

August 6, 2014

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

NRC STAFF'S MOTION FOR SUMMARY DISPOSITION OF CONTENTION 1

Pursuant to 10 C.F.R. § 2.1205 and the Atomic Safety and Licensing Board's (Board's) April 30, 2014 Revised General Schedule,¹ the staff of the U.S. Nuclear Regulatory Commission (Staff) submits this motion for summary disposition of Oglala Sioux Tribe's (OST) Contention 1, as admitted by the Board.² Attached to this motion is a separate Statement of Material Facts (Staff Attachment 1), to which the Staff submits there is no genuine issue to be heard.

Summary disposition is warranted on the grounds that there exists no genuine issue of material fact relevant to the contention, and, under applicable regulations, the Staff is entitled to a decision as a matter of law. Specifically, Contention 1 as admitted by the Board is a challenge to Crow Butte Resource's (CBR) Environmental Report's (ER) discussion of affected historic and cultural resources, including the proposed action's impacts on historic and cultural resources. The ER's discussion of historic and cultural resources has since been superseded by publication of the cultural resources sections of the Staff's draft Environmental Assessment

¹ Memorandum and Order (Revised General Schedule) (April 30, 2014) ("Revised General Schedule").

² As required under 10 C.F.R. § 2.323(b), counsel for the Staff contacted counsel for the Oglala Sioux Tribe and Crow Butte Resources in an effort to resolve the issues raised in this motion. Counsel for Crow Butte Resources stated that they would support the motion. Counsel for the OST, Ms. Cindy Gillis, replied by email that Staff counsel should contact the in-house counsel for the Tribe. Staff counsel made several attempts to reach the OST in-house counsel by telephone (no email address was provided) but was unsuccessful. Staff counsel also responded to Ms. Gillis asking to consult with her, as she is the attorney of record for the OST in this proceeding, but did not receive a response.

(EA). Because OST did not amend Contention 1 to challenge the new information in the cultural resources sections of the draft EA, there is no longer any genuine issue of material fact relative to Contention 1. The Staff is therefore entitled to summary disposition as a matter of law, and the Board should dismiss Contention 1.³

BACKGROUND

In May 2012, CBR submitted an application for a license amendment authorizing the Marsland Expansion Area (MEA) facility.⁴ Along with its application, CBR submitted an ER addressing the proposed MEA facility's impact on the environment. The ER, which is required by NRC regulations in 10 C.F.R. Part 51, helps inform the Staff's independent review of a license application and thereby helps the Staff meet the requirements of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. §§ 4321 *et seq.*

On January 29, 2013, OST filed a petition to intervene and request for hearing in which they proffered six contentions.⁵ The Board admitted, in part, two contentions, as reformulated

³ The Staff recognizes that, while this submittal is styled as a motion for summary disposition, which, if granted, generally results in a merits ruling on the contention at issue, the requested Board ruling is more akin to a motion to dismiss. The licensing board in the Strata-Ross proceeding recently issued a ruling granting summary disposition in similar circumstances, explaining that a ruling of dismissal in response to a motion for summary disposition "is not significant as a procedural matter because these two types of motions can be treated interchangeably as is appropriate to the circumstances that exist relative to the parties' pleadings and the record." *Strata Energy, Inc.* (Ross In Situ Recovery Uranium Project), Memorandum and Order (Ruling on Summary Disposition Motion Regarding Environmental Contention 4/5A) at 13 n.8 (July 25, 2014) (citing *Shaw Areva MOX Services* (Mixed Oxide Fuel Fabrication Facility), LBP-12-2, 75 NRC 159, 162 (2012)).

⁴ "License No. SUA-1534, Docket Number 40-8943, Marsland Expansion Area License Amendment Application" (ADAMS Accession No. ML12160A512) (May 16, 2012). The application's supporting documentation can be found in ADAMS by searching under Docket No. 04008943. The Technical Report (TR), Environmental Report (ER), and cultural resources investigation reports are available on the NRC's public website at <http://www.nrc.gov/materials/uranium-recovery/license-apps/marsland/marsland-app-docs.html>.

⁵ Petition to Intervene and Request for Hearing of the Oglala Sioux Tribe (Jan. 29, 2013) (Petition).

by the Board in its May 10, 2013 order.⁶ As admitted by the Board, Contention 1 challenges the Application for:

fail[ing] 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.⁷

On April 30, 2014, the Board issued its Revised General Schedule, noting that “the staff will issue the cultural resources section of the draft EA, along with supporting information, for public comment in June 2014.”⁸ The Board stated that “given the pendency of [OST’s] admitted contention 1 regarding the protection of historical and cultural resources, we will provide an opportunity for OST to submit any new/amended contentions relative to the staff’s draft EA/FONSI cultural resources submission”⁹ Thus, the Board ordered any new or amended contentions concerning the cultural resources sections of the draft EA to be filed by July 30, 2014.¹⁰ No new or amended contentions were filed by the July 30 deadline.

On June 30, 2014, the Staff made the cultural resources sections of the draft EA available on its website¹¹ and notified the Board and parties of their availability.¹² Section 3.6 of the draft EA contains the Staff’s description of the affected environment for historic and cultural

⁶ *Crow Butte Resources, Inc.* (Marsland Expansion Project), LBP-13-6, 77 NRC 253, 286-88, 306 (2013).

⁷ *Id.* at 306.

⁸ Revised General Schedule at 1.

⁹ *Id.* at 2.

¹⁰ *Id.* Appendix A at 1.

¹¹ <http://www.nrc.gov/materials/uranium-recovery/license-apps/marsland/section106-marsland.html> (Draft Cultural Resource Sections). This website also provided as supporting information redacted versions of the field survey report by the Crow and Santee Sioux Nations and the NRC’s report on a follow-up field survey of sites identified in the Crow/Santee Sioux report.

¹² Letter from Marcia J. Simon, NRC Staff Counsel, to Licensing Board (June 30, 2014).

resources at the MEA, and includes discussion of cultural resources identified at the site in Sections 3.6.3 and 3.6.5.¹³ In particular, Section 3.6.5 discusses places of religious or cultural significance to Native American tribes.¹⁴

As described in Section 3.6.5.2 of the draft EA, as part of the Staff's consultation efforts under Section 106 of the National Historic Preservation Act (NHPA), the Staff offered 21 Native American tribes, including the OST, an opportunity to visit the MEA site in November-December 2012 to conduct field surveys to identify cultural resources of interest to the tribes.¹⁵ Two tribes, the Santee Sioux Nation ("SSN") and the Crow Nation of Montana ("CN") accepted this opportunity and conducted a field survey during the indicated time period.¹⁶ These two tribes prepared a report ("SSN Report") for the NRC Staff documenting the results of their survey, which are discussed in Section 3.6.5.2 of the draft EA. On April 2, 2013, the NRC sent an unredacted version of this report to the consulting tribes, including the OST.¹⁷ In the summer of 2013, the NRC staff sent a cultural resources expert to the MEA site to conduct a follow-up field survey to collect additional documentation of the cultural resources identified in the SSN Report.

¹³ Draft Cultural Resource Sections at 1-12.

¹⁴ *Id.* at 10-12.

¹⁵ *Id.* at 12; see also Letter from Kevin Hsueh to THPOs "Continuation of Section 106 Consultation for the Proposed Crow Butte In-Situ Uranium Recovery (ISR) License Renewal, North Trend, Marsland, and Three Crow Projects" (Oct. 31, 2012) (ADAMS Accession No. ML12311A501).

¹⁶ Draft Cultural Resources Sections at 12; see also Letter from Kevin Hsueh to THPOs, "Update of Section 106 Consultation for the Proposed Crow Butte In-Situ Uranium Recovery (ISR) License Renewal, North Trend, Marsland, and Three Crow Projects" at 2 (Jan. 3, 2013) (ADAMS Accession No. ML13303A280).

¹⁷ Draft Cultural Resources Sections at 12; see also Letter from Kevin Hsueh to Richard Iron Cloud, Oglala Sioux Tribe Tribal Historic Preservation Office, "Update of Section 106 Consultations and Issuance of Traditional Cultural Properties Survey Completed by the Santee Sioux Nation and the Crow Nation for the Proposed Crow Butte In-Situ Uranium Recovery License Renewal, North Trend, Marsland and Three Crow Projects for Tribal Review and Comments" (Apr. 1, 2013) (ADAMS Accession No. ML13091A139). A redacted version of the report was placed in ADAMS on April 3, 2013 (ADAMS Accession No. ML13093A123).

As discussed in Section 3.6.5.2 of the draft EA, the NRC prepared a report based on this survey and sent an unredacted version to the consulting tribes, including the OST, on May 30, 2014.¹⁸

Sections 4.8 and 4.13 of the draft EA contain discussions of impacts on historic and cultural resources.¹⁹ These discussions incorporated and considered the information obtained from the SSN Report and the NRC follow-up field survey, and determined that the impacts, including cumulative impacts, on historic and cultural resources would be SMALL.²⁰

DISCUSSION

1. Legal Standards

The hearing in this matter is being conducted under the procedures in Subpart L of 10 C.F.R. Part 2. The standards for summary disposition under Subpart L are the same as those in Subpart G, *Rules for Formal Adjudications*.²¹ A party is entitled to summary disposition as to all or any part of the matters involved in the proceeding “if the filings in the proceeding, depositions, answers to interrogatories, and admissions on file, together with the statements of the parties and the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a decision as a matter of law.”²²

The movant bears the initial burden of showing that there is no genuine issue as to any material fact, which it attempts to do by means of a required statement of material facts not at issue and any supporting materials that accompany its dispositive motion.²³ The moving party

¹⁸ Draft Cultural Resources Sections at 12. A redacted version of the report was placed in ADAMS on the same date. *Id.*

¹⁹ Draft Cultural Resource Sections at 13-19.

²⁰ *Id.*

²¹ 10 C.F.R. § 2.1205(c) (“In ruling for motions for summary disposition, the presiding officer shall apply the standards for summary disposition set forth in subpart G of this part”).

²² 10 C.F.R. § 2.710(d)(2).

²³ *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-99-23, 49 NRC 485, 491 (1999).

need not, however, submit affidavits with its motion.²⁴ If the opposing party fails to counter each adequately supported material fact with its own statement of material facts in dispute and supporting materials, the movant's facts will be deemed admitted.²⁵ "[T]he mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact."²⁶ Also, "[o]nly disputes over facts that might affect the outcome' of a proceeding would preclude summary disposition."²⁷ Where a contention presents essentially a legal issue, summary disposition may be "the appropriate vehicle for resolution" of the contention.²⁸

In addition, the Commission will reject attempts to add new arguments in an answer to a summary disposition motion that could have been raised earlier.²⁹ In *Pilgrim*, the new arguments were rejected because they were not fairly encompassed by the contention as originally pled and admitted and because the intervenor did not attempt to amend the contention to add the new arguments.³⁰

²⁴ 10 C.F.R. § 2.1205 does not mention affidavits. The NRC's summary disposition rule for formal adjudications in Subpart G of Part 2 states that "[a]ny party to a proceeding may move, *with or without supporting affidavits*, for a decision by the presiding officer in that party's favor as to all or any part of the matters involved in the proceeding." 10 C.F.R. § 2.710(a) (emphasis added).

²⁵ *Advanced Medical Systems, Inc.* (One Factory Row, Geneva, Ohio), CLI-93-22, 38 NRC 98, 102-03 (1993). See also 10 C.F.R. § 2.710(b) ("[A] party opposing the motion may not rest upon the mere allegations or denials of his answer," but rather, "must set forth specific facts showing that there is a genuine issue of fact").

²⁶ *Anderson v. Liberty Lobby*, 477 U.S. 242, 247-48 (1986) (emphasis in original).

²⁷ *Energry Nuclear Generating Co.* (Pilgrim Nuclear Power Station), CLI-10-11, 71 NRC 287, 297 (2010) (quoting *Liberty Lobby*, 477 U.S. at 248).

²⁸ *U.S. Dept. of Energy* (High Level Waste Repository), CLI-09-14, 69 NRC 580, 591 n.65 (2009).

²⁹ See *Pilgrim*, CLI-10-11, 71 NRC at 308-310.

³⁰ *Id.* at 310.

2. Discussion

The Board should resolve Contention 1 in favor of the Staff because it involves a challenge to the cultural resources discussion in the ER, and that discussion has been superseded by the cultural resources sections in the draft EA. The draft EA sections contain the analysis that OST claimed was missing from the ER, and there are currently no admitted contentions challenging the draft EA's analysis.³¹

To determine whether there is a genuine issue of material fact, it is important to determine what issues are in dispute. Under NRC practice, the issues in dispute are determined by the scope of the admitted contention.³² The scope of a contention is defined both by its terms and bases.³³

As admitted by the Board, Contention 1 claims that the Environmental Report "lacks an adequate description of either the affected environment or the impacts of the project on archaeological, historical, and traditional cultural resources."³⁴ The Board characterized the OST's concern as "whether . . . the ER complies with the NRC's NEPA implementation requirements as they mandate an adequate description of any extant cultural resources on the

³¹ While in some circumstances it is appropriate to treat a contention based on the ER as a challenge to the staff's environmental analysis, OST's Contention 1 does not meet the standards for "migration." The migration tenet is applicable "only if the information in the staff's post-ER NEPA statement is 'sufficiently similar to the information in the ER,' i.e., essentially in *pari materia* with the ER information/analysis, or lack of information/analysis, that is the focus of the contention." *Strata Energy, Inc.* (Ross In Situ Recovery Uranium Project), LBP-13-10, 78 NRC 117, 133 (2013) (quoting *S. Nuclear Operating Co.* (Early Site Permit for Vogtle ESP Site), LBP-08-2, 67 NRC 54, 63-64 (2008)). Here, the cultural resources sections of the draft EA are materially different from the ER in that they contain the description of the affected environment of historic and cultural resources and the analysis of the impacts of the project on those resources, which Contention 1 claimed were missing from the ER. Therefore, the migration tenet does not apply and the OST would have to file a motion to amend the contention or to admit a new contention against the staff's draft EA, which it did not do. *Id.* (citing *Vogtle*, LBP-08-2, 67 NRC at 63-64).

³² See *Pilgrim*, CLI-10-11, 71 NRC at 297.

³³ *Id.*

³⁴ *Marsland*, LBP-13-6, 77 NRC at 306.

MEA site and an analysis of the impact of the proposed ISR project on those resources.”³⁵ In support of Contention 1, OST stated:

the Environmental Report, at 3-74 to 3-76, demonstrates that a significant number of archaeological, historical, and traditional cultural resources on site have not been evaluated but compared to results of a few cultural resource investigations on some private land, White River, and the Cities of Chadron and Crawford about 10 to 15 miles to the north, and the results of those surveys can serve as a cultural context for comparison to the MEA; therefore, the potential impacts to these resources have not been addressed.”³⁶

Contention 1 is a contention of omission, asserting that the ER failed to identify cultural resource sites within the MEA and failed to consider impacts to those resources.³⁷ In the time after its admission against the ER on May 10, 2013, Contention 1 has been mooted by the cultural resources sections of the Staff’s draft EA. The draft EA sections contain the description and analysis that OST contended was missing from the ER. With respect to a description of the affected environment of cultural and historical resources, the draft EA describes the findings of an “intensive on-the-ground survey of the MEA project area” conducted by the Crow and Santee Sioux Nations in late November and early December 2012.³⁸ The draft EA further discusses the deployment of a cultural resource expert in the summer of 2013 to collect additional documentation from the places of potential religious or cultural significance identified by the Crow Nation and Santee Sioux Nation at the MEA, and identifies the resulting report that documents the results of this evaluation.³⁹ The draft EA’s analysis of impacts—including

³⁵ *Id.* at 286.

³⁶ Petition at 11-12.

³⁷ In its ruling on the admissibility of Contention 1, the Board’s discussion focused on the fact that the archaeological survey on which the ER was based did not identify any Native American cultural resource sites, but the declaration of OST’s Tribal Historic Preservation Officer asserted a strong likelihood that cultural resource sites did exist within the MEA and therefore needed to be identified. *Marsland*, LBP-13-6, 77 NRC at 287-88.

³⁸ Draft Cultural Resource Sections at 12.

³⁹ *Id.*

cumulative impacts—to historic and cultural resources considers the information from these surveys as well, and concludes that impacts would be SMALL.⁴⁰

In summary, the basis for Contention 1, that the ER did not adequately describe existing cultural resources at the MEA site or evaluate the impacts of the proposed action on those resources, has been mooted by the cultural resources sections in the Staff's draft EA. No new or amended contentions have been filed challenging the Staff's environmental analysis. Because there is no longer any genuine issue of material fact relative to Contention 1, it should be dismissed.

CONCLUSION

For the reasons stated above, with respect to Contention 1, there are no material facts in dispute and the Staff is entitled to summary disposition as a matter of law. Thus, the Board should dismiss Contention 1 in its entirety.

Respectfully submitted,

/Signed (electronically) by/

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⁴⁰ *Id.* at 14, 19.

Executed in accord with 10 C.F.R. § 2.304(d)

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Dated at Rockville, Maryland
this 6th day of August, 2014

August 6, 2014

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) Docket No. 40-8943-MLA-2
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) ASLBP No. 13-926-01-MLA-BD01
(Marsland Expansion Project))

NRC STAFF'S STATEMENT OF MATERIAL FACTS TO SUPPORT MOTION FOR SUMMARY
DISPOSITION OF CONTENTION 1

The staff of the U.S. Nuclear Regulatory Commission (Staff) submits, in support of this motion for summary disposition of Contention 1, this statement of material facts, to which the Staff contends there is no genuine issue to be heard.

1. On May 10, 2013, the Atomic Safety and Licensing Board (Board) issued a Memorandum and Order admitting, in part, the Oglala Sioux Tribe's (OST) Contention 1.⁴¹
2. As admitted by the Board, Contention 1 claims that the Environmental Report (ER) "lacks an adequate description of either the affected environment or the impacts of the project on archaeological, historical, and traditional cultural resources."⁴²
3. On June 30, 2014, the Staff made the cultural resources sections of the draft Environmental Assessment (EA) for the Marsland Expansion Area (MEA) available on its website for public comment.⁴³
4. Also on June 30, 2014, the Staff notified the Board and the parties to this proceeding of these sections' availability and provided a link to their location on the website.⁴⁴
5. Draft EA section 3.6 contains a discussion of affected historic and cultural resources.⁴⁵

⁴¹ *Crow Butte Resources, Inc.* (Marsland Expansion Project), LBP-13-6, 77 NRC 253, 286-88 (2013).

⁴² *Id.* at 306.

⁴³ <http://www.nrc.gov/materials/uranium-recovery/license-apps/marsland/section106-marsland.html> (Draft Cultural Resource Sections).

⁴⁴ Letter from Marcia J. Simon, NRC Staff Counsel, to Licensing Board (June 30, 2014).

⁴⁵ Draft Cultural Resource Sections at 1-12.

6. Draft EA section 3.6.5.2 discusses the findings of a field investigation conducted by the Crow and Santee Sioux Nations at the MEA in late November and early December 2012. Tribal representatives conducted “an intensive on-the-ground survey of the MEA project area, recording 12 potential places of religious or cultural significance.”⁴⁶
7. Draft EA section 3.6.5.2 further explains that in the summer of 2013, the NRC sent a cultural resources expert to revisit and collect additional documentation from the 12 places identified by the Crow and Santee Sioux Nation field crews at the MEA.⁴⁷
8. Draft EA Sections 4.8 and 4.13 contain discussions of impacts on historic and cultural resources.⁴⁸ These discussions incorporated and considered the information from the Crow and Santee Sioux Nations field survey and the NRC follow-up, and determined that the impacts, including cumulative impacts, on historic and cultural resources would be SMALL.⁴⁹
9. OST has not filed a new contention based on the draft cultural resource sections of the EA. Nor has OST sought to amend their previously admitted Contention 1 based on the sections in the draft EA.
10. There are no currently admitted contentions that challenge the Staff’s description of the affected environment of historic and cultural resources in the cultural resource sections of the draft EA.
11. There are no currently admitted contentions that challenge the Staff’s impact analysis in the cultural resource sections of the draft EA.

Respectfully submitted,

/Signed (electronically) by/

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Dated at Rockville, Maryland
this 6th day of August, 2014

⁴⁶ *Id.* at 12.

⁴⁷ *Id.*

⁴⁸ Draft Cultural Resource Sections at 13-19.

⁴⁹ *Id.*

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "NRC STAFF'S MOTION FOR SUMMARY DISPOSITION OF CONTENTION 1" in the above-captioned proceeding have been served via the Electronic Information Exchange ("EIE"), the NRC's E-Filing System, this 6th day of August, 2014, which to the best of my knowledge resulted in transmittal of the foregoing to those on the EIE Service List for the above-captioned proceeding.

/Signed (electronically) by/

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