June 13, 2018

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

NRC STAFF RESPONSE TO THE OGLALA SIOUX TRIBE'S MIGRATED, RENEWED, AND NEW MARSLAND EXPANSION FINAL ENVIRONMENTAL ASSESSMENT CONTENTIONS

INTRODUCTION

The Staff of the U.S. Nuclear Regulatory Commission hereby responds to the Oglala Sioux Tribe's (OST's) "Migrated, Renewed, and New Marsland Expansion Final Environmental Assessment Contentions."[1] For the reasons set forth below, the Staff does not object to migration of Contention 2 to the final Environmental Assessment[2] (Final EA), but the Atomic Safety and Licensing Board (Board) should deny the 14 new or "renewed" contentions challenging the Final EA, because the proposed contentions fail to meet the requirements of 10 C.F.R. § 2.309(c)(1), (f)(1), or both, and are therefore inadmissible.

BACKGROUND

Crow Butte Resources, Inc. (CBR) holds NRC source materials license SUA-1534, which authorizes operation of CBR's existing in-situ uranium recovery (ISR) facility in Dawes

[1] The Oglala Sioux Tribe's Migrated, Renewed, and New Marsland Expansion Final Environmental Assessment Contentions (May 30, 2018) (New Contentions).

[2] NRC Office of Nuclear Materials Safety and Safeguards, "Environmental Assessment for the Marsland Expansion Area [MEA] License Amendment Application" (April 2018) (Agencywide Documents Access and Management System (ADAMS) Accession No. ML18103A145). In December 2017, the Staff issued a draft EA for public review and comment. "Draft Environmental Assessment for the Marsland Expansion Area License Amendment Application" (ML17334A870) (Draft EA).

County, Nebraska.[3] In 2012, CBR submitted to the NRC a request to amend its license to allow construction and operation of an ISR satellite facility at the Marsland Expansion Area (MEA) in Dawes County, Nebraska.[4] The MEA is located approximately 11 miles south-southeast of the existing CBR facility.

In 2012, the Staff published a notice in the *Federal Register* offering the opportunity to request a hearing in the MEA license amendment proceeding.[5] In response, the OST filed a hearing request and was admitted as a party to this proceeding.[6] After the Commission's decision on the Staff's appeal of contention admissibility, two contentions remained.[7] Contention 1, as reformulated by the Board, challenged the application's description of the affected environment and impacts of the project on archaeological, historical, and traditional cultural resources.[8] Contention 2, as admitted by the Board, challenged the sufficiency of information in the application regarding the geological setting of the area and the potential effects of the project on adjacent surface and groundwater resources.[9]

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[3] The current version of SUA-1534 (Amendment 3) (ML18117A295), issued on May 23, 2018, reflects the Staff's approval of the MEA application. The prior version of the license (Amendment 2) can be found at ML17013A659.

[4] "License No. SUA-1534, Docket Number 40-8943, Marsland Expansion Area License Amendment Application" (May 16, 2012) (ADAMS Package ML121600598). The application consisted of a Technical Report (TR) and Environmental Report (ER). In 2015, CBR submitted a complete update to the TR (ADAMS Package ML15328A422) (2015 TR), with updates responding to open issues in 2016 and 2017. The ER was last updated in April 2014. In November 2017, the Staff made available a "Compiled ER" that contains the latest versions of the ER (from 2014), including tables, figures, and appendices. The Compiled ER is available in ADAMS Package ML17325B322.

[5] "Crow Butte Resources, Inc. License SUA-1534, License Amendment To Construct and Operate Marsland Expansion Area," 77 Fed. Reg. 71,454 (Nov. 30, 2012).

[6] *Crow Butte Resources, Inc.* (Marsland Expansion Project), LBP-13-6, 77 NRC 253, 304 (2013). A hearing request on behalf of Consolidated Petitioners was denied. *Id*. at 304-05.

[7] *Crow Butte Resources, Inc*. (Marsland Expansion Project), CLI-14-2, 79 NRC 11, 26 (2014).

[8] LBP-13-6 at 306.

[9] *Id*.

In June 2014, the Staff made the cultural resources sections of the Draft EA available on its public website[10] and notified the Board and parties of their availability.[11] Pursuant to a prior scheduling order, the OST was provided 30 days to submit new or amended contentions on the draft cultural resources sections, but filed no new or amended contentions.[12] Shortly thereafter, the Staff filed a Motion for Summary Disposition of Contention 1.[13] The Board granted the Staff's motion and dismissed Contention 1.[14]

On December 11, 2017, the Staff notified the Board and parties that its Draft EA was publicly available in ADAMS.[15] Pursuant to the Board's direction, the deadline for filing a motion to admit new or amended contentions on the Draft EA was January 16, 2018.[16] The OST did not move to admit any new or amended contentions, nor did the OST file a statement supporting migration of Contention 2 to the Draft EA. Accordingly, the Staff filed a motion to deny the migration of the environmental component of Contention 2 into a challenge to the Draft EA.[17] The Board granted in part and denied in part the Staff's motion.[18]

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[10] *See* http://www.nrc.gov/materials/uranium-recovery/license-apps/marsland/section106-marsland.html (Draft Cultural Resource Sections). At the time it made the draft cultural resources sections available, the Staff also provided supporting information on the website, including redacted versions of a field survey report by the Crow and Santee Sioux Nations and the Staff's report on a follow-up field survey of sites identified in the Crow/Santee Sioux report.

[11] NRC Staff Letter to the Administrative Judges, at 1 (June 30, 2014).

[12] Memorandum and Order (Revised General Schedule), Appendix A at 1 (Apr. 30, 2014) (unpublished).

[13] NRC Staff's Motion for Summary Disposition of Contention 1 (Aug. 6, 2014).

[14] Memorandum and Order (Ruling on Motion for Summary Disposition Regarding Oglala Sioux Tribe Contention 1), at 2 (Oct. 22, 2014) (unpublished) ("Contention 1 Summary Disposition Order").

[15] NRC Staff Letter to the Atomic Safety and Licensing Board (Dec. 15, 2017), at 1. Shortly thereafter, on December 15, 2017, the Staff's Finding of No Significant Impact (FONSI) was published in the *Federal Register.* Draft Environmental Assessment and Draft Finding of No Significant Impact; Notice of Availability and Request for Comments, 82 Fed. Reg. 59,665 (Dec. 15, 2017).

[16] Memorandum and Order (Revised General Schedule), Appendix A (Apr. 20, 2017) (unpublished).

[17] NRC Staff's Motion to Deny Migration of Environmental Portion of Contention 2 (Jan. 26, 2018).

[18] *Crow Butte Resources, Inc.* (Marsland Expansion Area), LBP-18-2, 88 NRC __, __ (Mar. 16, 2018) (slip op. at 1).

On April 30, 2018, the Staff notified the Board and parties of the availability of the final EA.[19] On May 30, 2018, the OST filed the new contentions at issue here.

LEGAL STANDARDS

I. Timeliness Standards for New and Amended Contentions

New or amended contentions submitted after the initial date for hearing requests must meet the requirements of 10 C.F.R. § 2.309(c)(1). To do so, a party must demonstrate good cause by showing that the following three conditions are met:

(i) The information upon which the filing is based was not previously available

(ii) The information upon which the filing is based is materially different from information previously available, and

(iii) The filing has been submitted in a timely fashion based on the availability of the subsequent information.

The intervenor has the burden of demonstrating that any new or amended contention meets the standards in 10 C.F.R. § 2.309.[20] New environmental contentions must be "based on a significant difference between [the environmental information in the application] and the draft or final NRC NEPA document" and must also be "based on new information that is materially different from previously available information."[21] A contention based on the Staff's NEPA document cannot be admitted unless it rests on data or conclusions that "differ significantly" from those in the environmental information in the application.[22] A new NEPA contention is not an occasion to raise additional arguments that could have been raised previously.[23]

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[19] NRC Staff Letter to the Administrative Judges, at 1 (April 30, 2018).

[20] *AmerGen Energy Co., LL*C (Oyster Creek Nuclear Generating Station), CLI-09-7, 69 NRC 235, 260-61 (2009).

[21] Amendments to Adjudicatory Process Rules and Related Requirements, 77 Fed. Reg. 46,562, 46,567 (Aug. 3, 2012) (final rule).

[22] *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 & 2, Catawba Nuclear Station, Units 1 & 2), CLI-02-28, 56 NRC 373, 385 (2002).

[23] *Id.* at 385-86; *see also Private Fuel Storage, L.L.C*. (Independent Spent Fuel Storage Installation), LBP-00-27, 52 NRC 216, 223 (2000) (denying a late contention where the only assertion was that "certain

Furthermore, the Staff's NEPA document does not provide the only opportunity for an intervenor to submit a new contention. To the contrary, if an intervenor wishes to raise a new or amended contention while a hearing is ongoing, it must submit that contention at the time other information becomes available that would support its contention. In other words, the intervenor must submit its new contention "in a timely fashion based on the availability of the subsequent information."[24]

II. General Requirements for Contention Admissibility

In addition to meeting the requirements of 10 C.F.R. § 2.309(c)(1), new or amended contentions must also satisfy the six contention admissibility requirements of 10 C.F.R. § 2.309(f)(1). That section requires that each contention:

(i) Provide a specific statement of the issue of law or fact to be raised or controverted;

(ii) Provide a brief explanation of the basis for the contention;

(iii) Demonstrate that the issue raised in the contention is within the scope of the proceeding;

(iv) Demonstrate that the issue raised in the contention is material to the findings the NRC must make to support the action that is involved in the proceeding;

(v) Provide a concise statement of the alleged facts or expert opinions which support the requestor's/petitioner's position on the issue . . . ; and

(vi) Provide sufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact.

concerns that were not dealt with in the ER have additionally not been dealt with in the DEIS," with no showing of "new or different data or conclusions" in the DEIS); *Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Units 1 & 2), LBP-82-79, 16 NRC 1116, 1118 (1982) (finding no good cause for late filing where the DEIS contained no new information relevant to contention).

[24] 10 C.F.R. § 2.309(c)(1)(iii).

The contention admissibility requirements are "strict by design"[25] and "do not permit . . . 'notice pleading, with details to be filled in later.'"[26] It is the intervenor's burden to come forward with support for its contention,[27] and the intervenor has an "ironclad obligation to examine the publicly available documentary material pertaining to the facility in question with sufficient care to enable the petitioner to uncover any information that could serve as the foundation for a specific contention."[28] A board must reject a contention that rests on an incomplete or inaccurate reading of the application or the Staff's review document.[29] Finally, if an intervenor provides a document as a basis for a contention, the intervenor must explain the significance of the document and how it supports the contention.[30]

Further, an intervenor must do more than assert generally that there are deficiencies in the EA. An intervenor must identify all pertinent portions of the document it is challenging and state both the challenged position and the intervenor's opposing view. [31] To demonstrate a genuine, material dispute, the intervenor must address the specific analysis in the document

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

[26] *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 338 (1999).

[27] *Oyster Creek*, CLI-09-7, 69 NRC at 260-61; *see also Rules of Practice for Domestic Licensing Proceedings—Procedural Changes in the Hearing Process*, 54 Fed. Reg. 33,168, 33,171 (August 11, 1989) (final rule).

[28] *McGuire-Catawba*, CLI-02-28, 56 NRC at 386.

[29] *Cf. Georgia Institute of Technology* (Georgia Tech Research Reactor), LBP-95-6, 41 NRC 281, 300 (1995) (rejecting a contention based on mistaken reading of the Safety Analysis Report).

[30] *See USEC, Inc*. (American Centrifuge Plant), CLI-06-10, 63 NRC 451, 472 (2006) ("references to articles or correspondence, without 'explanation or analysis' of their relevance, [do] not provide an adequate basis" for admitting a contention); *id*. at 457 ("it is not up to the boards to search through pleadings or other materials to uncover arguments and support never advanced by the petitioners themselves; boards may not simply "infer" unarticulated bases of contentions"); *Fansteel, Inc.* (Muskogee, Oklahoma, Site), CLI-03-13, 58 NRC 195, 204-05 (2003) (stating that it is insufficient to refer generally to voluminous documents with no further analysis and supporting evidence showing why particular sections of those documents provide the basis for a contention).

[31] *Millstone*, CLI-01-24, 54 NRC at 358.

and explain how it is incorrect.[32] Or, in the case of an asserted omission, the intervenor must provide supporting reasons explaining why the missing information is required.[33] When an application contains information related to an intervenor's asserted omission and the intervenor does not challenge the adequacy of that information, the intervenor fails to show a genuine dispute.[34] An expert opinion that merely concludes that the EA is deficient, inadequate, or incorrect, without providing a reasoned basis for that conclusion, is inadequate.[35]

III. Migration of Admitted Contentions to a Staff Review Document

Under the "migration tenet," an existing NEPA contention challenging an applicant's environmental report can be "deemed to apply to the Staff's review document as it did to the application" without an affirmative showing by the contention's proponent that the 10 C.F.R. §§ 2.309(c)(1) and (f)(1) factors have been met.[36] The migration tenet can operate to "amend" a contention on an applicant's environmental report (ER) into a challenge to the Staff's EA if the EA adopts the same information and analyses from the ER that were challenged as inadequate, or if the EA maintains the same omission alleged in the ER.[37] However, the migration tenet only applies if the information in the Staff's EA is "sufficiently similar to the information in the ER" with respect to the issues challenged as deficient in the ER-based contention.[38] A new or amended

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[32] 10 C.F.R. § 2.309(f)(1)(vi).

[33] *Id*.; *see also NextEra Energy Seabrook, LLC* (Seabrook Station Unit 1), CLI-12-05, 75 NRC 301, 307 (2012) ("contentions shall not be admitted if at the *outset* they are not described with reasonable specificity or are not supported by some alleged fact or facts *demonstrating* a genuine material dispute") (emphasis in original, citations omitted).

[34] *See Progress Energy Carolinas (*Shearon Harris Nuclear Power Plant, Units 2 and 3), CLI-10-9, 71 NRC 245, 270 (2010). It is not enough to simply assert that the information is "deficient." *Id*.

[35] *See USEC*, CLI-06-10, 63 NRC at 472.

[36] *Strata Energy, Inc.* (Ross *In Situ* Recovery Uranium Project), CLI-16-13, 83 NRC 566, 570 n.17 (2016) (citing *Strata*, LBP-13-10, 78 NRC 117, 132-33 (2013)).

[37] LBP-13-10, 78 NRC at 132.

[38] *Id.* at 133 (citing *Southern Nuclear Operating Co*. (Early Site Permit for Vogtle ESP Site), LBP-08-2, 67 NRC 54, 63-64 (2008)); *see also Powertech USA, Inc. (*Dewey-Burdock In Situ Uranium Recovery Facility), LBP-13-9, 78 NRC 37, 46-47 (2013)*; Detroit Edison Co.* (Fermi Nuclear Power Plant, Unit 3),

contention challenging portions of the Staff's EA that are not substantially similar to the challenged portions of the ER must meet the "good cause" and contention admissibility standards in 10 C.F.R. §§ 2.309(c)(1) and (f)(1).[39]

IV. Legal Standards Related to the Staff's NEPA Review

NEPA requires that the Staff take a "hard look" at potential environmental effects of a proposed action. The hard look standard does not, however, require the Staff to address every environmental effect that could potentially result from the proposed action.[40] Rather, the Staff need only provide "[a] reasonably thorough discussion of the significant aspects of the probable environmental consequences" and need not discuss remote and highly speculative consequences.[41] Furthermore, as the Commission has explained, NEPA "does not call for certainty or precision, but an *estimate* of anticipated (not unduly speculative) impacts."[42]

Staff NEPA documents are not intended to be research documents,[43] and NEPA does not require the Staff to analyze every conceivable aspect of a proposed project.[44] Although it is always possible to gather more data in a particular area, the Staff "must have some discretion to draw the line and move forward with decisionmaking."[45]

LBP-12-23, 76 NRC 445, 470-71 (2012); *Progress Energy Florida, Inc.* (Levy County Nuclear Power Plant, Units 1 and 2), LBP-11-1, 73 NRC 19, 26 (2011).

[39] *Strata*, LBP-13-10, 78 NRC at 130-31.

[40] *Ground Zero Ctr. for Non-Violent Action v. U.S. Dept. of Navy*, 383 F.3d 1082, 1089-90 (9th Cir. 2004) (citing *No GWEN Alliance of Lane County, Inc. v. Aldridge*, 855 F.2d 1380, 1385 (9th Cir. 1988)).

[41] *Trout Unlimited v. Morton*, 509 F.2d 1276, 1283 (1974) (9th Cir. 1980).

[42] *Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-05-20, 62 NRC 523, 536 (2005) (emphasis in original).

[43] *Entergy Nuclear Generation Co*. (Pilgrim Nuclear Power Station), CLI-10-22, 72 NRC 202, 208 (2010) (citation omitted).

[44] *Private Fuel Storage, LLC* (Independent Spent Fuel Storage Installation), CLI-02-25, 56 NRC 340, 349 (2002).

[45] *Entergy Nuclear Generation Co.* (Pilgrim Nuclear Power Station), CLI-10-11, 71 NRC 287, 315 (2010).

Editing Staff NEPA documents to meet an intervenor's preferred language or emphasis "is not a function of [the NRC] hearing process,"[46] and boards "do not sit to 'flyspeck' environmental documents or to add details or nuances."[47] As long as the EA "on its face 'comes to grips with all important considerations' nothing more need be done."[48]

DISCUSSION

I. The Staff Does Not Object to Migration of Admitted Contention 2

In its New Contentions, the OST provides a "migration declaration" which states that Contention 2 is reformulated as a challenge to the Final EA, and which reiterates the bases described by the Board in LBP-18-2. The OST does not otherwise address the standards for migration of an environmental contention or information in the Final EA to support its migration declaration. Despite these omissions, the Staff does not oppose the admission of Contention 2 as a migrated contention, insofar as the Board has already admitted this contention as a migrated contention against the Draft EA and, with respect to the subject matter of the contention, the Final EA does not present substantially different information or analyses than was presented in the Draft EA.

[46] *System Energy Resources, Inc.* (Early Site Permit for Grand Gulf ESP Site), CLI-05-4, 61 NRC 10, 19 (2005) (internal citations omitted).

[47] *Exelon Generation Co.*, *LLC* (Early Site Permit for Clinton ESP Site), CLI-05-29, 62 NRC 801, 811 (2005); *see also Grand Gulf ESP*, CLI-05-4, 61 NRC at 19 (stating that "boards do not sit to parse and fine-tune" the Staff's NEPA documents).

[48] *Id.*

II. Contentions A–N Are Inadmissible as New Contentions

The OST has proposed 14 new or "renewed" contentions, labeled A through N.[49] For the reasons discussed below, the proposed contentions fail to meet the requirements of 10 C.F.R. § 2.309(c)(1), (f)(1), or both, and are therefore inadmissible.

A. Contentions A, B, C, H and I Are Inadmissible

Contentions A, B, C, H and I assert a variety of omissions, inaccuracies, or inadequacies in the Final EA related to the purpose and need for the MEA, decommissioning, groundwater quantity (consumptive use) impacts, and socioeconomic impacts.[50] As discussed more fully below, these contentions should be rejected because they are untimely under 10 C.F.R. § 2.309(c)(1) and, in any event, do not meet the contention admissibility requirements of 10 C.F.R. § 2.309(f)(1).

These proposed contentions fundamentally rely on a misunderstanding of two documents, which the OST portrays as material new information. The first document is a letter from CBR to the NRC dated April 2, 2018.[51] This letter informed the NRC about actions taken,

[49] As support for its new contentions, the OST attached nine "Exhibits" to its pleading. The OST did not explain how any of these documents satisfy the requirement in 10 C.F.R. § 2.309(c)(1)(iii) that new information must be provided in a timely fashion based on the availability of the information. The untimeliness of Exhibit A, dated March 16, 2018, is discussed in the Staff's response to Contention D. As for the remaining exhibits, they clearly do not meet the § 2.309(c)(1)(iii) requirement, and thus cannot serve as bases for timely new contentions. Exhibits B (LaGarry Opinion, dated February 15, 2018) and C (McLean Opinion, dated February 14, 2018) were written over two months prior to the issuance of the Final EA, and neither one appears to contain information that was unavailable prior to the issuance of the Draft EA. In fact, except for updating the author's professional qualifications, Exhibit B is virtually identical to the opinion provided by Dr. LaGarry in support of the original MEA contentions in 2013. The remaining documents (Exhibits D through H) date from 2015 or earlier.

Furthermore, in addition to failing to meet the § 2.309(c)(1) criteria, Exhibits B, C, E, F, and G should not be considered as support for any of the new contentions, because the OST does not explain the significance of these documents or how they support its contentions. *USEC*, CLI-06-10, 63 NRC at 472. It is not the Board's responsibility to search through documents to uncover support not advanced by an intervenor. *Id*. at 457.

[50] *See* New Contentions at 10-23, 31-38.

[51] Letter from Walter Nelson, Crow Butte Resources, to NRC, "Source Material License SUA-1534: Notification of [Cessation] of Production at the Crow Butte Mine" (Apr. 2, 2018) (April 2 Letter).

and anticipated future actions, related to operations at the existing CBR facility following the February 2018 announcement that Cameco planned to cease production at its U.S. operations. In the April 2 Letter, CBR stated that "the remaining production and injection from producing mine units [mine units 7-11] will be shut off in the next 60 days," but that "each mine unit (7-11) will continue to operate a limited number of wells to maintain a small 'bleed' flow for control of mining fluids." In addition, CBR stated as follows:

- "There has been no change to the restoration plans at [the existing CBR facility] and restoration activities will continue."
- "The restoration effort will take some time to complete and will result in the production and transportation of small amounts of uranium [i.e., yellowcake] and 11e2 byproduct material that is produced as a byproduct of the restoration process."
- "Within the next 21 months [i.e., by January 2020], [CBR] will submit Alternate Decommissioning Schedules for [the existing CBR facility]" which "will include a request to defer equipment decommissioning and also an integrated restoration schedule for all mine units."
- In the meantime, CBR will "continue to comply with all NRC approved restoration plans and decommissioning schedules until a new alternate decommissioning schedule has been approved."
- "All production equipment will remain in standby to provide the option to restart full operations in the future should market conditions warrant."
- CBR "intends to submit a request to change the NRC Licenses for Crow Butte Resources to Possession Only Licenses in the second half of 2018."[52]

By its own terms, the April 2 Letter does not indicate that CBR intends to permanently cease operations, that restoration has started in mine units 7-11, or when restoration in those mine units would begin.[53] Nor does the April 2 Letter indicate that any equipment, including

[52] Despite this stated intent, it is apparent from other statements in the April 2 Letter (particularly the previous sentence) that CBR intends to maintain its authority to use source material to have the option of restarting its uranium recovery and yellowcake production operations should market conditions warrant. This understanding is consistent with subsequent representations by CBR's counsel in the May 16 Board teleconference (*see* Tr. at 187-88). Moreover, and more relevant for purposes of contention admissibility, CBR has only stated an "intent" to submit such a request to the NRC but has not actually done so.

[53] There is no regulatory requirement that CBR immediately begin restoration and decommissioning. As stated in Sections 1.3 and 2.3.4 of the EA, restoration falls under the separate outdoor area provisions in the NRC's decommissioning regulations. Draft EA at 1-2, 2-10 to 2-11. Pursuant to 10 C.F.R. § 40.42(d) and (f), a licensee must either notify NRC and begin aquifer restoration within 26 months of ceasing

equipment in the central processing facility (CPF) at the CBR Facility, is being dismantled or decommissioned.[54] Finally, and perhaps most critically, all of the information in the April 2 Letter relates to ongoing operations at the existing facility. The letter does not specify any change in CBR's plans with respect to its application requesting authorization to construct and operate the MEA in the future.[55]

The second document on which the OST relies for these contentions is a license amendment request dated April 3, 2018, which seeks NRC approval of an alternate decommissioning schedule for groundwater restoration in mine units 2-6 at the existing CBR facility.[56] The document describes the restoration history and current status of restoration in mine units 2-6, and presents a schedule showing current projections for completing the remaining restoration phases in those mine units. The revised schedule, if approved, would replace the previously approved schedule identified in License Condition 10.2.2 (formerly 10.6). The April 2018 LAR, which addresses only mine units 2-6, is not the "integrated restoration schedule for all mine units" referred to in the April 2 Letter.

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lixiviant injection, or must submit a request to delay or postpone such activities within 25 months. Prior to those deadlines, CBR is not required to take any actions related to restoration or other decommissioning activities.

[54] As indicated in the April 2 Letter, the existing CBR facility continues to produce small quantities of uranium during restoration, which requires operation of the CPF.

[55] The Staff recognizes that construction and operation of the MEA would not occur unless CBR decides to restart operations at the existing CBR facility. However, the decision to cease operations, and any decision to restart operations at a later date, is a business decision based on market conditions. The decision does not preclude the Staff's licensing decision on the MEA application, which is whether to grant CBR the authority to construct and operate the MEA if CBR chooses to do so.

[56] Letter from Bob Tiensvold, Cameco Resources, to NRC DCD, "Request for Alternate Decommissioning (Groundwater Restoration) Schedule License SUA-1534 (November 2014)" (Apr. 3, 2018) (April 2018 LAR).

1. The April 2 Letter and April 2018 LAR Are Not Timely Bases for New Contentions

The OST did not submit new or amended contentions on the Draft EA, and the sections of the Final EA with which the OST takes issue are essentially unchanged from the Draft EA.[57] Therefore, in an effort to demonstrate good cause under 10 C.F.R. § 2.309(c)(1), the OST portrays the April 2 Letter and the April 2018 LAR as new information. But an examination of the two documents demonstrates that they do not meet the criteria in 10 C.F.R. § 2.309(c)(1)(ii) and (iii), and, therefore, do not provide the requisite good cause.

The Commission's regulations require that new information be "materially different than information previously available."[58] The OST does not discuss, let alone demonstrate, how the April 2 Letter and the April 2018 LAR meet this requirement. The April 2 Letter announces that CBR is ceasing operations in all remaining mine units at this time, but does not state that they are permanently ceasing operations. And eventual cessation of ISR operations is an anticipated milestone for any ISR facility. Indeed, the original MEA application stated that CBR had already ceased operations in certain wellfields and placed those wellfields in restoration, and eventually expected to cease operations of all mine units at the existing CBR facility.[59] The Final EA also acknowledged that uranium recovery activities at the existing CBR facility would eventually cease.[60] Therefore, an announcement that CBR has revised its timetable for doing so is not "materially different" information from what was previously available.

Likewise, the OST fails to demonstrate how the April 2018 LAR contains "materially different" information. In July 2016, CBR submitted a similar license amendment request for an

[57] *Compare* Sections 1.1, 1.2, 1.3, 2.3, 2.3.3, 2.3.4, 4.3, 4.7.1, 5.1, 5.3 of the Draft EA with the corresponding sections of the Final EA.

[58] 10 C.F.R. § 2.309(c)(1)(ii).

[59] *See* 2015 TR at 1-4, which indicates limited reserves remaining at current license area and stating that MU 2-6 are currently in restoration.

[60] Draft EA at 1-1; Final EA at 1-1.

alternate decommissioning schedule for mine units 2-6.[61] This July 2016 LAR contains the same information as the April 2018 LAR with respect to restoration history for each mine unit and CBR's intent to submit alternate concentration limit (ACL) applications for mine units 2 and 3.[62] Again, the OST has not explained how the information in the April 2018 LAR is materially different from information available nearly 2 years ago in the July 2016 LAR. Therefore, with respect to the April 2018 LAR, the OST has failed to meet 10 C.F.R. § 2.309(c)(1)(i) and (ii).

The regulations also require new information to be submitted "in a timely fashion based on the availability of the subsequent information."[63] In the Initial Prehearing Order for this proceeding, the Board stated that, for a motion to admit new or amended contentions "to be considered timely under 10 C.F.R. § 2.309(c)(1)(iii)," the motion and accompanying contentions should be filed "within 30 days of the date upon which the information that is the basis of the motion becomes available" to the intervenor.[64] According to their ADAMS profiles, the April 2 Letter was made publicly available on April 11, 2018, and the April 2018 LAR was made publicly available on April 16, 2018. Because the contentions based on these documents were not submitted within 30 days of the dates the documents were made available, the contentions are untimely on that basis as well.[65]

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[61] Request for Alternate Decommissioning (Groundwater Restoration) Schedule License SUA-1534 (November 2014) (July 27, 2016) (ML16322A356) (July 2016 LAR). This request was the basis for the current schedule reflected in License Condition 10.2.2 (formerly 10.6), which was approved in October 2017 as part of Amendment 2 to SUA-1534.

[62] The April 2018 LAR differs from the July 2016 LAR in a few minor respects, such as CBR's plan to submit a joint ACL application for mine units 2 and 3 rather than 2 separate applications; a status update on mine unit 3 related to spot treatment for elevated uranium levels; and schedule changes related to restoration phases and submittal of ACL applications. But the OST does not explain how any such differences from the earlier LAR are within the scope of the MEA proceeding or material to the Staff's decision on the MEA application.

[63] 10 C.F.R. § 2.309(c)(1)(iii).

[64] Memorandum and Order (Initial Prehearing Order) at 6 n.8 (February 8, 2013) (unpublished) (February 2013 Order).

[65] *Id*. The Commission has stated that if information becomes available during the Staff's review and that information could be used to challenge the environmental report (or, by analogy, the Staff's draft environmental review document), the intervenor "cannot await the issuance of the staff's NEPA analysis

In sum, the failure to meet the criteria of 10 C.F.R. § 2.309(c)(1) is sufficient grounds to reject each of these five contentions. However, as discussed in Sections II.A.2-II.A.6 below, each must also be rejected for failure to meet the admissibility criteria of § 2.309(f)(1).

2. Contention A Is Inadmissible

In Contention A, the OST asserts several omissions and deficiencies in the Final EA stemming from CBR's decision to cease production operations at the existing CBR facility. The Intervenors make the following claims: (1) many conclusions in the Final EA assume continued operation of the existing CBR facility; (2) there will now be 10 mine units in restoration instead of five; (3) the Final EA should have disclosed that CBR sought a possession-only license; (4) the Final EA should have described CBR's proposed decommissioning schedule and request to delay decommissioning of equipment; and (5) the discussion of decommissioning in the Final EA does not discuss CBR's decision to cease operations. In addition, the OST claims that several statements in the Final EA are no longer valid or accurate because of CBR's decision to cease production at the existing CBR facility.[66]

None of the issues raised in Contention A has an adequate factual basis or raises a genuine dispute with the Final EA on an issue of material fact or law, as required by 10 C.F.R. § 2.309(f)(1)(v) and (vi). To satisfy these contention admissibility requirements, an intervenor must provide facts or expert opinion that support its position, and explain why omitted information is required, or why the information in the document is inadequate, and support those explanations with facts or expert opinion. The OST fails to do so for each of the asserted omissions or inadequacies in Contention A.

to initiate the challenge." Amendments to Adjudicatory Process Rules and Related Requirements, 77 Fed. Reg. 46,562, 46,566-67 (Aug. 3, 2012) (final rule).

All of the claims in Contention A rely on statements in the April 2 Letter or the April 2018 LAR for support. The issues discussed in those documents relate to activities *already authorized* in SUA-1534, which are subject to the Staff's ongoing regulatory oversight of current operations at the existing CBR facility. They do not relate to or depend on the outcome of the Staff's review of the MEA application. The OST has not explained how CBR's decision to cease production at the existing CBR facility now (as opposed to some other point in time), or CBR's request to revise the schedule for restoration of wellfields *already in restoration*, are relevant to the MEA application or the Staff's review of the application. The OST has likewise failed to articulate why the information in these documents must be discussed, or even mentioned, in the Final EA. Therefore, these documents do not provide factual support for Contention A, nor do they provide a basis for a genuine dispute with the MEA application, as required by 10 C.F.R. § 2.309(f)(1)(v) and (vi).[67]

With regard to its specific concerns, the OST generally faults the Final EA for not addressing, as part of the discussion of decommissioning, CBR's decision to cease operations.[68] But the OST fails to explain why the Staff is required to do so. The OST asserts that "[t]here are many conclusions in the Final EA related to the [MEA] and its operation that assume the continued operation of the Crow Butte mine, including the continued injection of lixiviant and having no more than five (5) mining units in restoration phase. . . ."[69] The OST does not identify the specific conclusions in the Final EA that this statement refers to, nor does the OST further explain what it means by this assertion.[70] Therefore, the OST has failed to raise a genuine dispute with the Final EA on this issue.

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[67] The same argument applies with respect to any of the other new contentions that rely on these documents for support (e.g., Contentions B, C, H and I).

[68] New Contentions at 13-14.

[69] *Id*. at 12.

[70] It is the OST's responsibility to clearly articulate its concerns; neither the parties nor the Board should have to speculate about what the pleading means. *Entergy Nuclear Generation Co. and Entergy Nuclear*

The OST next asserts that as a result of CBR's decision to cease operations in its remaining wellfields, there will be 10 mine units in restoration "consuming vast amounts of water volumes" instead of the 5 currently in restoration.[71] But the OST's assumption that 10 mine units would be in restoration, as well as the claim that a "vast amount of water" will be consumed, are simply not supported by the documents on which the OST relies.[72] According to the April 2018 LAR, mine units 2-6 are currently in various stages of restoration; however, neither the April 2 Letter nor the April 2018 LAR indicates that mine units 7-11 are in restoration, nor specifies a timeframe for when that will occur.[73] Moreover, under License Condition (LC) 10.1.5, any changes to groundwater restoration plans must be submitted to the NRC for review and approval at least 60 days prior to groundwater restoration in a wellfield.[74] And, although the April 2 Letter states that CBR intends to submit an "integrated restoration schedule for all mine units" within 21 months, there is currently no such proposal before the agency. Without any

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Operations, *Inc*. (Pilgrim Nuclear Power Station), CLI-10-15, 71 NRC 479, 482 (2010) (citing *Commonwealth Edison Co*. (Zion Nuclear Power Station, Units 1 and 2), CLI-99-4, 49 NRC 185, 194 (1999)).

[71] New Contentions at 12.

[72] The OST's references to "pour [sic] volumes" (pore volumes) suggests that they are concerned about the total water volume needed for restoration of the remaining 10 mine units. As explained further in the Staff's response to Contention H, the total quantity of water needed for restoration at the existing CBR facility, and the expected impacts of restoration on groundwater resources from consumptive use, were considered in the Crow Butte license renewal proceeding. In addition, the additive impacts of consumptive use, considering the MEA, the existing CBR facility, and the proposed Three Crow Expansion Area (TCEA) were evaluated by CBR in 2016, and addressed in the Marsland Draft EA (with no changes in the analysis in the Final EA). Draft EA at 4-17 to 4-19, 5-6. The Draft and Final EAs also addressed the impacts of the proposed North Trend Expansion Area (NTEA) in the analysis. Draft EA at 4-18, Final EA at 4-18.

[73] The April 2 Letter explicitly states that "there have been no changes to restoration plans."

[74] SUA-1534, Amendment 3 at 9 (May 23, 2018). On June 12, 2018, the Staff received a copy of a letter (dated June 5, 2018) from CBR to the Nebraska Department of Environmental Quality (NDEQ) requesting that NDEQ revise CBR's Class III Underground Injection Control (UIC) permit for the existing CBR facility to allow all mine units to be placed in restoration status (instead of the current limit of five). Letter from Walter Nelson, CBR, to Marty Link, NDEQ, at 1 (ML18164A266). This request does not change the fact that under LC 10.1.5, CBR must request and obtain NRC approval of restoration plans for mine units 7-11 before they can be placed in restoration, and no such proposal has been submitted to the NRC. In addition, as discussed in the Staff's response to Contention H, LC 11.3.3 was imposed to ensure that the production zone aquifer will remain saturated. *See infra* at n.103.

proposed schedule or details on restoration plans, the Staff cannot, and is not required to, analyze the environmental impacts associated with possible future amendment requests.[75] Therefore, this assertion fails to raise a genuine dispute with the Final EA on this issue.

The OST next asserts that the Final EA did not disclose that CBR "has sought a possession-only license and that NRC policies preclude such an amendment."[76] But the April 2 Letter states only that CBR "intends to submit a request" for a possession only license "in the second half of 2018." Again, with no request pending before the agency, there is no requirement to consider the environmental impact of a hypothetical future licensing action. Therefore, the OST has failed to raise a genuine dispute with the EA on this issue. In addition, this claim lacks factual support. Although the OST quotes extensively from an NRC policy and guidance directive (PG 1-27), that document, in addition to being a guidance document rather than a binding requirement, explicitly states that it does not apply to licensing of uranium mills.[77]

The OST's claims that the EA should have described CBR's proposed decommissioning schedule and request to delay decommissioning are similarly flawed. Because there is currently no proposal to defer decommissioning of equipment before the agency, there is no need for the Staff to consider the impacts of such a request in the Final EA. And the only proposed decommissioning schedule before the agency is the April 2018 LAR, which is a separate licensing action associated with the existing CBR facility. Crucially, the OST has not specified

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[75] *Duke Energy Corp*. (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-14, 55 NRC 278, 295 (2002) ("To bring NEPA into play, a possible future action must at least constitute a 'proposal' pending before the agency . . . and must be in some way interrelated with the action that the agency is actively considering.")

[76] New Contentions at 12.

[77] NRC Policy and Guidance Directive (PG) 1-27, "Responses to Requests for Possession-Only Licenses" (Revision 0) at 1 (2000) (ML003685598). A complete reading of PG 1-27 further reinforces why this is so: PG 1-27 addresses situations where a licensee seeks to permanently cease operations but is unable to divest itself of licensed material—a situation that applies to licensees who possess source material in forms that would be easy to divest, such as sealed sources or devices. *See id*. An ISR licensee would be unable to divest itself of source material in this fashion.

any schedule-related statement or assumption in the Final EA that depends on (let alone is contradicted by) the April 2018 LAR. In addition, for the same reasons discussed previously, PG 1-27 does not provide factual support to this claim.[78]

Finally, the OST asserts that several statements in the Final EA are invalid or inaccurate in light of CBR's decision to cease operations. These asserted inaccuracies are based on incorrect readings of the MEA application and the Final EA, or constitute impermissible "flyspecking." First, the Final EA (and the application) states that the proposed action provides an option that allows CBR to recover uranium from a new area for continued yellowcake production at the existing CPF.[79] The OST asserts that this statement is now inaccurate because there is no "continued yellowcake production" at the existing CBR facility. But as the Final EA acknowledges, the eventual discontinuation of production at the existing CBR facility is the stated reason for seeking the MEA license amendment.[80] A misreading of a staff review document cannot form the basis for an admissible contention.[81]

Second, the OST takes issue with the Final EA's reference to the existing CBR facility as a "commercial recovery facility" when it has ceased production and is "in decommissioning and restoration of all the mining units." This claim amounts to nothing more than unsupported "flyspecking."[82] As stated previously, the documents cited by the OST simply do not support the OST's characterization of the licensee's decommissioning and restoration plans. Perhaps more fundamentally, the OST fails to explain how the facility ceases to be a "commercial uranium recovery facility" when it starts the restoration process. Under NRC regulations, the facility is a

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[78] *See id*. In addition, the OST has pointed to no requirement that an ISR licensee request, or receive, "standby status" upon ceasing uranium recovery operations.

[79] Compiled ER at 2-11 (ML17334A799), Final EA at 1-1.

[80] Final EA at 1-1.

[81] *Georgia Tech*, LBP-95-6, 41 NRC at 300.

[82] *Clinton ESP*, CLI-05-29, 62 NRC at 811.

licensed uranium recovery facility until decommissioning is complete and the NRC terminates the license. The OST identifies nothing in the Final EA to the contrary.

The OST's final three assertions are based on misunderstandings of the April 2 Letter or the conduct of the Staff's NEPA review. The OST asserts that (1) the Final EA's description in Section 1.2 of transport of loaded resin from the MEA to the CPF is inaccurate because the CPF is in decommissioning; (2) the Final EA incorrectly states that approval of uranium recovery activities at the MEA would allow CBR to maintain uranium production at licensed quantities once activities cease at the existing CBR facility; and (3) the discussion of socioeconomic impacts of the proposed action in Section 4.7.1 of the Final EA is inaccurate because it does not reflect reductions in personnel based on the cessation of operations at the existing CBR facility. The first of these assertions incorrectly assumes that the CPF is in decommissioning, when the April 2 Letter indicates that this is not the case.[83] The second and third assertions fail to recognize that the Staff's NEPA review evaluates impacts of a proposed action as if the action will take place as described in the application. The OST has identified nothing in CBR's plans as summarized in the April 2 Letter and the April 2018 LAR that contradicts material assumptions about the existing CBR facility, either in the MEA application or the Final EA. The OST's misreading of these documents cannot provide the basis for an admissible contention.[84]

3. Contention B Is Inadmissible

In Contention B, the OST asserts that the Staff failed to take a hard look at the impacts of the "proposed extended timeline for restoration and the other information contained in the Extension Amendment Request" or the impacts related to consumptive use arising from 10 mine units being in restoration. For the reasons discussed below, the OST has failed to provide

[83] The April 2 Letter indicates that small amounts of uranium are still being produced during the restoration process. This production requires the CPF to be operating.

[84] *Georgia Tech*, LBP-95-6, 41 NRC at 300.

factual support or raise a genuine dispute with the information in the Final EA, contrary to 10 C.F.R. § 2.309(f)(1)(v) and (vi).

First, the OST asserts that the timelines of activities presented in Figure 5.1 and in Sections 2.3 and 2.3.3 of the Final EA are inaccurate based on information in the April 2018 LAR.[85] But the OST has failed to demonstrate how this information is inaccurate. Sections 2.3 and 2.3.3 of the EA provide information on the relative timing of operations at the MEA, without reference to the existing CBR facility.[86] Figure 5.1 provides timelines for activities at the proposed expansion areas, along with a timeline for CPF operation to support yellowcake production using uranium recovered from proposed expansion facilities, and the Final EA specifically notes that the specific dates might change.[87] Accordingly, the OST does not explain how the April 2018 LAR materially contradicts the MEA-specific information or the timeframe for CPF production associated with expansion facilities in Figure 5.1.

Second, the OST asserts that the EA should have disclosed that CBR intends to request ACLs because it does not believe it will be able to restore the mine units to baseline standards.[88] But the OST has failed to explain how any requests for ACLs at the existing CBR facility would be relevant to the MEA, let alone contradict any analysis or conclusion in the Final EA. Therefore, the OST has failed to raise a genuine dispute with the Final EA on this issue.

Third, the OST asserts that Section 2.3.3 of the Final EA should have disclosed that "mining units [at the existing CBR facility] are impacting each other . . . and that there is no assurance that the restoration will ever be achieved to compliance with Appendix A, Criterion 5B

[85] New Contentions at 17-18.

[86] Final EA at 2-5, 2-8.

[87] *Id*. at 5-2.

[88] New Contentions at 18, 20.

[sic]." [89] The OST has not explained why these issues related to wellfield restoration at the existing CBR facility are relevant to the MEA (with respect to analysis of well restoration or any other issue), or contradict any analysis or conclusion in the Final EA. Therefore, the OST has failed to raise a genuine dispute with the Final EA on these issues.

Finally, the OST asserts that longer than expected restoration times will lead to greater consumptive use of water, and that the Final EA fails to describe or evaluate the impacts of consumptive use "when all ten mining units are in restoration as is currently the case."[90] The OST then quotes from the analysis of groundwater quantity impacts (direct impacts) during restoration from Section 4.3.2.1 of the Final EA. As mentioned previously, the direct impacts associated with restoration of the mine units at the existing CBR facility, including impacts on groundwater quantity (consumptive use), were addressed in the license renewal proceeding.[91] The OST has provided no factual or legal basis explaining why a discussion of direct impacts of the MEA (Section 4.3.2.1 of the Final EA cited by the OST) must address this issue.

4. Contention C is Inadmissible

In Contention C, the OST asserts that the Final EA fails to consider that the no-action alternative and the proposed action are "are almost the same" because CBR has ceased production and is entering full-time restoration and decommissioning at the existing CBR facility. This contention represents a fundamental misunderstanding of the definition of the proposed action and the Staff's NEPA review of the proposed action. As stated in the Final EA (and in the original MEA application), the proposed federal action is amending the license to authorize

[89] *Id*. at 18-19. The reference to mine units impacting each other appears to be a reference to information on page 3 of the April 2018 LAR, which discusses elevated uranium levels in a perimeter well in mine unit 3. These elevated levels were apparently the result of an incursion of mining fluids from active mine unit 7 and have been addressed by the licensee.

[90] New Contentions at 19. As discussed in the Staff's response to Contention A, neither the April 2 Letter nor the April 2018 LAR support this assertion. *See supra* at 17.

[91] *See* note 72 *supra*.

construction and operation of the MEA.[92] Pursuant to NEPA and the regulations in 10 C.F.R. Part 51, the Staff analyzed the proposed action and reasonable alternatives to the proposed action.[93] In order to assess the potential impacts of the proposed action, the Staff's analysis necessarily assumes that the MEA will be constructed and operated as stated in the application. The OST has provided no basis in fact or law to support the assertion that the proposed action—construction and operation of the MEA—has changed or must be redefined because CBR has decided to cease operations at the existing CBR facility. Therefore, the OST has failed to provide a factual or legal basis for this contention, and has also failed to adequately support the contention, contrary to the requirements in 10 C.F.R. § 2.309(f)(1)(ii) and (v). In addition, when an intervenor asserts a contention of omission, § 2.309(f)(1)(vi) states that the intervenor must explain why the omitted information was required. Thus, the OST has failed to raise a genuine dispute because it has not explained why the Final EA must consider this issue.

5. Contention H Is Inadmissible

In Contention H, the OST generally asserts that the Final EA fails to provide an analysis of groundwater quantity impacts and presents conflicting information on groundwater consumption, which precludes accurate evaluation of consumption impacts. The first assertion is factually incorrect because Section 4.3.2.1 of the Final EA contains a thorough discussion of groundwater quantity (consumptive use) impacts for all phases of the MEA project. That analysis contains an extensive discussion of consumptive use, which is based on revisions to the MEA Technical Report (TR) submitted in 2016 that incorporate the results of modeling of consumptive use impacts from operation of the existing CBR facility, the MEA, and proposed

[92] See Final EA at 1-1, 1-2.

[93] In this case, the only alternative considered was the no-action alternative (i.e., denying the amendment request). EA at 2-14. To the extent that the OST is attempting to challenge the range of alternatives considered, such a challenge is untimely because the discussion of alternative is identical in the Draft and Final EAs. Therefore, any such challenge should have been raised against the Draft EA.

TCEA.[94] The Staff's discussion of cumulative groundwater quantity impacts in Section 5.3.2 of the Final EA is based on the same consumptive use modeling.[95] In addition, the discussion of groundwater quantity impacts (both direct and cumulative impacts) in the Final EA is essentially unchanged from the discussion in the Draft EA.[96] Therefore, to the extent this contention challenges the analysis of direct or cumulative groundwater quantity impacts, the contention is untimely under 10 C.F.R. § 2.309(c)(1).[97]

In addition, the OST does not identify any particular information in the Final EA as unreliable or inaccurate. Instead, the OST simply asserts that the "entire discussion" in Section 4.3.2 of the Final EA must be revised to reflect the information in the April 2 Letter and the April 2018 LAR, "including the acknowledgment that restoration goals will not be achieved and that ACLs will be requested."[98] As explained in the Staff's response to Contention A, the issues raised in the cited documents relate to the existing CBR facility, not the MEA. Therefore, the OST has failed to demonstrate that these issues are within the scope of the proceeding and material to the findings the Staff must make on the MEA application. Furthermore, because the OST fails to identify specific deficiencies in Section 4.3.2 and does not explain why the changes it advocates are required, the OST has failed to raise a genuine dispute with the Final EA on this issue.

The OST further asserts that the Final EA should include a discussion "similar to that found in Section 4.6.2.2.1" of the Staff's environmental assessment for the license renewal

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[94] Final EA at 4-17 to 4-19. The analysis in Section 4.3.2.1 of the Final EA also considers the impacts of consumptive use at the North Trend Expansion Area (NTEA). *Id*. at 4-18.

[95] Final EA at 5-6.

[96] *Compare* Draft EA at 4-17 to 4-19, 5-16 *with* Final EA at 4-17 to 4-19, 5-6.

[97] Pursuant to the Board's February 2013 Order, a timely motion should have been filed within 30 days of either the disclosure of the 2016 update to the TR or the issuance of the Draft EA.

[98] New Contentions at 32, 36.

(LR EA), and that the analysis in Section 4.6.2.3 of the LR EA "was omitted from the [Marsland] Final EA."[99] To the extent that the Intervenors rely on the LR EA as support for this claim, it is untimely. The LR EA was available in 2014, well before publication of the Marsland Draft EA, and there is no substantive difference between the discussions of groundwater impacts in the Marsland Draft EA and Final EA. The OST had the opportunity to challenge the Marsland Draft EA on this issue but did not do so.

In any event, the Final EA does contain the cited analyses of groundwater quantity impacts.[100] Therefore, because the OST incorrectly asserts that the analyses were omitted from the EA, and did not identify specific inadequacies in those sections of the Final EA that contain the analyses, the contention fails to raise a genuine dispute with the Final EA.[101]

Finally, the OST asserts that the Final EA fails to describe or evaluate the additive cumulative impacts of groundwater restoration at the existing CBR site and at the MEA, which were both found to be MODERATE. The Intervenors claim that CBR expects to "consume more than 110 [pore] volumes of water to restore the 10 mining units currently in restoration" at the existing CBR facility, and that the Final EA fails to discuss or evaluate this large consumptive use of water.[102] As explained in the Staff's response to Contention A, the OST's claim that 10 mine units are currently in restoration at the existing CBR facility is not supported by the April 2 Letter or the April 2018 LAR, and CBR must obtain NRC approval before starting restoration in additional mine units.[103] Because there is no such request pending before the agency, the Staff

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[99] *Id*. at 32, 34-35, citing Final Environmental Assessment for the License Renewal of U.S. Nuclear Regulatory Commission License No. SUA-1534 (October 2014) (ML14288A517) (LR EA).

[100] Section 4.3.2.1 of the Final EA and Section 4.6.2.2.1 of the LR EA both address groundwater quantity impacts. Portions of Sections 4.3.2.1 and 4.3.2.2 of the Final EA discuss the impacts of groundwater restoration on groundwater quantity and quality—the topic addressed in Section 4.6.2.3 of the LR EA.

[101] *Shearon Harris*, CLI-10-9, 71 NRC at 270.

[102] New Contentions at 33-34.

[103] In addition, LC 11.3.3 requires CBR to monitor the water levels and drawdown rates in the production zone aquifer. SUA-1534, Amendment 3 at 19. If the water levels or drawdown rates fall below or above

is not required to consider the impacts of this potential future licensing action in its assessment of impacts for the MEA.[104]

6. Contention I Is Inadmissible

In Contention I, the OST appears to assert that the Final EA "fails to adequately analyze cumulative impacts." The OST claims that the Final EA does not address cumulative impacts of present and foreseeable future uranium milling activities at the existing Crow Butte site and the three proposed expansion areas (the NTEA, the TCEA and the MEA), asserting that "[t]he decommissioning of the Crow Butte mine and the simultaneous restoration of all ten (10) mining units" are reasonably foreseeable future projects.[105] The OST also asserts that the Final EA does not take a hard look at "the 2018 cessation and decommissioning of the Crow Butte mine."[106]

The OST fails to raise a genuine dispute with the Final EA on this issue because the Draft and Final EAs consider the cumulative impacts of decommissioning at the existing CBR

certain limits, CBR must submit a corrective action plan to the NRC for approval. *Id*. This license condition memorializes the commitment discussed in the Final EA that is intended to ensure that the production zone aquifer (Basal Chadron Sandstone) remains saturated, and thus that impacts on groundwater quantity would remain MODERATE. Final EA at 4-18.

[104] *McGuire-Catawba*, CLI-02-14, 55 NRC at 295. As noted in the Staff's response to Contention A, the environmental review for the renewal of SUA-1534 (for the existing CBR facility) fully considered the direct impacts on groundwater quantity (consumptive use) from restoring all mine units at the existing CBR facility. A contention on groundwater quantity impacts during restoration was litigated in that proceeding and decided in favor of the Staff. *Crow Butte Resources, Inc.* (In Situ Leach Facility, Crawford, Nebraska), LBP-16-13, 84 NRC 271, 403-404, 439 (2016). Additionally, the groundwater quantity impacts analysis for the MEA, described in Sections 4.3.2.1 and 5.3.2 of the Draft and Final EAs, considered cumulative (additive) impacts based on modeling of the existing CBR facility, the MEA, and the proposed TCEA over the time period 2014-2052, which includes the entire projected restoration period for the existing CBR facility. Draft EA at 4-17 to 4-19, 5-6; Final EA at 4-17 to 4-19, 5-6. The Draft and Final EAs also considered the additional impacts of the proposed NTEA. *Id*. at 4-18. CBR's consumptive use modeling results were submitted as an update to the MEA application in 2016. Therefore, any claim related to the additive cumulative effects of these projects on groundwater quantity (consumptive use), including the effects of restoring all of the mine units at the existing CBR facility, is untimely.

[105] New Contentions at 38.

[106] *Id.*

facility as part of the cumulative impacts analysis for water resources,[107] and the OST did not identify any deficiencies in that analysis. Also, the OST's claim that the Final EA does not consider the impacts of the existing CBR facility and the expansion areas is incorrect. As stated in Section 5.1 of the Final EA, the Staff's analysis considers the incremental effects of the proposed action (the MEA) along with the impacts of the existing CBR facility and the two other proposed expansion areas (NTEA and TCEA). Furthermore, the Staff's cumulative impact analysis conservatively assumed that all four facilities would be operating at the same time, even though that is unlikely to occur.[108] Therefore, the OST has failed to raise a genuine dispute with the Final EA on this issue.

In summary, for the reasons stated above, Contentions A, B, C, H and I are untimely and fail to meet one or more of the contention admissibility requirements in 10 C.F.R. § 2.309(f)(1). Therefore, Contentions A, B, C, H and I are inadmissible.

B. Contention D Is Inadmissible

In Contention D, the OST asserts that the Final EA does not discuss the results of the cultural survey approach agreed upon in the *Powertech* licensing proceeding for the Dewey Burdock site. The OST asserts that in the *Powertech* matter, the Staff, the OST, and the licensee "have agreed on protocols and procedures constituting an approach that the parties believe satisfy their respective obligations under NEPA and NHPA."[109] The OST bases this claim on Exhibit A of their pleading, a letter from the Staff to the OST dated March 16, 2018,

[107] *See* Sections 5.1 and 5.3 of the Draft EA and Final EA. The analyses in both documents are essentially identical.

[108] Final EA at 5-2.

[109] New Contentions at 24. Although the OST relates this document to agency obligations under the National Historic Preservation Act (NHPA), the remaining admitted contention in the *Powertech* proceeding relates solely to a purported deficiency in the Staff's Final Supplemental Environmental Impact Statement under NEPA. *See generally Powertech* (Dewey-Burdock *In Situ* Uranium Recovery Facility), LBP-17-9, 86 NRC 167 (2017).

after the issuance of the Marsland Draft EA.[110] Accordingly, the OST contends, the Staff should revise Sections 3.6 and 4.6 of the Marsland Final EA to reflect the contents of the *Powertech* letter and include in the Final EA a discussion of the "agreed-upon approach" and a statement about whether the NRC "would also employ the same approach at the Marsland site."[111] Contention D should be denied because it is both untimely under 10 C.F.R. § 2.309(c)(1) and does not meet the criteria for an admissible contention under 10 C.F.R. § 2.309(f)(1).

The NRC's rules of procedure "require the filing of contentions *as early as possible* after the information becomes available."[112] In this proceeding, the Board's February 2013 Order specifies that, to be considered timely, motions for the admission of new or amended contentions "must be filed within thirty days of the date upon which the information that is the basis of the motion becomes available to the Joint Intervenors [.]"[113]

The OST has failed to demonstrate that the information underlying Contention D was not previously available, contrary to 10 C.F.R. § 2.309(c)(1)(i). The premise of this contention is that the information in the Final EA concerning tribal cultural resources potentially impacted by the MEA project is inadequate because the Staff's efforts to obtain information on those resources were somehow insufficient. However, the information in the Final EA concerning the Staff's approach for obtaining information on tribal cultural resources in the Marsland review has been available to the OST since June 30, 2014.[114] That analysis has remained unchanged

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[110] New Contentions, Exhibit A.

[111] *Id*. at 24.

[112] *Pacific Gas & Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-12-13, 75 NRC 784, 789 (2012) (quoting *Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 6 and 7), LBP-11-33, 74 NRC 675, 686-87 (2011) (emphasis added); *see also Private Fuel Storage*, *LLC* (Independent Spent Fuel Storage Installation), CLI-04-4, 59 NRC 31, 45 (2004) (stating that "our rules require the filing of contentions as early as possible").

[113] February 2013 Order at 6 n.8. The Board's instruction is consistent with the Commission's direction that "the 'trigger point' for timely submission of new or amended contentions is when new information becomes available." *Diablo Canyon*, LBP-12-13, 75 NRC at 789 (quotations omitted).

[114] At that time, when the OST had a pending cultural resources contention (Contention 1) in this proceeding, the OST was given an explicit opportunity to submit new or amended contentions on the draft

through the issuance of the Draft EA in December 2017 and Final EA in April 2018. Accordingly, the OST should have challenged the EA's description of that approach when that information first became available, in 2014. In addition, the OST states that Exhibit A (the March 16, 2018 letter) supports this contention. As such, this contention should have been brought, at the very latest, within 30 days of the issuance of that letter.

Moreover, the OST has also failed to demonstrate that the information upon which the new Contention D is based is materially different from information previously available, contrary to 10 C.F.R. § 2.309(c)(1)(ii). The approach described in Exhibit A incorporates the essential elements of an approach described in a previous letter issued to the OST dated December 6, 2017.[115] The OST thus had actual notice of that intended approach as early as December 2017.

Finally, independent of Contention D's untimeliness, the OST's assertion regarding information in the Powertech proceeding does not serve to establish that the asserted missing information is material to the findings the Staff must make to support the action that is involved in *this* proceeding, as required by 10 C.F.R. § 2.309(f)(1)(iv). Likewise, the OST's assertion that the Final EA must describe this information does not establish that a genuine dispute exists on a material issue of law or fact with respect to the Final EA for the MEA project, as required by 10 C.F.R. § 2.309(f)(1)(vi). The OST's support for this contention, again the March 16 Powertech letter (Exhibit A), concerns an approach being pursued by the parties in a different proceeding for a different project in a different location (indeed, in a different state), with consideration of issues specific to that proceeding. Given these plain distinctions, the OST does not explain how describing this information in the Marsland Final EA would have any effect

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cultural resources sections of the Marsland EA—including the opportunity to raise concerns about the Staff's approach to obtaining information on cultural resources and its Section 106 consultation process. The OST did not do so.

[115] New Contentions, Exhibit A, at 1.

on the Staff's assessment of the impacts of the MEA project on tribal cultural resources, let alone demonstrate how the Final EA is inadequate merely because it lacks a description of that information. In sum, the OST fails to demonstrate how this dispute represents a genuine and material dispute with the Staff's environmental conclusions in the Final EA, contrary to 10 C.F.R. § 2.309(f)(1)(iv) and (vi), and therefore the contention must be dismissed on that basis as well.

C. Contentions E, F and G Are Inadmissible

1. Contention E Is Inadmissible

Contention E asserts that the Final EA fails to satisfy NEPA's hard look standard with respect to MEA pump test data.[116] The basis of this contention is the OST's assertion that the Theis and Cooper-Jacob methodologies used to evaluate the pump test data are inconsistent with various ASTM standards.[117] The OST contends that the methodologies used by CBR are inappropriate based on the properties of the ore bearing aquifer, and that it was inappropriate to use the pump test results for groundwater modeling.[118] For the reasons discussed below, this contention is inadmissible because it is untimely, unsupported, and fails to raise a genuine dispute with the EA.

First, the OST has not demonstrated that the issues raised in Contention E are based on previously unavailable information, or information that is materially different than previously available information. Specifically, the methods and assumptions used to analyze the pumping test were first discussed in the ER for the MEA.[119] Therefore, any contention asserting that

[116] New Contentions at 25.

[117] *Id.* at 26. In this contention and Contention F, the OST asserts narrowly defined deficiencies in the analysis of pumping test data and underlying assumptions that are distinguishable from the issues the Board enumerated as within the scope of already-admitted Contention 2.

[118] *Id.*

[119] Compiled ER at 3-45 to 3-47 (ML17334A794) and Appendix F (ML17339A445, ML17339A447). The description of the methods and assumptions regarding analysis of the pump test data is identical to that in

analysis methods and assumptions were inappropriate should have been raised as a challenge to the ER. In 2016, CBR submitted an update to the MEA TR that added a discussion of its groundwater quantity (consumptive use) modeling.[120] Therefore, any contention related to that particular modeling, or its use of inputs calculated from pumping test data, should have been raised in 2016. Finally, the discussion of pumping tests and groundwater modeling in the Draft and Final EAs is essentially identical.[121] Therefore, even had there been materially different information in the EA regarding the groundwater modeling or its use of data from the pumping test, any contention should have been raised against the Draft EA. Because the OST has failed to show that its concerns are based on any new or materially different information, this contention fails to meet 10 C.F.R. § 2.309(c)(1)(i) and (ii) and is therefore untimely.

While the contention's untimeliness is sufficient basis to reject it, the asserted deficiencies with Section 3.3.2.3 of the EA also lack adequate factual support and fail to raise a genuine dispute with the EA. First, the OST states that the EA did not consider the appropriateness of using the Theis and Cooper-Jacob models "in light of clear indication that the aquifer is heterogeneous."[122] But the OST offers no facts or expert opinions to support the conclusory statement that the aquifer is heterogeneous. The OST likewise offers no support for the assertion that "mean values for transmissivity and storativity that deviate by at least an order of magnitude render the model and its drawdown predictions highly suspect."[123] Bare unsupported assertions and speculation are insufficient to support a contention.[124] And

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the original 2012 ER. 2012 ER at 3-40 to 3-42 (ML12160A513) and Appendix F (ML12160A523, ML12160A524).

[120] Response to Open Issues, Marsland Expansion Area Technical Report (Part 2 of 2), (May 20, 2016) at 7-22 to 7-25 and Appendix GG (ML16155A268).

[121] Draft EA at 3-31; Final EA at 3-31.

[122] New Contentions at 26.

[123] New Contentions at 26.

[124] *Fansteel*, CLI-03-13, 58 NRC at 204-05.

because the OST has not explained these claims with reference to factual support, let alone articulated why the cited discussion in the EA is inadequate, the OST has failed to raise a genuine dispute with the Final EA on this issue, contrary to 10 C.F.R. § 2.309(f)(1)(v) and (vi).

2. Contention F Is Inadmissible

In Contention F, the OST asserts that the Final EA does not sufficiently analyze the potential impacts of the proposed aquifer restoration program, or provide sufficient information to allow the public to challenge its analysis, because it accepts "pump test data that relies [sic] on demonstrably inaccurate prima facie assumptions."[125] The OST also claims that CBR's proposed restoration plan will not be effective and will later have to be modified to use the same modeling approach that is being used at the existing CBR facility.[126] For the reasons discussed below, this contention is inadmissible because it is untimely, is unsupported by facts or expert opinions, and fails to raise a genuine dispute with the Final EA.

First, Contention F, like Contention E, challenges the assumptions used to analyze the pump test data (i.e., that the aquifer is homogeneous) and the use of pump test data to support the consumptive use modeling.[127] Therefore, for the same reasons discussed above with respect to Contention E, these challenges are untimely.[128]

Furthermore, the bases for this contention lack adequate factual support and fail to raise a genuine dispute with the EA, contrary to 10 C.F.R. § 2.309(f)(1)(v) and (vi). The OST asserts that "the pump test results reported in Section 3.3.2.3 are indicative of a highly fractured system

[125] New Contentions at 27.

[126] *Id.*

[127] *Id*. at 27, 28.

[128] In addition, the discussion of MODFLOW 2000 in the April 2018 LAR does not constitute new information that is materially different than information previously available. Because the OST is relying on the April 2018 LAR as its basis for assuming that CBR will ultimately use MODFLOW2000 at the MEA, the OST should have also examined the July 2016 LAR, which discusses CBR's use of the MODFLOW 2000 model in the same context. *See supra* at 14.

that allows imbibition of contaminants into the rock matrix, which is closer to a dual porosity model."[129] But the OST provides no reference to a document or expert opinion to support this statement. The OST in turn makes the equally unsupported and speculative claim that, based on this interpretation of the pump test results, the proposed restoration plan will not work and CBR will eventually have to use a different modeling approach (specifically, the MODFLOW2000 approach).[130] Finally, the OST asserts that the possibility of such a future change in restoration methodology would deprive the public of information that could be used to challenge the Staff's analysis.[131] But, as noted above, OST's assumption that CBR will "eventually have to modify its restoration plan with subsequent modeling such as the MODFLOW 2000 approach" is factually unsupported speculation, and it therefore does not raise a genuine dispute with the Final EA.

3. Contention G Is Inadmissible

Contention G asserts that the Final EA violates NRC regulations and NEPA because it "fails to provide an adequate baseline groundwater characterization or demonstrate that ground water and surface water samples were collected in a scientifically defensible manner."[132] The OST asserts that NEPA requires data to be obtained under specific protocols and that the EA must report that information in sufficient detail to "replicate the results."[133] The OST also states that the 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."[134] As discussed

[129] New Contentions at 27.

[130] *Id.*

[131] *Id*.

[132] *Id.* at 29.

[133] *Id*. at 30.

[134] New Contentions at 30.

below, this contention is inadmissible because it fails to meet the good cause standards in 10 C.F.R. § 2.309(c)(1) and fails to raise a genuine dispute with the EA, as required under 10 C.F.R. § 2.309(f)(1)(vi).

First, the OST has not demonstrated that Contention G is based on previously unavailable information, or information that is materially different than previously available information, as required by 10 C.F.R. § 2.309(c)(1). CBR provided information on groundwater characterization in the MEA application, and that information formed the basis for the Staff's analysis in the Final EA.[135] Furthermore, the discussions of groundwater characterization in the Draft and Final EAs are essentially identical.[136] The OST fails to even assert, let alone demonstrate, that the substantially identical discussion of groundwater characterization in the Draft and Final EAs materially differs from that found in the MEA application. Therefore, this contention should be rejected as untimely.

Moreover, Contention G fails to raise a genuine dispute with the Final EA, contrary to 10 C.F.R. § 2.309(f)(1)(vi). Sections 3.3.2, 3.3.3, 6.1 and 6.2 of the Final EA discuss groundwater resources, water use, preoperational and operational monitoring, respectively.[137] Although Contention G asserts deficiencies in the baseline groundwater characterization, it does not reference specific portions of the Final EA, nor does it take issue with the information in the sections of the Final EA related to groundwater characterization, surface water sampling, or similar topics.

Finally, the OST also asserts that the Final EA fails to demonstrate how the MEA will operate without the CPF at the existing CBR facility, asserting that the CPF has begun decommissioning. As discussed above with respect to Contention A, neither the April 2 Letter

[135] Compiled ER at 1-18 (ML17334A799); 3-37 to 3-40, 3-42 to 3-52 (ML17334A794); 6-1 to 6-12 (ML17339A517).

[136] Draft EA at 3-22 to 3-31, 3-34 to 3-35, 6-1 to 6-3; Final EA at 3-22 to 3-31, 3-34 to 3-35, 6-1 to 6-3.

[137] *See* Final EA at 3-22 to 3-31, 3-34 to 3-35, 6-1 to 6-3.

nor the April 2018 LAR supports the assertion that the CPF has begun decommissioning; indeed, those same documents (and other information in the record) refute that assumption.[138] For these reasons, the contention fails to satisfy 10 C.F.R. § 2.309(f)(1)(v) and (vi).

D. "Renewed" Contentions J-N Are Inadmissible

Although the OST describes Contentions J-N as "renewed," in fact none of these contentions has been previously raised in this proceeding.[139] As discussed individually below, these contentions are not based on new information. Indeed, the OST's assertions all could have been raised years ago, in some instances as early as the OST's initial hearing request (filed in 2013). Accordingly, all five contentions can be dismissed solely for failing to meet 10 C.F.R. § 2.309(c)(1).

1. Contention J Is Inadmissible

In Contention J, the OST asserts that the Final EA fails to demonstrate that the NRC has lawful jurisdiction over the land where the MEA is located.[140] Contention J is substantially identical to proposed Contention F in the CBR license renewal proceeding.[141] The OST's claims to ownership of the relevant land are based on now-abrogated 19th-century treaties between the U.S. government and Indian tribes.[142] These treaty-based claims were rejected by the board in the Crow Butte license renewal proceeding, in a decision affirmed by the Commission and

[138] For example, during the Board teleconference on May 16, 2018, counsel for CBR reiterated that the facility is not in decommissioning and there will be no change in status for the foreseeable future. Tr. at 168-169.

[139] New Contentions at 38.

[140] New Contentions at 38-53.

[141] The Oglala Sioux Tribe's Renewed and New Contentions Based on the Final Environmental Assessment (October 2014), at 4-14 (Jan. 5, 2015).

[142] New Contentions at 38-53.

based on binding Supreme Court case law.[143] Although the OST disputes the Supreme Court's authority to resolve this question under international law,[144] the extent of the Supreme Court's authority, and the underlying jurisdictional question itself, are outside the scope of this proceeding.[145] In addition, Contention J must be rejected as untimely because it contains no information that was not available as early as January 2013, when the OST submitted its initial request for a hearing.[146] Therefore, Contention J is inadmissible.

2. Contention K Is Inadmissible

Contention K is inadmissible for the same reasons as Contention J because it rests on the same legal and factual grounds. The OST asserts in this contention that its treaty-based land ownership claims and statements in the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) and other international law documents establish that NRC was required to obtain the OST's "free, prior and informed consent" before authorizing CBR's activities.[147] However, as the OST correctly acknowledges, the UNDRIP "is not binding international law," nor are the other international law documents cited by the OST.[148] In the Crow Butte license renewal proceeding, the board held that these "treaty-based claims of ownership of the Crow Butte mining site and international treaty-based claims cannot support the admission of [license renewal] EA Contention F."[149] Here, Contention K reiterates a subset

[143] *Crow Butte Resources, Inc*. (In Situ Leach Facility, Crawford, Nebraska), LBP-08-24, 68 NRC 691, 712 (2008); *Crow Butte Resources, Inc*. (In Situ Leach Facility, Crawford, Nebraska), CLI-09-9, 69 NRC 331, 337 (2009) (citing *United States v. Sioux Nation of Indians*, 448 U.S. 371 (1980)).

[144] New Contentions at 52.

[145] *See Hydro Resources., Inc.* (P.O. Box 777, Crownpoint, NM 87313), CLI-06-29, 64 NRC 417, 420 (2006) (explaining that similar jurisdictional questions are outside NRC's authority).

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

[147] New Contentions at 52-56.

[148] *Id*. at 55.

[149] *Crow Butte Resources, Inc*. (In Situ Leach Facility, Crawford, Nebraska), LBP-15-11, 81 NRC 401, 411 (2015).

of the treaty-based claims made in proposed Contention F in the license renewal proceeding, focusing on consent. For the same reasons that the OST's treaty-based ownership claims are inadmissible, any subsidiary claim relying solely on the same treaties is also inadmissible. And just as with Contention J, this contention should have been raised at the very outset of the proceeding and presents no new information to justify its untimeliness.[150] Therefore, Contention K is inadmissible.

3. Contentions L and M Are Inadmissible

In the related Contentions L and M, the OST alleges deficiencies in the Staff's description of cultural resources and its compliance with NHPA requirements.[151] These contentions are inadmissible because they are untimely. OST Contention 1, which challenged the information and analysis in the ER related to cultural resources, was originally admitted by the Board in 2013.[152] On June 30, 2014, the Staff published the cultural resources sections of its Draft EA for the MEA online,[153] informing the Board and the OST of the publication.[154] The Board ordered that any new or amended contentions related to cultural resources be submitted by July 30, 2014.[155] No such contentions were received by the deadline. The Board subsequently granted the Staff's motion for summary disposition of Contention 1.[156] Although

[150] *See* 10 C.F.R. § 2.309(c)(1)(i).

[151] New Contentions at 56-79.

[152] LBP-13-6 at 286-88. The Board held that the portion of Contention 1 challenging the Staff's Section 106 consultation was premature, and had to await publication of the Draft EA. LBP-13-6 at 287.

[153] *Crow Butte Marsland Documents Pertaining to Section 106 of the National Historic Preservation Act* (updated Dec. 15, 2017), http://www.nrc.gov/materials/uranium-recovery/license-apps/marsland/section106-marsland.html. These sections discuss cultural resources broadly, including historical and spiritual sites.

[154] Letter from NRC Staff to the Administrative Judges (June 30, 2014).

[155] Memorandum and Order (Revised General Schedule), Appendix A at 1 (April 30, 2014) (unpublished).

[156] In granting summary disposition, the Board noted that the OST had failed to submit a new or amended contention regarding the Staff's NHPA Section 106 consultation after the Staff published the draft cultural resources sections of the EA. Contention 1 Summary Disposition Order, slip op. at 13 n.4.

the OST mentioned the possibility of filing a motion to reopen Contention 1, it never did so.[157] The OST likewise did not file contentions on the complete Draft EA for the MEA published in December 2017. The cultural resources portions of the Final EA do not differ materially from the corresponding portions of the Draft EA.[158]

The OST's reliance on licensing board and Commission decisions in the *Powertech* case and the licensing board's decision in the CBR license renewal proceeding is similarly untimely.[159] Any contentions based on these 2015 and 2016 decisions should have been filed within the deadlines established by the Board in its February 2013 scheduling order.[160] Because the OST chose not to do so until after issuance of the Final EA, these contentions are inadmissible.[161]

4. Contention N Is Inadmissible

In this contention, the OST asserts that the Staff's discussion of environmental justice issues was flawed because of the geographical scope on which it focused.[162] This contention is untimely because it contains no information that was not previously available at the time of the publication of the Draft EA in December 2017, and because the environmental

[157] Tr. at 78-79. The Board told OST counsel during this conference that "if there's new information that would cause a new or amended contention . . . then it's certainly your responsibility to do that promptly and bring it to the Board's attention." *Id*. at 85.

[158] *See* Draft EA at 3-65 to 75, 4-36 to 39, 5-8 to 12; Final EA at 3-50 to 61, 4-39 to 41, 5-8 to 12. The OST acknowledges that Sections 3.6.3.3, 3.6.4, 3.6.5, and 4.6 of the Final EA are "essentially unchanged" compared to the Draft EA. New Contentions at 57. Moreover, the cultural resources sections of the Draft EA published in December 2017 are essentially identical to the draft sections made publicly available on the NRC website in 2014.

[159] *Crow Butte Resources, Inc*. (In Situ Leach Facility, Crawford, Nebraska), LBP-16-7, 83 NRC 340 (2016); *Powertech USA, Inc.* (Dewey-Burdock In Situ Uranium Facility), LBP-15-16, 81 NRC 618 (2015); *Powertech USA, Inc.* (Dewey-Burdock In Situ Uranium Facility), CLI-16-20, 84 NRC 219 (2016).

[160] February 2013 Order at 6 n.8.

[161] 10 C.F.R. § 2.309(c)(1)(iii).

[162] New Contentions at 79-84. The Staff considered environmental justice impacts to the population of the Pine Ridge Indian Reservation as well as the population nearer to the Marsland site. *See* Final EA at 4-42.

justice sections of the Final EA do not materially differ from the Draft EA.[163] Because the OST does not demonstrate that Contention N is based on any new or materially different information, as required by 10 C.F.R. § 2.309(c)(1), Contention N is untimely and therefore inadmissible.

CONCLUSION

The Staff does not object to the migration of admitted Contention 2 to the Final EA. For the reasons discussed above, however, the Staff requests that the Board deny admission of new contentions A through N.

Respectfully submitted,

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Dated at Rockville, Maryland
this 13th day of June, 2018.

[163] *See* Draft EA at 3-78, 4-40, 5-13; Final EA at 3-78, 4-40, 5-13.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "NRC Staff Response to Oglala Sioux Tribe's Proposed New Contentions" in the above-captioned proceeding have been served via the Electronic Information Exchange ("EIE"), the NRC's E-Filing System, this 13th day of June, 2018, which to the best of my knowledge resulted in transmittal of the foregoing to those on the EIE Service List for the above-captioned proceeding.

/Signed (electronically) by/
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