

August 18, 2014

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. 08-867-02-OLA-BD01
(Marsland Expansion Area))	

CROW BUTTE RESPONSE IN SUPPORT OF NRC STAFF
MOTION FOR SUMMARY DISPOSITION OF CONTENTION 1

INTRODUCTION

In accordance with 10 C.F.R. § 2.1205 and the Licensing Board’s April 30, 2014 Revised General Schedule, Crow Butte Resources, Inc. (“Crow Butte”) files this response in support of the NRC Staff’s motion for summary disposition of Contention 1, dated August 6, 2014. Summary disposition is warranted on the grounds that the omissions and inadequacies averred in the contention have been cured, and there no longer exists a genuine issue as to any material fact relevant to the contention. The NRC Staff has completed its review of cultural resources at the Marsland Expansion Area (“MEA”) and incorporated the results of the cultural resource surveys performed by Crow Butte’s contractor, the Santee Sioux Nation (“SSN”), and the NRC Staff into the cultural resource sections of the draft Environmental Assessment (“EA”). These efforts render the contention moot. No new or amended contentions were filed following publication of the draft EA. Therefore, the NRC Staff is entitled to a decision as a matter of law.

BACKGROUND

Crow Butte requested an amendment to Source Material License SUA-1534 in order to construct and operate a satellite uranium recovery facility at the MEA in Dawes County,

Nebraska. The Oglala Sioux Tribe (“OST”) timely filed a petition to intervene and proposed six contentions.¹ Crow Butte and the NRC Staff filed responses on February 25, 2013,² and OST replied on March 4, 2013.³

Subsequently, in an Order dated March 22, 2013, the Board sought the parties’ views on the results of cultural field surveys of the Marsland site conducted in November-December 2012 by Native American tribes other than OST. The survey results were documented in a report prepared by the Santee Sioux Nation (“SSN Report”), dated March 5, 2013. The Board specifically sought the parties’ views on the significance of the SSN Report with respect to the admissibility of OST’s proposed contention.⁴ Crow Butte and NRC Staff submitted filings addressing the SSN Report.⁵ OST did not file a reply or otherwise address the SSN Report in any of its pleadings. The Board issued LBP-13-06 on May 10, 2013. In LBP-13-06, the Board admitted a portion of Contention 1. As admitted by the Board, Contention 1 states:

The Application fails to meet the requirements of 10 C.F.R. §§ 51.60 and 51.45, the National Environmental Policy Act, the national Historic Preservation Act, and the relevant portions of NRC guidance included at NUREG-1569 section 2.4, in that it lacks an adequate description of either

¹ “Petition to Intervene and Request for Hearing of the Oglala Sioux Tribe,” dated January 29, 2013.

² “Applicant’s Response to Petition to Intervene Filed by the Oglala Sioux Tribe,” dated February 25, 2013; “NRC Staff Response to the Oglala Sioux Tribe’s Request for Hearing and Petition to Intervene,” dated February 25, 2013.

³ “Reply to NRC Staff and Applicant Responses to the Petition to Intervene and Request for Hearing of the Oglala Sioux Tribe,” dated March 4, 2013.

⁴ Memorandum and Order (Establishing Schedule for Additional Pleadings to Address Information in Recent Tribal Cultural Resources Survey Report), dated March 22, 2013.

⁵ “Applicant’s Supplemental Response on Standing and Contention Admissibility,” dated April 10, 2013; “NRC Staff’s Supplemental Pleading Regarding the Santee Sioux Nation Report,” dated April 10, 2013.

the affected environment or the impacts of the project on archaeological, historical, and traditional cultural resources.

On April 30, 2014, the Board issued a Revised General Schedule, noting that “the staff will issue the cultural resources section of the draft EA, along with supporting information, for public comment in June 2014.”⁶ The Board’s schedule directed OST to submit any new or amended contentions on the NRC Staff’s draft EA by July 30, 2014.

On June 30, 2014, the NRC Staff notified the Board and parties that the cultural resources sections of the draft EA were available for review. OST did not file a new or amended contention addressing the information in the draft EA sections on or before July 30, 2014. Thereafter, on August 6, 2014, the NRC Staff filed its motion for summary disposition of Contention 1.

DISCUSSION

The NRC Staff moves for summary disposition of Contention 1 on the ground that there no longer exists a genuine dispute concerning any material facts because the draft EA has rendered the original contention moot. Since the contention was admitted, the NRC Staff has considered the findings of the SSN Report, deployed a cultural resources expert to collect additional information from the places of potential religious or cultural significance identified in the SSN Report, and documented the results of its assessment of impacts to cultural resources in the draft EA. The draft EA supersedes Crow Butte’s ER and cures the dispute that was the basis for admitting Contention 1. In the absence of a new or amended contention, there remains no further issue to litigate. The NRC Staff is entitled to summary disposition as a matter of law.

⁶ Memorandum and Order (Revised General Schedule), dated April 30, 2014 (“Revised General Schedule”).

In LBP-13-06, the Board explained that Contention 1 was based primarily on the declaration of OST's Tribal Historic Preservation Officer, who stated that the presence of current or extinct water resources on the MEA created a strong likelihood that, contrary to the results reported in cultural resource survey reports referenced in the ER, cultural resource sites exist within the MEA that need to be identified and evaluated properly.⁷ Contention 1 therefore disputed the findings of Crow Butte's cultural resource contractor who recorded 15 newly-discovered euroamerican historic sites and five euroamerican historic isolated finds, but found "[n]o indigenous people sites or artifacts ... in the project area" (ER at 3-77) despite "anticipat[ing] discovering modern and historic trash debris or dumps, historic foundations and structures, and prehistoric lithic scatters or isolated finds situated sporadically across the [Marsland site]."⁸ The Board explained that, given the nature of Native American aboriginal culture, "the declaration, in and of itself, appears sufficient to support this contention."⁹ But, the Board went on to note that, "to whatever degree it might not be sufficient, the subsequent [SSN Report] has shown the concern to be well founded."¹⁰ Thus, Contention 1, at its core, was based on Crow Butte's failure to identify any tribal cultural resources within the MEA in the ER, in contrast to the findings of the SSN Report. The "omission" or inadequacy in the ER has been corrected by the NRC Staff in the draft EA.

⁷ LBP-13-06 at 32, citing OST Petition, unnumbered exh. 7, at 2 (Declaration of Wilmer Mesteth).

⁸ *Marsland Expansion Area Uranium Project Class III Cultural Resource Investigation*, dated April 28, 2011, at 20 (ML12165A503). A prehistoric site is defined as two or more artifacts within 30 meters of one another or the presence of a feature. *Id.*

⁹ LBP-13-06 at 32.

¹⁰ *Id.* The SSN Report identified several items of potential interest at the Marsland site.

The draft EA provides an overview of the area's cultural history and describes the cultural resources identified within the MEA. In Section 3.6.3.3, *Previous Cultural Resources Surveys*, the draft EA describes the surveys performed between November 2010 and February 2011 by Crow Butte's contractor, ARCADIS U.S., that were referenced in the ER. The draft EA also discusses the results of subsequent surveys. In Section 3.6.5.2, *Potential Places of Religious or Cultural Significance*, the draft EA describes field investigations conducted by two consulting Tribes, the Crow and Santee Sioux Nations, at the original license area, the Three Crow Expansion Area, and the MEA in late-2012. The draft EA notes the tribal field crews recorded 12 potential places of religious or cultural significance, which were documented in the SSN Report. A preliminary evaluation by the Crow Nation and Santee Sioux Nation indicated that none of these places was potentially eligible for listing on the National Register of Historic Places ("NRHP"). The draft EA also explains that, in the summer of 2013, the NRC sent a cultural resource expert to revisit the 12 places of potential religious or cultural significance identified in the SSN Report in order to collect additional documentation. The results of this evaluation confirmed the preliminary determination in the SSN Report that none of the places identified in the SSN Report is potentially eligible for listing on the NRHP.¹¹

¹¹ The NRC contractor's report, *Field Documentation of Potential Places of Tribal Religious or Cultural Significance*, dated December 2013 (ML14174B378), grouped the places identified in the SSN Report into eight Tribal Sites. The report noted (at 34) that Tribal Site No. 2 (SSN No. 1, stone cairn) is a previously undocumented element of the historic homestead recorded during the ARCADIS inventory of the MEA. Two of the places recorded by the Tribal field crews, Tribal Site No. 6 (SSN No. 11, gravesite) and Tribal Site No. 7 (SSN No. 12, buffalo jump), remain as potential places of Tribal religious or cultural significance, even though there is no extant evidence for American Indian affiliation at this time. Two of the sites, Tribal Site No. 2 (SSN No. 1, cairn) and Tribal Site No. 8 (SSN No. 13, mound), are clearly associated with the Euro-American historic period. The remaining sites, Tribal Site Nos. 1 (SSN Nos. 3-8), 3 (SSN No. 2), 4 (SSN No. 10) and 5 (SSN No. 9) are considered to have no cultural association, either American Indian or Euro-American, except that Tribal Site No. 4 is the result of recent

Based on the above, the draft EA includes new and updated information on cultural resources that was not included in the ER. The draft EA specifically incorporates the results of two additional cultural resource assessments that post-date the ER: the SSN Report and the subsequent NRC investigation of the sites identified in the SSN Report. The Commission has explained that where a contention alleges the omission of particular information, and the information is later incorporated into NRC Staff review documents, the contention is moot.¹² A contention is also moot where revised information eliminates the controversy, factual or otherwise, that was the basis for admitting a contention.¹³ Here, the allegedly inadequate information in the ER has been superseded by new cultural resource information in the draft EA. This new information incorporates and addresses the findings of the SSN Report that formed the basis of the dispute in Contention 1. Contention 1 is therefore moot and summary disposition is appropriate.¹⁴

In addition, the migration tenet is inapplicable here. Admitted contentions challenging an applicant's ER may, in some circumstances, function as challenges to similar

Crow Butte project activity. Thus, the conclusions of the NRC contractor's report are broadly consistent with the findings in the original cultural resources report prepared by ARCADIS.

¹² *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-28, 56 NRC 373, 282-283 (2002); *USEC, Inc.* (American Centrifuge Plant), CLI-06-09, 63 NRC 433 (2006).

¹³ *Private Fuel Storage, LLC* (Independent Spent Fuel Storage Installation), LBP-99-23, 49 NRC 485, 493 (1999).

¹⁴ *Exelon Generation Company* (Early Site Permit for Clinton ESP Site), LBP-05-19, 62 NRC 134, 182 (2005). If OST had a specific challenge to the impact assessment in the draft EA sections, OST should have filed a new or amended contention stating the challenge and the basis. Any new or amended contention at this stage is too late.

portions of the NRC Staff's environmental review document.¹⁵ The "migration tenet" applies when "the information in the [NRC Staff's environmental review document] is sufficiently similar to the information in the ER."¹⁶ Under those circumstances, filing a new or amended contention is not necessary and the previously-admitted contention is simply viewed as applying to the relevant portion of the NRC Staff review document.¹⁷ But, where the information and analysis in the NRC Staff review document is *different* from the ER on which the initial contention is based, an intervenor must submit a new or amended contention.¹⁸ Here, the NRC Staff's draft EA includes new information that specifically addresses OST's concerns expressed in Contention 1. The draft EA incorporates the findings of the SSN Report as well as the follow-up surveys by the NRC Staff. As a result, the draft EA discussion of cultural resources is substantially different than that in the ER that formed the basis for admitting Contention 1.¹⁹ Consequently, the migration tenet does not apply. The information on which the original Contention 1 was based has been overtaken by subsequent analyses. In the absence of a new or

¹⁵ *Private Fuel Storage, LLC* (Independent Spent Fuel Storage Installation), LBP-01-23, 54 NRC 163, 172 n.3 (2001).

¹⁶ *Progress Energy Florida, Inc.* (Levy County Nuclear Power Plant, Units 1 and 2), LBP-11-01, 73 NRC 19, 26 (2011).

¹⁷ *Detroit Edison Co.* (Fermi Nuclear Power Plant, Unit 3), LBP-12-23, 76 NRC 445, 470-71 (2012).

¹⁸ *Southern Nuclear Operating Co.* (Early Site Permit for Vogtle ESP Site), LBP-08-2, 67 NRC 54, 63-64 (2008).

¹⁹ Although the SSN Report was available by the time the Board issued LBP-13-06, OST never filed any documents challenging the adequacy of the SSN Report conclusions. *See* LBP-13-06 at 14 n.11 and 33 n.26. Neither OST's original petition nor its supporting declarations pointed to any section or statement in the SSN Report that is allegedly deficient. As a result, Contention 1 cannot be construed as a challenge to the adequacy of the SSN Report.

amended contention disputing the adequacy of the NRC Staff's assessment in the draft EA, Contention 1 is moot.²⁰

At bottom, the NRC Staff has eliminated the dispute underlying Contention 1. Since the contention was admitted, the NRC Staff has incorporated the results of two recent cultural resource surveys into the draft EA. Contention 1, as admitted by the Board, is now moot. There remains no genuine issue as to any material fact relevant to the admitted contention. Accordingly, the NRC Staff is entitled to a decision as a matter of law.

CONCLUSION

For the above reasons, the Board should grant summary disposition of Contention 1 in favor of the NRC Staff.

Respectfully submitted,

/s/ signed electronically by

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Dated at San Francisco, California
this 18th day of August 2014

²⁰ In effect, OST has abandoned Contention 1 by failing to respond to the new information regarding the SSN Report and NRC Staff surveys in the draft EA.

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CERTIFICATE OF SERVICE

I hereby certify that copies of “CROW BUTTE RESPONSE IN SUPPORT OF NRC STAFF MOTION FOR SUMMARY DISPOSITION OF CONTENTION 1” in the captioned proceeding have been served via the Electronic Information Exchange (“EIE”) this 18th day of August 2014, which to the best of my knowledge resulted in transmittal of the foregoing to those on the EIE Service List for the captioned proceeding.

/s/ signed electronically by
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