

April 19, 2018

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. 08-867-02-OLA-BD01
(Marsland Expansion Area))	

CROW BUTTE RESPONSE TO OST PETITION FOR REVIEW

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INTRODUCTION

In accordance with 10 C.F.R. § 2.341(b)(3), Crow Butte Resources, Inc. (“Crow Butte”) hereby responds to the “Intervenor Oglala Sioux Petition for Review,” dated March 25, 2019 (“OST Petition for Review”). OST requests that the Commission grant review of the Licensing Board Memorandum and Order (LBP-19-02), dated February 28, 2019; the Licensing Board Memorandum and Order (LBP-18-03), dated July 20, 2018; and the Licensing Board Memorandum and Order (Ruling on Motion for Summary Disposition Regarding Oglala Sioux Tribe Contention 1), dated October 22, 2014.

Crow Butte opposes the Petition for Review. The Petition fails to demonstrate a substantial question for review with respect to any of the considerations identified in 10 C.F.R. § 2.341(b)(4). OST has failed to identify a clear error of fact, error of law, procedural error, or abuse of discretion by the Board, or any other question or consideration that merits review. There is no basis for the Commission to revisit or second-guess the Board’s orders, factual findings, or conclusions of law based on the substantial record before it.

STANDARD FOR REVIEW

Under 10 C.F.R. § 2.341(b)(4), the Commission may, in its discretion, grant a petition for review, “giving due weight to the existence of a substantial question” with respect to

the following considerations: (1) a finding of material fact is clearly erroneous or in conflict with a finding as to the same fact in a different proceeding; (2) a necessary legal conclusion is without governing precedent or is a departure from or contrary to established law; (3) a substantial and important question of law, policy or discretion has been raised; (4) the conduct of the proceeding involved a prejudicial procedural error; or (5) any other consideration which the Commission may deem to be in the public interest. 10 C.F.R. § 2.341(b)(4)(i)-(v).

DISCUSSION

A. Petition for Review of LBP-19-02

In LBP-19-02, the Licensing Board found in favor of Crow Butte and the NRC Staff on the sole remaining admitted contention, Contention 2, which encompasses a series of geologic and hydrogeologic issues. In its Petition for Review, OST argues that “[t]he Board abused its discretion and erred when it shifted the burden of proof to OST” by requiring one of OST witnesses, Mr. Wireman, to “provide evidence justifying the installation of restoration wells to obtain water quality data”, by ruling that “ruled that there are no known faults without any evidence to support that fact,” and by requiring “that OST provide evidence to establish the need for pumping tests on all 11 of the MEA [Mining Units (MUs)], as opposed to the 4 covered by the May 2011 test.” OST Petition for Review at 6-7. But the Board specifically addressed CBR’s baseline water quality sampling program, the evidence (and lack thereof) relating to existing of local and regional faulting, and the significance and adequacy of the aquifer pumping test in exhaustive detail. *See, e.g.*, LBP-19-02 at 131-136 (water quality data), 136-138 (faulting), and 175-180 (aquifer pumping test). In each case, the Board weighed the evidence and the extensive expert testimony before it and made all of the factual findings necessary for it to reach its decision.

Against the backdrop of the substantial evidentiary record and specific findings by the Board, OST fails to identify a basis for Commission review. While the Commission has

authority to make its own *de novo* findings of fact, it generally does not exercise that authority where a Licensing Board has issued “a plausible decision that rests on carefully rendered findings of fact.” *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Facility), CLI-03-8, 58 NRC 11, 26 (2003). To invoke discretionary Commission review of Board fact findings, the intervenors must demonstrate that the Board’s findings were “clearly erroneous,” *i.e.*, “not even ‘plausible in light of the record viewed in its entirety.’” *Kenneth G. Piece* (Shorewood, Illinois), CLI-95-6, 41 NRC 381, 382 (1995). The Commission’s standard of “clear error” for overturning a Board decision “is quite high.” *PFS*, CLI-03-8, 58 NRC at 26. The record supports the Board’s findings on the technical, fact-intensive issues associated with vertical excursions. OST’s arguments cast no doubt on the validity of the Board’s factual findings and conclusions regarding water quality testing, faulting, and aquifer pump testing, let alone establish that they are “clearly erroneous.” The NRC has fully satisfied the National Environmental Policy Act (“NEPA”), the Atomic Energy Act (“AEA”), and applicable NRC regulations with respect to Contention 2.

B. Petition for Review of LBP-18-03

On May 30, 2018, OST submitted a migrated Contention 2 along with fourteen contentions OST designated either as new or “renewed” that challenged various aspects of the Final EA. In LBP-18-03, the Licensing Board found that, with the exception of Contention 2, which was eventually resolved in LBP-19-02, none of the proffered new or renewed contentions was admissible. OST now claims that the Board’s decision should be reversed with respect to Contentions D, J, K, L, M, and N.

In LBP-18-03 the Board methodically applied the Commission’s contention admissibility standards to each of OST’s contentions and rejected each in turn—most for multiple reasons. The Licensing Board found Contention D inadmissible for lack of factual or expert opinion support after noting that the stated factual underpinning for the contention was no longer

accurate. LBP-18-03 at 21-22. It dismissed Contentions J and K both because they were untimely and because they raised issues outside the scope of the proceeding, among other reasons. *Id.* at 33-37. The Board found Contentions L and M both untimely, with Contention L also lacking factual or expert opinion support. *Id.* at 37-39. And the Board concluded that Contention N was untimely, lacked factual or expert opinion support, and failed to show a genuine dispute with the Final EA on a material issue. *Id.* at 39-42. OST, however, does not grapple with the reasons articulated by the Board for its decision or claim any error with respect to a particular aspect of the Board decision, instead reiterating arguments made and rejected by the Board previously. OST therefore has not shown any mistake of fact or law that would warrant Commission review with respect to any of these contentions.

C. Petition for Review of Memorandum and Order, dated October 22, 2014

In its October 22 Decision, the Licensing Board granted an NRC Staff motion for summary disposition with respect to Contention 1. Contention 1, as admitted, had challenged Crow Butte’s discussion of historic and cultural resources in Crow Butte’s Environmental Report (“ER”). After outlining the procedural history of Contention 1, including the NRC Staff’s issuance of a Draft EA section specifically addressing cultural resources, the Board determined that the Draft EA addressed the alleged deficiency in Crow Butte’s ER that had formed the basis for Contention 1. October 22 Decision at 14. Lacking a new or amended contention pleading a material omission from, or inadequacy with, the Draft EA’s cultural resources section, the Board then found that there were no genuine material factual disputes remaining regarding Contention 1. *Id.* at 14-15. Accordingly, the Board granted the NRC Staff’s motion and dismissed Contention 1.

In its Petition for Review, OST claims it was without counsel during this period, but does appear to dispute that dismissal of its contention was in accord with NRC regulations and

rules of practice. OST Petition for Review at 17. Accordingly, OST has not shown any clearly erroneous factual finding or unsupported legal conclusion that would warrant review, much less reversal, of the October 22 Decision.

CONCLUSIONS

For the reasons set forth above, Commission should deny the petition for review and affirm the Board's decisions in LBP-19-02, LBP-18-03, and the October 22 Decision.

Respectfully submitted,

/s/ signed electronically by _____
Tyson R. Smith
889 Marin Drive
Mill Valley, California 94941

COUNSEL FOR CROW BUTTE
RESOURCES, INC.

Dated at Mill Valley, California
this 19th day of April 2019

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CERTIFICATE OF SERVICE

I hereby certify that copies of “CROW BUTTE RESPONSE TO OST PETITION FOR REVIEW” in the captioned proceeding have been served this 19th day of April 2019 via the Electronic Information Exchange (“EIE”), which to the best of my knowledge resulted in transmittal of the foregoing to all those on the EIE Service List.

/s/ signed electronically by _____
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