UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

LBP-18-3

ATOMIC SAFETY AND LICENSING BOARD PANEL

Before the Licensing Board:

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

In the Matter of	Docket No. 40-8943-MLA-2
CROW BUTTE RESOURCES, INC.	ASLBP No. 13-926-01-MLA-BD01
(Marsland Expansion Area)	July 20, 2018

MEMORANDUM AND ORDER
(Denying Admission of New and Renewed Contentions)

On May 30, 2018, intervenor Oglala Sioux Tribe (OST) submitted a migrated contention declaration regarding admitted Contention 2 along with fourteen contentions OST designates either as new or, as OST references them, "renewed" that challenge various aspects of the Nuclear Regulatory Commission (NRC) staff's final environmental assessment (EA) for applicant Crow Butte Resources, Inc.'s (CBR) license amendment request for authorization to conduct activities associated with in situ uranium recovery (ISR) mining in the Marsland Expansion Area (MEA).[1] See [OST] Migrated, Renewed, and New Marsland Expansion Final [EA] Contentions (May 30, 2018) [hereinafter OST New Contentions]. While not contesting the migration of Contention 2 as challenging the NRC staff's final rather than draft EA, both the

[1] Although dated May 30, 2018, which was the assigned due date under the Board's general schedule for this proceeding, see Licensing Board Memorandum and Order (Revised General Schedule) (Apr. 20, 2017) app. A, at 1 (unpublished) [hereinafter General Schedule Order], the agency's E-Filing system logged in the OST filing as being received at 12:01 a.m. on May 31, 2018. Neither the staff nor the applicant has objected to the filing as late.

NRC staff and applicant CBR oppose the admissibility of all the new/renewed contentions as lacking good cause under the standards in 10 C.F.R. § 2.309(c)(1) and/or for failing to fulfill one or more of the contention pleading requirements in section 2.309(f)(1). See NRC Staff Response to the [OST] Migrated, Renewed, and New Marsland Expansion Final [EA] Contentions (June 13, 2018) at 1 [hereinafter Staff Response]; [CBR] Response to the [OST] Final [EA] Contentions (June 13, 2018) at 1, 3–4 [hereinafter CBR Response].

For the reasons set forth below, the Licensing Board finds that none of the proffered new or renewed contentions is admissible. Contention 2, however, remains an admissible contention, and now migrates as a challenge to the final EA.

I. BACKGROUND

On May 10, 2013, the Board granted OST's petition to intervene and request for a hearing. See LBP-13-6, 77 NRC 253, 266 (2013), aff'd, CLI-14-2, 79 NRC 11 (2014). OST was admitted as an intervenor, having proffered two admissible contentions challenging CBR's 2012 application to operate a satellite ISR facility within the MEA near Crawford, Nebraska.[2] See id. at 266. Contention 1 contested the discussion of affected historic and cultural resources in CBR's environmental report (ER).[3] See id. at 286. Currently the only admitted contention, Contention 2 challenges the sufficiency of CBR's application regarding the project area's geological setting and the MEA's potential effects on adjacent surface and groundwater

[2] In the same order, the Board determined that OST's other four contentions, Contentions 3–6, were inadmissible. See LBP-13-6, 77 NRC at 305. Contention 3 challenged the ER as containing an "Inadequate Analysis of Ground Water Quantity Impacts"; Contention 4 questioned the ER's efficacy because "Requiring the Tribe to Formulate Contentions Before an EIS is Released Violates NEPA"; Contention 5 contested the ER's "Failure to Consider Connected Actions"; and Contention 6 claimed "The [ER] does not Examine Impacts of a Direct Tornado Strike." Id. at 295–302.

[3] [CBR], Application for Amendment of USNRC Source Materials License SUA-1534, [MEA], Crawford, Nebraska, [ER] (May 2012) [hereinafter ER] (ADAMS Accession No. ML12160A513).

resources. See id. at 289. This contention is a hybrid safety and environmental contention, raising issues regarding the adequacy of the application's "hydrogeologic characterization of the MEA site." Id. at 294–95.

In June 2014, the cultural resources section of the draft EA was made available to the parties and the public.[4] See Letter from Marcia J. Simon, NRC Staff Counsel, to Licensing Board at 1 (June 30, 2014). OST did not submit new or amended contentions regarding that draft EA section. The staff then filed a motion for summary disposition asserting Contention 1 had been resolved based on the draft EA section, which the Board granted in October 2014. See Licensing Board Memorandum and Order (Ruling on Motion for Summary Disposition Regarding [OST] Contention 1) (Oct. 22, 2014) at 2 (unpublished).

On December 11, 2017, the draft EA was made available to the parties and the public in its entirety.[5] See Letter from Marcia J. Simon, NRC Staff Counsel, to Licensing Board at 1 (Dec. 11, 2017). When OST did not file new or amended contentions relating to the draft EA by the Board-assigned deadline, the staff, supported by the applicant, challenged the migration of the environmental portions of Contention 2. See NRC Staff's Motion to Deny Migration of Environmental Portion of Contention 2 (Jan. 26, 2018) at 1; [CBR] Response to NRC Staff Motion to Deny Migration of Contention 2 (Feb. 2, 2018) at 1. The Board denied the motion in part and allowed the majority of Contention 2 to migrate from a challenge to the CBR ER to a dispute with the staff's draft EA. See LBP-18-2, 87 NRC 21, 27–28 (2018). The Board,

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[4] Division of Fuel Cycle Safety, Safeguards & Environmental Review (FCSE), Office of Nuclear Material Safety and Safeguards (NMSS), [CBR] Proposed [MEA], NRC Documentation of NHPA Section 106 Review (Draft Cultural Resources Sections of [EA]) (June 2014) [hereinafter Draft EA Cultural Resources Sections] (ADAMS Accession No. ML14176B129).

[5] FCSE, NMSS, Draft [EA] for the [MEA] License Amendment Application (Dec. 2017) [hereinafter Draft EA] (ADAMS Accession No. ML17334A870). This included the previously published draft EA section on cultural resources. Compare Draft EA Cultural Resources Sections at 1–20, with Draft EA at 3-65 to -76, 4-36 to -38, 5-8 to -12.

however, granted the motion as to the environmental aspects of the omission portion of the contention.[6] See id. at 35–36.

The final EA was made available to the parties and the public on April 30, 2018.[7] See Letter from Marcia J. Simon, NRC Staff Counsel, to Licensing Board at 1 (Apr. 30, 2018). Under the proceeding's general schedule, that publication triggered the deadline for filing any new or amended contentions based on the final EA and the staff's safety evaluation report (SER), which previously had been issued on January 31, 2018.[8] See General Schedule Order at 2; see also Letter from Marcia J. Simon, NRC Staff Counsel, to Licensing Board at 1 (Jan. 31, 2018). Thereafter, on May 30, 2018, OST submitted its new and renewed contentions, along with its migration declaration, that now are before the Board for disposition. See OST New Contentions at 1–3, 10–84.

In June 13, 2018 responsive pleadings, while acknowledging that Contention 2 could migrate to challenge the final EA, the staff and CBR opposed admission of OST's new and renewed contentions. See Staff Response at 1; CBR Response at 1 (omitting any discussion of Contention 2's migration). On June 20, 2018, OST filed a combined reply to both responses, reasserting that all of its new and renewed contentions were admissible.[9] See [OST] Combined

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[6] At the initial contention admissibility stage, based on the information submitted by OST in support of Contention 1, the Board identified four specific alleged deficits in the application, the second of which involved an omission of various hydrogeologic parameters. See LBP-13-6, 77 NRC at 289. The challenge to the omission, as it relates to the safety aspects, remains. See infra section II.A.

[7] FCSE, NMSS, [EA] for the [MEA] License Amendment Application (Apr. 2018) [hereinafter Final EA] (ADAMS Accession No. ML18103A145).

[8] In April 2014, the Board determined that because these final staff environmental and safety review documents were to be published in close temporal proximity, it would be simpler to provide for a unified date for submitting any new or amended contentions based on the later of the final EA or the SER. See General Schedule Order at 2 n.1.

[9] Because of the unavailability of OST's counsel of record, on July 20, 2018, this pleading was submitted by e-mail to the agency's hearing docket and served on the other parties to this proceeding and the Board on his behalf by counsel who has not yet been

Reply to NRC Staff's and [CBR] Responses to Tribe's Migrated, Renewed and New Contentions Based on the Marsland Expansion Final [EA] (June 20, 2018) [hereinafter OST Reply].

The license application at issue here, which would permit CBR to undertake ISR activities in the MEA, is an amendment to CBR's existing 10 C.F.R. Part 40 source materials license. See LBP-13-6, 77 NRC at 265. CBR's existing license, which covers another ISR site near Crawford, Nebraska, that includes both a mining site and a processing facility, is the subject of a pending license renewal proceeding.[10] See id. at 266.

II. ANALYSIS

A. Migration of OST Contention 2

As currently admitted, Contention 2 reads:

> OST Contention 2: Failure to Include Adequate Hydrogeological Information to Demonstrate Ability to Contain Fluid Migration
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> The application and draft environmental assessment fail to provide sufficient information regarding the geological setting of the area to meet the requirements of 10 C.F.R. Part 40, Appendix A, Criteria 4(e) and 5G(2); the National Environmental Policy Act; and NUREG-1569 section 2.6. The application and draft environmental assessment similarly fail to provide sufficient information to establish potential effects of the project on the adjacent surface and ground-water resources, as required by

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authorized by OST to enter an appearance in this case and so lacked access to the agency's E-Filing system so as to make submissions for this proceeding. See E-Mail from David Frankel, Esq., to Hearing Docket and Crow Butte Marsland Proceeding Service List (June 20, 2018, 10:50 p.m. EDT) (ADAMS Accession No. ML18192C150).

[10] To refer only to the mining area at the licensed Crawford site, we will use the term "Crow Butte mine," while for the Crawford site's central processing facility, we will use "CPF," and for the Crawford site as a whole, we will use the term "renewal site." The license renewal application, which was the subject of licensing board partial initial decisions in 2016, see Crow Butte Res., Inc. (In Situ Leach Facility, Crawford, Neb.), LBP-16-7, 83 NRC 340 (2016), petition for Commission review pending; Crow Butte Res., Inc. (In Situ Leach Facility, Crawford, Neb.), LBP-16-13, 84 NRC 271 (2016), petition for Commission review pending, remains before a licensing board in a proceeding that we will refer to as the "Renewal Site" proceeding.

> NUREG-1569 section 2.7, and the National Environmental Policy Act.

LBP-18-2, 87 NRC at 36–37. The Board, however, has sought to clarify the scope of this contention in various orders throughout this proceeding. See, e.g., LBP-13-6, 77 NRC at 289; LBP-18-2, 87 NRC at 37. Thus, as noted previously, see supra note 6, within the scope of this contention are safety and environmental concerns that include:

> (1) the adequacy of the descriptions of the affected environment for establishing the potential effects of the proposed MEA operation on the adjacent surface water and groundwater resources; (2) exclusively as a safety concern, the absence in the applicant's technical report, in accord with NUREG-1569 section 2.7, of a description of the effective porosity, hydraulic porosity, hydraulic conductivity, and hydraulic gradient of site hydrogeology, along with other information relative to the control and prevention of excursions; (3) the failure to develop, in accord with NUREG-1569 section 2.7, an acceptable conceptual model of site hydrology that is adequately supported by site characterization data so as to demonstrate with scientific confidence that the area hydrogeology, including horizontal and vertical hydraulic conductivity, will result in the confinement of extraction fluids and expected operational and restoration performance; and (4) whether the draft EA contains unsubstantiated assumptions as to the isolation of the aquifers in the ore-bearing zones.

LBP-18-2, 87 NRC at 37.

Under Commission case law, an environmental challenge may migrate to subsequently-issued National Environmental Policy Act (NEPA)-related environmental review documents without the contention's proponent resubmitting the contention. See id. at 30. A contention may migrate "where the information in the Staff's environmental review document is 'sufficiently similar' to the material" in the previously issued licensing document. Strata Energy, Inc. (Ross In Situ Uranium Recovery Project), CLI-16-13, 83 NRC 566, 570 n.17 (quoting Strata Energy, Inc. (Ross In Situ Recovery Uranium Project), LBP-13-10, 78 NRC 117, 133 (2013), petition for review denied, Strata Energy, Inc. (Ross In Situ Uranium Recovery Project),

CLI-16-13, 83 NRC 566, 601 (2016), petition for review denied sub nom., Nat. Res. Def. Council v. NRC, 879 F.2d 1202, 1206–07 (D.C. Cir. 2018)).

Here, OST has submitted a "migration declaration" for Contention 2, averring that the contention as set forth in LBP-18-2 questioning the staff's draft EA should now be considered a challenge to the final EA.[11] Neither the staff nor the applicant objects to the migration of this admitted contention.[12] See Staff Response at 9; see also CBR Response (omitting any challenge to migration). Given that no party objects, and the staff acknowledges that "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," Staff Response at 9, Contention 2 will migrate as a challenge to the final EA with regard to the environmental portion of the contention, and will continue to be admissible as a technical/safety contention challenging the CBR application. See infra section III.

B. Standards Governing the Admission of New/Amended Contentions

When a party seeks to admit a new or amended contention after the initial hearing petition is due to be filed, the contention must satisfy standards for both timeliness and admissibility. Section 2.309(c)(1) of the agency's Part 2 rules of practice sets forth the standards for timeliness by requiring that "good cause" be shown for submitting a new or

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[11] OST indicates that it is seeking the migration of both the environmental and scientific portions of the contention. See OST New Contentions at 1. It is not clear, however, that the migration tenet can be "applied" to already admitted safety contentions. See Ross, LBP-13-10, 78 NRC at 132 n.7; see also LBP-18-2, 87 NRC at 36 n.7. An intervenor may not litigate the adequacy of the staff's safety review, so any safety-related contention must be based on the content of the application. See AmerGen Energy Co., LLC (Oyster Creek Nuclear Generating Station), CLI-08-23, 68 NRC 461, 476 (2008); Private Fuel Storage, L.L.C. (Indep. Spent Fuel Storage Installation), LBP-01-3, 53 NRC 84, 97 (2001). Therefore, there arguably is no need for a contention to migrate from the CBR application to the staff's SER, so that the safety aspects of Contention 2 will be litigated at the evidentiary hearing stage as a challenge to the CBR application.

[12] Although OST was neither required to submit a migration declaration nor to plead the migration standards unless the staff or CBR challenged this contention's migration, see Ross, LBP-13-10, 78 NRC at 143 n.15, its submission of this declaration has been of material assistance in clarifying the status of this contention.

amended contention, while the requirements governing contention admissibility are found in section 2.309(f)(1). Both standards are discussed in more detail below.

1. “Good Cause” for the Submission of New/Amended Contentions

Under section 2.309(c)(1), when a party submits a new or amended contention after the initial date for filing a hearing request, “good cause” must be shown establishing why the contentions ought to be admitted as timely submitted. To make such a showing, an intervenor must demonstrate that:

> (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.

10 C.F.R. § 2.309(c)(1)(i)–(iii). The first two “good cause” factors relate to the nature of the information that is being used as the basis for a new or amended contention, while the third obliges the sponsoring party to submit a new or amended contention in a timely manner upon learning of new, materially different information that may form the basis of the contention. See Ross, LBP-13-10, 78 NRC at 130.

Regarding the third factor, section 2.309(c)(1)(iii) does not define “timely,” providing the presiding officer with a degree of latitude in determining whether or not a contention should be viewed as timely. See id. at 130–31. As such, a board may, as we have in this proceeding, define timeliness by specifying a deadline for timely filing a new or amended contention following a “triggering event” that makes the previously unavailable/materially different information available so as to be the basis for the new or amended contention. See Licensing Board Memorandum and Order (License Amendment Effectiveness Stay Application, In Limine Motions, and Site Visit/Limited Appearance Session/Evidentiary Hearing Scheduling) (May 21, 2018) app. A, at 2 (unpublished) (indicating that new or amended contentions based on the final EA or SER would be deemed timely if filed by May 30, 2018); see also Licensing Board

Memorandum and Order (Initial Prehearing Order) (Feb. 8, 2013) at 6 n.8 (unpublished) (noting that to be considered timely, any motion to admit a new or amended contention "should be filed within 30 days of the date upon which the information that is the basis of the motion becomes available to the petitioner/intervenor").

Thus, relative to the "good cause" factors, it is a fundamental principle of practice before the Commission that a new or amended contention must be raised at the earliest possible opportunity. See DTE Elec. Co. (Fermi Nuclear Power Plant, Unit 3), CLI-15-1, 81 NRC 1, 7 (2015). "Petitioners who choose to wait to raise contentions that could have been raised earlier do so at their peril." Id.

2. Admissibility of New/Amended Contentions

As with contentions filed at the time of the initial hearing petition, new or amended contentions must meet the six admissibility factors set out in section 2.309(f)(1). See 10 C.F.R. § 2.309(c)(4). These factors require the proponent of a new or amended contention to:

> (i) Provide a specific statement of the issue of law or fact to be raised or controverted . . . ;
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> (ii) Provide a brief explanation of the basis for the contention;
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> (iii) Demonstrate that the issue raised in the contention is within the scope of the proceeding;
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> (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 on which the petitioner intends to rely at hearing . . . ;
>
> (vi) . . . [P]rovide sufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact.

Id. § 2.309(f)(1)(i)–(vi); see also LBP-13-6, 77 NRC at 283–86. Failure to comply with any one of these requirements is grounds for dismissing the contention. See LBP-13-6, 77 NRC at 284

(citing FirstEnergy Nuclear Operating Co. (Davis-Besse Nuclear Power Station, Unit 1), CLI-12-8, 75 NRC 393, 395–96 (2012)).

C. Timeliness of OST Contentions

In its motion, OST neither cites nor discusses any of the three section 2.309(c)(1) "good cause" factors. In their responses, the staff and CBR highlight the applicability of the section 2.309(c)(1) good cause standard to OST's contentions and OST's purported failure to establish the timeliness of its various contentions under those criteria. See Staff Response at 4–5; CBR Response at 3–4. In its reply, however, OST asserts as a general matter that the draft EA should not be considered a factor in assessing the timeliness of its new and renewed contentions under section 2.309(c)(1). See OST Reply at 2. This is so, OST declares, because the draft EA was subject to change after the public comment period, which effectively negates the need to file new contentions regarding that document based on ripeness considerations. See id. Further, OST maintains it has both provided lengthy public comments on the draft EA and submitted its new and renewed contentions at the first available opportunity following the issuance of the final EA. As a result, and in light of the Commission's recognition that NEPA-based issues cannot be the subject of an evidentiary hearing until the staff's environmental review is completed with the final EA, OST declares that the Board should reject any assertion its fourteen contentions needed to be submitted prior to issuance of the final EA. See id.

In challenging the staff's environmental review documents, an intervenor that delays filing new contentions until the staff's final environmental document is issued "risk[s] the possibility that there will not be a material difference" between the draft and final environmental review documents, "thus rendering any newly proposed contentions on previously available information impermissibly late." Fermi, CLI-15-1, 81 NRC at 7. Just as "the Commission expects that the filing of an environmental concern based on the ER will not be deferred because the staff may provide a different analysis in the [draft EIS]," so too "the institutional

unavailability of a licensing-related document does not establish good cause for filing a contention late if information was available early enough to provide the basis for the timely filing of that contention." Duke Power Co. (Catawba Nuclear Station, Units 1 & 2), CLI-83-19, 17 NRC 1041, 1048–49 (1983). Therefore, an intervenor must contest information contained in a draft environmental review document contemporaneously with its publication, and may not wait to see whether the challenge is resolved when the final environmental document is issued. See Calvert Cliffs 3 Nuclear Project, LLC (Calvert Cliffs Nuclear Power Plant, Unit 3), LBP-10-24, 72 NRC 720, 732 (2010).

Moreover, submitting comments on a staff environmental document during the public comment period for that document is a wholly separate process from filing contentions challenging that document as a party to an adjudication. See LBP-18-2, 87 NRC at 31–32 n.5 (indicating that fate for new/amended contention submissions by a party relative to the staff's SER and final EA is independent of any deadlines set by the staff for general comments on these reports by the public). Thus, filing public comments on a draft environmental review document will not excuse or otherwise toll the need to file a contention based on the draft document nor will it, in and of itself, make timely a contention submitted in the first instance as a challenge to the final environmental document. See Progress Energy Fla., Inc. (Levy Cty. Nuclear Power Plant, Units 1 & 2), LBP-09-10, 70 NRC 51, 144 (2009) (noting that because the proponent of a late-filed contention filed rulemaking comments that mirrored contention's basis on the same day intervention petition was filed, the petitioner was aware of the facts and issues supporting the contention and could have included that contention with the original petition to intervene); see also Private Fuel Storage, L.L.C. (Indep. Spent Fuel Storage Installation), LBP-00-27, 52 NRC 216, 221–24 (2000) (rejecting a late-filed contention challenging a June 2000 draft environmental impact statement (DEIS) because the contention was not based on previously unavailable information notwithstanding party's assertion that, upon learning of the

relevant information, it "did not 'idly' wait until the DEIS was published to make its concerns known" but adhered to the NEPA process by filing EIS scoping comments in May 1999).

Consequently, OST's generic claim that its failure to submit any new or amended contentions relative to the draft EA should not be considered as a basis for finding its post-final EA submitted contentions untimely under section 2.309(c)(1) is without merit.[13]

D. Admissibility of OST's New Contentions

1. OST Contention A:[14] Failure of the Final EA to Adequately Describe [CBR's] Cessation of Operations; Proposal to Be Possession-Only License in "Standby Status" and Impacts of Decommissioning

DISCUSSION: OST New Contentions at 10–16; Staff Response at 15–20; CBR Response at 4–6; OST Reply at 3–4.

RULING: Inadmissible, in that this contention lacks factual or expert opinion support and does not provide sufficient information to show a genuine dispute exists with the final EA on a material issue. See 10 C.F.R. § 2.309(f)(1)(v)–(vi).

OST's Contention A alleges that the staff "fail[ed] to conduct the required 'hard look' analysis at impacts of the proposed mine associated with CBR's maintenance of the [Crow Butte mine] in 'standby status.'" OST New Contentions at 10. OST's overarching argument is that because the MEA relies on the renewal site's CPF to process the MEA's uranium resin to yellowcake form, and CBR is ceasing all operations at the renewal site, NEPA requires that the final EA provide an updated discussion that accounts for the renewal site's cessation of

[13] To the degree these OST assertions may be footed in concerns about the effective use of limited resources, such an argument is best addressed to the presiding officer in the context of a motion to extend the time for filing new or amended contentions relative to a draft environmental document.

[14] Although OST used various headings to designate its new and renewed contentions, for uniformity we have adopted the style "OST Contention X." We do not believe this will cause any confusion with OST's previously submitted contentions that, like admitted Contention 2, were labeled with a numeric rather than an alpha designator. Likewise, we have adopted a standardized capitalization regime for OST's contention titles.

operations. More specifically, OST posits a variety of deficiencies based on the final EA's omission of any discussion or analysis of CBR's April 2, 2018 letter advising the staff of the cessation of renewal site operations. See id. at 11–15 (citing Letter from Walt Nelson, CBR SHEQ Coordinator, to NRC Document Control Desk (Apr. 2, 2018) [hereinafter Cessation Letter] (ADAMS Accession No. ML18093A186)). These alleged insufficiencies include (1) in accord with staff policy and guidance directive PG 1-27, the final EA should have indicated that CBR is seeking a possession-only license for the renewal site, id. at 12–13 (citing Division of Industrial and Medical Nuclear Safety, NMSS, Policy and Guidance Directive PG 1-27, Reviewing Requests to Convert Active Licenses to Possession-Only Licenses (rev. 0, Feb. 2000) [hereinafter PG 1-27] (ADAMS Accession No. ML003685598)); (2) the final EA should have discussed CBR's proposed decommissioning schedule and its request to delay the decommissioning of certain equipment at the renewal site, id. at 13; (3) conclusions throughout the final EA, such as the purpose and need statement and socioeconomic impact analysis, are now misleading and should be revised in light of the cessation letter, id. at 14, 16; and (4) the final EA's decommissioning section does not discuss CBR's decision to cease mining operations at the renewal site, id. at 13–14.[15]

[15] Also cited by OST in support of this contention is an April 3, 2018 CBR letter and accompanying April 3 license amendment request (LAR) for an alternate decommissioning schedule for renewal site mining units (MUs) 2-6, which are currently undergoing decommissioning. See OST New Contentions at 12 (citing Letter from Bob Tiensvold, CBR Restoration Manager, to NRC Document Control Desk (Apr. 3, 2018) [hereinafter 2018 LAR] (ADAMS Accession No. ML18102A539)). In addition to asserting that the April 2 cessation letter's reference to the reduced production and injection flows at renewal site MUs 7-11 means that there will now be "ten (10) [MUs] in restoration, consuming vast amounts of water volumes," OST maintains that the April 3 LAR's references to the possibility of seeking 10 C.F.R. Part 40, app. A, criterion 5B(5)(c) alternate concentration limits for MUs 2-6 means "[CBR] has acknowledged that it will never be able to return the water to its baseline condition." OST New Contentions at 12. Because these claims are restated with more specificity in Contention B, we address them in section II.D.2 infra.

Putting aside the question of whether this issue statement should have been filed by early May 2018 as a challenge to the adequacy of the draft EA,[16] we agree with the staff and CBR that Contention A lacks the factual support necessary for an admissible contention pursuant to section 2.309(f)(1)(v), and also fails to demonstrate a genuine dispute with the final EA on a material issue per section 2.309(f)(1)(vi).

Looking to the substance of the April 2 cessation letter, the letter's purpose is to provide the NRC with operational information related to the renewal site in light of the public announcement by Cameco Resources, CBR's parent company, that it was ceasing production operations at its United States facilities, including the renewal facility, "due to continued low uranium prices." Cessation Letter at 1. The letter also gave updates regarding the production

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[16] Relative to this contention and the others in which the April 2 cessation letter and the April 3 LAR play a central role in supporting the contention, there is a significant question as to whether good cause for admission of those contentions exists under section 2.309(c)(1). For those aspects of the contention that are based on the April 2 cessation letter and the April 3 LAR, even if the information contained in those two documents was considered materially different, previously unavailable information under section 2.309(c)(1)(i) and (ii), those letters were made public on April 2 and 3, 2018, respectively, and, using their issuance dates as the "trigger dates" for submitting any new or amended contention based on their content, then such a contention arguably needed to be filed within 30 days from April 2 or 3, which is approximately a month before OST submitted its contentions to the Board.

That being said, in its reply filing, OST suggests that in assessing the section 2.309(c)(1)(iii) "availability" of this information, we should take into account the possibility that OST first had notice of these items via a May 2018 mandatory discovery disclosure that included the April 2 cessation letter and the April 3 LAR. See OST Reply at 4. There appears to be nothing in the CBR or staff May 2018 mandatory disclosures in this proceeding regarding those letters. But in the staff's May 1, 2018 mandatory disclosure for the CBR North Trend ISR expansion area license amendment proceeding, which was served on OST counsel, see Letter from David Cylkowski, NRC Staff Counsel, to Licensing Board, Crow Butte Res., Inc. (License Amendment for the North Trend Expansion Project), No. 40-8943, at unnumbered pp. 2, 5 (May 1, 2018), the staff did reference an April 4, 2018 CBR letter indicating that "the uranium market has been significantly depressed for a number of years, and this fact [led] to [CBR parent] Cameco's decision to suspend production activities" at the renewal facility, Letter from Walter Nelson, CBR SHEQ Coordinator, to NRC Document Control Desk at 1 (Apr. 4, 2018) (ADAMS Accession No. ML18102A537). Using the date of this disclosure filing as the "trigger date," OST's May 30 contention filing arguably would be timely.

Nonetheless, given our finding that Contention A and the other contentions associated with these April letters are inadmissible on other grounds, we need not reach the question of what was the "trigger date" for timely filing regarding these contentions.

and injection flows for renewal site active units 7 through 11, as well as assurances that the licensee would "continue[] to perform all required environmental and health physics monitoring as required" by the Crow Butte License. Id. CBR further stated that it intends to submit alternate decommissioning schedules for the Crow Butte renewal site MUs to the NRC within twenty-one months of the date of the letter and will seek to change its license to a "possession-only" license in the second half of 2018, but that "[a]ll production equipment will remain in standby to provide the option to restart full operations in the future should market conditions warrant." Id.

OST characterized the April 2 cessation letter as CBR's declaration that it is permanently ceasing operations at the renewal site, including the Crow Butte mine and the CPF and, as such, the final EA must take this into account. The letter, however, explicitly states that there has not been a permanent cessation of operations, with the facility equipment in standby mode awaiting a more favorable economic climate. Further, although the letter states that a possession-only license will be sought for the renewal facility sometime before the end of 2018, CBR in its pleading before the Board indicated it has determined that a possession-only license is not necessary because of ongoing renewal site activities and it has no near term plans to seek such a license.[17] See CBR Response at 5 & n.10.

Clearly, the April 2 cessation letter does not support OST's central factual premise that there is now a permanent cessation of operations at the CBR renewal site, which in turn requires an additional EA discussion about a variety of matters. And this mischaracterization in OST's basis for this contention fatally undercuts the contention both factually and as framing the

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[17] While this statement is in a representation of counsel rather than a submission by CBR for the licensing docket, for the purpose of this proceeding it has the same legal effect and, if contradicted by subsequent CBR actions, could be the basis for, among other things, a new contention. See 10 C.F.R. § 2.304(d).

requisite material dispute. Further, even assuming PG 1-27 is applicable,[18] in the face of CBR's declaration that there is no permanent cessation of equipment operations at the renewal site and that CBR will not seek a possession-only license, the staff's "possession only" guidance statement on which OST relies for its claim that there must be additional decommissioning discussion in the EA does not support OST's assertion. See PG 1-27, at 4 (stating if licensee has not permanently ceased operations, license cannot be converted to possession-only status, but only to standby status that permits 24-month period of inactivity/decommissioning delay unless extended period of inactivity has been authorized). So too, OST's claims about the need to provide an EA discussion of decommissioning delays for well sites and equipment and to make revisions to the EA's purpose and need statement and socioeconomic impact analysis are premised on the assumption that CBR operations at the renewal site have permanently ceased, which is not what the April 2 cessation letter portends.

The April 2 cessation letter does not provide factual support for OST's assertion that CBR is permanently ceasing operations at the renewal site nor has OST, based on its assertions regarding that letter, carried its burden to show a dispute exists on a material issue of law or fact relative to the final EA. We thus find Contention A inadmissible as failing to fulfill the requirements of section 2.309(f)(1)(v) and (vi).

2. OST 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), Including Failure to Describe the Expected Increases in Consumptive Use of Water in Restoration

DISCUSSION: OST New Contentions at 17–21; Staff Response at 20–22; CBR Response at 6–9; OST Reply at 4–5.

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[18] As the staff notes, the policy guidance statement indicates it does not apply to "uranium milling." Staff Response at 18 (citing PG 1-27, at 1).

RULING: Inadmissible, in that this contention lacks factual or expert opinion support and does not provide sufficient information to show a genuine dispute exists with the final EA on a material issue. See 10 C.F.R. § 2.309(f)(1)(v)–(vi).

This contention involves the alleged NEPA violation of omitting any discussion or analysis in the staff's final EA of the "impacts of the proposed extended timeline for restoration and the other information contained in the [April 3 LAR]," including consumptive water use arising from all ten of the renewal site mining units being in the restoration phase. OST New Contentions at 17. More specifically, OST asserts that the April 3 LAR's alternate and extended decommissioning schedule makes the timelines in final EA Figure 5-1, as well as "timelines of various portions" of the final EA, "inaccurate and misleading." Id. OST contends as well that CBR has submitted the April 3 LAR due to its difficulty returning the renewal site's MUs back to baseline groundwater standards, which OST interprets to mean CBR will have the same problem restoring the MEA's MUs back to baseline when the time comes, a situation that merits discussion in the final EA. Id. at 17–18.

Also with regard to baseline restoration, OST asserts that the final EA should have disclosed that one of the renewal site's active MUs is impacting the decommissioning of two of the inactive MUs so that "there is no assurance that restoration will ever be achieved to compl[y] with [10 C.F.R Part 2,] Appendix A, Criterion 5(B)." Id. at 19. OST maintains as well that with all ten renewal site MUs in restoration, "the result will be more consumptive use [of water] at very high usage rates" and that the final EA does not discuss or account for this increased water use. Id. at 19. Finally, OST declares that, based on the April 3 LAR, the final EA should have disclosed that CBR intends to "request [alternate concentration limits (ACL)] amendments in 2020" for the renewal site, which is during the MEA license amendment term, id. at 20, and finds the final EA's section 5 "Cumulative Impacts" analysis wanting because the mine restoration activities at the renewal site are not included in that EA section, id. at 21 (citing Final EA at 5-1).

Again putting aside timeliness considerations, see supra note 16, with regard to Contention B's concern about an omitted EA analysis of the impacts of very high consumptive water use as a result of all ten renewal site MUs being decommissioned during a single restoration phase,[19] the contention is inadmissible as lacking a factual basis. Stating that "there have not been changes to restoration plans" regarding these units, the April 2 cessation letter neither contains an indication those operating units are in restoration nor specifies when restoration will occur, other than to indicate alternate decommissioning schedules will be submitted in twenty-one months that are subject to agency approval and will reflect an integrated restoration schedule for all renewal site MUs. Cessation Letter at 1. Additionally, OST fails to provide a factual basis for any possible wellfield restoration relationship between the renewal site MUs and the MEA MUs, much less about any related or cumulative impacts to the MEA based on the renewal site April 3 LAR. As a result of this significant factual deficiency, Contention B is inadmissible under section 2.309(f)(1)(v).

Contention B also cannot be admitted to this proceeding because it fails to provide sufficient information to raise a genuine dispute with the final EA on a material factual or legal issue. A petitioner seeking admission of a contention contesting a NEPA document must not only point out what specific deficiencies exist, but also must demonstrate why the deficiencies raise a genuine material dispute relative to the NEPA document. See Duke Energy Corp. (Oconee Nuclear Station, Units 1, 2 & 3), CLI-99-11, 49 NRC 328, 336–37 (1999). Besides failing to acknowledge or challenge the final EA's assessment of consumptive use that takes into account the renewal site and the Three Crow, North Trend, and Marsland expansion sites, see Final EA at 4-16 to -19, OST also has not established a material factual dispute relative to its claim that the EA's Figure 5-1 schedules are "inaccurate and misleading," OST New

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[19] Of the ten renewal site MUs, per the April 3 LAR, five are inactive and already being decommissioned, see 2018 LAR at 1, and, per the April 2 cessation letter, five are becoming inactive as a result of the cessation of operations, see Cessation Letter at 1.

Contentions at 17. We fail to see how the April 3 LAR, which makes no mention of the expansion areas, establishes any material factual dispute regarding this figure's schedules, particularly given that Figure 5-1 shows the renewal site's CPF supporting expansion area mining activities through the year 2041. Moreover, CBR has indicated that, notwithstanding the suspension of active mining at the renewal site, it has no plans to decommission the CPF that would be used for processing materials from these expansion sites. See CBR Response at 10 n.28. Therefore, OST's assertion that Figure 5-1 is inaccurate in light of the April 3 LAR fails to frame a material dispute.[20]

As to OST's complaint that the final EA is deficient because of the staff's twin failures to (1) discuss an April 3 LAR-identified problem involving an active MU possibly affecting CBR's restoration of two inactive MUs to baseline concentrations; and (2) disclose that CBR indicated in the April 3 LAR that it will be seeking ACLs for renewal site units, OST again has failed to establish a genuine dispute on a material issue of law or fact for either claim. "A contention that simply alleges that some matter ought to be considered does not provide the basis for an admissible contention." Sacramento Mun. Util. Dist. (Rancho Seco Nuclear Generating Station), LBP-93-23, 38 NRC 200, 246 (1993), petition for review denied, CLI-94-2, 39 NRC 91, 91 (1994). By failing to show the relevance of these renewal site situations to the MEA's circumstances, OST's claim is only an assertion that a baseline concentration at a CBR ISR facility MU so as to require an ACL at that facility. This is insufficient to require a NEPA analysis for ACL impacts for any other pending CBR ISR application, particularly given that an ACL can only be obtained for an MU at an ISR site via a license amendment request that is subject to NEPA examination and an adjudicatory hearing. See Ross, CLI-16-13, 83 NRC at 593.

[20] Additionally, OST's undifferentiated reference to other EA "timelines" lacks sufficient specificity to provide the basis for an admissible contention. See 10 C.F.R. § 2.309(f)(1)(i).

3. OST Contention C: Evaluating All Reasonable Alternatives – No-Action Alternative and Proposed Action are Almost Identical – The Final EA Failed to Consider All Reasonable Alternatives in Light of Crow Butte Mine Cessation and Decommissioning

DISCUSSION: OST New Contentions at 21–23; Staff Response at 22–23; CBR Response at 9–10; OST Reply at 5.

RULING: Inadmissible, in that this contention lacks factual or expert opinion support. See 10 C.F.R. § 2.309(f)(1)(v).

Apparently again relying for factual support on CBR's April 2 cessation letter for the currently operating Crow Butte renewal site MUs, with this contention OST asserts that because CBR "has ceased production and is entering full time restoration and decommissioning [at the renewal site], the no-action alternative and the proposed action, in light of the decommissioning, are almost the same." OST New Contentions at 23. OST argues that the now "slight differences" between the proposed action and the no-action alternative should be considered and discussed, as the failure to do so violates NEPA. Id.

Putting timeliness concerns aside once more, see supra note 16, this contention is inadmissible under section 2.309(f)(1)(v) because, as was explained previously in our ruling on Contention A, see supra section II.D.1, the April 2 cessation letter does not provide a valid factual basis for the OST premise that the revised EA discussion of the no-action alternative is needed because the renewal site has permanently ceased production so that restoration and decommissioning now will commence for all MUs and, presumably, the CPF. Given that the basis for the no-action alternative discussion sought by OST must be the supposition that CBR's renewal site cessation action also will result in the MEA, should it be licensed, becoming an equally inactive facility, this contention's attempt to transfer this factual inaccuracy regarding the renewal site's status to the MEA facility is equally lacking.

Ignoring the illogic of the supposition that CBR would seek to license a facility it never intends to operate and thereby trigger the EA discussion sought by OST, as we noted above

relative to Contention B, see supra section II.D.2, should ISR mining at the renewal site cease, the CPF will continue to be available at the renewal site for processing material from the MEA (and potentially other CBR extension facilities). Thus, as the staff suggests, see Staff Response at 23 n.93, even in the face of the April 2 cessation letter, the no-action alternative for the MEA must continue to be, as the final EA discusses, denial of the CBR license amendment request, a result that OST has failed to challenge with an admissible contention having factual support.

4. OST 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 Discussion in Section 3.6 and 4.6 of Final EA

DISCUSSION: OST New Contentions at 23–25; Staff Response at 27–30; CBR Response at 10–12; OST Reply at 5–6.

RULING: Inadmissible, in that this contention lacks factual or expert opinion support. See 10 C.F.R. § 2.309(f)(1)(v).

With this contention, OST seeks to reopen the issue of the adequacy of the cultural resources portion of the staff's EA by reference to recent developments in the Dewey-Burdock ISR licensing proceeding relating to a pending cultural resources contention. Specifically, OST cites a March 16, 2018 staff letter that OST asserts outlines an agreed approach for satisfying the parties' respective obligations under NEPA and the National Historic Preservation Act (NHPA). From this, OST declares that the staff's final EA in this proceeding is deficient because it fails to discuss this approach and its applicability to the MEA. See OST New Contentions at 4 (citing OST New Contentions ex. A (Letter from Cinthya I. Román, Chief, Environmental Review Branch, FCSE, NMSS, to Trina Lone Hill, Director, OST Cultural Affairs & Historic Preservation Office (Mar. 16, 2018))).

Putting aside the timeliness question of whether this issue statement should have been filed by mid-April 2018 as a challenge to the adequacy of the draft EA,[21] we find it inadmissible because the factual basis for this contention is wanting. As indicated in both the staff's June 19, 2018 letter to the Dewey-Burdock licensing board and a subsequent July 2, 2018 staff status report, because of issues of coming to agreement on a methodology for the approach outlined in the March 2018 letter, the staff has decided not to pursue that approach further and will now seek summary disposition on the pending cultural resources contention without engaging in additional cultural resource activities. See Letter from Emily Monteith, NRC Staff Counsel, to Licensing Board, Powertech (USA), Inc. (Dewey-Burdock In Situ Uranium Recovery Facility), No. 40-9075-MLA, at 2 (June 19, 2018); Letter from Emily Monteith, NRC Staff Counsel, to Licensing Board, Dewey-Burdock, No. 40-9075-MLA, at 1–2 (July 2, 2018); see also Licensing Board Order (Establishing Procedures for Filing Motions for Summary Disposition), Dewey-Burdock, No. 40 9075 MLA (July 19, 2018) at 4–5 (unpublished) (granting staff motion to establish schedule for summary disposition motions and responses). Given the stated factual underpinning for this contention is no longer accurate, this contention lacks a sufficient basis and so must be dismissed.[22] See Ga. Power Co. (Vogtle Elec. Generating Plant, Units 1 & 2), ALAB-872, 26 NRC 127, 136 (1987) (finding contention was appropriately dismissed as lacking

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[21] For this contention, and arguably for Contentions L and M as well, because OST asserts the mid-March staff letter should be relevant to the staff's environmental review, there is the question which Board-established deadline applies to the timely submission of a contention based on that letter relative to the good cause standard of section 2.309(c)(1)(iii), i.e., the May 30, 2018 deadline for filing new or amended contentions relative to the final EA or the generic deadline whereby a new/amended contention based on new and materially different information needed to be filed within 30 days of becoming available. Given that these contentions are inadmissible on other grounds, we need not reach that question either.

[22] We would observe that when finality attaches in this proceeding, OST may raise before the Commission in a petition for review any disagreement it has with this or any other ruling made today regarding the admission of a cultural resources contention or with the Board's earlier summary disposition decision regarding OST's cultural resources Contention 1 based on, among other things, developments in Dewey-Burdock or any other pending ISR adjudication. See 10 C.F.R. § 2.341(a).

a proper basis when factual support for the contention had been repudiated by its original source and no other independent information supporting the allegation had been offered).

5. OST 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

DISCUSSION: OST New Contentions at 25–26; Staff Response at 30–32; CBR Response at 12–13; OST Reply at 7–8.

RULING: Inadmissible, in that this contention is not based on materially different, previously unavailable information and lacks factual or expert support. See 10 C.F.R. § 2.309(c)(1)(i)–(ii), (f)(1)(v).

OST claims in this contention that the final EA violates NEPA because it uses inappropriate methodologies and models in evaluating and analyzing pump test data, and "fails to enforce any degree of scientific rigor" relative to two hydrogeologic parameters, transmissivity and storativity. OST New Contentions at 26. Both the staff and CBR argue that this contention is untimely because the relevant "methods and assumptions used to analyze the pumping test" were used in CBR's ER and the staff's draft EA. See Staff Response at 30–31; CBR Response at 11. The staff also maintains that the alleged deficiencies lack adequate factual support because OST has provided no facts or expert opinions to support its various technical conclusions. See Staff Response at 31–32.

Contention E is not based on materially different, previously unavailable information. The challenged material, including the pump test data and the analyses that relied upon that data, was used in the ER and so has existed since the outset of this proceeding. See, e.g., ER at 3-40 to -42. Not surprisingly, OST makes no assertion that the information was not previously available given that the admitted Contention 2 challenge relates to this same data and analyses. Furthermore, OST references no material difference between the challenged

information as contained in sections 3.3.2.3 and 4.3.2.1 of the draft EA and the final EA.[23] As OST has not based this contention on any previously unavailable materially different information, the contention must be rejected. See 10 C.F.R. § 2.309(c)(1)(i)–(ii).

Additionally, Contention E is inadmissible because OST has not provided factual or expert support for this issue statement. See id. § 2.309(f)(1)(v). OST presents various technical and scientific conclusions as the basis for deeming the final EA's pump test data analysis inadequate. Yet, none of these conclusions is supported by expert affidavits or other evidence.[24] It is well-established that a contention's sponsor must provide "documents or other factual information or expert opinion that set forth the necessary technical analysis to show why the proffered bases support its contention." Private Fuel Storage, L.L.C. (Indep. Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 180 (1998) (citation omitted). OST may not simply declare that "[u]nder no rational definition of the terms, can an aquifer with a transmissivity range from 230 [feet squared per day (ft^2/day)] to 2,469 ft^2/day and storativity range from $1.7x10^{-3}$ to $8.32x10^{-5}$ be considered homogeneous and isotropic," OST Reply at 7, or that "[m]ean values for transmissivity and storativity that deviate by at least an order of magnitude render the model and its drawdown predictions highly suspect," OST New Contentions at 26, without so much as a citation. Contention E is not admissible on this basis as well.

[23] Although OST cites to section 4.2.3.1, see OST New Contentions at 26, which does not exist in either the draft or final EA, see Draft EA at v; Final EA at v, given the page numbers also cited and the context, we assume the citation was a transposition and is intended to refer to section 4.3.2.1.

[24] Although OST does reference several American Society for Testing and Materials (ASTM) standards that it asserts were violated by CBR's use, and staff's EA acceptance, of the Theis and Jacob's drawdown methods to establish MU hydraulic properties, see OST New Contentions at 25–26, we observe that those ASTM standards indicate how to conduct/evaluate a test and do not dictate which tests are best to use for a given site.

Nonetheless, we do find that parts of this contention fall validly within the scope of Contention 2 and so may be presented at the upcoming evidentiary hearing in litigating that contention. CBR states that, to the extent this contention contests the adequacy of the pump test data used to develop the hydrogeologic model for the site, these bases are already contained in admitted Contention 2. See CBR Response at 12. But CBR continues, "the portion of the contention that challenges the methods used for analyzing pump test data or the discussion of transmissivity and storativity" is untimely because these are essentially new bases for challenges not specifically called out in the original petition, or the Board's clarification of bases, see LBP-18-2, 87 NRC at 37, and, as such, are now too late. CBR Response at 13 & n.36.

We disagree. Licensing boards admit contentions, not bases. 10 C.F.R. § 2.309(a); see, e.g., Tenn. Valley Auth. (Watts Bar Nuclear Plant, Unit 2), LBP-09-26, 70 NRC 939, 988 (2009) (citing Entergy Nuclear Vt. Yankee, LLC (Vt. Yankee Nuclear Power Station), LBP-06-20, 64 NRC 131, 147 (2006)); S. Nuclear Operating Co. (Early Site Permit for Vogtle ESP Site), LBP-07-3, 65 NRC 237, 255 (2007). On the other hand, as they are intended "to put the other parties on notice as to what issues they will have to defend against or oppose," bases can frame the scope of the contention. Pub. Serv. Co. of N.H. (Seabrook Station, Units 1 & 2), ALAB-899, 28 NRC 93, 97 (1988), aff'd sub nom. Massachusetts v. NRC, 924 F.2d 311 (D.C. Cir.), cert denied, 502 U.S. 895 (1991). Nonetheless, the agency's rules of practice only require that the petitioner "[p]rovide a brief explanation of the basis for the contention," 10 C.F.R. § 2.309(f)(1)(ii), a recognition that mandating an exhaustive summary of all aspects of a petitioner's argument would be tantamount to asking the petitioner to prove its case at the contention admissibility stage, see La. Energy Servs., L.P. (Nat'l Enrichment Facility), CLI-04-35, 60 NRC 619, 623 (2004). Brevity thus is permitted, although it also must be recognized that a petitioner takes a not insignificant risk in relying on just a few factual,

technical, or legal points in framing a contention lest the presiding officer reject later attempts to "fill in the blanks" as being outside the scope of the contention.

In this instance, while both the staff and CBR recognize that the challenged transmissivity and storativity parameters enunciated in this contention are related to Contention 2, both also contend that the issues defined in Contention E are distinctive from those issues that are within the scope of admitted Contention 2. See Staff Response at 30 n.117; CBR Response at 12–13 & n.36. We find, however, that these parameters are consistent with the breadth of Contention 2 as defined by OST's four specific deficits that have been outlined in our previous decisions. See, e.g., LBP-13-6, 77 NRC at 289. To be sure, CBR protests that Contention 2 as admitted "specifically challenges the adequacy of certain parameters" that do not include transmissivity and storativity. CBR Response at 13 n.36. Yet this approach fails to give meaning to the wide-ranging phrase included in the deficiency summation relative to safety-related matters: "along with other information relative to the control and prevention of excursions." LBP-18-2, 87 NRC at 37 (quotations omitted). Moreover, the now-challenged parameters appear to be directly associated with the already-challenged bases, both as to safety and environmental matters, and are integrally related to those bases. While OST specifically challenged certain parameters in setting forth the bases for its contention, it also did not foreclose the possibility of challenging other, related parameters.

Therefore, while Contention E is rejected for the above reasons, to the degree it wishes to do so, OST as part of its case regarding Contention 2 may present evidence relating to storativity and transmissivity at the evidentiary hearing on this contention.

6. OST 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

DISCUSSION: OST New Contentions at 26–29; Staff Response at 32–33; CBR Response at 13–14; OST Reply at 7–8.

RULING: Inadmissible, in that this contention is not based on materially different, previously unavailable information and lacks factual or expert support. See 10 C.F.R. § 2.309(c)(1)(i)–(ii), (f)(1)(v).

Relative to this contention, OST claims that because the final EA accepts pump test data that is based on "demonstrably inaccurate" assumptions, the final EA does not "sufficiently analyze the potential impacts of the proposed aquifer restoration program." OST New Contentions at 27. In opposition, the staff and CBR note that the information that is the basis for this contention was contained in the ER and so this contention is untimely. See Staff Response at 32; CBR Response at 15. Both also challenge OST's failure to provide expert support for the contention. See Staff Response at 32–33; CBR Response at 15.

Contention F suffers from the same good cause deficiencies as Contention E. OST again cites to sections 3.3.2.3 and 4.3.2.1, as well as 4.3.2.2,[25] each of which is nearly identical in the final and draft version of the EA. See OST New Contentions at 27–28. The pump test data, and the assumptions that underlie that information, were available to OST in the ER and the draft EA. The information in the final EA was therefore previously available to OST, and is not materially different than that which was contained in the draft EA. Contention F thus may not be admitted as lacking good cause.

OST also has not provided factual or expert support for Contention F, and so it must be rejected. See 10 C.F.R. § 2.309(f)(1)(v). OST asserts that the final EA's data does not support the aquifer being homogeneous, but rather is "indicative of a highly fractured system that allows imbibi[ng] of contaminants into the rock matrix, which is closer to a dual porosity model." OST New Contentions at 27. Here again, however, OST provides no expert support, let alone any citation, for this technical conclusion. Likewise, the rest of the contention is devoid of any

[25] Once again, the OST citation in its pleading to section 4.2.3.2 undoubtedly reflects a transposition. See supra note 23.

citation to any document that would support the technical conclusions. An unsupported contention must be rejected.

CBR nonetheless recognizes that to some extent this contention also challenges "the adequacy of the pump test data collected and used to develop the hydrogeologic model of the site" and thus is litigable as within the scope of admitted Contention 2. See CBR Response at 14. We agree that this contention raises issues that fall within the scope of Contention 2 because it asserts that "an acceptable conceptual model of site hydrology" adequately supported by the data presented in the site characterization has not been developed. LBP-18-2, 87 NRC at 37. While Contention F is rejected for the above reasons, to the degree OST chooses to do so, OST as part of its case regarding Contention 2 may present evidence regarding the purported failure to employ an acceptable conceptual model.

7. OST Contention G: The Final EA Fails to Provide an Adequate Baseline Groundwater Characterization or Demonstrate that Gro[und] Water and Surface Water Samples Were Collected in a Scientifically Defensible Manner Using Proper Sample Methodologies

DISCUSSION: OST New Contentions at 29–31; Staff Response at 33–35; CBR Response at 14–15; OST Reply at 8.

RULING: Inadmissible, in that this contention is not based on materially different, previously unavailable information, lacks factual or expert opinion support, and does not provide sufficient information to show a genuine dispute exists with the final EA on a material issue. See 10 C.F.R. § 2.309(c)(1)(i)–(ii), (f)(1)(v)–(vi).

The agency's regulations implementing NEPA require an environmental review to contain a description of the affected environment, 10 C.F.R. § 51.45(b), 51.71(a), 51.90, including a baseline characterization of groundwater and surface water that may be impacted, see id. Part 40, app. A, criterion 7. The baseline characterization is intended to show what the potentially affected environment looked like before any action is taken as an aid in determining what impacts the project will have. OST argues that the final EA fails to provide an adequate

baseline characterization for the MEA or show that the background information was collected in a scientifically defensible manner. See OST New Contentions at 29. In essence, OST contends that because the baseline data was poorly gathered, the modeling and analysis included in the final EA that relied upon that information does not create an adequate baseline. See id. at 30–31.[26] The staff and CBR argue that this contention is untimely because the groundwater characterization was provided in the ER and/or included in the draft EA. See Staff Response at 34; CBR Response at 15. CBR also challenges this contention because OST provides no support for its conclusions, and because Contention G fails to raise a genuine dispute on a material issue in that OST "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." CBR Response at 15.

We find that OST does not have good cause to raise this contention now because the challenge it seeks to frame could have been proffered as contesting the groundwater characterization in the applicant's ER. As CBR notes, see id., ER section 6.1.2 is titled "Baseline Groundwater Monitoring," ER at 6-4 to -9, and the draft EA contained several sections discussing groundwater resources, water use, and groundwater monitoring, see Draft EA at 3-39 to -52, 6-1 to -3. Because the background information on groundwater in the impacted area was available prior to the publication of the final EA, the contention is not based on previously unavailable information. Additionally, the relevant sections in the final EA are not materially different than those in the draft EA, and thus this contention cannot be based on previously unavailable information that is materially different, as is required to show good cause.

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[26] OST also alleges that the staff has failed to explain how the MEA site will be able to operate "now that the [CPF] is being decommissioned." OST New Contentions at 30. This aspect of the contention is not admissible because it lacks a factual basis under section 2.309(f)(1)(v). As noted above, see supra sections II.D.1 and II.D.2, the April 3 LAR does not state that the CPF will be decommissioned, but instead indicates that it will remain in standby mode to be used later if CBR desires. Therefore, the staff does not need to explain the decommissioning of the CPF in the final EA.

Compare Draft EA at 3-39 to -52, with Final EA at 3-23 to -36, and Draft EA at 6-1 to -3, with Final EA at 6-1 to -3.

OST also fails to provide support for its contention. It is true that an accurate groundwater characterization is necessary to ensure that the project's impacts are adequately analyzed. OST, however, supplies no support for its assertions that the background data here was inadequately collected, that the results cannot be replicated, that the technology used was not of proper "quality and calibration," or for any of its other vague statements regarding the baseline characterization. See OST New Contentions at 30–31. While OST says the final EA is inadequate based on its "evidence," id. at 31, the Board can find no citation to any specific fact or expert opinion that supports its contention. OST also does not challenge any specific portion of the final EA, any data set, any modeling or methodology, any technology used, or any conclusion in the final EA that OST has deemed inadequate. To proffer an admissible contention, OST needed to show that a genuine dispute exists with the final EA on a material issue. Thus, in addition to lacking good cause for its admission, Contention G lacks factual or expert support and does not raise a genuine dispute on a material issue, and so must be rejected. 10 C.F.R. § 2.309(f)(1)(v)–(vi).

8. OST 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

DISCUSSION: OST New Contentions at 31–36; Staff Response at 23–26; CBR Response at 15–17; OST Reply at 8–9.

RULING: Inadmissible, in that this contention lacks factual or expert opinion support and does not provide sufficient information to show a genuine dispute exists with the final EA on a material issue. See 10 C.F.R. § 2.309(f)(1)(v)–(vi).

With this issue statement, OST claims that the staff has not adequately analyzed the groundwater quantity and quality impacts associated with the extended restoration that will result from the April 2 cessation letter and the April 3 LAR. Further, according to OST, those

impacts will be greater than stated because CBR, in decommissioning the renewal site, will not achieve restoration goals and will have to request ACLs. See OST New Contentions at 32 (referencing the April 3 LAR and April 2 cessation letter as acknowledging CBR's intent to seek ACLs in the future). Rather than questioning the use of ACLs in general, with this contention OST is challenging the staff's failure to account for ACLs in its impact analysis, asserting that if the ACLs are granted and decommissioning occurs, more water will be consumed and the project will have a larger impact. See id. at 32–33.

Without regard to the question of timeliness, see supra note 16, to the extent this contention seeks to rely on the April 3 LAR and the April 2 cessation letter to establish its concerns about extended restoration, it suffers from the same deficiencies as Contention B already discussed above. Thus, as was the case with Contention B, this contention lacks factual support and does not raise a genuine dispute on a material issue as required by section 2.309(f)(1)(v)–(vi). See supra section II.D.2.

9. OST Contention I: The Final EA Fails to Adequately Analyze Cumulative Impacts that Include Decommissioning of [the CPF] and Existing Mining Units

DISCUSSION: OST New Contentions at 36–38; Staff Response at 26–27; CBR Response at 18; OST Reply at 9.

RULING: Inadmissible, in that this contention is not based on materially different, previously unavailable information and does not provide sufficient information to show a genuine dispute exists with the final EA on a material issue. See 10 C.F.R. § 2.309(c)(1)(i)–(ii), (f)(1)(vi).

In its final new contention, which OST clearly recognizes is a contention of omission, see OST Reply at 9, OST maintains that the final EA violates NEPA and its implementing regulations because the final EA fails to provide a cumulative impact analysis that accounts for the decommissioning of the CPF or the rest of the renewal site. See OST New Contentions at 37. According to OST, the staff was required to include the "decommissioning of the Crow Butte mine and the simultaneous restoration of all ten (10) [MUs]" because these are

"reasonably foreseeable" future sites that could be developed for mining. Id. at 38 (referring to the requirement in 40 C.F.R. § 1508.7 that cumulative impacts include those from "other past, present, and reasonably foreseeable future actions").

This contention fails to raise a genuine dispute with the final EA regarding a material issue because the purportedly missing information exists in the final EA. Initially, however, we note that neither the April 3 LAR nor the April 2 cessation letter provides there will be ten mines in restoration at the same time. As we have observed previously, see supra sections II.D.1 and II.D.2, because OST has mischaracterized the content of these letters, there is no genuine dispute in this regard. Moreover, the cumulative impact analysis discusses a groundwater model "to evaluate potential cumulative impacts caused by the consumptive use of groundwater at the MEA, [Three Crows Expansion Area], and existing Crow Butte license Area," and specifically discussed the interplay between restoration at the renewal site and the impacts from the MEA. Final EA at 5-6. Because this is a contention of omission and the omission does not exist, there is no genuine dispute to support admission of this contention. 10 C.F.R. § 2.309(f)(1)(vi).

This contention also is not based on materially different, previously unavailable information. As discussed above, there is no omission in the final EA as OST claims. The information and analysis relating to the cumulative impacts of the various mining projects by CBR, including consumptive use from restoration in the final EA, was included in the draft EA as well, and is not materially different. Compare Draft EA at 5-5 to -6, with Final EA at 5-6. Thus, this contention cannot be admitted because it lacks good cause.

E. Admissibility of OST's "Renewed" Contentions

Although none previously were before this Board, see supra note 2 and accompanying text, in submitting these five "renewed" contentions, OST observed that they "are being re-submitted in order to perfect them for appeal and/or resolution at the international level." OST New Contentions at 1.

1. OST Contention J: Failure to Discuss or Demonstrate Lawful Federal Jurisdiction and Authority over Crow Butte's Activities

DISCUSSION: OST New Contentions at 38–53; Staff Response at 35–36; CBR Response at 19–20; OST Reply at 10–11.

RULING: Inadmissible, in that this contention is not based on previously unavailable information and is outside the scope of this proceeding. See 10 C.F.R. § 2.309(c)(1)(i), (f)(1)(iii).

In this contention, OST claims that the final EA fails to discuss or demonstrate that the NRC, through the United States, has jurisdiction over the land upon which CBR seeks authorization to operate its ISR facility.[27] See OST New Contentions at 39. The staff and CBR maintain that this contention is untimely because it is not based on new information, and is beyond the scope of the proceeding as the Supreme Court has already provided binding precedent on this question. See Staff Response at 35–36; CBR Response at 19.

Contention J fails to meet the required good cause standard for filing post-initial hearing petition contentions. Such new contentions "must be based on new facts not previously available," even when the proponent is challenging a new licensing document. Entergy Nuclear Generation Co. (Pilgrim Nuclear Power Station), CLI-12-10, 75 NRC 479, 493 n.70 (2012). The facts upon which OST relies to show that the NRC lacks jurisdiction over the MEA are not new at all, but instead have been known by OST since the outset of the proceeding. Indeed, OST filed this same contention in the Renewal Site proceeding in 2015, based on the same information. See [OST] Renewed and New Contentions Based on the Final [EA] (October 2014), Crow Butte Res., Inc. (License Renewal for the In Situ Leach Facility, Crawford, Neb.),

[27] While this is the first time OST has raised this jurisdictional challenge in this proceeding, OST did proffer this issue as "EA Contention F" in the Renewal Site proceeding. See Crow Butte Res., Inc. (License Renewal for the In Situ Leach Facility, Crawford, Neb.), LBP-15-11, 81 NRC 401, 410 (2015).

No. 40-8943 (Jan. 5, 2015) at 4–14 [hereinafter OST Renewal Site Petition]. Given that the information relied upon to support Contention J was previously available to OST, this contention must be rejected as lacking good cause.[28] 10 C.F.R. § 2.309(c)(1)(i).

Contention J is also inadmissible because it is outside the scope of this proceeding. To admit this contention, the Board would necessarily have to question Supreme Court binding precedent determining that the United States is not bound by the Fort Laramie Treaty of 1868[29] and/or the Court's authority to make such a determination. Like the Renewal Site board, we find that the Supreme Court's holding in United States v. Sioux Nation of Indians, 448 U.S. 371 (1980), is controlling and requires us to reject this contention based on treaty rights. See Crow Butte Res., Inc. (In Situ Leach Facility, Crawford, Neb.), LBP-08-24, 68 NRC 691, 711–12 (2008), aff'd, CLI-09-9, 69 NRC 331, 337 (2009); see also Crawford, LBP-15-11, 81 NRC at 411. While OST may have the freedom to question the Court's determination or authority, see OST Reply at 10–11, we do not. The issue of the NRC's jurisdiction over the MEA is therefore beyond the scope of this proceeding. 10 C.F.R. § 2.309(f)(1)(iii).

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[28] In its reply, OST asserts that because this issue statement raises a "jurisdictional" question, it cannot be untimely. See OST Reply at 10. Putting aside the fact that (1) a licensing board is not necessarily governed by the constitutional Article III constraints that are the basis for OST's "jurisdictional" claim, see Edlow Int'l Co. (Agent for the Gov't of India on Application to Exp. Special Nuclear Material), CLI-76-6, 3 NRC 563, 569–70 (1976); and (2) there is nothing in section 2.309(c)(1)'s good cause provisions (or elsewhere in the agency's rules) to suggest that timeliness concerns are waived for "jurisdictional" issues, this OST concern fails to account for the fact that in determining that issue we would not be writing upon a clean slate. Given the previous instances in which this issue has been raised in agency adjudications that preceded the start of this proceeding by several years, and the resulting outcome in those proceedings as described above in the context of whether this contention is within the scope of the proceeding, we do not perceive that our ruling does any damage to that precept.

[29] Treaty with the Sioux — Brulé, Oglala, Minicanjoe, Yanktonei, Hunkpapa, Blackfeet, Cuthead, Two Kettle, Sans Ares, and Santee — and Arapaho, Apr. 29, 1868, 15 Stat. 635.

2. OST Contention K: Failure to Obtain the Consent of the Oglala Sioux Tribe as Required by Treaty and International Law

DISCUSSION: OST New Contentions at 53–56; Staff Response at 36–37; CBR Response at 20–22; OST Reply at 11–14.

RULING: Inadmissible, in that this contention is not based on previously unavailable information, is outside the scope of this proceeding; and does not provide sufficient information to show a genuine dispute exists with the final EA on a material issue. See 10 C.F.R. § 2.309(c)(1)(i), (f)(1)(iii), (vi).

In support of this contention,[30] OST asserts that the Fort Laramie Treaty of 1868 and Article 19 of the 2007 United Nations Declaration on the Rights of Indigenous Peoples (UN DRIP) require the NRC to seek or acquire the "free, prior, and informed consent" of OST before authorizing any action at the MEA. OST New Contentions at 53–54 (quoting G.A. Res. 61/295, art. 19, United Nations Declaration on the Rights of Indigenous Peoples (Sept. 13, 2007)). According to OST, because the final EA does not show that OST has been adequately informed and provided its consent, and does not provide any justification for the NRC's failure to obtain such consent, the final EA is inadequate. See id. at 56. In their responses, both the staff and CBR maintain that this contention is untimely because it could have been raised at the outset of the proceeding. See Staff Response at 37; CBR Response at 22. The staff also declares that, besides relying on what OST acknowledges is nonbinding international law, like Contention J this contention is outside the scope of the proceeding because this treaty-based claim, while focusing on consent, is still precluded by Supreme Court precedent. See Staff Response at 36–37. Additionally, CBR argues the contention does not show a genuine dispute with the final EA because OST fails to show that any of its legal authority applies to this

[30] Again, this contention was not raised earlier in this proceeding. OST did raise the issue of free, prior, and informed consent in 2015 in the Renewal Site proceeding, in both EA Contention F and EA Contention 1. See OST Renewal Site Petition at 10–11, 16–17.

proceeding so as to require this discussion be included in the final EA. See CBR Response at 20–21.

Like Contention J, OST has not shown good cause to admit Contention K because the information on which OST relies has been available to it since the outset of the proceeding. Our rules of practice require new contentions be based upon information that was not previously available. OST was then aware of the lack of the asserted free, prior, and informed consent, and the international treaties it cites, as well as the contents of the Fort Laramie Treaty. Additionally, as with Contention J, OST filed contentions with similar factual bases and so had actual knowledge of the information it needed to file this contention much earlier. See supra note 30. Therefore, this contention must be rejected as lacking good cause. See 10 C.F.R. § 2.309(c)(1)(i).

And for the same reason as Contention J, Contention K is outside the scope of this proceeding. See 10 C.F.R. § 2.309(f)(1)(iii). Claims that consultation was inadequate or consent was not given, which are based on rights provided in the Fort Laramie Treaty, cannot be the basis for an admissible contention. Such a contention would require the Board to question the Supreme Court's Sioux Nation of Indians decision that the treaty is no longer in effect, which the Board is in no position to do. See supra section II.E.1.

This contention also does not raise a genuine dispute regarding a material issue relative to the final EA. See 10 C.F.R. § 2.309(f)(1)(vi). OST relies primarily on two sources — the Fort Laramie Treaty and the UN DRIP — as legal authority that would require the staff to provide a discussion of free, prior, informed consent in the final EA. Neither the Fort Laramie Treaty nor the UN DRIP imposes any legal obligation on the NRC, however. Because the treaty is no longer in effect, any duty levied by it cannot serve as a legal basis for requiring the staff to include further discussion in the final EA. And, as OST recognizes, see OST New Contentions at 55, for its part the UN DRIP is a non-binding declaration that imposes no legal obligations on the NRC either. Moreover, while OST references various other international agreements,

organs, and case law, all of these create no legal requirements for the staff in composing the final EA, and thus cannot serve to create a genuine dispute on a material issue relative to the final EA.

3. OST Contention L: Failure to Meet Applicable Legal Requirements Regarding Protection of Historical, Cultural, and Spiritual Resources

DISCUSSION: OST New Contentions at 56–65; Staff Response at 37–38; CBR Response at 22–26; OST Reply at 14–15.

RULING: Inadmissible, in that this contention is untimely and lacks factual or expert opinion support. See 10 C.F.R. § 2.309(c)(1)(iii), (f)(1)(v).

Although similar to Contention D in that it relies on recent developments in the Dewey-Burdock proceeding as supporting its admittance, this cultural resources contention posits additional items as bases for admission, in particular a 2013 opinion letter from archaeologist Dr. Louis Redmond challenging the adequacy of the survey methodology utilized by the staff in its draft and final MEA EA cultural resource analysis and the ruling on a cultural resources contention by the Renewal Site board. See OST New Contentions at 58–64 (citing ex. D (Letter from Louis A. Redmond, Ph.D., President/Owner, Red Feather Archeology, to David C. Frankel, Esq. (Jan. 28, 2013) [hereinafter Redmond Letter]), and Crawford, LBP-16-7, 83 NRC at 389, 390, 399–400, 402).

As we noted above in the discussion regarding Contention D, see supra section II.D.4, recent events have deprived the Dewey-Burdock developments relied upon by OST of any efficacy as a factual basis for this contention. And for the contention's survey adequacy and Renewal Site board ruling aspects, timeliness is a problem.[31] Both the Redmond letter and the

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[31] To whatever degree it might be argued that the March 2018 developments in the Dewey-Burdock case provided the impetus for a contention for which the Redmond letter and the Renewal Site board ruling simply provide addition support, the fact that the Dewey-Burdock situation now fails to support the contention does not provide a basis for ignoring the timeliness issues that attach to this supporting information as a basis for the contention.

Renewal Site board ruling matters substantially predate the mid-December 2017 issuance of the staff's draft EA. Because that draft incorporated the staff's previously-issued cultural resources analysis that was, in turn, substantially unchanged in the final EA, compare Draft EA Cultural Resources Sections at 1–24, with Draft EA at 3-65 to -75, 4-36 to -38, 5-8 to -11, and Final EA at 3-50 to -61, 4-39 to -41, 5-8 to -11, the timely submission of any contention with the survey adequacy and Renewal Site board matters as a supporting basis needed to be submitted by mid-January 2018.[32]

This contention thus is not admissible because it lacks both good cause and factual support. See 10 C.F.R. § 2.309(c)(1)(iii), (f)(1)(v).

4. OST Contention M: 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

DISCUSSION: OST New Contentions at 65–79; Staff Response at 37–38; CBR Response at 22–26; OST Reply at 14–15.

RULING: Inadmissible, in that this contention is untimely. See 10 C.F.R. § 2.309(c)(1)(iii).

This cultural resources contention focuses on the alleged failure of the staff to undertake properly the consultation process with OST and other tribes as part of the process for preparing the cultural resources analysis for the draft and final EA. As the basis for this contention, OST again references Dr. Redmond's 2013 opinion letter and the cultural resources ruling of the Renewal Site board as well as the 2016 Commission ruling affirming the cultural resources decision of the Dewey-Burdock licensing board, both of which considerably preceded the recent

[32] Moreover, as OST indicates in its new contentions pleading, the survey concerns were submitted to the staff as part of OST's late January 2018 comments on the draft EA, thereby reflecting OST's awareness of this alleged deficiency as a potential basis for a contention. See OST New Contentions at 57. But as we noted in section II.C above, submitting public comments regarding the staff's draft EA does not toll the deadline for timely submitting new or amended contentions regarding that document in this proceeding.

developments in the Dewey-Burdock proceeding that were the focus of Contentions D and L. See OST New Contentions at 69–71, 74–79 (citing Redmond Letter; Crawford, LBP-16-7, 83 NRC at 389, 390, 399–400, 402, 404; Powertech (USA), Inc. (Dewey-Burdock In Situ Uranium Recovery Facility), CLI-16-20, 84 NRC 219, 249 (2016)).

As was the case with Contention L, see supra section II.E.3, the matters cited as support for this contention substantially predate the mid-December 2017 issuance of the staff's draft EA, which included a cultural resources discussion. As we noted there, this required, at a minimum, the mid-January 2018 submission of any contention referencing those items as bases for the contention. Consequently, lacking the requisite good cause required by section 2.309(c)(1), this contention is inadmissible as well.

5. OST Contention N: Failure to Take the Requisite "Hard Look" at Environmental Justice Impacts

DISCUSSION: OST New Contentions at 79–84; Staff Response at 38–39; CBR Response at 26–29; OST Reply at 15–16.

RULING: Inadmissible, in that this contention is not based on materially different, previously unavailable information, lacks factual or expert opinion support, and does not provide sufficient information to show a genuine dispute exists with the final EA on a material issue. See 10 C.F.R. § 2.309(c)(1)(i)–(ii), (f)(1)(v)–(vi).

In its last contention,[33] OST alleges that the final EA failed to take a "hard look" at "whether relicensing the Crow Butte facility would cause disproportionate and adverse impacts on minority and low-income populations within a 50-mile environmental impact area around the facility." OST New Contentions at 79. The contention claims that the use of the smaller 15-mile impact area in the final EA excluded the area where the Oglala Lakota people are located,

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[33] Like the other "renewed" contentions, Contention N was not one of the original six contentions proffered by OST in this proceeding. See supra note 2 and accompanying text. A similar contention, however, was submitted by OST as EA Contention 3 in the Renewal Site proceeding. See Crawford, LBP-15-11, 81 NRC at 415–17.

which impermissibly allowed the staff to forego a more detailed environmental justice analysis than should have been provided in the final EA. See id. at 82, 84. Both the staff and CBR argue that this contention is untimely in that it could have been raised earlier. See Staff Response at 38–39; CBR Response at 28–29. Additionally, CBR contends that the final EA appropriately followed all legal requirements pertaining to an environmental justice review and that OST has provided neither an evidentiary basis for its contention, nor demonstrated a genuine dispute with the final EA. See CBR Response at 27–28.

This contention is not based on materially different, previously unavailable information.[34] The information and conclusions in the final EA concerning the environmental justice impacts of the license amendment are nearly identical to what was included in the draft EA. Compare Draft EA at 3-78 to -79, 4-40 to -43, with Final EA at 3-63 to -64, 4-43 to -45. The draft and final EAs also contained the same discussion of the impacts that the Pine Ridge Indian Reservation would face if the license amendment was granted. See Draft EA at 4-42; Final EA at 4-45. The information challenged in the final EA relating to environmental justice was previously available to OST, which OST apparently acknowledges given that its contention notes that OST "included these deficiencies in its comments to the NRC Staff on the Draft EA." OST New Contentions at 84. The challenged portions of the final EA are thus not materially different than previously available information. Accordingly, this contention lacks good cause and must be denied. See 10 C.F.R. § 2.309(c)(1)(i)–(ii).

But even if there were good cause demonstrated for admitting this contention, OST has not met at least two of the contention admissibility standards. First, OST has not provided factual support for its contention. OST alleges that "a full examination of all of the impacted

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[34] Although the Renewal Site board admitted a contention substantially similar to this one following the issuance of the final EA in that proceeding, see id. at 417, in that instance there was no established schedule for filing new or amended contentions relative to a draft EA, see id. at 405.

[environmental justice] communities and institutions within the 50-mile radius of [the] CBR facility" is required. OST New Contentions at 82. NRC guidance, however, suggests that in a rural area an environmental justice analysis for a materials facility should encompass a four-mile radius, and that "a 50 mile radius is not automatically required." Division of Waste Management, NMSS, Environmental Review Guidance for Licensing Actions Associated with NMSS Programs, NUREG-1748, at C-4 & n.3 (Aug. 2003) [hereinafter NUREG-1748] (ADAMS Accession No. ML032450279). While this guidance is not definitive on this question, OST provides no information that would explain why the staff is required under NEPA to use a larger impact area.

By the same token, OST does not provide factual support to show that a larger impact area was warranted because of the disproportionate impacts that would befall OST members. While disproportionate religious and cultural impacts can provide the basis for an environmental justice-based contention, see NUREG-1748, at 5-22, 6-25, C-6; see also N. States Power Co. (Prairie Island Nuclear Generating Plant Indep. Spent Fuel Storage Installation), LBP-12-24, 76 NRC 503, 522 (2012), the proponent must make more than "generalized statements of concern . . . regarding these religious and cultural impacts," Crawford, LBP-08-24, 68 NRC at 734; see also Nuclear Mgmt. Co., LLC (Palisades Nuclear Plant), LBP-06-10, 63 NRC 314, 367 (2006). While OST observed that the final EA indicates there may be impacts to cultural resources, see OST New Contentions at 82, the final EA also explains that the staff's review "did not identify any specific examples of cultural or other resources . . . unique to [OST]," Final EA at A-40 (emphasis omitted). The burden thus is on OST to provide factual support for its claim that the final EA's discussion is inadequate and the staff needs to consider environmental justice impacts in greater detail by showing that the project would have

disproportionately high impacts on its historic, cultural, and spiritual interests. OST does not provide any such support.[35]

Finally, OST does not raise a genuine dispute on a material issue relative to the final EA. Although OST alleges that "there is no mention of the Tribe and its people" in section 3.7.4, OST New Contentions at 83, the environmental justice impact section contained in section 4.7.2 contains a discussion specifically about the population of the Pine Ridge Indian Reservation, see Final EA at 4-45.

For these reasons, i.e., lack of good cause under 10 C.F.R. § 2.309(c)(1), failing to provide adequate factual support as required by 10 C.F.R. § 2.309(f)(1)(v), and failing to raise a genuine dispute on a material issue pursuant to 10 C.F.R. § 2.309(f)(1)(vi), OST's Contention N regarding environmental justice impacts is rejected.

III. DEFINING THE SCOPE OF OST CONTENTION 2 AS MIGRATED

In section II.A above, we noted that OST's declaration that its admitted Contention 2 be considered a challenge to the staff's final EA was not opposed. Consequently, below we set forth the language of that contention, as well as the four alleged hydrogeological deficiencies that have been identified as being within the scope of that contention. As we also have observed previously, see LBP-18-2, 87 NRC at 36, the Commission has acknowledged that, in the appropriate circumstances, a board may define the scope of a contention in light of the foundational support that leads to its admission. See Crow Butte Res., Inc. (North Trend Expansion Project), CLI-09-12, 69 NRC 535, 553 (2009); see also Ross, LBP-13-10, 78 NRC

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[35] For example, in the Prairie Island proceeding, the intervening tribe supported its environmental justice contention by describing, in detail, the "destruction and desecration of sacred burial mounds and other culturally and historically significant sites" in relation to the licensed activity at issue. Prairie Island Indian Community's Request for Hearing and Petition to Intervene in License Renewal Proceedings for the Prairie Island Independent Spent Fuel Storage Installation, N. States Power Co. (Prairie Island Nuclear Generating Plant Indep. Spent Fuel Storage), No. 72-10-ISFSI-2 (Aug. 24, 2012) at 45 (emphasis omitted).

at 138. Given the complexity and technical nature of both the environmental and safety aspects of this contention, we continue to consider it important, in appropriate instances, to outline the scope of Contention 2 with as much specificity as possible.

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

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

> The application and final environmental assessment fail to provide sufficient information regarding the geological setting of the area to meet the requirements of 10 C.F.R. Part 40, Appendix A, Criteria 4(e) and G(2); the National Environmental Policy Act; and NUREG-1569 section 2.6. The application and final environmental assessment similarly fail to provide sufficient information to establish potential effects of the project on the adjacent surface and ground-water resources, as required by NUREG-1569 section 2.7, and the National Environmental Policy Act.

More specifically, the scope of the safety and environmental concerns encompassed by this contention include the following: (1) the adequacy of the descriptions of the affected environment for establishing the potential effects of the proposed MEA operation on the adjacent surface water and groundwater resources; (2) exclusively as a safety concern, the absence in the applicant's technical report, in accord with NUREG-1569 section 2.7, of a description of the effective porosity, hydraulic porosity, hydraulic conductivity, and hydraulic gradient of site hydrogeology, along with other information relative to the control and prevention of excursions such as transmissivity and storativity; (3) the failure to develop, in accord with NUREG-1569 section 2.7, an acceptable conceptual model of site hydrology that is adequately supported by site characterization data so as to demonstrate with scientific confidence that the area hydrogeology, including horizontal and vertical hydraulic conductivity, will result in the confinement of extraction fluids and expected operational and restoration performance; and (4) whether the final EA contains unsubstantiated assumptions as to the isolation of the aquifers in the ore-bearing zones.

IV. CONCLUSION

For the reasons set forth above, we find that OST's admitted Contention 2 should migrate from being a challenge to the NRC staff's draft EA to contesting the staff's final EA. Additionally, we conclude that none of the fourteen new or renewed contentions proffered by OST as challenges to the staff's final EA is admissible because they fail to fulfill the 10 C.F.R. § 2.309(c)(1) good cause standard for admitting a new or amended contention filed after the date for submitting an initial intervention petition and/or one or more of the section 2.309(f)(1) requirements governing contention admissibility.

For the foregoing reasons, it is the twentieth day of July 2018, ORDERED, that (1) Intervenor Oglala Sioux Tribe's admitted Contention 2 migrates to become a challenge to the

NRC staff's final EA, as specified in section III above; and (2) OST's request to admit the fourteen new or renewed contentions set forth in its May 30, 2018 submission is denied.

THE ATOMIC SAFETY
AND LICENSING BOARD

/RA/

G. Paul Bollwerk, III, Chairman
ADMINISTRATIVE JUDGE

/RA/

Dr. Richard E. Wardwell
ADMINISTRATIVE JUDGE

/RA/

Dr. Thomas J. Hirons
ADMINISTRATIVE JUDGE

Rockville, Maryland

July 20, 2018

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **MEMORANDUM AND ORDER (Denying Admission of New and Renewed Contentions)** have been served upon the following persons by Electronic Information Exchange.

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

Dated at Rockville, Maryland
this 20th day of July, 2018