

April 10, 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. 08-867-02-OLA-BD01
(Marsland Expansion Area))	

APPLICANT’S SUPPLEMENTAL RESPONSE ON
STANDING AND CONTENTION ADMISSIBILITY

INTRODUCTION

In an Order, dated March 22, 2013, the Licensing Board sought the parties views on the significance, if any, of the cultural resources survey report prepared by the Santee Sioux Nation (“SSN Report”) with respect to the standing of the Oglala Sioux Tribe (“OST”) and Consolidated Petitioners and the admissibility of their proposed contentions.¹ As discussed below, the SSN Report does not, by itself, provide a basis for standing for Consolidated Petitioners or OST, nor does it resolve the inadequacies of the petitioners’ earlier filings. Likewise, the SSN Report does not provide a basis for admitting Consolidated Petitioners’ Contention D or OST’s Contention 1. The mere fact that additional sites were identified during the cultural resource survey does not create a genuine dispute with the application on a material issue. And, any claim brought under the National Historic Preservation Act (“NHPA”) remains premature.

¹ Memorandum and Order (Establishing Schedule for Additional Pleadings to Address Information in Recent Tribal Cultural Resources Survey Report), dated March 22, 2013.

BACKGROUND

Section 106 of NHPA requires that, prior to issuing a license, 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”). Federal agencies also must make a “reasonable and good faith effort to identify any Indian tribes ... that might attach religious and cultural significance to historic properties in the area of potential effects and invite them to be consulting parties.”²

In its application, Crow Butte provided information to support the NRC Staff’s activities relating to the NHPA. Specifically, the Environmental Report (“ER”) describes a cultural resources investigation performed by Crow Butte’s cultural resources contractor that recorded 15 newly-discovered euroamerican historic sites and five euroamerican historic isolated finds.³ The ER explains that none of the newly-recorded historic sites were recommended as eligible for the NRHP.⁴ The ER also notes that “[n]o indigenous people sites or artifacts were found in the project area”⁵ 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].”⁶

² 36 C.F.R. § 800.4(f)(2).

³ ER at 3-76.

⁴ *Id.* at 3-77.

⁵ *Id.* at 3-77.

⁶ *Marsland Expansion Area Uranium Project Class III Cultural Resource Investigation*, dated April 28, 2011, at 20 (ADAMS Accession No. ML12165A503). A prehistoric site is defined as 2 or more artifacts within 30 meters of one another or the presence of a feature. *Id.*

The NRC Staff initiated the Section 106 consultation process shortly after receiving Crow Butte's application. On September 5, 2012, the NRC Staff sent letters to the leaders of 21 tribes, including the OST, inviting the tribes to participate in the Section 106 process. On October 31, 2012, the NRC Staff sent letters to the Tribal Historic Preservation Officers ("THPOs"), including the OST THPO, inviting them to send representatives to conduct field surveys to identify cultural resources of interest. Two tribes, the Santee Sioux and Crow, accepted the offer and conducted surveys in November and December 2012. The results of those surveys are documented in the SSN Report. The SSN Report identified nine sites and two items of interest at the Marsland site. The precise location of those sites within Marsland is non-public information and is not available to the applicant.

DISCUSSION

A. Consolidated Petitioners Do Not Have Standing

In their petition, Consolidated Petitioners base their standing on that of three individuals. In particular, the individuals claim standing based on potential contamination of water resources, including groundwater and the White River. As discussed in Crow Butte's response to the petition (at 6-11), none of those individuals demonstrated an injury or causation that would support standing under basic judicial concepts. In particular, the individuals failed to show that Crow Butte's operations at Marsland could cause contamination of water used by them. The SSN Report does not change that conclusion, as the presence of cultural resources at Marsland does not create a new means by which Crow Butte's operations could cause surface or groundwater contamination.

There is also no showing that Crow Butte's operations could cause an injury-in-fact to an individual petitioner's interest in cultural resources at Marsland. For example, neither

the petitioners nor the SSN Report allege that Crow Butte's operations will adversely impact historical properties owned by the petitioners. The individual petitioners also do not indicate that they have visited the Marsland site or other cultural resources located nearby,⁷ or articulated any other direct personal interest in the prehistoric sites at Marsland.⁸ Consequently and notwithstanding the SSN Report, there is no concrete and personalized interest in cultural resources at Marsland that could support standing.

Moreover, to the extent that the any of the individuals are asserting an injury based on a failure by the NRC Staff to comply with the NHPA, the SSN Report does not cure the lack of standing. There can be no procedural injury until the NRC has at least had an opportunity to comply with the NHPA's procedural dictates.⁹ Petitioners have no standing to complain that the government will violate the law at some undefined future point in time.¹⁰

⁷ See *Sierra Club v. Morton*, 405 U.S. 727, 739 (1972) (finding no standing where the plaintiff failed to allege that it or its members used or visited the area for any purposes or would otherwise be affected by the proposed action). Here, none of the individual petitioners has indicated that they have visited the Marsland site or that they personally would be adversely impacted by a change in the cultural values of the sites identified in the SSN Report.

⁸ To the extent that Ms. Afraid of Bear Cook asserts an injury based on her interests, as a member of the OST, in cultural properties at Marsland and in NRC compliance with the NHPA, she has not demonstrated standing. A petitioner must assert his or her own legal rights and interests, and cannot rest on the legal rights or interests of third parties such as OST. *Warth v. Seldin*, 422 U.S. 490, 499 (1975).

⁹ *St. Croix Chippewa Indians of Wis. v. Salazar*, 384 Fed.Appx. 7, 8 (D.C. Cir. 2010) (unreported) (“To allege a cognizable procedural harm, plaintiffs must identify an injury that follows the violation of a procedural right, which was afforded to them by statute and designed to protect their threatened concrete interests.”) (emphasis added). If anything, the SSN Report indicates that the NRC Staff is taking active steps to fulfill its duties under the NHPA by involving tribes in the process of identifying cultural resources at Marsland.

¹⁰ *Allen v. Wright*, 468 U.S. 737, 754 (1984); *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 224-227 (1974); see also *O’Shea v. Littleton*, 414 U.S. 488, 494 (1974) (“An abstract injury is not enough.”).

Standing cannot be based on an asserted right simply to have the NRC act in accordance with the NHPA.¹¹ This is the type of generalized grievance shared by a large number of individuals that has been repeatedly found insufficient to support standing.¹²

B. Consolidated Petitioners' Proposed Contention D Is Inadmissible.

In proposed Contention D, the Consolidated Petitioners state that Crow Butte's cultural resources survey must be inadequate since the team found "no archaeological, historical, or traditional cultural resources at the site."¹³ The Consolidated Petitioners, through the Redmond letter, also alleged poor survey conditions. But both assertions were (and are) unsupported. As Crow Butte explained in its initial response, the cultural resources investigation conducted by Crow Butte's contractor recorded 15 newly discovered euroamerican historic sites and five euroamerican historic isolated finds.¹⁴ The SSN Report identified an additional nine sites. There was (and remains) no support for the claim that no cultural resources were identified at the Marsland site.

The Consolidated Petitioners also alleged in proposed Contention D that "a significant number of archaeological, historical, and traditional cultural resources on site have

¹¹ The Supreme Court repeatedly has rejected claims of standing predicated on "the right, possessed by every citizen, to require that the Government be administered according to law." *Baker v. Carr*, 369 U.S. 186, 208 (1962).

¹² An asserted interest only in government compliance shared in substantially equal measure by all or a large class of citizens is a "generalized grievance" that is not the sort of distinct and palpable harm sufficient to support standing. *Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1)*, CLI-83-25, 18 NRC 327, 333 (1983). This is similar to cases rejecting "taxpayer standing" based on generalized grievances shared by the public at large. *See, e.g., Frothingham v. Mellon*, 262 U.S. 447 (1923); *Flast v. Cohen*, 392 U.S. 83 (1968).

¹³ Consolidated Petitioners' Petition to Intervene at 70 ("Con. Pet.").

¹⁴ ER at 3-76.

not been evaluated.”¹⁵ At the time this statement was made it was certainly incorrect, as the cultural resources reports referenced in the application had evaluated each of the sites found during the investigations conducted by Crow Butte’s cultural resource contractor. The results of the surveys documented in the subsequent SSN Report cannot rescue the contention — even if applied retroactively to statements made prior to issuance of the SSN Report. The SSN Report explains that the newly-discovered sites have been severely damaged by cattle and years of disturbance and notes that the survey found no evidence of eligibility for inclusion on the NRHP.¹⁶ There is simply no expert or factual support for contending that cultural resources at Marsland have not been evaluated.

At bottom, the suppositions and bare assertions in the Consolidated Petition and the Redmond letter do not raise a genuine dispute with the application, even when taking the findings in the SSN Report into account. The Petitioners’ claim that no cultural resources were found at Marsland was as untrue before the SSN Report as it was after. And, on its face, the SSN Report states that the newly-discovered sites have been evaluated for eligibility on the NRHP. Therefore, there is no material issue in dispute. Proposed Contention D is inadmissible.

C. OST Does Not Have Standing

Crow Butte’s initial response (at 6-8) opposed standing for OST. In contrast with other NRC proceedings that had found standing for OST, Crow Butte noted the absence of any known prehistoric artifacts within the Marsland site. Without any prehistoric artifacts, there could be no standing for OST. With the SSN Report, that initial analysis has been overtaken by

¹⁵ Con. Pet. at 69-70.

¹⁶ See SSN Report at 6 (recognizing “no potential significance for the National Register of Historic Places, for any and all of the findings during the [traditional cultural properties survey].”).

subsequent events. While Crow Butte agrees that OST may have a concrete interest in the newly-discovered sites identified in the SSN Report, this does not complete the standing inquiry. Instead, the analysis only shifts from the second element to the first element of the test for standing based on a procedural injury, as discussed below.

OST bases its standing on an alleged procedural injury under the NHPA. Specifically, OST seeks standing under the NHPA “based on the Tribe’s procedural rights in identifying, evaluating, and establishing protections for historic and cultural resources.”¹⁷ Where the injury is based on a violation of a procedural right, standing exists only if (1) the government allegedly violated procedural rights designed to protect a party’s threatened concrete interest, and (2) the alleged violation resulted in injury to the party’s concrete, particularized interest.¹⁸ As noted previously, compliance with the NHPA is the NRC Staff’s responsibility, not the applicant’s. Here, the NRC Staff has only just begun to consult as required by the NHPA. OST has not pointed to any specific procedural non-compliance (*i.e.*, an “actual” injury) that is alleged to have occurred to date.¹⁹ Instead, their concern is that the NRC will fail, at some undefined

¹⁷ OST Petition to Intervene at 8-9 (“OST Pet.”).

¹⁸ *Ctr. for Law & Educ. v. Dept. of Educ.*, 396 F.3d 1152, 1157 (D.C. Cir. 2005) (emphasis added); *see also St. Croix Chippewa*, 384 Fed.Appx. at 8 (“To allege a cognizable procedural harm, plaintiffs must identify an injury that follows the violation of a procedural right, which was afforded to them by statute and designed to protect their threatened concrete interests.”) (emphasis added); *Nulankeyutmonen Nkihtaqmikon v. Impson*, 503 F.3d 18, 28 (1st Cir. 2007) (finding standing where “the procedural injury alleged by Plaintiffs has already occurred”).

¹⁹ If anything, the SSN Report demonstrates that the NRC Staff is taking active steps to implement the NHPA by involving tribes in the process of identifying cultural resources at Marsland.

point in the future, to comply with the NHPA. Any claim of a procedural injury is premature — that is, in the language of standing analyses, the injury is not “imminent.”²⁰

Moreover, as discussed above, an asserted interest only in future government compliance is a “generalized grievance” that lacks the concrete and imminent harm sufficient to support standing. Standing cannot be based simply on a right to demand government compliance with the law.²¹ The mere possibility of some future procedural non-compliance is too “abstract” an injury.²²

D. OST’s Proposed Contention 1 Is Inadmissible

In proposed Contention 1, OST asserts that the ER (at 3-76) “demonstrates that a significant number of archaeological, historical, and traditional cultural resources on site have not been evaluated.”²³ There is no basis for this statement. There have now been three cultural resource investigations at the Marsland site — two by Crow Butte’s cultural resource contractor and one by Santee Sioux/Crow Tribes (documented in the SSN Report). And, contrary to the assertions of OST (OST Pet. at 12), all three cultural resources surveys identified sites and assessed their eligibility for inclusion in the NRHP. OST has not raised a genuine dispute with the conclusions of any of those surveys regarding NRHP eligibility, much less provided any expert support for such a dispute.

²⁰ See *Lujan v. Defenders of the Wildlife*, 504 U.S. 555, 560-61 (1992) (holding that an injury must be actual or imminent to satisfy standing requirements).

²¹ *Baker*, 369 U.S. at 208.

²² See *Los Angeles v. Lyons*, 461 U.S. 95, 101-102 (1983) (explaining that, unless a person “has sustained or is immediately in danger of sustaining some direct injury,” there is no standing).

²³ OST Pet. at 11-12.

Another basis for proposed Contention 1 relates to the alleged failure of Crow Butte to comply with the NHPA. This basis is similar to claims that were previously rejected by the Commission in the license renewal and North Trend proceedings.²⁴ As the Commission explained in those proceedings, the NHPA requires a *federal agency* to take into account the effects that certain proposals may have on properties listed, or eligible for listing, under the NRHP.²⁵ Regardless of the applicant's efforts, the burden rests on the NRC to fulfill the consultation requirements.²⁶ Nothing in the SSN Report transforms a premature NHPA contention into a ripe one. Because the NRC Staff has not yet had the opportunity to comply with its Section 106 obligations, the proposed contention remains premature.²⁷

CONCLUSION

For the above reasons, Consolidated Petitioners and OST both lack standing. They also have not submitted an admissible contention. Accordingly, their petitions to intervene and requests for hearing should be denied.

²⁴ *Crow Butte Resources, Inc.* (License Renewal), CLI-09-09, 69 NRC 331, 348-351 (2009); *Crow Butte Resources, Inc.* (North Trend), CLI-09-12, 69 NRC 535, 565-566 (2009).

²⁵ *CBR LR*, CLI-09-09, 69 NRC at 350-351; *CBR NT*, CLI-09-12, 69 NRC at 566.

²⁶ At present, the focus of the proceeding is on Crow Butte's application, not the adequacy NRC Staff reviews. As the Commission explained, OST may file a contention relating to NHPA compliance when the NRC Staff consultation is complete. *CBR LR*, CLI-09-9, 69 NRC at 351.

²⁷ The Tribe also claims that it has "not had the opportunity to be involved in the assessment or determination of the significance of the identified sites, nor had the opportunity to identify additional sites that may warrant evaluation or listing." OST Pet. at 9. This is simply not true. The NRC Staff explained that it sent letters to OST and the OST THPO inviting them to participate as Section 106 consulting parties and send representatives to conduct field surveys to identify cultural resources of interest. "NRC Staff Response to OST Petition to Intervene," dated February 25, 2013, at 4-5.

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Dated at San Francisco, California
this 10th day of April 2013

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CERTIFICATE OF SERVICE

I hereby certify that copies of “APPLICANT’S SUPPLEMENTAL RESPONSE ON STANDING AND CONTENTIONS” in the captioned proceeding have been served via the Electronic Information Exchange this 10th day of April 2013.

/s/ signed electronically by _____

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