

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of:)	
)	Docket No. 40-8943-MLA-2
CROW BUTTE RESOURCES, INC.)	
)	ASLBP No. 08-867-02-OLA-BD01
(Marsland Expansion Area))	

CROW BUTTE RESOURCES' RESPONSE TO THE OGLALA
SIOUX TRIBE'S FINAL ENVIRONMENTAL ASSESSMENT CONTENTIONS

Tyson R. Smith
Louise Dyble
Winston & Strawn LLP
101 California St.
San Francisco, CA 94111

COUNSEL FOR CROW BUTTE
RESOURCES

June 13, 2018

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INTRODUCTION

Pursuant to 10 C.F.R. § 2.309(i)(1), Crow Butte Resources, Inc. ("Crow Butte") hereby answers the "The Oglala Sioux Tribe's Migrated, Renewed, and New Marsland Expansion Final Environmental Assessment Contentions" ("OST Final EA Contentions"), dated May 30, 2018. For the reasons discussed below, the proposed renewed and new contentions are untimely and are otherwise inadmissible.

BACKGROUND

On June 16 and 19, 2012, Crow Butte submitted an Application for Authorization to Operate a Satellite In Situ Uranium Recovery ("ISR") Facility within the Marsland Expansion Area ("Marsland" or "MEA"), including an Environmental Report ("ER"). On January 29, 2013, the Oglala Sioux Tribe ("OST") submitted its Petition to Intervene and Request for Hearing, which included six initial contentions with regard to the ER. The Atomic Safety and Licensing Board ("Board") issued a Memorandum and Order on May 10, 2013, admitting only two OST contentions, Contention 1 (Failure to Meet Applicable Legal Requirements Regarding Protection of Historical and Cultural Resources) and Contention 2 (Failure to Include Adequate Hydrological

Information to Demonstrate Ability to Contain Fluid Migration) (“LBP-13-6”). On October 22, 2014 the Board granted the Staff’s Motion for Summary Disposition of OST Contention 1.

Following the release of the Draft Environmental Assessment for the Marsland Expansion Area (“Draft EA”) on December 7, 2017, the NRC Staff filed a Motion to Deny Migration of Contention 2, which the Board granted in part and denied in part in its Memorandum and Order of March 16, 2018 (“LBP-18-02”). The NRC issued the Safety Evaluation Report (“SER”) in January 2018, and the Final Environmental Assessment (“Final EA”) on April 30, 2018. On May 21, 2018, the Board issued a Memorandum and Order establishing a May 30, 2018 for any New/Amended Contention Motion/Migration Declaration in response to the Final EA. The OST Final EA Contentions, including a Migration Declaration with respect to Contention 2 as well as fourteen proposed renewed and new contentions, were filed on May 30, 2018.

ADMISSIBILITY AND TIMELINESS STANDARDS

Although the OST Final EA Contentions were authorized by the Board’s March 16, 2018 and May 21, 2018 orders, the timeliness and admissibility of OST’s proposed renewed and new contentions must be evaluated in accordance with the Commission’s standards in 10 C.F.R. Part 2. In general, a contention must be based on the application or other documents available at the time the hearing request and petition to intervene is filed.¹ The regulations provide that intervenors may file a new or amended environmental contention if there are data or conclusions in the EA that “differ significantly from the data or conclusions in the applicant’s documents.”² Otherwise, a new contention may be considered only if: (1) the information upon which the new

¹ 10 C.F.R. § 2.309(f)(2); *see also Private Fuel Storage, LLC* (Independent Spent Fuel Storage Installation), LBP-00-27, 52 NRC 216, 223 (2000) (time to submit contentions tolls when the information on which the contention is based first becomes available).

² 10 C.F.R. § 2.309(f)(2).

or amended contention is based was not previously available; (2) the information upon which the new or amended contention is based is materially different from information previously available; and (3) the new or amended contention has been submitted in a timely fashion based on the availability of subsequent information.³

New or amended contentions, including those based on the Final EA, also must meet the admissibility standards that apply to all contentions, which the Commission has said are “strict by design.”⁴ As set forth in 10 C.F.R. § 2.309(f)(1), a proposed contention must contain: (1) a specific statement of the issue of law or fact raised; (2) a brief explanation of the basis for the contention; (3) a demonstration that the issue is within the scope of the proceeding; (4) a demonstration that the issue is material to the findings that the NRC must make regarding the action which is the subject of the proceeding; (5) a concise statement of the alleged facts or expert opinions supporting the contention; and (6) sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact. Failure to comply with any of these requirements is grounds for the dismissal of a contention.⁵

DISCUSSION

Crow Butte addresses below each of the proposed new and renewed contentions and concludes that none are admissible under the standards of 10 C.F.R. § 2.309. Additionally, nowhere in their proposed contentions do the intervenors attempt to show, much less affirmatively

³ 10 C.F.R. § 2.309(c)(1).

⁴ *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349, 358 (2001).

⁵ *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 325 (1999). “Mere ‘notice pleading’ does not suffice.” *Amergen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-06-24, 64 NRC 111, 119 (2006) (internal quotation omitted).

demonstrate, that the proposed contentions are based on new or materially different information in the Final EA. Indeed, for each contention, Crow Butte demonstrates that the contention could have been raised previously—for example, based on the original License Amendment Request (“LAR”), the SER, the Draft EA, or Section 106 consultation documentation. All of the contentions are therefore untimely.

A. Contention A: Failure of the Final EA to adequately describe the CBO’s cessation of operations; proposal to be possession-only licensee in “standby status” and impacts to decommissioning.

Contention A alleges that the Final EA fails to take a “hard look” at the impacts of the proposed mine associated with Crow Butte’s placing the mine in standby status. OST argues that Crow Butte’s decision to cease production activities at the main mining area⁶ should be specifically addressed in the Final EA and further that the Final EA “should have disclosed that Crow Butte has sought a possession-only license and that NRC policies preclude such an amendment.”⁷

Contention A raises issues outside the scope of this license amendment proceeding. This proceeding is limited to consideration of Crow Butte’s request for a license amendment authorizing development of a new wellfield at the MEA, which is geographically distant from the

⁶ See Letter from Walt Nelson, Crow Butte, to NRC, dated April 2, 2018 (“Cessation Notice”) (ML18093A186). The Cessation Notice states that Crow Butte had reduced production and injection flows from Mine Units 7, 8, 9, 10, and 11 at the main mining area. The Notice confirms that Crow Butte will continue to comply with all NRC approved restoration plans and decommissioning schedules. And it explains that production equipment (*i.e.*, the Central Processing Facility) will remain in standby to provide the option to restart full operations in the future should market conditions warrant. The Cessation Notice only addresses current operations in the main mining area; it does not discuss the Marsland site.

⁷ OST Final EA Contentions at 12.

current mined area that is the purported basis for the contention.⁸ The issues raised by the intervenors with respect to the restoration status of mine units at the existing wellfield relate solely to operations at the main mining area and will be the subject of separate NRC reviews and approvals, as necessary.⁹ They have no bearing on the MEA. OST's argument is not applicable to the adequacy of the license amendment request at issue or a legal requirement associated with issuance of the amendment. Moreover, Crow Butte has not in fact requested a "possession only" license from the NRC, and has no near-term plans to do so.¹⁰ And, even if it had, the request would be the subject of separate NRC reviews and approvals and not within the scope of this limited license amendment proceeding.¹¹ Any issues relating to the status of mining activities at the main mining area are outside the scope of the approval at issue here.¹²

OST also fails to demonstrate a genuine dispute with the Final EA on a material issue. OST has made no attempt to link development and operation of the wellfield at Marsland

⁸ See *Crow Butte Resources, Inc.* (Marsland Expansion Area), LBP-13-06, slip op. at 3 (“[T]he 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 [Central Processing Facility] for processing, with barren resin then returned to the MEA facility by tanker truck for reuse.”).

⁹ Contrary to OST's claims (OST Final EA Contentions at 12), there are not 10 mine units in restoration. Crow Butte's NDEQ permit currently authorizes restoration activities in no more than five mine units at a time.

¹⁰ Crow Butte has determined that a possession-only license is not necessary in the near term in light of the ongoing activities at the Crow Butte site.

¹¹ A Licensing Board only has jurisdiction over those matters which are within the scope of the amendment application. *Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), LBP-88-19, 28 NRC 145, 152-53 (1988).

¹² 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).

to ongoing restoration efforts associated with the wellfield at the original mining site. OST has wholly failed to acknowledge, much less account for, the difference between mining in two different wellfields or the continued availability of production equipment at the Central Processing Facility. Restoration activities at the main mining area will necessarily proceed in accordance with the restoration schedule for those mine units as permitted by Nebraska Department of Environmental Quality (“NDEQ”) and as authorized by the NRC. Those activities, and approvals associated with restoration timing, are wholly separate from the planned development and mining at the MEA.¹³ Moreover, to the extent that loaded resin from Marsland would be transported to the Central Processing Facility for processing into yellowcake, the intervenors themselves note that Crow Butte has no plans to decommission equipment at the Central Processing Facility and instead intends to maintain production equipment in standby to provide the option to restart should market conditions warrant.¹⁴ At bottom, the contention does not contain any specific claim of inadequacy with respect to the MEA.

B. Contention B: The Final EA fails to describe or evaluate the impacts from the new restoration timeline stated in the extension amendment request (April 3, 2018),

¹³ Although Crow Butte announced the “cessation of production” with its 2018 Cessation Notice (see note 6, above), this has little impact on the schedule for the existing wellfields, as the mine units at the site were depleted of ore already. Production was already set to end over the next several years, with the only recovered uranium from that point forward being the byproduct of restoration activities.

¹⁴ See OST Final EA Contentions at 6 (citing Crow Butte’s Cessation Notice). OST incorrectly states elsewhere in the Final EA Contentions (at 30) that “[t]he Final EA fails to explain how the Marsland site will be able to operate now that the Central Processing Plant is being decommissioned with the rest of the CBO.” The conflicting statements in the Final EA Contentions only underscores OST’s failure to grapple with the salient differences between the Central Processing Facility, the existing wellfield, and the proposed Marsland satellite facility.

including failure to describe the expected increases in consumptive use of water in restoration.

Similar to proposed Contention A, Contention B alleges that the Final EA for the MEA is inadequate because it fails to discuss the status of restoration at the main mining area. Specifically, OST asserts that “the Final EA should have disclosed that, as described in the April 3 Extension Amendment Request, the mining units are impacting each other - MU3; MU4; MU7, and that there is no assurance that the restoration will ever be achieved to compliance with Appendix A, Criterion 5(B).”¹⁵ OST also claims that the Final EA fails “to disclose that Crow Butte has notified the NRC of its intentions to request an [Alternate Concentration Limit (ACL)] amendment in 2020.”¹⁶

As with Contention A, this contention raises an issue outside the scope of the license amendment proceeding. The thrust of the contention relates to restoration at the main mining area, not at the MEA.¹⁷ OST’s references to impacts among MU3, MU4, and MU7 are to mine units at the main mining area. They are unrelated to the undeveloped mine units at Marsland. The status of restoration at the main mining area has no relation to the future restoration of the MEA, which is located more than 10 miles distant.¹⁸ Similarly, any future submittals requesting

¹⁵ *Id.* at 18.

¹⁶ *Id.* at 20.

¹⁷ *See, e.g.*, OST Final EA Contentions at 18 (“Section 2.3.3 of the Final EA should have disclosed that, as described in the April 3 Extension Amendment Request, the mining units [at the main mining area] are impacting each other.”); *id.* 19 (“Final EA fails to describe or evaluate the impacts here due to failure to evaluate greater consumptive use when all ten mining units are in restoration as is currently the case.”).

¹⁸ *See* Final EA at 1-1 (ML18103A145).

an ACL for the mine units in the existing wellfield will be the subject to separate NRC reviews and approval.¹⁹ They are not within the scope of this limited license renewal proceeding.

Contention B comes too late in any event. OST seeks to rely on the existence of a plan to submit a request for an ACL at the main mining area at some point in the future.²⁰ But, Crow Butte had in fact notified the NRC of its intent to submit ACLs for the main mining area at least as early as October 2017.²¹ This letter was available prior to publication of the Draft EA in December 2017. Accordingly, Contention B could have been raised based on the Draft EA. Contention B is therefore untimely.

Contention B also fails to demonstrate a genuine issue with the Final EA on a material issue. The Contention nowhere addresses the extensive discussion in the Final EA that describes a detailed assessment of consumptive use during operations and restoration that takes into account the main mining area, MEA, and the Three Crow Expansion Area, and that also addressed the North Trend Expansion Area.²² The NRC concluded that “[a]quifer restoration would not desaturate the Basal Chadron Sandstone aquifer or destabilize the resource.”²³ Based

¹⁹ NRC regulations explicitly allow the use of ACLs. 10 C.F.R. Part 40, Appendix A, Criterion 5B(5)(c). To the extent OST challenges the use of an ACL, this is an impermissible challenge to an NRC regulation. 10 C.F.R. § 2.335(a).

²⁰ See OST Final EA Contentions at 18 (“OST submits that the Final EA needed to disclose that it had been notified by Crow Butte that it intends to request ACLs because it does not believe it will be able to restore the mining units to baseline standards”); *id.* at 20 (“[T]here is a failure to disclose that Crow Butte has notified the NRC of its intentions to request ACL amendments in 2020”).

²¹ See, e.g., Letter from L. Teahon, Crow Butte, to NRC, dated October 5, 2017, at 7 (ML17013A659).

²² Final EA at 4-16 to 4-19. Nearly identical discussion was included in the Draft EA. Proposed Contention B is therefore untimely as well.

²³ Final EA at 4-19.

on this, the NRC concluded that “the potential short-term impact from consumptive groundwater use during aquifer restoration would be MODERATE” and that, because water levels would eventually recover after aquifer restoration was complete, “the overall potential long-term impact from consumptive groundwater use during aquifer restoration would be SMALL.”²⁴ OST has not provided any information or expert opinion to suggest that Marsland restoration would desaturate the Basal Chadron Sandstone aquifer or destabilize the resource, or that water levels would not recover following restoration.²⁵ Accordingly, the contention does not raise a genuine dispute on a material issue.

C. Contention C: Evaluating all reasonable alternatives - no-action and proposed action are almost identical – the Final EA failed to consider all reasonable alternatives in light of Crow Butte mine cessation and decommissioning.

Proposed Contention C asserts that the Final EA fails to analyze reasonable alternatives as required by the National Environmental Policy Act (“NEPA”). OST claims that, “since Crow Butte has ceased production and is entering full time restoration and decommissioning, the no-action alternative and the proposed action, in light of the decommissioning, are almost the same.”²⁶ OST claims that “[t]he slight differences should be discussed and considered in an environmental assessment that takes into account the impacts of the cessation and decommissioning.”²⁷

²⁴ *Id.*

²⁵ 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. *Ariz. Pub. Serv. Co.* (Palo Verde Nuclear Stations, Units 1, 2, and 3), CLI-91-12, 34 NRC 143, 155 (1991).

²⁶ OST Final EA Contentions at 23.

²⁷ *Id.*

This contention is inadmissible. In both the Draft and Final EA, the proposed action is to authorize construction and operation activities at the MEA, and the “no action” alternative is denial of the request to amend the license to permit ISR operations at the MEA. The only basis provided for the contention is that Crow Butte has announced plans to cease production at the main mining area.²⁸ As discussed above, the status of production and restoration at the main mining area has no bearing on the license amendment request that is the subject of this proceeding. Accordingly, the contention raises an issue that is outside the scope of this proceeding.

Moreover, OST provides no discussion of how this information related to the status of production at the main mining area would inform, much less change, the assessment of alternatives associated with the Marsland license amendment. Even assuming that OST’s characterization of the differences between the alternatives as “slight” were correct, OST provides no basis for concluding that this would violate NEPA.²⁹ The proposed contention does not demonstrate a genuine dispute with the Final EA alternative analysis. Accordingly, Contention C is inadmissible.

D. Contention D: Failure to include results of Cultural Survey approach in Powertech Dewey Burdock in discussion in Final EA – NRC, OST and a licensee agreed on approach in similar proceeding; pertains to discussions in Section 3.6 and 4.6 of Final EA.

Proposed Contention D alleges that the NRC Staff “should have” revised the Final EA to include a discussion of a letter issued by the NRC in an unrelated proceeding.³⁰ The March

²⁸ Contrary to OST’s claims, Crow Butte has not initiated, and has no plans to initiate, decommissioning of the Central Processing Facility.

²⁹ See OST Final EA Contentions at 23 (“The failure to consider that the proposed alternative and the no-action alternative are almost the same in light of the cessation and decommissioning, violates NEPA.”).

³⁰ OST Final EA Contentions at 23-25.

16, 2018 letter cited by OST describes the planned approach to identifying historic, cultural, and religious sites for a different proposed facility operated by a different company in a different state: the Dewey-Burdock In Situ Uranium Recovery Project in Fall River and Custer Counties, South Dakota.³¹

This contention lacks a legal basis and in any event raises an issue that is outside of the scope of this proceeding. The only basis for its claim that the letter “should have” been discussed in the Final EA is that it was issued “[a]fter publication of the Draft EA and before publication of the Final EA”.³² To impute a requirement that a final EA must be revised to include a discussion of every conceivably relevant document issued *after* a draft EA is posted publicly to enable review and comment would fundamentally undermine the purpose of environmental review and upend the NRC’s timeliness requirements for proposed contentions.³³ The letter also raises an issue outside the Marsland license amendment proceeding—the letter cited by OST is focused solely on an application for an entirely different site, located in a different state, and filed by a different applicant. Unsupported statements of potential significance on an unrelated application cannot form the basis for an admissible contention.

³¹ Letter dated March 16, 2018, Subject: U.S. Nuclear Regulatory Commission’s Approach to Identify Historic, Cultural, and Religious Sites at the Dewey-Burdock In Situ Uranium Recovery Project in Fall River and Custer Counties, South Dakota, Docket No. 50-9075 (ML18074A232).

³² OST Final EA Contentions at 24.

³³ Agency decisions regarding whether to supplement an environmental review document are governed by the rule of reason. *Hydro Resources, Inc.* (P.O. Box 777, Crownpoint, New Mexico 87313), LBP-04-23, 60 NRC 441, 448 (2004) (citing *Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 373-74 (2004)). A supplemental environmental document is needed where new information “raises new concerns of sufficient gravity such that another, formal in-depth look at the environmental consequences of the proposed action is necessary.” *Private Fuel Storage* (Independent Spent Fuel Storage Installation), CLI-06-3, 63 NRC 19, 28 (2006). OST made no effort to address this standard.

OST also makes no attempt to identify a specific alleged deficiency in the Final EA that a discussion of the NRC letter could conceivably address. OST quotes (and highlights) passages from Section 3.6 in the Final EA, including a description of consultation requirements, and Section 4.6, including a description of some of the actions that were taken to meet those requirements. OST makes no attempt to explain why or how these sections are deficient, or why or how discussion of an NRC letter issued in a different proceeding describing procedures for a different site could possibly address any such deficiencies. Consequently, Contention D fails to raise a genuine dispute on a material issue.

Contention D is outside the scope of the proceeding and immaterial to the adequacy of the Final EA, and may not be admitted.

E. Contention E: The Final EA fails to take the required hard look at the pump test data resulting in a cascading lack of scientific rigor in assumptions and modeling relied on in the analysis and evaluation of potential impacts from the licensed activity.

Contention E alleges that the Final EA fails to take the required hard look at the pump test data. OST argues that “[d]espite public comments pointing out the inadequacy,” Section 3.3.2.3 of the Final EA relies on drawdown and recovery data collected during the aquifer pumping test to estimate the hydrogeological properties of the ore-bearing aquifer and confining layers.³⁴ OST goes on to complain that “[t]he Final EA fails to enforce any degree of scientific rigor” on two parameters: transmissivity and storativity.³⁵

To the extent that this contention challenges the adequacy of the pump test data collected and used to develop the hydrogeologic model of the site (*i.e.*, demonstrating adequate “confinement”), this aspect of the contention is already part of admitted Contention 2. However,

³⁴ OST Final EA Contentions at 25.

³⁵ *Id.* at 26.

the portion of the contention that challenges the methods used for analyzing pump test data or the discussion of transmissivity and storativity in Section 4.2.3.1 of the Final EA is untimely. OST points to nothing new or different in the Final EA relative to the Draft EA with respect to Crow Butte’s use of Theis and Jacob’s Straight-Line Distance-Drawdown Methods. OST also identifies no new information in the Final EA relative to transmissivity and storativity.³⁶ In fact, OST acknowledges that the public had previously commented on these same topics based on the Draft EA.³⁷ Because the only part of Contention E that is not part of an existing contention is untimely, the Board should deny Contention E in its entirety.

F. Contention F: The Final EA’s failure to critically evaluate the pump test data renders the analysis and evaluation of potential impacts from restoration incomplete and insufficiently detailed to inform the public.

Contention F alleges that, by accepting pump test data “that relies on demonstrably inaccurate *prima facie* assumptions,” the Final EA does not, and cannot, sufficiently analyze the potential impacts of the proposed aquifer restoration program.³⁸ OST argues that “[t]here is no evidence suggesting the target aquifer is homogeneous” and instead should be considered as a “highly fractured system.”³⁹ OST asserts that these allegedly flawed assumptions will challenge restoration.

³⁶ Contention 2 as admitted specifically challenges the adequacy of certain parameters—effective porosity, hydraulic porosity, hydraulic conductivity, and hydraulic gradient. But, it did not challenge storativity or transmissivity. LBP-18-02, slip op. at 8. A challenge to those parameters is now too late.

³⁷ *Id.* at 25-26.

³⁸ *Id.* at 27.

³⁹ *Id.*

To the extent that this contention challenges the adequacy of the pump test data collected and used to develop the hydrogeologic model of the site (*i.e.*, demonstrating adequate “confinement”), this aspect of the contention is already part of admitted Contention 2. The rest of the contention, including portions challenging treatment of the site as a homogeneous system or the potential impacts of aquifer restoration, is untimely.⁴⁰ OST points to nothing new or different in the Final EA relative to the Draft EA with respect to homogeneity or restoration impacts. Moreover, OST has not provided any expert support for its bald assertion that the aquifer cannot be treated as homogeneous or that it is “closer to a dual porosity model.”⁴¹ Because the only part of Contention F that is not part of an existing contention is untimely and otherwise inadmissible, the Board should deny Contention F in its entirety.

G. Contention G: The Final EA fails to provide an adequate baseline groundwater characterization or demonstrate that ground water and surface water samples were collected in a scientifically defensible manner using proper sample methodologies.

Proposed Contention G alleges that the Final EA fails to provide an adequate baseline groundwater characterization or to demonstrate that ground water and surface water samples were collected in a scientifically defensible manner using proper sample methodologies.⁴² OST provides no basis for this contention other than stating that “[t]he manner in which baseline water quality information is gathered is crucial to any analysis that relies on the data,” as is “[t]he quality and calibration of the technology used to gather the baselines.”⁴³

⁴⁰ Contention 2 never argued that the site should be treated as a “highly fractured system.”

⁴¹ Bare assertions are insufficient to allow the admission of a proffered contention. *Fansteel, Inc.* (Muskogee, Oklahoma Site), CLI-03-13, 58 NRC 195, 203 (2003).

⁴² OST Final EA Contentions at 29.

⁴³ *Id.* at 30.

This contention is untimely. Section 6.1.2, *Baseline Groundwater Monitoring*, of the original license amendment request documents the results of the radiological and non-radiological analyses for private water supply wells for the MEA as well as the monitor wells installed within the MEA for purposes of assessing the site. OST could have brought its concerns about baseline water quality studies at the time the license amendment application was filed. Contention G is therefore untimely.

Moreover, Contention G fails to raise a genuine dispute on a material issue. The contention is nothing more than a bald assertion that the application somehow does not reflect an accurate baseline of water quality. There is no expert support for the contention. And the proposed contention identifies no specific aspect of the application or Final EA that is alleged to be deficient, much less any particular data that is alleged to be suspect. This is insufficient to establish a dispute that could form the basis for an admissible contention.

H. Contention H: The Final EA fails to adequately analyze ground water quantity and quality impacts due to extended restoration timetable of April 2018 and known need for ACLs.

Proposed Contention H is nearly identical to Contention 3 as set forth in OST's original request for hearing, and as such has already been rejected by the Board.⁴⁴ Nevertheless, OST again attempts to argue that the Final EA fails "to provide an analysis of the ground water quantity impacts of the project" and further asserts that it presents "conflicting information on

⁴⁴ Compare OST Final EA Contentions at 31 ("The Final EA violates the National Environmental Policy Act in its failure to provide an analysis of the ground water quantity impacts of the project. Further, the Final EA presents conflicting information on ground water consumption such that the water consumption impacts of the project cannot be accurately evaluated.") to OST Request for Hearing at 18-19 ("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.") (emphasis added).

ground water consumption such that the water consumption impacts of the project cannot be accurately evaluated.”⁴⁵ The purported basis is primarily a recitation of statements in the Final EA and the EA associated with license renewal for the main mining area and Central Processing Facility.⁴⁶ Contention H is inadmissible.

Most importantly, Contention H is untimely. OST cites the discussion of consumptive use in Section 4.3.2 of the Final EA, highlighting the NRC Staff’s overall conclusions regarding impacts from consumptive use.⁴⁷ This discussion is identical to that in the Draft EA.⁴⁸ To the extent that OST is alleging that Crow Butte’s plans with respect to ACLs for the main mining area represent new information, those plans pre-date the Draft EA and therefore cannot support a timely contention.⁴⁹ The discussion on the amount of groundwater used in the restoration process cited by OST likewise was available in the same section in the Draft EA and cannot form the basis for a timely contention.⁵⁰ And the excerpt from the License Renewal EA included in Contention H also cannot form the basis for a timely contention.⁵¹ The excerpted information was available in the License Renewal EA, which was published in October, 2014, well before the

⁴⁵ OST Final EA Contentions at 31.

⁴⁶ *Id.* at 34-36.

⁴⁷ *Id.* at 32.

⁴⁸ *Compare* Final EA at 4-15 to Draft EA at 4-15.

⁴⁹ NRC regulations explicitly allow the use of ACLs. 10 C.F.R. Part 40, Appendix A, Criterion 5B(5)(c). To the extent OST challenges the use of an ACL, this is an impermissible challenge to an NRC regulation. 10 C.F.R. § 2.335(a); *see also Crow Butte Resources, Inc.* (License Renewal), LBP-15-11, slip op. at 40-41.

⁵⁰ OST Final EA Contentions at 33-34. There are no differences between the Draft and Final EA in the relevant section.

⁵¹ *Id.* at 34.

publication of the Draft EA.⁵² Simply put, there is nothing new in proposed Contention H that could not have been raised at least as early as the Draft EA.

Moreover, OST provides no expert opinion or other information to suggest that any particular aspect of evaluation in the Draft or Final EA is inadequate. While the contention excerpts the discussion in the License Renewal EA and the Final EA, it does not dispute the detailed assessment in the Final EA of consumptive use during operations and restoration that took into account the main mining area, MEA, and the Three Crow Expansion Area, and that also addressed the North Trend Expansion Area.⁵³ In that assessment, the NRC concluded that “[a]quifer restoration would not desaturate the Basal Chadron Sandstone aquifer or destabilize the resource.”⁵⁴ Based on this, the NRC determined that the potential short-term impact from consumptive groundwater use during aquifer restoration would be MODERATE and that, because water levels would eventually recover after aquifer restoration was complete, the overall potential long-term impact from consumptive groundwater use during aquifer restoration would be SMALL.⁵⁵ OST has not provided any information or expert opinion to suggest that restoration at the Marsland site would desaturate the Basal Chadron Sandstone aquifer or destabilize the resource, or that water levels would not recover following restoration. Accordingly, the contention does not raise a genuine dispute on a material issue.

⁵² See Final Environmental Assessment for the License Renewal of U.S. Nuclear Regulatory Commission License No. SUA-1534, Docket No. 040-08943 (October 2014) at 81-83.

⁵³ Final EA at 4-16 to 4-19.

⁵⁴ *Id.* at 4-19.

⁵⁵ *Id.*

I. Contention I: The Final EA fails to adequately analyze cumulative impacts that include decommissioning of central processing plant and existing mining units.

Proposed Contention I alleges that the Final EA fails to adequately analyze cumulative impacts of decommissioning the Central Processing Plant and existing mine units.⁵⁶ The contention argues that the “cumulative impacts analysis [] must address not only past uranium mining in the region by CBR or others, but also present and foreseeable uranium development - including the existing Crow Butte site, the North Trend Expansion Area, the Three Crows Expansion Area and the MEA (the “CBR Expansion Areas”).”⁵⁷ This contention is inadmissible.

The Final EA does address the cumulative impacts of the existing site, along with the North Trend, Three Crow, and MEA satellite wellfields.⁵⁸ Moreover, the same analysis was included in the Draft EA.⁵⁹ Accordingly, there is no omission as alleged, and any contention alleging an omission is also untimely.

With respect to the claim that the Final EA should have addressed the status of the mine units at the main mining area, the contention fails to present a genuine dispute on a material issue. OST presents no evidence to support its assertion that impacts associated with restoration of the existing mine units would influence the cumulative impacts analysis. Nor could there be any, given that the analysis already assumes that those units will be restored. In short, Contention I is based on pure speculation, unsupported by any expert opinion or other information that suggests that the current assessment is inadequate. Accordingly, Contention I is inadmissible.

⁵⁶ OST Final EA Contentions at 37.

⁵⁷ *Id.* at 38.

⁵⁸ See Final EA, Chapter 5, *Cumulative Impacts* (addressing, among others, cumulative land use, geology, water resources, air, and archeological impacts).

⁵⁹ See Draft EA, Chapter 5, *Cumulative Impacts*.

J. Contention J: Failure to discuss or demonstrate lawful federal jurisdiction and authority over Crow Butte’s activities.

In Contention J, OST argues that the EA “fails to demonstrate lawful federal jurisdiction and NRC authority over the territory and lands upon which Crow Butte seeks the renewal of its license.”⁶⁰ OST asserts that it “is the lawful possessor of sovereign jurisdiction, to the exclusion of the United States, over the territory upon which both the land and its natural resources lie and is the rightful caretaker of that land and its natural resources, including its minerals and its surface and ground water and air.”⁶¹ According to OST, the United States lacks jurisdiction over the activities that occur within that territory or over the land and its natural resources.⁶²

As the Board explained in LBP-08-24 addressing a similar contention, it is bound by the Supreme Court’s decision in *United States v. Sioux Nation of Indians*, 448 U.S. 371, 423-24 (1980), which found Congress rescinded the portion of the Treaty that granted the Black Hills territory (including the area now belonging to Crow Butte) to the Sioux Tribe, through Congress’s power of eminent domain.⁶³ The contention therefore raises issues outside the scope of this proceeding. The contention is also untimely because it could have been raised based on the original license amendment application. Finally, OST fails to take issue with any specific part of the Final EA, and the assertion that the NRC Staff is not respecting treaty rights is merely a

⁶⁰ OST Final EA Contentions at 39.

⁶¹ *Id.* at 40.

⁶² *Id.* at 41.

⁶³ *Crow Butte Resources, Inc.* (License Renewal for In Situ Leach Facility, Crawford, Nebraska), LBP-08-24, slip op. at 60-61; *see also Cogena Mining, Inc.* (Irigaray and Christensen Ranch Facilities), CLI-09-09, slip op. at 5-6 (finding that the Board in LBP-08-24 correctly relied on the Supreme Court decision in *Sioux Nation of Indians*).

statement of general concern that does not raise a material dispute of law or fact for the Board to consider. Proposed OST Contention J is therefore inadmissible.

K. Contention K: Failure to obtain the consent of the Oglala Sioux Tribe as required by treaty and international law.

The intervenors claim that the Final EA fails to adequately address “the collective human right recognized by international law of ‘free, prior, and informed *consent*’ to “any [] unauthorized encroachment upon the Tribe’s territory or the development of contamination of the Tribe’s natural resources,” and also fails to adequately or meaningfully summarize the “nature and extent of the so-called consultation [with indigenous peoples].”⁶⁴ OST complains that the Final EA does not demonstrate that its members have been adequately informed or have given free consent to the proposed MEA, and that it does not include any discussion “excusing the NRC from its violations of the collective human rights” of indigenous peoples that OST presumes would result from the issuance of the license.⁶⁵

This contention is outside of the scope of this proceeding. OST does not provide any legal basis for the purported standards on which this contention rests, either requiring a discussion of consent to unauthorized encroachment or development, or requiring a “meaningful” summary of consultation processes. OST relies on passages of the Fort Laramie Treaty of 1868 granting tribal rights to limit access to and use of specific land, and on provisions of the United Nations Declaration on the Rights of Indigenous Peoples of 2007 (“UN Declaration”) relating to “collective human rights to self-determination, to territorial integrity, and to property . . . within

⁶⁴ OST Final EA Contentions at 53 (emphasis in original).

⁶⁵ *Id.* at 56.

their territorial boundaries” as the purported basis of this contention.⁶⁶ The OST fails to demonstrate that either of these authorities applies to the MEA or in the context of NRC environmental review.⁶⁷ The intervenors’ vague and generalized concerns do not demonstrate any genuine dispute with the conclusions in the EA and therefore do not support an admissible contention.

Moreover, no genuine dispute exists between OST and the applicant on any material issue of law or fact related to Contention K. OST’s discussion of this contention fails even to cite Section 106 of the National Historic Preservation Act, which properly informed the intensive tribal consultation process described in detail in the Final EA.⁶⁸ The Final EA demonstrates, and nowhere does OST dispute, that the required tribal consultation has indeed occurred, starting with the issuance of a formal invitation to twenty-one tribes (including the OST) to participate as consulting parties and request for any known information on any areas on the project site that may have cultural significance on September 5, 2012.⁶⁹ The Final EA discusses subsequent literature searches, field investigations at the site, the completion of a Tribal survey of the MEA, and the distribution of the survey report and associated documents to the consulting

⁶⁶ *Id.* at 53-54.

⁶⁷ *Id.* at 54.

⁶⁸ Final EA at 3-50 through 3-61.

⁶⁹ *Id.* at 3-57; U.S. Nuclear Regulatory Commission, Letter from Larry W. Camper, NRC, to Jim Shakespeare, Northern Arapaho Business Committee, “Invitation for Formal Section 106 Consultation Pursuant to the National Historic Preservation Act Regarding the Crow Butte Resources, Inc. License Amendment Application for the Proposed Marsland Expansion Area In-Situ Uranium Recovery Satellite Facility, in Dawes County and Sioux County, Nebraska,” September 5, 2012 (ML12248A266).

Tribes for review and comment.⁷⁰ This process met the applicable requirements of National Historic Preservation Act as well as NRC guidance and policies.

Finally, and most importantly, this contention is untimely because it does not involve any new or previously unavailable information. Not only was OST directly informed of studies underway of the MEA on multiple occasions during the process of consultation and study, but information on the process of tribal consultation and findings regarding cultural resources was also made available for public comment on June 30, 2014.⁷¹ Moreover, all of the information in the Final EA, including discussion of applicable law and detailed description of the tribal consultation, was included in the Draft EA.⁷²

Contention K is both untimely and lacks a legal or factual basis, and must therefore be rejected.

L. Contention L and Contention M: Failure to meet applicable legal requirements regarding protection of historical, cultural, and spiritual resources; and failure to meet applicable legal requirements regarding protection of historical, cultural, and spiritual resources by reason of the failure to involve or consult the Oglala Sioux Tribe as required by federal and international law.

Contentions L and M restate claims that were first made by OST as Contention 1 in its Petition to Intervene and Request for Hearing on January 29, 2013, which addressed the adequacy of the Environmental Review (“ER”) submitted by CBR with its application.⁷³ Because

⁷⁰ Final EA at 3-57 through 3-61.

⁷¹ U.S. Nuclear Regulatory Commission, “Crow Butte Resources, Inc., Proposed Marsland Expansion Area, NRC Documentation of NHPA Section 106 Review (Draft Cultural Resources Sections of Environmental Assessment),” June 30, 2014 (ML14176B129).

⁷² *Compare* Draft EA at 3-65 through 3-76 to Final EA at 3-50 through 3-61.

⁷³ Petition to Intervene and Request for Hearing of the Oglala Sioux Tribe, January 29, 2013 (ML13029A806).

the process of reviewing historical and cultural resources was still ongoing at the time that Contention 1 was submitted, the Board established a schedule for the proceeding that allowed OST to amend its contention in response to information developed in the course of that review.⁷⁴ OST did not file any amended contentions by the deadline established by the Board, however, and on October 22, 2014 the Board granted a Staff motion for summary disposition of Contention 1.⁷⁵ The Board found that the cultural resources sections of the Draft EA, which were posted publicly on June 30, 2014, adequately “address the CBR ER’s Native American cultural resources site identification deficiency” and that “lacking a new/amended OST contention pleading a material omission from, or inadequacy with, the draft EA cultural resources sections, we conclude that there are no genuine material factual disputes remaining regarding OST contention 1.”⁷⁶ Contentions L and M are both untimely and improper—attempting to revive issues that have been settled by the Board well after the window has closed for a timely challenge.

In Contention L, the intervenors claim that the Final EA does not meet the requirements of NEPA, the National Historic Preservation Act (“NHPA”), and related applicable regulations because it lacks an adequate description of and “hard look” at the affected environment or the impacts of the project on archaeological, historical, and traditional cultural resources.⁷⁷ Specifically, OST claims that the Final EA does not fulfill the requirements for environmental

⁷⁴ See Memorandum and Order (Ruling on Motion for Summary Disposition Regarding Oglala Sioux Tribe Contention 1), October 22, 2014, at 3-4 (ML14295A237).

⁷⁵ *Id.* at 14-15.

⁷⁶ *Id.*

⁷⁷ OST Final EA Contentions at 56.

reports to the NRC set forth in 10 C.F.R. Sections 51.45, 51.60, 51.70, and 51.71⁷⁸ because “[n]o specific, proper, or sufficient survey was performed for this license expansion in order to demonstrate that archaeological sites within the project area are properly identified, evaluated and protected and to show that it has submitted a proper analytic discussion.”⁷⁹ Contention L relies heavily upon a January 28, 2013 statement of Dr. Louis A. Redmond addressing the very same alleged deficiencies in the ER that the Board ruled were addressed by the Draft EA sections on cultural resources.⁸⁰ It objects to information at the foundation of the cultural and historical review, including a 2009 ethnographic field study by Sebastian LeBeau and a field investigation conducted by members of the Crown Nation and Santee Sioux Nation (two of the other consulting tribes).⁸¹ Contention L also includes a discussion of the Board’s partial initial decision in the license renewal proceeding that has no bearing on the adequacy of the Final EA in this license amendment proceeding.⁸² The partial initial decision pre-dates the Draft EA, and therefore cannot support a timely contention based on the Final EA. Contention L is untimely.

Contention M revisits Contention 1 as well, challenging the adequacy of the tribal consultation that was undertaken as part of the cultural review process, claiming that the “whole process of Section 106 ‘consultation’ was fundamentally flawed, did not amount to a good faith

⁷⁸ OST’s discussion incorrectly cites 40 C.F.R. Sections 51.10, 51.70, 51.71, but it is clear that their intent was to refer to NRC regulations under title 10.

⁷⁹ OST Final EA Contentions at 56-57.

⁸⁰ Dr. Redmond’s affidavit was filed in support of Contention 1, which was admitted and later resolved through summary disposition. There is therefore nothing “new” in Dr. Redmond’s statement.

⁸¹ Draft EA at 3-74, 3-75.

⁸² OST Final EA Contentions at 62.

consultation, and failed to satisfy NHPA let alone the requirements for an adequate consultation under NEPA.”⁸³ As with its discussion of Contention L, OST relies on the 2013 statement by Dr. Louis A. Redmond submitted with the original Contention 1, ignoring the fact that it addresses the ER and not the EA.⁸⁴ Contention M also includes an extensive, in-depth discussion of law and precedent related to tribal sovereignty and rights, including NRC and federal court decisions, presidential orders, federal legislation, and international agreements.⁸⁵ However, OST’s wide-ranging legal analysis never addresses the basic requirements under 10 C.F.R. § 2.309 that the information upon which a new or amended contention is based must not previously available, and that the information upon which a new or amended contention is based must be materially different from information previously available.

Nowhere in either Contention L or Contention M have intervenors made any attempt to identify information in the Final EA that was different from the Draft EA. To the contrary, OST acknowledges that there are no material changes in the substance of the Final EA that would differentiate it from the Draft EA with regard to issues raised in Contention L: “The OST in its comments to the Draft EA challenged the sufficiency of the EA on this issue . . . In response, the NRC Staff cited Sections 3.6, 3.3, 3.6.4, 3.6.5, and 4.6 of the Final EA which are essentially unchanged from the Draft EA.”⁸⁶ Similarly, in Contention M, OST complains: “Nothing has been changed or added by the NRC Staff to the discussion/assessment since the

⁸³ *Id.* at 69.

⁸⁴ *Id.* at 70-71.

⁸⁵ *Id.* at 71-74.

⁸⁶ *Id.* at 57.

Board’s findings and ruling to address or correct these fundamental deficiencies [in the Draft and Final EA] in regard to the Marsland Expansion Area or Application.”⁸⁷

Neither Contention L nor Contention M meets the basic, threshold requirements for a new or amended environmental contention under 10 C.F.R. § 2.309(c)(1). All of the information about tribal consultation and cultural resources studies that is included in the Final EA has been available to the public since the release of cultural resource sections of the Draft EA June 30, 2014, and to the OST, as an officially-designated consulting tribe, even earlier.⁸⁸ Contention L and Contention M are untimely and must be rejected.

M. Contention N: Failure to take the requisite “Hard Look” at environmental justice impacts.

OST claims that the Final EA fails to adequately address potential disproportionate or adverse impacts on minority and low-income populations within the 50-mile area around the facility.⁸⁹ It cites Executive Order 12,898 (1994) (“EO 12,898”) as an authority requiring environmental justice reviews, but acknowledges that the NRC is “not expressly bound” by its provisions.⁹⁰ OST also cites NRC decisions requiring NRC Staff to conduct “detailed”

⁸⁷ *Id.* at 58.

⁸⁸ Not only did OST have the ability to review the Information regarding tribal consultation and cultural resources studies that was first posted publicly on June 30, 2014, but as an officially-designated consulting tribe, OST received regular notifications and updates regarding ongoing studies and surveys. As documented in Section 3.6.5.2 of the Final EA, the NRC sent an unredacted copy of the Tribal field survey report that was conducted at the site on April 2, 2013, and on May 30, 2014, OST was provided with an unredacted copy of the summer 2013 field survey report.

⁸⁹ OST Final EA Contentions at 79.

⁹⁰ *Id.*

consideration of environmental justice and to “take care to mitigate or avoid special impacts attributable to the special character of [local communities].”⁹¹

Contrary to OST claims, the Final EA demonstrates that NRC Staff did faithfully follow NRC guidance and procedures adopted to fulfill the standards set forth in EO 12,898, and that its investigation fully met these standards in identifying minority and low-income populations in the site vicinity and in assessing potential impacts from Crow Butte’s proposed operations.⁹² NRC Staff considered the nearest minority populations to the MEA, which were located in the City of Crawford, more than 15 miles from the MEA, and the Town of Hemingford, approximately 15.4 miles from the MEA, as well as schools in Crawford, Hemingford and the community of Marsland, acknowledging that more students in the vicinity of the MEA live in families in poverty than are found in the state as the whole.⁹³ It concluded that there would be no adverse environmental impacts to the population within the MEA from proposed project activities, and there would be no disproportionate impact to any minority population from the construction and implementation of the MEA.⁹⁴

The intervenors claim that the Final EA must evaluate environmental justice impacts on all minority and low-income populations within a 50-mile impact area, but they provide no basis for this standard.⁹⁵ And while the intervenors cite information provided in the Final EA to support their contention that American Indians (and specifically, Oglala Lakota people) reside

⁹¹ *Id.* at 79-80.

⁹² Final EA at 3-63, 3-64, 4-43, 4-44, 4-45.

⁹³ *Id.* at 9-92.

⁹⁴ *Id.* at 4-33.

⁹⁵ OST Final EA Contentions at 79, 82.

within a 50-mile radius of the MEA, they have not provided any data or supporting affidavits regarding activities or potential impacts on this or any other minority or low-income population.⁹⁶ Simply noting the presence of minority or low-income populations does not establish a disproportionate impact (*i.e.*, that those populations would suffer impacts different from what others would experience).⁹⁷ OST conflates environmental impacts with “historic, cultural and spiritual interests” of “indigenous peoples with ancestral ties to the area” and claim that those peoples would “suffer adverse impacts disproportionate in both kind and amount.”⁹⁸ However, even if these interests may be considered in evaluating environmental justice impacts (a contention which the intervenors have provided no evidence to support), the intervenors provide no evidentiary basis for their assertions.⁹⁹ The intervenors’ generalized concerns and unsupported claims do not demonstrate a genuine dispute with the conclusions in the Final EA and therefore do not support an admissible contention.

Contention N is also untimely. The NRC Staff included the same information and reached the same conclusions in its assessment of potential environmental justice impacts in its Draft EA as it did in its Final EA, as OST implicitly acknowledges. OST complains that “OST included these deficiencies in its comments to the NRC Staff on the Draft EA but it [sic] apparently

⁹⁶ *Id.* at 82.

⁹⁷ *See e.g.*, “Policy Statement on the Treatment of Environmental Justice Matters in NRC Regulatory and Licensing Actions,” 68 Fed. Reg. 62642, 62644 (Nov. 5, 2003) (noting that “[t]he focus of any [environmental justice] review should be on identifying and weighing disproportionately significant and adverse environmental impacts on minority and low-income populations that may be different from the impacts on the general population”).

⁹⁸ OST Final EA Contentions at 82.

⁹⁹ *Id.*

fell on deaf ears.”¹⁰⁰ A new contention based on the Final EA is only timely if the information on which it is based was not previously available or is materially different from information that was available previously.¹⁰¹ Here, the intervenors have made no attempt to identify any new or materially different information in the Final EA relative to the Draft EA. The same basis for the NRC Staff’s assessment, as well as the overall conclusion on environmental justice impacts, were included both in the Draft EA. This contention is therefore untimely.

CONCLUSION

For the foregoing reasons, none of the intervenors proposed contentions are admissible or timely. Contentions A-N should be denied.

Respectfully submitted,

/s/ signed electronically by
Tyson R. Smith
Louise Dyble
Winston & Strawn LLP
101 California Street
San Francisco, CA 94111

COUNSEL FOR CROW BUTTE
RESOURCES, INC.

Dated at San Francisco, California
this 13th day of June 2018

¹⁰⁰ *Id.* at 84.

¹⁰¹ 10 C.F.R. § 2.309(c).

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of:)	
)	Docket No. 40-8943-MLA-2
CROW BUTTE RESOURCES, INC.)	
)	ASLBP No. 08-867-02-OLA-BD01
(Marsland Expansion Area))	

CERTIFICATE OF SERVICE

I hereby certify that copies of “CROW BUTTE RESOURCES’ RESPONSE TO THE OGLALA SIOUX TRIBE’S FINAL ENVIRONMENTAL ASSESSMENT CONTENTIONS” in the captioned proceeding have been served this 13th day of June 2018 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.

/s/ signed electronically by
Tyson R. Smith
Winston & Strawn LLP
101 California Street
San Francisco, CA 94111

COUNSEL FOR CROW BUTTE
RESOURCES, INC.