February 25, 2013

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	Docket No. 40-8943-MLA-2
CROW BUTTE RESOURCES, INC.	)	
	)	ASLBP No. 13-926-01-MLA-BD01
(Marsland Expansion Project)	)	

NRC STAFF RESPONSE TO THE OGLALA SIOUX TRIBE'S REQUEST FOR HEARING AND PETITION TO INTERVENE

INTRODUCTION

Pursuant to 10 C.F.R. § 2.309(h), the Nuclear Regulatory Commission (NRC) Staff hereby files its response to a request for hearing and petition to intervene filed by the Oglala Sioux Tribe (Tribe or Petitioner) on January 29, 2013.[1] The Tribe has requested a hearing on Crow Butte Resources, Inc.'s application for a license amendment to construct and operate an in-situ uranium recovery satellite facility near Marsland, Nebraska. For the reasons discussed below, the Atomic Safety and Licensing Board (Board) should deny the Tribe's request because the Tribe has not demonstrated that it has standing to intervene in this proceeding and the Tribe has failed to set forth an admissible contention.

BACKGROUND

Crow Butte Resources, Inc. (CBR or Applicant) possesses NRC source material license SUA-1534 to operate an in-situ leach (ISL) uranium recovery facility in Crawford, Nebraska.[2] On May 16, 2012, CBR submitted to the NRC a request to amend its license to allow CBR to

[1] "Petition to Intervene and Request for Hearing of the Oglala Sioux Tribe" (Jan. 29, 2013) (Petition).

[2] On November 27, 2007, CBR filed a timely request for renewal of its license. Agencywide Documents Access Management System (ADAMS) Accession No. ML073470645. Although the license renewal proceeding is ongoing, CBR continues to operate its existing uranium recovery operation pursuant to 10 C.F.R. § 40.42(a).

construct and operate an ISL uranium recovery satellite facility at the Marsland Expansion Area (MEA) in Dawes County, Nebraska.[3] The MEA is located approximately 11 miles south-southeast of the CBR main facility and approximately 4.5 miles northeast of Marsland, Nebraska.[4] After conducting an acceptance review, the Staff formally accepted CBR's license amendment application for review on October 5, 2012.[5] On November 30, 2012, the Staff published a notice in the Federal Register offering the opportunity to request a hearing in the MEA license amendment proceeding.[6]

I. The Proposed Action

The in situ leach recovery process proposed for the MEA involves injecting lixiviant into an underground geological formation containing uranium deposits (*i.e.*, the "ore zone"). Lixiviant is a mixture of groundwater charged with oxygen and bicarbonate. As lixiviant is pumped through the ore zone, the uranium dissolves into the lixiviant. The uranium-bearing lixiviant is then pumped back to the surface, where the uranium is separated from the lixiviant, processed into yellowcake, and shipped to other facilities to be enriched for use as reactor fuel. After the uranium is removed, the lixiviant is re-charged with oxygen and bicarbonate and reinjected into the ore zone to repeat the cycle.

As a satellite facility, the operations at the MEA will be limited to injection of lixiviant into the ore zone, pumping of uranium-bearing lixiviant to the surface, and separation of uranium

[3] "License No. SUA-1534, Docket Number 40-8943, Marsland Expansion Area License Amendment Application" (ADAMS Accession No. ML12160A512) (May 16, 2012). The application's supporting documentation can be found in ADAMS by searching under Docket No. 04008943. The Technical Report (TR), Environmental Report (ER), and cultural resources investigation reports are available on the NRC's public website at http://www.nrc.gov/materials/uranium-recovery/license-apps/marsland/marsland-app-docs.html.

[4] TR at 1-2.

[5] E-mail from Tom Lancaster, NRC, to Cameco Resources, "Acceptance Review, Marsland Expansion Area License Amendment Application, Crow Butte Resources, Inc., Crawford, Nebraska, License SUA-1534 (TAC J00674)" (Oct. 5, 2012) (ADAMS Accession No. ML12285A142).

[6] "Crow Butte Resources, Inc. License SUA-1534, License Amendment To Construct and Operate Marsland Expansion Area," 77 Fed. Reg. 71,454 (Nov. 30, 2012).

from the lixiviant via ion exchange.[7] The loaded ion exchange resins from the MEA will be transported to the main Crow Butte facility in Crawford, Nebraska, for subsequent processing into yellowcake.[8]

II. Licensing and Regulation of Uranium Recovery Facilities

As with other uranium recovery applications, the NRC Staff will conduct a detailed technical review of CBR's application. The Staff's review will include both a safety review and an environmental review. The Staff's safety review will focus on the Technical Report (TR) that CBR submitted with its application, while the environmental review will focus on CBR's Environmental Report (ER). The Staff will conduct its safety review to determine whether CBR's application meets all applicable requirements in 10 C.F.R. Part 20 and 10 C.F.R. Part 40. In particular, the Staff will assess whether the application meets the applicable requirements in Appendix A of Part 40, "Criteria Relating to the Operation of Uranium Mills and the Disposition of Tailings or Wastes Produced by the Extraction or Concentration of Source Material from Ores Processed Primarily for Their Source Material Content."[9] The Staff will conduct its environmental review in accordance with the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4321 *et seq.*, the NRC's NEPA-implementing regulations at 10 C.F.R. Part 51, and the National Historic Preservation Act (NHPA), 16 U.S.C. § 470f.

III. Staff Review Schedule

In its Initial Prehearing Order,[10] the Board asked the Staff to provide its current schedule for issuance of draft and final environmental and safety documents.[11] The Staff currently plans

[7] *See* TR at 3-15 to 3-17.

[8] TR at 1-3 to 1-4.

[9] The criteria from 10 C.F.R. Part 40, Appendix A, that apply to review of ISL facilities are 2, 4, 5B1-5B6, 5C, 5D, 5F, 7, 7A, 8, 8A, 9, and 13.

[10] Memorandum and Order (Initial Prehearing Order) (Feb. 8, 2013).

[11] *Id*. at 3.

to complete its draft environmental review document in January, 2014, and to issue the final version of that document in March, 2014. The Staff plans to issue its safety evaluation report (SER) in February, 2015.

IV. Section 106 Consultation

Section 106 of the NHPA, requires that, prior to issuing a license for an undertaking, a federal agency must take into account the effect of the undertaking on "any district, site, building, structure, or object that is included in or eligible for inclusion" in the National Register of Historic Places (NRHP).[12] The regulations implementing Section 106 require federal agencies to "involve . . . consulting parties . . . in findings and determinations made during the section 106 process."[13] In particular, with respect to Indian tribes, the agency must "make a reasonable and good faith effort" to identify tribes that should be consulted, and provide those tribes

> a reasonable opportunity to identify [their] concerns about historic properties, advise on the identification and evaluation of historic properties, including those of traditional religious and cultural importance, articulate [their] views on the undertaking's effects on such properties, and participate in the resolution of adverse effects.[14]

In this proceeding, the Staff initiated the consultation process within a month of beginning its acceptance review of the MEA application.[15] On September 5, 2012, the Staff sent letters to the leaders of 21 tribes, including the Oglala Sioux Tribe, inviting the tribes to participate as Section 106 consulting parties in the MEA proceeding.[16] Subsequently, on

---

[12] 16 U.S.C. § 470f.

[13] 36 C.F.R. § 800.2(a)(4).

[14] *Id*. at § 800.2(c)(2)(ii)(A).

[15] The acceptance review began on August 6, 2012. *See* http://www.nrc.gov/materials/uranium-recovery/license-apps/marsland/marsland-schedule.html.

[16] *See, e.g.*, Letter from Kevin Hsueh to President John Yellow Bird Steele, Oglala Sioux Tribe, "Invitation for Formal Section 106 Consultation Pursuant to the National Historic Preservation Act Regarding the Crow Butte Resources, Inc. License Amendment Application for the Proposed Marsland Expansion Area In-Situ Uranium Recovery Satellite Facility, in Dawes County and Sioux County, Nebraska" (Sept. 5,

October 31, 2012, the Staff sent letters to the Tribal Historic Preservation Officers (THPOs) of the 21 tribes, including Mr. Wilmer Mesteth, the Tribe's THPO, inviting the tribes to send representatives to all four of the CBR sites to conduct field surveys to identify cultural resources of interest to the tribes.[17] Finally, on January 13, 2013, the Staff sent letters to the THPOs, including Mr. Mesteth of the Oglala Sioux Tribe, providing an update on Section 106 activities.[18] As noted in this letter, two tribes accepted the offer to conduct field surveys and completed those surveys in November-December 2012.[19] The Staff is awaiting reports from those tribes on the results of their surveys.[20]

V. Scope of the Present Licensing Proceeding

This proceeding concerns "an amendment to Source Material License SUA-1534 to construct and operate an ISL satellite facility at CBR's Marsland site in Dawes County, Nebraska."[21] As stated in Section II above, the Staff's decision on whether it can issue the

---

2012) (ADAMS Accession No. ML12248A299). A copy of this letter was also sent to Mr. Wilmer Mesteth, the Oglala Sioux Tribe's Tribal Historic Preservation Officer (THPO). *Id*. Because none of the tribes responded to this letter, the Staff followed up with telephone calls to ascertain interest in consultation. A Staff telephone log indicates that Mr. Mesteth was called on November 19, 2012, and indicated that the Tribe wanted to participate as a consulting party.

[17] Letter from Kevin Hsueh to THPOs regarding "Continuation of Section 106 Consultation for the Proposed Crow Butte In-Situ Uranium Recovery (ISR) License Renewal, North Trend, Marsland, and Three Crow Projects" (Oct. 31, 2012) (ADAMS Accession No. ML12311A501). This letter was initially sent by e-mail on October 31, 2012. To follow up, a hardcopy was mailed to tribal leaders, including President Yellow Bird Steele of the Oglala Sioux Tribe, on November 21, 2012. *See*, *e.g.*, Letter from Kevin Hsueh to President John Yellow Bird Steele, Oglala Sioux Tribe, "Transmittal of a Letter Sent to the Tribal Historic Preservation Officers Regarding the Proposed Crow Butte License Renewal, North Trend, Marsland and Three Crow Projects" (Nov. 21, 2012) (ADAMS Accession No. ML12320A480). The Tribe did not respond to this letter.

[18] Letter from Kevin Hsueh to THPOs, "Update of Section 106 Consultation for the Proposed Crow Butte In-Situ Uranium Recovery (ISR) License Renewal, North Trend, Marsland, and Three Crow Projects" (Jan. 3, 2013) (ADAMS Accession No. ML13303A280). This letter was sent by e-mail to the THPOs.

[19] *Id*. at 2.

[20] *Id*.

[21] Crow Butte Resources, Inc. License SUA-1534, License Amendment To Construct and Operate Marsland Expansion Area, 77 *Fed. Reg*. 71,454 (Nov. 30, 2012).

requested license amendment will be based on a review of CBR's application in light of existing statutory and regulatory requirements.

In the Introduction to its Petition, the Tribe raises a number of issues that are outside the scope of this proceeding or otherwise irrelevant.[22] Petition at 1-6. First, the Tribe asserts that ISL operations in the United States have historically caused a variety of adverse environmental impacts. The Tribe cites a State of Wyoming investigative report that cited a particular ISL licensee for several violations of state regulations. Petition at 2-3. These alleged violations are irrelevant to the present proceeding, which involves a different licensee and a different proposed action. The issue in this proceeding is whether CBR's license amendment application meets applicable statutory and regulatory requirements, not whether other ISL licensees are complying with those requirements.

Next, the Tribe claims that ISL uranium mines have been unsuccessful in restoring mined aquifers to baseline conditions, citing a United States Geological Survey (USGS) report on production and remediation issues associated with in-situ uranium recovery. Petition at 3-4. Again, the performance of ISL licensees in general is irrelevant to the issue of whether CBR's license application should be approved. Moreover, the regulations governing groundwater restoration do not necessarily require ISL licensees to return all groundwater constituents to baseline levels.[23] Thus, if the Tribe is asserting that the regulations are inadequate, that issue is outside the scope of this proceeding.[24] Otherwise, it is unclear how this claim is relevant to this proceeding.

---

[22] The Tribe raised the same issues in the *Powertech* proceeding. *See* "Petition to Intervene and Request for Hearing of the Oglala Sioux Tribe" at 1-6 (April 6, 2010) (ADAMS Accession No. ML100960645).

[23] In 10 C.F.R. Part 40, Appendix A, Criteria 5A-5D and 13 incorporate standards imposed by the U.S. Environmental Protection Agency (EPA) in 40 C.F.R. Part 192, Subparts D and E. Criterion 5B of 10 C.F.R. Part 40, Appendix A, defines the standard to be applied to groundwater restoration. Criterion 5B(6) allows licensees to propose alternate concentration limits (ACLs) that present no significant hazard when a return to background levels may not be practically achievable at a specific site.

[24] *See* 10 C.F.R. § 2.335(a).

Third, the Tribe asserts that the NRC's regulatory framework for ISL licensing is outdated, citing remarks made by NRC Staff at a Commission Briefing on Uranium Recovery held in March 2010. Petition at 4-5. If guidance is outdated, the Staff will not follow it.[25] The Tribe also notes that the U.S. Environmental Protection Agency (EPA) and the NRC are in the process of revising regulations that govern groundwater protection and restoration at ISL sites. Petition at 5. Until new regulations are issued, however, the Staff and the Board must apply existing regulations in reviewing CBR's application and in ruling on the admissibility of any contention. Therefore, these anticipated revisions to the regulations are irrelevant to the Staff's review of the application and the Board's consideration of issues before it.

Finally, the Tribe points to an EPA letter dated March 3, 2010, commenting on the NRC's draft supplemental environmental impact statements (SEISs) for three ISL uranium recovery facilities in Wyoming. Petition at 6. The Tribe notes that the EPA rated these documents "inadequate." *Id*. But comments on those site-specific draft environmental documents in different licensing proceedings have no bearing on the Staff's review of CBR's application in this proceeding.

DISCUSSION

In order for a hearing request to be granted, a petitioner must demonstrate that it has standing to intervene in the proceeding and must submit at least one admissible contention.[26]

[25] For example, the Staff has determined that certain guidance in NUREG-1569, "Standard Review Plan for In Situ Leach Uranium Extraction License Applications," related to groundwater restoration is not the appropriate standard to be used to evaluate license applications because it is inconsistent with Criterion 5B of 10 C.F.R. Part 40, Appendix A. *See* NRC Regulatory Issue Summary (RIS) 2009-05, "Uranium Recovery Policy Regarding: (1) The Process For Scheduling Licensing Reviews of Applications For New Uranium Recovery Facilities And (2) The Restoration Of Groundwater At Licensed Uranium In Situ Recovery Facilities" at 3 (April 29, 2009) (ADAMS Accession No. ML083510622).

[26] 10 C.F.R. § 2.309(a).

I. Standing

A. Legal Requirements for Standing

Any person who requests a hearing or seeks to intervene in a Commission proceeding must demonstrate that he or she has standing.[27] The Commission's regulations in 10 C.F.R. § 2.309(d)(1) provide that a request for hearing or petition to intervene must state:

(i) The name, address and telephone number of the petitioner;

(ii) The nature of the requestor's/petitioner's right under the Act to be made a party to the proceeding;

(iii) The nature and extent of the requestor's/petitioner's property, financial or other interest in the proceeding; and

(iv) The possible effect of any decision or order that may be issued in the proceeding on the requestor's/petitioner's interest.

The Commission has long applied contemporaneous judicial concepts of standing to determine whether a party has a sufficient interest to intervene as a matter of right.[28] Thus, to establish standing, a petitioner must allege "(1) an actual or threatened, concrete and particularized injury, that (2) is fairly traceable to the challenged action, (3) falls among the general interests protected by the Atomic Energy Act (or other applicable statute, such as [NEPA]) [29] and (4) is likely to be redressed by a favorable decision."[30] The alleged injury must

[27] 10 C.F.R. § 2.309(a); *see also* 42 U.S.C. § 2239(a) ("the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding, and shall admit any such person as a party to such proceeding").

[28] *Calvert Cliffs 3 Nuclear Project, LLC & Unistar Nuclear Operating Servs., LLC* (Combined License Application for Calvert Cliffs, Unit 3), CLI-09-20, 70 NRC 911, 915 (2009) ("Calvert Cliffs 3").

[29] Generally, the AEA and NEPA are the governing statutes in NRC proceedings. Here, because the Tribe has asserted an interest in cultural and historic resources that may be protected under the National Historic Preservation Act (NHPA), the zone of interests of that statute is also germane to the standing inquiry. *See Crow Butte Resources, Inc*. (In Situ Leach Facility, Crawford, Nebraska), LBP-08-24, 68 NRC 691, 702 n.33 (2008) ("Crow Butte LR").

[30] *Sequoyah Fuels Corp. (Gore*, Oklahoma Site Decommissioning, CLI-01-2, 53 NRC 9, 13 (2001).

be "actual or imminent, not 'conjectural' or 'hypothetical,'"[31] and standing will be denied when the threat of injury is too speculative.[32] To establish that an injury is "fairly traceable," a petitioner must establish a causal nexus between the alleged injury and the challenged action.[33] A determination that the injury is "fairly traceable" to the challenged action, however, does not depend "on whether the cause of the injury flows directly from the challenged action, but whether the chain of causation is plausible."[34]

The Commission has historically presumed standing in power reactor construction permit and operating license proceedings based on a petitioner's 50-mile proximity to the facility.[35] In nuclear materials cases, however, "proximity alone does not suffice for standing, absent an 'obvious' potential for offsite harm."[36] Thus, standing "must be determined on a case-by-case basis, taking into account the petitioner's distance from the source, the nature of the activity, and the significance of the radioactive source."[37] In materials cases, a presumption of standing based on geographical proximity to the proposed facility is only applied "where there is a determination that the proposed action involves a significant source of radioactivity producing an obvious potential for offsite consequences."[38] Where the proposed action does not present an obvious potential for offsite consequences, petitioners must show a "specific and plausible

---

[31] *Calvert Cliffs 3*, CLI-09-20, 70 NRC at 916 n.22 (*quoting Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)).

[32] *Sequoyah Fuels Corp. & Gen. Atomics* (Gore, Oklahoma Site), CLI-94-12, 40 NRC 64, 72 (1994).

[33] *Commonwealth Edison Co*. (Zion Nuclear Power Station, Units 1 & 2), LBP-98-27, 48 NRC 271, 276 (1998), aff'd, CLI-99-4, 49 NRC 185 (1999).

[34] *Sequoyah Fuels*, CLI-94-12, 40 NRC at 75.

[35] *Calvert Cliffs 3*, CLI-09-20, 70 NRC 911 at 915; *Florida Power & Light, Co.* (St. Lucie, Units 1 & 2), CLI-89-21, 30 NRC 325, 329 (1989).

[36] *Nuclear Fuel Services, Inc.* (Erwin, Tennessee), CLI-04-13, 59 NRC 244, 248 (2004).

[37] *U.S. Army Installation Command* (Schofield Barracks, Oahu, Hawaii, and Pohakuloa Training Area, Island of Hawaii, Hawaii), CLI-10-20, 72 NRC 185, 188 (2010).

[38] *Georgia Institute of Technology* (Georgia Tech Research Reactor), CLI-95-12, 42 NRC 111, 115 (1995) (citing *Sequoyah Fuels*, CLI-94-12, 40 NRC at 75 n.22).

means" by which the licensing action may harm them.[39] "Conclusory allegations about potential radiological harm," however, are not sufficient to establish standing.[40]

For an organization to assert standing on its own behalf, it must satisfy the same standing requirements as an individual by showing a discrete institutional injury to the organization itself.[41] An organization seeking to intervene in its own right must demonstrate a palpable injury-in-fact to its organizational interests that is within the zone of interests of the AEA, NEPA or the NHPA.[42] An organization cannot assert injury-in-fact to itself based upon nothing more than a broad, unparticularized interest—shared with many others—in the preservation of the environment, "no matter how longstanding the interest or how qualified the organization may be in evaluating the problem."[43]

B. The Tribe Has Not Demonstrated That It Has Standing In This Proceeding

In its Petition, the Tribe asserts three bases for standing: (1) the Tribe's interest in protecting its cultural and historic resources that may be present at the MEA site, (2) the Tribe's procedural rights under the NHPA, and (3) the Tribe's interest in protecting lands it owns in the vicinity of the MEA. Petition at 8-9. The Tribe supports its standing arguments with Declarations from Mr. Wilmer Mesteth, the Tribe's THPO, and Ms. Denise Mesteth, the Director of the Oglala Sioux Tribal Land Office. Petition at 8. As explained below, the Tribe has not demonstrated that it has standing under any of these bases.

---

[39] *USEC, Inc*. (American Centrifuge Plant), CLI-05-11, 61 NRC 309, 311-12 (2005).

[40] *Nuclear Fuel Services*, CLI-04-13, 59 NRC at 248.

[41] *International Uranium (USA) Corp.* (White Mesa Uranium Mill), CLI-01-21, 54 NRC 247, 252-53 (2001).

[42] See *Sierra Club v. Morton*, 405 U.S. 727, 739 (1972); *Georgia Tech*, CLI-95-12, 42 NRC at 115. As noted previously, the NHPA also applies to this proceeding, in addition to the AEA and NEPA. *See n.29 supra (citing Crow Butte LR*, LBP-08-24, 68 NRC at 702 n.33).

[43] *Sierra Club v. Morton*, 405 U.S. at 734-35, 739.

1. Standing Based On An Interest In Protecting Cultural Resources

With regard to the Tribe's first basis for standing, the Staff does not dispute that the MEA is situated within the aboriginal lands of the Tribe, and that the Tribe has an interest in identifying and protecting cultural resources of the Tribe that might be found at the MEA. That interest alone, however, is not sufficient to establish the Tribe's standing to intervene in this proceeding.[44] The Tribe must also allege an "actual or threatened, concrete and particularized injury" to its interest that is "fairly traceable" to the proposed action,[45] and the injury must be "actual or imminent," not "conjectural" or "hypothetical."[46]

Mr. Mesteth's Declaration does not allege such an injury. Mr. Mesteth makes general assertions regarding the possible presence of cultural resources at the site. For example, he states that "there may well be cultural resources that only the Tribe can identify" and that CBR's determination of cultural resources "may not be fully comprehensive." W. Mesteth Decl. at ¶ 5. He also suggests that there is a "strong likelihood" that artifacts or burial grounds can be found near current or extinct water resources. *Id*. at ¶ 8. He also indicates that the Tribe has not studied the proposed area.[47] *Id*. at ¶¶ 9, 10. However, Mr. Mesteth has not indicated that he or the Tribe is presently aware of any specific sites or artifacts of interest to the Tribe within the MEA site. The Staff recognizes that, *in the future*, it is possible that cultural resources of interest to the Tribe could be discovered at the MEA site, which could potentially support standing in the future.[48] However, at present, the Tribe has not identified any specific, known

---

[44] *See Crow Creek Tribe v. Brownlee*, 331 F.3d 912, 916 (D.C. Cir. 2003) (stating that an Indian tribe does not have standing merely because it has statutory rights in cultural artifacts on certain lands).

[45] *Sequoyah Fuels*, CLI-01-2, 53 NRC at 13.

[46] *Calvert Cliffs 3*, CLI-09-20, 70 NRC at 916 n.22.

[47] As stated in Section IV of the "BACKGROUND" section of this response, the Tribe was offered an opportunity to send representatives to all four of the Crow Butte sites to conduct a field survey for cultural resources. *See* pp. 4-5 *supra*. The Tribe did not respond to this offer.

[48] In fact, one of the goals of Section 106 consultation under the NHPA is to identify such resources, if they exist. *See* 36 C.F.R. § 800.2(c)(2)(ii)(A).

sites or artifacts that may be threatened by activities at the MEA. Therefore, the Tribe has not shown a "concrete or particularized" or "actual or imminent" injury to its interest in cultural resources.[49]

As noted in section 3.8.1 of the ER, and as Mr. Mesteth acknowledged in his Declaration, the Applicant conducted an intensive cultural resources investigation of the entire 4500-acre MEA site. ER at 3-76; W. Mesteth Decl. at ¶ 12. Although the investigation uncovered several new euroamerican sites and finds, "[n]o indigenous people sites or artifacts were found in the project area."[50] ER at 3-77. Further, as noted in the ER, each of the newly discovered sites was evaluated, and none were recommended as eligible for the NRHP. *Id*. These facts, coupled with the fact that the Tribe has not identified known sites of interest to it on the MEA site, distinguish this case from the *Crow Butte* license renewal and *Powertech* proceedings. When the Tribe requested a hearing in the *Crow Butte* license renewal, there were eight known archaeological sites of Native American origin at the site.[51] Similarly, when the Tribe requested a hearing in *Powertech*, there were numerous known but unevaluated Native American sites and artifacts.[52]

---

[49] *Sequoyah Fuels*, CLI-01-2, 53 NRC at 13. *See also Crow Creek Sioux*, 331 F.3d at 916 (Tribe must show "some actual or imminent injury" to its interests); *Preservation Coalition of Erie County v. Federal Transit Administration*, 129 F.Supp. 2d 551, 562 (W.D.N.Y 2000) ("speculation that historic resources might possibly be [present at a site] would not be a sufficient basis for standing.").

[50] In its argument for standing, the Tribe incorrectly asserts that "a significant number of cultural, historic, and archaeological resources have not been identified in the expansion project area." Petition at 9 (citing ER at 3-76). As discussed previously, the ER, including page 3-76, as well as the reports on the cultural resources investigation, indicate otherwise.

[51] *See Crow Butte LR*, CLI-09-9, 69 NRC 331, 337-38 (2009) (citing "eight archaeological sites within the project area that are Native American in origin" which the licensee had known about since it began operations the 1980s).

[52] *See Powertech*, LBP-10-16, 72 NRC at 392. The cultural resources investigation for Powertech identified many previously recorded Native American sites that had not been evaluated, and, in addition, identified numerous newly-discovered Native American sites that were not evaluated during the investigation. *See* Kruse et al., "A Level III Cultural Resources Evaluation of Powertech (USA) Incorporated's Proposed Dewey-Burdock Uranium Project Locality Within the Southern Black Hills, Custer and Fall River Counties, South Dakota," at. 4.1 to 4.7 (ADAMS Accession No. ML100670309) and 5.1 to 5.4 (ADAMS Accession No. ML100670314).

The Staff respectfully submits that if the Board grants standing based only on the possibility of finding cultural resources in the future, it would set a precedent which effectively allows an Indian tribe to establish standing to intervene in any NRC proceeding involving a site within the tribe's aboriginal territory merely by stating that there "may be" cultural resources of interest to the tribe on that site. The Staff submits that such a standard would be contrary to the legal requirements for standing that require a concrete and particularized injury that is "actual or imminent," not "conjectural" or "hypothetical."[53] Also, it is not clear that harm would occur to any yet-to-be-discovered cultural resources during the license review period, while the Staff is conducting its NEPA review and NHPA consultations. If cultural resources of interest to the Tribe are discovered during that timeframe, the Tribe could seek to intervene at that point in the proceeding.

2. Standing Based On Procedural Rights Under The NHPA

The Tribe also seeks standing "based on the Tribe's procedural rights [under the NHPA] in identifying, evaluating, and establishing protections for historic and cultural resources." Petition at 8-9. The Tribe claims that it has not "had the opportunity to identify additional sites that may warrant evaluation or listing." *Id*. at 9. However, the Tribe was offered such an opportunity in November 2012.[54]

The Tribe cites the Commission's decision in the *Crow Butte* license renewal proceeding, CLI-09-9, in support of a procedural interest supporting standing. Petition at 9. In

---

[53] *Calvert Cliffs 3*, CLI-09-20, 70 NRC at 916 n.22.

[54] *See* pp. 4-5 *supra*. The Tribe later asserts that the Staff, in its acceptance review of the application, analyzed "whether the applicant's efforts to identify and assess the impacts on historic and cultural resources, as presented in the application, meet the NRC's standards under the NHPA." Petition at 16. This statement is incorrect, because the Staff's acceptance review assesses the completeness of an application to determine whether it contains sufficient information for the Staff to begin its detailed technical and environmental reviews. *See, e.g.*, NUREG-1748, "Environmental Review Guidance for Licensing Actions Associated with NMSS Programs" at 1-6 (August, 2003). Furthermore, it is the Staff's Section 106 consultation that must meet the requirements of the NHPA, not the application. *Crow Butte LR*, CLI-09-9, 69 NRC at 348-51.

CLI-09-9, the Commission affirmed the board's ruling that the Tribe had demonstrated standing.[55] The board had found that, in the 1998 renewal of the license for the CBR main facility, the Staff had failed to consult with the Tribe regarding cultural resources found on the site, in violation of Section 106 of the NHPA.[56] In affirming the board's decision, the Commission recognized the failure to consult and found that the board "based standing both on the substantive interest the Tribe has in protecting the artifacts on the site and on its procedural interest in being consulted on their significance.[57] The Commission also noted that "the Board pointed to federal case law holding that, where a party's procedural right has been violated, that party has standing to contest the procedural violation even when the underlying interest . . . does not face an 'immediate' threat."[58]

In the *Crow Butte* license renewal and *Powertech* proceedings, the boards applied a relaxed standard for standing based on procedural injury that the Supreme Court articulated in *Lujan v. Defenders of Wildlife*: "[a] person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy."[59] The Staff's position is that this standard would apply where a procedural violation has already occurred, but not in anticipation of a possible future procedural violation. The Commission, in upholding the Tribe's standing in the *Crow Butte* license renewal proceeding, described the holding in *Nulankeyutmonen Nkihtaqumikon* (*NN*) as follows: "*where*

---

[55] *Crow Butte LR*, CLI-09-9, 69 NRC 331, 339 (2009).

[56] *Crow Butte LR*, LBP-08-24, 68 NRC 691, 714-15.

[57] *Crow Butte LR*, CLI-09-9, 69 NRC at 338.

[58] *Id*. at 339, citing LBP-08-24, 68 NRC at 714 n.117. The case that the board cited was *Nulankeyutmonen Nkihtaqumikon v. Impson*, 503 F.3d 18 (1st Cir. 2007) ("*NN*").

[59] 504 U.S. 505, 572 n.7 (1992); *see Powertech*, LBP-10-16, 72 NRC at 393; *Crow Butte LR*, LBP-08-24, 68 NRC at 714. For example, the Court stated that a person "living adjacent to the site for proposed construction of a federally licensed dam has standing to challenge the licensing agency's failure to prepare an environmental impact statement." *Id*. Such a person would have standing even though the dam might not be built for many years (no immediacy), and even if requiring the agency to prepare an EIS would not ultimately cause the license to be denied or altered (no redressability). *See id*.

a party's procedural right has been violated, that party has standing to contest the procedural violation even when the underlying interest . . . does not face an 'immediate' threat."[60] Unlike the license renewal proceeding, in this license amendment proceeding, there has been no procedural violation. The Staff has already initiated the required Section 106 consultation and the Tribe has not alleged specifically how the Staff has violated its rights under the NHPA.[61] Thus, there is no basis for the Tribe to assert a procedural violation of its rights under the NHPA, and no basis to for applying a "relaxed" standing requirement.

3. Standing Based On Interest In Protecting Lands Owned By The Tribe

Finally, the Tribe asserts standing based on its interest in protecting lands it owns within the vicinity of the MEA. Petition at 10. The Tribe relies on the Declaration of Denise Mesteth to support its claim. Petition at 10. Ms. Mesteth, however, does not identify any specific lands owned by the Tribe, nor does she give any indication of how close such lands are to the MEA. The Tribe also cites the opinion of Dr. Hannan LaGarry as evidence of "fractured geology of the area and other disturbances" that could serve as pathways by which contaminated groundwater from the MEA could migrate into adjoining aquifers and contaminate lands owned by the Tribe.[62] However, without identifying the locations of the lands that the Tribe owns, the Tribe

---

[60] *Crow Butte LR*, CLI-09-9, 68 NRC at 339 (emphasis added). The *NN* case supports the view that this standard is invoked after a procedural violation has occurred. In *NN*, the Bureau of Indian Affairs (BIA) determined that an EIS was not required before approving lease of tribal land. 503 F.3d at 24. Plaintiffs who lived near the land and used it for tribal ceremonies, community events, and recreation sued, based on the BIA's failure to follow procedures of NEPA, NHPA, and other statutes before approving the lease. *Id*. at 27. Because the lease had been approved without issuance of an EIS, the procedural violation had actually occurred. In reversing the district court's determination that the plaintiffs lacked standing, the Court of Appeals noted that its reversal rested "in large part on the *BIA's change in position regarding finality* of its lease approval." *Id*. at 23 (emphasis added). The district court had "relied heavily" on the BIA's representations that the approval was still revocable. *Id*. at 26. On appeal, however, the BIA conceded that its lease approval was final, and there would be no further opportunity to review the lease. *Id*.

[61] The Staff's activities to date are described in Section IV of the "BACKGROUND" section of this response. *See* pp. 4-5 *supra*.

[62] As discussed further in the Staff's responses to the Tribe's contentions, the LaGarry Opinion discusses possible contaminant pathways in general, but does not describe "plausible pathways" by which contaminants could travel to any specific location.

cannot show specific and plausible pathways by which contaminated water would reach those lands.[63] Therefore, because the Tribe has failed to demonstrate a "concrete and particularized injury" that is "fairly traceable" to the proposed action, the Board should not grant standing on this basis.

II. Contentions

A. Legal Requirements for Contentions

The legal standards governing admissibility of contentions are set forth in the NRC's Rules of Practice at 10 C.F.R. § 2.309(f)(1). In order to be admissible, a contention must:

(i) Provide a specific statement of the legal or factual issue sought to be raised or controverted;

(ii) Provide a brief explanation of the basis for the contention;

(iii) Demonstrate that the issue raised is within the scope of the proceeding;

(iv) Demonstrate that the issue raised in the contention is material to the findings the NRC must make to support the action that is involved in the proceeding;

(v) Provide a concise statement of the alleged facts or expert opinions which support the requestor's/petitioner's position on the issue and on which the petitioner intends to rely at the hearing, together with references to the specific sources and documents, which the petitioner intends to rely to support its position on the issue; and

(vi) Provide sufficient information to show that a genuine dispute with the Applicant/licensee exists on a material issue of law or fact. This information must include references to specific portions of the application (including the Applicant's environmental report and safety report) that the petitioner disputes and the supporting reasons for each dispute, or, if the petitioner believes that the application fails to contain information on a relevant matter as required by law, the identification of each failure and the supporting reasons for the petitioner's belief.

The purpose of the Commission's contention pleading requirements is to "focus litigation on concrete issues and result in a clearer and more focused record for decision."[64] The

[63] *See USEC, Inc*. (American Centrifuge Plant), CLI-05-11, 61 NRC 309, 311-12 (2005).

[64] *Changes to Adjudicatory Process (Part II)*, 69 Fed. Reg. 2182, 2202 (January 14, 2004).

Commission "should not have to expend resources to support the hearing process unless there is an issue that is appropriate for, and susceptible to, resolution in an NRC hearing." *Id*. The "contention admissibility 'requirements are deliberately strict, and [the Commission] will reject any contention that does not satisfy the requirements.'"[65] Mere "notice pleading" does not suffice.[66] Further, the petitioner bears the burden of meeting the pleading standards. The Board may not supply missing information or draw inferences on the petitioners' behalf.[67]

A contention must be rejected where, rather than raising an issue that is concrete or litigable, it reflects nothing more than a generalization regarding the petitioner's view of what the applicable policies ought to be.[68] "Requiring the substance and presentation of contentions to be concrete and specific to the license application helps ensure that individual license Applicants are not put into the position of defending the policies and decisions of the Commission itself."[69] Therefore, a contention must demonstrate a genuine dispute with the Applicant, because "[i]t is the license application, not the NRC staff review, that is at issue in [NRC] adjudications."[70] Petitioners are likewise required to raise environmental contentions on

---

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

[66] *See Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Unit 3), CLI-09-5, 69 NRC 115, 120 (2009) (citing *Consumers Energy Co.* (Palisades Nuclear Plant), CLI-07-18, 65 NRC 399, 414 (2007)).

[67] *See Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), LBP-01-35, 54 NRC 403, 422 (2001) (*citing Statement of Policy on Conduct of Adjudicatory Proceedings,* CLI-98-12, 48 NRC 18, 22 (1998) "[a] contention's proponent, not the licensing board, is responsible for formulating the contention and providing the necessary information to satisfy the basis requirement for the admission of contentions in 10 C.F.R. § 2.714(b)(2)).

[68] *Private Fuel Storage, L.L.C.*, (Independent Spent Fuel Storage Installation), CLI-04-22, 60 NRC 125, 129 (2004) (citing *Philadelphia Electric Co.* (Peach Bottom Atomic Power Station, Units 2 & 3), ALAB-216, 8 AEC 13, 20–21 (1974)); *see also* 10 C.F.R. § 2.335.

[69] *Private Fuel* Storage, CLI-04-22, 60 NRC at 130.

[70] *Florida Power & Light Co.* (Turkey Point Nuclear Plant, Units 3 and 4), CLI-01-17, 54 NRC 3, 25 (2001) (citing *Baltimore Gas & Elec. Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-25, 48 NRC 325, 350 (1998), *aff'd sub nom Nat'l Whistleblower Ctr v. NRC*, 208 F.3d 256 (D.C. Cir. 2000), *cert. denied*, 121 S. Ct. 758 (2001).

the Applicant's ER.[71] When a contention challenging the ER is admitted, the Staff can then request additional information from the Applicant in order to resolve any deficiencies as the Staff develops its environmental review document. *Id.* "If the [environmental review document] addresses the concerns alleged in the contention, the original contention becomes moot and the intervenor must raise a new contention if it claims the [environmental review document] discussion is still inaccurate or incomplete." *Id.*

B. The Tribe Has Not Set Forth an Admissible Contention

As discussed more fully below, the Tribe has proposed six contentions, none of which is admissible.[72] Contentions 1 and 5, which challenge the Staff's reviews under NEPA and the NHPA, are not ripe for adjudication. Contentions 2 and 3, which assert various deficiencies in the application related to hydrogeological issues, are not adequately supported and fail to raise a genuine dispute with the Applicant. Contention 4, which claims that the regulations in 10 C.F.R. Part 51 violate NEPA, constitutes an impermissible challenge to NRC regulations. Finally, Contention 6, which asserts that CBR fails to address tornado strikes, overlooks information in the application that addresses this issue and thus fails to raise a genuine dispute with the Applicant.

Contention 1 – Failure to Meet Applicable Legal Requirements Regarding Protection of Historical and Cultural Resources, and Failure to Involve or Consult the Oglala Sioux Tribe as Required by Federal Law

In Contention 1, the Tribe makes two claims. First, the Tribe claims that the application does not meet the requirements of 10 C.F.R. §§ 51.60 and 51.45 and NEPA because it "lacks an adequate description of either the affected environment or the impacts of the project on archaeological, historical, and traditional cultural resources." Petition at 11. Second, the Tribe

[71] *Private Fuel* Storage, CLI-04-22, 60 NRC at 130.

[72] Each of the contentions raised in the Petition is identical to a contention raised in the *Powertech* proceeding. As explained in the ensuing discussion, the support provided for Contentions 1, 2 and 3 in this Petition (which correspond to Contentions 1, 3 and 4, respectively, in *Powertech*) is significantly different that the support provided in the *Powertech* proceeding.

asserts that the application "fails to demonstrate compliance under the [NHPA], and the relevant portions of NRC guidance included in NUREG-1569 section 2.4" *Id*.

As its first basis for this contention, the Tribe cites 10 C.F.R. § 51.45(b) for the requirement that an application contain a description of the environment affected and a discussion of impacts of the proposed action on the environment. Petition at 11. The Tribe then asserts that "the Environmental Report, at 3-74 to 3-76, demonstrates that a significant number of archaeological, historical, and traditional cultural resources on site have not been evaluated but compared to results of a few cultural resource investigations" on private land and in northern Dawes County (near the White River, Crawford, and Chadron).[73] Petition at 11-12. The Tribe concludes from this statement that the potential impacts to these resources have not been addressed.

Sections 3.8.1 and 4.8 of the ER describe, respectively, the affected environment in terms of cultural resources and impacts of the proposed project on cultural resources. ER at 3-76 to 3-78, 4-23. The discussion in section 3.8.1 of the ER (the portion cited by the Tribe) does not support the Tribe's claim that "a significant number of cultural and historical resources have not been evaluated." The euroamerican sites and finds discovered in CBR's cultural resources investigation were all evaluated for eligibility in the National Register of Historic Places (NHRP), and "[n]o indigenous people sites or artifacts were found in the project area." ER at 3-76 to 3-77. Moreover, in concluding that cultural resources were not evaluated but only compared to results of other cultural resources investigations, the Tribe has misread the first paragraph of section 3.8.1 of the ER. That paragraph explains that there have been few cultural resources investigations on private land in southern Dawes County (where the MEA is located), but such investigations have been more numerous in the northern part of the county (around the White River, Chadron, and Crawford). ER at 3-76. Thus, the results of the surveys that have

[73] The Tribe refers to pages 3-74 to 3-76 of the ER, but the cultural resources discussion is actually on pages 3-76 to 3-78.

been conducted (in the northern part of the county) can serve as a context for comparison to the MEA. ER at 3-76. The remainder of the paragraph discusses the findings of those surveys. *Id*. (starting with "Known resources include . . . .").

The Tribe's conclusion also overlooks the remainder of Section 3.8.1, which explains the steps the Applicant took to identify and evaluate historical and cultural resources on the MEA site. Those steps included a search of records for previously reported archaeological sites and an "intensive pedestrian block cultural resources inventory" of the entire 4500-acre MEA site. [74] ER at 3-76. Thus, because the Tribe's claim is based on a misreading of the application, it fails to raise a genuine dispute with the application, as required by 10 C.F.R. § 2.309(f)(1)(vi).

Another asserted deficiency with CBR's discussion of cultural resources is that the Applicant "failed to conduct ethnographic studies in concert with a field study." W. Mesteth Decl. at ¶ 16. When a petitioner asserts that an application fails to contain required information, that petitioner must "[identify] . . . the supporting reasons for the petitioner's belief." 10 C.F.R. § 2.309(f)(1)(vi). Mr. Mesteth has provided no further explanation of why the Applicant must conduct such a study. Therefore, this assertion fails to raise a genuine dispute with CBR as required by 10 C.F.R. § 2.309(f)(1)(vi).

The Tribe has not identified any other specific deficiency in CBR's discussion of cultural resources in Sections 3.8.1 or 4.8 of the ER, or in the cultural resources reports submitted to the NRC. Therefore, because the Tribe has not raised a genuine dispute with the application, the contention is inadmissible.

---

[74] On June 8, 2012, CBR submitted reports on its cultural resources investigation to the NRC as part of the CBR license amendment application for the MEA. *See* Letter to NRC Document Control Desk from John Schmuck, Cameco Resources (June 8, 2012), ADAMS Accession No. ML12165A501. Publicly available versions of the reports have been available in ADAMS since June 13, 2012. *See* "Cameco Resources Marsland Expansion Area Uranium Project, Class III Cultural Resources Investigation, Dawes County, Nebraska" (April 28, 2011), ADAMS Accession Nos. ML12165A503, ML12165A504, and ML12165A505 (CR Report); Cameco Resources Marsland Expansion Area Uranium Project Addition, Cultural Resources Inventory, Dawes County, Nebraska" (March 5, 2012), ADAMS Accession No. ML12165A502 (CR Supplement).

The Tribe has also not provided adequate support for this contention. The Tribe relies on the Declaration of Wilmer Mesteth as support. Petition at 11. Mr. Mesteth makes several broad claims concerning the Applicant's cultural resources evaluation that are either unsupported, unclear, or based on a misreading of the ER. *See* W. Mesteth Decl. at ¶¶ 5-6, 8-14. For example, Mr. Mesteth states that "Since there are cultural resources identified in the license application, and there may well be more that only the Tribe can identify . . . the Tribe has a protected interest here." W. Mesteth Decl. at ¶ 5. Neither the Tribe's interest in cultural resources nor the possibility of undiscovered cultural resources supports the claim that the discussion in sections 3.8.1 or 4.8 of the ER are inadequate. CBR's cultural resources investigation at the site revealed no indigenous peoples' sites or artifacts, ER at 3-77, and Mr. Mesteth has not identified any specific sites known to the Tribe within the boundaries of the MEA that were left out of the Applicant's field survey. Although Mr. Mesteth asserts that "the discovery of an Indian camp and prehistoric artifacts in the Tribe's treaty and aboriginal territory . . . implicates important tribal interests," W. Mesteth Decl. at ¶ 6, this statement does not specify where this site is located with respect to the MEA site. Therefore, this statement does not support the contention that the cultural resources investigation for the MEA site was inadequate.

Mr. Mesteth also states that current and extinct water resources are known to be favored camping sites of indigenous people, and thus "the likelihood that cultural artifacts and evidence of burial grounds exist in these areas is strong." W. Mesteth Decl. at ¶ 8. While this may be true, the general "likelihood" of finding artifacts and sites in certain locations does not mean they will be found. This statement does not support the conclusion that the cultural resources investigation was inadequate merely because no artifacts or sites were found. Other than the

issue of an ethnographic study, which the Staff addressed earlier,[75] Mr. Mesteth has not identified any particular flaw in the methods used in the cultural resources investigation.

Mr. Mesteth takes issue with the finding in the ER that there will be no impacts on cultural resources. W. Mesteth Decl. at ¶ 14, citing ER at 2-11. The conclusion that there would be no impacts on cultural resources was based on lack of eligibility of sites for listing on the NRHP and a recommendation of avoidance for two of the sites. ER at 4-23. Mr. Mesteth does not dispute these reasons. Instead, he asserts that the Applicant used "comparison results of unidentified surveys to serve as a cultural context of known resources of indigenous peoples with the MEA of which have not been identified by the Tribe." W. Mesteth Decl. at ¶ 14. This statement resembles the Tribe's assertion that "cultural resources have not been evaluated but compared to results of a few cultural resources investigations . . . ." Petition at 11-12. As discussed previously in response to that assertion, the Applicant used results of other surveys within the county as context for its evaluation of cultural resources at the site, but also performed a site-specific inventory and evaluation, as Mr. Mesteth acknowledges. W. Mesteth Decl. at ¶ 12. Further, Mr. Mesteth has not indicated that he is aware of "known resources of indigenous peoples" at the MEA site. Therefore, there is no support for the claim that the Applicant's conclusion regarding impacts is faulty.

Finally, Mr. Mesteth quotes from the first paragraph of section 3.8.1 of the ER (page 3-76) and concludes "this indicates that use of the area by indigenous and camp population was, and has been, extensive." W. Mesteth Decl. at ¶ 11. However, this conclusion is not supported by the quoted text, which discusses resources found in surveys conducted in the northern part of the county, not at the MEA site. That text does not support the inference that the area was used extensively by "indigenous and camp population."

In summary, Mr. Mesteth has not raised a genuine dispute with the Applicant, nor has he provided adequate support for this contention. None of his statements are sufficient to support

[75] *See* p. 20 *supra*.

the contention that the ER fails to meet the requirements of 10 C.F.R. § 51.45. Therefore, this claim is inadmissible pursuant to 10 C.F.R. § 2.309(f)(1)(v) and (vi).

The second part of Contention 1 asserts that the application does not demonstrate compliance under the NHPA or the guidance in section 2.4 of NUREG-1569.[76] The Tribe asserts that "NUREG-1569 Section 2.4 imposes several *requirements* . . . that have not been met in this case." Petition at 12 (emphasis added). Specifically, the Tribe suggests that acceptance criteria 2.4.3(1), 2.4.3(3), 2.4.3(4), and 2.4.3(5) have not been met. *Id*. However, NUREGs are guidance and do not impose binding legal requirements.[77] Thus, because the Tribe has not identified requirements that the Applicant must comply with, the Tribe's claims based on section 2.4 of NUREG-1569 are insufficient to support an admissible contention.[78]

The Tribe also asserts that the NRC has not yet engaged in consultation with the Tribe as required by the NHPA. Petition at 13-16. Because the obligation to comply with the NHPA belongs to the Staff, not the Applicant, under the Commission's decisions in the *Crow Butte* license renewal and *North Trend* proceedings, this claim is premature and unripe for litigation.[79]

---

[76] NUREG-1569 sets forth the Staff's guidance on how an applicant or licensee may comply with NRC regulations in the context of ISL licensing.

[77] *Curators of the University of Missouri*, CLI-95-1, 41 NRC 71, 98 (1995) (NUREGs and Regulatory Guides are advisory by nature and do not themselves impose legal requirements on either the Commission or its licensees). NUREG-1569 specifically states that "acceptance criteria laid out in this standard review plan are for the guidance of NRC staff" and "[r]eview plans are not substitutes for the Commission's regulations, and compliance with a particular standard review plan is not required. . . ." NUREG-1569 at xviii.

[78] In any event, the acceptance criteria in section 2.4.1(3), (4), and (5) include qualifiers. For instance, section 2.4.1(3) states, "*Where appropriate*, tribal authorities have been consulted . . . ." NUREG-1569 at 2-11 (emphasis added). Sections 2.4.1(4) and (5) both say "*If delegated by NRC*," the applicant will provide evidence of contact with tribal authorities (2.4.1(4)) or present a memorandum of agreement (2.4.1(5)). *Id*. (emphasis added).

[79] *Crow Butte LR*, CLI-09-9, 69 NRC at 350-51; *Crow Butte Resources, Inc.* (North Trend Expansion Project), CLI-09-12, 69 NRC 535, 564-66 (2009) ("Crow Butte North Trend").

If the Tribe believes that the Staff's NEPA document, when issued, reflects inadequacies in the NHPA consultation, the Tribe can submit contentions on this issue at that time.[80]

The Tribe claims that *Crow Butte* is distinguishable because "in this case, the Tribe argues that the NHPA requires consultation under Section 106 to begin as early as possible in the consideration of the undertaking." Petition at 16. Although the Tribe did not argue in *Crow Butte* that consultation must begin "as early as possible," the Tribe does not explain why this distinction matters. The Commission's holding in the *Crow Butte* decisions was that a contention alleging a failure to consult under Section 106 must wait until the Staff releases its NEPA document.[81] Moreover, as discussed in Section IV of the "BACKGROUND" section of this Response, the Staff initiated the consultation process in September 2012, within one month of beginning its acceptance review of the application.[82] Thus, the Tribe's claims regarding the Staff's consultation are incorrect.

In the *Powertech* proceeding, the Tribe proposed this same contention and the board held that the first part, regarding inadequacies in the discussion of cultural resources, was admissible.[83] In *Powertech*, there were numerous Native American cultural resources within the site and vicinity, and a significant number of sites that had not been evaluated.[84] In contrast, in this proceeding, neither the Applicant nor the Tribe has identified any Native American cultural resources on the site. In *Powertech*, Mr. Mesteth provided a supporting declaration that, in several instances, disputed specific portions of the application.[85] In his *Powertech* declaration,

---

[80] *Crow Butte LR*, CLI-09-9, 69 NRC at 351.

[81] *See, e.g.*, *Crow Butte LR*, CLI-09-9, 69 NRC at 351.

[82] *See* pp. 4-5 *supra*.

[83] *Powertech*, LBP-10-16, 72 NRC at 419-422. The board denied the claims related to compliance with NUREG-1569 and the NHPA. *Id*.

[84] *See* n.52 *supra*.

[85] *See, e.g.*, Declaration of Wilmer Mesteth (Powertech) at ¶¶ 11-13, 19 (ADAMS Accession No. ML100960642).

Mr. Mesteth also cited statements made in a proceeding before the South Dakota Department of Environment and Natural Resources.[86] Similar support is lacking here. Thus, as explained above, Contention 1 in this proceeding is inadmissible in its entirely, because it fails to raise a genuine dispute and lacks adequate support.

Contention 2: Failure to Include Adequate Hydrogeological Information to Demonstrate Ability to Contain Fluid Migration

In Contention 2, the Tribe makes two assertions. First, the Tribe states that the application "fails to provide sufficient information regarding the geological setting of the area to meet the requirements of 10 C.F.R. § 40.31(f), 10 C.F.R. § 51.45, 10 C.F.R. § 51.60, 10 C.F.R. Part 40, Appendix A, Criteria 4(e) and 5G(2), [NEPA], and NUREG-1569 section 2.6." Petition at 17. Second, the Tribe asserts that the application "similarly fails to provide sufficient information to establish potential effects of the project on the adjacent surface and ground-water resources, as required by 10 C.F.R. 51.45, NUREG-1569 section 2.7, and [NEPA]." Petition at 17. As support for this contention, the Tribe cites the opinion of Dr. Hannan LaGarry and EPA comments on NRC draft SEISs for ISL facilities in Wyoming. As discussed more fully below, this contention is inadmissible because the Tribe fails to raise a genuine dispute with the Applicant, as required by 10 C.F.R. § 2.309(f)(1)(vi), and fails to provide adequate support for its claims, as required by 10 C.F.R. § 2.309(f)(1)(v).

Initially, the Staff notes that Criteria 4(e) and 5G(2) of 10 C.F.R. Part 40, Appendix A, are not relevant to the review of the MEA application. Criterion 4(e) relates to impoundments (i.e., either tailings impoundments or ponds), which will not be present at the MEA.[87] Criterion 5G(2) requires an adequate description of characteristics of underlying soils and geologic formations,

---

[86] *Id*. at ¶¶ 15-17.

[87] Additionally, Criterion 4(e) states that uranium processing facilities must be located away from faults that may cause impoundment failure, but the criterion applies only to faults that meet the definition of a "capable fault" in 10 C.F.R. Part 100, Appendix A, III(g). Neither the Tribe nor Dr. LaGarry identify any "capable faults" that exist at or near the MEA.

but this criterion refers specifically to "tailing disposal system proposals." Because ISR facilities do not generate tailings (unlike conventional mines where ore is physically excavated), this criterion is not applicable to the MEA application.

With regard to the Tribe's claim that the application "fails to provide sufficient information regarding the geological setting," it is not clear exactly what the Tribe is referring to by "geological setting." Section 2.6 of the TR describes the geology and seismology of the MEA site and surrounding region, Section 2.7 of the TR discusses site and regional hydrology, including hydrogeology, and Sections 3.0 and 5.7.8 of the TR discuss facility operations that will monitor and contain fluid migration. Neither the Tribe nor its expert, Dr. LaGarry, has identified any information in these sections of the application (or any other section) that they dispute or consider to be inadequate. The LaGarry Opinion discusses regional stratigraphy and various general contaminant pathways, but does not specifically challenge the adequacy of the sections of the application addressing geology, seismology, hydrology, and hydrogeology. Therefore, this contention does not raise a genuine dispute with the Applicant, as required by 10 C.F.R. § 2.309(f)(1)(vi).

The Tribe also fails to provide adequate support for this claim. The Tribe alleges that "the application fails to present sufficient information in a scientifically defensible manner to adequately characterize the site and off-site hydrogeology to ensure confinement of the extraction fluids." Petition at 18. According to the Tribe, "these deficiencies include unsubstantiated assumptions as to the isolation of the aquifers in the ore-bearing zones." Petition at 18. The Tribe cites the LaGarry Opinion as support for this assertion. However, the Tribe fails to identify specific statements in the LaGarry opinion that support its assertion. Merely "attaching a document in support of a contention without any explanation of its

significance does not provide an adequate basis for a contention."[88] Also, the LaGarry Opinion does not identify any "unsubstantiated assumptions" in the application.

In order to show a genuine dispute with an applicant, a petitioner must refer to "specific portions of the application . . . that the petitioner disputes" and must provide "supporting reasons for each dispute." 10 C.F.R. § 2.309(f)(1)(vi). Dr. LaGarry does not do so with respect to CBR's discussion of confinement or any of the information that CBR provided in the application to demonstrate adequate confinement, such as isopachs, site-specific cross-sections, and pumping test results. *See, e.g.*, TR Sections 2.7.2.2 and 2.7.2.3 and accompanying tables and figures. In fact, the LaGarry Opinion does not directly address isolation of the mined aquifer (i.e., confinement of the aquifer). Dr. LaGarry does assert that "the simplified 'layer-cake' concept applied by pre-1990's workers is incorrect, and overestimates the thickness and areal extent of many units by 40-60%." LaGarry Opinion at 4. However, he does not indicate where in the MEA application CBR relies on the "layer cake" concept, nor does he explain the significance of this statement (i.e., how it supports the contention).[89] Therefore, this statement does not raise a genuine dispute with the application.

The LaGarry Opinion also discusses "lack of containment" due to faults. But Dr. LaGarry's statements that there are "potential" faults in the area that "may allow" transmission of mining fluids, or that there are "probably" many unknown faults, are general, speculative statements. *See* LaGarry Opinion at 4-5. Figure 2.6.12 of the TR is a map showing faults and other structural features in the vicinity of the MEA. Dr. LaGarry does not take issue with this figure, nor does he identify any additional *known* faults in the vicinity of the MEA. Dr. LaGarry provides Figure 1, which purports to show the location of faults and "vulnerable" areas of

---

[88] *Private Fuel Storage* (Independent Spent Fuel Storage Installation), LBP-98-10, 47 NRC 288, 298-99 (1998).

[89] For example, even if areal extent and thickness are overestimated, that does not necessarily mean that there is inadequate confinement.

aquifers with respect to the MEA site. However, the scale of that figure is so large that it can only be viewed as a "schematic" or birds-eye view of the geology of the area.[90] More importantly, Figure 1 provides no indication of the location of the cross-section depicted in the figure with respect to the MEA site from an east-west perspective. Therefore, it is not possible to ascertain whether the cross section accurately reflects the stratigraphy at the site. In summary, for the reasons stated above, the LaGarry Opinion does not support this contention.

The Tribe also cites the EPA comments on draft SEISs for ISL projects in Wyoming, but fails to explain how these comments on draft SEISs for other ISL projects have any bearing on the MEA application.[91] Because the Tribe has not provided adequate support through the LaGarry Opinion, the EPA Letter, or otherwise, the Tribe has not provided adequate support for their first claim, as required by 10 C.F.R. § 2.309(f)(1)(v).

With regard to the Tribe's second claim, which asserts that the application "fails to provide sufficient information to establish potential effects of the project on adjacent surface and ground-water resources," The Tribe quotes portions of two sections of NUREG-1569, claiming that these are requirements that the application "must" meet. Petition at 17-18. First, the Tribe cites NUREG-1569 section 2.7.1(3) and states that the application must include a description of "effective porosity, hydraulic conductivity, and hydraulic gradient" of site hydrogeology, including any "other information relative to the control and prevention of excursions."[92] The Tribe also quotes from section 2.7.2 of NUREG-1569, entitled "Review Procedures," and asserts that the

---

[90] As indicated in Figure 1 of the LaGarry Opinion, the cross-section depicted in the figure runs the entire north-south length of the state of Nebraska – a distance of hundreds of miles. LaGarry Opinion at 3. Also, the vertical scale of the figure is exaggerated by a factor of 106. *Id*.

[91] As discussed in Section V of the "BACKGROUND" section of this Response, those comments raise issues that are not within the scope of this proceeding. *See* p.7 *supra*. Therefore, they do not provide support for this contention.

[92] The Tribe's excerpt from Section 2.7.1(3) is not accurate. Section 2.7.1(3) describes one area of the Staff's review of hydrology: "[a] description of site hydrogeology, including . . . (ii) a description of aquifer properties, including material type, formation thickness, effective porosity, hydraulic conductivity, and hydraulic gradient; (iii) estimated thickness and lateral extent of aquitards, and other information relative to the control and prevention of excursions." NUREG-1569 at 2-20.

application does not present sufficient information "in a scientifically defensible manner" to adequately characterize the site and off-site hydrogeology to ensure confinement of extraction fluids. As discussed in the Staff's response to Contention 1, NUREG-1569, like other NUREGs, contains guidance and does not impose legal requirements on applicants.[93] Therefore, allegations of failure to meet criteria in a NUREG are insufficient to support an admissible contention. Also, the Tribe does not explain what it means by "scientifically defensible" and gives no examples to support that claim.

The quoted language from sections 2.7.1(3) and 2.7.2 of NUREG-1569 relates to various aspects of site hydrogeology.[94] The Tribe does not actually assert that CBR has failed to provide information discussed in those sections of NUREG-1569. *See* Petition at 17-18. CBR describes site hydrogeology, including aquifer properties such as hydraulic gradient and hydraulic conductivity, in section 2.7.2 of the TR. CBR provides the estimated thickness and extent of confining units in the same section. Also, in section 2.7.2.3 of the TR (3.4.3.3 of the ER), CBR discusses the conceptual model of site hydrology referred to in Section 2.7.2 of NUREG-1569. Because neither the Tribe nor Dr. LaGarry specifically challenge the information presented on these topics, they have not raised a genuine dispute with the Applicant on these issues, as required by 10 C.F.R. § 2.309(f)(1)(vi).

The Staff notes that the *Powertech* board admitted a contention identical to this one in that proceeding.[95] Because the proceedings involve two entirely different sites and applications, an issue that spawns an admissible contention in one proceeding will not necessarily do so in the other. And even if issues are similar, petitioners must meet the contention admissibility requirements. In *Powertech*, the Tribe provided a 30-page expert opinion from Dr. Robert

---

[93] *See* p.23 and n. 77 *supra* (citing *Curators of the University of Missouri*, CLI-95-1, 41 NRC at 98).

[94] *See* NUREG-1569 at 2-20 to 2-22.

[95] *Powertech*, LBP-10-16, 72 NRC at 424-426.

Moran that contained far more detail than the LaGarry Opinion.[96] Dr. Moran identified specific portions of the application that he disputed, and provided supporting reasons explaining his position. As a result, the *Powertech* board found that the Dr. Moran's opinion provided sufficient support for the contention and raised a genuine issue with the application.[97] In contrast, in this proceeding the Tribe provided the six-page opinion of Dr. LaGarry, which, as discussed above, does not identify portions of the application that the Tribe disputes, and therefore does not raise a genuine dispute with the Applicant. Therefore, in this proceeding, the contention is inadmissible.

Contention 3: Inadequate Analysis of Ground Water Quantity Impacts

Contention 3 makes two assertions. First, the Tribe asserts that the application violates NEPA because it fails to provide an analysis of groundwater quantity impacts of the project. Petition at 18. Second, the Tribe asserts that the application "presents conflicting information on groundwater consumption such that the consumption impacts cannot accurately be evaluated." Petition at 18-19. The Tribe again cites the LaGarry Opinion as support for these assertions. Petition at 19.

The Tribe's first claim must be rejected because CBR discusses groundwater quantity (consumption) impacts in Section 7.2.5.1 of the TR (TR at 7-12) and Section 4.4 of the ER (ER at 4-9). Because the application does in fact discuss these impacts and the Tribe has not challenged those sections of the application, the Tribe has failed to raise a genuine dispute with the Applicant, as required by 10 C.F.R. § 2.309(f)(vi). The Tribe also provides no support for this claim. Although the Tribe asserts that the LaGarry Opinion "sets forth the primary concerns related to the Applicant's lack of credible analysis of ground water quantity impacts based upon lack of knowledge as to the Stratigraphy of Water-Bearing Rocks in Northwestern Nebraska,"

[96] *Id*. at 425. The Declaration Dr. Robert E. Moran in *Powertech* can be found at ADAMS Accession No. ML100960635.

[97] *Id*. at 426.

Petition at 19, the Tribe does not explain how Dr. LaGarry's description of the stratigraphy has any relation to groundwater quantity impacts or the Applicant's discussion of those impacts. The LaGarry Opinion does not address groundwater quantity impacts at all. Thus, the Tribe has not provided adequate support for this claim as required by 10 C.F.R. § 2.309(f)(1)(v).

The Tribe's second claim regarding "conflicting information on groundwater consumption" is also inadmissible because it lacks adequate support and fails to raise a genuine dispute with the Applicant. The Tribe has not pointed to any information in the application that constitutes "conflicting information" in CBR's discussion of groundwater consumption, nor has the Tribe explained why consumption impacts cannot accurately be evaluated. As noted above, the LaGarry Opinion does not discuss groundwater quantity impacts at all. Thus, the Tribe has provided neither facts nor expert opinion to support its claim, as required by 10 C.F.R. § 2.309(f)(v). In addition, because the Tribe has failed to identify particular portions of the application that it disputes, the Tribe has failed to raise a genuine dispute with the Applicant, as required by 10 C.F.R. § 2.309(f)(vi).

The Tribe argues that 10 C.F.R. § 51.45 and NEPA require an applicant to provide sufficient data "for a scientifically defensible review of the environmental impacts of the operation and for the Commission to conduct an independent analysis." Petition at 19. The Tribe has not cited a provision in 10 C.F.R. § 51.45 or NEPA that requires a "scientifically defensible" review of impacts,[98] nor has the Tribe explained what "scientifically defensible" means. For these reasons, this argument does not support the contention.

The Staff again recognizes that the *Powertech* board admitted an identical contention to this one.[99] However, in *Powertech*, the Tribe provided the expert opinion of Dr. Moran to support the contention, and the board found that Dr. Moran specifically identified issues with

[98] 10 C.F.R. § 51.45(c) requires "sufficient data to aid the Commission in its development of an independent analysis," but says nothing about a "scientifically defensible review of impacts."

[99] *Powertech*, LBP-10-16, 72 NRC at 426-428.

water usage and cited specific portions of the application with which he disagreed.[100] Here, in contrast, the LaGarry Opinion does not discuss groundwater quantity impacts, nor does it identify alleged inadequacies or contradictions in specific portions of the application where such impacts are discussed. Thus, in this proceeding the Tribe has not provided adequate support for this contention or raised a genuine dispute with the Applicant, rendering this contention inadmissible.

Contention 4: Requiring the Tribe to Formulate Contentions before an EIS is Released violates NEPA

In Contention 4, the Tribe claims that "[t]he procedure used by NRC to consider the Crow Butte application fails to satisfy the public participation and informed decision-making mandates of NEPA." Petition at 19. Specifically, the Tribe argues that "NRC Staff has violated NEPA by requiring that the Tribe formulate and submit detailed contentions before the NEPA process is complete, denying the Tribe the benefit of NEPA analysis." Petition at 20.

This contention is an impermissible challenge to the NRC's regulations in 10 C.F.R. § 2.309(f)(2), which require a petitioner to file NEPA-related contentions based on an applicant's environmental report at the time the petitioner requests a hearing.[101] Unless a petitioner can show special circumstances under 10 C.F.R. § 2.335(b), a contention challenging a regulation is not a litigable issue in a licensing proceeding.[102] In *Powertech*, the board rejected an identical

[100] *See id*. at 427-28.

[101] 10 C.F.R. § 2.309(f)(2) states that "[o]n issues arising under [NEPA], participants shall file contentions based on the applicant's environmental report." *See also Florida Power & Light Co*. (Turkey Point Nuclear Plant, Units 3 & 4), CLI-01-17, 54 NRC 3, 24 (2001) (rejecting a petitioner's claim of unwarranted difficulty framing contentions because the NRC staff had not yet issued its SEIS, and explaining that, under NRC regulations, "[c]ontentions must be based upon the applicant's . . . license application and Environmental Report.").

[102] *Shearon Harris*, CLI-10-09, 71 NRC at 254 (holding that a contention must be rejected to the extent it challenges NRC regulations); *Private Fuel Storage*, CLI-04-22, 60 NRC at 129 (explaining that a contention must be rejected when it reflects nothing more than a generalization regarding the petitioner's view of what the applicable policies ought to be).

contention on this basis.[103] Also, as the Tribe acknowledges (Petition at 20), the NRC regulations provide the opportunity to file "new or amended environmental contentions [based on a draft or final NRC environmental review document] if the contention complies with the requirements of [§ 2.309(c)]."[104]

As stated in Section IV of the "Background" section of this response, the NRC has already invited the Tribe to become a consulting party pursuant to Section 106 of the NHPA, and the Tribe has indicated its desire to do so.[105] As a consulting party, the Tribe will have an opportunity to assist in identifying cultural resources, evaluating potential impacts on cultural resources, and mitigating adverse effects.

Contention 5: Failure to consider connected actions

In Contention 5, the Tribe asserts that "[t]he Crow Butte expansion proposal to further conduct ISL operations activities is being considered by multiple federal agencies," but "NRC, the lead agency for purposes of NEPA – has failed to engage these other agencies" in violation of the "'action-forcing' mandate and purpose of NEPA." Petition at 21. Specifically, the Tribe argues that "[t]he Class V deep injection well is a 'connected action' and even though [the U.S. Environmental Protection Agency (EPA)] is the permitting agency," NRC must analyze that application in its NEPA analysis for the MEA project. Petition at 22.

---

[103] *Powertech (USA), Inc*. (Dewey Burdock In Situ Uranium Recovery Facility), LBP-10-16, 72 NRC 361, 437-438 (2010) ("Any challenge by the Tribe to this regulation is not litigable in this proceeding, and cannot be admitted as a contention" absent a showing of special circumstances under 10 C.F.R. § 2.335(b)).

[104] The revisions to the NRC's adjudicatory rules in 10 C.F.R. Part 2 that became effective in September 2012 include a revised requirement in 10 C.F.R. § 2.309(c) for demonstrating good cause to file hearing requests, intervention petitions, and motions for leave to file new or amended contentions after the original deadline. Amendments to Adjudicatory Process Rules and Related Requirements, 77 Fed. Reg. 46,562, 46,591 (Aug. 3, 2012) (final rule). Under this new provision, the participant must show that the information was not previously available, the information is materially different from information previously available, and the filing is timely based on availability of the subsequent information. *Id*.

[105] *See* pp. 4-5 and n.16 *supra*.

As an initial matter, assuming that the Tribe is referring to the Class V Underground Injection Control (UIC) permit for the MEA facility, CBR states in Section 4.2.1.5 of the TR that this permit must be obtained from the Nebraska Department of Environmental Quality (NDEQ). Because the EPA has delegated the responsibility for the UIC program in Nebraska to the state, the NDEQ oversees issuance of Class V (and other) UIC permits.[106] Therefore, the Tribe has not shown that EPA review is required in this instance.

In any event, this contention is not ripe for litigation because the Staff has not completed its NEPA analysis. The Tribe's issue here is with NRC's NEPA review, not with the application. Thus, pursuant to the Commission's decisions in the *Crow Butte* license renewal and *North Trend* proceedings, the Tribe must wait until the Staff issues its environmental review document before challenging the adequacy of the Staff's NEPA review.[107] Because this contention challenges the Staff's ongoing NEPA review, not the application, the contention fails to raise a genuine dispute with the application and must be rejected under 10 C.F.R. § 2.309(f)(1)(vi).[108] The *Powertech* board rejected a contention identical to this one in that proceeding for the reasons discussed above.[109]

In addition, the Tribe provides no support for its claim that the Staff has failed to engage other agencies in the NEPA process. During its NEPA review, the NRC will consult with other federal or state agencies as appropriate, and provide those agencies with an opportunity to review the Staff's environmental review document. The Tribe does not point to any authority holding that this approach violates NEPA. Although the Tribe cites several cases in its petition (Petition at 21-22), each of those cases involves a final agency decision and EIS. Therefore,

---

[106] *See* 40 C.F.R. § 147.1401 (EPA regulation authorizing Nebraska to administer the UIC program for Class V wells); NEB. ADMIN. CODE, Title 122, Chapter 6 (NDEQ regulations governing Class V wells).

[107] *See Crow Butte LR*, CLI-09-9, 69 NRC at 348-51; *Crow Butte North Trend*, CLI-09-12, 69 NRC at 566.

[108] *See Crow Butte LR*, CLI-09-9, 69 NRC at 351; *Crow Butte North Trend*, CLI-09-12, 69 NRC at 566.

[109] Powertech, LBP-10-16, 72 NRC at 438-440.

these cases do not support admission of a contention challenging the Staff's ongoing NEPA review.

Contention 6: The Environmental Report does not Examine Impacts of a Direct Tornado Strike

In Contention 6, the Tribe claims that the ER fails to discuss the impact of tornado strikes in the ER. The Tribe argues that "although tornado strikes are common occurrences in the region, there is no recognition of this reasonably foreseeable impact, even though it is coupled with catastrophic consequences." Petition at 22-23. The Tribe considers this alleged omission to be an example of the Applicant's "failure to provide a complete Environmental Report" and the NRC's "failure to comply with NEPA requirements at the earliest stages of the proceedings." *Id*. at 23. The Tribe cites the Council on Environmental Quality (CEQ) regulations at 40 C.F.R. § 1502.22(b)(3), which require consideration of "low-probability environmental impacts with catastrophic consequences, if those impacts are reasonably foreseeable." *Id*. The Tribe claims that "neither the Applicant's environmental report nor any NEPA document produced by the NRC has examined the impacts which would occur if the proposed ISL facility received a direct or indirect hit from a tornado." *Id*. The Tribe cites as an example a tornado strike at the Fansteel plant in Muskogee, Oklahoma. *Id*.

This contention must be rejected because the CBR application does address tornado strikes. In Section 7.5.6 of the TR, "Natural Disaster Risk," the Applicant states as follows:

> NUREG/CR-6733 considered the potential risks to an ISR facility from natural disasters. Specifically, the risk from an earthquake and a tornado strike were analyzed. NRC determined that the primary hazard from these natural events was from dispersal of yellowcake from a tornado strike and failure of chemical storage facilities and the possible reaction of process chemicals during either event. NUREG/CR-6733 recommended that the licensees follow industry best practices during design and construction of chemical facilities. CBR is committed to following these standards.
>
> . . . .
> The Crow Butte operation is located in an area subject to tornadoes. CBR emergency procedures currently contained in the SHEQMS Volume VIII,

> Emergency Manual, provide instructions for response and mitigation of natural disasters and spills or radioactive materials.

TR at 7-36. The same information is presented in the ER at Section 4.12.3.6 (ER at 4-42 to 4-43).

The Staff also notes that the MEA is a satellite facility to the main CBR facility. Because yellowcake production will not occur at the MEA, the primary radioactive hazard of a tornado strike identified in NUREG/CR-6733 (dispersal of yellowcake) cannot occur at the MEA. Furthermore, NUREG/CR-6733 explains that "tornado risk is very low at uranium ISL facilities" and "no design or operational changes are required to mitigate this risk."[110] The Tribe has not explained why the Applicant's reliance on NUREG/CR-6733 is inappropriate.

The CEQ regulation that the Tribe cites requires agencies to consider reasonably foreseeable low-probability environmental impacts *with catastrophic consequences*. 40 C.F.R. § 1502.22(b)(3) (emphasis added). But the Tribe has no provided any explanation of why the consequences of a tornado strike at the MEA facility would be "catastrophic." As noted above, there will be no yellowcake at the MEA facility, and thus no chance of yellowcake dispersal during a tornado. The impacts of the tornado strike at the Fansteel plant in Oklahoma that the Tribe describes in its Petition do not appear to have been catastrophic. Petition at 23. Furthermore, the Tribe does not explain why the impacts of a tornado strike at the Fansteel plant, which is not an ISL facility, are even relevant to assessing the impacts of a similar event at an ISL satellite facility such as the MEA.

The *Powertech* board rejected an identical contention after concluding that the Applicant discussed "the possibility of a tornado strike and determined that no operational design changes would be necessary should such a strike occur."[111] The MEA application contains a similar

---

[110] NUREG/CR-6733, "A Baseline Risk-Informed, Performance-Based Approach for In Situ Leach Uranium Extraction Licensees," Center for Nuclear Waste Regulatory Analyses at 4-56 (Sept. 2001) (ADAMS Accession No. ML012840152).

[111] *Powertech*, LBP-10-16, 72 NRC at 440-442.

discussion and reaches the same conclusion.[112] Therefore, the contention should be rejected here because there is no distinction warranting a different result.

CONCLUSION

For the reasons discussed above, the Oglala Sioux Tribe has not demonstrated standing to intervene in this proceeding and has not submitted an admissible contention. Therefore, the Board should deny the Tribe's hearing request under 10 C.F.R. § 2.309(a).

Respectfully submitted,

/Signed (electronically) by/
Marcia J. Simon
Counsel for the NRC Staff
marcia.simon@nrc.gov

Dated at Rockville, Maryland
this 25th day of February, 2013

---

[112] *Id*. at 441-442.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	Docket No. 40-8943-MLA-2
CROW BUTTE RESOURCES, INC.	)	
	)	ASLBP No. 13-926-01-MLA-BD01
(Marsland Expansion Project)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "NRC STAFF RESPONSE TO THE OGLALA SIOUX TRIBE'S REQUEST FOR HEARING AND PETITION TO INTERVENE" in the above-captioned proceeding have been served via the Electronic Information Exchange ("EIE"), the NRC's E-Filing System, this 25th day of February, 2013, which to the best of my knowledge resulted in transmittal of the foregoing to those on the EIE Service List for the above-captioned proceeding.

/Signed (electronically) by/
Marcia J. Simon
Counsel for the NRC Staff
U.S. Nuclear Regulatory Commission
Office of the General Counsel
Mail Stop: O-15 D21
Washington, D.C. 20555-0001
(301) 415-1261
Marcia.Simon@nrc.gov