LBP-13-6

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD PANEL

Before the Licensing Board:

G. Paul Bollwerk, III, Chairman
Dr. Richard E. Wardwell
Dr. Thomas J. Hirons

In the Matter of	Docket No. 40-8943-MLA-2
CROW BUTTE RESOURCES, INC.	ASLBP No. 13-926-01-MLA-BD01
(Marsland Expansion Area)	May 10, 2013

MEMORANDUM AND ORDER
(Ruling on Intervention Petitions)

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In a May 2012 application, Crow Butte Resources, Inc., (CBR) requests an amendment to its 10 C.F.R. Part 40 source materials license that authorizes the operation of its existing in situ uranium recovery (ISR) facility near Crawford, Nebraska. Specifically, CBR asks that the Nuclear Regulatory Commission (NRC) authorize the operation of a satellite ISR facility, the Marsland Expansion Area (MEA) site, which is located in Dawes County, Nebraska, some eleven miles to the southeast of CBR's Crawford central processing facility (CPF). See Letter from Josh Leftwich, Director of Safety, Health, Environment and Quality, CBR, to Keith McConnell, Deputy Director, Decommissioning and Uranium Recovery Licensing Directorate, Division of Waste Management and Environmental Protection, NRC Office of Federal and State Materials and Environmental Management Programs (May 16, 2012) at 1 (ADAMS Accession No. ML12160A512). With the January 29, 2013 submission of hearing requests by petitioner Oglala Sioux Tribe (OST) and by petitioners Antonia Loretta Afraid of Bear Cook, Bruce McIntosh, Debra White Plume, Western Nebraska Resources Council (WNRC), and Aligning for

Responsible Mining (ARM), referred to jointly herein as the Consolidated Petitioners (CP), challenging various aspects of the CBR application, there are now five ongoing ISR cases, including this one, pending before Atomic Safety and Licensing Boards. The other four are (1) two CBR-related cases, which we will refer to respectively as Crow Butte Renewal and Crow Butte North Trend, that involve the renewal of the current license for CBR's Crawford CPF and another CBR amendment request seeking authority to operate the proposed North Trend Expansion Area (NTEA) satellite facility located some five miles northwest of the Crawford facility; (2) a proceeding regarding initial operation of Powertech (USA) Inc.'s proposed Dewey-Burdock ISR facility near Edgemont, South Dakota; and (3) an adjudication concerning initial authorization to operate Strata Energy, Inc.'s proposed Ross ISR facility located in Cook County, Wyoming.[1] Moreover, various of the petitioners now before us are parties to one or more of the other two CBR cases and/or the Powertech proceeding.

We thus do not necessarily write upon a clean slate in this proceeding, particularly to the extent the Commission has made rulings regarding standing and contention admissibility matters in the other ongoing ISR cases. Nonetheless, it is incumbent upon us to look carefully at the particular factual and legal arguments made by the petitioners in this proceeding in support of their hearing requests. And after doing so, we conclude that although the Consolidated Petitioners lack standing as of right to intervene in this proceeding, OST has

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[1] See Strata Energy, Inc. (Ross In Situ Recovery Uranium Project), LBP-12-3, 75 NRC 164, aff'd in part and review declined, CLI-12-12, 75 NRC 603 (2012) (affirming standing ruling and declining review as to contention admissibility rulings); Powertech (USA), Inc. (Dewey-Burdock In Situ Uranium Recovery Facility), LBP-10-16, 72 NRC 361 (2010); Crow Butte Res., Inc. (In Situ Leach Facility, Crawford, Nebraska), LBP-08-24, 68 NRC 691 (2008), aff'd in part and rev'd in part, CLI-09-9, 69 NRC 331 (2009); Crow Butte Res., Inc. (North Trend Expansion Project), LBP-08-6, 67 NRC 241 (2008), aff'd in part and rev'd in part, CLI-09-12, 69 NRC 535 (2009).

established its standing and has proffered two admissible contentions, with the result that we grant OST party status in this proceeding.

I. BACKGROUND

Regarding the technical background associated with this case, a synopsis of the ISR process as a means of extracting uranium for subsequent conversion to nuclear power reactor fuel and other uses was recently provided in the Ross and Dewey-Burdock licensing boards' standing and contention admissibility rulings and need not be repeated here.[2] See Ross, LBP-12-3, 75 NRC at 175–76; Dewey-Burdock, LBP-10-16, 72 NRC at 378–80. It is worth noting, however, that the authorization CBR seeks for its proposed MEA facility would be limited to extracting uranium via ion exchange lixiviant and then loading that uranium onto ion exchange resin, which will then be transported offsite by tanker truck to the existing Crawford CPF for processing, with barren resin then returned to the MEA facility by tanker truck for reuse. See 1 CBR, Application for Amendment of USNRC Source Materials License SUA-1534, [MEA], Crawford, Nebraska, Environmental Report at 1-2 to -3, 1-6 (May 2012) (ADAMS Accession No. ML12160A513) [hereinafter ER]; see also 1 CBR, Application for Amendment of USNRC Source Materials License SUA-1534, [MEA], Crawford, Nebraska, Technical Report at 1-4 (May 2012) (ADAMS Accession No. ML12160A527) [hereinafter TR].

Turning then to this proceeding's procedural background, in response to the May 2012 submission of CBR's application for the MEA facility, the NRC issued a hearing opportunity notice on November 26, 2012. See [CBR], License SUA–1534, License Amendment to Construct and Operate [MEA], 77 Fed. Reg. 71,454 (Nov. 30, 2012). By timely hearing petitions

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[2] As has been noted previously, although the ISR process sometimes is referred to as the in situ leach (ISL) process, the ISL and ISR processes are the same, with ISR being a newer term. See Ross, LBP-12-3, 75 NRC at 176 n.3.

dated January 29, 2013, OST and CP submitted, respectively, six and five contentions challenging the validity of the CBR licensing request. See Petition to Intervene and Request for Hearing of [OST] (Jan. 29, 2013) [hereinafter OST Petition]; Consolidated Request for Hearing and Petition for Leave to Intervene (Jan. 29, 2013) [hereinafter CP Petition]. By memorandum dated February 4, 2013, the Secretary of the Commission referred these petitions to the Licensing Board Panel's Chief Administrative Judge. See Memorandum from Annette Vietti-Cook, NRC Secretary, to E. Roy Hawkens, Chief Administrative Judge (Feb. 4, 2013) at 1. In response, on February 6 the Chief Administrative Judge referred the OST and CP submissions to this Licensing Board to rule on standing and contention admissibility matters and to preside at any hearing. See [CBR], Establishment of Atomic Safety and Licensing Board, 78 Fed. Reg. 9945 (Feb. 12, 2013).

In timely answers dated February 25, 2013, CBR and the NRC staff asserted that OST and the various individuals and organizations that constitute the Consolidated Petitioners all lack standing to intervene and have failed to provide any admissible contentions. See Applicant's Response to Petition to Intervene Filed by [OST] (Feb. 25, 2013) at 1 [hereinafter CBR OST Answer]; NRC Staff Response to the [OST] Request for Hearing and Petition to Intervene (Feb. 25, 2013) at 1 [hereinafter Staff OST Answer]; Applicant's Response to Petition to Intervene Filed by [CP] (Feb. 25, 2013) at 1 [hereinafter CBR CP Answer]; NRC Staff Response to the Request for Hearing and Petition to Intervene by [CP] (Feb. 25, 2013) at 1 [hereinafter Staff CP Answer]. OST contested these assertions in a reply timely submitted on March 4, 2013. See Reply to NRC Staff and Applicant Responses to the Petition to Intervene and Request for Hearing of [OST] (Mar. 4, 2013) at 3 [hereinafter OST Reply]. CP did not submit a reply.

After reviewing these various filings, on March 15, 2013, the Licensing Board advised the participants it had concluded that, with one exception, the participants had provided the Board with information and explanations of their legal positions sufficient for the Board to reach the requisite standing and contention admissibility determinations without seeking additional participant input by way of a prehearing conference or otherwise. See Licensing Board Memorandum and Order (Requesting Additional Information) (Mar. 15, 2013) at 1–2 (unpublished). The exception, the Board indicated, was the need for more information from the staff regarding the status of a report referenced by the staff in its answer that was to address a fall 2012 cultural resources survey conducted on the MEA and other nearby CBR sites by representatives of Native American tribes other than OST. See id. at 2.

Thereafter, in a March 20 submission the staff indicated that the Native American tribal survey report had been received on March 5 and would be distributed to the other participants no later than April 3, after appropriate redactions were made to avoid disclosing report-identified cultural resource locations at the MEA and other CBR sites. See NRC Staff Response to Board Order Requesting Additional Information (Mar. 20, 2013) at 1–2. As a consequence, on March 22 the Board issued an order establishing a further briefing schedule to allow the participants to address the relevance of that report to their previous arguments regarding the standing of OST and CP, as well as the admissibility of two contentions -- OST contention 1 and CP contention D -- that raised issues concerning the sufficiency of the cultural resources analysis provided in the CBR ISR application. See Licensing Board Memorandum and Order (Establishing Schedule for Additional Pleadings to Address Information in Recent Tribal Cultural Resources Survey Report) (Mar. 22, 2013) at 3 (unpublished). CBR and the staff submitted filings addressing these matters on April 10. See Applicant's Supplemental Response on Standing and Contention Admissibility (Apr. 10, 2013) [CBR Cultural Resources Response];

NRC Staff's Supplemental Pleading Regarding the Santee Sioux Nation Report (Apr. 10, 2013) [hereinafter Staff Cultural Resources Response]. OST and CP did not file replies.

II. ANALYSIS

A. OST and CP Standing

1. Standards Governing Standing

For an individual or organization to be deemed a "person whose interest may be affected by the proceeding" under section 189a of the Atomic Energy Act of 1954 (AEA), 42 U.S.C. § 2239(a)(1)(A), so as to have standing "as of right" such that party status can be granted in an agency adjudicatory proceeding, the intervention petition must include a statement of (1) the petitioner's name, address, and telephone contact information; (2) the nature of the petitioner's right under the AEA to be made a party; (3) the nature of the petitioner's interest in the proceeding, whether property, financial or otherwise; and (4) the possible effect of any decision or order that might be issued in the proceeding on the petitioner's interest. See 10 C.F.R. § 2.309(d)(1)(i)–(iv).[3] In assessing this information to determine whether a petitioner has established standing, the Commission generally applies contemporaneous judicial standing concepts to section 189a adjudicatory proceedings, inquiring whether the participant has established that (1) it has suffered or faces the genuine threat that it will suffer a distinct and palpable injury that constitutes injury-in-fact within the zones of interest arguably protected by the governing statutes (e.g., the AEA, the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4321, et seq.); (2) the injury is fairly traceable to the challenged action; and (3) the injury is likely to be redressed by a favorable decision. See, e.g., Yankee Atomic Elec. Co.

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[3] The references to 10 C.F.R. Part 2 contained in this issuance reflect the Part 2 changes adopted in August 2012. See Amendments to Adjudicatory Process Rules and Related Requirements; Final Rule, 77 Fed. Reg. 46,562 (Aug. 3, 2012).

(Yankee Nuclear Power Station), CLI-96-1, 43 NRC 1, 6 (1996) (citing cases). An organization that asserts it has standing to intervene in its own right, i.e., organizational standing, must establish a discrete institutional injury to the organization's interests, which must be based on something more than a general environmental or policy interest in the subject matter of the proceeding. See, e.g., Int'l Uranium (USA) Corp. (White Mesa Uranium Mill), CLI-01-21, 54 NRC 247, 252 (2001) (citing cases). Alternatively, an entity may seek to demonstrate its standing to intervene on behalf of its members, i.e., representational standing, by showing it has an individual member who can fulfill all the necessary standing elements and who has authorized the organization to represent his or her interests. See, e.g., Vt. Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), CLI-00-20, 52 NRC 151, 163 (2000) (citing cases).

Finally, in assessing whether a petition meets these standing elements, which a presiding officer must do even if there are no objections to a petitioner's standing, the Board must apply a number of important benchmarks. Initially, "[t]he petitioner bears the burden to provide facts sufficient to establish standing." PPL Bell Bend, LLC (Bell Bend Nuclear Power Plant), CLI-10-7, 71 NRC 133, 139 (2010). Generally speaking, this burden is met "if the petitioner provides plausible factual allegations that satisfy each element of standing." U.S. Army Installation Command (Schofield Barracks, Oahu, Hawaii, and Pohakuloa Training Area, Island of Hawaii, Hawaii), LBP-10-4, 71 NRC 216, 229 (2010) (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992)), aff'd, CLI-10-20, 72 NRC 185 (2010). Moreover, in assessing whether a petitioner has demonstrated its standing, a licensing board is to "construe the petition in favor of the petitioner." Ga. Inst. of Tech. (Georgia Tech Research Reactor, Atlanta, Georgia), CLI-95-12, 42 NRC 111, 115 (1995). At the same time, however, if a petitioner's factual claims in support of its standing are contested, untenable, conjectural, or

conclusory, a board need not uncritically accept such assertions, but may weigh those informational claims and exercise its judgment about whether the standing element at issue has been satisfied. See Schofield Barracks, LBP-10-4, 71 NRC at 230 & n.14 (citing Bell Bend, CLI-10-7, 71 NRC at 139; Consumers Energy Co. (Palisades Nuclear Plant), CLI-07-18, 65 NRC 399, 410 (2007); Commonwealth Edison Co. (Zion Nuclear Power Station, Units 1 and 2), CLI-00-5, 51 NRC 90, 98 (2000)).

We apply these general precepts below in evaluating the OST and CP standing presentations.[4]

2. Rulings on Standing

a. OST

DISCUSSION: OST Petition at 6–10; CBR OST Answer at 2–8; Staff OST Answer at 8–16; OST Reply at 4–13; CBR Cultural Resources Response at 6–8; Staff Cultural Resources Response at 3–4.

RULING: In a materials licensing action, in ascertaining whether a hearing requestor has demonstrated an "injury in fact" so as to have standing, often the initial focus is on whether the activity for which licensed authorization is sought may have any radiological impacts upon the petitioner. In such an instance, "whether a petitioner could be affected by the licensing action must be determined on a case-by-case basis, taking into account the petitioner's distance from the source, the nature of the licensed activity, and the significance of the radioactive source." Schofield Barracks, CLI-10-20, 72 NRC at 188 (footnote omitted). At the same time, however, it is not imperative that the potential harm involve physical or bodily injury

[4] 10 C.F.R. § 2.309(e) permits an individual or group to seek discretionary intervention if the requirements necessary to be afforded standing as of right cannot be established. None of the petitioners here has requested that such intervention be granted.

caused by a radioactive source; nonradiological impacts can be a basis for standing as well.[5] See, e.g., Ross, CLI-12-12, 75 NRC at 612–13 & n.49 (upholding standing based on dust impacts from ISR facility trucks using dirt road in front of petitioner's home).

In this instance, OST asserts that the proposed MEA and its associated mining activities pose potential harm to cognizable interests sufficient to establish its standing based on potential radiological or nonradiological injuries associated with (1) the "proximity" of the MEA to lands the tribe owns and leases for domestic and agricultural purposes that require "the beneficial use of both groundwater and surface waters"; and (2) the tribe's interest in assuring the protection of (a) tribal "cultural resources" situated on the MEA as a result of the tribe's earlier use of that property as a part of the tribe's "aboriginal lands," and (b) the tribal procedural right to be consulted regarding historic preservation matters in accordance with section 106 of the 1966 National Historic Preservation Act (NHPA), 16 U.S.C. § 470a(b)(3)(E), (d)(2). OST Petition, unnumbered exh. 7, at 2, 3–4 (Declaration of Wilmer Mesteth) [hereinafter Mesteth Declaration]; id. unnumbered exh. 8, at 1–2 (Declaration of Denise M. Mesteth). The Board does have a concern about whether in this instance OST has met its burden to show the necessary injury in fact based on possible radiological (or other health and safety) impacts to the property it

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[5] In instances when a radiological health or safety impact is asserted to provide the basis for a petitioner's injury in fact, in lieu of the usual injury and causation showings, a petitioner can attempt to establish its standing based on the "proximity plus" protocol by showing "(1) that the proposed licensing action involves a 'significant source' of radiation, which has (2) an 'obvious potential for offsite consequences.'" Schofield Barracks, CLI-10-20, 72 NRC at 189 (footnote omitted) (quoting Sequoyah Fuels Corp. (Gore, Oklahoma Site), CLI-94-12, 40 NRC 64, 75 n.22 (1994)). Before us, OST has made no effort to establish that any "proximity plus" presumption should be applicable in determining standing relative to the licensing action they are challenging. See Crow Butte N. Trend, LBP-08-6, 67 NRC at 272-73. As a consequence, we must look to the traditional standing precepts of injury and causation, as well as redressibility, to determine whether OST has made a sufficient factual and legal demonstration regarding its standing to intervene. See Schofield Barracks, CLI-10-20, 72 NRC at 189; see also Exelon Generation Co. (Peach Bottom Atomic Power Station, Units 2 and 3), CLI-05-26, 62 NRC 577, 581 (2005).

purportedly leases to others for domestic and agricultural uses.[6] It is unnecessary for us to resolve that issue relative to OST's standing, however, given our conclusion that OST has demonstrated the requisite injury in fact based on its interest in protecting extant cultural resources located on its aboriginal lands.

In this regard, we note initially that we agree with the staff in its assertion "that the MEA is situated within the aboriginal lands of [OST], and that [OST] has an interest in identifying and protecting cultural resources of [OST] that might be found at the MEA." Staff OST Answer at 11. With this statement, the staff recognizes what the Commission has already endorsed relative to the nature of OST's interest as a federally recognized Native American tribe, see Cogema Mining, Inc. (Irigaray and Christensen Ranch Facilities), LBP-09-13, 70 NRC 168, 185 (2009) (noting OST listed on Bureau of Indian Affairs list of federally recognized Native American tribes), in the cultural resources in the area around the Crawford CPF and the nearby

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[6] With regard to this OST causation showing, a principal concern is OST's otherwise unexplicated use of the term "proximity" to describe where the property it leases to others is situated relative to the MEA. In a materials licensing case in which an important factor in determining whether there is a cognizable injury for standing purposes is the actual distance the petitioner or its property is from the source of a radiological or other alleged health or safety impairment, the use of such an imprecise description is not particularly helpful to a presiding officer in making an informed standing decision. Nor does OST's showing account for the circumstance here in which, in contrast to the Crow Butte Renewal proceeding, applicant CBR has alleged without contradiction that the MEA lies within the watershed of the Niobrara River, which flows to the south, rather than in the watershed of the White River, which flows to the north toward OST's Pine Ridge Reservation and was acknowledged to encompass OST tribal lands. See CBR OST Answer at 8; Crow Butte Renewal, CLI-09-9, 69 NRC at 344, 345–46.

expansion areas, such as the MEA, that once were part of OST's recognized aboriginal lands.[7] See Crow Butte Renewal, CLI-09-9, 69 NRC at 337–39.

The staff, however, goes on to make the additional claim, echoed by CBR, that this OST interest is not sufficiently "concrete" and "particularized" in this instance to justify a finding that OST has an "injury in fact" sufficient to afford it standing in this proceeding. See Staff OST Answer at 11; CBR OST Answer at 7. As the basis for this concern, the staff and CBR in their answers initially posited the lack of any tribal sites or artifacts found as a result of the several-months-long cultural resources survey conducted on the MEA at the behest of CBR. See Staff OST Answer at 11-12; CBR OST Answer at 7. And as additional evidence that a concrete OST interest is lacking, in its answer the staff makes reference to the tribe's asserted failure to avail itself of an opportunity to send a representative to the MEA during a three-week period from mid-November to early December 2012 to conduct a cultural resources field survey. See Staff OST Answer at 11 & n.47. Further, in its answer the staff declares that to afford OST

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[7] Previous agency case law has acknowledged that in instances when a governmental organization, including a federally recognized Native American tribe, is unable to establish standing because the facility or nuclear material in question does not fall within its jurisdictional boundaries, see 10 C.F.R. § 2.309(d)(2), by reason of such an entity's interest in protecting individuals and territory that fall within its sovereign guardianship, that entity nonetheless may be accorded standing if its boundaries come within a distance from the nuclear facility or material that otherwise would establish standing for an individual or nongovernmental organization, whether via a proximity presumption or otherwise. See Fla. Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 6 and 7), LBP-11-6, 73 NRC 149, 169–70 (2011); N. States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 and 2), LBP-08-26, 68 NRC 905, 912–14 (2008); Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant), LBP-99-25, 50 NRC 25, 29–31 (1999); see also Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-98-13, 48 NRC 26, 33 (1998) (holding that, as sovereign body, Native American tribe maintains strong interest in its members' welfare such that its organizational purpose is germane to the interests it seeks to represent in proceeding). Although the existing jurisdictional boundaries of its Pine Ridge Reservation may well not accord OST such standing here, see supra p. 10 & note 6, as the Commission appears to have recognized in the Crow Butte Renewal proceeding, OST's statutorily recognized interest in the tribal cultural resources that may still be extant on its recognized aboriginal lands seemingly would provide a cognizable interest for the purpose of establishing its standing. See Crow Butte Renewal, CLI-09-9, 69 NRC at 337–39.

standing in this instance “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.” Id. at 13.

Nor, according to the staff, does the March 2013 cultural resources report prepared by the Santee Sioux Nation (SSN) necessarily provide the support OST needs to establish its standing, notwithstanding the fact that the report identified eleven potential cultural resources sites on the MEA as a result of the late 2012 survey conducted by monitors from SSN and the Crow Nation (CN).[8] Instead, the staff maintains that “the impact of the SSN report on standing ultimately rests on whether the OST can demonstrate how the report supports a finding of injury under that standard.” Staff Cultural Resources Response at 4. CBR, on the other hand, asserts that while the report might supply OST with a concrete interest in the identified sites, it still does not support a finding that OST has standing in this proceeding. According to CBR, OST’s basis for standing is an alleged procedural injury under NHPA section 106’s consultation requirement. Yet, CBR claims, this purported harm is irrelevant to any challenge to CBR’s ER, which is the focus of this proceeding, because section 106 implicates only the staff’s NEPA compliance responsibilities. Moreover, according to CBR, OST’s injury is being alleged prematurely because the staff’s section 106 compliance activities are not yet completed. See CBR Cultural Resources Response at 7–8.

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[8] Although OST, as a NHPA section 106 consulting tribe, was provided by the staff with an unredacted version of the SSN/CN cultural resources report, CP (as well as CBR) were provided with access to a redacted version that does not disclose information regarding the location of the SSN/CN-identified cultural resource sites, which is considered protected information under NHPA section 304, 16 U.S.C. § 470w-3(a). See Letter from Marcia J. Simon, NRC Staff Counsel, to Licensing Board (Apr. 3, 2013); SSN, [Traditional Cultural Properties Survey], Crow Butte Project, Dawes County, Crawford Nebraska, at unnumbered p. 10 (ADAMS Accession No. ML13093A123) [hereinafter Cultural Resources Survey].

For several reasons, we find unpersuasive these arguments claiming OST's cultural resources injury showing is lacking for standing purposes. As to the CBR assertion that the "procedural" nature of OST's interest is disqualifying in this instance, we find this an overly narrow reading of the injury OST alleges. While it is true that OST has claimed that it has been injured by a staff failure to follow the procedural directives of NHPA section 106, as we indicated above, it is also apparent that OST has asserted an injury footed in its separate concern about harm to cultural resources that might be located within its aboriginal lands as they encompass the MEA. See supra p. 9; see also OST Petition at 8–9.

And with regard to the adequacy of this claimed interest as a basis for OST's standing, we note initially that even in the absence of the recent SSN cultural resources report, it is not apparent why, consistent with the Commission's determinations in both the Crow Butte North Trend and Crow Butte Renewal proceedings regarding tribal standing based on alleged cultural resources injuries, OST would lack standing here. Assuming, as the Commission found in those proceedings, that the tribal interest in cultural resources on established aboriginal lands is sufficient to provide the requisite injury in fact, it cannot be the case that simply because a cultural resources survey conducted at the behest of an applicant finds no artifacts or possible tribal sites, the tribe is deprived of standing to challenge the adequacy of that survey. For standing purposes, the focus is on the nature of the tribal interest in the cultural resources that might still exist on a federally-recognized tribe's aboriginal lands, not the adequacy of the applicant's survey. Moreover, the staff's concern that affording standing in such a situation effectively creates an open-ended opportunity for cultural resource-based claims of tribal standing comes down to no more than a worry about a licensing board's ability properly to

adjudge assertions regarding the expanse of tribal aboriginal lands, a matter that, as we have indicated, see supra p. 11, we need not consider further in this proceeding.[9]

That being said, with nearly a dozen cultural resource sites now having been identified on the MEA site, consistent with board and Commission rulings in the Crow Butte North Trend and Crow Butte Renewal proceedings,[10] OST's standing to intervene as of right in this proceeding is manifest.[11]

b. CP

DISCUSSION: CP Petition at 4–7; CBR CP Answer at 2–12; Staff CP Answer at 5–18; CBR Cultural Resources Response at 3–5; Staff Cultural Resources Response at 4–5.

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[9] Because OST's proffered contention 1 raises cultural resource concerns, the redressibility element of its standing showing is evident. We also do not need to get into the matter of whether this standing basis allows OST to raise other contentions unrelated to cultural resource issues. Longstanding agency precedent makes clear that there is no "contention-based" requirement mandating that a petitioner establish a link between the injury in fact asserted to justify its standing and the particular issues the petitioner wants to litigate in challenging an application. Rather, to have standing existing case law indicates that a petitioner need only show that a cognizable injury is associated with a proposed licensing action and that granting the relief sought, e.g., denial of the application, will address that injury. See Crow Butte Renewal, CLI-09-9, 69 NRC at 339–41; Yankee Nuclear, CLI-96-1, 43 NRC at 6.

[10] Although the staff suggested in its answer that the failure of OST representatives to take part in the late 2012 SSN/CN survey that resulted in the identification of possible cultural resource sites indicated OST's asserted interest was not sufficiently concrete, see supra p. 11, in the wake of the survey's results the staff has not made any renewed claim based on either which tribe found the cultural resource sites or whether those sites ultimately might be linked to OST aboriginal tribal activity. Certainly, nothing in the Commission's Crow Butte North Trend or Crow Butte Renewal proceeding rulings suggests that (1) who locates a particular cultural resource site or artifacts; or (2) whether that site or the artifacts it might contain can be tied definitively to a particular tribe has any bearing on whether a tribe's cultural resource interest is sufficient to establish its standing regarding those resources that otherwise might exist on its recognized aboriginal lands.

[11] While somewhat surprising from a participant represented by counsel, the lack of an OST reply to the CBR and staff responses to the Board's March 22 issuance does not affect our determination in this regard. As we observed above, even without the new cultural resources survey information, we would have concluded that OST had established its standing to intervene in this proceeding.

RULING: Because the Consolidated Petitioners consist of several different individuals and organizations, we deal with each separately below, concluding that every one of these individuals and organizations has failed to establish the requisite standing as of right so as to be admitted as a party to this proceeding.

i. Antonia Loretta Afraid of Bear Cook

In an affidavit attached to the CP petition, Antonia Loretta Afraid of Bear Cook, who seemingly seeks to intervene as an individual petitioner, and also is willing to have her interests represented by WNRC or ARM, declares that she has a home in Chadron, Nebraska, where she takes water from a ninety-foot deep well in the Brule Formation and a farm on the Pine Ridge Reservation for which she utilizes water from the Arikaree aquifer and the White River, which flows near the reservation. See CP Petition, unnumbered Petitioner Declaration at 1 (Jan. 24, 2013 declaration of Antonia Loretta Afraid of Bear Cook). She also states that she is an OST enrolled member and has a "vested interest in Traditional Cultural Properties that may exist within the [MEA]." Id. at 2.

Both CBR and the staff assert that these claims are insufficient to establish Ms. Cook's standing in the proceeding. Both contend that her reliance on her water usage from the Brule Formation at her home in Chadron, which is some twenty-five miles northeast of the MEA, and from the Arikaree aquifer and the White River on her farm at the Pine Ridge Reservation, which is approximately fifty miles northeast of the MEA, are insufficient because she fails to suggest a plausible pathway for MEA contamination to reach these water sources. CBR and the staff declare, without contradiction from CP, which did not submit a reply pleading regarding these CBR and staff assertions, that both surface water and the Brule Formation, as the upper aquifer below the MEA, flow to the south toward the Niobrara River, which is in a different river basin from the White River, and flow away from Chadron and the Pine Ridge Reservation to the north.

See CBR CP Answer at 7–8, 10 n.32; Staff CP Answer at 12–13. Further, the staff maintains that Ms. Cook's asserted interest in tribal cultural resources is too conjectural or hypothetical to establish standing because she lives some distance from the MEA site and has not provided any information indicating that "she has ever visited the MEA site or is presently aware of any cultural properties of interest to her or the Tribe located within the MEA." Staff CP Answer at 13.

Relative to Ms. Cook's purported interest arising from her Chadron home and Pine River Reservation farm water usage, the Board agrees with CBR and the staff that she has failed to demonstrate a "plausible pathway" from the MEA to either of these properties so as to establish the requisite injury in fact. Initially we note that standing in each agency proceeding depends on the factual circumstances associated with that case, so that the grant of standing to Ms. Cook in the Crow Butte Renewal case based on asserted water usage impacts is not dispositive here. See PPL Bell Bend LLC (Bell Bend Nuclear Power Plant), CLI-10-7, 71 NRC 133, 138 & n.27 (2010) (citing Crow Butte Renewal, CLI-09-9, 69 NRC at 343). As it turns out, the Crawford ISR facility that is the subject of that proceeding is not only closer to both Chadron and the Pine Ridge Reservation by some ten miles, but the CPF also is undisputedly located in a different watershed than the MEA, i.e., that of the White River rather than the Niobrara River. As a consequence, the potential aquifer and associated White River impacts that were of import in that proceeding in establishing her standing are not relevant here. Ms. Cook thus cannot be afforded standing in this proceeding on the basis of her Chadron home and Pine Ridge Reservation farm water usage.

We also find her assertion of an interest based on cultural resource concerns insufficient to establish her injury in fact here because she has failed to show relative to such resources on the MEA site that there is a concrete or particularized injury to herself as an individual.

Essentially Ms. Cook is attempting to establish as an OST member a cultural resources interest that is the same as that of the tribe. We, however, are unable to conclude that for standing purposes, even with the identification by the late-2012 SSN/CN survey of potential cultural resources sites on the MEA, any individual interest she might have has the same parameters as that of the tribe relative to those sites and any artifacts they might contain. Instead, for standing purposes as an individual, Ms. Cook would need to demonstrate that the MEA site holds some particular importance for her personally. For example, she might demonstrate that some particular activity on the property or specific location on the site, such as a place of worship or burial ground, has cultural or religious significance for her as an individual.[12] See Crow Butte N. Trend, LBP-08-6, 67 NRC at 288–89 (petitioner asserts standing based on use of ISR expansion area to gather eagle feathers for ceremonial and religious uses).

Having failed to satisfy her burden of showing a cognizable injury in fact, we must find Ms. Cook lacks standing to intervene in this proceeding as an individual. Additionally, her

[12] We consider our holding in this regard to be consistent with judicial authority regarding the standing of an individual tribal member to raise an NHPA claim, see Nulankeyutmonen Nkihtaqmikon v. Impson, 503 F.3d 18, 27 (1st Cir. 2007) (ruling tribal members who live very near proposed liquified natural gas terminal and use the land and surrounding waters have standing to raise NEPA and NHPA concerns); Mont. Wilderness Ass'n v. Frye, 310 F. Supp. 2d 1127, 1150–51 (D. Mont. 2004) (determining tribal member who regularly visits tribal migratory route on national monument land to pursue cultural undertakings has standing under NHPA to raise concerns about proposed oil and gas leases); see also La Cuna de Aztlan Sacred Sites Prot. Circle Advisory Comm. v. Dep't of the Interior, No. EDCV 11-1478-GW(SSX), 2012 WL 6839790, at *4 (C.D. Cal. 2012) (rejecting argument that, in addition to the tribe, individual tribal representative has standing to sue under NHPA section 106 consultation provisions); cf. 36 C.F.R. § 800.2(c)(2)(ii) ("Section 101(d)(6)(B) of the [NHPA] requires the agency official to consult with any Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to historic properties that may be affected by an undertaking."), as well as agency precedent suggesting that an individual tribal member who does not reside on a tribal reservation where a facility is proposed to be located must show injury in fact relative to that member's activities on the reservation even when the reservation is asserted to be on aboriginal tribal lands, see Private Fuel Storage, LLC (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 170–71, aff'd, CLI-98-13, 48 NRC at 31–32.

asserted interest cannot provide the basis for representational standing for either WNRC or ARM.[13]

ii. Bruce McIntosh

In affidavits supporting the CP hearing petition and seeking to intervene both as an individual and in support of the representational standing of WNRC and ARM, Bruce McIntosh declares that he has lived, worked, and recreated in Dawes County for sixty-seven years, including having a home in Chadron where he uses water from the Brule and Arikaree aquifers for personal, household, domestic purposes, including gardening, bathing, and drinking. See CP Petition, unnumbered Petitioner Declaration at 1 (Jan. 29, 2013 declaration of Bruce McIntosh) [hereinafter McIntosh Declaration]; id. unnumbered Petitioner Declaration at 1 (Jan. 29, 2013 declaration of WNRC vice-chair Bruce McIntosh) [hereinafter McIntosh WNRC Declaration]. CBR and the staff assert he lacks standing for basically the same reasons as Ms. Cook did in claiming water usage-related injury in fact, i.e., that he has failed to establish a plausible water excursion pathway from the MEA site to where he resides, works, and recreates.

We must agree. Mr. McIntosh's assertion regarding the significance of water usage at his Chadron home has the same failing as that of Ms. Cook, as outlined in section II.A.2.b.i above. By the same token, his additional claim based on his long-time residence in Dawes County, which lacks any showing about the extent, frequency, and duration of any employment

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[13] With this determination, as well as our standing decisions in sections II.A.2.b.ii.–iii below, we do not face the situation that arose in the Dewey-Burdock ISR proceeding when, because two petitioners seeking both to intervene as individuals and to provide the representational standing basis for an organization were found to have standing, each petitioner was required to choose whether he or she wished to proceed as an individual or allow the organization to go forward as his or her representative. See Licensing Board Order (Accepting Elections Regarding Representation), Powertech (USA), Inc. (Dewey-Burdock In Situ Uranium Recovery Facility), Docket No. 40-9075-MLA (Aug. 17, 2010) at 1 & n.3 (unpublished).

or recreational pursuits he might have had in the vicinity of the MEA, fails to provide the particularity and concreteness needed to establish the requisite injury in fact. See Bell Bend, CLI-10-7, 71 NRC at 139–40. Thus, he too lacks standing to intervene in this proceeding as an individual, so that his asserted interest cannot provide the basis for representational standing for either WNRC or ARM.[14]

iii. Debra White Plume

Debra White Plume has provided an affidavit in support of her standing to intervene as of right both as an individual and as a basis for the representational standing of WNRC and ARM. Her affidavit indicates that she resides in Manderson, South Dakota, where she uses water from the Arikaree aquifer for personal, household, and domestic purposes, including gardening, irrigation, bathing, and drinking, as well as for ranching purposes, including maintaining livestock such as horses and buffalo. She notes further that the elk, deer, and antelope drink this water as do the birds and other life forms. See CP Petition, unnumbered Petitioner Declaration at 1 (Jan. 29, 2013 declaration of Debra White Plume) [hereinafter White Plume Declaration]. For their part, observing that Manderson is nearly sixty-five miles to the northeast of the MEA site, CBR and the staff assert Ms. White Plume likewise lacks standing for basically the same reasons as applied to Ms. Cook's and Mr. McIntosh's claims of water usage-related injury in fact, i.e., that she has failed to establish a plausible water excursion pathway for contaminants from the MEA site to her property.

Although Ms. White Plume was admitted as a party to both the Crow Butte North Trend and Crow Butte Renewal proceedings based on the potential for water-usage impacts, as we have pointed out previously, see supra p. 16, that is not dispositive of her standing in this case.

[14] While not necessarily binding in this instance, we note that Mr. McIntosh also failed to establish his standing relative to the Crawford CPF in the Crow Butte Renewal proceeding. See Crow Butte Renewal, LBP-08-24, 68 NRC at 710.

And, in fact, for the same reasons we found applicable to Ms. Cook and Mr. McIntosh in sections II.A.2.b.i.–ii above, we conclude that she has failed to meet her burden of demonstrating the requisite injury in fact based on the distance and location of her residence relative to the MEA so as to establish her individual standing or provide the basis for representational standing for either WNRC or ARM.

iv. ARM

As outlined in the affidavit of its legal director David Frankel, ARM seeks to establish its representational standing in this proceeding based upon ARM's representation of the interests of Ms. Cook, which are asserted to provide her with the requisite standing. See CP Petition, unnumbered Petitioner Declaration at 1 (Jan. 29, 2013 declaration of David Frankel) [hereinafter Frankel Declaration]. As with Ms. Cook's assertion of individual standing, both CBR and the staff oppose granting ARM standing as her representative. As we indicated in section II.A.2.b.i above, Ms. Cook has been unable to show the requisite injury in fact so as to establish her individual standing.[15] Concomitantly, ARM lacks representational standing.[16]

In addition, however, ARM claims organizational standing as a basis for its admission as a party to this proceeding, an assertion both CBR and the staff contest. In this regard, Mr.

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[15] While Mr. Frankel's affidavit mentions only Ms. Cook's individual standing as a basis for ARM's representational standing, see Frankel Declaration at 1, the affidavits of Mr. McIntosh and Ms. White Plume also state that they have authorized ARM to represent their interests, see McIntosh Declaration at 1; White Plume Declaration at 1. For the reasons provided in sections II.A.2.b.ii.–iii above, however, those individuals likewise lack individual standing and so cannot provide a basis for ARM's representational standing.

[16] Although ARM was able to establish its representational standing in the Dewey-Burdock ISR proceeding, that was done on the basis of the individual standing showing of Mr. Frankel, see Dewey-Burdock, LBP-10-16, 72 NRC at 390, whose individual standing has not been alleged as a supporting basis for ARM's representational standing in this instance. In any event, it seems unlikely that the circumstances supporting standing for Mr. Frankel in the Dewey-Burdock proceeding would suffice here. See id. at 386 (finding standing on the basis of Mr. Frankel's use of water from the Inyan Kara aquifer at his Buffalo Gap, South Dakota residence located to the north of the Pine Ridge Reservation).

Frankel's affidavit states that ARM's "physical address" is in Chadron, Nebraska, with a post-office box mailing address in Pine Ridge, South Dakota. Frankel Declaration at 1. Further, the CP hearing petition describes ARM as a "[non-governmental organization] based at Pine Ridge Indian Reservation founded to prevent abusive mining which is mining that does not comply with the International Precautionary Principle." CP Petition at 6.

As was noted by the licensing board in the Dewey-Burdock ISR case,[17] organizational standing is footed in the capacity of an organization to show, consistent with the Supreme Court's decision in Sierra Club v. Morton, 405 U.S. 727 (1972), a discrete injury to its organizational interests. See Dewey-Burdock, LBP-10-16, 72 NRC at 389. For the reasons stated in section II.A.2.b.i above regarding the purported standing of Ms. Cook relative to the location of her Chadron home and Pine Ridge Reservation farm property, we find nothing Mr. Frankel has provided in connection with ARM's physical location that would establish any specific injury in fact to ARM as an organized entity so as to provide organizational standing. So too, ARM's purported interest as an organization in preventing abusive mining clearly is a generalized interest that will not support organizational standing. See Dewey-Burdock, LBP-10-16, 72 NRC at 389 (ruling organizational interest in protecting "the natural resources of the Black Hills of South Dakota with a focus on groundwater contamination from uranium mining" insufficient to establish organizational standing (quoting Consolidated Request for Hearing and Petition for Leave to Intervene, Powertech (USA), Inc. (Dewey-Burdock In Situ Uranium Recovery Facility), Docket No. 40-9075-MLA (Mar. 8, 2010) at 27)).

As a consequence, we conclude that ARM has failed to establish its standing as of right in this proceeding.

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[17] Although ARM petitioned to intervene in the Dewey-Burdock case, it apparently did not seek organizational standing. See id. at 389.

v. WNRC

The affidavit provided by WNRC vice-chair Bruce McIntosh in support of the CP hearing petition indicates that WNRC seeks to establish its representational standing in this proceeding based upon WNRC's representation of Ms. Cook, whose interests have been asserted to provide her with the requisite standing. See McIntosh WNRC Declaration at 1. Having contested Ms. Cook's standing, both CBR and the staff assert that WNRC also lacks representational standing. As we indicated in section II.A.2.b.i above, Ms. Cook has been unable to demonstrate the requisite injury in fact so as to establish her standing.[18] WNRC thus lacks representational standing as well.[19]

WNRC also maintains that it should be admitted to this proceeding as a party because it has organizational standing, a claim that CBR and the staff challenge.[20] In apparent support of this claim, Mr. McIntosh states in his affidavit on behalf of WNRC that the organization's

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[18] Mr. McIntosh's affidavit on behalf of WNRC likewise mentions only Ms. Cook's individual standing as a basis for WNRC's representational standing, see McIntosh WNRC Declaration at 1, although the individual affidavits of Mr. McIntosh and Ms. White Plume also state that they have authorized WNRC to represent their interests, see McIntosh Declaration at 1; White Plume Declaration at 1. For the reasons set forth in sections II.A.2.b.ii.–iii above, however, those two individuals lack individual standing and so cannot provide a basis for WNRC's representational standing.

[19] WNRC was able to establish its representational standing in the Crow Butte North Trend and the Crow Butte Renewal proceedings, but it did so on the basis of the standing showings of individuals who have neither sought to intervene in this proceeding nor indicated they are willing to allow WNRC to represent their interests here. See Crow Butte N. Trend, LBP-08-6, 67 NRC at 281-82 (WNRC's representational standing based on individual standing of Dr. Francis Anders); Crow Butte Renewal, LBP-08-24, 68 NRC at 709 (WNRC's representational standing based on individual standing of David Alan House).

[20] Although WNRC asserted in the Crow Butte North Trend and Crow Butte Renewal proceedings that it had organizational standing, the licensing boards there found WNRC had established its representational standing and did not reach the question of its organizational standing. See Crow Butte N. Trend, LBP-08-6, 67 NRC at 281–82; Crow Butte Renewal, LBP-08-24, 68 NRC at 709.

"physical address" and its post office box mailing address are in Chadron, Nebraska. McIntosh WNRC Declaration at 1. Further, he declares that

> WNRC has existed since its inception in 1983 for the sole purpose of participating in public hearings by regulatory agencies concerning permitting and licensing of the operations at Crow Butte Resources, Crawford, NE, and enforcement of such permits and licenses. As such, WNRC's organizational purpose is limited to the operations of Crow Butte Resources and its purpose specifically includes intervention in proceedings such as this proceeding.

Id.

Once again, for the reasons stated in section II.A.2.b.i above regarding the purported standing of Ms. Cook relative to the location of her Chadron home, nothing Mr. McIntosh has provided regarding WNRC's physical location vis-à-vis the MEA site is sufficient to establish any concrete injury in fact to WNRC's interests that would provide organizational standing. Additionally, for the reasons discussed below, we are unable to conclude that WNRC's stated organizational interest is one that is cognizable for the purpose of establishing organizational standing, i.e., is one that is more than "a mere 'interest in a problem,' no matter how longstanding the interest and no matter how qualified the organization is in evaluating the problem." Sierra Club v. Morton, 405 U.S. at 739.

Certainly, in his description of WNRC's purpose quoted above, Mr. McIntosh has attempted to bring a greater degree of specificity to that organization's interest in this proceeding than is usually the case for public interest entities that seek to establish their organizational standing in this agency's adjudications. His above-quoted declaration about the organization's "sole" purpose, however, is not consistent with this much more generalized description of WNRC's organizational purpose/interest provided in the CP hearing petition that his declaration allegedly supports:

> [WNRC] is a Nebraska nonprofit which was formed in 1983 to protect the natural resources of Western Nebraska with a focus on groundwater contamination from uranium mining.

See CP Petition at 6-7. Given this seeming inconsistency in the information that has been provided, and WNRC's acknowledged participation in other recent ISR licensing proceedings, we have looked to see what, if any, representations WNRC has made in those proceedings regarding its organizational purpose. And as it turns out, it is this CP petition description, rather than the statement provided by Mr. McIntosh in his declaration, that WNRC previously has proffered when representing the nature of its organizational interest in the Crow Butte North Trend and Crow Butte Renewal cases in which WNRC also has sought to intervene.[21]

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[21] See Request for Hearing and Petition to Intervene, Crow Butte N. Trend, Docket No. 40-8943-MLA (Nov. 12, 2007) exh. A, at A-1 (statement of WNRC Board Chairman Buffalo Bruce that WNRC "was formed (1983) specifically to protect the natural resources of Western NE") (ADAMS Accession No. ML073240313); Affidavit, Crow Butte N. Trend, Docket No. 40-8943-MLA (Dec. 28, 2007) at 1 (statement of Bruce McIntosh that WNRC "was formed in 1983 to protect the natural resources of Western Nebraska with a focus on groundwater contamination from uranium mining") (ADAMS Accession No. ML080080289); Consolidated Request for Hearing and Petition for Leave to Intervene, Crow Butte Renewal, Docket No. 40-8943-OLA (July 28, 2008) unnumbered affidavit at 1 (declaration of WNRC Vice Chair Buffalo Bruce that the WNRC "was formed in 1982 to protect the natural resources of Western Nebraska with a focus on groundwater contamination from uranium mining") (ADAMS Accession No. ML082170525).

We also note relative to the items referenced above that, based on the mailing address in the various declarations in the Crow Butte North Trend and Crow Butte Renewal proceedings provided by the individual calling himself Buffalo Bruce, it seems apparent that this person and Bruce McIntosh are one and the same.

Based on the totality of the information before us,[22] we find that the WNRC statement of interest that is found in the CP petition is the more accurate description of WNRC's organizational interest relative to this proceeding. Moreover, that statement has the same generality problem that was identified by the Dewey-Burdock licensing board as rendering a purported organizational interest insufficient to establish organizational standing. See Dewey-Burdock, LBP-10-16, 72 NRC at 389; supra section II.A.2.b.iv. We thus conclude that WNRC lacks organizational standing to intervene in this proceeding.[23]

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[22] Although the submissions cited above, see supra note 21, are not within the docket of this proceeding, they are publicly available in the agency's electronic hearing docket/ADAMS database system and relate directly to a matter we previously advised the participants was of interest to the Board, i.e., "any similarities or differences regarding the issues of standing and contention admissibility that may exist relative to any of the standing or admissibility determinations made in [the Crow Butte North Trend, Crow Butte Renewal, and Dewey-Burdock] ISR licensing cases." Licensing Board Memorandum and Order (Initial Prehearing Order) (Feb. 8, 2013) at 3 (unpublished).

[23] Agency cases routinely acknowledge the availability of organizational standing as of right based on an organization's own interests, as opposed to an organization's representation of the interests of one or more of its members. See supra p. 7. And while the cases are legion in which claims of interest-based organizational standing have been denied, see, e.g., EnergySolutions, LLC (Radioactive Waste Import/Export Licenses), CLI-11-3, 73 NRC 613, 621–22 (2011); Entergy Nuclear Operations, Inc. (Palisades Nuclear Plant), CLI-08-19, 68 NRC 251, 266, 269–70 (2008); Nuclear Mgmt. Co., LLC (Monticello Nuclear Generating Plant), CLI-06-6, 63 NRC 161, 163 (2006), only rarely has organizational standing been granted to a nongovernmental entity, see Entergy Nuclear Operations, Inc. (Indian Point, Units 2 and 3), LBP-08-13, 68 NRC 43, 60 (2008) (concluding that, with standing of various organizations unchallenged by applicant or the staff, each organization has demonstrated institutional injury to the organization itself and representational standing); Atlas Corp. (Moab, Utah), LBP-00-4, 51 NRC 53, 59 (2000) (finding no need to analyze standing of other petitioning organizations when public interest organization had clear representational standing, other than to note that each meets standing requirements in its own right or as representative of its members). As a consequence, the parameters associated with granting (rather than denying) organizational standing in an agency adjudicatory proceeding are still somewhat imprecise, although it appears that such standing could arise based on an asserted injury to a tangible asset, such as a building or land owned or regularly utilized by an organization, that is located near a proposed licensing activity, see Palisades, CLI-08-19, 68 NRC at 269–70 (determining that, in a license transfer proceeding, three-mile distance between facility and organization's offices does not qualify for organizational standing); Yankee Atomic Elec. Co. (Yankee Nuclear Power Station), CLI-94-3, 39 NRC 95, 102 n.10 (1994) (finding that, in a reactor

(continued...)

B. Contention Admissibility

With these standing determinations in hand, we turn next to the question of the admissibility of the OST and CP contentions under 10 C.F.R. § 2.309(f)(1). For the reasons set forth in section II.A.2 above, because each of the individuals and organizations who make up the Consolidated Petitioners has failed to establish standing as of right under section 2.309(c), we find it unnecessary to address the admissibility of their five proffered contentions. On the other hand, having found that OST has established its standing as of right under section 2.309(c), we turn to the question of the admissibility of its six proffered contentions.

1. Contention Admissibility Standards

Section 2.309(f)(1) of the Commission's rules of practice specifies the requirements that must be met for a contention to be deemed admissible. Specifically, a contention must provide (1) a specific statement of the legal or factual issue sought to be raised; (2) a brief explanation of its basis; (3) a concise statement of the alleged facts or expert opinions, including references to specific sources and documents, that support the petitioner's position and upon which the petitioner intends to rely at hearing; and (4) sufficient information demonstrating that a genuine dispute exists in regard to a material issue of law or fact, including references to specific portions of the application that the petitioner disputes, or in the case when the application is

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[23](...continued)
decommissioning proceeding, a public interest group lacked organizational standing when its business address did not lie within fifty miles of the facility), or perhaps could be based on an organizational interest that has well-recognized institutional underpinnings, see supra note 7; see also Pac. Gas & Elec. Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-03-2, 57 NRC 19, 26–27 (2003) (finding organizational standing based on the interest of two state power generation and transmission agencies as beneficiaries of antitrust license condition under consideration in proceeding), or perhaps an organizational statement of interest/purpose that has a specific focus on challenging the particular licensing authorization that is being sought in a specific agency proceeding. That being said, given our finding above about the overly generalized nature of WNRC's organizational interest, this is not a matter we need parse further in this proceeding.

alleged to be deficient, the identification of such deficiencies and supporting reasons for this belief. See 10 C.F.R. § 2.309(f)(1)(i), (ii), (v), (vi). In addition, the petitioner must demonstrate that the issue raised in the contention is both "within the scope of the proceeding" and "material to the findings the NRC must make to support the action that is involved in the proceeding." Id. § 2.309(f)(1)(iii), (iv). Failure to comply with any of these requirements is grounds for dismissing a contention. See FirstEnergy Nuclear Operating Co. (Davis-Besse Nuclear Power Station, Unit 1), CLI-12-8, 75 NRC 393, 395–96 (2012). And, as is pertinent to this proceeding, NRC case law has further developed these requirements, as summarized below.

a. Challenges to Statutory Requirements/Regulatory Process/Regulations

An adjudication is not the proper forum for challenging applicable statutory requirements or the basic structure of the agency's regulatory process. See Phila. Elec. Co. (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13, 20, aff'd in part on other grounds, CLI-74-32, 8 AEC 217 (1974). Similarly, a contention that attacks a Commission rule, or which seeks to litigate a matter that is, or clearly is about to become, the subject of a rulemaking, is inadmissible. See 10 C.F.R. § 2.335; Potomac Elec. Power Co. (Douglas Point Nuclear Generating Station, Units 1 and 2), ALAB-218, 8 AEC 79, 85, 89 (1974). This includes contentions that advocate stricter requirements than agency rules impose or that otherwise seek to litigate a generic determination established by a Commission rulemaking.[24] By the same token, a contention that simply states the petitioner's views about what regulatory

[24] See Fla. Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-01-6, 53 NRC 138, 159 (2001); Pac. Gas & Elec. Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-93-1, 37 NRC 5, 29–30 (1993); Pub. Serv. Co. of N.H. (Seabrook Station, Units 1 and 2), LBP-82-06, 16 NRC 1649, 1656 (1982); see also Yankee Atomic Elec. Co. (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 251 (1996); Ariz. Pub. Serv. Co. (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), LBP-91-19, 33 NRC 397, 410, aff'd in part and rev'd in part on other grounds, CLI-91-12, 34 NRC 149 (1991).

policy should be does not present a litigable issue. See Peach Bottom, ALAB-216, 8 AEC at 20–21 & n.33.

b. Challenges Outside Scope of Proceeding

All proffered contentions must be within the scope of the proceeding as defined by the Commission in its initial hearing notice and order referring the proceeding to a licensing board. See 10 C.F.R. § 2.309(f)(1)(iii); Fla. Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-00-23, 52 NRC 327, 329 (2000); Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-825, 22 NRC 785, 790–91 (1985). As a consequence, any contention that falls outside the specified scope of the proceeding must be rejected. See Pac. Gas & Elec. Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-11-11, 74 NRC 427, 435 (2011).

c. Need for Adequate Factual Information or Expert Opinion

It is the petitioner's obligation to present factual allegations and/or expert opinion necessary to support its contention. See 10 C.F.R. § 2.309(f)(1)(v); USEC, Inc. (American Centrifuge Plant), CLI-06-10, 63 NRC 451, 457 (2006). While a board may appropriately view a petitioner's supporting information in a light favorable to the petitioner, failure to provide such information regarding a proffered contention requires that the contention be rejected. See Ariz. Pub. Serv. Co. (Palo Verde Nuclear Stations, Units 1, 2, and 3), CLI-91-12, 34 NRC 143, 155 (1991). Neither mere speculation nor bare or conclusory assertions, even by an expert, alleging that a matter should be considered will suffice to allow the admission of a proffered contention. See Fansteel, Inc. (Muskogee, Oklahoma Site), CLI-03-13, 58 NRC 195, 203 (2003). If a petitioner neglects to provide the requisite support for its contentions, it is not within a board's power to make assumptions or draw inferences that favor the petitioner, nor may the board supply information that is lacking. See Crow Butte N. Trend, CLI-09-12, 69 NRC at 553; Palo Verde, CLI-91-12, 34 NRC at 155. Likewise, simply attaching material or documents as a basis

for a contention, without setting forth an explanation of that information's significance, is inadequate to support the admission of the contention. See Fansteel, CLI-03-13, 58 NRC at 204–05.

d. Insufficient Challenge to the Application

All properly formulated contentions must focus on the license application in question, challenging either specific portions of or alleged omissions from the application (including the safety analysis report/TR and the ER) so as to establish that a genuine dispute exists with the applicant on a material issue of law or fact. See 10 C.F.R. § 2.309(f)(1)(vi). Any contention that fails directly to controvert the application or that mistakenly asserts the application does not address a relevant issue will be dismissed. See Crow Butte N. Trend, CLI-09-12, 69 NRC at 557; Am. Centrifuge Plant, CLI-06-10, 63 NRC at 462-63.

2. OST's Contentions

With these standards in mind, as well as our previous recognition that no ruling on the CP contentions is required because those petitioners lack standing, see supra p. 26, we turn to the admissibility of each of the OST contentions, beginning with a recitation of the contention as it is specified in the OST hearing request.

a. 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

> The Application fails to meet the requirements of 10 C.F.R. §§ 51.60 and 51.45, and the National Environmental Policy Act because it lacks an adequate description of either the affected environment or the impacts of the project on archaeological, historical, and traditional cultural resources. The Application also fails to demonstrate compliance under the National Historic Preservation Act, and the relevant portions of NRC guidance included at NUREG-1569 section 2.4.

DISCUSSION: OST Petition at 11–16; CBR OST Answer at 9–11; Staff OST Answer at 18–25; OST Reply at 17–19; CBR Cultural Resources Response at 8–9; Staff Cultural Resources Response at 5–8.

RULING: Admissible in part, as denominated in Appendix A to this decision, and inadmissible in part in that this contention and its foundational support (1) are sufficient to establish a genuine material dispute adequate to warrant further inquiry regarding the adequacy of the CBR ER's description of either the affected environment or the impacts of the project relative to archaeological, historical, and traditional cultural resources; but (2) fail to establish a material dispute relating to the application relative to the matter of the ER's compliance with the tribal consultation requirement of NHPA section 106 as it is implemented in the context of the agency's NEPA process, see 10 C.F.R. § 2.309(f)(1)(vi); supra section II.B.1.d.

With this contention, OST seeks to raise two concerns relative to the ER's discussion regarding cultural resources that might exist within the MEA site. The first is the question whether, in light of the 2012 cultural survey conducted on the MEA site at the behest of CBR that is the principal basis for the CBR ER's cultural resources discussion, the ER complies with the NRC's NEPA implementation requirements as they mandate an adequate description of any extant cultural resources on the MEA site and an analysis of the impact of the proposed ISR project on those resources. Second, OST claims that the process being utilized by the staff to identify and address cultural resource issues fails to comply with the provisions of the NHPA, as they are implemented through the agency's NEPA review process, in particular the section 106 requirement for tribal consultation.

Looking at the latter issue first, we find that previous Commission rulings on that matter require that this portion of OST contention 1 be dismissed as failing to raise a material dispute because this matter has been raised prematurely. In its review of the admissibility of similar

concerns set forth in contentions in both the Crow Butte North Trend and the Crow Butte Renewal proceedings, the Commission noted that carrying out the NHPA section 106 consultation requirement, as implemented as part of the agency's NEPA review process, is a responsibility that accrues to the staff rather than the applicant. As a consequence, according to the Commission, a contention seeking to contest how the consultation mandate is (or is not) being carried out is one that can be raised in the first instance only after the staff's draft environmental impact statement (EIS), which presumably provides some discussion regarding that matter, has been issued. See Crow Butte N. Trend, CLI-09-12, 69 NRC at 564–66; Crow Butte Renewal, CLI-09-9, 69 NRC at 348–51. The Commission thus dismissed the tribal consultation contentions as prematurely filed, albeit without prejudice to their renewal following issuance of the staff's draft EIS, a result recently emulated by the Dewey-Burdock licensing board in disposing of an OST contention raising an identical concern in that proceeding, see Dewey-Burdock, LBP-10-16, 72 NRC at 421–22. We reach the same result here.

As to the first question whether the ER's description and analysis of MEA site cultural resources is adequate, in their initial answers arguing for dismissal of this contention, both CBR and the staff placed considerable reliance on the fact that, notwithstanding the identification of Native American cultural resources on both of CBR's North Trend and CPR sites, a three-month-long cultural resources survey process and the resulting April 2011 and March 2012 reports prepared by an archaeological survey firm at the behest of CBR found no Native American cultural resource sites on the MEA site.[25] But, as we have already noted above, see

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[25] In their answers, neither CBR nor the staff disputed whether, consistent with the agency's 10 C.F.R. Part 51 NEPA implementation regulations, OST can contest in this proceeding the adequacy of the CBR ER's cultural resources discussion. Certainly, such an OST challenge appears to be appropriate in light of the guidance in the staff's ISR standard review plan indicating that an ISR applicant is to provide such information for staff review, see Office of Nuclear Materials Safety and Safeguards, NRC, Standard Review Plan for In Situ (continued...)

supra p. 12, the survey conducted in late 2012 by SSN and CN representatives identified eleven sites on the MEA as potentially being Native American cultural resource sites. CBR and the staff, however, assert that this recent information does not provide a sufficient basis for this aspect of OST contention 1. According to CBR, its contractor's two surveys and the SSN/CN survey fulfill any NHPA requirements to the extent those studies assess whether the identified sites are eligible for inclusion in the National Register of Historic Places, thereby depriving the contention of any expert support or any semblance of a material dispute that needs resolution. The staff takes a similar tack, declaring that the reported results of the SSN/CN survey address, and in fact moot, any deficiency alleged in the OST contention.

In support of its original contention, OST provided the declaration of its Tribal Historic Preservation Officer stating that the presence of current or extinct water resources on the MEA create a strong likelihood that, contrary to the results reported in the CBR cultural resource survey reports, cultural resource sites not only exist within the MEA, but those sites need to be identified and the impact of the proposed ISR activities on those sites needs to be evaluated properly. See OST Petition, unnumbered exh. 7, at 2 (Declaration of Wilmer Mesteth). Given the nature of Native American aboriginal culture, in these circumstances this statement, in and of itself, appears sufficient to support this contention. But to whatever degree it might not be sufficient, the subsequent SSN/CN survey has shown the concern to be well founded, providing further, compelling support for this OST contention. Nor do we find persuasive the assertions by CBR and the staff that, by identifying these sites, the second survey has essentially corrected any deficiencies in the original CBR-sponsored survey so as to "moot" any aspect of

[25](...continued)
Leach Uranium Extraction License Applications, NUREG-1569, at 9–10, 2-9 to -12 (June 2003) (http://www.nrc.gov/reading-rm/doc-collections/nuregs/staff/sr1569/sr1569.pdf) [hereinafter NUREG-1569], and the board's analysis of just such a claim in the Dewey-Burdock proceeding, see Dewey-Burdock, LBP-10-16, 72 NRC at 417–18, 421.

this contention challenging the adequacy of the original survey. At this stage of the proceeding, such a claim has the hallmarks of an attempt to obtain a Board "merits" determination regarding this contention, something the Commission has indicated is inappropriate at the contention admissibility stage. See Diablo Canyon, CLI-11-11, 74 NRC at 443 ("for the purposes of contention admissibility, we do not consider the merits of [a petitioner's] arguments").

Thus, consistent with the licensing board rulings in the Crow Butte North Trend, Crow Butte License Renewal, and Dewey-Burdock proceedings, we find that the recent archaeological survey discovery of potential Native American cultural resource sites on the MEA is sufficient to establish the admissibility of this portion of OST contention 1,[26] the terms of which are specified in Appendix A below.

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

> 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); the National Environmental Policy Act; and NUREG-1569 section 2.6. 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 the National Environmental Policy Act.

DISCUSSION: OST Petition at 17–18; CBR OST Answer at 12–14; Staff OST Answer at 25–30; OST Reply at 20–22.

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[26] Although (as we noted previously, see supra note 11) OST's action is unusual for a participant represented by counsel, nothing before us suggests that its failure to respond to the CBR and staff answers to the Board's March 22 request for additional information constitutes OST's abandonment of this contention.

RULING: Admissible, as denominated in Appendix A to this decision, in that this contention and its foundational support are sufficient to establish a genuine material dispute adequate to warrant further inquiry.

With this issue statement, OST contests the adequacy of the hydrogeologic information provided in CBR's application, claiming that the data provided does not demonstrate that CBR can contain fluid migration. OST asserts further that CBR's application fails to provide sufficient information to define the geological setting of the area in the vicinity of the MEA and to establish adequately the potential effects of the project on the adjacent surface and groundwater resources. OST supports its contention by alleging four specific deficits in CBR's application: (1) the descriptions of the affected environment are insufficient "to establish the potential effects of the proposed [ISR] operation on the adjacent surface water and ground water resources"; (2) "a description of the 'effective porosity, hydraulic conductivity, and hydraulic gradient' of site hydrogeology," is absent along with "'other information relative to the control and prevention of excursions'"; (3) "an acceptable conceptual model of site hydrology adequately supported by the data presented in the site characterization" has not been adequately developed to demonstrate "with scientific confidence that the area hydrogeology, including horizontal and vertical hydraulic conductivity, will result in the confinement of extraction fluids and expected operational and restoration performance"; and (4) the ER contains "unsubstantiated assumptions as to the isolation of the aquifers in the ore-bearing zones." OST Petition at 17–18 (quoting NUREG-1569, at 2-20 to -21).

For the reasons set forth below, we conclude that OST has satisfied the requirements of 10 C.F.R. § 2.309(f)(1).

First, OST has presented "a specific statement of law or fact," id. § 2.309(f)(1)(i), namely, the allegation that "[t]he application fails to provide sufficient information regarding the

geological setting of the [MEA] area." OST Petition at 17. More specifically, OST has presented the four particular deficits that we enumerated in the paragraph above.

Second, OST has provided "a brief explanation of the basis for the contention." 10 C.F.R. § 2.309(f)(1)(ii). OST explains that contention 2 is based on a number of NRC regulations, the opinion of Dr. Hannan LaGarry that accompanies OST's petition, the staff's ISR standard review plan NUREG-1569, and United States Environmental Protection Agency (EPA) comments on the review process associated with other Wyoming-based ISR facilities. OST Petition at 17–18.

Third, there appears to be no dispute that contention 2 is within the scope of this proceeding. See 10 C.F.R. § 2.309(f)(1)(iii); see also Dewey-Burdock, LBP-10-16, 72 NRC at 426 (admitting similar OST Contention 3); Crow Butte Renewal, LBP-08-24, 68 NRC at 727 (admitting similar OST Contention D). And indeed, given the nature of the ISR process, we find it difficult to imagine a more relevant issue to an ISR licensing proceeding than the adequacy of the applicant's analysis of hydrogeology.

Fourth, the issue presented by contention 2 "is material to the findings the NRC must make" in this licensing proceeding. 10 C.F.R. § 2.309(f)(1)(iv); see also Dewey-Burdock, LBP-10-16, 72 NRC at 426 (admitting similar OST Contention 3); Crow Butte Renewal, LBP-08-24, 68 NRC at 727 (admitting similar OST Contention D). Again, issues relating to hydrogeology are of paramount importance in ISR licensing proceedings. If CBR's analysis of the hydrogeology of the MEA site is inadequate, as OST argues is the case in contention 2, that inadequacy would most certainly impact the NRC's decision on whether, and under what terms, to grant CBR the license it seeks.

Fifth, OST has provided the alleged facts and expert support on which it relies to support contention 2. See 10 C.F.R. § 2.309(f)(1)(v). Namely, OST relies on the opinion of Dr. Hannan

LaGarry, the contents of NUREG-1569, and EPA comments on ISR license review processes. CBR and the staff challenge OST's reliance on each of these sources of information, see CBR OST Answer at 14, Staff OST Answer at 26–29, but we find that OST's reliance on these items is sufficient to satisfy section 2.309(f)(1)(v).

And in that regard, we observe that we do not believe that now is the appropriate time to probe the merits of Dr. LaGarry's opinion. See Diablo Canyon, CLI-11-11, 74 NRC at 443. We do note, however, that Dr. LaGarry has substantial experience dealing with the geology of northwestern Nebraska and has presented his opinion that ISR operations at the MEA site likely would "contribute toxic heavy metal contaminants, including but not limited to uranium, through three pathways." OST Petition, unnumbered exh. 9, at unnumbered p. 4 (Expert Opinion [of Hannan E. LaGarry, Ph.D.,] on the Environmental Safety of In-Situ Leach Mining of Uranium Near Marsland, Nebraska) [hereinafter LaGarry Opinion]. Moreover, this argument does not appear to be merely speculative, as Dr. LaGarry, in providing his expert opinion regarding the geology of northwestern Nebraska, explains how contamination through these pathways would occur. The Commission has made clear that section 2.309(f)(1)(v) "does not call upon the intervenor to make its case at this stage of the proceeding, but rather to indicate what facts or expert opinions, be it one fact or opinion or many, of which it is aware at that point in time which provide the basis for its contention." Rules of Practice for Domestic Licensing Proceedings - Procedural Changes in the Hearing Process, 54 Fed. Reg. 33,168, 33,170 (Aug. 11, 1989). As such, relative to this contention, Dr. LaGarry's opinion is sufficient to satisfy section 2.309(f)(1)(v).[27]

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[27] Although we note that Dr. LaGarry has provided his input in the form of an "expert opinion" rather than an affidavit, neither CBR nor the staff has raised any questions about the form or authenticity of this submission. Neither did the Crow Butte Renewal board when a document bearing the same label and Dr. LaGarry's name was proffered by OST in that

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In addition, though, we do not consider OST's above-referenced reliance on NUREG-1569 and the EPA's ISR comments to be flawed, as CBR and the staff suggest. We understand and appreciate that NUREG-1569 is merely a guidance document and thus is not legally binding. See, e.g., Private Fuel Storage, LLC (Independent Spent Fuel Storage Installation), CLI-01-22, 54 NRC 255, 264 & n.37 (2001) (citing cases). We believe, however, that these NUREG provisions are informative to the degree they support the common sense approach that technical analyses and conclusions should be presented in a scientifically defensible manner. This is an obvious and reasonable threshold when documenting technical arguments associated with a complex evaluation like the analysis of hydrogeologic and hydrologic impacts from in-situ geologic recovery of uranium. In addition, guidance documents, while not binding, "describe an approach to compliance with [NRC] rules that is acceptable to the NRC," and so can be informative for that reason. Areva Enrichment Servs., LLC (Eagle Rock Enrichment Facility), CLI-11-04, 74 NRC 1, 8 n.35 (2011).[28] In addition, we find OST's

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[27](...continued)
proceeding. See Crow Butte Renewal, LBP-08-24, 68 NRC at 727. Nor do we here.

[28] It is, of course, evident that a variety of technical and environmental subjects must be addressed in, and a detailed discussion about those subjects generally is required for, an application seeking authorization for a significant nuclear materials facility such as the MEA. It thus is not surprising that the staff, as the agency organization with the primary responsibility for application review, provides various guidance documents, including regulatory guides, standard review plans, and staff-sponsored generic licensing issue analyses, that outline what those subjects are and how they might be treated. In essence, these let an applicant know about the interpretations and expectations that the staff has relative to an application's compliance with the relevant requirements found in title 10 of the Code of Federal Regulations as those regulatory mandates implement the applicable dictates of the Atomic Energy Act, NEPA, and other congressional enactments.

And while it is true that these guidance documents are not binding upon an applicant, it also seems apparent that an applicant that wants to pursue an alternative compliance path, as well as a petitioner that wants to assert in a contention that some compliance mechanism is needed other than that provided for in the guidance document, must provide an explanation as to why this guidance is not sufficient/appropriate. Also, not surprising is that applicants and the
(continued...)

reference to the EPA comments provides some context for, and perspective on, OST's concerns about ISR activities. If nothing else, it shows that OST's misgivings are not an isolated instance.

Sixth, and finally, we conclude that contention 2 presents a genuine dispute between OST and CBR's application on a material issue of law or fact. 10 C.F.R. § 2.309(f)(1)(vi). We have already stated that the issue presented in contention 2 is material to this proceeding. Moreover, we consider the dispute genuine because it is adequately supported, as discussed supra, and, as we explain infra, is specific enough to allow CBR to understand what portions of its application are being challenged, notwithstanding the CBR and staff assertions that the contention is inadmissible because it lacks specificity and fails to point to the specific portions of the application that it is challenging.

While it is true that OST does not cite to any specific portion of the CBR application to support its allegations, this is not an illogical or unreasonable approach in this particular instance. OST is essentially pointing to all sections of the application relating to hydrogeology as the source of its concern about alleged inadequacies that OST perceives as all-encompassing deficiencies in the application. The purpose for the requirement in

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[28](...continued)
staff seek to rely upon an applicant's unchallenged compliance with such staff guidance as dispositive of a contention raising an issue about whether the applicant has met the particular regulatory requirement addressed by that guidance. See Staff OST Answer at 36 (contending contention not admissible as failing to challenge applicant's reliance on NUREG/CR analysis to address tornado hazard concerns). Nor is it surprising that an applicant or the staff would question whether a petitioner has provided adequate support for its claim regarding an applicant's failure to follow staff guidance. See id. at 29 (asserting petitioner has not shown a basis for claim of applicant's noncompliance with staff NUREG standard review plan guidance). What is surprising, however, is the assertion that the claimed failure of an applicant to meet the criteria in a staff guidance document is facially insufficient to support an admissible contention, see id. (asserting alleged failure to meet NUREG criteria, which is not a requirement, is insufficient to support admissible contention), a misdirected averment that is inconsistent with the argument that applicant compliance with such guidance provides a basis for denying a contention.

section 2.309(f)(1)(vi) that petitioners reference specific sections of an application appears to be twofold: (1) to demonstrate to the presiding officer that the petitioner's dispute with the applicant is indeed genuine and thereby assist the presiding officer in determining the scope of a potential evidentiary hearing; and (2) to put the applicant on notice regarding what portions of the application it needs to defend.[29] While contention 2 may not be drafted as clearly as we might have wished, it is sufficient in these circumstances to satisfy the apparent dual purposes of section 2.309(f)(1)(vi).

In making this determination, we do not in any way seek to marginalize the importance of this admissibility prerequisite. Indeed, requiring that a petitioner demonstrate that a contention presents a genuine dispute prevents a licensing board (and the participants) from wasting limited resources on adjudicating frivolous contentions. And requiring that a petitioner point to specific portions of the application allows (1) the Board to determine what issues it must probe at an evidentiary hearing; (2) the applicant to determine what areas of its application it must defend; and (3) the staff to determine what issues it may need to consider and address more carefully in its EIS or safety evaluation report. What we do recognize, however, is that a petitioner can, in certain limited circumstances, put the other participants and the Board on adequate notice of what sections of the application are being challenged even when the petitioner does not explicitly cite those sections in its petition.

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[29] Cf. International Uranium (USA) Corp. (Receipt of Material From Tonawanda, New York), LBP-98-21, 48 NRC 137, 142 n.7 (1998) ("A simple reference to a large number of documents is not enough to put the parties on notice as to the basis for intervention; rather, a petitioner must clearly identify and summarize the facts being relied on [in] the specific portions of the documents cited.") In other words, the purpose of the requirement in 10 C.F.R. § 2.309(f)(1)(v) that a petitioner state with specificity the facts and opinions it intends to rely on at hearing is to put the parties on notice about the arguments the petitioner intends to make at hearing. We see no reason that this same logic would not apply to section 2.309(f)(1)(vi).

Here, a common sense reading of OST's petition makes abundantly clear which sections of CBR's application it is challenging, namely those sections pertaining to CBR's discussion of the hydrogeologic conditions at and around the MEA site and CBR's discussion of fluid confinement at the site. It is apparent to us that OST is challenging section 3.4.3.2, "Aquifer Testing and Hydraulic Parameter Identification Information," and section 3.4.3.3, "Hydrologic Conceptual Model for the Marsland Expansion Area." See 1 ER at 3-40 to -45. Indeed, CBR undercuts its own argument regarding the vagueness of OST's petition, given that CBR's answer indicates the applicant knew exactly which sections to defend. See CBR OST Answer at 12–13 (citing and defending 1 ER at 3-41, 3-44 to -45). So, while OST may not have cited to specific portions of CBR's application, OST nonetheless pled its contention with enough specificity to alert CBR to the portions of its application that it will be called upon to defend.

In addition, while it is clear to us that CBR and the staff both knew which portions of the ER OST has challenged, neither CBR nor the staff has conclusively shown where in the application there is, as OST asserts there should be, a scientifically defensible characterization of onsite and offsite hydrogeology to ensure confinement of the extraction fluids. For instance, CBR makes much of one pumping test performed in the ore zone (i.e., the Chadron Formation) to define the production yield and, according to CBR, to demonstrate hydraulic isolation between the production zone and the overlying aquifer (i.e., the Brule Formation). See id. Yet without referencing any technical support regarding the adequacy of just one pumping test as being sufficient to support its conclusion, CBR declares that because this one finite-duration test showed no discernible responses in the overlying aquifer, that test supports the conclusion that aquifer confinement exists between the hydrogeologic units for continuous ISR operational pumping. Id. at 13. Thus, notwithstanding OST's stated concern about the adequacy of this single test, CBR has not shown that the rate and duration of the pumping test was adequate to

represent the hydraulic stress that will be placed on the Chadron Formation ore zone during long-term operational pumping. Furthermore, CBR has made no attempt to show that this pumping test (or other investigations CBR performed) defines the hydraulic characteristics of the other confining layers and aquifers at the MEA site.[30]

For its part, the staff points to the fact that

> 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.

Staff OST Answer at 29. While this summary description of the cited materials is accurate, the staff provides no explanation of how these descriptions are sufficient to characterize the site adequately for assessing the viability of ISR operations. Nor could the staff likely make such a representation at this point given it is just beginning its technical review of the application.

In sum, it is apparent to us that both CBR and the staff (1) were adequately apprised of those portions of the application that OST was challenging; and (2) have not presented any information that persuasively counters the notion that this OST issue statement presents a genuine dispute with the application. As such, we must conclude that contention 2 meets the requirements of section 2.309(f)(1)(vi) as well.

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[30] We think it worth noting that added to this is the circumstance that six additional items presented by CBR as evidence for confinement seem to support rather than refute OST's arguments. CBR's use of imprecise qualifiers such as "[hydraulic head data] <u>indicate</u> strong vertically downward gradients," "particle size distribution results <u>suggest</u> a maximum <u>estimated</u> hydraulic conductivity," "vertical flow is <u>expected</u> to be low," and "[vertical conductivity value] is <u>likely to be</u> even lower" are nothing more than general, provisional statements that lack technical support. CBR OST Answer at 13 (emphasis added). Indeed, these broad-based statements seem to raise more questions about site characterization than they answer and suggest the need for a merits-based inquiry on the matter of extraction fluid confinement that is best achieved through the hearing process.

Having thus reviewed the various elements of 10 C.F.R. § 2.309(f)(1), we find that contention 2 is admissible as satisfying those tenets. Contention 2 raises a genuine material dispute with CBR's application by appropriately posing several complex technical issues concerning the adequacy of the ER's hydrogeologic characterization of the MEA site and its environs that cannot be resolved at this stage of the adjudicatory process. Instead, the matters raised in OST contention 2 must await further consideration prior to their resolution, either by summary disposition or an evidentiary hearing during which the Board can obtain and perform a merits-based review of testimony from the participants' expert witnesses.

c. Contention 3: Inadequate Analysis of Ground Water Quantity Impacts

> The application violates the National Environmental Policy Act in its failure to provide an analysis of the ground water quantity impacts of the project. Further, the application presents conflicting information on ground water consumption such that the water consumption impacts of the project cannot be accurately evaluated. These failings violate 10 C.F.R. § 40.32(c), 40.32(d), and 51.45.

DISCUSSION: OST Petition at 18–19; CBR OST Answer at 14–16; Staff OST Answer at 30–32; OST Reply at 22–23.

RULING: Inadmissible, in that this contention and its foundational support fail to present factual allegations and/or expert opinion necessary to support this contention and are insufficient to show that a genuine dispute on a material factual or legal issue exists so as to warrant admission of the contention. See 10 C.F.R. § 2.309(f)(1)(v), (vi); supra section II.B.1.c., d.

With this contention, OST contests the failure of CBR to evaluate groundwater impacts from ISR activities at the MEA, claiming that CBR presented conflicting information on the quantity of groundwater consumption. Declaring that the opinion of Dr. LaGarry sets forth "the primary concerns related to the application'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," OST makes the claim that the application fails to meet agency NEPA requirements by not providing reliable and accurate information on groundwater consumption and so fails to establish that CBR procedures are adequate to protect human health and safety and the environment. OST Petition at 19.

CBR and the staff maintain, however, that this contention fails to demonstrate the requisite material dispute with the application. Both point out that the ER does, in fact, address groundwater consumption. The staff notes that "CBR discusses groundwater quantity (consumption) impacts in Section 7.2.5.1 of the TR ([4] TR at 7-12) and Section 4.4 of the ER ([4] ER at 4-9)," Staff OST Answer at 30, while CBR declares that the ER states that the quantified groundwater consumption from ISR operation of 0.5 to 2.0 percent of the total mining flow is estimated to have "minimal" drawdown effect on the Chadron aquifer, CBR OST Answer at 15 (citing 4 ER at 4-10) (ADAMS Accession No. ML12160A518). Both CBR and the staff also declare that Dr. LaGarry's expert opinion is silent on the issue of water consumption, the staff noting in particular that OST has not provided the requisite support for its claim. According to the staff, OST does not explain how Dr. LaGarry's description of the stratigraphy has any relation to this contention in that the LaGarry opinion does not address groundwater quantity impacts at all. And while again recognizing, as with OST contention 2, that the Dewey-Burdock board admitted a contention identical to OST contention 3, the staff nonetheless asserts that the expert in that case identified issues with water usage and cited specific portions of the application with which he disagreed, something the staff asserts OST has failed to do in this proceeding. See Staff OST Answer at 31–32.

OST has failed to point out where in the CBR application the alleged discrepancy regarding groundwater quantity resides. Indeed, OST's cursory reference in its contention to

potential groundwater quantity impacts is not substantiated by other information either in OST's petition or in its expert's written opinion. In its reply, OST does argue that both the CBR and staff answers regarding the admissibility of this contention go to the merits of the issue, rather than the admissibility of the proffered contention. This recognized precept, however, does not excuse a petitioner from providing a sound basis for its contention in its petition or in an expert affidavit or other supporting information that specifically corroborates the contested issues framed by the contention. See Luminant Generation Co., LLC (Comanche Peak Nuclear Power Plant, Units 3 and 4), CLI-11-9, 74 NRC 233, 244 (2011). As a consequence, a mere allegation of conflicting application information on groundwater quantity consumption at the site without providing some specific examples of this conflict with reference to the application is insufficient to demonstrate the requisite material dispute. Certainly, Dr. LaGarry's mention of the potential ISR impacts to groundwater quality in the context of the complex hydrogeologic setting of the MEA site does not substitute for the lack of any apparent discussion in his opinion about groundwater quantity (i.e., consumption) impacts associated with ISR activities at the site.

For these reasons, OST's petition to admit contention 3 dealing with groundwater quantity impacts is denied for failing to provide adequate supporting information and to show a material dispute as required by 10 C.F.R. § 2.309(f)(1)(v), (vi).

d. Contention 4: Requiring the Tribe to Formulate Contentions before an EIS is Released Violates NEPA

> The procedure used by NRC to consider the Crow Butte application fails to satisfy the public participation and informed decision-making mandates of NEPA. The procedural requirements of NEPA are designed to benefit those who participate in agency decision-making processes and to require that the agency take a "hard look" at the impacts, alternatives, mitigation measures, and other aspects of a federal action at the earliest stages of the decision process, in recognition that when a "decision is made without the information that NEPA seeks to put before the decision maker, the harm that NEPA seeks to prevent

> occurs." See: Sierra Club v. Marsh, 872 F.2d 497, 500 (1st Cir. 1989) quoting Commonwealth of Massachusetts v. Watt, 716 F.2d 946 at 953 (1st Cir. 1983)[.]
>
> By contrast, the procedure used in the present proceedings denies the Tribe and the NRC the information that a NEPA analysis provides. Importantly, this interdisciplinary analysis and information is provided during the NEPA process by the applicant, staff, and members of the public. All of these sources of information are recognized by NEPA, but the Tribe is prejudiced here when significant sources of information are not available until the NRC has taken final action to accept or deny its contentions. It is of no consequence that the NRC provides an opportunity to seek permission to pursue new or rejected contentions later in the proceedings, based on information revealed in the NEPA analysis. See: Id. ("Once large bureaucracies are committed to a course of action, it is difficult to change that course - even if new, or more thorough, NEPA statements are prepared and the agency is told to 'redecide.'").

DISCUSSION: OST Petition at 19–21; CBR OST Answer at 16; Staff OST Answer at 32–33; OST Reply at 23–27.

RULING: Inadmissible, in that this contention and its foundational support raise matters that impermissibly challenge a Commission rule and so are outside the scope of this proceeding. See 10 C.F.R. § 2.309(f)(1)(iii); supra section II.B.1.a., b.

In support of this contention, OST asserts that NEPA's procedural requirements are intended to benefit those participating in agency decisionmaking processes as well as to ensure the agency has taken a "hard look" at the impacts, alternatives, and mitigation measures associated with a proposed agency action and that an agency decision regarding such an action is deficient if it is made without the information that the NEPA process is intended to generate. According to OST, however, the agency's procedural construct for submitting contentions raising NEPA-related challenges to a proposed licensing action fails to fulfill these fundamental NEPA principles. To meet the Part 2 mandates that govern the timeliness and admissibility of any contentions raising NEPA-related matters, OST acknowledges it generally is

required to contest the applicant's ER, as opposed to the staff's draft or final EIS. But this procedural scheme, OST maintains, is both a waste of the agency and OST resources and counterproductive to the NEPA purpose of providing the agency's environmental decisionmaking process with all significant relevant information.

We conclude, however, that, given the current structure of the agency's adjudicatory process, this OST claim clearly is not litigable in this proceeding. For the reasons asserted by CBR and the staff, and as the Dewey-Burdock licensing board recognized relative to an essentially identical OST-lodged contention, see Dewey-Burdock, LBP-10-16, 72 NRC at 435–38, this contention is a challenge to the agency's rules, specifically 10 C.F.R. § 2.309(f)(2), that, in the absence of a section 2.335 waiver request, which OST has not submitted, this Board cannot consider. OST thus must avail itself of another agency process, i.e., a rulemaking petition, see 10 C.F.R. § 2.802, if it wishes to pursue this concern.[31]

e. Contention 5: Failure to Consider Connected Actions

> The Crow Butte expansion proposal to further conduct ISL operations activities is being considered by multiple federal agencies. However, NRC, the lead agency for purposes of NEPA

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[31] In the NEPA-realm, for licensing adjudications conducted under what are, for all practical purposes, the default hearing procedures of 10 C.F.R. Part 2, Subpart L, it does not seem untoward to consider whether there are avenues to eliminate what has become, with the truncated Subpart L discovery process, a virtual adjudicatory "dead zone" during the often-lengthy period between the admission of ER-based contentions and the staff's issuance of a draft EIS. One way would be to have any NEPA-based contentions first filed after the staff's draft EIS is issued. This change, which seemingly would go a long way toward addressing OST's concern about ensuring more timely and cost-effective intervenor input, also could make the hearing process more efficient by eliminating the oft-invoked need to amend ER-focused contentions based on the draft EIS, while still affording the staff some opportunity to account in its final EIS for any issues raised in an adjudicatory proceeding. Nor would such a revision appear to run afoul of the general principle that the application, not the staff's review, is to be the focus of a licensing adjudication, given that the responsibility for fulfilling NEPA's requirements ultimately rests with the agency, not the applicant. See Pac. Gas & Elec. Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-728, 17 NRC 777, 807, review denied, CLI-83-32, 18 NRC 1309 (1983). Be that as it may, if this is a matter OST wishes to pursue further, it must do so in the rulemaking context.

> - has failed [to] engage these other agencies and therefore has failed to comply with the "action-forcing" mandate and purpose of NEPA.

DISCUSSION: OST Petition at 21–22; CBR OST Answer at 17–18; Staff OST Answer at 33–35; OST Reply at 27–28.

RULING: Inadmissible, in that this contention and its foundational support fail to present factual allegations and/or expert opinion necessary to support this contention and are insufficient to show that a genuine dispute on a material factual or legal issue exists so as to warrant admission of the contention. See 10 C.F.R. § 2.309(f)(1) (v), (vi); supra section II.B.1.c., d.

Although this contention is worded generally, it is apparent from the supporting basis information supplied by OST that it has a very specific focus, which is what is of interest to us in determining its admissibility. See Crow Butte N. Trend, CLI-09-12, 69 NRC at 553 (observing that to define scope of admitted contention properly, board should have specified which bases were admitted); see also Pub. Serv. Co. of N.H. (Seabrook Station, Units 1 and 2), ALAB-899, 28 NRC 93, 97 (1988) ("The reach of a contention necessarily hinges upon its terms coupled with its stated bases."), aff'd sub nom. Mass. v. NRC, 924 F.2d 311 (D.C. Cir. 1991). And the focus of this OST concern is CBR's plan to employ a deep injection well for disposal of hazardous materials, which OST asserts is a "connected action" to the MEA, along with the responsibility of the NRC and the EPA to assess this proposal as part of their respective NEPA review and purported well permitting processes.

Initially, in contesting this contention's admissibility, both CBR and the staff make the point that it is the State of Nebraska Department of Environmental Quality (NDEQ), rather than EPA, that is responsible for issuing a Class I underground injection control (UIC) permit that would authorize CBR to dispose of facility waste using a deep injection well. Also, according to

CBR, the possibility of a deep injection well being utilized for waste disposal and its potential impacts is discussed in various portions of its ER and TR, thereby nullifying what is essentially a contention of omission. Finally, according to the staff and CBR, like the NHPA section 106 cultural consultation contentions rejected by the Commission in the Crow Butte North Trend and Crow Butte Renewal proceedings and a similar OST contention that was ruled inadmissible by the Dewey-Burdock licensing board, this contention is essentially a challenge to the staff's review process rather than a challenge to the ER and so must await, at a minimum, the issuance of the staff's initial environmental review document.

As is reflected in ER Table 1.5-2, which is cited by OST as support for its contention, see OST Petition at 22 (citing 1 ER at Table 1.5-2 (Environmental Approvals for Crow Butte Project)), and consistent with section 147.1401 of title 40 of the Code of Federal Regulations as it implements EPA's authority under section 1422 of the Safe Drinking Water Act, 42 U.S.C. § 1422, the NDEQ is the EPA-approved permitting authority for Class I injection wells within the state and is the regulatory entity from which CBR must seek and obtain the UIC permit necessary to allow CBR to operate a deep injection well at the MEA site. Thus, the OST premise that EPA has some type of NEPA responsibility in connection with the UIC permitting process that NRC must seek to incorporate into this proceeding is mistaken and fails to allege a material dispute with the CBR application. Moreover, to the degree that OST's contention might be considered to be challenging either the omission from, or the adequacy of, the ER's impacts analysis regarding the proposed deep disposal well on the MEA site, neither of these claims would provide a basis for contention admission. The ER does, in fact, contain such an analysis, see, e.g., 4 ER at 4-11, 4-45, and neither OST's contention nor the supporting technical opinion of Dr. LaGarry makes any attempt to contravene any part of that analysis.

Finally, as is reflected in the determination of the Dewey-Burdock board on an almost identical contention in that proceeding, Dewey-Burdock, LBP-10-16, 72 NRC at 438-40, as well as the recent consideration by the Levy combined license board of a post-draft EIS challenge to the staff's reliance on a state water usage permitting process relative to the adequacy of the staff's NEPA finding on the environmental impacts of potential power reactor facility groundwater usage, see Progress Energy Fla., Inc. (Levy County Nuclear Power Plant, Units 1 and 2), LBP-13-4, 77 NRC __, __ n.77 (slip op. at 85 n.77) (Mar. 26, 2013), any OST NEPA-based challenge to the efficacy of, or the staff's reliance on, the Nebraska DEQ UIC permitting process relative to the staff's environmental review, must await the staff's initial environmental review document.[32]

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

> The Environmental Report provides an encyclopedic recital of considerable irrelevant information, but fails to provide information on reasonably foreseeable impacts of the proposal. ER 3-66[.] As one example, although tornado strikes are common occurrences in the region, there is no recognition of this

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[32] In that regard, the Board notes that on the staff's website page describing its environmental and safety review schedules for this proceeding, see Application Review Schedule for Marsland, http://www.nrc.gov/materials/uranium-recovery/license-apps/marsland/marsland-schedule.html (last visited May 10, 2013), the staff indicates that its initial environmental review document may be a draft environmental assessment (EA) rather than a draft supplemental EIS, as has been issued relative to a number of other ISR facilities, see, e.g., Office of Federal and State Materials and Environmental Management Programs, NRC, [Draft EIS] for the Ross ISR Project in Crook County, Wyoming; Supplement to the Generic [EIS] for In-Situ Leach Uranium Milling Facilities, NUREG-1910 (supp. 5 Mar. 2013) (ADAMS Accession No. ML13078A036). As 10 C.F.R. § 51.31 makes clear, such an assessment can be the basis of a finding under section 51.32 that the proposed agency action will not have a significant effect upon the environment such that an full-blown EIS (or supplemental EIS) is not required. And, of course, a contention challenging the adequacy/propriety of a staff determination to prepare an EA in lieu of a supplemental EIS would need to await the issuance of the draft EA as well. See Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant), LBP-00-19, 52 NRC 85, 93–98 (2000) (admitting post-EA submitted contention challenging staff's determination to issue EA rather than EIS).

> reasonably foreseeable impact, even though it is coupled with catastrophic consequences. See http://www.crh.noaa.gov/unr/?n=svrtor NOAA Rapid City regarding tornado preparedness in region surrounding Rapid City, South Dakota). This is but one example of the applicant's failure to provide a complete Environmental Report and the NRC failure to comply with the NEPA requirements at the earliest stages of the proceedings.

DISCUSSION: OST Petition at 22–24; CBR OST Answer at 18–19; Staff OST Answer at 35–37; OST Reply at 28–29.

RULING: Inadmissible, in that this contention and its foundational support fail to present factual allegations and/or expert opinion necessary to support this contention and are insufficient to show that a genuine dispute on a material factual or legal issue exists so as to warrant admission of the contention. See 10 C.F.R. § 2.309(f)(1) (v), (vi); supra section II.B.1.c., d.

Citing a 1991 incident in which a tornado struck and damaged a number of buildings at the now-shuttered-and-being-decommissioned Fansteel rare earths extraction facility in Oklahoma, OST asserts that the possibility that a tornado might strike the MEA site is a foreseeable one and that the CBR ER fails to discuss the impacts of such an event. Both CBR and the staff maintain, however, that the ER does have a discussion of the impacts of a tornado strike, so that this attempt by OST to gain admission of a contention of omission is unavailing.

The true nature of this issue statement as a contention of omission is apparent from the last sentence of its basis, as provided by OST:

> Where it is reasonably foreseeable that a tornado could strike the proposed ISL facility and damage the control facilities, with the associated winds dispersing toxic and radioactive materials across the landscape, the NRC and the applicant have ignored an important, and foreseeable, environmental impact with potentially catastrophic consequences.

OST Petition at 24. Yet, as both CBR and the staff point out, within the CBR ER discussion of "Natural Disaster Risk," the possibility of tornadic dispersal of toxic and radioactive materials has not been ignored. In that regard, the ER states 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 licensees follow industry best practices during design and construction of chemical facilities. CBR is committed to following these standards.

4 ER at 4-42; see also 4 TR at 7-36 (ADAMS Accession No. ML12160A531). There thus is a discussion in the ER (and the CBR TR as well) regarding the possibility of both chemical and radiological impacts from a tornado, the nature of which it indicates are described in more detail in NUREG/CR-6733, a study performed at the behest of the staff by the Center for Nuclear Waste Regulatory Analysis (CNWRA) to define the risks associated with ISR facility operations, see CNWRA, A Baseline Risk-Informed, Performance-Based Approach for In Situ Leach Uranium Extraction Licensees, NUREG/CR-6733 (Sept. 2001) (ADAMS Accession No. ML012840152) [hereinafter NUREG/CR-6733]. Therefore, OST contention 6 cannot move forward as a contention of omission. Further, even if considered as a contention attempting to challenge the adequacy of this ER discussion on tornado impacts, other than to reference the Fansteel event that involved an entirely different type of facility, OST has made no effort to contest the substance of the ER discussion, or the associated NUREG analyses, of either the

chemical or radiological impacts of a tornado strike at an ISR facility.[33] As a result, this contention cannot be admitted.

III. PROCEDURAL/ADMINISTRATIVE MATTERS

Having thus determined in section II above that petitioner OST has established standing and has set forth at least one admissible contention, OST is admitted as a party to this proceeding. Consequently, below we set forth procedural guidance for further litigation regarding OST's admitted contentions.

A. General Guidance

Given there was no request in OST's hearing petition that the Board ask the Commission for permission to conduct this proceeding under the procedures specified in 10 C.F.R. Part 2, Subpart G, see Crow Butte N. Trend, CLI-09-12, 69 NRC at 571–73, unless all parties agree that this proceeding should be conducted pursuant to 10 C.F.R. Part 2, Subpart N, this proceeding will be conducted in accordance with the procedures of 10 C.F.R. Part 2, Subparts C and L. Assuming all the parties currently do not consent to conducting this proceeding under Subpart N, the parties should hold a conference within ten days of the date of this issuance to discuss their particular claims and defenses and the possibility of settlement or

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[33] In the NUREG/CR-6733 impacts analysis referenced in the ER, CNWRA declares the possible reactivity of dispersed stored chemicals on an ISR site or the exposure to dispersed yellowcake from 110 55-gallon drums are the bounding tornado-generated accident sequences that need to be considered for an ISR site. See NUREG/CR-6733, at 4-55 to -56. To contest the merits of this impacts analysis, among other things OST could have challenged whether, relative to the MEA site, the impacts outlined in the CNWRA study and, in the case of a possible chemical dispersal, proposed mitigation measures, had, in fact, been correctly determined or whether those chemical and radiological accident sequences indeed are bounding. OST, however, has made no substantive challenge to the CNWRA analysis upon which CBR relied in its ER.

resolution of any part of this proceeding and to make arrangements for the required disclosures under 10 C.F.R. § 2.336(a).[34]

The Board will oversee the discovery process through status reports and/or conferences, and expects that each of the parties will comply with the process to the maximum extent possible, with the understanding that failing to do so will result in appropriate Board sanctions.[35]

Pursuant to 10 C.F.R. § 2.332(d), the Board is to consider the staff's projected schedule for completion of its safety and environmental evaluations in developing the hearing schedule. Accordingly, on or before Friday, May 17, 2013, the staff shall submit to the Board through the E-Filing system a written estimate of its current projected schedule for completion of its safety and environmental evaluations, including, but not limited to, its best estimate of the dates for issuance of any open item and final safety evaluation reports and the draft and final supplemental EIS or EA evaluations relative to the MEA facility.

B. Prehearing Conference to Establish General Schedule for the Proceeding

The Board thereafter will conduct a prehearing conference to discuss initial discovery disclosures, scheduling, and other matters on a date to be established by the Board in a subsequent order. The parties should be prepared to address the following matters at the prehearing conference:

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[34] Among the items to be discussed is whether the staff's section 2.336(b) hearing file can be provided electronically via the NRC web site sooner than thirty days from the date of this issuance.

[35] In this regard, when a party claims a privilege and withholds information otherwise discoverable under the rules, the party shall expressly make the claim and describe the nature of what is not being disclosed to the extent that, without revealing what is sought to be protected, other parties will be able to determine the applicability of the privilege or protection. The claim and identification of privileged materials must occur within the time provided for disclosing withheld materials. See 10 C.F.R. § 2.336(a)(3), (b)(5).

1. Estimates (discussed during the parties' conference) regarding when this case will be ready for an evidentiary hearing.
2. Time limits for updating mandatory disclosures under 10 C.F.R. § 2.336(d) and for updating the hearing file under 10 C.F.R. § 2.1203(c).
3. Whether any party intends to assert a privilege or protected status for any information or documents otherwise required to be disclosed herein and, if so, proposals for the submission of privilege logs under 10 C.F.R. § 2.336(a)(3), (b)(5), procedures and time limits for challenges to such assertions, and the development of a protective order and nondisclosure agreement.
4. Whether any of the parties anticipates submitting a motion for summary disposition regarding any of the admitted contentions and the timing and page length of such a motion and responses thereto.
5. Time limits for various evidentiary hearing-related filings, including:
    a. The final list of potential witnesses for each contention pursuant to 10 C.F.R. § 2.336(a)(1).
    b. Any unanimous request, pursuant to 10 C.F.R. § 2.310(h), to handle any specific contention under 10 C.F.R. Part 2, Subpart N.
    c. Any motion for cross-examination under 10 C.F.R. § 2.1204(b).
    d. The parties' initial written statements of position and written direct testimony with supporting affidavits pursuant to 10 C.F.R. § 2.1207(a)(1), along with consideration of (i) whether the parties should file simultaneously or sequentially, and, if sequentially, which party should file first; and (ii) the timing of filing of written responses, rebuttal testimony, and in limine motions relative to direct or rebuttal testimony.

6. The items outlined in 10 C.F.R. § 2.329(c)(1)–(3).
7. The possibility of settling any of the contentions, in whole or in part, including the status of any current settlement negotiations and the utility of appointing a settlement judge pursuant to 10 C.F.R. § 2.338(b).
8. Whether a site visit would be appropriate and helpful to the Board in the resolution of the contentions.
9. Any other procedural or scheduling matters the Board may deem appropriate.

IV. CONCLUSION

For the reasons set forth above, we conclude that in challenging CBR's license amendment application for authorization to construct and operate the MEA ISR satellite facility, although the individuals and organizations that constitute the Consolidated Petitioners have failed to establish their standing as of right to intervene in this proceeding, petitioner OST has demonstrated its standing and has provided two admissible contentions. As a consequence, the CP intervention petition is denied, while OST's hearing request is granted and it is admitted as a party to this proceeding. The text of OST's admitted contentions is set forth in Appendix A to this decision.

For the foregoing reasons, it is this tenth day of May 2013, ORDERED, that:

1. Having established its standing to participate in this proceeding, with respect to the contentions specified in paragraph three below, the hearing request of OST is granted and that petitioner is admitted as a party to this proceeding.

2. Having failed to establish their standing to participate in this proceeding, the hearing request of petitioners Antonia Loretta Afraid of Bear Cook, Bruce McIntosh, Debra White Plume, Western Nebraska Resources Council (WNRC), and Aligning for Responsible Mining (ARM), referred to jointly as the Consolidated Petitioners, is denied.

3. The following of OST's contentions are admitted for litigation in this proceeding: contention 1, in part, and contention 2.

4. The following of OST's contentions are rejected as inadmissible for litigation in this proceeding: contention 1, in part, contention 3, contention 4, contention 5, and contention 6.

5. The parties are to undertake the administrative/procedural actions required by section III above in accordance with the schedule established therein.

6. In accordance with the provisions of 10 C.F.R. § 2.311, as it rules upon intervention petitions, any appeal to the Commission from this memorandum and order must be taken within

twenty-five (25) days after it is served, except with respect to an appeal regarding selection of a hearing procedure, which must be filed within ten (10) days after this issuance is served.

THE ATOMIC SAFETY
AND LICENSING BOARD

/RA/

G. Paul Bollwerk, III, Chairman
ADMINISTRATIVE JUDGE

/RA/

Richard E. Wardwell
ADMINISTRATIVE JUDGE

/RA/

Thomas J. Hirons
ADMINISTRATIVE JUDGE

Rockville, Maryland

May 10, 2013

APPENDIX A

ADMITTED CONTENTIONS

1. OST Contention 1: Failure to Meet Applicable Legal Requirements Regarding Protection of Historical and Cultural Resources

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

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

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); the National Environmental Policy Act; and NUREG-1569 section 2.6. 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 the National Environmental Policy Act.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of CROW BUTTE RESOURCES, INC. In-Situ Leach Uranium Recovery Facility, Crawford, Nebraska (License Amendment – Marsland Expansion Area)	)))))))))	 Docket No. 40-8943-MLA-2

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **MEMORANDUM AND ORDER (Ruling on Intervention Petitions) – LBP-13-6** have been served upon the following persons by Electronic Information Exchange.

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[Original signed by Herald M. Speiser]
Office of the Secretary of the Commission

Dated at Rockville, Maryland
this 10th day of May, 2013