573 (emphasis in original); see also *Clark v. United States,* 289 U.S. 1, 15, 53 S.Ct. 465, 469, 77 L.Ed. 993 (1933). It is the purpose of the crime-fraud exception to the attorney-client privilege to assure that the "seal of secrecy,"*ibid.,* between lawyer and client does not extend to communications "made for the purpose of getting advice for the commission of a fraud" or crime. *O'Rourke v. Darbishire,* [1920] A.C. 581, 604 (P.C.)."

This indicates that the Crow Butte project was and has always been a joint venture between the foreign interests of the Government of South Korea and the Government of West Germany. Further, we note that in 1988, before the fall of the Berlin Wall, the United States was still engaged in the Cold War and dealing with the emergence of fundamentalist and terrorist extremists. During that time, in and close to the de-militarized zones that separate North Korea and South Korea, and East Germany from West Germany, the communist backed intelligence services were actively working through counterparts in their respective "sister" countries in the West. It is well known that the East German Stasi had one of the most effective and active intelligence services in the World. In fact, given the circumstances, it is not unlikely that some relative of an employee in the South Korean Electric Company (or the West German Electric Company) would be contacted and offered large sums of money by someone who is an operative for the communist sister country who might actually be related to that employee by blood or marriage. That being the case, where the parties intend to accept profit shares in the form of "raw materials," i.e., yellowcake uranium, one must ask whether any Crawford, Nebraska yellowcake might be sitting in an underground tunnel in North Korea this very moment.

If NRC regulators at appropriate levels had been made aware of this joint venture of foreign interests they would certainly have denied such attributes of foreign control, ownership and domination as being inimical to the common defense and security of the United States. While it is theoretically possible to imagine an effective Negation Plan for

such a venture, the entire matter would be subject to severe scrutiny at various levels of the US Government and its intelligence services as well as by the public and concerned citizen groups such as WNRC. Anyone who was aware of the applicable NRC regulations would have had to turn a blind eye or intentionally conceal the true ownership of the Crow Butte mine in order to secure an NRC license on behalf of his foreign bosses.[27] How could that not be inimical to the common defense and security of the United States?

Based on the foregoing, Petitioners seek discovery of all documents related to communications between KEPCO and any person involved with Applicant or any of its other shareholders. There is no basis for any privilege to be asserted with respect to such communications. Specifically, Petitioners seek evidence of an arrangement to evade the requirements of the Alien Ownership Act, Neb.Rev.Stat. Section 76-402.

In addition, it appears that Cameco engaged in a staged, "creeping acquisition" of Applicant in 1995-1996, 1998 and 2000 and in light of the apparent sham stock transactions among Geomex and Uranerz so that Geomex ended up being able to sell Cameco just under 1/3 ownership of the Crow Butte mine in the first stage of the purchase, and another percentage so as to perfectly give Cameco 90% (overwhelming control and able to perform "squeeze-out merger" of minority shareholders with dissenters' rights obligations) while adjusting KEPCO's percentage to equal its 10% ownership interest that was initially issued, then dis-avowed and then re-issued so that KEPCO would get the benefit of its bargain (and presumably would then refrain from bringing an embarrassing lawsuit). Therefore, further discovery should include all

[27] Such a person would also be in violation of 10 CFR Section 40.10 regarding deliberate misconduct.

Cameco documents related to its acquisition of Geomex and UUS, Inc. as well as any other information in its possession relevant to the matters being disputed in this case. In this regard, Petitioners are seeking to take the deposition of James R. Curtiss, former Winston & Strawn and current and 14 year Cameco Board member, as to non-attorney-client privileged communications as well as any communications exempted therefrom by the crime/fraud exception (see, Footnote 25 above), to find out if there was a conscious arrangement to shift equity in sham transactions to evade regulatory requirements and prepare Cameco's staged acquisition under the Cameco Loophole. We believe that in 1994 only a handful of individuals in the World would be so intimately familiar with the NRC regulations and gaps therein as Mr. Curtiss. In that year, Mr. Curtiss joined Cameco's Board and within a year after that, Cameco embarked on its creeping acquisition of Applicant under a new loophole, potentially discovered by Mr. Curtiss as one of the leading experts in the field. Therefore, Petitioners believe that Mr. Curtiss has personal knowledge relevant to these matters which are not privileged and which may be freely disclosed in this proceeding. Of course, if Mr. Curtiss is found to be a material witness, Petitioners will argue that Counsel for the Applicant, Mr. Smith of the Winston & Strawn firm, should withdraw as Applicant's counsel.

2. Applicant CBR Has Suppressed Geologic Data and Designed Monitoring to Avoid Detection of Suspected Groundwater Contamination For the Purpose of Concealing Knowledge of the Same Faults and Fractures Alleged by Petitioners to Exist

In connection with this matter, and particularly in light of the fact that these fractures and faults have been known to exist since at least 1984, Petitioners under

Subpart G procedures reasonably request complete discovery including the deposition of Applicant's President Steve Collings and the authors of the following 1984 Expert Hydrogeologist's Opinion, attached hereto (emphasis added):

> **Letter dated June 21, 1984 from Hoskins Western Sunderegger, Inc., Lincoln Nebraska to Upper Niobrara – White Natural Resources District, Chadron, NE**
>
> Re: EPA Aquifer Exemption Hearing for Uranium Mining Permit Application for Wyoming Fuel Company
>
> Page 2 -
>
> "….3. **Wyoming Fuel has not shown that the lower Chadron is a separate unit of the Regional aquifer which includes the Chadron and the Brule. If the lower Chadron is hydraulically connected with the Brule, any injection would "endanger drinking water sources"**….
>
> "We have prepared an alternate geologic interpretation (Figures 1 and 2 of this letter) based on the Wyoming Fuel data submitted in the exemption petition. The alternate interpretation is a physical model which includes faults to explain changes between bore holes. Faults are known to occur in the region in connection with springs. Thus the fault fractures play an important role in the flow system by providing upward movement along faults. The best example of this is the large spring (1,000 GPM) at Fort Robinson State Park located about 6 miles west of Boring numbered PT-7. Numerous smaller springs occur in the area northwest to northeast of Boring numbered PT-7. It is possible that the disruption of groundwater flow by faulting caused the uranium ore to be deposited in the first place."
>
> /s/ David W. Thomssen, Certified Professional Geologist
> /s/ Roy W. Elliot, Hydrogeolist

In addition, Petitioners were recently made aware of the following Whistleblower Letter (attached hereto) which describes the intentionally suppression by Mr. Collings on behalf of FEN and by representatives of Uranerz, to conceal unfavorable geologic data:

Excerpt from John Petersen Letter dated April 4, 1989 to Gary Konwinski, NRC, Uranium Recovery Field Office, Denver –

"I am writing to you to express my concern regarding the **probability of ground water contamination in the course of on-going and anticipated in situ uranium mining operations in Dawes County**, Nebraska. These operations are directed by Ferret Exploration Company of Nebraska with joint venture support from Uranerz USA, Inc…."

"I am personally acquainted with the circumstances which are described herein through my former affiliation with Uranerz….During my employment by Uranerz I had the opportunity to examine the exploration data of the Crow Butte area in the course of my normal duties, and in fact, my opinion concerning the interpretation of the Crow Butte data was specifically sought by Uranerz management within the last year….I believe certain aspects of the geology of the Crow Butte uranium deposits have been deliberately overlooked or suppressed so that mining could proceed and profits be gained regardless of the effect upon local ground water quality…."

"…The amount of information that is now available in the general Crow Butte area is great enough to minimize the uncertainty of geologic interpretation to the point that certain probabilities (not possibilities) may be stated."

"It is my understanding that geologists of the Nebraska State agencies involved in permitting believed that structural control of the Crow Butte mineralization was likely, but were ultimately dissuaded from that belief by Ferret personnel. In fact, it is my understanding that mining was only allowed to proceed because structural control was finally ruled out. I have no way of knowing exactly what information was used to arrive at that evaluation, but I can state that as a matter of my professional **opinion I find it to be highly probable that most, if not all, uranium mineralization in the Crow Butte area is directly and primarily controlled by near-vertical faults cutting through the area."**
***

"**Mr. Stephen P. Collings of Ferret and Mr. Karl Kegel, President of Uranerz USA, Inc. were made aware of the liklihood [sic] of structural control by means of technical memoranda written in July 1988** by another geologist in the Uranerz organization. This person would have reasons to fear retribution if he made is own views known to regulatory agencies. Since I am separated from Uranerz however, I am free to act. **Mr. Kegal and Mr. Collings along with Mr. H. Akin, who is the**

Uranerz Vice President in charge of mining operations, and who has immediate supervisory responsibility on behalf of Uranerz have apparently agreed to surpress [sic] general knowledge of the structural interpretation so that mining and exploration may proceed unimpeded."

"…It is true that hardly an area exists that is not somehow affected by faulting….In contrast, the Crow Butte area faults not only exist, but they control mineralization. The significance is obvious. **Near-vertical, secondary porosity that is provided by such faults make for natural and effective zones for ground water movement and also for the movement of uranium-laden solvents injected into the ore zone in the course of mining. Under these circumstances, the contamination of suprajacent, and to some extent, subjacent, aquifers becomes possible, if not likely."**

"It is my understanding that Ferret, with the approval of Uranerz top management, has refused to undertake specifically designed drilling to investigate the significance of the structural control of mineralization. Clearly, Ferret and Uranerz will choose to ignore the existence of faults and their significance in relation to ground water quality unless they are forced to address the issue either by enforcement of regulation, or perhaps, if that is not forthcoming, by public pressure."

"I believe that the Nebraska Department of Environmental Control and the Nuclear Regulatory Commission should require specific investigations to evaluate the significance of faulting in relation to ground water quality and that mining should be suspended until it can be shown that uranium mining has not and will not cause ground water contamination."

The Whistleblower Letter contains conclusions very similar to the assertions by the Petitioners in connection with the admitted Contentions in this very case – through no coincidence. Accordingly, Petitioners under Subpart G procedures reasonably request complete discovery including the deposition of Applicant's President Steve Collings, Mr. H. Akin, Mr. Karl Kegel, Uranerz, the July 1988 Geologist Memorandum referred to in the Whistleblower Letter and the testimony of the author thereof, John Petersen, if he is alive and can be found after almost 20 years.

Petitioners also seek discovery of all geologic data, drilling logs, water quality records, monitoring well records, well logs, data concerning the localized geology especially through the White River alluvium, data concerning flow rate, flow directions and porosity and related information that may be relevant to the admitted Contentions, including all those in the possession of Applicant or any current for former shareholder or joint venture partner thereof including Geomex and its affiliates, IMC and its affiliates, Uranerz and its affiliates and Cameco and its affiliates, whether in the US, Canada, Germany, Korea, or elsewhere.

3. Applicant Has Misrepresented the Nature of Consultations Regarding Mineral and Water Resources in Conflict With Testimony of Material Witnesses.

During oral argument Applicant's counsel made certain representations concerning the nature and extent of consultations and what might have occurred or been said. Specifically, the discussion with Mr. Harvey Whitewoman concerning water quality, and with regard to the pre-historic Indian Camp and artifacts was described by Counsel for Applicant. See, HT at 321 ("Harvey White Woman called and spoke to the Crow Butte. That's a statement of fact, that's in the nature of a consultation…"); HT at 323 ("Those requirements are that you consult with tribes, tribal governments in the potentially affected area, send out letters, follow up to make sure they respond."); HT at 326 ("in this particular set of circumstances it doesn't because no one from the tribes responded to the letter and identified potential cultural or archeological resources in the

area of the project. They didn't respond to the consultation. So that they didn't avail themselves of the opportunity to make a determination. That's all there is."); HT at 327 ("It's a consultation which is here is what we are going to do, do you have anything to say back. And if there is nothing back then that is the end of the process, there's-nothing more for the applicant to do there. They've responded.")

According to Mr. Whitewoman, no concerns of any kind were addressed. Affidavit of Harvey Whitewoman at Paragraphs 3-6. As attested to by the attached Affidavit of Harvey Whitewoman attached to Petitioners Memorandum of Law re: Indigenous Issues dated February 22, 2008, at the time, Mr. Whitewoman was employed as assistant to Mr. Johnson Holy Rock, who was the Fifth Member of the OST Council. The Office of the Fifth Member is a member of the Executive Committee of the Tribal Council and does not have any authority to bind the Tribe. Such authority rests with the Tribal Council and to some extent the Tribal President. Under the Oglala Sioux Tribe Constitution and Bylaws. Upon receipt of Applicant's notice to the Tribe that it planned to expand to a new site just south of the Pine Ridge Indian Reservation, Mr. Holy Rock sent a letter to Applicant to inquire about possible impacts on the Tribe's water resources. Receiving no response, Mr. Whitewoman as administrative assistant to the Fifth Member called to follow-up on the letter and spoke with a company representative, who explained the *in situ* mining process. Applicant's representative did not provide information to either Mr. Whitewoman, Mr. Holy Rock, or the OST on the potential impacts of the proposed new mine site on the Tribe's water resources. Affidavit of Harvey Whitewoman at Paragraphs 8-9.

Unfortunately, since the filing of his Affidavit, Mr. Whitewoman has succumbed to terminal cancer and passed on. Accordingly, Petitioners under Subpart G procedures reasonably request complete discovery including the deposition of whomever spoke with Mr. Whitewoman, whomever wrote the letters referred to in the Application and by Applicant's Counsel in the oral argument and referred to above, as well as the opportunity to submit testimony of Johnson Holy Rock and others with relevant information concerning the cultural resources. For example, there is general knowledge at Pine Ridge Indian Reservation that there was a plague on a large number of families who were camped out at or near Crow Butte. As a result, it is suspected that there may be Indian graves in addition to the other cultural resources in the area.

During the May 8, 2008 scheduling tele-conference, Mr. Steve Cohen, NRC Project Manager stated that he was restricted by something from revealing the location of the Indian Camp and artifacts except to a very large general area of about 160 acres. When Judge Oliver asked more precisely where it was, Mr. Cohen refused to answer saying he was restricted. It was stated that the Oglala Sioux Tribe Historic Preservation Officer could contact the Nebraska SHPO and get the information. This result makes no sense. We are in a legal proceeding governed by the Federal Rules of Evidence and further governed by the penalties of perjury, enforcement of contempt orders and our obligations as attorneys and officers of the court. There are mechanisms to protect the confidentiality of information including the presentation *in camera* with attorneys and not lay petitioner clients so that the information may be evaluated. It is also possible to include lay petitioner clients based on a written undertaking or court order to preserve the

confidentiality of the information. All these are sufficient to protect the interests – against theft or wrongdoing associated with the cultural artifacts – especially where, as here, the interests of the Indigenous Petitioners are the same as the interests being protected by the statute. Accordingly, Petitioners seek further discovery of the information withheld by Mr. Steve Cohen during the May 8, 2004 tele-conference subject to such protections as the Board may deem necessary or appropriate to protect the confidentiality and serve the purposes of the underlying statute.

CONCLUSION

For the reasons stated above, the foregoing legal principles and facts, especially in light of the reckless disregard by Applicant of the applicable laws and regulations concerning disclosure of foreign ownership and geologic information and the intentional concealment of such information from regulators, clearly support of the standing of Petitioners and the admissibility of Contention E stated in the Petition and the implementation of Subpart G discovery procedures including depositions, interrogatories and document requests under supervision of the Board as described above.

Respectfully submitted on this 23rd day of May, 2008

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_____/s/_____
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