UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of:	)	
	)	Docket No. 40-8943
CROW BUTTE RESOURCES, INC.	)	
	)	ASLBP No. 08-867-02-OLA-BD01
(License Renewal)	)	

PETITION FOR REVIEW OF LBP-15-11 AND LBP-16-07

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INTRODUCTION

Under 10 C.F.R. §§ 2.341(b)(1) and (4), Crow Butte Resources, Inc. ("Crow Butte") requests that the Commission grant review of the Licensing Board Memorandum and Order (LBP-15-11), dated March 16, 2015, insofar as it admitted Contention 1, and the Partial Initial Decision (LBP-16-07), which resolved Contention 1 in favor of the Oglala Sioux Tribe ("OST"). Contention 1 was untimely and never should have been admitted. Compounding the initial error, the Licensing Board misapplied Commission precedent and ignored NEPA's "rule of reason" in resolving Contention 1 in favor of the intervenors.

STATEMENT OF THE CASE

Crow Butte filed its license renewal application in November 2007. Nearly seven years later, in October 2014, the NRC Staff issued its final Environmental Assessment ("EA"). The parties filed initial written testimony in May 2015, and the Board held an oral evidentiary hearing in August 2015, followed by a second evidentiary hearing in October 2015.[1] The Board

[1] Under the model milestones, the evidentiary hearing would have been held in April 2015.

issued its partial initial decision on Contention 1 on May 26, 2016.[2] The Licensing Board's decision in LBP-16-07 means that now, after more than eight years, the NRC Staff's consideration of cultural resource impacts is back to square one. This is the wrong outcome, and an unnecessary one. As a result, the excessive and costly process for the second renewal of Crow Butte's existing license continues with no end in sight.

As discussed in this petition for review, contrary to the Licensing Board's decision, the NRC Staff fully complied with the National Historic Preservation Act ("NHPA") and NEPA. The NRC Staff made substantial (and repeated) efforts to obtain information on traditional cultural properties ("TCPs") from multiple sources, including the Oglala Sioux Tribe ("OST"), other intervenors, and the public. The NRC Staff extensively engaged OST in its efforts to identify potential cultural resources, including through letters and emails, multiple meetings, and government-to-government communications. The NRC Staff supplemented these efforts with literature reviews, field visits, discussions with local experts, and archeological surveys. The NRC Staff filed a notice on the adjudicatory docket and provided the parties a specific opportunity to comment on draft NEPA documentation of cultural resource impacts. And, in the final EA,[3] the NRC Staff identified TCPs and assessed potential impacts on them from Crow Butte's operations. These efforts more than satisfy the NHPA "reasonable effort" and NEPA "hard look" standards—particularly since the renewed license does not authorize any new or different activities and Crow Butte has no plans for further ground disturbing activities at the site.

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[2] The Board projects issuing its final decision on the remaining admitted contentions (Contentions A, C, D, F, 6, 9, 12, and 14) no later than December 30, 2016—that is, more than two years after issuance of the final EA.

[3] *Final Environmental Assessment for the License Renewal of U.S. Nuclear Regulatory Commission License No SUA-1534*, dated November 2014 (Ex. NRC-101) ("EA").

The Board faults the NRC Staff for not going further—specifically, for not utilizing unspecified experts in Lakota culture and TCPs—and repeatedly suggests that the NRC Staff may identify TCPs within the license area only through a "new field investigation."[4] But, the NRC Staff did develop information on Lakota TCPs, and there is no requirement in NHPA or NEPA that the NRC Staff, the applicant, or OST conduct a new field investigation. Regardless, any deficiencies in the NRC Staff's assessment of Lakota TCPs—and none were identified at the hearing—resulted not from inaction on the Staff's part, but from the tribe's refusal to participate in field surveys or provide comments on the draft NRC Staff evaluation of cultural resources. At the hearing, the OST witness stated that conducting a "proper TCP survey" would take "a couple [of] years" and involve multiple visits to the area in different seasons or ceremonies performed by tribal elders.[5] Yet, OST did not submit a TCP survey proposal when requested by the NRC Staff, did not avail themselves of the opportunity to conduct an on-site TCP survey when given the chance, and did not comment on the draft EA.

It is well established under NEPA that there will always be more data that could be gathered, but that nonetheless the NRC at some point must draw the line and move forward with decisionmaking. This "rule of reason" is of particular importance where the complaining party has refused to join in efforts to identify cultural resources. OST's lack of good-faith participation wasted the time of the parties, the judges, and the Commission, while unnecessarily running up the NRC's bill.[6] There should be no reward for recalcitrance in the face of the NRC

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4 LBP-16-07 at 70; *see also id*. at 68, 71, 83.

5 Tr. at 2274-76.

6 To date, the NRC Staff has charged Crow Butte at least $294,000 in fees associated with the NRC Staff's cultural resources review. This is a shockingly large fee for the second renewal of a license for an existing facility that does not anticipate any additional land-disturbing activities. It is also evidence of a consultation process that has run adrift.

Staff's sincere efforts to solicit information on TCPs and analyze cultural resource impacts in the EA. The Commission must take review and reverse the Board decisions on cultural resources in LBP-15-11 and LBP-16-07 to restore the integrity of the NHPA and NEPA processes.

STANDARD FOR REVIEW

Under 10 C.F.R. § 2.341(b)(4), the Commission may, in its discretion, grant a petition for review of a full or partial initial decision, giving due weight to the existence of a "substantial question" with respect to the following considerations:

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

As discussed below, this petition for review meets this standard for both the initial decision to admit Contention 1 in LBP-15-11 and the subsequent decision on the merits in LBP-16-07.

Despite lower grade deposits and higher costs, part of the rationale for continuation of mining uranium in the United States is a predictable and sound regulatory process. It seems that rationale may no longer exist. It is imperative that the Commission promptly reverse the Board decision in LBP-15-11 and LBP-16-07 to restore an appropriate and rational scope to the NHPA and NEPA processes.

DISCUSSION

A. Contention 1 Was Untimely

Contention 1 never should have been admitted.[7] In finding Contention 1 to be timely, the Board incorrectly applied the timeliness criteria in 10 C.F.R. §§ 2.309(f)(2) and (c). The Board found proposed Contention 1 timely because it was filed within 30 days of the final EA—even though the exact same information, analysis, and conclusions on cultural resources had been available to the intervenors for more than a year prior to publication of the final EA. According to the Board, the intervenors "were to wait until the publication of the EA before proffering any NEPA-related new contentions, as long as the new contentions were based on data or conclusions not available at the time of the [License Renewal Application ("LRA")]."[8] The Board read 10 C.F.R. § 2.309(c)(1) out of the regulation.

1. Contentions Must Be Filed When Information First Becomes Available

A contention must be based on the application or other documents available at the time the hearing request and petition to intervene is filed.[9] Section 2.309(f)(2) provides that intervenors may file a new environmental contention after the initial deadline—for example, based on a draft or final NRC review document—but only if the contention complies with 10

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7 In CLI-15-17, the Commission denied Crow Butte's petition for interlocutory review of the Board decision admitting Contention 1 after noting that other admitted contentions were already pending. Because the Board now has resolved Contention 1, Crow Butte's petition for review of the decision to admit Contention 1 is ripe.

8 LBP-15-11 at 26.

9 10 C.F.R. § 2.309(f)(2); *Private Fuel Storage, LLC* (Independent Spent Fuel Storage Installation), LBP-00-27, 52 NRC 216, 223 (2000) (time to submit contentions tolls when the information on which the contention is based first becomes available, not publication of an NRC Staff NEPA review document).

C.F.R. § 2.309(c)(1). Under 10 C.F.R. § 2.309(c)(1), new or amended contentions may not be filed after the initial deadline unless the intervenor demonstrates 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.

The criteria in sections 2.309(f)(2) and (c)(1) reflect the Commission's longstanding policy that a petitioner has an "iron-clad obligation to examine the publicly available documentary material … with sufficient care to enable it to uncover any information that could serve as the foundation for a specific contention."[10] The finding of good cause for late-filing of contentions is related to the total previous unavailability of information.[11] New or amended contentions must be based on new facts not previously available.[12] Documents merely summarizing earlier documents or compiling pre-existing, publicly available information into a single source do not render "new" the summarized or compiled information.[13]

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10 *Sacramento Municipal Utility District* (Rancho Seco Nuclear Generating Station), CLI-93-3, 37 NRC 135, 147 (1993); *see also Shaw Areva MOX Services, LLC* (Mixed Oxide Fuel Fabrication Facility), CLI-09-2, 69 NRC 55, 65 n.47 (2009).

11 *Philadelphia Elec. Co.* (Limerick Generating Station, Units 1 and 2), LBP-83-39, 18 NRC 67, 69 (1983).

12 *Entergy Nuclear Generation Co. and Entergy Nuclear* (Pilgrim Nuclear Power Station), CLI-12-10, 75 NRC 479, 493 n.70 (2012) (emphasis in original).

13 *See Northern States Power Co.* (Prairie Island Nuclear Generating Plant, Units 1 and 2), CLI-10-27, 72 NRC 481, 493-96 (2010) (finding that a contention based on pre-existing information compiled in a safety evaluation report was untimely).

2. The Board Applied the Incorrect Standard In Assessing the Timeliness of Proposed Contention 1

At the outset, the Board incorrectly summarized the applicable regulatory requirements. The Board began by stating that a timely filing of an intervenor's challenge to the adequacy of the NRC Staff's environmental review "is generally triggered by the release of a NEPA document."[14] The Board also cited a Commission decision for the proposition that the NRC Staff's first attempt to analyze a NEPA issue gives rise to an intervenor's "first opportunity to raise contentions on the adequacy of this assessment."[15] According to the Board, the Commission explained that intervenors "were to wait until the publication of the [final] EA before proffering any NEPA-related new contentions, as long as the new contentions were based on data or conclusions not available at the time of the LRA."[16] The Board therefore wrongly reasoned that the intervenors could (indeed, must) wait until the final EA to raise new environmental contentions—even when the only data and information on which the contention

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14 LBP-15-11 at 7.

15 *Id*. at 8, citing *Pac. Gas & Elec. Co.* (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), CLI-08-1, 67 NRC 1, 6 (2008). In *Diablo Canyon*, the intervenor filed its environmental contention following release of the NRC Staff's draft revised environmental assessment supplement, which was the first document—applicant or NRC Staff—assessing the likelihood and consequences of a terrorist attack. In contrast, OST did not file its contention challenging the NRC Staff's cultural resource assessment until after issuance of the final EA—despite the LRA's reliance on earlier archeological surveys and the availability of the NRC Staff's draft cultural resources assessment more than a year prior to the final EA.

16 LBP-15-11 at 26. The Board also stated that:

> Intervenors had no obligation to proffer new or amended environmental contentions to challenge information in the SER, which concerns safety findings. Instead, Intervenors were constrained to await the issuance of the EA, which came out shortly thereafter, as the triggering event for filing new or amended environmental contentions.

Id. at 27 (emphasis in original) (internal citations omitted).

was based had been included in either the LRA or the publicly-available draft of the cultural resources section of the EA.[17] The Board's formulation of the timeliness requirements is not supported by the language of the regulation or Commission precedent.[18]

First, the Board's interpretation of the timeliness provisions ignores the plain language of the regulation. Conspicuously absent from the Board's decision was any recognition of the regulatory language that expressly requires a new or amended contention—even one based on a NEPA document—to "compl[y] with the requirements in paragraph (c) of this section."[19] Instead, the Board reasoned only that the contention was timely because it was filed within 30 days of the final EA—without any consideration of whether the contention was based on new and materially different information or was filed promptly once the new information became available.[20] The Board's approach nullifies the clear language and intent of the regulations.

Second, the Board's formulation of the timeliness criteria allowed intervenors to "lie in wait" until the NRC Staff issued its final EA before raising contentions. The Commission's timeliness standards aim to avoid precisely this result. As the Commission has recognized, there simply would be "no end to NRC licensing proceedings if petitioners could

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17 In LBP-15-11 note 36, the Board incorrectly stated that, because the NRC Staff did not publish a draft EA, there was no prior opportunity to file new contentions. As discussed *infra*, the NRC Staff in fact had published the draft cultural resources assessment for comment in September 2013.

18 Crow Butte specifically highlighted the Commission's timeliness criteria during oral argument on the proposed contentions. *See* Tr. at 752-756; *but see id*. at 752-753 (JUDGE ROSENTHAL: "I mean, that's what I thought the scheme was, but you're saying, no, that they've got to keep track of whatever the staff issues. And if they have a problem with that, they've got to move then. They can't wait until the end of the process."). The NRC's rules contemplate exactly that obligation.

19 10 C.F.R. § 2.309(f)(2).

20 LBP-15-11 at 15-16. That was the extent of the timeliness analysis for proposed Contentions 1 and 2.

disregard [the] timeliness requirements and add new contentions at their convenience during the course of a proceeding based on information that could have formed the basis for a timely contention at the outset of the proceeding"—a prophesy borne out by the procedural history in this too-lengthy proceeding.[21] Even the "institutional unavailability of a licensing-related document [(*e.g.*, a final EA)] 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."[22] It therefore is not the availability of a final EA that is the trigger for a timely contention, but rather the availability of the information upon which the contention is based—in this case, the LRA and the NRC Staff's draft cultural resources assessment.[23]

Third, the intervenors did not address the timeliness of their proposed cultural resources contentions. They never cited 10 C.F.R. § 2.309(f)(2) or 10 C.F.R. § 2.309(c)(1). And, they never claimed that their contentions were based on new or different information than that available previously, or that their contentions were timely filed based on the availability of that information. To the extent that proposed Contention 1 disputed the adequacy of the final

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21 *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-09-7, 69 NRC 235, 271-272 (2009) (footnotes, internal quotation marks, and citations omitted). As discussed further *infra*, the intervenors did not dispute the cultural resources identified in the LRA, nor did they dispute the NRC Staff's draft cultural resources assessment. Had they done so, the NRC Staff and Crow Butte would have had an opportunity to address their concerns during the review process.

22 *Duke Power Co.* (Catawba Nuclear Station, Units 1 & 2), CLI-83-19, 17 NRC 1041, 1048 (1983).

23 *See Entergy Nuclear Vermont Yankee, L.L.C.* (Vermont Yankee Nuclear Power Station), LBP-06-14, 63 NRC 568, 573, 579-80 (2006) (rejecting attempt to "stretch the timeliness clock" where new contentions were based on information that was previously available and it failed to identify precisely what information was "new" and "different").

EA's identification of cultural resources or TCPs,[24] the contention should have been based on the LRA. Section 2.4.1 of the LRA (Exh. CBR-011 at 2-49 to 2-56) summarizes the results of two prior Class III field investigations by Bozell and Pepperl (Exhs. CBR-027 and CBR-028). The intervenors therefore should have raised any concerns regarding the adequacy of those surveys or the identification of TCPs at that time.[25] Yet, in assessing timeliness of Contention 1, the Board stated only:

> In 2008 the Board admitted a cultural resources consultation contention, but on appeal the Commission ruled that the contention was not yet ripe for adjudication. The Commission, however, stated that the NRC Staff's fulfilment of its National Historic Preservation Act (NHPA) obligations could form the basis for a new contention, and that new contentions are "usually considered timely if filed within 30 days of publication" of a NEPA document. Accordingly, contentions 1 and 2 were timely filed.[26]

There are two problems with this conclusion beyond the failure to base the contention on the cultural resources identified in the LRA. As the NRC Staff explained in the EA (at 87), it posted a draft cultural resources assessment on the NRC's public website on

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[24] The Board bifurcated Contention 1 into two primary issues: (1) the NRC's Staff identification obligations; and (2) the NRC Staff's consultation obligations. The Board found for the intervenors only with respect to the NRC Staff's identification of cultural resources.

[25] Significantly, OST's original contention challenged NRC compliance with NHPA consultation requirements (an NRC Staff procedural responsibility), not the adequacy of Crow Butte's identification of cultural resources (a substantive topic addressed in the LRA). Because the original contention focused only on consultation, the Commission found it premature. In evaluating proposed Contentions 1 and 2, the Board never even acknowledged this history, instead making a blanket finding of timeliness based only on the final EA. The Board simply ignored the fact that the LRA had previously identified cultural resources. The Commission recently noted a similar deficiency in a Board analysis of timeliness. *See Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 and 3), CLI-16-10, __ NRC __ (slip op. June 2, 2016) at 33 (noting that contentions must be based on draft NEPA documents, where the same information is available in both the draft and final NEPA document).

[26] LBP-15-11 at 15-16 (internal citations omitted).

September 30, 2013, and requested public comment.[27] And, the NRC Staff provided a specific notice of the availability of this information to the parties in this proceeding, including OST.[28] The website and comment solicitation included the NRC Staff's basis for NHPA compliance and the cultural resource evaluation in the final EA.[29]

Indeed, the information in the NRC Staff's 2013 draft consultation documents—including the description of the consultation process, the assessment of previously-identified cultural resources, reliance on prior surveys, review of TCPs and TCP surveys, and the overall conclusion—is the same as that later incorporated into the EA. The table below compares the draft and final evaluations of TCPs, which were the focus of the Board's analysis in LBP-16-07:

Draft Cultural Resources Evaluation at 11 (September 2013)	**Final EA Cultural Resources at 56-57 (November 2014)**
In addition to the previously recorded archaeological sites within the Crow Butte APE that were evaluated as having a Native American cultural affiliation, other potential places of cultural significance are located in the vicinity of the Crow Butte APE. The preliminary identification of these potential TCPs comes from the Tribal information-gathering meeting, supplemented by literature searches: • Crow Butte—The Crow Butte itself is located about 0.5 miles east of the CBR project area. Crow Butte was the site of a legendary 1849 battle between	In addition to the previously recorded archaeological sites within the Crow Butte APE that were evaluated as having a Native American cultural affiliation, other potential places of cultural significance are located in the vicinity of the Crow Butte APE. The identification of these potential TCPs comes from the tribal information-gathering meeting held in June 2011, supplemented by literature searches: • Crow Butte—The Crow Butte itself is located about 0.5 miles east of the CBR project area. Crow Butte was the site of a legendary 1849 battle between

27 The information was posted at http://www.nrc.gov/info-finder/materials/uranium/licensed-facilities/crow-butte/section-106-license-renewal-docs.html.

28 *See* NRC Staff Letter to ASLB, dated October 1, 2013 (ADAMS Accession No. ML13274A631) (notifying the Board and the parties that the Staff had published on the NRC website information related to its cultural resources evaluation under Section 106).

29 "Crow Butte In-Situ Uranium Recovery Facility License Renewal National Historic Preservation Act of 1966, As Amended, Consultation" (ADAMS Accession No. ML13260A566).

members of the Lakota and the Crow Tribes. Although exact details of the event differ in accounts over time, it is well remembered through Native American memory and by non-Indians as well (Cross 1916; Hanson and Wyatt 2009). • Vision Quest Sites—A long ridge adjacent to Crow Butte was used in earlier years as a place that young Lakota men went to for vision quests. This locale would be about 1 mile east of the CBR project area. • Medicinal Herbs—According to Tribal representatives at the information-gathering meeting, unspecified herbs used in traditional medical practices to treat ailments such as headache, stomachache, and arthritis grow on the CBR project area and around Crow Butte. Tribal members believe these herbs do not grow elsewhere. • Cultural Landscape—The general region in which the CBR In-Situ Uranium Recovery Facility and appurtenant well fields are located is steeped in history, especially during the period of Fort Robinson and the Red Cloud Agency (1873–1877) and the Great Sioux War (1876–1877). For Native Americans, the CBR project area and the surrounding area includes land involved in the 1851 and 1868 Fort Laramie Treaties, having been traditionally occupied by various Lakota bands of the Great Sioux Nation. Oglala Lakota Chief Little Wound (ca. 1835–1899) is said to have camped around Crow Butte during that time. During the Red Cloud Agency era, other Tribes were brought to and occupied this general area as well, including Arapaho and Northern Cheyenne people.	members of the Lakota and the Crow Tribes. Although exact details of the event differ in accounts over time, it is well remembered through Native American memory and by non-Indians as well (Cross 1916; Hanson and Wyatt 2009). • Vision Quest Sites—A long ridge adjacent to Crow Butte was used in earlier years as a place that young Lakota men went to for vision quests. This locale would be about 1 mile east of the CBR project area. • Medicinal Herbs—According to Tribal representatives at the information-gathering meeting, unspecified herbs used in traditional medical practices to treat ailments such as headache, stomachache, and arthritis grow on the CBR project area and around Crow Butte. Tribal members believe these herbs do not grow elsewhere. • Cultural Landscape—The general region in which the CBR In Situ Uranium Recovery Facility and appurtenant well fields are located is steeped in history, especially during the period of Fort Robinson and the Red Cloud Agency (1873–1877) and the Great Sioux War (1876–1877). For Native Americans, the CBR project area and the surrounding area includes land involved in the 1851 and 1868 Fort Laramie Treaties, having been traditionally occupied by various Lakota bands of the Great Sioux Nation. Oglala Lakota Chief Little Wound (ca. 1835–1899) is said to have camped around Crow Butte during that time. During the Red Cloud Agency era, other Tribes were brought to and occupied this general area as well, including Arapaho and Northern Cheyenne people.

As a result, the information on which the proposed contention was based, and the conclusions it challenged, were available at least as early as September 30, 2013—that is, more than one year prior to the final EA, which was published in November 2014.

The Board's reliance on the earlier Commission decision in this proceeding is misplaced. While the Commission previously found that OST's Environmental Contention B, which related to NHPA procedural compliance, was not ripe because the NHPA consultation obligations apply only to federal agencies (not to private applicants), the Commission never indicated that a contention on NEPA issues could only become ripe upon issuance of the final EA.[30] Nothing in the Commission's decision should be read to suggest that intervenors can wait until the final EA is published to file new substantive—as opposed to procedural compliance—contentions, particularly where cultural resources were identified in the LRA and when intervenors were specifically notified in the interim of the availability of the NRC Staff's draft cultural resource assessment.

In the end, the Board's sole focus on the final EA as the trigger for new cultural resource contentions—rather than the LRA, the draft EA documentation, or the availability of new and materially different information—is contrary to longstanding Commission assessments of timeliness. New contentions must be based on new facts not previously available,[31] and documents, like the final EA here, that merely compile pre-existing, publicly available

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30 *See* CLI-09-09 at 24 (noting that the Commission's rules of procedure explicitly allow the filing of new contentions on the basis of the draft or final environmental impact statement where that document contains information that differs "significantly" from the information that was previously available). This focus on significantly different information is especially important when, as noted *supra*, OST's initial contention was focused only on consultation requirements, not the LRA's identification of cultural resource impacts.

31 *Pilgrim*, CLI-12-10, 75 NRC at 493 n.70 (emphasis in original).

information (*e.g.*, the LRA and the draft cultural resource assessment) do not render "new" the summarized or compiled information.[32] There simply is no excuse for the intervenors' tardiness where, as here, the information that formed the basis for the contention was publicly available on the NRC docket for more than a year prior. The Board therefore erred in finding Contention 1 timely. The Commission should reverse LBP-15-11 to the extent that it admitted Contention 1.

B. The Final EA Satisfies the NHPA and NEPA

Should the Commission find that Contention 1 was timely, the Commission nevertheless should reverse the Board decision in LBP-16-07 resolving Contention 1 in favor of OST. The Board found that "the NRC Staff's TCP survey of the Crow Butte License area did not meet its Identification Obligations under the NHPA" and that, as a result, "the EA is deficient under NEPA because it fails to take a 'hard look' at potential TCPs within the Crow Butte License area, including failing to analyze the objections raised by the tribes with respect to the inadequacy of the open site TCP survey."[33] However, the NRC Staff reviewed prior Class III archeological survey data, performed supplemental literature reviews, led field trips and meetings with OST and others, solicited information on TCPs from OST and others, and issued the draft EA for comment, including its draft assessment of TCPs. These efforts satisfy the NRC Staff's obligations under both NHPA and NEPA. The NRC Staff evaluation is not inadequate simply because the Board can articulate additional actions that it thinks could be taken.

Moreover, OST never voiced its concerns with the open site approach during the NRC Staff's NHPA and NEPA reviews, instead raising that concern for the first time after-the-

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32 *Entergy Nuclear Vermont Yankee, L.L.C. and Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), CLI-11-2, 73 NRC 333, 344 (2011).

33 LBP-16-07 at 96-97.

fact (and even then, only obliquely).[34] OST's complaints about the open site approach, had they been raised following issuance of the draft EA, could have been addressed by the NRC Staff. But, the NRC Staff cannot address an issue that it is not aware of until the parties file testimony. Ultimately, the NRC Staff should not be faulted for finally deciding—after years of efforts and delay, caused at least in part by OST's refusal to consult or provide comments—to document its cultural resources evaluation in the final EA. Indeed, under the NEPA "rule of reason," an agency has discretion to "draw the line and move forward with decisionmaking," notwithstanding that there "will always be more data that could be gathered."[35]

1. The NRC Staff Undertook Extensive Efforts To Identify Cultural Resources

The NRC Staff's efforts to identify cultural resources were exhaustive and satisfy NHPA and NEPA. For the EA's cultural resource analysis, the NRC Staff began with the Class III field inventories performed for the original license application.[36] The NRC Staff reviewed those for completeness, including extent of coverage, site file and literature searches, resource identification, and evaluations.[37] Given the time that had elapsed since the original identification

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34 In proposed Contentions 1 and 2, OST complained that they were invited to do their own TCP's at their own cost, but did not specifically take issue with the open site approach itself. *See* "The Oglala Sioux Tribe's Renewed and New Contentions Based on the Final Environmental Assessment (October 2014)," dated January 5, 2015, at 14-40.

35 *Town of Winthrop v. Federal Aviation Administration*, 535 F.3d 1, 12-13 (1st Cir. 2008). A NEPA document is not a "research document," reflecting the frontiers of scientific methodology, studies and data. *Id*.

36 These are the Bozell & Pepperl surveys. Exhs. CBR-027 and CBR-028. Class III surveys are widely accepted for NHPA compliance. *See, e.g.*, *Southern Utah Wilderness Alliance v. Norton*, 326 F.Supp.2d 102 (D.D.C. 2004) (finding a Class III survey, combined with appropriate mitigation measures, satisfies the NHPA). And importantly, the intervenors' witness, Dr. Redmond, stated during the hearing that he did not contest the qualifications of Bozell and Pepperl or the conclusions of their report. Tr. at 988-989.

37 Exh. NRC-076-R2 at 59-60.

and evaluation, the NRC Staff conducted an assessment of the current status of these resource sites through a field visit to evaluate their current physical condition. Recognizing that the original license application and environmental reviews may not have adequately addressed known or potential places of religious or cultural significance for tribes, the NRC Staff also took further action to ensure that it met its obligations under the NHPA and NEPA.

First, the NRC Staff completed literature reviews to: (1) identify historic-period Tribes that traditionally occupied or used the Nebraska Panhandle region, and (2) identify potential places or resources of religious or cultural significance that could occur within the area of potential effect ("APE") or in close proximity.[38] Next, because the Lakota ancestors of the modern-day Tribes of the Rosebud, Standing Rock, Pine Ridge (Oglala), Crow Creek, Lower Brule, Cheyenne River, and Fort Peck Sioux Reservations were the traditional occupants of the area, the NRC Staff gave special emphasis to potential Lakota places of significance, especially for the nearby OST. To identify potential Lakota places or resources of religious or cultural significance, the NRC Staff performed supplemental literature searches and conducted interviews with local experts in the history and ethnohistory of the area (Exh. NRC-051A at 3; Exh. NRC-051C at 6-8). According to the NRC Staff, this analysis revealed the presence of several potential places of tribal importance in the vicinity of the project area, but none within the APE.

Second, the NRC Staff also gathered information directly from Lakota experts, including the OST Tribal Historic Preservation Officer, during a 2011 field visit to the project area (Exh. NRC-050). During the field visit, the Oglala Sioux representatives noted the presence of nearby buttes, which are outside the APE, as earlier vision quest places (Ex. NRC-010 at 56-

[38] *Id*.

57, 73; Exh. NRC-076-R2 at 61), and observed that some medicinal plants of importance to the Oglala Sioux could grow within the APE (Ex. NRC-050 at 7-9). Because of its prominence and close proximity to the project area, the NRC Staff considered the Crow Butte geologic feature as a potential TCP even though the feature has not been recorded or evaluated as a place of Tribal significance or nominated for listing on the National Register as a TCP. The NRC Staff also considered the vision quest site and medicinal plants identified by the OST experts as potential TCPs in the draft and final EA (Ex. NRC-010 at 56-57).

Third, nothing in NHPA or NEPA mandates participation by tribal members or their representatives in field investigations. Nor do the statutes give potentially affected tribes the right to dictate the scope of the NRC Staff's investigation. But in any event, OST refused to participate in efforts to develop a supplemental field survey and declined an offer conduct its own investigation of the project area. As the Board noted, the NRC Staff asked OST to submit a draft "statements of work" that would reflect its concept for conducting a TCP survey.[39] To develop a final statement of work, the NRC Staff held three teleconferences with members of local tribes on April 9, August 21, and August 24, 2012. And, on October 31, 2012, the NRC Staff invited the Indian tribes to participate in an open site TCP survey to be conducted in November 2012. OST did not participate, nor did they discuss any misgiving regarding the use of the open site approach with the NRC Staff at that time.[40] According to Mr. Yellow Thunder,

[39] LBP-16-07 at 47.

[40] *Id*. at 53.

instead of explaining the Tribe's concerns, OST representatives refused to work with the NRC Staff.[41]

After taking into account all of the above, the NRC Staff documented its analysis in a draft assessment that it published on its website. The NRC Staff specifically notified the parties in this proceeding of the availability of the draft assessment and requested comments. No parties filed comments alleging a deficient assessment. The NRC Staff subsequently finalized the EA, which reached the same conclusions as the draft assessment of cultural resources. These efforts collectively reflect a reasonable effort to identify cultural resources and represent a "hard look" at cultural resources.

Although recognizing that it cannot direct the actions of the NRC Staff, the Board nevertheless suggests that compliance with NHPA and NEPA requires a "new" field investigation.[42] However, there is nothing in the statute or regulations establishing such a prescriptive requirement. Neither the NHPA nor the Advisory Council on Historic Preservation ("ACHP") implementing regulations automatically require the NRC Staff to conduct a survey of the entire license area.[43] And, because Crow Butte is not proposing any new land-disturbing

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41 Tr. at 2171–72. Mr. Yellow Thunder testified that "[w]e were merely listening and not participating to develop" the TCP survey. *Id*. at 2171. He added that at some point "we refused to participate in any more conference calls." *Id*. at 2172-73.

42 The Board cites (LBP-16-07 at 37), as an example, a statement of work prepared for the Dewey-Burdock application for a TCP survey that would cover the approximately 2700-acre project at a cost of more than $800,000. Exh. BRD-022. The Crow Butte site is approximately 3300 acres, suggesting a cost of at least that much, for a survey that would duplicate previous ones—despite there being no plans for further ground disturbance.

43 *See Wilson v. Block*, 708 F.2d 735, 754 (D.C. Cir. 1983) ("[T]he [ACHP] regulations do not expressly require agencies in all cases completely to survey impact areas, and in fact recognize that the need for survey will vary from case to case."); *National Indian Youth Council v. Watt*, 664 F.2d 220, 228 (10th Cir. 1981) (upholding partial survey because "the argument that a complete survey must be made of 40,000 acres before mining begins on eight acres borders on the absurd").

activities and existing mitigation and avoidance measures remain in place, there is no change in the *status quo* that might otherwise warrant a new field investigation.[44] In light of the previous Class III survey and the NRC Staff's reconsideration and supplementation of that information during its environmental evaluation, a new field investigation would be wasteful and unnecessary. The Board's decision wrongly sets a new standard for NHPA and NEPA compliance that is unsupported by the statutes or implementing regulations.

2. The NRC Staff Did Not Overlook Any TCPs

Despite the best efforts of the NRC Staff, the Board found that the Staff did not meet its obligations to identify TCPs. The Board stated that, while the Bozell and Pepperl Class III survey "was a good start," it fails to satisfy the NHPA's requirement to identify and protect Indian-origin historic properties,[45] even when combined with the NRC Staff's literature reviews, informal meetings, and information gathered from OST representatives in 2011. Yet, there is absolutely no information in the record indicating that the NRC Staff overlooked or ignored any potential cultural resources, including TCPs. OST has not identified a single historic site or TCP that the NRC Staff is alleged to have overlooked in the EA.

For example, the Board gave great weight to statements by OST witnesses that the area was "utilized by the Sioux as an encampment during the period of forced removal by the

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[44] *See Wilderness Society v. U.S. Bureau of Land Management*, 822 F.Supp.2d 933 (D. Ariz. 2011), *aff'd sub nom*. *Wilderness Soc. v. Bureau of Land Management*, 526 Fed.Appx. 790 (9th Cir. 2013) (holding that BLM's reliance on prior data was acceptable since a new management plan did not alter the land use in question); *Southern Utah Wilderness Alliance v. Burke*, 981 F.Supp.2d 1099, 1108 (D. Utah 2013) (finding Class I surveys to be inadequate, and requiring a Class III survey, where there was a change in the *status quo*).

[45] LBP-16-07 at 83. This statement underscores the untimely nature of Contention 1. The LRA's assessment of cultural resources relied on the Bozell and Pepperl surveys. If the intervenors had concerns with the adequacy of those surveys to identify archeological or historic properties within the license area, they should have been raised at that time.

United States . . . and the 'sign or starve' treatymaking tactics of the United States in the mid to late 1800s," and that therefore "it can be reasonably presumed that many sites and artifacts of significant historic and cultural importance to the [Oglala Sioux] Tribe exist in the area."[46] But, the NRC Staff acknowledged in the EA (at 57) that the general region "is steeped in history, especially during the period of Fort Robinson and the Red Cloud Agency (1873–1877) and the Great Sioux War (1876–1877)," and that the project area and the surrounding area includes land involved in the 1851 and 1868 Fort Laramie Treaties. Moreover, the NRC Staff specifically considered the potential for "sign or starve" encampments during its review. According to NRC Staff witnesses (Exh. NRC-076-R2 at 60):

> Mr. CatchesEnemy is correct that a potential exists for the occurrence of mid-19th century Lakota and other Tribal encampments associated with the Fort Robinson era and the treaty-making activities in the general vicinity. To assess this possibility, the Staff reviewed historical literature and maps dealing with the historical activities associated with that era. Some of this effort also involved similar evaluation for the proposed CBR NTEA, which is located north of the town of Crawford and closer to Fort Robinson. The inquiry indicated that the Lakota camps associated with the Fort Robinson treaty-making era were distributed from just south of the fort, eastward along the White River, but in proximity to the Red Cloud Agency situated in the eastern part of the military reservation. While the literature review did not indicate the presence of mid-19th century Lakota encampments within or close to the current CBR license area, the previous Class III survey data were evaluated for a possible presence of a sizable historic period Native American camp. None was evident in the archaeological data.

The Board however dismissed the NRC Staff's efforts as "inferior to the expertise of the Oglala Sioux Tribe witnesses who testified to the contrary" (*i.e.*, that there were sign or starve encampments on the Crow Butte site). But, the OST witnesses did not definitively state

[46] LBP-16-07 at 23-24; *see also id*. at 61.

that there were such encampments on the project site,[47] nor did they offer any evidence or specific testimony as to the location of any encampments relative to the Crow Butte site.[48] Had they done so—whether based on the LRA, during consultation efforts (*e.g.*, as part of an open site survey), or in comments on the draft EA—the parties would have had the opportunity to consider the evidence and respond. But, they provided no concrete information to call into question the NRC Staff's analysis. And, the only other TCPs cited by the Board or OST—the Crow Butte geologic feature, vison quest site, and medicinal herbs—were all specifically addressed in the EA.[49] The Board's reliance on wholly unsupported and non-specific statements is too-slim a reed on which to reject the EA and demand further (time consuming and costly) work.[50]

At bottom, the NRC Staff undertook extensive and repeated efforts to identify cultural resources at the Crow Butte site. These efforts included reviews of the Class III 100% coverage pedestrian surveys led by respected archeologists that were performed prior to initial operations (*i.e.*, when the site was in an undisturbed condition), supplemental literature reviews,

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47 Tr. at 2268-69 (CHAIR GIBSON: Given this, you claim that it is reasonable to presume that there are sites of significant historic or cultural importance in the Crow Butte license area. Is that correct? MR. CATCHES-ENEMY: Yes.). This "presumption" is a remarkably weak basis for dismissing the specific efforts of the NRC Staff to verify unsupported and non-specific statements made by OST in the course of its NHPA and NEPA reviews.

48 Indeed, at the time of the 2011 field visit, the Oglala Sioux representatives did not note the potential for mid-19th century Lakota encampments to be located within the project area boundaries. Exh. NRC-076-R2 at 61.

49 *Compare* LBP-16-07 at 23, 70-71 to EA at 56-57.

50 *See* LBP-16-07 at 82 ("[I]t is at least plausible that there are TCPs within the license area requiring identification and protection."). More data always can be gathered or more surveys conducted. But, the NRC Staff has a responsibility to move forward with decisionmaking once it has conducted a reasonable complete and detailed analysis, as it did here.

discussions with knowledgeable OST experts, and attempts to obtain information from OST and others. While the Board apparently believes that only a new field investigation will suffice, new surveys are not dictated by the NHPA or NEPA—particularly when no new land disturbance activities will occur. Moreover, the record is devoid of support for any specific omission; OST did not present any evidence that the NRC Staff overlooked or ignored any TCP. As the D.C. Circuit recently noted, "the NRC need not provide a perfect analysis, only one that is 'thorough and comprehensive.'"[51] Here, the NRC Staff's efforts more than satisfy that standard.

CONCLUSION

For the reasons, the Commission should reverse LBP-15-11 to the extent that it admitted Contention 1 or, in the alternative, reverse the Board's decision in LBP-16-07 that resolved Contention 1 in favor of the intervenors.

Respectfully submitted,

/s/ signed electronically by
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Dated at San Francisco, California
this 20th day of June 2016

[51] *New York v. NRC*, __ F.3d __ (D.C. Cir. June 3, 2016) (slip op. at 14).

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of:	)	
	)	Docket No. 40-8943
CROW BUTTE RESOURCES, INC.	)	
	)	ASLBP No. 08-867-02-OLA-BD01
(License Renewal)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of "PETITION FOR REVIEW OF LBP-15-11 AND LBP-16-07" in the captioned proceeding have been served this 20th day of June 2016 via electronic mail to Consolidated Intervenors at davidcoryfrankel@gmail.com, Arm.legal@gmail.com, and harmonicengineering@gmail.com and 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 for the captioned proceeding other than Consolidated Intervenors.

/s/ signed electronically by
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