

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

NRC STAFF'S ANSWER OPPOSING THE OGLALA SIOUX TRIBE'S PETITION FOR REVIEW
OF LBP-19-2, LBP-18-3, AND MEMORANDUM AND ORDER DISMISSING CONTENTION 1

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INTRODUCTION

The NRC Staff hereby responds to the Oglala Sioux Tribe's (OST) petition for review¹ of several Atomic Safety and Licensing Board decisions in this proceeding, which involves a license amendment to construct and operate the Marsland Expansion Area (MEA), a satellite *in situ* uranium recovery (ISR) facility to be located near the existing Crow Butte Resources, Inc. (CBR) ISR facility in Dawes County, Nebraska. The OST seeks review of the Board's Initial Decision, LBP-19-2, which found in favor of the Staff and CBR on Contention 2; the Board's interlocutory decision, LBP-18-3, which denied admission of 14 new contentions on the final Environmental Assessment (EA); and the Board's unpublished interlocutory decision granting the Staff's motion for summary disposition of Contention 1.² For the reasons discussed below, the Commission should deny review of the OST Petition because it fails to identify any legal or

¹ Oglala Sioux Tribe Petition for Review (March 25, 2019) (OST Petition).

² *Crow Butte Resources* (Marsland Expansion Area), LBP-19-2, 89 NRC ____ (Feb. 28, 2019) (slip op.); *Marsland*, LBP-18-3, 88 NRC 13 (2018); Memorandum and Order (Ruling on Motion for Summary Disposition Regarding Oglala Sioux Tribe Contention 1) (Oct. 22, 2014) (unpublished) (ADAMS Accession No. ML14295A237) (SD Decision).

factual error in the Board's rulings, and therefore fails to identify a substantial question for review as required by 10 C.F.R. § 2.341(b)(4).

BACKGROUND

In 2012, CBR requested an amendment to its existing operating license, SUA-1534, to construct and operate a satellite ISR facility at the MEA.³ The MEA site is located approximately 11 miles south-southeast of CBR's existing ISR facility in Crawford, Nebraska.⁴ The Staff published a notice in the *Federal Register* offering the opportunity to request a hearing on the MEA license amendment application.⁵ Thereafter, the OST timely filed a petition to intervene, and the Board granted the OST's hearing request and admitted two contentions: Contention 1, which challenged the application's description of the affected environment and assessment of impacts of the project on archaeological, historical, and traditional cultural resources; and Contention 2, which challenged the sufficiency of information regarding the geological setting of the area and the information needed to establish potential effects of the project on adjacent surface water and groundwater resources.⁶

On June 30, 2014, the Staff published the sections of its draft EA pertaining to cultural resources, along with supporting information, on the NRC website.⁷ On August 6, 2014, after the deadline for filing new or amended contentions on the cultural resources sections of the EA

³ Letter from Josh Leftwich to Keith McConnell re: License No. SUA-1534, Docket Number 40-8943, Marsland Expansion Area License Amendment Application (May 16, 2012) (Agencywide Documents Access and Management System (ADAMS) Accession No. ML12160A512).

⁴ Application for Amendment of USNRC Source Materials License SUA-1534, Marsland Expansion Area, Crawford, Nebraska, Technical Report, § 1.3, at 1-2 (May 2012) (ADAMS Accession No. ML12160A527).

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

⁶ *Marsland*, LBP-13-6, 77 NRC 253, 306 (2013). On appeal, the Commission upheld the Board's decision admitting Contentions 1 and 2. *Marsland*, CLI-14-2, 79 NRC 11, 26 (2014).

⁷ Letter from Marcia J. Simon to the Atomic Safety and Licensing Board (June 30, 2014) (ADAMS Accession No. ML14181B280).

had passed,⁸ the Staff filed a motion for summary disposition of Contention 1.⁹ The Board granted the Staff's motion.¹⁰

On December 15, 2017, the NRC issued the complete draft EA and a draft Finding of No Significant Impact (FONSI) for the MEA application for public review and comment.¹¹ The OST did not file a motion to admit new or amended contentions on the draft EA.¹² On April 30, 2018, the Staff issued the final EA,¹³ and on May 30, 2018, the OST filed 14 new contentions challenging the final EA.¹⁴ The Board denied admission of the OST's new contentions in LBP-18-3.¹⁵

The evidentiary hearing on Contention 2 was held from October 30 through November 1, 2018.¹⁶ Thereafter, the Board issued an Initial Decision (LBP-19-2), ruling in favor of the Staff

⁸ According to the Board's scheduling order in effect at the time, new or amended contentions on cultural resources were due by July 30, 2014. Memorandum and Order (Revised General Schedule) at 2 (Apr. 30, 2014) (unpublished).

⁹ NRC Staff's Motion for Summary Disposition of Contention 1 (Aug. 6, 2014). CBR filed a response in support of the Staff's motion. Crow Butte Response in Support of NRC Staff Motion for Summary Disposition of Contention 1 (Aug. 18, 2014). The OST did not file a response to the Staff's motion.

¹⁰ SD Decision at 1.

¹¹ See Letter from Marcia J. Simon to the Atomic Safety and Licensing Board (Dec. 11, 2017) (ADAMS Accession No. ML17345A881) (notifying Board and parties of availability of the draft EA in ADAMS); Draft Environmental Assessment and Draft Finding of No Significant Impact; Notice of Availability and Request for Comments, 82 Fed. Reg. 59,665 (Dec. 15, 2017) (providing notice of issuance of draft FONSI and availability of draft EA).

¹² The deadline for filing a motion for new or amended contentions on the draft EA was January 16, 2018. Memorandum and Order (Revised General Schedule), Appendix A (Apr. 20, 2017) (unpublished) (April 2017 Order).

¹³ See Letter from Marcia J. Simon, Counsel for the NRC Staff, to the Atomic Safety and Licensing Board (April 30, 2018) (ADAMS Accession No. ML18120A238) (notifying Board and parties of availability of the final EA in ADAMS); Environmental Assessment and Finding of No Significant Impact; Issuance, 83 Fed. Reg. 19,576 (May 3, 2018) (providing notice of issuance of FONSI and availability of final EA).

¹⁴ The Oglala Sioux Tribe's Migrated, Renewed, and New Marsland Expansion Final Environmental Assessment Contentions (May 30, 2018) (OST New Contentions).

¹⁵ LBP-18-3, 88 NRC at 53.

¹⁶ Tr. at 300-1039.

and CBR on Contention 2.¹⁷ The OST has now sought review of LBP-19-2, LBP-18-3, and the SD Decision.

DISCUSSION

The OST generally claims that the Board abused its discretion in LBP-19-2 and in two interlocutory decisions (LBP-18-3 and the SD Decision). The OST asserts that in LBP-19-2 the Board “made errors of law and clearly erroneous findings of fact” such as shifting the burden of proof, mischaracterizing testimony, and assuming evidence not in the record.¹⁸ The OST also claims that in LBP-18-3 the Board erroneously declined to admit several contentions seeking to challenge the Staff’s final EA.¹⁹ Finally, the OST claims that the SD Decision failed to safeguard its interest in identifying and protecting cultural resources.²⁰

As explained in detail below, the OST Petition should be denied. The OST has not identified any substantial questions of law in these three decisions that warrant Commission review, and the OST’s assertions of erroneous factual findings in LBP-19-2 fall far short of demonstrating “clear error” sufficient to disturb the Board’s findings.²¹

¹⁷ LBP-19-2 (slip op. at 273).

¹⁸ OST Petition at 1, 5-9. As discussed in Section II.D *infra*, the OST also asserts that the Board improperly upheld the Staff’s issuance of the MEA license amendment prior to the evidentiary hearing and final agency determination. *Id.* at 9-10.

¹⁹ *Id.* at 10-16.

²⁰ *Id.* at 16-18.

²¹ In addition, the OST challenges to the factual findings in LBP-19-2 focus on a handful of narrow issues from the Board’s thorough and carefully reasoned decision. These findings represent only a few of many pieces of evidence that the Board weighed in reaching its decision on Contention 2. The OST has not challenged the vast majority of the Board’s factual findings, or the Board’s ultimate conclusions, regarding Contention 2. As a result, even if the OST’s assertions of error had merit, the OST has not shown that they would result in a different outcome on Contention 2.

I. Legal Standards for Commission Review

In deciding whether to grant a petition for review of a licensing board's initial decision, the Commission will consider whether the petitioner has raised a substantial question with respect to one or more of the following:

- (i) A finding of material fact is clearly erroneous or in conflict with a finding as to the same fact in a different proceeding;
- (ii) A necessary legal conclusion is without governing precedent or is a departure from or contrary to established law;
- (iii) A substantial and important question of law, policy, or discretion has been raised;
- (iv) The conduct of the proceeding involved a prejudicial procedural error; or
- (v) Any other consideration which the Commission may deem to be in the public interest.²²

In addition, the Commission will not grant a petition for review "to the extent that it relies on matters that could have been but were not raised before the presiding officer."²³

The Commission accords substantial deference to the Board's rulings on the merits of admitted contentions. Where the Board's decision rests on carefully made factual findings, the Commission typically will not disturb the decision.²⁴ The Commission defers to the Board's factual findings unless they are "clearly erroneous."²⁵ The clearly erroneous standard is by design "a difficult one to meet," requiring a showing that the Board's determination is "not even

²² 10 C.F.R. § 2.341(b)(4).

²³ *Id.* § 2.341(b)(5).

²⁴ *Hydro Resources, Inc.* (P.O. Box 15910, Rio Rancho, NM 87174), CLI-01-4, 53 NRC 31, 45 (2001); see also *Pa'ina Hawaii*, CLI-10-18, 72 NRC 56, 72-73 (2010) (stating that the Commission refrains from making *de novo* findings of fact "in situations where a Licensing Board has issued a plausible decision that rests on carefully rendered findings of fact.").

²⁵ *Honeywell Int'l, Inc.* (Metropolis Works Uranium Conversion Facility), CLI-13-1, 77 NRC 1, 18-19 (2013) (citing *David Geisen*, CLI-10-23, 72 NRC 210, 224-25 & n.61 (2010)).

plausible in light of the record as a whole.”²⁶ As a result, the Commission “seldom grant[s] review” when a petition for review “relies primarily on claims that the Board erred in weighing the evidence in a merits decision.”²⁷

The standard for reversal of a contention admissibility decision is likewise difficult to satisfy; the Commission will defer to the Board on issues of contention admissibility unless there is an error of law or abuse of discretion.²⁸ Further, the Commission generally will leave to the Board’s judgment whether a proposed contention has a sufficient factual basis to be admitted for hearing.²⁹

II. The OST Has Not Identified a Substantial Question of Law or a Clearly Erroneous Finding of Fact in LBP-19-2 That Warrants Commission Review.

The OST generally asserts three Board errors in LBP-19-2: first, the Board improperly shifted the burden of proof to OST witnesses;³⁰ second, the Board “created a new standard” for baseline monitoring requirements;³¹ and third, the Board supplied its own evidence to support its conclusions regarding faults and fractures in the MEA.³² Although asserted as errors of law, each of these arguments is, in reality, a disagreement with the Board’s factual findings and

²⁶ *Powertech (USA), Inc.* (Dewey Burdock *In Situ* Uranium Recovery Facility), CLI-16-20, 84 NRC 219, 228 (2016).

²⁷ See, e.g., *DTE Electric Co.* (Fermi Nuclear Power Plant, Unit 3), CLI-14-10, 80 NRC 157, 162-63 (2014); *Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-12-1, 75 NRC 39, 45-46 (2012).

²⁸ *Southern Nuclear Operating Co.* (Vogtle Electric Generating Plant, Units 3 and 4), CLI-09-16, 70 NRC 33, 35 (2009); *Calvert Cliffs 3 Nuclear Project, LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), CLI-09-20, 70 NRC 911, 914 (2009).

²⁹ *Entergy Nuclear Operations, Inc.* (Indian Point, Units 2 and 3), CLI-15-6, 81 NRC 340, 354-55 (2015); *Marsland*, CLI-14-2, 79 NRC at 26.

³⁰ OST Petition at 4, 5-7. The OST also claims that the Board mischaracterized the testimony of its witness Mr. Wireman. *Id.* at 4. However, the OST does not identify the specific testimony that it asserts was mischaracterized or provide any other support for this assertion.

³¹ *Id.* at 7-8.

³² *Id.* at 9.

weighing of the evidence. The OST also asserts that the Board improperly “upheld [the] Staff’s decision to issue the license amendment prior to the evidentiary hearing and well in advance of the final agency determination.”³³ For the reasons discussed below, none of the OST’s claims meets the standard of clear error or raises a substantial question of law that warrants Commission review.

A. The Board Did Not Improperly Shift the Burden of Proof to the OST.

The OST claims that the Board improperly shifted the burden of proof to the OST by requiring its witness, Mr. Wireman, to provide evidence justifying the installation of restoration wells to obtain water quality data, by “rul[ing] that there are no known faults without any evidence,” and by requiring the OST to provide evidence to establish the need for additional pumping tests.³⁴ Contrary to the OST’s assertions, there was no burden shifting. Indeed, the OST concedes that the Board correctly acknowledged that the ultimate burdens of proof reside with the Staff and CBR,³⁵ but then claims, incorrectly, that an intervenor bears no burden whatsoever in the hearing.³⁶

³³ OST Petition at 9-10.

³⁴ *Id.* at 6-7. In its discussion of burden shifting, the OST cites two CEQ regulations, 40 C.F.R. § 1502.24 and § 1502.22, but it does not explain how those regulations support its argument. With regard to section 1502.24, the OST does not explain how the Board’s decision fails to ensure the scientific integrity of the discussions and analyses in the Staff’s final EA when, in fact, the Board concluded that the EA was sufficient in all respects. LBP-19-2 (slip op. at 272-73). Furthermore, section 1502.22 only requires an agency to gather data “essential to a reasoned choice among alternatives,” and the intervenor bears the burden of demonstrating that “(1) the missing information is essential to a reasoned choice between the alternatives, and (2) that the public was unaware of the limitations of the data the [federal agency] relied on.” *Trout Unlimited v. U.S. Dep’t of Agric.*, 320 F.Supp. 2d 1090, 1110-11 (D. Colo. 2004) (citations omitted).

³⁵ OST Petition at 5 (citing LBP-19-2 (slip op. at 16-17)).

³⁶ *Id.* While the applicant and Staff bear the ultimate burden of proof, “each party must bear its burden by going forward with affirmative evidentiary presentations and testimony [and] its rebuttal evidence and rebuttal testimony,” and “the parties are responsible for ensuring that there is sufficient evidence on-the-record to meet their respective burdens.” Changes to Adjudicatory Process, 69 Fed. Reg. 2182, 2213 (January 14, 2004) (final rule).

Moreover, as explained below, each of the OST's assertions amounts to nothing more than a disagreement with the Board's factual findings and weighing of the evidence. The Board considered the evidence presented by all the parties—the Staff, CBR, and the OST—and made findings based on applicable law, record evidence, and the credibility of the parties' expert witnesses. The OST has not demonstrated that the Board committed any error, much less clear error, in making these determinations.

1. The Board Did Not Err in Its Findings on the Timing of Baseline Water Quality Assessments.

The OST first asserts that the Board shifted the burden of proof when it accorded greater weight to the testimony of the Staff's expert over that of the OST expert on the issue of the appropriate time to assess baseline water quality for setting groundwater restoration standards.³⁷ The OST reiterates that in the opinion of its expert, Mr. Wireman, baseline water quality is "pre-mining" and must be taken before operations begin.³⁸ Therefore, the OST concludes that the Board erred by accepting the "unsupported" testimony of NRC expert Dr. Striz over that of Mr. Wireman.³⁹

The OST has not demonstrated that the Board erred in making that determination. Rather, the OST has demonstrated that both parties' experts provided testimony, and after weighing that testimony, along with other evidence, the Board found the Staff's position more

³⁷ OST Petition at 6.

³⁸ *Id.*

³⁹ *Id.* The OST's expert, Mr. Wireman, asserted that wells needed to obtain baseline water quality data for establishing groundwater restoration standards had not been installed. Ex. OST004-R at 3; Tr. at 654. He claimed that installing these wells and assessing baseline water quality after operations begin would lead to higher baseline values due to migration of groundwater from operating mine units to those under construction. Tr. at 662. In response, the Staff's expert, Dr. Striz, testified that such migration would be implausible because of the inward hydraulic gradient (required by license condition) and monitoring. Tr. at 666-67. Dr. Striz also explained that the Staff can revise baseline values if the Staff believes the data used to establish them contains outlier values, citing a pilot study in which the Staff made such revisions. Tr. at 660.

persuasive.⁴⁰ Furthermore, the OST's reference to Dr. Striz's testimony about elevated uranium levels in a pilot study does not support its claim that migration could occur.⁴¹ Although the OST suggests that the pilot study example supports Mr. Wireman's position,⁴² Dr. Striz specifically testified that the movement of water from an active mine unit to an adjacent area was not an issue in the pilot study.⁴³ Ultimately, the Board concluded that "CBR and the Staff have proffered sufficient evidence to support their position that it is suitable to wait to install and sample these restoration wells as each [mine unit] is developed."⁴⁴

In summary, the OST's argument amounts to nothing more than an unsupported claim that the Board should have agreed with its witness. The Commission has stated that, in the face of such challenges, it will not substitute the judgment of an intervenor's expert for that of the Board.⁴⁵ As such, the OST has not identified how the Board's exercise of its judgment in weighing the experts' testimony demonstrates a substantial question warranting review.

2. The Board Did Not Err in Its Findings Related to Faults and Fractures.

The OST also claims that the Board erred "when it ruled that there are no known faults without any evidence to support that fact."⁴⁶ The OST asserts that CBR should have performed fracture testing to "obtain scientific confidence that no fractures in fact exist at the MEA," and

⁴⁰ LBP-19-2 (slip op. at 131-36).

⁴¹ OST Petition at 6.

⁴² *Id.*

⁴³ Tr. at 683-84.

⁴⁴ LBP-19-2 (slip op. at 135).

⁴⁵ *Strata Energy, Inc.* (Ross In Situ Uranium Recovery Project), CLI-16-13, 83 NRC 566, 584 (2016) (citing *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-09-7, 69 NRC 235, 266 (2009)).

⁴⁶ OST Petition at 7.

that the Staff's and CBR's testimony regarding the absence of faults and fractures was based on assumptions.⁴⁷

Contrary to the OST's characterization of the Board's findings, the Board concluded that, although there is likely some degree of faulting and fracturing at the MEA, it is the transmissivity of such features, rather than their mere presence, that is the critical factor.⁴⁸ The Board found "no evidence in the hydrogeologic data . . . that conclusively supports the presence of extensive, transmissive, heterogeneous pathways" that would allow contaminants to migrate into adjacent aquifers or surface waters.⁴⁹ In addition, the Board identified several reasons why, even if faults or fractures were present, they would not lead to adverse environmental impacts at the site.⁵⁰ Finally, the Board also concluded that multiple lines of evidence supported the conclusion that ISR production fluids will be contained within the production zone aquifer.⁵¹ In reaching these conclusions, the Board conducted an exhaustive analysis of the evidence presented by all of the parties and determined that it strongly supported the Staff's and CBR's position.⁵²

The Commission will defer to the Board on its factual findings absent a showing that the Board's findings were "*not even plausible* in light of the record viewed in its entirety."⁵³ That is not the case here, where the Board's findings on faults and fractures are thoroughly grounded in

⁴⁷ *Id.*

⁴⁸ LBP-19-2 (slip op. at 70).

⁴⁹ *Id.*

⁵⁰ *Id.* (slip op. at 70-71).

⁵¹ *Id.* (slip op. at 72-81).

⁵² *Id.* (slip op. at 51-58, 62-71, 72-81, 83, 84-86).

⁵³ *Private Fuel Storage, LLC* (Independent Spent Fuel Storage Installation), CLI-05-16, 62 NRC 1, 3 (2005) (quoting *Private Fuel Storage, LLC*, CLI-05-1, 61 NRC 160, 174 (emphasis added and footnote omitted in original)).

the evidentiary record. Accordingly, the OST has not demonstrated a substantial question for review with respect to these findings.

3. The Board Did Not Improperly Require the OST to Provide Evidence That Additional Pumping Tests Were Needed.

Finally, the OST claims that the Board improperly required the OST to “provide evidence to establish the need for pumping tests on all 11 mine units at the MEA,” instead of the four units covered by the May 2011 aquifer pumping test.⁵⁴ Because the OST provides no further explanation or support for this claim, it should be rejected outright.⁵⁵ In any event, however, the Board specifically addressed the adequacy of a single aquifer pumping test at the MEA at the hearing and in LBP-19-2. After considering evidence from all of the parties,⁵⁶ the Board concluded that the single test was sufficient for pre-licensing assessment of the MEA site, particularly given the “strong evidence of strata consistency” based on extensive site characterization data.⁵⁷ Furthermore, in reaching that conclusion, the Board recognized that License Condition 11.3.4 in CBR’s license requires an aquifer pumping test in each mine unit prior to commencing operations in that unit.⁵⁸

On appeal the OST has not disputed any of the evidence presented by the Staff or CBR regarding the aquifer pumping test, nor has the OST challenged the basis for the Board’s analysis and conclusion. The fact that the Board accorded greater weight to the Staff’s and CBR’s evidence than to the OST’s is not a basis for overturning the Board’s decision.⁵⁹

⁵⁴ OST Petition at 7.

⁵⁵ See *Strata*, CLI-16-13, 83 NRC at 592 (stating that the Commission “do[es] not consider cursory, unexplained legal arguments” and “will not speculate about what a pleading is supposed to mean”).

⁵⁶ LBP-19-2 (slip op. at 175-80).

⁵⁷ *Id.* (slip op. at 179-80).

⁵⁸ *Id.* (slip op. at 179); Ex. NRC009 at 21.

⁵⁹ *Geisen*, CLI-10-23, 72 NRC at 225.

Therefore, the OST has not raised a substantial question warranting review, let alone demonstrated that the Board committed clear error warranting Commission review.

B. The Board Did Not Create a New Standard Regarding Timing for Obtaining Baseline Restoration Data.

In Section II.B of its petition for review, the OST asserts that the Board “created a new standard” for baseline monitoring requirements in stating that “It is at best questionable that water quality data should be obtained before ISR operations begin.” The OST states that the Board should have adopted Mr. Wireman’s view that all baseline sampling be completed before any operations on the site and that the Board erred in ruling that baseline monitoring can occur as mine units are developed.⁶⁰

In support of this claim, the OST asserts that the Board misread the Commission’s decision in the *Strata in situ* uranium recovery proceeding, CLI-16-13.⁶¹ The relevant issue in *Strata* was whether additional monitoring data, akin to the pre-operational monitoring used to determine groundwater protection standards under 10 C.F.R. Part 40, Appendix A, Criterion 5B(5), were required for NEPA purposes.⁶² The *Strata* board found no legal basis for such a requirement,⁶³ and the Commission found no error in that legal ruling.⁶⁴ The Commission, in short, did not conclude in *Strata* that such pre-operational monitoring data were required.

⁶⁰ OST Petition at 7-8.

⁶¹ *Id.* at 8 (citing *Strata*, CLI-16-13, 83 NRC at 583-84).

⁶² *Strata*, LBP-15-3, 81 NRC 65, 90 (2015).

⁶³ *Id.* at 111-12.

⁶⁴ *Strata*, CLI-16-13, 83 NRC at 583-84. The *Strata* board specifically distinguished pre-licensing site characterization for NEPA purposes from the post-licensing activities used to set restoration values and stated that Criterion 5B(5) groundwater collection is not required to occur before the license is granted. *Strata*, LBP-15-3, 81 NRC at 91-92, 111. The Commission found no legal error in the *Strata* board’s holding that groundwater monitoring for purposes of NEPA review “need not conform to the groundwater monitoring requirements applicable to an operating facility.” *Strata*, CLI-16-13, 83 NRC at 583 (citing *Strata*, LBP-15-3, 81 NRC at 91-92).

The OST has therefore failed to explain how *Strata* supports its claim that the Board created a new standard, much less that the Board erred in concluding that the installation of restoration wells could be done as each mine unit is developed. The OST also ignores the Board's determination, as a factual matter, that CBR and the Staff provided sufficient evidence to support this finding.⁶⁵ Instead, the OST simply reiterates its claim that the opinion of its expert, Mr. Wireman, is correct.⁶⁶ The Board's decision indicates that it weighed all of the evidence, including the testimony by the parties' witnesses, and provided a reasoned basis for its findings on this issue. The fact that the Board ultimately found the Staff's witness more persuasive does not constitute reviewable error.

C. The Board Did Not Provide Its Own Evidence or Assume Evidence Not in the Record Regarding the Presence of Fractures at the MEA Site.

In Section II.C of its petition for review, the OST claims that the Board provided its own evidence or assumed the existence of evidence in the record. Namely, the OST claims the Board supplemented "the unsupported opinion of CBR witnesses" that there is no evidence of fractures at the MEA that are sufficiently transmissive to serve as a contaminant pathway.⁶⁷ However, the OST does not identify any evidence that was purportedly supplied by the Board itself, but merely claims there is "no evidence" to support the CBR witnesses' position.⁶⁸ Contrary to the OST's assertions, the Board examined in depth the presence of fractures and faults at the MEA and, more importantly, the ability of such features to act as pathways for

⁶⁵ LBP-19-2 (slip op. at 135). The Board specifically pointed to the Staff's testimony that CBR previously provided sufficient data to establish a pre-operational water quality baseline, as well as Dr. Striz's testimony that constituent migration between mine units would be unlikely. *Id.* (slip op. at 132-34).

⁶⁶ OST Petition at 9.

⁶⁷ *Id.*

⁶⁸ *Id.* The OST also claims, without further explanation, that it was required "to prove a negative." *Id.*

contaminants.⁶⁹ In particular, the Board cited multiple lines of evidence which demonstrate that production fluids will be contained within the production zone aquifer.⁷⁰ Because the Board's findings and conclusions on these issues are amply supported by evidence in the record, the OST has not demonstrated any error warranting Commission review.

D. The Board Did Not Address the Staff's Issuance of the MEA License Amendment.

In Section II.D of its petition for review, the OST claims that the Board erred by upholding the Staff's decision to issue the MEA license amendment prior to the hearing and a final agency determination.⁷¹ However, OST misapprehends the NRC's regulatory authority and framework. Because the Board had no occasion to "rule on" the Staff's issuance of the license amendment, the OST has specified no legal error by the Board.⁷² As the OST itself acknowledges, the NRC's rules of practice contemplate that the Staff will promptly issue its approval or denial of an application, notwithstanding the pendency of a hearing, once the requisite findings are made.⁷³ The Staff issued the MEA license amendment consistent with that regulation.

The OST also claims that the Board's action (or, more accurately, the Staff's action) is contrary to NEPA's requirement to make information available to the public before making decisions and taking actions. The OST cites the D.C. Circuit's recent decisions in two uranium recovery cases, *Natural Resources Defense Council v. NRC* and *Oglala Sioux Tribe v. NRC*, to support its claim that issuing the license prior to the resolution of NEPA issues raised in an

⁶⁹ LBP-19-2 (slip op. at 51-58, 62-71, 72-83, 84-86).

⁷⁰ *Id.* (slip op. at 72-83).

⁷¹ OST Petition at 9.

⁷² The OST did not request a stay of the issuance of the license amendment.

⁷³ OST Petition at 9 (citing 10 C.F.R. § 2.1202(a)).

evidentiary hearing violates NEPA.⁷⁴ But this proceeding is distinguishable from the situations in both of those cases. In *Oglala Sioux Tribe*, after the NRC had issued the license, a licensing board subsequently concluded in a merits hearing that the Staff's NEPA analysis contained a significant deficiency.⁷⁵ The court ruled that, under those circumstances, NEPA did not allow the agency to base its determination to keep the license in effect on the intervenors' failure to show "irreparable harm."⁷⁶ In *NRDC*, the court found that, although a licensing board determined that the Staff's NEPA analysis had been deficient in one respect, the NRC's decision to issue a license did not violate NEPA because the board concluded that the identified deficiency was cured by information in the evidentiary hearing record.⁷⁷

As an initial matter, at the time the Staff issued the MEA amendment, it had completed the full, statutorily required process under NEPA and the NRC's implementing regulations. The OST's assertion that NEPA somehow prohibits issuance of the license prior to completion of the adjudicatory hearing is flawed. NEPA does not create any right to a hearing, nor does it require that an agency alter its existing hearing procedures or adopt a particular decision-making structure when exercising its substantive authority.⁷⁸ The NRC's hearing process arises from the Atomic Energy Act (AEA). NEPA does not dictate the NRC's procedures for implementing the AEA hearing requirement, nor does it require that a hearing provided under the AEA necessarily be completed prior to the issuance of a license, even if contentions asserting

⁷⁴ *Natural Res. Def. Council v. NRC*, 879 F.3d 1202 (D.C. Cir. 2018) (*NRDC*); *Oglala Sioux Tribe v. NRC*, 896 F.3d 520 (D.C. Cir. 2018).

⁷⁵ *Oglala Sioux Tribe*, 896 F.3d at 525.

⁷⁶ *Id.* at 538.

⁷⁷ *NRDC*, 879 F.3d at 1208, 1215.

⁷⁸ *Natural Res. Def. Council v. NRC*, 823 F.3d 641, 652 (D.C. Cir. 2016) (internal citations omitted); *Union of Concerned Scientists v. NRC*, 920 F.2d 50, 56 (D.C. Cir. 1990); see also *Beyond Nuclear v. NRC*, 704 F.3d 12, 18 (1st Cir. 2013) ("NEPA does not, by its own terms or its intent, alter the Commission's hearing procedures[.]").

noncompliance with NEPA have been raised. Instead, the additional process provided by the NRC pursuant to the AEA afforded the OST the opportunity to raise its NEPA contentions.⁷⁹

Furthermore, unlike the licensing boards in *Powertech* and *Strata*, the Board identified *no* procedural deficiencies in the Staff's compliance with NEPA. Nothing in the Staff's environmental review needed supplementing by additional information in the record, nor was further Staff action needed.⁸⁰ Put another way, no information gathered during the course of this adjudication was found to warrant any action with respect to the license amendment. The OST has therefore not identified any reviewable issue.

In summary, the OST has not demonstrated that the Board committed a reviewable error in LBP-19-2, nor has the OST provided any other justification under 10 C.F.R. § 2.341(b)(4) for Commission review of the decision.

III. The OST Has Not Identified a Substantial Question of Law That Warrants Commission Review of LBP-18-3.

In Section III of its petition for review, the OST seeks review of asserted errors in LBP-18-3, the Board's decision rejecting the OST's new contentions on the Staff's final EA.⁸¹ For the reasons discussed below, the OST has not demonstrated that the Board erred as a

⁷⁹ Relatedly, the OST asserts that, because the NRC regulations allowing issuance of a license prior to a hearing are not in accordance with NEPA, the agency should conduct a rulemaking to revise the regulations. OST Petition at 10. With this claim, the OST does not assert an error in LBP-19-2, but instead challenges NRC regulations. Such a challenge is impermissible in NRC adjudicatory proceedings without seeking a waiver, 10 C.F.R. § 2.335(a), (b), and, furthermore, the OST improperly raises this issue for the first time on appeal, contrary to 10 C.F.R. § 2.341(b)(5). This claim does not present a substantial question for review.

⁸⁰ See LBP-19-2 (slip op. at 272-73) (finding that the Staff's EA met the requirements of NEPA and 10 C.F.R. Part 51, and that the application met the requirements of the AEA and 10 C.F.R. Part 40).

⁸¹ The OST objects to the Board's decisions on Contentions J, K, D, L, M and N, but it does not challenge the Board's decisions declining to admit the other contentions the OST filed on the final EA (Contentions A, B, C, E, F, G, H and I).

matter of law or abused its discretion in rejecting these contentions, and, therefore, the Commission should deny the petition for review.

A. The Board Did Not Err in Rejecting Contentions J and K.

The OST first asserts legal errors in the Board's decision on Contentions J and K. These contentions asserted that the Board lacked jurisdiction over the MEA and surrounding land (Contention J) and that the OST, by law, has a right to prior consent before CBR can conduct activities at the MEA (Contention K).⁸² The Board rejected these contentions for two reasons. First, the Board found the contentions untimely because these issues were known to the OST in 2013, at the outset of this proceeding, and could have been raised at that time.⁸³ Second, the Board found the contentions outside the scope of the proceeding, because binding Supreme Court precedent precludes the Board's consideration of the issues raised.⁸⁴

On appeal, the OST asserts that the Commission should take review because the Board's decisions authorize the violation of treaties, the OST's sovereign rights, and international law.⁸⁵ With regard to asserted treaty rights, the Commission, like the Board, is bound by Supreme Court precedent. The Court has held that Congress abrogated the 1868 Fort Laramie Treaty; the OST's claims of sovereignty over the MEA and surrounding areas are thus invalid.⁸⁶ The two federal cases that the OST cites, *Montana v. United States*, and *Knighon v. Cedarville Rancheria of Northern Paiute Indians*, address tribal sovereignty over non-members on legally recognized tribal lands (i.e., within a reservation), but neither case holds that a tribe's sovereignty extends to former treaty lands, such as the area of northwestern

⁸² OST Petition at 10-12; see also OST New Contentions at 38-56.

⁸³ LBP-18-3, 88 NRC at 45.

⁸⁴ *Id.* at 46, 47.

⁸⁵ OST Petition at 11.

⁸⁶ LBP-18-3, 88 NRC at 46 (citing *United States v. Sioux Nation of Indians*, 448 U.S. 371 (1980)).

Nebraska where the MEA is located.⁸⁷ The NRC lacks the authority to adjudicate the OST's sovereignty or jurisdiction over former treaty lands, prior consent to use such lands, or the applicability of international law to those jurisdictional claims, and the NRC's licensing process—and specifically its environmental review process—is not the forum for resolving such disputes.⁸⁸ The Board, as well as the Commission,⁸⁸ is limited by the authority granted under the AEA and environmental statutes such as NEPA and the National Historic Preservation Act (NHPA).

In summary, the OST has not demonstrated that the Board committed legal error in rejecting these contentions and has not identified a substantial question of law that is within the Commission's authority to address. Accordingly, there is no basis for granting Commission review of the Board's decisions on Contentions J and K.

B. The Board Did Not Err in Rejecting Contention D.

The OST also claims that the Board erred in rejecting Contention D, which asserted that the Final EA did not discuss a planned cultural resources survey approach for the Dewey-Burdock site in South Dakota that was described in a March 16, 2018 letter sent to the OST in the *Powertech* licensing proceeding.⁸⁹ The Board found this contention inadmissible because the Staff had discontinued the implementation of the planned site survey approach in the

⁸⁷ See *Montana v. United States*, 450 U.S. 544, 557, 564-65 (1981) (tribe may prohibit hunting and fishing by nonmembers on land belonging to or held in trust for the tribe, but principle of retained sovereignty does not authorize tribe to regulate hunting and fishing by non-members in lands no longer owned by the tribe); *Knighon*, 918 F.3d 660, 664 (9th Cir. 2019) (tribe has inherent power to exclude nonmembers from tribal lands).

⁸⁸ See *Hydro Resources, Inc.* (P.O. Box 777, Crownpoint, NM 87313), CLI-06-29, 64 NRC 417, 420 (2006) (stating that the NRC has no authority to decide jurisdictional disputes, and that "it is not the function of the EIS process to resolve existing or potential jurisdictional disputes.").

⁸⁹ LBP-18-3, 88 NRC at 36. The OST claimed the proposed approach had been agreed upon by the parties in *Powertech* as a means of resolving a contention in that proceeding related to the Staff's NEPA analysis of cultural resources. *Id.* (citing OST New Contentions at 24).

Powertech proceeding, and therefore the purported factual basis for the contention—the agreement on a survey approach for the Dewey-Burdock site—was no longer valid.⁹⁰

On appeal, the OST does not challenge the Board’s determination that the factual basis for Contention D was invalid, nor does the OST offer any evidence that the Board’s decision was legally unsound. Instead, the OST merely claims that the Staff’s EA does not meet the requirements of NEPA and NHPA, and that the Commission should review this contention because it relates to the OST’s interest in cultural resources.⁹¹ These claims do not constitute substantial questions that merit Commission review.⁹²

C. The Board Did Not Err in Rejecting Contentions L, M and N.

The OST asserts that the Board erred in rejecting Contentions L, M and N as untimely.⁹³ As the OST acknowledges, Contentions L and M are an attempt to resurrect the cultural resource issues that were originally raised in Contention 1, which was dismissed in 2014.⁹⁴ In LBP-18-3, the Board found Contentions L and M untimely under 10 C.F.R. § 2.309(c)(1) because the documents the OST relied on as support for these contentions dated from 2016 or

⁹⁰ LBP-18-3, 88 NRC at 36-37.

⁹¹ OST Petition at 13.

⁹² In its response to the OST’s new contentions, the Staff also observed that Contention D was untimely because it failed to meet the requirements in 10 C.F.R. § 2.309(c)(1). See NRC Staff Response to the Oglala Sioux Tribe’s Migrated, Renewed, and New Marsland Expansion Final Environmental Assessment Contentions at 28-29 (June 30, 2018) (Staff Response to OST New Contentions). Although the Board did not reach the issue, the lack of good cause for the OST’s untimely filing remains a separate, valid basis for rejecting Contention D.

⁹³ OST Petition at 14-16. In Contentions L and M, the OST asserted deficiencies in the Staff’s description of cultural resources in the EA and the Staff’s compliance with NHPA consultation requirements, respectively. OST New Contentions at 56-79. In Contention N, the OST asserted that the Staff’s discussion of environmental justice in the EA was flawed because its geographic scope was limited. *Id.* at 79-84.

⁹⁴ OST Petition at 15 (stating that the interests contained in these contentions “were raised at the time OST first intervened as Contention 1 in this matter. . .”).

earlier.⁹⁵ The Board concluded that, to be timely, new contentions relying on these documents should have been submitted at the latest by mid-January 2018, the deadline for new contentions on the draft EA.⁹⁶ Similarly, the Board found Contention N's environmental justice (EJ) challenge untimely because the EJ information in the draft EA was virtually identical to the EJ information in the final EA and, therefore, Contention N was not based on materially different, previously unavailable information.⁹⁷

On appeal, the OST claims that the Board "misapprehended the timeliness consideration regarding NEPA-specific environmental contentions."⁹⁸ As support, the OST quotes language from a Commission decision stating that an evidentiary hearing on environmental contentions may not take place until the Staff completes its environmental review.⁹⁹ But the cited language relates to the timing of an evidentiary hearing, not the timeliness standard for new contentions. Contrary to the OST's claims, the regulations and regulatory history clearly contemplate the filing of contentions based on a draft NEPA document.¹⁰⁰ Moreover, OST counsel was (or should have been) aware of the deadlines in the Board's scheduling orders for filing new or

⁹⁵ LBP-18-3, 88 NRC at 48-50. The Board also noted that for Contention L, the OST's reliance on the March 16, 2018 letter from Powertech was unavailing because it no longer provided a valid factual basis. *Id.* at 48.

⁹⁶ *Id.* at 49, 50. In response to Contentions L and M, the Staff argued that the OST should have submitted new contentions related to cultural resources and Section 106 consultation by July 30, 2014, the deadline originally defined by the Board. Staff Response to OST New Contentions at 37.

⁹⁷ LBP-18-3, 88 NRC at 50-51.

⁹⁸ OST Petition at 14.

⁹⁹ *Id.* (citing *Crow Butte Resources* (In Situ Leach Facility, Crawford, Nebraska), CLI-15-17, 82 NRC 33, 45 & n.76 (2015)).

¹⁰⁰ See Amendments to Adjudicatory Process Rules and Related Requirements, 77 Fed. Reg. 46,561, 46,572 (Aug. 3, 2012) (final rule) (explaining that "participants may file a new or amended contention after the deadline in § 2.309(b) based on a *draft* or final NRC NEPA document if the participant demonstrates good cause" by satisfying the three factors in § 2.309(c)(1))(emphasis added).

amended contentions based on the issuance of the draft EA.¹⁰¹ As the Board pointed out in LBP-18-3, it is a “fundamental principle of practice before the Commission that a new or amended contention must be raised at the earliest possible opportunity,”¹⁰² and “[p]etitioners who choose to wait to raise contentions that could have been raised earlier do so at their peril.”¹⁰³

The OST makes several additional unsupported assertions attempting to excuse its failure to file new contentions on the draft EA. First, the OST claims that the draft EA is “subject to change” and that contentions based on a draft EA would not be ripe.¹⁰⁴ For the reasons explained above, this claim is incorrect. The OST also asserts that the comments it submitted on the draft EA are “identical to” contentions and rejecting them as such would be an injustice to the OST and violation of its sovereignty, territory and treaties.¹⁰⁵ But the fact remains that the OST did not file a motion to admit new or amended contentions containing these comments by the deadline established by the Board in this proceeding.¹⁰⁶ Instead, the OST submitted the comments to the NRC Office of Administration as comments on the draft EA.¹⁰⁷ Finally, the

¹⁰¹ April 2017 Order, Appendix A at 1. Also, in a 2016 teleconference, the Board discussed with OST counsel the need to promptly raise new or amended contentions when new information becomes available. See Tr. at 85.

¹⁰² LBP-18-3, 88 NRC at 26 (citing *DTE Electric Co. (Fermi Nuclear Power Plant, Unit 3)*, CLI-15-1, 81 NRC 1, 7 (2015)).

¹⁰³ *Fermi*, CLI-15-1, 81 NRC at 7.

¹⁰⁴ OST Petition at 15.

¹⁰⁵ *Id.* The OST also incorrectly states that the comments were submitted “shortly prior to the [draft EA] contention submission deadline.” *Id.* New contentions on the draft EA were due on January 16, 2018. April 2017 Order, Appendix A at 1. The OST’s comments were not submitted until January 29, 2018. See Letter from Andrew B. Reid to May Ma (Jan. 29, 2018) (ADAMS Accession No. ML18046A060).

¹⁰⁶ Nor did the OST file a motion seeking permission to file new contentions late, with a showing of good cause for missing the deadline.

¹⁰⁷ The Staff considered the OST’s comments and provided responses to them, along with the other comments received, in Appendix A of the final EA. Ex. NRC006 at A-1 to A-47.

OST suggests that it deserves special treatment based on its status as a sovereign indigenous nation, but provides no legal basis for this assertion.¹⁰⁸ The NRC discharges its trust responsibility to tribes through compliance with its authorizing statutes (e.g., the AEA), its regulations, and other applicable statutes, such as NEPA and the NHPA.¹⁰⁹ That responsibility does not extend to providing a tribe greater rights than it would otherwise have under those statutes.¹¹⁰ Further, as discussed in Section III.A *supra*, the OST's sovereignty does not extend to the area where the MEA is located, and the treaties it cites are no longer in effect.

In summary, the Board's conclusion that these contentions were untimely is both supported by the record and consistent with the NRC's regulations and case law. The OST has raised no substantial question of law warranting Commission review.

IV. The OST Has Not Identified a Substantial Question of Law or a Clearly Erroneous Finding of Fact in the Board's Memorandum and Order Dismissing Contention 1 That Warrants Commission Review.

In Section IV of its petition for review, the OST seeks review of the Board's SD Decision, which granted the Staff's motion for summary disposition and dismissed Contention 1 from this proceeding.¹¹¹ The Commission should deny the request for review because, as discussed below, the OST has not demonstrated that the Board erred in granting summary disposition, nor has the OST raised substantial questions of law related to that decision.

¹⁰⁸ OST Petition at 15.

¹⁰⁹ *Morongo Band of Mission Indians v. FAA*, 161 F.3d 569, 574 (9th Cir. 1998); see also Tribal Policy Statement, 82 Fed. Reg. 2402, 2405 (Jan. 9, 2017) (explaining that the NRC is an independent regulatory agency that does not hold in trust Tribal lands or assets, and, therefore, the NRC fulfills its trust responsibility through its Tribal Policy Statement, NRC regulations, and recognizing obligations under applicable treaties or statutes).

¹¹⁰ See *Skokomish Indian Tribe v. FERC*, 121 F.3d 1303, 1308-09 (9th Cir. 1997) (stating that because FERC exercises its trust responsibility in the context of the Federal Power Act (FPA), the agency "properly declined to afford a tribe greater rights than they have under the FPA and its implementing regulations.").

¹¹¹ SD Decision at 2.

The OST acknowledges that the dismissal of Contention 1 was “in accordance with NRC regulations and rules of practice.”¹¹² The Board’s SD Decision includes a detailed recital of the legal standards for summary disposition.¹¹³ Moreover, the Board did not grant the Staff’s summary disposition motion simply because it was unopposed, but instead applied the appropriate standards and decided the motion on the merits.¹¹⁴ Ultimately, the Board found that summary disposition was appropriate for two independent reasons: first, because the extensive new information on cultural resources in the draft EA cured the deficiency originally alleged in CBR’s environmental report (ER), and second, because the information in the draft EA was significantly different than the information in the ER.¹¹⁵

On appeal, the OST does not challenge the Board’s reasoning or any other aspect of the SD Decision. Instead, the OST makes several unavailing arguments which generally suggest that dismissing its cultural resources contention was unjust and inequitable. First, the OST claims that the Board’s decision “failed to safeguard the Tribe’s demonstrated interest in identifying and protecting its cultural resources.”¹¹⁶ Although the OST cites or quotes from several federal court cases in claiming that the Board failed to safeguard its interests,¹¹⁷ the

¹¹² OST Petition at 17.

¹¹³ SD Decision at 4-6.

¹¹⁴ *Id.* at 8-13.

¹¹⁵ *Id.* at 10-13. The Board noted that, although it had rejected the OST’s NHPA consultation claims in Contention 1 as premature, the OST did not file new or amended contentions regarding the consultation process after the cultural resources sections of the draft EA were made available. *Id.* at 14 n.4.

¹¹⁶ OST Petition at 17. The OST cites the NRC’s trust responsibility in making this claim. As discussed in Section III.C *supra*, the trust responsibility does not extend to providing tribes with greater rights than it would have under the AEA, NRC regulations, and other statutes such as NEPA and NHPA.

¹¹⁷ *Id.* (citing *Quechan Indian Tribe of the Fort Yuma Reservation v. U.S. Dep’t of the Interior*, 547 F.Supp. 2d 1033 (D. Ariz. 2008); *Slockish v. U.S. Fed. Highway Admin.*, 682 F.Supp. 2d 1178 (D. Or. 2010); and *Pueblo of Sandia v. United States*, 50 F.3d 856 (10th Cir. 1995)).

OST fails to explain why those cases, or statements from them, demonstrate Board legal error or raise a substantial question of law with respect to the SD Decision.

The OST also claims that the NRC must conduct a cultural resources survey of the MEA involving the OST because the protection of tribal cultural properties “is of ‘high order’ and a responsibility owed, by operation of NEPA, from the agency to the public generally.”¹¹⁸

Although the OST cites *Oglala Sioux Tribe v. NRC* for this proposition, the court’s actual statement in that case, and the context, do not support the OST’s claim. In addressing whether it had jurisdiction to hear the case, the court stated that “environmental values protected by NEPA are of a high order.”¹¹⁹ The court held that it had jurisdiction “to consider whether the NRC may authorize a licensee to go ahead with construction—notwithstanding the Commission’s conclusion that there has been a significant deficiency in its NEPA compliance—unless an intervenor demonstrates irreparable harm.”¹²⁰ The OST has not explained how this jurisdictional determination, or any other aspect of the case, has any bearing on the SD Decision.

Finally, the OST complains that it lacked counsel during a portion of this proceeding,¹²¹ and it asserts that the NRC should have been on notice that the OST was concerned about protection of cultural resources at the MEA.¹²² But the OST’s lack of counsel does not reflect

¹¹⁸ OST Petition at 17.

¹¹⁹ *Oglala Sioux Tribe*, 896 F.3d at 529.

¹²⁰ *Id.* at 529-30.

¹²¹ OST Petition at 16. The OST was represented by counsel from January 2013 until at least September 2013. In addition to filing the initial hearing request, OST’s original counsel participated in a June 2013 Board teleconference (Tr. at 5) and submitted the OST’s initial disclosures in September 2013 (Oglala Sioux Tribe’s Initial Mandatory Disclosures (Sept. 9, 2013) (ADAMS Accession No. ML13253A451)). During that time, there were several instances when the OST did not file responsive pleadings. *Marsland*, CLI-14-2, 79 NRC at 14 & n.10. The OST’s initial attorney, Ms. Gillis, has never filed a notice of withdrawal in this proceeding despite having done so in the *Powertech* proceeding. See Notice of Withdrawal for Waonsilawin C. Gillis (May 29, 2014) (ADAMS Accession No. ML14153A429).

¹²² OST Petition at 16-17.

errors in the Board's SD Decision and does not raise a question of law that warrants Commission review. It was not the Staff's or the Board's responsibility to ensure that the OST had counsel; there is no right to counsel (or, indeed, an obligation to retain counsel) when a litigant appears voluntarily in NRC proceedings.¹²³ Intervenors are responsible for deciding whether to be represented by counsel and for taking the necessary steps to do so.¹²⁴ And, as the Board noted in its decision on the 2014 Show Cause Order in this proceeding, "having chosen its counsel, OST must accept the consequences of its counsel's actions."¹²⁵

In sum, the OST has not identified any Board error in the SD Decision, nor has the OST identified any other substantial question of law related to that decision which warrants Commission review.

CONCLUSION

The OST has not identified any legal or factual error in LBP-19-2, LBP-18-3, or the Board's SD Decision that warrant review under 10 C.F.R. § 2.341(b)(4). Accordingly, the Commission should deny the petition for review.

Respectfully submitted,

/Signed (electronically) by/

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/Executed in Accord with 10 C.F.R. § 2.304(d)/

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¹²³ See 10 C.F.R. § 2.314(b) (persons may be represented by counsel or on their own behalves); Attorney General's Manual on the Administrative Procedure Act 61-62 (1947) (right to counsel in 5 U.S.C. § 555(b) does not apply in voluntary appearances before an agency).

¹²⁴ *Cleveland Elec. Illuminating Co.* (Perry Nuclear Power Plant, Units 1 and 2), ALAB-802, 21 NRC 490, 498 (1985) (citation omitted).

¹²⁵ Memorandum and Order (Regarding Order to Show Cause) at 7 (Feb. 6, 2015) (unpublished) (ADAMS Accession No. ML15037A390) (citing *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 386-87 (1993)).

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Dated at Rockville, Maryland
this 19th day of April 2019.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "NRC Staff's Answer Opposing the Oglala Sioux Tribe's Petition for Review of LBP-19-2, LBP-18-3, and Memorandum and Order Dismissing Contention 1" in the above-captioned proceeding have been served via the Electronic Information Exchange ("EIE"), the NRC's E-Filing System, this 19th day of April, 2019, which to the best of my knowledge resulted in transmittal of the foregoing to those on the EIE Service List for the above-captioned proceeding.

/Signed (electronically) by/

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