

August 1, 2016

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of:)	
)	Docket No. 40-8943
CROW BUTTE RESOURCES, INC.)	
)	ASLBP No. 08-867-02-OLA-BD01
(License Renewal))	

REPLY IN SUPPORT OF PETITION FOR REVIEW OF LBP-15-11 AND LBP-16-07

I. INTRODUCTION

On July 22, 2016, the Oglala Sioux Tribe (“OST”) filed an answer opposing Crow Butte’s petition for review of LBP-15-11 and LBP-16-07.¹ Crow Butte had argued that Contention 1 was untimely because the information on which the contention was based had been available for at least one year prior. In its answer OST continues to disregard NRC regulations requiring contentions to be filed based on the availability of information. OST simply ignores the timeliness criteria in 10 C.F.R. § 2.309(c)(1).

OST also fails to demonstrate that the NRC Staff’s efforts to identify and assess cultural resources were deficient under either the National Environmental Policy Act (“NEPA”) or the National Historic Preservation Act (“NHPA”). The NRC Staff made repeated efforts to obtain information from OST and others; supplemented these efforts with literature reviews, field visits, discussions with local experts, and archeological surveys; and offered an opportunity to comment on draft assessments. OST never demonstrated any substantive defect in the NRC Staff’s assessment. The NRC Staff more than satisfied both NEPA and the NHPA.

¹ “Oglala Sioux Tribe’s Answer To Crow Butte’s Petition For Review Of The Board’s Contention 1 Decision,” dated July 22, 2016 (“OST Answer”).

II. DISCUSSION

A. Contention 1 Was Untimely

Nothing in OST's answer provides a basis for finding Contention 1 to be timely. OST specifically acknowledges (at 5) that the information Crow Butte relies on for its timeliness challenge was published on the NRC Staff's website on September 30, 2013. Yet, OST did not file Contention 1 until January 5, 2014 — more than 1 year later. This fact alone should be sufficient for the Commission to conclude that Contention 1 was untimely. 10 C.F.R. § 2.309(c)(1) allows a new contention after the initial deadline only where information upon which the contention is based was not previously available; is materially different from information previously available; and has been submitted in a timely fashion based on availability of the subsequent information. OST cannot meet that standard where, as here, the same information regarding the identification of cultural resources, including traditional cultural properties ("TCPs"), was available to the parties for more than a year prior to the final EA.

OST next claims (at 6) that Contention 1 was timely because the Staff's notice of the availability of the draft assessment referred only to the NHPA and not to NEPA. According to OST, the NEPA review for tribal cultural properties and interests is "significantly broader than that required by NHPA," implying this somehow excuses OST from filing a contention based on the draft assessment.² Apart from the lack of a citation for this proposition, the fact remains that the NRC Staff's discussion of cultural resources in the final EA was nearly identical to that in the draft assessment made available on October 1, 2013.³ And, while OST suggests (at 6) that it

² OST Answer at 6; *see also id.* at 8 ("[T]he website postings and letter to the Board relied upon by Crow Butte ... were not the equivalent of the "hard look" review required by NEPA and did not trigger the 30-day filing deadline for Contention 1.").

³ *See* "Petition for Review of LBP-15-11 and LBP-16-07," dated June 20, 2016, at 10-13; NRC Staff Notice, dated October 1, 2013 (ADAMS Accession No. ML13274A631).

waited to file new contentions because the Staff could potentially “correct deficiencies” in the draft Section 106 review, Commission timeliness requirements focus on the availability of the facts underlying a contention, not a final review document that compiles previously available information.⁴ This reflects the policy that a petitioner has an “iron-clad obligation to examine the publicly available documentary material ... to uncover any information that could serve as the foundation for a specific contention.”⁵ New contentions must be based on new facts not previously available, not merely on a review document that incorporates those same facts. OST’s reading, and that of the Board in LBP-15-11, would nullify 10 C.F.R. § 2.309(c)(1).

OST next argues (at 8) that its contention was timely based on a Board scheduling order from October 2014.⁶ But, the scheduling order post-dates the availability of the draft cultural resource assessment by a year, and therefore is no excuse for OST’s failure to file a contention when the information first became available in September 2013. Moreover, the Board’s order merely calculates and sets the dates for filing proposed new contentions. The order in no way absolves the parties from their obligation to otherwise satisfy the requirements for an admissible contention. OST simply missed its opportunity to file contentions on the NRC Staff’s cultural resource assessment. That failure cannot be cured after the fact.

B. The Final EA Satisfies NEPA and NHPA

OST argues that the Board correctly found that the NRC Staff did not satisfy NEPA. OST cites (at 9-10) the Board decision for the proposition that “the NRC Staff’s

⁴ OST seems to be arguing that a party can identify a potential concern with a draft document, but then wait to see if it gets fixed in the final document before filing a new contention. The Commission’s rules prohibit precisely that situation.

⁵ *Sacramento Municipal Util. Dist. (Rancho Seco)*, CLI-93-3, 37 NRC 135, 147 (1993).

⁶ Order (Scheduling Filing of New/Amended Contentions and Requesting Proposed Evidentiary Hearing Dates) (Oct. 28, 2014) (ADAMS Accession No. ML14301A317).

consultation process suffered from years of inaction and delay, a confusing multi-site approach, and for most of the process an absence of sincere respect for the government-to-government relationship that exists between Indian tribes.” But, even if true, this argument says nothing about the adequacy of the evaluation in the final EA.

Rather than address the errors identified in the Petition, OST simply repeats the conclusions in LBP-16-07. For example, OST claims (at 11) that the initial field survey by Bozell and Pepperl Survey was outdated. However, the primary complaint with this document was that it “ignore[d] important intangible resources and those other resources that did not have ‘physical integrity,’ including, for example, the Crow Butte vision quest site, the historic sign or starve encampments, and important or unique indigenous medicinal herbs.” But, “intangible resources” were in fact captured in the final EA as TCPs, as was the area’s historical significance. As an archeological field survey, Bozell and Pepperl was never intended to be the NRC’s assessment of TCPs—an important distinction seemingly lost on OST and the Board.

OST also reiterates (at 12) the Board’s concerns with the NRC Staff’s efforts to solicit information from individuals steeped in Lakota culture. But, the NRC Staff performed supplemental literature searches and conducted interviews with local experts in the history of the area (Exhs. NRC-051A at 3; NRC-051C at 6-8) specifically to identify potential Lakota places or resources of religious or cultural significance. The Staff also gathered information directly from Lakota experts, including the OST Tribal Historic Preservation Officer, during a 2011 field visit (Exh. NRC-050). These efforts resulted in identification of multiple TCPs that were assessed in the final EA (Exhs. NRC-010 at 56-57, 73; NRC-076-R2 at 61).

OST also claims (at 12) that the Staff failed to resolve disputes with OST over the TCP survey approach. But, the fact that Staff did not ultimately perform the surveys in the

manner preferred by OST does not render the Staff's review and conclusions automatically deficient. Nothing in NHPA or NEPA commands tribal members' participation in field investigations. The NEPA "hard look" is not a specific procedural requirement. Likewise, neither NHPA nor NEPA gives potentially affected tribes the right to dictate the scope of the NRC Staff's investigation. But, even if they did, OST refused to participate in efforts to develop a field survey and declined an offer to conduct its own investigation. As the Board noted (LBP-16-07 at 47), the Staff asked OST to submit a draft "statement of work" for a TCP survey, but OST never did. OST now claims (at 12) that "[c]ontrary to the representations of Crow Butte," OST did submit "their own TCP survey proposal prepared by the Makoche-Wowapi." But, that proposal involved Dewey-Burdock, not Crow Butte.⁷ The Staff also invited tribes, including OST, to participate in an open site TCP survey. OST again did not participate.⁸ The NRC Staff's attempts to gather information from OST and others more than satisfy NEPA's rule of reason, particularly in light of OST's refusal to participate in the Staff's efforts.

At bottom, nothing in the record indicates that the Staff overlooked or ignored any potential cultural resources, including TCPs. OST is clearly disappointed with the outreach by the Staff and with the specifics of the review, including who was engaged in that effort. But, in the end, it is the findings of the review that are at issue. And in that regard OST has not identified a single historic site or TCP that the Staff overlooked in the EA.

III. CONCLUSION

For the above reasons, the Board erred in finding Contention 1 timely.

⁷ Tr. at 2185-2186.

⁸ LBP-16-07 at 53.

Respectfully submitted,

/s/ signed electronically by
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COUNSEL FOR CROW BUTTE
RESOURCES, INC.

Dated at San Francisco, California
this 1st day of August 2016

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CERTIFICATE OF SERVICE

I hereby certify that copies of “REPLY IN SUPPORT OF PETITION FOR REVIEW OF LBP-15-11 AND LBP-16-07” in the captioned proceeding have been served this 1st day of August 2016 via electronic mail to Consolidated Intervenors at davidcoryfrankel@gmail.com, Arm.legal@gmail.com, and harmonicengineering@gmail.com and via the Electronic Information Exchange (“EIE”), which to the best of my knowledge resulted in transmittal of the foregoing to all those on the EIE Service List for the captioned proceeding other than Consolidated Intervenors.

/s/ signed electronically by _____
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