

<sup>3</sup> LBP-11-30, 74 NRC \_\_ (Oct. 31, 2011) (slip op.) (Board Memorandum). No party sought our leave to respond to the Board Memorandum, although Crow Butte submitted a letter to the (continued . . .)

The Board raises essentially two concerns. The first is the protracted nature of this proceeding.<sup>4</sup> Originally, the Staff estimated that it expected to complete the Safety Evaluation Report (SER) in the summer or fall of 2009, and the final environmental review document in December 2009.<sup>5</sup> According to the Staff's latest estimates, the SER will not be issued until April 2012, and the final environmental review document is expected to be completed in August 2012.<sup>6</sup> Provided this schedule holds, a hearing on the license renewal application will be held approximately four years after the Board granted the hearing requests.<sup>7</sup>

The Board's second, related concern is that the significant delays in the Staff's review potentially deprive the Tribe of its hearing rights under section 189a of the Atomic Energy Act of 1954, as amended.<sup>8</sup> The license, which was set to expire on February 28, 2008, is in timely renewal; *in situ* leach recovery operations continue on the site pending a decision on the license renewal application.<sup>9</sup> In particular, the Board cites an admitted contention of the Tribe's

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Board providing its views. Smith, Tyson R., Winston & Strawn LLP, letter to the Administrative Judges (Nov. 4, 2011) (Crow Butte Letter).

<sup>4</sup> LBP-11-30, 74 NRC at \_\_\_ (slip op. at 5-7).

<sup>5</sup> Klukan, Brett Michael Patrick, Counsel for the NRC Staff, letter to the Administrative Judges (Jan. 15, 2009).

<sup>6</sup> Klukan, Brett Michael Patrick, Counsel for the NRC Staff, letter to the Administrative Judges (Feb. 8, 2012). Since the issuance of the Board Memorandum, the Staff's schedule for the safety review has slipped further still. At the time of the Board Memorandum, the Staff estimated issuance of the final SER by December 2011. Klukan, Brett Michael Patrick, Counsel for the NRC Staff, letter to the Administrative Judges (Oct. 14, 2011).

<sup>7</sup> The Board previously expressed its concern over scheduling delays. The Board sought from the Staff a report "providing an explanation of the significant and continuing delays in completing the technical review documents." Memorandum (Requesting Report from the NRC Staff) (Mar. 29, 2011), at 4 (unpublished). On this point, the Board observes, "We have previously requested the Staff to explain these considerable delays, but our request has stanchd nothing—the delays continue." LBP-11-30, 74 NRC at \_\_\_ (slip op. at 6).

<sup>8</sup> See LBP-11-30, 74 NRC at \_\_\_ (slip op. at 6); 42 U.S.C. § 2239(a).

<sup>9</sup> See 10 C.F.R. § 40.42(a) (providing that a specific license expires on the expiration date stated in the license, unless the licensee has filed a request for renewal not less than 30 days prior to the expiration date, and providing that a license in timely renewal expires on the day on (continued . . . )

(Environmental Contention D, one of several admitted contentions in the proceeding), which claims that the ongoing uranium recovery operation “is contaminating the water on the reservation upon which its members reside.”<sup>10</sup> In the Board’s view, the “extreme delay” in the completion of the Staff’s review, and therefore the resulting delay in hearing the Tribe’s claim “of serious physical injury stemming from Crow Butte’s operations,” raises statutory compliance issues.<sup>11</sup> Recognizing its lack of authority to supervise the Staff’s review, the Board referred its concerns to us.<sup>12</sup>

Although the merits of the Tribe’s Environmental Contention D have not yet been litigated, the Board appears concerned that the delay in the proceeding is resulting in harm now to Tribal members, from possible contamination of water going to the Pine Ridge Reservation.<sup>13</sup> If the Tribe is of the view that its members face imminent harm from ongoing site operations,

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which the NRC makes a final determination to deny the request, or, if the determination states an expiration date, then the stated expiration date). See *generally* Request for License Renewal (Nov. 27, 2007) (ADAMS accession no. ML073470645).

<sup>10</sup> LBP-11-30, 74 NRC at \_\_ (slip op. at 1). See *also id.* at \_\_ (slip op. at 5). Environmental Contention D asserts:

In [section] 7.4.3 [Crow Butte’s] [a]pplication incorrectly states there is no communication among the aquifers, when in fact, the Basal Chadron aquifer, where mining occurs, and the aquifer[] which provides drinking water to the Pine Ridge Indian Reservation, communicate with each other, resulting in the possibility of contamination of the potable water.

*Request for Hearing and/or Petition to Intervene* (July 28, 2009, docketed July 29, 2008), at 18 (Tribal Petition). See *also id.* at 19-21; LBP-08-24, 68 NRC at 725-27; CLI-09-9, 69 NRC at 352-54.

<sup>11</sup> LBP-11-30, 74 NRC at \_\_ (slip op. at 6).

<sup>12</sup> *Id.* at \_\_ (slip op. at 7-8) (citing *Duke Energy Corp.* (Catawba Nuclear Station, Units 1 and 2), CLI-04-6, 59 NRC 62, 67 (2004)).

<sup>13</sup> See *id.* at \_\_ (slip op. at 6) (“At this stage of the proceedings, it matters not that the Tribe might be able to establish, once a hearing is eventually held, that its claim is meritorious and, therefore, its members might well have been sustaining additional grievous injury while the Staff conducted its environmental review . . . which has, to date, been extended twelve separate times.”).

then it may, at any time, file a petition for enforcement action (which could include a request to suspend or otherwise modify the license) pursuant to 10 C.F.R. § 2.206. Moreover, if the NRC Staff grants the renewed license before the hearing takes place, the Tribe may seek a stay of the Staff's action.<sup>14</sup>

That said, the Board rightly is concerned about the lengthy delays associated with the Staff's review of Crow Butte's license renewal application. The Staff has, at various points in the proceeding, provided reasons for schedule slippage. With respect to the environmental review, it appears that the principal cause for delay is the Staff's completion of required consultation activities pursuant to section 106 of the National Historic Preservation Act (NHPA).<sup>15</sup> The Board is particularly frustrated with this delay, observing that it finds "no reason why the identification of historic properties should not have been completed years ago."<sup>16</sup> Regarding the safety review, the Staff has cited as bases for delay the time needed to resolve requests for additional information, as well as ongoing discussions with Crow Butte as to "the possible preclusion of certain anticipated license conditions."<sup>17</sup> In addition, the Staff recently stated that it "cannot finalize the SER before receiving from [Crow Butte] certain revisions to the Technical Report" associated with the application.<sup>18</sup>

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<sup>14</sup> See 10 C.F.R. § 2.1213.

<sup>15</sup> *NRC Staff's Submittal in Response to March 29, 2011 Memorandum Requesting Report from the NRC Staff* (Apr. 15, 2011), at 4 (April 15 Staff Status Report); Klukan, Brett Michael Patrick, Counsel for the NRC Staff, letter to the Administrative Judges (Oct. 14, 2011), at 1 (noting that the NHPA review "is taking significantly longer than previously anticipated by the Staff to complete").

<sup>16</sup> LBP-11-30, 74 NRC at \_\_ (slip op. at 7 & n.25).

<sup>17</sup> April 15 Staff Status Report at 2.

<sup>18</sup> Klukan, Brett Michael Patrick, Counsel for the NRC Staff, letter to the Administrative Judges (Nov. 16, 2011).

We appreciate the Board's bringing its concern to our attention, but we do not agree with its suggestion that the Tribe may have been deprived of its hearing rights. First, the record before us shows that, while this proceeding undoubtedly has been slow to get off the ground, the Staff has been conducting the necessary safety and environmental reviews on an ongoing basis. The Staff's status reports reflect that, to complete both the safety and environmental reviews, the Staff has requested considerable information from Crow Butte and other stakeholders bearing on health and safety issues. Its efforts appear reasonable.<sup>19</sup> The Staff also has been conducting legally-required, and hopefully productive, NHPA consultations with the Tribe itself (among others).<sup>20</sup> Further, the Staff, at the Board's direction, consistently has provided monthly status reports keeping the Board and parties apprised of its review schedule and offering explanations for delays. Significantly, the Tribe has not asserted at any point that it has been prejudiced, or otherwise harmed, by delay.<sup>21</sup>

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<sup>19</sup> The Board observes that Crow Butte "had every incentive to endeavor to put off the hearing for as long as possible." LBP-11-30, 74 NRC at \_\_\_ (slip op. at 6-7). In its letter to the Board, counsel for Crow Butte expresses its interest in timely and efficient issuance of NRC Staff review documents and resolution of pending contentions, and states that it has acted promptly to obtain information requested by the NRC. Crow Butte Letter at 2. We expect Crow Butte to respond expeditiously and accurately to Staff inquiries.

<sup>20</sup> Indeed, the Tribe appears to be actively involved in the Staff's NHPA efforts. See, e.g., Hsueh, Kevin, Office of Federal and State Materials and Environmental Management Programs, NRC, letter to James Laysbad, Tribal Historic Preservation Officer, Oglala Sioux Tribe (Oct. 28, 2011) (ML112980555) (explaining the NHPA outreach process); Hsueh, Kevin, Office of Federal and State Materials and Environmental Management Programs, NRC, letter to Tribal Historic Preservation Officers (Jan. 19, 2012) (ML120320430) (package) (extending an invitation to attend a February 14-15, 2012, government-to-government meeting as part of ongoing NHPA section 106 consultations).

<sup>21</sup> At least some of the activities undertaken by the Staff contributing to the delay ultimately may respond to concerns articulated by the Tribe. As indicated in the text, the Staff has undertaken efforts to perform NHPA consultation activities with a number of interested entities, including the Tribe. As the Board noted, the Tribe proffered Environmental Contention B, which asserted the Staff's failure to consult with the Tribe regarding cultural resources that may be in the license renewal area, and thereby its failure to fulfill its statutory obligations under the NHPA. Board Memorandum, LBP-11-30, 74 NRC at \_\_\_ (slip op. at 7 n.25). See *generally* Tribal Petition at 13-15; LBP-08-24, 68 NRC at 719-23 (admitting the contention); CLI-09-9, 69 NRC at 348-51 (reversing the Board's decision and finding the contention premature).

Looking ahead, and given the delays that already have taken place in this proceeding, we expect that, “absent compelling circumstances, the Staff will accord sufficient priority and devote sufficient resources to meeting its current estimated safety and environmental review schedule.”<sup>22</sup>

IT IS SO ORDERED.

For the Commission

**[SEAL]**

**/RA/**

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Annette L. Vietti-Cook  
Secretary of the Commission

Dated at Rockville, Maryland,  
This 22<sup>nd</sup> day of February 2012

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<sup>22</sup> *Shieldalloy Metallurgical Corp.* (Decommissioning of the Newfield, New Jersey Facility), CLI-09-1, 69 NRC 1, 5 (2009) (responding to the Board’s Memorandum of concern regarding, among other things, significant delays in the adjudicatory proceeding).

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

In the Matter of	)	
	)	
CROW BUTTE RESOURCES, INC.	)	Docket No. 40-8943-OLA
	)	
In-Situ Leach Uranium Recovery Facility,	)	
Crawford, Nebraska	)	
	)	
(License Amendment)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing COMMISSION MEMORANDUM AND ORDER (CLI-12-04) have been served upon the following persons by Electronic Information Exchange.

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Dated at Rockville, Maryland  
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