

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

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

In the Matter of
CROW BUTTE RESOURCES, INC.
(Marsland Expansion Area)

Docket No. 40-8943-MLA-2

ASLBP No. 13-926-01-MLA-BD01

March 16, 2018

MEMORANDUM AND ORDER
(Granting in Part and Denying in Part Motion to
Deny Migration of Environmental Portion of Contention 2)

By motion dated January 26, 2018, the Nuclear Regulatory Commission (NRC) staff has asked the Licensing Board to deny the migration of the environmental portion of the sole remaining admitted contention of intervenor Oglala Sioux Tribe (OST). See NRC Staff's Motion to Deny Migration of Environmental Portion of Contention 2 (Jan. 26, 2018) at 1 [hereinafter Staff Motion]. That contention, admitted as "OST Contention 2: Failure to Include Adequate Hydrogeological Information to Demonstrate Ability to Contain Fluid Migration," questions the sufficiency of the May 2012 application of Crow Butte Resources, Inc., (CBR) for authorization to operate a satellite in situ uranium recovery (ISR) facility within the Marsland Expansion Area (MEA), in particular the project area's geological setting and the MEA's potential effects on adjacent surface water and groundwater resources. See LBP-13-6, 77 NRC 253, 294-95, 306 (2013), aff'd, CLI-14-2, 79 NRC 11 (2014). According to the staff, to the extent this contention challenges the environmental report (ER) portion of the CBR May 2012 application, the Board should not permit it to migrate forward as contesting the staff's recently-issued draft

environmental assessment (EA). See Staff Motion at 7. Applicant CBR and intervenor OST have provided responses supporting and opposing, respectively, the staff's motion. See [CBR] Response to NRC Staff Motion to Deny Migration of Contention 2 (Feb. 5, 2018) [hereinafter CBR Response]; [OST] Response to NRC Staff's Motion to Deny Migration of Contention 2 (Feb. 5, 2018) [hereinafter OST Response].

For the reasons set forth below, we grant in part and deny in part the staff's motion to preclude migration of OST Contention 2, finding that only one aspect of the contention will not be subject to further consideration in this proceeding as an environmental-based challenge.

I. BACKGROUND

On May 16, 2012, CBR filed an application with the agency to amend the existing ISR license for its Crow Butte ISR site to permit CBR to construct and operate a satellite ISR facility in the MEA, which is located in Dawes County, Nebraska. On January 29, 2013, OST submitted a request for hearing and petition to intervene in this proceeding, see Petition to Intervene and Request for Hearing of [OST] (Jan. 29, 2013) [hereinafter OST Petition], and the Board subsequently found that OST had standing to intervene and had proffered two admissible contentions, see LBP-13-6, 77 NRC at 304–05. On October 22, 2014, the Board granted the staff's motion for summary disposition of OST Contention 1, leaving OST Contention 2 as the only contention extant in this matter.¹ See Licensing Board Memorandum and Order (Ruling on Motion for Summary Disposition Regarding [OST] Contention 1) (Oct. 22, 2014) at 2 (unpublished) [hereinafter Board Summary Disposition Ruling].

¹ OST Contention 1 challenged the CBR ER's historical and cultural resources review of the MEA site. See LBP-13-6, 77 NRC at 286. The staff's dispositive motion contested the contention's continuing viability in light of the staff's June 2014 issuance of the portion of its draft EA addressing historical and cultural resources issues relating to the MEA facility. See Board Summary Disposition Ruling at 8–9.

As admitted by the Board, Contention 2 reads:

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.

LBP-13-6, 77 NRC at 306. In brief, referencing both agency safety and environmental prescripts, Contention 2 embodies concerns “posing several complex technical issues” involving the adequacy of and, in one instance, a complete omission from, the application’s “hydrogeologic characterization of the MEA site.” *Id.* at 294–95.

To keep pace with the evolving nature of the staff’s safety and environmental review schedules for this proceeding, the Board has issued a series of scheduling orders advising the parties of associated filing deadlines, including those relating to the submission of new/amended contentions and migration declarations.² Most recently, in April 2017 we issued a revised scheduling order that, based on a staff representation that its draft EA for the MEA facility would be issued in toto in mid-December 2017, set a January 16, 2018 deadline for the filing of new or amended draft EA-associated contentions and/or a migration declaration regarding Contention 2. See Licensing Board Memorandum and Order (Revised General

² See, e.g., Licensing Board Memorandum and Order (Revised General Schedule) (July 26, 2016) at 2 & app. A (unpublished); Licensing Board Memorandum and Order (Revised General Schedule) (Feb. 11, 2016) at 2–5 & app. A (unpublished) [hereinafter February 2016 Order]; Licensing Board Memorandum and Order (Revised General Schedule) (Apr. 30, 2014) at 2–3 & app. A (unpublished); Licensing Board Memorandum and Order (Initial Prehearing Conference and Scheduling Order) (June 14, 2013) at 5–6 & app. A (unpublished).

Schedule) (Apr. 20, 2017) app. A, at 1 (unpublished). Thereafter, on December 11, 2017, the staff notified the Board and the parties that the staff's draft EA for the MEA was publicly available for review in the agency's ADAMS document database system.³ See Letter from Marcia J. Simon, NRC Staff Counsel, to Licensing Board (Dec. 11, 2017) at 1. This was followed by the December 15, 2017 Federal Register publication of the staff's finding of no significant impact (FONSI) for the MEA. See Draft [EA] and Draft [FONSI]; Notice of Availability and Request for Comments, 82 Fed. Reg. 59,665 (Dec. 15, 2017).

Observing that the January 16 deadline passed without OST filing either a new or amended contention motion based on the draft EA or a migration declaration for Contention 2, on January 26, 2018, the staff filed a motion to deny migration of the environmental portion of Contention 2. See Staff Motion at 1. On February 5, 2018, CBR filed a response to the staff's motion in which it supported the dismissal of Contention 2 as moot. See CBR Response at 1. That same date, OST filed its response opposing the staff's motion, arguing that because "[t]here is no clearer picture of the [MEA] hydrology with the publication of the EA than there was in CBR's ER," the Board should deny the staff's motion and Contention 2 should migrate. OST Response at 2.

II. ANALYSIS

A. Standards Governing Contention Migration

The Commission has recognized that a contention challenging an applicant's ER generally may be viewed by a board as a challenge to the staff's subsequently issued National

³ That issuance incorporated the historical and cultural resources portion of the EA previously issued for comment in 2014. Compare [CBR] Proposed [MEA], NRC Documentation of [National Historic Preservation Act] Section 106 Review (Draft Cultural Resources Sections of [EA]) (June 25, 2014) (ADAMS Accession No. ML14176B129), with Office of Nuclear Material Safety and Safeguards (NMSS), NRC, Draft [EA] for the [MEA] License Amendment Application at 3-65 to -76, 4-36 to -38, 5-8 to -12 (Dec. 2017) (ADAMS Accession No. ML17334A870) [hereinafter Draft EA].

Environmental Policy Act (NEPA)-related environmental review documents. See La. Energy Servs., L.P. (Claiborne Enrichment Ctr.), CLI-98-3, 47 NRC 77, 84 (1998). This migration tenet, as it has been labeled, allows a previously admitted contention challenging an applicant's ER to be construed as a challenge to a later-issued staff environmental review document (such as an EA) without requiring the contention's proponent to file a new or amended contention. See Crow Butte Res., Inc. (In Situ Leach Facility, Crawford, Neb.), CLI-15-17, 82 NRC 33, 42 n.58 (2015). A board, however, need only permit migration of an admitted contention "where the information in the Staff's environmental review document is 'sufficiently similar' to the material in the applicant's environmental report." Strata Energy, Inc. (Ross In Situ Uranium Recovery Project), CLI-16-13, 83 NRC 566, 570 n.17 (2016) (quoting Strata Energy, Inc. (Ross In Situ Recovery Uranium Project), LBP-13-10, 78 NRC 117, 133 (2013), petition for review denied, CLI-16-13, 83 NRC at 601), petition for review denied sub nom. Nat. Res. Def. Council v. NRC, 879 F.3d 1202, 1206–07 (D.C. Cir. 2018). Thus, migration is appropriate so long as the draft EA's "analysis or discussion at issue is essentially in para materia with the ER analysis or discussion that is the focus of the contention." S. Nuclear Operating Co. (Early Site Permit for Vogtle ESP Site), LBP-08-2, 67 NRC 54, 63–64 (2008).

These requirements notwithstanding, the proponent of the contention is not required to resubmit the contention if it maintains the contention properly will migrate. See Ross, LBP-13-10, 78 NRC at 143 n.15. "[A] contention's sponsor may choose not to make any submission regarding an admitted ER-based environmental contention it believes properly will migrate and can simply await an applicant or Staff filing challenging the contention's continued viability in light of the Staff's environmental document." Id.

The Commission's rules of practice provide that the proponent of a motion has the burden of proof. See 10 C.F.R. § 2.325. Accordingly, when a motion challenging contention migration is filed, the movant has the burden of proof to show that migration should not be permitted. Such a motion also must "state with particularity the grounds" upon which relief is

sought, and “be accompanied by any affidavits or other evidence relied on.” Id. § 2.323(b). More specifically, to meet its burden the proponent of a motion to deny migration must (1) detail what new information or analysis is included in the staff’s environmental review document; and (2) explain why that information or analysis is relevant to, and provides a reasonable basis for concluding that, the deficiencies challenged in the contention have been adequately addressed.

Moreover, in applying the migration tenet, consideration also must be given to the case law that distinguishes between a contention of omission and a contention of adequacy. See, e.g., Duke Energy Corp. (McGuire Nuclear Station, Units 1 & 2; Catawba Nuclear Station, Units 1 & 2), CLI-02-28, 56 NRC 373, 382–83 (2002) (“There is, in short, a difference between contentions that merely allege an ‘omission’ of information and those that challenge substantively and specifically how particular information has been discussed in a license application.”). If a contention is one of omission—for instance, challenging an absence of information in an ER—and new licensing documents are provided that supply such information, the previous contention loses its efficacy and the adequacy of the new information should become the focus of concern in that “new claims must be raised in a new or amended contention.” Id. at 382; see also id. at 383 (“[A] significant change in the nature of the purported NEPA imperfection, from one focusing on comprehensive information omission to one centered on a deficient analysis of subsequently supplied information, warrants issue modification by the complaining party.” (quoting Private Fuel Storage, L.L.C. (Indep. Spent Fuel Storage Installation), LBP-02-2, 55 NRC 20, 30 (2002))). The migration tenet thus may not be used to change the basic form of a contention from a contention of omission to one of adequacy. See Private Fuel Storage, L.L.C. (Indep. Spent Fuel Storage Installation), LBP-01-23, 54 NRC 163, 172 n.3 (2001).

B. Efficacy of Staff's Motion to Deny Migration

Although the Board requested that OST submit a migration declaration regarding Contention 2 by the deadline for submitting new/amended contentions,⁴ see February 2016 Order at 4–5, consistent with agency case law, OST's failure to do so is not, in and of itself, a reason for the Board to refuse to allow the environmental portion of Contention 2 to migrate as a challenge to the staff's draft EA.⁵ See Ross, LBP-13-10, 78 NRC at 143 n.15. At the same time, as discussed above, if the staff or the applicant maintains that the migration tenet is not applicable, it can request that the Board deny migration of the contention, as the staff has done here. For such a motion to succeed, however, the moving party has the burden of establishing with specificity that migration is not appropriate because the draft EA is not substantially similar to the ER. And to make that showing, the moving party must establish where and how the draft EA diverges from the ER, and why that divergence makes the environmental portion of Contention 2 no longer viable.

In this instance, the staff contends that the draft EA contains new information and analysis relating to Contention 2 that are not sufficiently similar to the information and analysis in the applicant's ER. See Staff Motion at 1. In our determination admitting Contention 2, the Board concluded that OST was challenging ER sections 3.4.3.2 and 3.4.3.3 as providing an inadequate discussion of the project's potential impact on surface water and groundwater

⁴ As was noted in our February 2016 order, a migration declaration submitted by an admitted contention's sponsor, whether alone or in conjunction with a new/amended contention motion, provides an opportunity for the sponsor to avoid any doubt as to its position on the status of the contention. See February 2016 Order at 5.

⁵ That being said, in its response OST declared that it was "surprised" by the January 16, 2018 date for filing such a declaration, or any new or amended contentions, due to the "conflicting date" for filing comments on the staff's EA. OST Response at 1. Putting aside the fact that the date for making such filings in this adjudication has been established in a series of orders going back to 2013, the most recent of which was issued in April 2017, see supra note 2 and accompanying text, OST should now be aware that the upcoming date for such submissions by a party to this adjudication relative to the staff's safety evaluation report (SER) and final EA is independent of any deadlines that may be set by the staff for general comments on these reports by the public.

resources. See LBP-13-6, 77 NRC at 293. In this regard, the Board found that OST supported its contention by alleging there were four specific deficits in the 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 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.”

Id. at 289 (quoting OST Petition at 17–18 (quoting NMSS, NRC, Standard Review Plan for In Situ Leach Uranium Extraction License Applications, NUREG-1569, at 2-20 to -21 (June 2003) [hereinafter NUREG-1569])). The staff now contends that because the draft EA contains new and relevant information relative to the OST concerns embodied in Contention 2, the environmental portion of that contention should not migrate. See Staff Motion at 1.

In support of its motion, the staff provides several examples of new information in the draft EA. See id. at 5–6. The staff points the Board to five sections of the draft EA that the staff argues contain “new information and analysis in several areas related to confinement and the ability to contain production fluids.” Id. at 5. CBR also specifies several sections that it maintains incorporate “new information and analysis pertinent to the four alleged deficiencies identified by the Board that [go] beyond what had been presented” in the ER. CBR Response at 4–5. In contrast, OST argues that “the EA merely parrots CBR’s data that it provided in the ER, especially regarding the discussion of whether area hydrogeology will result in confinement of mining fluids” and “provides no discussion whatsoever regarding . . . the data collected during Pump Test 8, that appears, at best, inconclusive.” OST Response at 2.

As the proponent of a motion to deny migration, the staff falls short of meeting its burden. To prevail, it is incumbent on the movant to plead its motion with specificity and adequately support all points required for a board to grant the motion. See, e.g., U.S. Dep't of Energy (High-Level Waste Repository), LBP-08-5, 67 NRC 205, 209–10 (holding that a proponent of a motion seeking an order striking a discovery certification bore the burden “of supporting all points required for such an order”), aff'd, CLI-08-22, 68 NRC 355, 358 (2008). In the context of a motion to deny migration of a contention, the staff must do more than simply point the board to sweeping sections of the draft EA as new and relevant to the admitted contention. Instead, the staff must adequately explain (1) why those sections in the draft EA are not substantially similar to the analysis and discussion contained in the ER; and (2) why the new analysis and discussion provide a reasonable basis for concluding that the deficiencies in the ER challenged by the admitted contention have been adequately addressed, aside from the bare fact that it is new information.

While the staff in its motion and CBR in its response provided examples of sections that may contain new information, neither party’s pleading met the required level of specificity and analysis. It is not the Board’s responsibility to search through the staff’s lengthy and technically dense draft EA to determine whether the information contained therein would meet the standard to prevent migration. See FirstEnergy Nuclear Operating Co. (Davis-Besse Nuclear Power Station, Unit 1), CLI-12-8, 75 NRC 393, 404 n.67 (2012) (“[N]either [the Commission] nor the Board is obliged to look through lengthy documents for information on which a litigant relies.”).

Moreover, it is not enough to indicate, as both the staff and CBR do in their submissions, that the information is “new and different” so as to prevent migration of a contention of adequacy. See, e.g., Staff Motion at 5, 6; CBR Response at 5. As the movant, the staff had the burden of pointing out exactly what allegedly new information or analysis is contained in the draft EA, and how exactly that new information or analysis provides a reasonable basis for concluding the information adequately addresses one or more of the four ER deficits challenged

by Contention 2 such that a new/amended contention is required. See Fansteel Inc. (Muskogee, Okla. Site), CLI-03-13, 58 NRC 195, 204 (2003) (affirming that a petitioner has an obligation not just to refer generally to voluminous documents, but to provide analysis and supporting evidence as to why particular sections of those documents provide a basis for a contention); LBP-13-6, 77 NRC at 285 (noting petitioner required to explain the significance of any information contained in a document provided as the basis for the contention). The staff having failed to do so in its pleading, the Board will not “hunt for such evidence” that the draft EA is not substantially similar to the ER, “plumb the record” for arguments that there is a reasonable basis to conclude that the new information adequately addresses the deficits, or generally “do counsels’ work for them.” Nat. Res. Def. Council, 879 F.3d at 1209.

In this regard, the staff points to draft EA section 4.3.2.2 as a part of its review document that is not substantially similar to the ER, asserting that this section “discusses an assessment of potential contamination of an irrigation well within the MEA license area based on a hypothetical ISR well casing leak.” Staff Motion at 5. The staff, however, fails to identify to which of the four contention-identified deficits this section relates, much less explain how adding this discussion would remedy the ER’s challenged deficits. Likewise, the staff references draft EA section 3.2.2.2 as “an independent review of literature related to reported faults in the area of the MEA, as well as the Staff’s conclusions as to why the reported faults, even if they exist, will not contribute to impacts on surface or groundwater.” Id. at 5–6. Although this portion of the motion tells the Board the general subject matter of the cited section of the draft EA, the staff nonetheless fails to identify how the new information is relevant to the challenges posed by Contention 2 or to provide a reasonable basis for concluding that the deficiencies outlined in Contention 2 have been adequately addressed. So too, the staff claims that draft EA sections 3.2.2.2, 3.3.2.3, and 3.3.2.5 all “discuss CBR’s commitment . . . to perform additional aquifer pumping tests in all mine units not covered by the regional pump test described in the 2012 ER.” Id. at 6. Yet, once again the motion does not provide the Board with any explanation

as to why this discussion alleviates the deficits that OST alleges. Certainly, the staff could have provided the Board with a technical description or an affidavit explaining the staff's position as to why this information was new, how this material addressed the issues raised in Contention 2, and why this information provided a reasonable basis for concluding those issues were adequately addressed such that a new or amended contention was warranted.

Not dissimilarly, when an intervenor seeks to admit a new or amended contention, the agency's rules of practice require, among other things, that the filing be based on information that is "materially different" from that which was previously available. 10 C.F.R. § 2.309(c)(1)(ii). In arguing that this requirement has been satisfied, we reasonably may expect the petitioner will provide appropriate affidavits, declarations, or other information explaining to the Board why the subsequent licensing documents contain new information that is materially different such that the petitioner could not have proffered the contention earlier in the proceeding. See Ross, LBP-13-10, 78 NRC at 134 (noting intervenors provided multiple declarations with expert statements supporting "resubmitted" and new contentions). So too, a movant arguing that the information contained in a draft EA is not "sufficiently similar" to the ER must support its motion adequately. The staff thus might have provided a declaration containing expert statements describing specifically both what new information is contained in the draft EA and why that information provides a reasonable basis for concluding the EA adequately addresses OST claims that the ER is deficient in its description of the affected environment, has an inadequately-developed model of site hydrogeology, and makes unsubstantiated assumptions regarding aquifer isolation at the MEA. Instead, the staff inappropriately left it to the Board to ferret out and supply this technical analysis.⁶

⁶ While CBR's response provides some further detail, even briefly explaining to which deficits the new information might relate, it also falls short. See, e.g., CBR Response at 4-5. CBR's response, like the staff's motion, contains no explanation as to why the allegedly new information provides a reasonable basis for concluding that the deficiencies challenged in Contention 2 have been adequately addressed. Like the staff, CBR simply states that there is

Additionally, however, as we noted above, for purposes of challenging the application of the migration tenet, there is a distinction between what must be shown relative to a contention of adequacy versus a contention of omission. While Contention 2 is generally a contention of adequacy, one of the four OST-identified concerns, as outlined in LBP-13-6, was framed as an omission. In this regard, we observed the second OST deficit alleged that “‘a description of the “effective porosity, hydraulic conductivity, and hydraulic gradient” of site hydrogeology,’ is absent” from the ER. LBP-13-6, 77 NRC at 289 (emphasis added) (quoting OST Petition at 17–18 (quoting NUREG-1569, at 2-20)). Because this aspect of the contention involves an omission, if the missing information was provided in subsequent licensing documents, it was incumbent upon OST to file a new or amended contention within the specified deadline challenging the adequacy of any discussion of these three hydrogeological characteristics in the draft EA. In its motion, the staff states that section 3.3.2.1 contains “information on effective porosity, hydraulic conductivity, and hydraulic gradient (information asserted to be lacking in the 2012 ER).” Staff Motion at 6 & n.24 (citing Draft EA at 3-39 to -45). The staff thus maintains, and OST does not contest, that the information allegedly missing from the ER is now present within the draft EA. Moreover, the staff does not need to provide any explanation about the adequacy of this new information given that a claimed omission is cured simply by providing the information.

The staff having supplied the missing information, if OST believed the information provided to rectify the omission was inadequate, it was OST’s responsibility to replace or amend its contention, which it did not do. We therefore grant the staff’s motion to deny migration as to the environmental portion of the second deficit identified in LBP-13-6. But as to the other

new information and omits any analysis of why this new information is adequate to address the ER deficiencies alleged in Contention 2.

aspects of the contention, for the reasons provided above we must reject the remainder of the staff's migration denial request.

III. DEFINING THE SCOPE OF CONTENTION 2 AS MIGRATED

The Commission has acknowledged that, in the appropriate circumstances, a board may define the scope of a contention in light of the foundational support that leads to its admission. See Crow Butte Res., Inc. (North Trend Expansion Project), CLI-09-12, 69 NRC 535, 553 (2009); see also Ross, LBP-13-10, 78 NRC at 138. Given the complexity and technical nature of both the environmental and safety aspects of this contention,⁷ we consider it important that the Board continue, in appropriate instances, to clarify the scope of Contention 2 with as much specificity as possible.

Because our rulings in this decision provide such an opportunity, we now view the migrated contention to provide as follows:

⁷ Although CBR previously characterized Contention 2 as a "hybrid" contention having both safety and environmental aspects, see Tr. at 23, CBR now questions the staff's classification of Contention 2 in this manner, asserting that "[t]he contention is clearly and unambiguously an environmental contention" that not only should not migrate but should be dismissed in its entirety, CBR Response at 5 n.15, with the result that this proceeding would be terminated before the Board. Nonetheless, given the contention's references to both NEPA and 10 C.F.R. Part 40, Appendix A technical criteria, the hybrid nature of this contention seems clear.

Perhaps spurring CBR in this regard is its recognition that, as a general matter, the issuance of the staff's SER does not trigger the migration tenet. See id. at 6 n.15 (citing Ross, LBP-13-10, 78 NRC at 132 n.7 (noting that because the application, not the staff's safety review, is the focus of any admitted safety contention, the staff's SER issuance generally does not trigger the migration tenet)). Be that as it may, whether, and to what degree, that principle might apply to a safety-based contention of omission, particularly in light of any license application amendments or applicant responses to staff requests for additional information (RAIs), is a matter we need not address at this juncture.

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

The application and draft environmental assessment fail to provide sufficient information regarding the geological setting of the area to meet the requirements of 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 and draft environmental assessment similarly fail to provide sufficient information to establish potential effects of the project on the adjacent surface and ground-water resources, as required by NUREG-1569 section 2.7, and the National Environmental Policy Act.⁸

More specifically, the scope of the safety and environmental concerns encompassed by this contention include the following: (1) the adequacy of the descriptions of the affected environment for establishing the potential effects of the proposed MEA operation on the adjacent surface water and groundwater resources; (2) exclusively as a safety concern, the absence in the applicant's technical report, in accord with NUREG-1569 section 2.7, of a description of the effective porosity, hydraulic porosity, hydraulic conductivity, and hydraulic gradient of site hydrogeology, along with other information relative to the control and prevention of excursions; (3) the failure to develop, in accord with NUREG-1569 section 2.7, an acceptable conceptual model of site hydrology that is adequately supported by site characterization data so as 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) whether the draft EA contains unsubstantiated assumptions as to the isolation of the aquifers in the ore-bearing zones.

⁸ The original Contention 2 contained references to 10 C.F.R. §§ 40.31(f), 51.45, and 51.60. These provisions, however, describe the requirements applicable to an applicant's ER and can be removed because they are no longer relevant given the admitted ER-related portions of Contention 2 migrate as challenges to the staff's draft EA. See Ross, LBP-13-10, 78 NRC at 134 n.10.

IV. CONCLUSION

For the reasons set forth above, having determined that, other than with respect to the environmental aspect of the contention regarding the omission of a description of effective porosity, hydraulic conductivity, and hydraulic gradient, the staff has failed to carry its burden to establish that the migration of Contention 2 to a challenge to the staff's draft EA should be denied, we grant the staff's motion to deny migration only as to the environmental aspects of the omission portion of the contention.

For the foregoing reasons, it is the sixteenth day of March 2018, ORDERED, that the NRC staff's January 26, 2018 motion to deny migration of the environmental portion of OST Contention 2 is (1) granted as to the environmental portion of the deficit 2 aspect of the contention; and (2) denied as to all other aspects of the contention.

THE ATOMIC SAFETY
AND LICENSING BOARD

/RA/

G. Paul Bollwerk, III, Chairman
ADMINISTRATIVE JUDGE

/RA/

Dr. Richard E. Wardwell
ADMINISTRATIVE JUDGE

/RA/

Dr. Thomas J. Hirons
ADMINISTRATIVE JUDGE

Rockville, Maryland

March 16, 2018

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of)
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CROW BUTTE RESOURCES, INC.) Docket No. 40-8943-MLA-2
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In-Situ Leach Uranium Recovery Facility,) ASLBP No. 13-926-01-MLA-BD01
Crawford, Nebraska)
)
(License Amendment –)
Marsland Expansion Area))

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **MEMORANDUM AND ORDER (Granting in Part and Denying in Part Motion to Deny Migration of Environmental Portion of Contention 2)** have been served upon the following persons by Electronic Information Exchange.

Office of Commission Appellate
Adjudication
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: ocaamail@nrc.gov

U.S. Nuclear Regulatory Commission
Office of the Secretary of the Commission
Mail Stop O-4F00
Washington, DC 20555-0001
Hearing Docket
E-mail: hearingdocket@nrc.gov

Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Mail Stop T-3F23
Washington, DC 20555-0001

U.S. Nuclear Regulatory Commission
Office of the General Counsel
Mail Stop O-14A44
Washington, DC 20555-0001
Susan Vrahoretis, Esq.

G. Paul Bollwerk, III, Chair
Administrative Judge
E-mail: paul.bollwerk@nrc.gov

Marcia J. Simon, Esq.
Emily Monteith, Esq.
David Cylkowski, Esq.
Sabrina Allen, Paralegal

Dr. Richard E. Wardwell
Administrative Judge
E-mail: richard.wardwell@nrc.gov

E-mail:
susan.vrahoretis@nrc.gov
marcia.simon@nrc.gov
emily.monteith@nrc.gov
david.cylkowski@nrc.gov
sabrina.allen@nrc.gov

Dr. Thomas J. Hirons
Administrative Judge
E-mail: thomas.hirons@nrc.gov

OGC Mail Center : OGCMailCenter@nrc.gov

Law Clerks
Sarah B. Ladin
E-mail: sarah.ladin@nrc.gov
Joseph D. McManus
E-mail: joseph.mcmanus@nrc.gov

Crow Butte Resources, Inc., Docket No. 40-8943-MLA-2

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W. Cindy Gillis, Esq.
522 Seventh Street, Suite 202
Rapid City, S.D. 57701-2756
Counsel for Oglala Sioux Tribe
Email: cindy@mariogonzalezlaw.com

McGuire Law Firm
625 South 14th Street, Suite C
Lincoln, Nebraska 68508
Mark D. McGuire
Counsel for Crow Butte Resources, Inc.
E-mail: mdmcguire46@gmail.com

Winston & Strawn, LLP
101 California Street
San Francisco, CA 94111
Tyson R. Smith, Esq.
Louise Dyble, Esq.
Counsel for Crow Butte Resources, Inc.
E-mail: trsmith@winston.com
ldyble@winston.com

Winston & Strawn, LLP
1700 K Street
Washington, DC 20006
Carlos Sisco, Paralegal
Counsel for Crowe Butte Resources, Inc.
E-mail: csisco@winston.com

Ved Nanda Center for International and
Comparative Law
1075 Waite Drive
Boulder, CO 80303
Andrew Reid, Esq.
Counsel for Oglala Sioux Tribe
E-mail: lawyerreid@gmail.com

[Original signed by Brian Newell]
Office of the Secretary of the Commission

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