

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

LBP-23-01

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Michael M. Gibson, Chairman
G. Paul Bollwerk, III
Dr. Gary S. Arnold

In the Matter of

CROW BUTTE RESOURCES, INC.

(License Renewal for the
In Situ Leach Facility, Crawford, Nebraska)

Docket No. 40-8943

ASLBP No. 08-867-02-OLA-BD01

January 5, 2023

MEMORANDUM AND ORDER
(Granting Motion to Terminate Proceeding)

This proceeding regarding the renewal of the 10 C.F.R. Part 40 license of Crow Butte Resources, Inc. (CBR) for its Crawford, Nebraska in situ uranium recovery (ISR) facility currently is before the Atomic Safety and Licensing Board (the Board) pending disposition of the sole unresolved contested issue, i.e., Contention 1 (Consultation and Tribal Cultural Properties).

The Nuclear Regulatory Commission (NRC) Staff recently issued an environmental assessment (EA) supplement that addresses tribal cultural properties at the Crawford ISR facility. No new or amended contentions were filed challenging this EA supplement. Accordingly, on December 5, 2022, the NRC Staff moved to terminate the proceeding because no actual or potential disputed matters remain.¹ Of the other three parties to this proceeding, CBR responded with support for the motion, while Consolidated Intervenors stated they have no

¹ See NRC Staff's Motion to Terminate Proceeding (Dec. 5, 2022) at 1 [hereinafter Staff Termination Motion].

objection to the motion.² Intervenor Oglala Sioux Tribe (OST) declared that it takes no position on the grant or denial of the motion, but renewed its continuing subject matter jurisdiction objection to the proceeding, asserting that the United States, in the form of the NRC, has no authority to entertain or issue any permit or license to CBR to conduct activities on the land where the CBR ISR facility is located.³

For the reasons set forth below, we grant the NRC Staff's December 5, 2022 motion and terminate this proceeding.

I. BACKGROUND

The genesis of this proceeding was CBR's November 2007 application to renew its source materials license that authorizes CBR to operate its Dawes County, Nebraska ISR facility.⁴ OST and Consolidated Intervenors challenged various aspects of the CBR license application and were granted party status in this adjudicatory proceeding because they established standing and proffered at least one admissible contention.⁵ Several years later, the NRC Staff issued its October 2014 National Environmental Policy Act (NEPA)-related final EA addressing the CBR renewal application. OST and Consolidated Intervenors then submitted new and amended contentions challenging certain provisions of that EA. In March 2015, the Board ruled upon the admissibility of those nine contentions.⁶

² See id. at 1 n.1; see also Answer Supporting NRC Staff's Motion to Terminate Proceeding (Dec. 15, 2022) at 1 [hereinafter CBR Answer].

³ See Response of [OST] to NRC Staff's Motion to Terminate Proceeding (Dec. 15, 2022) at 12 [hereinafter OST Answer].

⁴ See Letter from Stephen P. Collings, President, CBR, to Charles L. Miller, Director, Office of Federal and State Materials and Environmental Management Programs, NRC (Nov. 27, 2007) transmitting and enclosing CBR's Application for Material License, NRC Form 313 (Nov. 26, 2007) (Agencywide Documents Access and Management System (ADAMS) Accession No. ML073470645).

⁵ See LBP-08-24, 68 NRC 691, 760 (2008), aff'd in part and rev'd in part, CLI-09-9, 69 NRC 331 (2009).

⁶ See LBP-15-11, 81 NRC 401, 449 (2015), petition for review denied, CLI-20-8, 92 NRC 255, 279 (2020) (Contention 1). Although the Commission dismissed OST's original

Among the nine admitted contentions, Contention 1 raised concerns with the EA's treatment of tribal cultural properties. The other eight admitted contentions were associated with site geology and hydrogeology, including well monitoring frequency and excursion indicators, surface water impacts, aquifer communication, and consumptive groundwater use impacts during aquifer restoration. In August and October 2015, the Board held two evidentiary hearing sessions on these nine contentions.⁷

In May 2016, the Board issued a partial initial decision dealing with the tribal consultation and cultural resources matters embodied in Contention 1.⁸ The Board resolved this contention in favor of OST and the Consolidated Intervenors, declaring that the NRC Staff's final EA failed to meet its identification obligations under the National Historic Preservation Act (NHPA) and failed to fulfill its NEPA responsibility to take the requisite "hard look" at cultural resources within the license area at the CBR facility.⁹ The Board further ruled that the NRC Staff was obligated to take appropriate action to cure the deficiencies, including possibly issuing a cultural resources-related EA supplement.¹⁰ The Board's second partial initial decision, issued in December 2016, addressed the balance of the admitted contentions, which concerned site geology and hydrogeology.¹¹ The Board ruled in favor of CBR and the NRC Staff on the site

Contention B concerning cultural resources and consultation as premature, see CLI-09-9, 69 NRC at 350-51, among the post-final EA new contentions submitted by OST and Consolidated Intervenors were several relating to cultural resources and consultation, which the Board admitted in part and combined into a single contention, designated as Contention 1, see LBP-15-11, 81 NRC at 411-15, 449.

⁷ See Tr. at 949-2375, 2404-640.

⁸ See LBP-16-7, 83 NRC 340 (2016), petition for review denied, CLI-20-8, 92 NRC at 279.

⁹ See id. at 411.

¹⁰ See id. at 414-15. The Board also concluded that the Staff had met its NHPA consultation obligations. See id. at 411.

¹¹ See LBP-16-13, 84 NRC 271 (2016), petition for review denied, CLI-18-8, 88 NRC 141 (2018).

geology and hydrogeology issues, with the exception of the ISR wastewater land application issue (Contention 12B).¹²

In rulings issued in November 2018, May 2019, and October 2020, respectively, the Commission denied Consolidated Petitioners' petition for review of the Board's findings on the site geology and hydrogeology contentions that the Board had resolved in favor of CBR and the NRC Staff, reversed the Board's determination regarding the ISR wastewater land application contention, and declined to take review of the Board's decision regarding Contention 1.¹³ Thus, as of October 2020, only Contention 1 was unresolved.

Previously, in January 2017 the NRC Staff had advised the Board and the parties that it would suspend its work relating to Contention 1 until the pending appeal before the Commission had been decided.¹⁴ But with the October 2020 Commission decision declining to take review of the Board's ruling regarding Contention 1, the NRC Staff again began working with CBR and OST to develop a methodology for a tribal cultural resources survey of the CBR license area.¹⁵ As outlined in the September 2021 methodology, the tribal survey would include a field investigation of the CBR site as supplemented by oral history interviews with tribal elders, historians, and spiritual advisors, and would culminate in a report the NRC Staff could use to prepare an EA cultural resources supplement identifying sites of historic, cultural, or religious

¹² See id. at 441.

¹³ See CLI-18-8, 88 NRC at 172 (denying Consolidated Intervenor's petition for review of LBP-16-13); CLI-19-5, 89 NRC 329, 343–44 (2019) (granting CBR petition for review, reversing Licensing Board's LBP-15-11 admission of Contention 12B, and making sua sponte determination that environmental record in this case satisfies NEPA with respect to ISR wastewater land application issues); CLI-20-8, 92 NRC at 279 (denying Crow Butte's petition for review of Contention 1).

¹⁴ See Letter from David M. Cylkowski, NRC Staff Counsel, to Licensing Board at 1 (Jan. 17, 2017).

¹⁵ See Letter from Marcia J. Simon, NRC Staff Counsel, to Licensing Board at 1 (May 3, 2021).

significance to OST.¹⁶ With funding provided by CBR, OST hired a cultural resources management (CRM) firm to assist in conducting the survey.¹⁷ The survey process included a four-week field investigation conducted over a six-week period in November and December 2021, oral history interviews of tribal elders during approximately the same time frame, and a report for the NRC Staff to use in preparing an EA supplement.¹⁸ Using the April 2022 final survey report, the NRC Staff conducted additional NHPA and NEPA analyses and prepared both a draft and final supplement to the 2014 EA.¹⁹ These supplements described the Staff's additional activities, analyses, and conclusions regarding cultural resources associated with the CBR site.

In June 2022, the NRC Staff provided OST with a preliminary draft of the EA supplement for review and comment.²⁰ After considering OST's initial comments, in August 2022 the NRC Staff issued a revised draft of the EA supplement and a draft finding of no significant impact

¹⁶ See Survey Methodology to Identify Sites of Historic, Cultural, and Religious Significance to [OST] for the [CBR ISR] Facility in Dawes County, Nebraska at 11–22 (Sept. 2021) (ADAMS Accession No. ML21252A074).

¹⁷ See Letter from Marcia J. Simon, NRC Staff Counsel, to Licensing Board at 1–2 (Oct. 1, 2021).

¹⁸ See Letter from Marcia J. Simon, NRC Staff Counsel, to Licensing Board at 1–2 (Nov. 1, 2021); Letter from Marcia J. Simon, NRC Staff Counsel, to Licensing Board at 1–2 (Dec. 1, 2021); Letter from Marcia J. Simon, NRC Staff Counsel, to Licensing Board at 1–2 (Jan 3, 2022).

¹⁹ See Letter from Marcia J. Simon, NRC Staff Counsel, to Licensing Board at 1 (May 1, 2022) .

Regarding the cultural resources survey methodology and process crafted by the parties and utilized in this proceeding, which included a CRM firm chosen by OST and retained using funding provided by CBR, OST counsel described it as “unique” and “somewhat of a model on how to proceed in other matters so that we have both NEPA compliance and [NHPA] compliance” while at the same time characterizing the NRC Staff's approach in creating the process as being “very cooperative and very patient with us.” Tr. at 3120. Given the result here, OST counsel's observations about the cultural resources methodology and process developed in this proceeding warrant serious consideration by the NRC Staff, license applicants, and Native American tribes or individuals for use in the future to achieve compliance with applicant and NRC NHPA and NEPA responsibilities.

²⁰ See Letter from Marcia J. Simon, NRC Staff Counsel, to Licensing Board at 1 (June 30, 2022).

(FONSI) for public review and comment.²¹ Finally, on October 25, 2022, the NRC Staff issued the final EA supplement, including an appendix addressing all comments received and an updated FONSI.²²

As the NRC Staff, CBR, and OST negotiated the methodology and implementation of the cultural resources survey, the parties apprised the Licensing Board about this process through the NRC Staff's monthly status reports and through a series of eight all-party status conferences.²³ Additionally, when the Board was informed in May 2022 that the draft EA supplement was nearing completion, it issued an order setting a briefing schedule for any new or amended contentions regarding the EA supplement and specified that any such contentions were to be filed within thirty days of the Federal Register publication of an agency notice of availability of the final EA supplement.²⁴ The Board reiterated this directive in a September 2022 issuance that also requested the NRC Staff to notify the Board and the parties of the ADAMS accession number of the final EA supplement contemporaneous with publication of the Federal Register notice of the final EA supplement's availability, which the Staff did on October 25, 2022.²⁵

When the November 25, 2022 deadline for filing new or amended contentions passed without a filing from either OST or the Consolidated Intervenors, the NRC Staff submitted the

²¹ See Letter from Lorraine Baer, NRC Staff Counsel, to Licensing Board at 1 (Aug 1, 2022).

²² See Letter from Marcia J. Simon, NRC Staff Counsel, to Licensing Board at 1 (Nov. 1, 2022) [hereinafter NRC Staff November 2022 Status Report].

²³ See, e.g., supra notes 15–16, 18–22; Tr. at 2681–3155.

²⁴ See Licensing Board Order (Establishing a Briefing Schedule for New and/or Amended Contentions) (May 12, 2022) at 1 (unpublished).

²⁵ See Licensing Board Order (Requesting Notice of Publication of Final [EA] and Public Availability of Party Comments on Draft [EA] Supplement) (Sept. 13, 2022) at 2 (unpublished); NRC Staff November 2022 Status Report at 1.

instant motion to terminate the proceeding, to which the other parties have responded as previously described.²⁶

II. DISCUSSION

Commission case law requires that once the last contention in a proceeding is resolved, the licensing board loses jurisdiction over the proceeding and the case must be terminated before the board.²⁷ Consistent with this authority, when all admitted contentions have been resolved, either through licensing board rulings or through party actions, and when there is no reasonable prospect that any new litigable issues will be timely raised, there is no basis for continuing the adjudicatory proceeding.²⁸ In responding to the Board's LBP-16-7 ruling, the NRC Staff adopted the October 25, 2022 final EA supplement on cultural resources and the associated FONSI related to the Crow Butte renewal application. This, combined with the lack of any new pending or amended contentions regarding tribal cultural resources (or any other matter), means that there is no unresolved contention (or the reasonable prospect of such a contention) for the Board to consider.

As noted previously, all parties to this proceeding either support, do not object to, or take no position regarding this NRC Staff motion.²⁹ OST does, however, reiterate its continuing subject matter objections regarding the proceeding, specifically disputing

²⁶ See supra notes 2–3 and accompanying text. Both the OST and CBR answers to the NRC's Staff's termination motion were timely filed in accordance with the Board's December 6, 2022 issuance establishing the date for any answers to that NRC Staff filing. See Licensing Board Order (Providing Deadline for Replies to Motion to Dismiss) (Dec. 6, 2022) at 2 (unpublished).

²⁷ See Va. Elec. Power Co. d/b/a/ Dominion Va. Power and Old Dominion Elec. Coop. (North Anna Power Station, Unit 3), CLI-12-14, 75 NRC 692, 699–701 (2012) (finding licensing board decision to hold proceeding open after all contentions had been dismissed was reversible error).

²⁸ See id. Whether a different result might follow in the face of a licensing board's consideration of whether the record before the board justifies Commission referral of a sua sponte issue pursuant to 10 C.F.R. § 2.340(a)(1) is not a matter we need address here as that is not the circumstance before the Board.

²⁹ See supra pp. 1–2.

the authority of the United States by its [NRC] to entertain or issue any permit or license to [CBR] or any other entity or person to conduct any activity upon the Unceded Lands of the 1868 Ft. Laramie Treaty or the territory of the 1868 and 1851 Ft. Laramie Treaties without the prior consent of OST and the Oceti Sakowin Oyate.³⁰

As CBR points out, however, these claims were previously rejected by both the Board and the Commission.³¹

We thus conclude that, lacking any unresolved admitted contentions, this proceeding must be terminated.

III. ORDER

There being no further matters relating to the CBR license renewal application pending for adjudication before this Licensing Board, the NRC Staff's December 5, 2022 motion to terminate this proceeding is granted and this proceeding is terminated.

In accordance with 10 C.F.R. § 2.341(a)(2), this ruling will constitute a final agency decision 120 days from the date of issuance, absent a Commission order extending the

³⁰ OST Answer at 2.

³¹ See CBR Answer at 2 nn.4–5 (citing LBP-08-24, 68 NRC at 712; CLI-09-09, 69 NRC at 337).

time for Commission sua sponte review or the filing of a petition for review pursuant to section 2.341(b).

It is so ORDERED.

THE ATOMIC SAFETY
AND LICENSING BOARD

/RA/

Michael M. Gibson, Chairman
ADMINISTRATIVE JUDGE

/RA/

G. Paul Bollwerk, III
ADMINISTRATIVE JUDGE

/RA/

Dr. Gary S. Arnold
ADMINISTRATIVE JUDGE

Rockville, Maryland

January 5, 2023

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of)
)
CROW BUTTE RESOURCES, INC.) Docket No. 40-8943-OLA
)
In-Situ Leach Uranium Recovery Facility,)
Crawford, Nebraska)
)
(License Renewal))

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **MEMORANDUM AND ORDER (Granting Motion to Terminate Proceeding) (LBP-23-01)** have been served upon the following persons by Electronic Information Exchange, and by electronic mail as indicated by an asterisk.

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DOCKET NO. 40-8943-OLA

**MEMORANDUM AND ORDER (Granting Motion to Terminate Proceeding)
(LBP-23-01)**

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Dated at Rockville, Maryland,
this 5th day of January 2023.