UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Kristine L. Svinicki, Chairman
Jeff Baran
Annie Caputo
David A. Wright
Christopher T. Hanson

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

CLI-20-08

MEMORANDUM AND ORDER

This proceeding stems from challenges to the Crow Butte Resources, Inc. application to renew its source materials license for an *in situ* leach uranium recovery facility located near Crawford, Nebraska. Following an evidentiary hearing on admitted contentions, the Atomic Safety and Licensing Board issued a Partial Initial Decision addressing Contention 1 (Consultation and Tribal Cultural Properties) and related procedural matters.[1] In LBP-16-7, the Board resolved Contention 1 in part in favor of the two intervenors, the Oglala Sioux Tribe and Consolidated Intervenors (together Intervenors). The Board found that the NRC Staff did not comply with certain obligations under the National Historic Preservation Act (NHPA) and the National Environmental Policy Act (NEPA).[2] More specifically, the Board concluded that the

[1] LBP-16-7, 83 NRC 340 (2016).

[2] *See id.* at 411-12. The Board also partially ruled in favor of the Staff by concluding that the Staff had "met its Consultation Obligations under the NHPA." *See id.* at 411.

Staff neither "satisfied NHPA's requirement to identify, assess, and . . . attempt to mitigate impacts on [Traditional Cultural Properties (TCPs)] within the license area, nor NEPA's requirement to take a hard look at cultural resources within the license area."[3]

Crow Butte seeks review of LBP-16-7.[4] Crow Butte additionally seeks review of an earlier Board decision, LBP-15-11, insofar as that decision admitted Contention 1 for hearing.[5] For the reasons outlined below, we decline to take review of the challenged decisions.

I. INTRODUCTION

Crow Butte raises two primary claims on appeal. First, Crow Butte argues that the Board erred in finding Contention 1 timely and therefore should not have admitted the contention for hearing.[6] Second, Crow Butte claims that in resolving Contention 1 on the merits the Board "misapplied Commission precedent and ignored NEPA's 'rule of reason'" standard.[7] Crow Butte argues that "contrary to the Licensing Board's decision, the Staff fully complied with the [NHPA] and NEPA."[8] The Intervenors oppose Crow Butte's petition for review.[9]

At our discretion, we may grant a petition for review, giving due weight to the existence of a substantial question with respect to the following considerations:

(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;

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[3] *Id.* at 412.

[4] *Petition for Review of LBP-15-11 and LBP-16-7* (June 20, 2016) (Petition).

[5] *Id.* at 1, 5-14; *see also* LBP-15-11, 81 NRC 401, 411-15 (2015).

[6] Petition at 1.

[7] *Id.*

[8] *Id.* at 2.

[9] *See Consolidated Intervenors Answer to Petition for Review* (July 14, 2016) (CI Answer); *Oglala Sioux Tribe's Answer to Crow Butte's Petition for Review of the Board's Contention 1 Decision* (July 22, 2016) (Tribe's Answer).

(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 we may deem to be in the public interest.[10]

Regarding contention admissibility rulings, we "generally defer to the Board unless we find either an error of law or abuse of discretion."[11] We "accord the Board's judgment at the pleading stage substantial deference."[12] We are highly deferential "particularly where much of [the] evidence is subject to interpretation."[13]

II. BACKGROUND

Following a notice of opportunity for hearing, a Licensing Board was established in 2007.[14] In its threshold ruling on intervention, the Board granted a hearing to the Tribe and the

[10] 10 C.F.R. § 2.341(b)(4)(i)-(v).

[11] *FirstEnergy Nuclear Operating Co.* (Davis-Besse Nuclear Power Station, Unit 1), CLI-12-8, 75 NRC 393, 397 (2012); *see also NextEra Energy Seabrook, LLC* (Seabrook Station, Unit 1), CLI-12-5, 75 NRC 301, 307 (2012).

[12] *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Unit 3), CLI-09-5, 69 NRC 115, 119 (2009); *see also, e.g.*, *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Unit 3, CLI-08-17, 68 NRC 231, 234 (2008) (the "Commission gives substantial deference to Board conclusions on standing and contention admissibility unless the appeal points to an error of law or abuse of discretion").

[13] *In the Matter of David Geisen,* CLI-10-23, 72 NRC 210, 225 (2010).

[14] Notice of Opportunity for Hearing, 73 Fed. Reg. 30,426 (May 27, 2008); Crow Butte Resources, Inc.; Establishment of Atomic Safety and Licensing Board, 73 Fed. Reg. 49,496 (Aug. 21, 2008). *See generally* Ex. CBR-011, Application for 2007 Renewal of USNRC Source Materials License SUA-1534, Crow Butte License Area (Nov. 27, 2007) (ADAMS accession no. (ML073480264) (package)).

Consolidated Intervenors.[15] On appeal, we affirmed the admission of four contentions for hearing.[16]

In LBP-16-7, the Board outlined the history of this proceeding, which we need not repeat here.[17] We address today only the case history that bears on Crow Butte's petition for review. Because much of Crow Butte's petition challenges Contention 1's timeliness, we begin with brief summaries of Contention 1, the NRC's contention timeliness standards, and earlier procedural history that the Board found relevant in finding Contention 1 timely.

A. Contention 1

In October 2014, the Staff informed the Board and the parties that the Staff had issued its final Environmental Assessment (EA) for the Crow Butte license renewal application and that the EA had been made publicly available in ADAMS.[18] The Board then promptly established a deadline for any new or amended contentions based on the Staff's EA.[19] Both the Tribe and the Consolidated Intervenors filed various new and amended contentions challenging the final EA.[20]

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[15] *See* LBP-08-24, 68 NRC 691, 698, 760 (2008). Consolidated Intervenors include the Western Nebraska Resources Council, Owe Aku/Bring Back the Way, Debra White Plume, Joe American Horse & Tiospaye, Loretta Afraid-of-Bear Cook & Tiwahe, Thomas Kanatakeniate Cook, and Beatrice Long Visitor Holy Dance (now deceased). Debra White Plume, Joe American Horse, and Loretta Afraid-of-Bear Cook also are members of the Oglala Sioux Tribe. *See* CI Answer at 1; *see also* LBP-08-24, 68 NRC at 698. The Board found that the Great Sioux Nation Treaty Council had no standing to participate as a party but could participate as an interested local governmental body. *See id.* at 698, 760; 10 C.F.R. § 2.315(c).

[16] *See* CLI-09-9, 69 NRC 331 (2009).

[17] *See* LBP-16-7, 83 NRC at 347-49.

[18] *See* Letter from Marcia Simon, Counsel for NRC Staff, to the Administrative Judges (Oct. 27, 2014).

[19] *See* Order (Scheduling Filing of New/Amended Contentions and Requesting Proposed Evidentiary Hearing Dates) (Oct. 28, 2014) (unpublished). Based on the public availability of the final EA, the Board set a thirty-day deadline, with contentions due on November 26, 2014. *See id.* at 2; Order (Granting Intervenors' Unopposed Motion for Extension of Time to File New/Amended Contentions) (Nov. 4, 2014) (unpublished) (extending the filing deadline to January 5, 2015).

[20] *See The Oglala Sioux Tribe's Renewed and New Contentions Based on the Final Environmental Assessment (October 2014)* (Jan. 5, 2015) (Tribe's New Contentions Based on

Relevant here, each of the Intervenors submitted nearly identical versions of two contentions (Contention 1 and Contention 2) challenging the EA's analysis of historical and cultural resources.[21] The contentions raised claims under the NHPA and NEPA, including arguments that the Staff failed to consult all interested tribes in a meaningful fashion as required by the NHPA, and that the EA lacked an adequate description of potential project impacts on archaeological, historical, and traditional cultural resources.

Citing the overlap in issues, the Board addressed the contentions together and found them admissible in part. In LBP-15-11, the Board described the contentions as raising the following admissible issues: (1) whether there was meaningful consultation with the Tribe pursuant to the National Historic Preservation Act; (2) whether a class III archaeological study represented a hard look under NEPA; and (3) whether cultural surveys performed and incorporated into the EA adequately supported the EA's conclusions.[22] The Board consolidated the contentions into one, which it titled EA Contention 1: "Whether the cultural surveys performed and incorporated into the EA formed a sufficient basis on which to renew Crow Butte's permit."[23]

B. Timeliness Standards for New and Amended Contentions

The NRC has strict contention admissibility standards, which include standards governing the timeliness of contentions. Our adjudicatory process requires petitioners to "carefully review" the application at issue "and raise all their distinct challenges at the outset,

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EA); *Consolidated Intervenors' New Contentions Based on the Final Environmental Assessment (October 2014)* (Jan. 5, 2015) (CI's New Contentions Based on EA).

[21] *See* Tribe's New Contentions Based on EA at 14-40; CI's New Contentions Based on EA at 4-28.

[22] *See* LBP-15-11, 81 NRC at 415.

[23] *Id.* at 411, 451. Further references in this decision to "Contention 1" refer to this consolidated contention.

avoiding piecemeal supplemental contentions unless they could not have been raised earlier."[24] Our rules therefore specify that contentions submitted in initial petitions to intervene must be based on "documents or other information available at the time the petition is to be filed," such as the application, supporting safety analysis report, the environmental report, or other supporting document "filed by an applicant or licensee, or otherwise available to a petitioner."[25] For NEPA issues, contentions submitted in an intervention petition are based on the applicant's environmental report.[26]

Following the intervention petition deadline, participants may still file new or amended environmental contentions challenging the Staff's environmental review documents, such as "a draft or final NRC environmental impact statement, environmental assessment, or any supplements to these documents," *if* the timeliness requirements in 10 C.F.R. § 2.309(c) are met.[27] Under these requirements, new or amended contentions "will not be entertained" unless the presiding officer determines that there is good cause for the filing, which can be demonstrated if a contention is based on information that: (i) "was not previously available"; (ii) "is materially different from information previously available"; and (iii) "has been submitted in a timely fashion based on the availability of the subsequent information."[28]

C. Board's Decision in LBP-15-11 and Related Early Case History

In LBP-15-11, the Board addressed the admissibility of the Intervenors' proposed contentions challenging the EA. The Board described at length the timeliness rules.[29] Applying

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[24] *See Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-12-10, 75 NRC 479, 482-83 (2012).

[25] 10 C.F.R. § 2.309(f)(2).

[26] *Id.*

[27] *Id.*

[28] *Id.* § 2.309(c)(1).

[29] *See* LBP-15-11, 81 NRC at 407-08 (quoting, in full, 10 C.F.R. § 2.309(c)(1)(i)-(iii)).

those rules, the Board went on to reject—strictly on timeliness grounds—two of the Intervenors' proffered new contentions in their entirety, finding them based on information that had already been available in the license renewal application.[30] On similar timeliness grounds, the Board partially rejected two other contentions.[31]

As to Contention 1, the Board found early case history pertinent. As the Board noted, Contention 1 reflected the Intervenors' effort "to renew" an earlier cultural resources contention that the Board had admitted in 2008, but that we had dismissed on appeal as not yet ripe for adjudication.[32] In LBP-08-24—the Board's threshold decision on hearing requests—the Board had admitted the Tribe's "Contention B," a contention that challenged the cultural resources discussion in Crow Butte's environmental report.

1. History of Contention B

In Contention B, which encompassed arguments under both the NHPA and NEPA, the Tribe had claimed that it had "not been consulted . . . regarding the cultural resources that may be in the license renewal area," and further claimed that the cultural resources identified in the environmental report could not be "complete" because "the Tribe . . . had no input on this list."[33] In admitting Contention B, the Board found that the Tribe raised genuine and material disputes with the application by claiming that "the legal requirement of consultation did not occur," and

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[30] *See id.* at 418-19, 429. (challenged air quality issues "previously discussed" in the renewal application); *see also id.* at 418-19 (challenge to water quality studies could have been brought based on information in the application).

[31] *See id.* at 425-26, 437.

[32] *Id.* at 414; *see also* Tribe's New Contentions Based on EA at 14 ("By these Environmental Assessment Contentions 1 and 2 jointly asserted herein with the Consolidated Intervenors, the Tribe hereby renews its previous Contention B which the Commission ruled had been prematurely asserted"); LBP-08-24, 68 NRC at 719.

[33] *See* LBP-08-24, 68 NRC at 719; LBP-15-11, 81 NRC at 414 n.69; *Request for Hearing and/or Petition to Intervene* (July 28, 2008) (Tribe's Petition to Intervene), at 13-15.

"by specifically disputing Crow Butte's finding . . . that there will be no significant impacts to cultural resources as a result of continued operation of the [*in situ* leach] uranium mine."[34]

Crow Butte and the Staff appealed the admission of Contention B, arguing that the contention was premature for adjudication. In CLI-09-9, we agreed that the contention was not ripe and reversed the Board's contention admissibility determination, given that the contention centered on claimed deficiencies (under the NHPA and NEPA) said to stem from a failure to consult the Tribe, while Crow Butte itself had no obligation under the NHPA to consult the Tribe.[35]

In our decision, however, we made a point of addressing a Board concern regarding timeliness. In admitting the contention, the Board had expressed the concern that if the Intervenors were made to wait until the Staff's environmental analysis to file a consultation-related cultural resources contention, the Staff or applicant might characterize a subsequent contention as untimely—for failure to meet the additional, "more rigorous" timeliness standards that are applied to contentions filed after the initial petition deadline.[36] The Board reasoned that to require the Tribe to defer its cultural resources contention until the Staff's NEPA review was complete would impose an added and undue "hardship" on the Tribe, thereby "tilt[ing] the balance in favor of determining that [Contention B was] ripe for adjudication."[37]

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[34] LBP-08-24, 68 NRC at 723. As the Board described, the Tribe disputed the environmental report's "representations regarding cultural resources found on the site" because the conclusions were reached without the input of Tribal Historic Preservation Officers who were "singularly qualified to identify cultural resources and to determine their importance and how they should be protected." *See id.*

[35] *See* CLI-09-9, 69 NRC at 348-51; *see also NRC Staff's Notice of Appeal of LBP-08-24, Licensing Board's Order of November 21, 2008, and Accompanying Brief* (Dec. 10, 2008), at 21-22 (Staff stating that it was "not required at this time to engage that [NHPA consultation] process and has not yet begun" the process); *Crow Butte Resources' Notice of Appeal of LBP-08-24* (Dec. 10, 2008), at 7 ("[i]f the NRC fails to consult during the environmental review process, a new contention could be filed").

[36] *See* LBP-08-24, 68 NRC at 720; CLI-09-9, 69 NRC at 350-51.

[37] LBP-08-24, 68 NRC at 720.

We responded by reaffirming that our rules expressly allow for new contentions based on "the draft or final environmental impact statement where that document contains information that differs 'significantly' from the information that was previously available."[38] We therefore stated that "whether and how the Staff fulfills its NHPA obligations are issues that could form the basis for a new contention," pursuant to our rules for new and amended contentions.[39]

When we issued our decision, we expected that the Staff would address its NHPA-related obligations (including cultural resources issues) at the time that it issued a draft or final NEPA document, such as a draft or final EA or environmental impact statement (EIS). The Staff initially predicted that it would complete the environmental review by December 2009.[40] The Staff, however, experienced delays in performing its environmental review of the license renewal application and ultimately issued a final EA in October 2014, nearly five years after its initial estimate and seven years after Crow Butte filed its application.[41] The Board promptly set a thirty-day deadline for contentions challenging the final EA.[42] The Intervenors' contentions followed.

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[38] CLI-09-9, 69 NRC at 351 & n.104. In CLI-09-9, we referenced the rule in place at the time. *Compare* 10 C.F.R. § 2.309(c)(1)(ii) (2016) *with* 10 C.F.R. § 2.309(f)(2) (2009). The NRC revised the rules governing new and amended contentions in 2012; those revisions do not affect our decision today. *See generally* Revisions to Rules of Practice, 77 Fed. Reg. at 46,571-72; *see also* LBP-11-15, 81 NRC at 408 n.30.

[39] *See* CLI-09-9, 69 NRC at 351.

[40] *See* Initial Scheduling Order (Jan. 8, 2009) (unpublished), at 2; Letter from Brett Klukan, Counsel for NRC Staff, to the Administrative Judges (Apr. 16, 2009), at 1 (status report noting that expected date of December 2009 for issuance of final environmental review document had not changed); LBP-11-30, 74 NRC 627, 634 (2011).

[41] *See* Letter from Marcia Simon, Counsel for NRC Staff, to the Administrative Judges (Oct. 27, 2014); *see also* LBP-15-2, 81 NRC 48, 62-63 (2015) (summarizing monthly status reports regarding the Staff's environmental review schedule).

[42] *See* Order (Scheduling Filing of New/Amended Contentions and Requesting Proposed Evidentiary Hearing Dates) (Oct. 28, 2014) (unpublished); Order (Granting Intervenors' Unopposed Extension of Time to File New/Amended Contentions) (Nov. 24, 2014) (unpublished) (extending the deadline by 40 days)).

2. Board Ruling on Contention 1

In LBP-15-11, the Board found Contention 1 to be a timely (and otherwise admissible) challenge to the Staff's final EA. In doing so, the Board highlighted the Tribe's earlier-admitted cultural resources contention and our decision to dismiss that contention as premature.[43] The Board noted that in CLI-09-9 we had stated that the Staff's fulfillment of its obligations under the NHPA could serve as a basis for a new cultural resources contention.[44] Because the Staff did not publish a draft EA, the Board described the final EA as the first opportunity for the Intervenors to review the Staff's "analysis of the project's environmental impacts."[45] The Board added that in CLI-09-9 we also had stated that contentions based on new information in a NEPA document typically would be "considered timely if filed within 30 days of publication of the draft" NEPA document.[46] Given that the Intervenors in Contention 1 sought to renew the previously-dismissed cultural resources Contention B, and given further that the Staff never published a draft EA, the Board found the new cultural resources claims in Contention 1 to be a timely-raised challenge to the Staff's final EA.[47]

We turn now to Crow Butte's arguments challenging the Board's timeliness and merits rulings on Contention 1. We begin with Crow Butte's challenge to LBP-15-11.

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[43] *See* LBP-15-11, 81 NRC at 414.

[44] *Id.*

[45] *See id.* at 409 n.36.

[46] *See id.* at 414-15; CLI-09-9, 69 NRC at 351 & n.105.

[47] Crow Butte sought interlocutory review of the Board's decision to admit Contention 1. We denied the request for failure to meet the interlocutory review standards. *See* CLI-15-17, 82 NRC 33, 42-45 (2015).

III. ANALYSIS

A. LBP-15-11: Timeliness of Contention 1

Crow Butte claims that "Contention 1 should never have been admitted" for hearing because the Board "incorrectly applied the timeliness criteria" found in the NRC contention admissibility regulations.[48] Crow Butte therefore seeks reversal of LBP-15-11 to the extent that the decision admitted Contention 1. Crow Butte's core claim is that the Board erred in basing its timeliness ruling on the Staff's final EA because "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."[49] Crow Butte therefore argues that the Board failed to examine "whether the contention was based on new and materially different information or was filed promptly once the new information became available."[50] Specifically, Crow Butte claims that Contention 1 challenges information that either (1) had been available in Crow Butte's 2007 application, or (2) was made available in the Staff's "draft cultural resources assessment" posted on the NRC's public website on September 30, 2013.[51]

Crow Butte's reference to the "draft cultural resources assessment" is shorthand for information that the Staff made available during the course of its NEPA review. On October 1, 2013, the Staff notified the Board and the parties that the Staff had posted on the NRC website "information related to its cultural resources evaluation per Section 106 of the National Historic Preservation Act."[52] The Staff's notification contained a link for accessing the website and

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[48] Petition at 5.

[49] *Id.*

[50] *Id.* at 8.

[51] *See id.* at 8-11.

[52] *See* Letter from Brett Klukan, Counsel for NRC Staff, to the Administrative Judges (Oct. 1, 2013) (Staff Notification).

sought "comments from the public as well as any information relevant to any of the posted conclusions made by the Staff."[53]

Crow Butte claims that this information "included the NRC Staff's basis for NHPA compliance and the cultural resource evaluation in the final EA."[54] In its petition, Crow Butte provides a table comparing a description of TCPs that appeared in the "draft consultation documents" posted on the NRC website with nearly-identical descriptions of TCPs that appear in the final EA.[55] Crow Butte therefore concludes that "the information on which the [Intervenors'] 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."[56]

Crow Butte, in short, claims that the Staff's issuance of the final EA did not establish good cause that would demonstrate timeliness under our rules governing admissibility of contentions filed after the initial petition.[57] Rather, Crow Butte argues that the applicable "trigger for a timely contention" was the "availability of the *information* upon which the contention was based—in this case, the [license renewal application] and the NRC Staff's draft cultural resources assessment."[58] Crow Butte therefore contests "the Board's sole focus on the final EA as the trigger for new cultural resources contentions—rather than the [license renewal application], the draft EA documentation, or the availability of new and materially different

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[53] *See id.* at 1 (stating that information could be found at http://www.nrc.gov/info-finder/materials/uranium/licensed-facilities/crow-butte/section-106-license-renewal-docs.html).

[54] Petition at 11.

[55] *Id.* at 11-12.

[56] *Id.* at 13.

[57] *Id.* at 9.

[58] *Id.*

information."[59] Crow Butte argues that the final EA "merely compile[d] pre-existing, publicly available information" from the license renewal application and the "draft cultural resource[s] assessment," and did not serve to "render 'new' the summarized or compiled information" in the EA.[60]

We have carefully reviewed Crow Butte's arguments. Although Crow Butte accurately describes our standards governing timeliness of new or amended contentions, those standards are applied on a case-specific basis. Here, given the facts of this case, we do not discern an error of law or abuse of discretion warranting reversal or further review of the Board's decision to admit Contention 1 as timely. We find unpersuasive Crow Butte's claim that Contention 1 was late because it should have been based on the license renewal application. We also conclude that the significance of the Staff's posted information relating to its NHPA section 106 evaluation—that is, whether the information constituted the appropriate basis and deadline trigger for new or refiled cultural resource contentions—was insufficiently clear. For several reasons, we defer to the Board's judgment on the timeliness of Contention 1.

First, Crow Butte incorrectly asserts that the Intervenors should have challenged—but did not—the application's cultural resources discussion.[61] Specifically, Crow Butte claims that "[t]o the extent that proposed Contention 1 disputed the adequacy of the final EA's identification of cultural resources or TCPs,[62] the contention should have been based on the [application]" application.[63] Crow Butte maintains that the Intervenors "did not dispute the cultural resources

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[59] *Id.* at 13.

[60] *Id.* at 13-14.

[61] *See id.* at 10.

[62] Traditional Cultural Properties reflects the "subset of cultural resources that relate to Native American history and culture." *See* LBP-16-7, 83 NRC at 349 n.23); *see also* Ex. NRC-083, National Register Bulletin, Guidelines for Evaluating Traditional Cultural Properties (1998).

[63] *See* Petition at 9-10.

identified" in the application, adding further that "[h]ad they done so, the NRC Staff and Crow Butte would have had an opportunity to address their concerns during the review process."[64] In short, Crow Butte—which previously and successfully sought to have the earlier Contention B dismissed as "premature" for adjudication—now argues that the Intervenors failed to meet contention timeliness standards because their claims should have been raised at the time of the application.

But the Tribe in Contention B *did* dispute the adequacy of the cultural resources identified in Crow Butte's environmental report. Crow Butte mistakenly claims that the contention only asserted a failure to comply with NHPA tribal *consultation* requirements and did not challenge "the adequacy of Crow Butte's *identification* of cultural resources."[65] On the contrary, by its own terms Contention B also challenged the cultural resources identified by Crow Butte in the application.[66] Although Contention B was rooted in an asserted failure to consult the Tribe, the contention's claims spanned both NHPA and NEPA issues, encompassing the completeness and accuracy of the identified cultural resources.[67] In support of Contention B, the Tribe expressly cited to a table in the application that listed cultural resources and challenged the list because the Tribe "neither had the opportunity to evaluate the

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[64] *See id.* at 9 n.21.

[65] *See id.* at 10 n.25; *see also id.* at 13 n.30.

[66] Among its claims, the Tribe in Contention B stated that while the "Applicant has identified what it believes to be cultural resources in the area, . . . the Tribe has had no input on this list, and it therefore cannot be complete." *See* Tribe's Petition to Intervene at 13.

[67] *See id.* (stating that the Tribe was the most "qualified to judge [the] existence and importance" of potential cultural sites and artifacts, "which is precisely why consultation is required and those determinations are not left to the federal agency or company proposing [an] action"); *see also id.* at 15 ("The Tribe has its own [Tribal Historic Preservation Officer], who should be consulted before determining that there are no significant cultural resources in the area . . . . The Application also states . . . that the Nebraska [State Historic Preservation Officer] has determined that the identified sites or artifacts are not eligible for inclusion on the National Register, but the Tribe has not been consulted . . . regarding any sites or potential sites").

completeness of this list, nor the opportunity to evaluate the accuracy of the significance ascribed to the items on the list."[68] We reject, therefore, Crow Butte's argument that Contention 1 is untimely because the Intervenors failed to challenge cultural resources identified in the application. The Tribe's challenge to the identified cultural resources was part of Contention B's core claim that consultation requirements had not been satisfied; as such it was not error for the Tribe to re-propose and for the Board to reconsider the identification claim when it was raised again after the final EA.

We also are unpersuaded by Crow Butte's claims regarding the information posted on the NRC website and decline to disturb or revisit further the Board's timeliness ruling. At bottom, taking all relevant factors into account, ambiguity existed regarding the Staff's notification and associated posted information. While Crow Butte refers to the information posted on the NRC website as the "*draft* cultural resources assessment,"[69] the Staff's notification did not characterize any of the information posted as part of its draft EA or otherwise equivalent to a draft EA in content or significance. Therefore, it may not have been clear at the time that the items posted on the website for public comment—as opposed to an anticipated Staff final environmental review document—constituted the Staff environmental analysis on which the Intervenors were to base new or amended contentions on cultural resources.

First, in this case both our decision and those of the Board created the expectation that the appropriate time for the Intervenors to refile a cultural resources contention would be when the Staff actually completed or fulfilled its NHPA-related requirements and NEPA review—that

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[68] *Id.* at 15 (citing Table 2.4-1 from the environmental report); *see also, e.g.*, Tr. at 361-63 (contention questions "the accuracy" of the identified resources "because the reason why there is the requirement of consultation is for accuracy and completeness"). When it admitted Contention B, the Board understood the contention to challenge the application's findings regarding impacts to cultural resources. *See* LBP-08-24, 68 NRC at 723.

[69] *Id*. at 10; *see also*, *e.g*., *id*. at 8 n.17, 9 & n.21, 13 (referring to "draft EA documentation").

is, when it issued a final or at least a draft EA or EIS.[70] When we issued CLI-09-9, we expected that the Staff, following appropriate consultations, would provide its conclusions on cultural resources in its draft or final NEPA review document. After all, as we earlier noted, the Staff originally expected to issue a final NEPA document in 2009. Our decision accordingly referred to the Tribe "defer[ring] its contention until the NEPA review is complete," and to "the filing of new contentions on the basis of the draft or final [environmental review document]."[71] Similarly, in commenting on Staff delays in completing the environmental review, the Board referred to the earlier-dismissed Contention B, stating that "once the Staff *completes its environmental analysis*, if the Tribe remains unsatisfied with the results of the consultative process, a new contention could be filed."[72]

Second, the Staff's notification stated only that "information related to" the Staff's "cultural resources evaluation per Section 106 of the National Historic Preservation Act" had been posted on the NRC website, and that the Staff was "seeking comments from the public as well as any information relevant" to posted conclusions.[73] How the information was to be considered vis-à-vis the Staff's pending NEPA review was not specified. Just two weeks before, the Staff had informed the Board and the parties that it expected to issue its "final environmental

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[70] *See, e.g.*, CLI-09-9, 69 NRC at 349 (describing argument on appeal as whether "issue will not ripen until the Staff completes its NEPA review").

[71] CLI-09-9, 69 NRC at 351. Although we specified that new contentions based on a draft or final Staff NEPA document must be based on "information that differs 'significantly' from" that previously available, the particular example that we gave (taken from the 2009 version of the rule) was that of "'data or conclusions in the NRC draft or final environmental impact statement . . . that differ significantly from the data or conclusions in the *applicant's* documents.'" *See id.* at 351 & n.104 (emphasis added) (quoting 10 C.F.R. § 2.309(f)(2) (2009)). Crow Butte is correct that it was not our intent in CLI-09-9 to declare that cultural resource/consultation contentions would *only* be ripe if based on a draft or final EA or EIS, regardless of what other NEPA-related document the Staff might potentially issue in the interim. But we acknowledge that the Board and the Intervenors relied on statements in our decision in forming their understanding that the Intervenors should await the Staff's draft or final NEPA review document.

[72] *See* LBP-11-30, 74 NRC at 632 n.25 (emphasis added).

[73] *See* Staff Notification at 1.

review document" by the end of November 2013.[74] At the time of the Staff's notification, therefore, the Staff was expected to issue its *final* NEPA review document relatively soon—a document also expected to contain information on the Staff's consultation and cultural resources evaluation pursuant to the NHPA.[75]

In other words, in the same relative time-frame as the Staff's notification requesting public comment on its NHPA-related efforts, the Board and parties had reason to expect that the Staff's NEPA review was concluding and that a final NEPA document—on which a potential cultural resources contention might be based—would be issued in short order. Neither the Board nor the parties could have envisioned in October 2013 that the Staff would not issue its NEPA review document for another year. We find unpersuasive, therefore, Crow Butte's suggestion that the Intervenors chose or were "allowed" to "'lie in wait' until the Staff issued its final EA before raising contentions."[76] Having *already* raised a similar cultural resources contention before, the Intervenors sought to refile their contention at the appropriate time. By waiting until the first Staff NEPA review document of record, the Intervenors reasonably assumed that they were following Commission and Board guidance.[77] The record likewise

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[74] *See* Letter from Brett Klukan, Counsel for NRC Staff, to the Administrative Judges (Sept. 16, 2013), at 1. The Staff's September 2013 status report also indicated, without further comment, that the Staff anticipated "in the near future releasing for public comment information related to its Section 106 evaluation." *See id.* In its first status report following its notification, the Staff informed the Board that although it believed it could no longer meet the November estimate, it was "finalizing" its final environmental review document and that "issuance of the document will occur in December [2013]." *See* Letter from Brett Klukan, Counsel for NRC Staff, to the Administrative Judges (Nov. 5, 2013), at 1.

[75] As we stated in CLI-09-9, typically "[t]he NRC implements its responsibilities under NHPA in conjunction with the NEPA process." *See* CLI-09-9, 69 NRC at 348 n.89.

[76] Petition at 8.

[77] *See* CI's Answer at 4 ("The Commission and the Board gave Intervenors the understanding that there would be one opportunity to file on the Environmental Assessment and that the deadline would be 30 days after the publication of that final Environmental Assessment"); *see also Consolidated Intervenors' Combined Reply to NRC Staff and Applicant's Responses to Newly Filed EA Contentions* (Feb. 6, 2015), at 4 (quoting CLI-09-9, 69 NRC at 350-51).

reflects that the Board itself had established deadlines to file new or amended contentions based on its understanding of Commission direction.[78]

Further, the Staff's notification did not highlight the potential significance of the material that the Staff had posted. If the Staff sought to have the information effectively treated as akin to a draft EA in significance, some clarification of the nature of the information would have been helpful to the Board and parties, particularly given that all parties understood that the Intervenors likely were awaiting the issuance of a NEPA document on which to base refiled cultural resources contentions.[79] We therefore agree with the Tribe that the Staff's Board notification and the associated information did not clearly appear to be "the equivalent of [a draft EA] that would provide the Tribe with sufficient notice and information to trigger the filing deadline for a contention challenging an EA's analysis of Tribal, historic, cultural, religious, and spiritual interests."[80]

New or amended NEPA contentions are often based on a draft or final NEPA review document (e.g., an EA or EIS). When other documents are prepared during the Staff's NEPA review that are of sufficient significance as to be the subject of a Board notification it should not be necessary to wonder whether the documents serve as a contention-deadline trigger. Here, for instance, the Board—or any party—appropriately might have sought clarification regarding the significance of the notification to the adjudication, particularly on the question of whether the time was ripe, in terms of the Staff's review, to re-submit the consultation and related cultural

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[78] *See, e.g.*, LBP-16-7, 83 NRC at 350 n.27 ("In rejecting this earlier contention as premature, the Commission instructed that the Contention be refiled after the EA was issued") (citing LBP-15-11, 81 NRC at 414-15).

[79] The Staff prepared a draft EA, although it was not made publicly available. The Staff provided a draft EA in March 2014 (and a revised version in September of that year) to the State of Nebraska, Department of Environmental Quality. *See* Ex. NRC-010, Final EA, at 129.

[80] *See* Tribe's Answer at 6; *see also id.* at 8.

resources claims that we had previously excluded as premature. But no clarification regarding the notification was sought or given by the Board or any party.

Moreover, "[l]icensing boards have considerable discretion in their management of adjudicatory proceedings."[81] While the Board must apply our contention admissibility rules, it still has leeway to structure the proceeding as it views appropriate to best promote efficiency.[82] In its case management role, the Board here reasonably directed that all new and amended contentions based on the final EA were to be filed on a single, clearly identified schedule.[83]

Considering all of the case-specific factors before us, we conclude that the Board's finding of Contention 1 as timely constituted neither legal error nor abuse of discretion warranting the reversal of LBP-15-11 and dismissal of the contention. We therefore defer to the Board's judgment on Contention 1's timeliness.

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[81] *See Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-16-11, 83 NRC __, __ (June 2, 2016) (slip op. at 22 & n.101).

[82] In LBP-15-11, the Board expressed its general view that while "timely filing . . . is triggered on the date of public disclosure" of information, "[t]his requirement also must be considered keeping in mind . . . promoting efficient adjudication," which might "not be served by a licensing board having to rule on contention admissibility after every minor Staff publication." *See* LBP-15-11, 81 NRC at 409 & n.32.

[83] We note that a cultural resources contention, while not definite, nonetheless was expected, given the earlier-dismissed Contention B. This was not the case, then, of a late effort to introduce a wholly new or unexpected matter. And the fact that the Intervenors filed Contention 1 based on the 2014 EA instead of the 2013 Board notification did not delay the evidentiary hearing. As we noted earlier in this proceeding, "[e]ven had Intervenors proposed their contentions earlier, the hearing could not take place until the Staff's environmental review was complete," that is, until the Staff issued its final EA. *See* CLI-15-17, 82 NRC at 45 (denying interlocutory review). Moreover, the Staff's posted information pertained only to the NHPA evaluation and cultural resources, and therefore the Intervenors still would have had the opportunity to submit new or amended contentions challenging the EA on other environmental topics (as they in fact did).

B. LBP-16-7: Board's Merits Decision Resolving Contention 1

1. Board's Merits Findings

Following an evidentiary hearing, the Board issued its merits ruling on Contention 1 in LBP-16-7. Crow Butte seeks reversal of this decision to the extent that the Board resolved Contention 1 on the merits in favor of the Intervenors.

The Board first examined whether the Staff satisfied its obligations under the NHPA to provide "an opportunity for Indian tribes to consult meaningfully" on the Crow Butte license renewal action.[84] In what it termed a "close call," the Board found that the Staff, after much delay, ultimately afforded the Tribe reasonable opportunities for consultation, and therefore had satisfied its consultation obligations under the NHPA.[85]

The Board next addressed whether the Staff met the NHPA requirements to "make a reasonable and good faith effort" to identify historic properties, their significance, the potential effects of the license renewal on them, and potential mitigation measures—requirements that the Board referred to as the Staff's "Identification Obligations."[86] The Board addressed the adequacy of each effort to identify historic properties. These efforts included the following: (1) a Class III archeological field inventory, called the Bozell & Pepperl Survey, conducted in two phases in the 1980s and published in a 1987 report; (2) NRC Staff literature reviews and interviews; (3) an information-gathering session with six tribes, held June 7-9, 2011, at the Pine Ridge Reservation; and (4) a TCP field survey conducted in November 2012.[87]

The Board found these efforts to identify historic and cultural properties deficient. In LBP-16-7, the Board concluded that "potential TCPs and historic properties within the license

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[84] *See* LBP-16-7, 83 NRC at 382 (citing 54 U.S.C. § 302706 (West 2016)).

[85] *See id.* at 369-83 (detailing findings on this issue). This ruling has not been appealed.

[86] *See id.* at 354-56, 383-402 (referencing 54 U.S.C. § 306108 (West 2016) and Advisory Council on Historic Preservation regulations implementing the NHPA).

[87] *See id.* at 383-402.

area have not been identified and assessed, nor have attempts been made to mitigate potential impacts, in contravention of the NRC Staff's obligations under the NHPA."[88] The Board therefore found that the Staff had not satisfied its "Identification Obligations" as required by the NHPA.[89]

The Board next considered Staff's NEPA obligations under NEPA, particularly whether the Staff took a "hard look" at the potential environmental impacts of the license renewal on TCPs and cultural resources.[90] Observing that a NEPA review "is not limited to a focus on historic properties in the same way as the NHPA," the Board went on to find that the Staff's EA gave "short shrift . . . to a review of tangible and intangible TCPs that do not rise to the level of historic properties under the" NHPA.[91]

As part of its NEPA findings, the Board noted that the final EA had not addressed comments from tribes that had objected to the TCP field survey conducted in late 2012. Specifically, the Board stated that while "comments were received objecting to" the field survey report, and moreover the EA "promised" to provide a "'detailed assessment of the report and the comments in the Environmental Impacts section,'" the EA actually "did not discuss these comments by Indian tribes in opposition to the . . . approach taken" in the field survey.[92] The Board found the EA deficient under NEPA "for failing to take a hard look at potential TCPs within the Crow Butte license area" and for failing "to analyze the objections raised by the tribes with respect to the inadequacy of the open site TCP survey."[93]

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[88] *See id.* at 402.

[89] *See id.*

[90] *See id.* at 402-04.

[91] *See id.* at 402-03.

[92] *See id.* at 403 (quoting Ex. NRC-010, Final EA, at § 3.9.8).

[93] *See id.* at 404.

Having found that the "NRC Staff satisfied neither the NHPA's requirement to identify, assess, and to attempt to mitigate impacts on TCPs within the license area, nor NEPA's requirement to take a hard look at cultural resources within the license area," the Board concluded that it was unable to determine whether license renewal would result in "no significant impacts," and that as a result the NRC's Finding of No Significant Impact (FONSI) had been placed "in doubt."[94] The Board nonetheless concluded that the NEPA and NHPA deficiencies it had found did not warrant either staying the effectiveness of the license renewal or denying the license renewal application because the Intervenors had not presented "evidence that imminent harm would result from granting the license [renewal] before the NRC Staff fulfills its NEPA and NHPA requirements."[95]

While the Board did not direct the Staff to take any particular remedial action, it suggested that "the most efficient method for curing these NEPA and NHPA deficiencies would

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[94] *Id.* at 412. The Board acknowledged License Condition 9.8, which requires the licensee to "administer a cultural resource inventory if such survey has not been previously conducted," but concluded that by its terms the license condition would "exclude those areas already encompassed by the" same surveys (e.g., the Bozell & Pepperl survey) that the Board had found insufficient. *See id.* at 401 n.466. Similarly, the Board stressed that even if Crow Butte is not conducting "new mining activities in the license area," the Staff still needed to show that it had satisfied its obligations under the NHPA to make a reasonable and good faith effort to identify TCPs or other historic properties in the license area. *See id.* at 401. The Board noted, further, that Crow Butte intends to use the license area as a "centralized processing site" for expansion sites near the license area, and that the license area also will be subject to reclamation activities, both activities that potentially could pose "harm to unprotected TCPs." *See id.*

[95] *Id.* at 413. The Intervenors earlier sought a stay of effectiveness of the renewed license; the Board denied the stay application. LBP-15-2, 81 NRC at 48, *aff'd*, CLI-15-17, 82 NRC at 37-42; *see also* LBP-15-2, 81 NRC at 57 n.66 (citing, among other things, 10 C.F.R. § 40.42(a)). The Board noted that under our timely renewal regulation, when a licensee applies to renew its license at least thirty days prior to expiration, the license is effectively extended until a final decision is made on the application. LBP-15-2, 81 NRC at 57 & n.66 (citing 10 C.F.R. § 40.42(a)). Section 40.42(a) implements Section 558 of the Administrative Procedure Act, 5 U.S.C. § 558(c)(2). Therefore, under applicable law, a stay (or revocation) of the renewed license would have only served to reinstate the prior license. The situation of a license in timely renewal is therefore distinguishable from that of a new license, and without more we do not consider the D.C. Circuit's ruling in *Oglala Sioux Tribe v. NRC*, 896 F.3d 520 (D.C. Cir. 2018) to require action on the license at this time.

be for the NRC Staff to publicly supplement its EA with additional analyses and findings with respect to possible TCPs.[96] The Board also instructed the Staff to provide it with monthly status reports on its activities, including the status of any revised EA or EA supplement.[97]

2. Crow Butte's Appeal

Crow Butte argues that the Staff's final EA satisfies both NEPA and the NHPA. Crow Butte therefore seeks reversal of the Board's findings in favor of the Intervenors. For the reasons discussed below, we decline to take review of LBP-16-7 because Crow Butte's petition fails to meet our review standard.

The Board's decision in LBP-16-7 is rooted in its assessment of the evidence presented, including testimony and exhibits. We "expect our licensing boards to review testimony, exhibits, and other evidence carefully" to resolve factual disputes.[98] Our standard of "clear error" for overturning a Board's factual findings following a merits hearing is high. Even where the "record evidence . . . may be understood to support a view sharply different from that of the Board" does not mean that the "Board's own view of the evidence was 'clearly erroneous'—i.e., that its findings were not even plausible in light" of the full record.[99]

Crow Butte outlines the Staff's efforts to identify cultural resources.[100] As Crow Butte describes, the "NRC Staff reviewed prior Class III archeological survey data, performed

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[96] *See* LBP-16-7, 83 NRC at 414.

[97] *Id.* at 414-15. In January 2017, the Staff notified the Board that, at the licensee's request, it was suspending all work related to Contention 1 during the pendency of this appeal. *See* Letter from David M. Cylkowski, Counsel for NRC Staff, to the Administrative Judges (Jan. 17, 2017).

[98] *See Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-05-19, 62 NRC 403, 411 (2005).

[99] *See Private Fuel Storage,* CLI-03-8, 58 NRC 11, 26 (2003) (quoting *Kenneth G. Pierce* (Shorewood, Illinois), CLI-95-6, 41 NRC 381, 382 (1995) (internal quotation omitted)); *see also, e.g.*, *Strata Energy, Inc.* (Ross *In Situ* Uranium Recovery Project), CLI-16-13, 84 NRC 566, 586 (2016).

[100] Petition at 15; *see also id.* at 15-18.

supplemental literature reviews, led field trips and meetings with [the Oglala Sioux Tribe] and others, solicited information on TCPs from [the Tribe] and others, and issued the draft EA for comment."[101] The Board, however, provided grounds for finding each of these efforts deficient. Crow Butte does not address the Board's specific reasoning and therefore fails to point to any "clearly erroneous" material factual error in the Board's assessment of the efforts to identify potential TCPs. Nor does Crow Butte otherwise present a substantial question warranting review.

For example, the Board acknowledged that the Bozell & Pepperl Class III archaeological survey, conducted in the 1980s, was an "intensive, professionally conducted study," involving a "pedestrian 'by-foot' survey of a significant portion of the license area."[102] Yet the Board found the study insufficient to satisfy the NHPA identification requirements because the survey team had "made no attempt to communicate with any of the neighboring tribes, such as the Oglala Sioux Tribe . . . to inquire whether those tribes had other literature resources or advice that might bear on the identification or evaluation of historic properties."[103]

The Board additionally found significant that the Staff's obligations under the NHPA are now more extensive than they were at the time of the Bozell & Pepperl survey. Specifically, the Board highlighted that because federal agencies "are now required to assume responsibility for identifying, assessing and attempting to mitigate impacts to tribal cultural resources," the Staff now must "consider the cultural or religious significance that tribes might ascribe to TCPs," which was not an obligation in the 1980s.[104] As Crow Butte itself states, "[a]s an archeological

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[101] *Id.* at 14.

[102] *See* LBP-16-7, 83 NRC at 384.

[103] *Id.* at 384-85.

[104] *Id.* at 384.

field survey, Bozell and Pepperl was never intended to be the NRC's assessment of TCPs."[105] The Board also found "no evidence . . . presented" that the staff who performed the Bozell & Pepperl survey had "any specific expertise with Native American" TCPs and "a review of the report itself fails to identify any such expertise."[106] Crow Butte does not call into question these findings.

Similarly, the Board explained why it found insufficient the other efforts to identify TCPs or historic properties. As to the Staff's literature reviews and related interviews, the Board found "no evidence that the NRC Staff enlisted anyone during its literature search, nor interviewed anyone" who had a "demonstrated familiarity with the range of potentially historic properties that may be encountered" and was qualified to evaluate whether the area contains TCPs or potentially eligible historic properties that may not yet have been identified.[107]

Crow Butte stresses that the Staff "gathered information directly from Lakota experts, including the [Tribe's] Tribal Historic Preservation Officer" during a June 2011 visit to the Crow

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[105] *See Reply in Support of Petition for Review of LBP-15-11 and LBP-16-7* (Aug. 1, 2016), at 4.

[106] LBP-16-7, 83 NRC at 385.

[107] *See id.* at 398 (internal quotation omitted). The Board stated, for example, that the literature reviews "focused largely on Euro-American resources and Euro-American cultural artifacts, and so those reviews would not be expected to uncover sites of significance to Indian tribes." *See id*. at 389. The Board also noted a Staff expert's statement that a literature review should be merely "a corollary" to other identification efforts, such as a field survey. *See id*. (quoting Tr. at 2024)). More significantly, the Board found that the Staff had "overstate[d] the value" of interviews conducted with local archaeology experts because the Staff's "primary focus was, not on the license area itself, but rather on Crow Butte's expansion sites." *See id*. at 389-90. The Board further concluded that the purpose of the Staff expert's "travel to the Crow Butte sites was not to search for more TCPs" that may exist, but instead was "to check on those historic properties that had previously been identified in the Bozell & Pepperl Survey," and therefore "not to find new TCPs or historic properties within the license area." *See id.* at 390.

Crow Butte notes that the Staff's "literature review did not indicate the presence of mid-19th century Lakota ['sign-or-starve'] encampments within or close to the current" Crow Butte license area, and that there was no evidence "in the archaeological data" of a "sizable historic period Native American camp." *See* Petition at 20 (quoting Staff testimony). But the Board considered the same evidence and concluded that the literature review was "inferior to the expertise" of the Tribe "witnesses who testified to the contrary." *See* LBP-16-7, 83 NRC at 387.

Butte area, which involved meetings and a bus tour.[108] But the Board found the June 2011 visit "inadequate to identify historic properties."[109] The Board concluded that "[w]hile the bus tour may have placed Indian tribal members within the license area, there never was an opportunity for attendees to exit the bus and examine the area," and that the meeting's "cursory discussions and the brief bus tour cannot be deemed to meet the NHPA's requirements to identify, assess, and attempt to mitigate impacts to potential historic properties of significance."[110]

Crow Butte points out that the Staff obtained information from the meeting that led it to identify in its EA four potential TCPs. But Crow Butte does not show clear error in the Board's conclusions regarding the overall comprehensiveness and adequacy of the June 2011 meeting and bus tour. The Board addressed the four new TCPs identified in the course of the June 2011 visit and rejected the argument that the identification of these properties was evidence of an adequate effort to identify TCPs.[111] Crow Butte does not demonstrate that the Board improperly weighed the evidence presented or reached implausible conclusions unsupported by the record as a whole. Merely because in the course of the visit tribal members identified four properties that the Staff added to its EA does not by itself suggest that the meeting and bus tour represented adequate efforts to identify potential TCPs.[112] Crow Butte simply repeats

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[108] *See* Petition at 16.

[109] *See* LBP-16-7, 83 NRC at 394.

[110] *Id.*

[111] *See* LBP-16-7, 83 NRC at 393-94. Crow Butte also argues that during this visit, the Oglala Sioux representatives did not specifically "note the potential for mid-19th century Lakota encampments to be located within the project area boundaries." *See* Petition at 21 n.48 (citing Ex. NRC-076-R2, NRC Staff's Rebuttal Testimony (June 8, 2015), at 61 (Staff Rebuttal Testimony)). But again, the Board found that the visit did not provide a meaningful opportunity to identify properties at the Crow Butte site, "as the tour covered four sites, was constrained by driver delays, and did not allow the tribal members to exit the bus." *See* LBP-16-7, 83 NRC at 372; *see also id*. at 393-94.

[112] *See* Ex. NRC-010, Final EA, § 3.9.8.

arguments rejected by the Board without demonstrating that the Board's conclusions were clearly erroneous.

In its EA, the Staff also relies on a TCP field survey conducted in November 2012. As the EA describes, the Staff "invited all the consulting Tribes to complete" a TCP field survey of the Crow Butte facility and "proposed expansion areas in the vicinity."[113] The Staff proposed an "open site"[114] field survey, where Crow Butte would open the site to tribal representatives, with participating tribes to receive a $10,000 flat fee regardless of the time spent at the site or the nature of the work performed.[115] Two tribes agreed to participate in the field survey, the Crow Nation and the Santee Sioux Nation. Following the survey, the Santee Sioux Nation Tribal Historic Preservation Office submitted a survey report to the NRC.

In LBP-16-7, the Board detailed various reasons for finding the 2012 TCP survey deficient. Those reasons included that "neither the Crow Nation nor the Santee Sioux Nation . . . has a sufficient relationship to the license area," and that therefore the surveyors were "inappropriate for the task" of conducting the TCP field survey for the Crow Butte area.[116] The Board moreover emphasized that neither the Crow Nation nor the Santee Sioux Nation "actually surveyed the license area—and this alone renders the November 2012 . . . Survey deficient."[117] The Board therefore found fault with the EA's description of the survey report as having "concluded that there were 'no eligible sites of cultural or religious significance to the Tribes'" at

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[113] *See id*.

[114] The Board described the "open site" approach as not having any particular "formal structure," but instead allowing surveyors to enter "the license area to search for TCPs as they deemed appropriate." *See* LBP-16-7, 83 NRC at 394.

[115] *See id.* at 397.

[116] *Id.* at 399.

[117] *See id.* at 400.

the Crow Butte facility.[118] The Board found the EA's description incorrect as to the Crow Butte license area because no physical inspection of the license renewal area had been made.[119]

As the Board went on to describe, quoting Staff testimony, Crow Nation representatives determined that the "current lease area was so disturbed by past agricultural and other historic land uses, including the ongoing mining operations, that there were essentially no areas that had not been disturbed by previous activities."[120] Tribal representatives therefore did not "inspect any acreage for the current license area by pedestrian inventory."[121]

Ultimately, the Board concluded that the "decision to eschew a survey of the license area because of ground disturbance cannot be equated to a determination that the license area lacks potential TCPs or historic properties."[122] The Board found that the "Staff's reliance on the Crow and Santee Sioux assessment that the ground was disturbed cannot stand as the determining factor" regarding whether "an actual field investigation" was warranted, and stated that no evidence was presented "that the license area was so disturbed" that it could not be surveyed.[123] "Based on the record as a whole," the Board found it to be "at least plausible" that there are TCPs "within the license area requiring identification and protection—either those waiting to be discovered, or those that were evaluated previously but incorrectly."[124]

Crow Butte does not address the sufficiency of the TCP survey and therefore does not identify any clear error in the Board's assessment of that survey. Crow Butte instead stresses

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[118] *See id.* (quoting Ex. NRC-010, Final EA, § 3.9.8).

[119] *See id*. The Board called this a "critical fact not even mentioned in the EA." *Id.*

[120] *See id.* (quoting Ex. NRC-001-R, NRC Staff's Initial Testimony (May 8, 2015), at 74 (Initial Staff Testimony)).

[121] *See* Ex. NRC-001-R, Initial Staff Testimony, at 74.

[122] *See* LBP-16-7, 83 NRC at 400.

[123] *See id.* at 400-01.

[124] *See id.* at 401.

that the Tribe did not respond to the Staff's invitation to participate in the field survey, and that the Tribe failed to comment on the Staff's "draft cultural resources assessment." Crow Butte further argues that "nothing in NHPA or NEPA mandates participation by tribal members" in field investigations, "[n]or do the statutes give potentially affected tribes the right to dictate the scope of the NRC Staff's investigation."[125]

But the Board's decision does not conclude that identification efforts can only be satisfied by a field investigation conducted by Oglala Sioux Tribe members. In fact, the Board acknowledged that the Staff "need not rely on the Oglala Sioux Tribe to meet its Identification Obligations under the NHPA," and further acknowledged that "the intensive TCP survey preferred by the tribes may well have been infeasible on a cost basis."[126] Here, the Staff itself considered important the need to identify "potential Lakota places of significance, especially for the nearby Oglala Sioux Tribe,"[127] and the Staff chose to have a TCP field survey performed, "ultimately opt[ing] for the open site" approach, which Crow Butte had suggested.[128] The Board simply assessed the survey that *was* performed and found it insufficient for a number of specific reasons. Crow Butte's petition does not call into substantial question any of the Board's specific grounds for finding the 2012 TCP survey deficient.

Ultimately, the core issue here is whether the Staff's efforts—with or without the Tribe's direct assistance—were adequate to assess the area and support the Staff's conclusions in the EA. The Board ruled against the Tribe on the issue of consultation, in view of the Tribe's own

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[125] *See* Petition at 17.

[126] *See* LBP-16-7, 83 NRC at 398, 402 n.467).

[127] *See id.* at 364 (quoting Ex. NRC-076-R2, Staff Rebuttal Testimony, at 59).

[128] *See id.* at 364, 367-68; *see also* Ex. NRC-001-R, Initial Staff Testimony, at 63 ("[T]he Tribes felt very strongly that the only way to properly identify cultural properties was with a [TCP] survey . . . While the [Advisory Council on Historic Preservation's] regulations and guidance do not declare any single method by which cultural properties must be identified, the Staff considered the Tribes' comments and chose to conduct a TCP survey of the Crow Butte facility and proposed expansion areas.").

failures to respond to the Staff.[129] The Board therefore recognized that the Staff cannot force the Tribe's participation or assistance, which is why the Board suggested that the Staff, if unable to obtain information from knowledgeable Tribe members, could alternatively seek to "locate and utilize experts who are knowledgeable about Lakota culture and TCPs" that may be in the license renewal area.[130] In any event, as the Tribe states, the "burden was on the NRC Staff—not the Tribe—to demonstrate it had fulfilled its responsibilities under the NHPA and NEPA."[131]

Crow Butte argues that the Tribe "has not identified a single historic site or TCP that the NRC Staff is alleged to have overlooked in the EA."[132] But again, the focus of the Board's decision is whether the sum and breadth of the Staff's efforts were reasonably sufficient to identify potential sites and properties, regardless of the level of response by the Tribe.[133] The Board found that each source of information that the EA relies on—the Bozell & Pepperl survey, the literature reviews and interviews, the June 2011 meeting, and the 2012 TCP field survey—was not a reasonable effort to identify potential TCPs. In short, the Board found that the Staff

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[129] *See* LBP-16-7, 83 NRC at 382-83.

[130] *See id.* at 402 n.467.

[131] *See* Tribe's Answer at 9.

[132] Petition at 19.

[133] Nonetheless, the Board addressed what it viewed as limited or ineffective Staff efforts to engage the Tribe regarding the field survey. The Board concluded that because the Staff initially contemplated a survey encompassing multiple license sites, including that of the Powertech site, the survey proposals may have been confusing. Relatedly, the Tribe did submit a proposed statement of work for a TCP survey for the Powertech site in South Dakota; the Tribe submitted its survey proposal a month before the Staff decided not to conduct a survey encompassing both the Crow Butte and the Powertech sites and shortly before the Staff issued its invitation for the "open site" survey of the Crow Butte area. *See* LBP-16-7, 83 NRC at 369-71, 396-98. The Board also observed that although "this proceeding had then been pending for over four years, and even though the NRC Staff took two more years to complete its EA," and other field survey approaches had been considered, the Staff essentially adopted Crow Butte's suggested "open site" proposed survey approach "in less than a month," established "an extremely short turnaround, allowing only fourteen days within which to respond," and then "pushed for site reviews to be completed in less than a month thereafter." *See id*. at 398; *see also id.* at 379-80.

relied on investigations or reviews that had not been shown to be sufficiently comprehensive, no matter that Tribe "witnesses did not definitively state" that there were "sign-or-starve" "encampments on the project site," nor could offer specific evidence "as to the location of any encampments."[134]

Crow Butte does not identify any material evidence that the Board may have overlooked or misunderstood. Crow Butte instead rehashes arguments made before the Board, referencing the same testimony or other evidence that the Board considered but found less persuasive than that of the Intervenors.

The Board in its role as the fact-finder judged the credibility of the witnesses, weighed the evidence, and provided a clear, extensive description of its reasoning. Crow Butte has not identified a clear factual or legal error warranting reversal or further examination of the Board's decision.[135] We decline to take plenary review of LBP-16-7. [136]

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[134] *See* Petition at 20-21.

[135] Our colleagues in the dissent rely on the fact-specific findings in a Ninth Circuit Court of Appeals case as instructive in this proceeding. *See* Chairman Svinicki and Commissioner Caputo, dissenting at 1, 5-7 (citing *Muckleshoot Indian Tribe v. U.S. Forest Service*, 177 F.3d 800, 811 (1999)). Respectfully, we view *Muckleshoot* as inapplicable and distinguishable. Given the procedural posture of *Muckleshoot*, the Ninth Circuit reviewed the facts of the case *de novo*. *See Muckleshoot*, 177 F.3d at 804. By contrast, a much more stringent factual standard of review—clear error—applies here. *See* 10 C.F.R. § 2.341(b)(4)(i). Further, while the court in *Muckleshoot* was "unable to conclude that the Forest Service failed to make a reasonable and good faith effort to identify historic properties" it ultimately reversed the agency's decision on other grounds. *Muckleshoot*, 177 F.3d at 807, 809. In so ruling, the court stated that "the Forest Service will have an opportunity to re-open its quest for and evaluation of historic sites on Huckleberry Mountain." *Id.* at 807.

[136] Our decision to deny Crow Butte's petition as to LBP-16-7 should not be understood as a merits-based view of our own on the adequacy of the Staff's cultural resources analysis or the need for any particular further Staff activities.

III. CONCLUSION

For the reasons discussed above, Crow Butte's petition for review of LBP-15-11 and LBP-16-7 is *denied*.

IT IS SO ORDERED.

For the Commission

Annette L. Vietti-Cook Digitally signed by Annette L. Vietti-Cook Date: 2020.10.08 12:12:14 -04'00'

Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, Maryland,
this 8th day of October 2020.

Additional Views of Commissioner Wright

My colleagues in the dissent view this case as involving legal error. Specifically, my colleagues view the Board's decision as requiring the Staff to take specific actions to cure the noted NEPA and NHPA deficiencies, instead of assessing the Staff's actions under a "reasonable and good faith effort" standard.[1] Based on that, they would overturn the Board's decision. While I respect their views, I do not read the Board as requiring any particular action to cure the identified deficiencies. In fact, the Board made clear that it did "not direct the NRC Staff regarding the specifics as to how it should achieve [compliance with NEPA and the NHPA]."[2] For this reason, I do not view this case as containing legal error on the Board's part. Therefore, I view this case through the lens of the factual standard of review, clear error.

The standard for showing "clear error" is "a difficult one to meet: to do so, a petitioner must demonstrate that the Board's determination is 'not even plausible in light of the record as a whole.'"[3] As noted in the majority opinion, even where the "record evidence . . . may be understood to support a view sharply different from that of the Board" does not mean that the "Board's own view of the evidence was 'clearly erroneous.'"[4] In its petition here, Crow Butte does not address the Board's specific reasoning regarding the Staff's efforts and therefore does not identify a clear factual error in the Board's decision.

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[1] Chairman Svinicki and Commissioner Caputo, dissenting at 4-5, 7 (Dissent).

[2] LBP-16-7, 83 NRC at 414.

[3] *See, e.g.*, *Strata Energy, Inc.* (Ross In Situ Recovery Uranium Project), CLI-16-13, 83 NRC 566 (2016) (quoting Shaw AREVA MOX Services, LLC (Mixed Oxide Fuel Fabrication Facility), CLI-15-9, 81 NRC 512, 519 (2015); Honeywell International, Inc. (Metropolis Works Uranium Conversion Facility), CLI-13-1, 77 NRC 1, 18-19 (2013).

[4] *See Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-03-8, 58 NRC 11, 26 (2003) (quoting *Kenneth G. Pierce* (Shorewood, Illinois), CLI-95-6, 41 NRC 381, 382 (1995) (internal quotation omitted)); *see also, e.g.*, *Strata Energy, Inc.* (Ross *In Situ* Uranium Recovery Project), CLI-16-13, 84 NRC 566, 586 (2016).

After reviewing the Board's comprehensive, case-specific factual findings, I find the Board's conclusions plausible and therefore defer to the Board. In particular, I find that the Board assessed the Staff's efforts to determine reasonableness and, based on its review of the factual record, found that these efforts did not comply with the Staff's NEPA and NHPA obligations. For example, as noted in the majority opinion, the Board emphasized that at the time the Bozell & Pepperl survey was conducted, the NHPA did not require agencies to "consider the cultural or religious significance that tribes may ascribe to TCPs, as was required in 2007 when Crow Butte applied to renew its license."[5] The dissent points to the Board's description of the Bozell & Pepperl survey as a Class III archaeological survey that covered a significant portion of the license area as one means to distinguish precedent the Board cited.[6] But I find reasonable that the Board considered the adequacy of the Staff's efforts and the Bozell & Pepperl survey based on the legal obligations existing when the challenge was brought, and not on the legal obligations in place decades earlier, when that survey was prepared.

The dissent also raises concerns about the majority setting precedent that will adversely impact the Staff and applicants in various licensing reviews going forward. I do not view this case as setting precedent for other cases and licensing boards. On the contrary, I view the majority's decision as declining to take review of LBP-16-7 and LBP-15-11 based on the standard of review set forth in our regulations, these Board decisions, Crow Butte's petition for review, and the record in this case. Finally, my decision to deny Crow Butte's petition does not indicate a merits-based view on the adequacy of the Staff's cultural resources analysis or the need for any specific Staff activities.

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[5] LBP-16-7, 83 NRC at 384.

[6] *See* Dissent at 4 n.17.

Chairman Svinicki and Commissioner Caputo, dissenting.

In this Order, the majority legitimizes a Board decision that ignored the legal standard for the sufficiency of the Staff's NEPA and NHPA reviews. The Board's decision inappropriately focused only on whether any historic properties had actually been identified rather than on whether the staff made a "reasonable and good faith effort to carry out appropriate identification efforts."[1] The majority upholds this error and declines to apply the well-established legal principles that guide NHPA and NEPA review. We would overturn this legal error and the Board's conclusion that the Staff must conduct a new field investigation to comply with NEPA and NHPA.[2] Nothing in the text of those statutes, implementing regulations, guidance documents, or case law compels such a result. In fact, when presented with a similar set of facts, the Ninth Circuit Court of Appeals held that a field investigation was not required.[3] As a result, the majority needlessly prolongs this case, creates a precedent that will impose unnecessary and confusing burdens on NRC Staff and applicants, and effectively allows third-parties to indefinitely impede NRC reviews by withholding their participation.

NRC precedent, Federal caselaw, and NEPA's implementing regulations acknowledge that NEPA is governed by a "rule of reason" that requires an agency to include only in NEPA documentation information that is reasonably available.[4] Likewise, NHPA's implementing

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[1] 36 C.F.R. § 800.4(b)(1).

[2] LBP-16-7, 83 NRC at 393 ("a new field investigation appears to be the only 'reasonable and good faith effort' for identifying TCPs within the license area.").

[3] *Muckleshoot Indian Tribe v. U.S. Forest Service*, 177 F.3d 800, 811 (1999) (finding the Forest Service undertook reasonable identification efforts even when "the Forest Service resisted the Tribe's requests for a formal study of cultural properties" and given "a more thorough exploration, the Forest Service might have discovered more eligible sites").

[4] *Entergy Nuclear Generation Company and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-10-22, 72 NRC 202, 208 (2010) (finding that some information, needed for a NEPA review, may "prove to be unavailable, unreliable, inapplicable, or simply not adaptable" and directing the Staff to provide a reasonable analysis of available information in such cases); *Town of Winthrop v. F.A.A.*, 535 F.3d 1, 13 (1st Cir. 2008) ("It is not unreasonable for an agency

regulations recognize that an agency may not be able to identify all historic properties and hence require a "reasonable and good faith" effort to identify historic properties.[5] Despite these principles, the majority's opinion expands a troubling line of precedents upholding Board decisions faulting Staff NEPA and NHPA analyses for omitting unavailable information while ignoring whether the Staff in fact took reasonable steps to acquire that information.[6] Such outcomes place the Staff in an untenable position of seeking missing information without any idea of whether its original efforts to obtain that information were reasonable and if not, what would be reasonable. Unsurprisingly, the Staff has struggled to fulfill a similarly nebulous mandate in another uranium recovery case, leading to years of squandered effort that ultimately yielded no additional information.[7]

The issue of accounting for unavailable information in NEPA and NHPA analyses has arisen with regularity in NRC adjudications. However, the Board and Commission's failure to articulate what constitutes a reasonable effort to acquire such information leaves future litigants with little certainty on how the agency will address these issues. With an array of advanced reactor applications on the horizon, this long-standing flaw in our NEPA and NHPA processes

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to decline to study in an SEIS a pollutant for which there are not yet standard methods of measurement or analysis."); 40 C.F.R. § 1502.21 (directing agencies to include essential information in an environmental impact statement unless "the overall costs of obtaining it are unreasonable or the means to obtain it are not known").

[5] 36 C.F.R. § 800.4(b)(1).

[6] *E.g., Powertech (USA), Inc.* (Dewey-Burdock *In Situ* Uranium Recovery Facility), CLI-16-20, 84 NRC 219, 247-48 (2016) (rejecting Staff argument that the board committed legal error by not considering whether the Staff made reasonable efforts to acquire missing information because "the fundamental issue . . . is inherently factual").

[7] *Powertech (USA), Inc.* (Dewey-Burdock *In Situ* Uranium Recovery Facility), LBP-19-10, 90 NRC at __ (slip op. at 3-19) (2019) (describing the Staff's unsuccessful four-year effort to obtain missing information on cultural resources following a ruling that the Staff's initial four-year effort to obtain missing information on cultural resources did not satisfy NEPA or NHPA).

glares more brightly than ever and may stymie Congress's and the NRC's efforts to efficiently right-size the licensing process for such applications. As explained below, adhering more directly to the requirements of NEPA and NHPA as articulated in the statutes, implementing regulations, and legal precedent would enhance certainty in future NRC adjudications and avoid the unnecessary and wasteful result of the majority's holding in this case.[8] Therefore, we dissent.

A. The Board Incorrectly Determined a New Field Investigation Was Required

1. National Historic Preservation Act

Crow Butte argues that contrary to the standard discussed above, the Board made a legal error by concluding that the Staff could meet its NHPA obligations in this proceeding "only through a 'new field investigation.'"[9] The Board acknowledged that 36 C.F.R. § 800.4(b)(1), the relevant NHPA implementing regulation, requires only that agencies "make a 'reasonable and good faith effort'" to identify historic properties.[10] To understand what constitutes a "reasonable and good faith effort," the Board reviewed precedents from the Federal Circuit Courts, ACHP guidance, and documents from the NRC Staff.[11] From this review, the Board concluded that in

[8] Because we would find that the Board's merits decision rested on a clear legal error, we would not reach the issue of whether the underlying contention was timely. However, we express concern that the majority's position on timeliness could potentially weaken the rigorous requirement that timeliness of a contention be tied to the availability of the information and not to the issuance of a specific Staff document. We therefore would be hesitant to endorse such an approach.

[9] Petition at 3 (*quoting* LBP-16-7, 83 NRC at 393).

[10] LBP-16-7, 83 NRC at 353 (quoting 36 C.F.R. § 800.4(b)(1)).

[11] *Id*. at 390-93 (citing *Montana Wilderness Association v. Connell*, 725 F.3d 988 (9th Cir. 2013); *Pueblo of Sandia v. United States*, 50 F.3d 856, 860 (10th Cir. 1995); Meeting the "Reasonable and Good Faith" Identification Standard in Section 106 Review, ACHP, at 3, available at http://www.achp.gov/digital-library-section-106-landing/meeting-reasonable-and-good-faith-identification-standard.pdf) (last retrieved Aug. 3, 2020) (ACHP Guidance); Ex. NRC-012, U.S. NRC Materials License SUA-1534, § 9.8 (Nov. 5, 2014) (Crow Butte License); Ex. BRD-023,

this proceeding, "a new field investigation appears to be the *only* 'reasonable and good faith effort' for identifying TCPs within the license area."[12]

On its face, however, the Board's interpretation of 36 C.F.R. 800.4(b)(1) constitutes a clear departure from the meaning of the regulation. The Board relied on authorities that certainly suggest that the level of effort an agency must expend to meet the "reasonable and good faith effort" standard could depend on the circumstances of a given proceeding.[13] The Board also concluded that several of these sources indicated that where previous field investigations did not adequately identify TCPs, a new field investigation may be "appropriate,"[14] "reasonable,"[15] or even "preferred."[16] But no authority on which the Board relies clearly advances a new field investigation as the required or "only" way to meet the "reasonable and good faith effort" standard with respect to TCPs.[17] By providing this direction to the Staff, the

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Letter from Kevin Hsueh, Chief, Environmental Review Branch, NRC Office of Federal and State Materials and Environmental Management Programs (Oct. 31, 2012) at 1 (Hsueh Letter)).

[12] LBP-16-7, 83 NRC at 393 (emphasis added) (quoting 36 C.F.R. § 800.4(b)(1)). Throughout its discussion of standards and precedents, it is apparent that the Board considers a "field investigation" to be essentially a field survey. *Id.* at 392. This limited view of a "field investigation" is particularly troubling given the Tribe's resistance to consulting with and providing information to the Staff. *See id.* at 381.

[13] *Pueblo of Sandia*, 50 F.3d at 861-62.

[14] LBP-16-7, 83 NRC at 392 (citing ACHP Guidance).

[15] *Id*. (citing Hsueh Letter).

[16] *Id*. (citing Ex. NRC-012, Crow Butte License, § 9.8).

[17] To the extent the Board found *Montana Wilderness* controlling, *Id*. at 392-93, we find that precedent distinguishable. Unlike *Montana Wilderness*, the subject of this proceeding is not a federal plan to protect and preserve historic objects but rather a request from a private entity to renew a license for a uranium recovery facility. *Montana Wilderness*, 725 F.3d at 1008. Moreover, while *Montana Wilderness* rested in part on the BLM's failure to follow its own guidance on when to prepare new field surveys, no party has pointed to any NRC guidance that would require the Staff to do so in this case. *Id*. Additionally, while the previous surveys in *Montana Wilderness* only covered a small percentage of the total acreage in the Monument, *id*., the Board found that the Bozell & Pepperl Survey "was a Class III archeological survey . . . of a

Board exceeded its authority by veering into the realm of case management—an area squarely under the direction of Staff management and the Commission itself[18]—in prescribing a process to resolve the deficiencies the Board identified in the Staff's review. But more essentially, by pivoting its attention to whether the Staff successfully completed a new field investigation, the Board ignored the more fundamental question: whether the Staff's overall efforts to identify TCPs, including the Staff's efforts to complete a field survey, were, in fact, reasonable.

In *Muckleshoot Indian Tribe v. U.S. Forest Service*, the Ninth Circuit examined a similar fact pattern and concluded that the agency efforts were reasonable. In that proceeding, the court considered a challenge from the Muckleshoot Indian Tribe to a proposed exchange of land, which contained TCPs, between the Forest Service and the Weyerhaeuser Company.[19] The record in that proceeding indicated "that the Forest Service researched historic sites in the Exchange area and communicated several times after the commencement of the public

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significant portion of the license area." LBP-16-7, 83 NRC at 384. Most significantly, unlike the land use plan in *Montana Wilderness,* which would concentrate traffic and activity in certain corridors within the area of effect and as a result would likely damage unidentified resources, Crow Butte's license renewal application does not propose to conduct extensive new or substantially changed activities in the license area that would have a high probability of disturbing undiscovered resources. *Montana Wilderness*, 725 F.3d at 1008.

[18] *See, e.g., Duke Energy Corp.* (Catawba Nuclear Station, Units 1 and 2), CLI-04-6, 59 NRC 62, 74 (2004) ("NRC Staff Reviews, which frequently proceed in parallel to adjudicatory proceedings, fall under the direction of Staff management and the Commission itself, not the licensing boards.").

[19] *Muckleshoot Indian Tribe*, 177 F.3d at 802-05. While the Ninth Circuit appeared also to consider the NHPA's consultation requirements in *Muckleshoot Indian Tribe*, *id*. at 805-806 (finding an "opportunity to interpret the specific consultation requirements of NHPA"), its analysis and holding directly address the identification component of the NHPA, *id*. at 807 (declining to find that the Forest Service "failed to make a reasonable and good faith effort to identify historic properties").

comment period with Tribal officials regarding the identification and protection of cultural resources that might be affected by the Exchange."[20]

The Muckleshoot Indian Tribe claimed that "the Forest Service ignored its claims that numerous other places of historic importance were situated on the portions of [land] proposed for exchange."[21] Specifically, the Muckleshoot Indian Tribe requested "a study of its historical places and trails," but the Forest Service responded by requesting "the immediate disclosure of any information the Tribe possessed about those sites," which the "Tribe was unable, or unwilling, to provide."[22] The Ninth Circuit noted that the Forest Service's identification efforts "were in tension with the recommendations" from the applicable ACHP guidance and "could have been more sensitive to the needs of the Tribe."[23] Consequently, the court concluded that "[g]iven more time or a more thorough exploration, the Forest Service might have discovered more eligible sites."[24] But the court also noted that the Muckleshoot Indian Tribe "had many opportunities to reveal more information to the Forest Service."[25] Ultimately, the court found no violation of the NHPA section 106 identification requirement because of those opportunities.[26]

Muckleshoot Indian Tribe serves as a useful guide to understanding what a "reasonable and good faith" effort encompasses. In this proceeding, the Staff, like the Forest Service in *Muckleshoot Indian Tribe*, successfully identified historic properties in the area of effect, with the

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[20] *Id*. at 806.

[21] *Id*.

[22] *Id.*

[23] *Id*. at 807.

[24] *Id*.

[25] *Id*.

[26] *Id*.

exception of TCPs.[27] And, as in *Muckleshoot Indian Tribe*, the Staff after several repeated attempts was ultimately unable to effectively engage tribal expertise in identifying those TCPs, potentially leaving many TCPs unidentified.

To the extent a contrast exists between the two cases, it relates to the Staff having undertaken more extensive efforts to avail itself of the Oglala Sioux Tribe's expertise than the Forest Service did with respect to the Muckleshoot Indian Tribe. The Staff clearly provided the Oglala Sioux Tribe an opportunity to provide relevant information regarding TCPs at the scheduled May 23, 2013, government to government meeting.[28] Moreover, unlike the Forest Service, which after several communications simply requested the immediate disclosure of all relevant information, the Staff spent years communicating with a number of Tribes and the licensee and the better part of a year attempting to design a survey. When the Staff was unable to achieve consensus on the approach for the survey, it held an open-site survey, to which the Oglala Sioux Tribe, along with many other Tribes, was invited. Thereafter, the Staff continued to work toward facilitating government to government meetings.[29] Perhaps the Oglala Sioux Tribe, like the Muckleshoot Indian Tribe, preferred a more formal study. But the Staff's efforts certainly provided the Oglala Sioux Tribe with "an opportunit[y] to reveal more information" to the agency in addition to an opportunity to assist the agency in attempting to identify additional TCPs beyond those already known to the Tribe.[30] Thus, if anything, the Staff provided the

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[27] *Compare* LBP-16-7, 83 NRC at 384, 402 (noting the Bozell & Pepperl Survey yielded "valuable information about historic properties and that, as such, it is clearly pertinent to this license renewal" and it constituted a "good start" for making a reasonable and good faith effort) *with id*. at 389 (finding that the Bozell and Pepperl Survey did not "not meet the requirement of the current version of the NHPA with respect to TCPs").

[28] *Id*. at 382-83.

[29] *Id*. at 367-82.

[30] *Muckleshoot Indian Tribe*, 177 F.3d at 807.

Oglala Sioux Tribe with a greater opportunity to provide information regarding TCPs than that provided to the Muckleshoot Indian Tribe by the Forest Service.

Our colleagues suggest that *Muckleshoot Indian Tribe* is "inapplicable and distinguishable" because the Ninth Circuit employed a different standard of review and ultimately remanded the case to the Forest Service on other grounds.[31] But we do not rely on *Muckleshoot Indian Tribe* to conclude that Crow Butte's appeal meets a specific standard for review; rather we look to *Muckleshoot Indian Tribe* to understand the meaning of the term "reasonable and good faith effort." The standard of review the Ninth Circuit used is therefore irrelevant to our analysis.[32] Moreover, Federal Courts of Appeals frequently consider many claims in an opinion; the Ninth Circuit's remand to the Forest Service on other grounds does not provide additional insight into its discussion of whether the Forest Service fulfilled its identification obligations under the NHPA. To the extent these features represent the greatest differences between *Muckleshoot Indian Tribe* and the instant proceeding, we conclude that the Ninth Circuit's analysis of the "reasonable and good faith" standard in *Muckleshoot Indian Tribe* is indeed on point.

Therefore, the Board's failure to explicitly consider whether these efforts constituted a "reasonable and good faith" effort amounts to clear legal error. Rather, the record establishes that the Staff met this standard in providing the Oglala Sioux Tribe, and other Tribes, a reasonable opportunity to provide the agency information on TCPs. Moreover, the Board's

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[31] Majority Opinion at 31 n.135.

[32] Moreover, the majority notes that *Muckleshoot Indian Tribe* relied on a *de novo* standard instead of the "clear error" standard of review the majority employed. However, because Crow Butte claimed that the Board erred legally in determining that a new field investigation is the only way to meet the "reasonable and good faith effort" standard, a *de novo* standard of review is consistent with our precedents. *Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc*. (Vermont Yankee Nuclear Power Station), CLI-10-17, 72 NRC 1, 11 (2010).

insistence that the Staff complete a new field investigation represents a dramatic and warrantless expansion of the NHPA's requirements.

2. National Environmental Policy Act

Crow Butte also argued that the Board erroneously required the Staff to conduct a new field survey to meet NEPA's "hard look" requirement.[33] According to Crow Butte, "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."[34] Crow Butte is correct as a matter of law; we have previously held that some information, needed for a NEPA review, may "prove to be unavailable, unreliable, inapplicable, or simply not adaptable" and directed the Staff to provide a reasonable analysis of available information in such cases.[35] Indeed, the Supreme Court has cautioned, "The scope of the agency's inquiries must remain manageable if NEPA's goal of ensuring a fully informed and well considered decision is to be accomplished."[36]

The Board concluded that the Staff's NEPA analysis was deficient in large part because it found that the Staff had not fulfilled its Identification Obligations under the NHPA. Thus, the Board found that the Staff's EA did not take a "hard look" at the potential environmental impacts of the license renewal on TCPs and cultural resources.[37] This finding rests on a legal error similar to the error supporting the Board's NHPA conclusion: the Board only identified potentially

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[33] Petition at 3.

[34] *Id*.

[35] *Entergy Nuclear Generation Company and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-10-22, 72 NRC 202, 208 (2010).

[36] *Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 776 (1983) (quotations omitted).

[37] LBP-16-17, 83 NRC at 402-04.

missing information without considering whether the Staff undertook reasonable efforts to obtain that information. However, the Board's holding that the Staff undertook a "genuine effort" to consult with the Oglala Sioux on identifying TCPs in the license area at the scheduled government to government meeting on May 23, 2013, as well as the additional Staff efforts undertaken for identification, should have been judged to satisfy NEPA's "hard look" requirement.[38] Ironically, the Board itself noted that the survey approach favored by the Tribes was likely unfeasible from a cost standpoint and that the Oglala Sioux Tribe actively resisted consulting with and providing information to the staff.[39] Both suggest that Tribal participation in the survey was not reasonably available. Therefore, the Board's ruling on NEPA also significantly expands the scope of that statute's requirements by demanding that the Staff make extraordinary efforts to acquire missing information even after it became apparent that the information could not be obtained through reasonable steps, potentially requiring, in the Board's own view, steps that were likely unfeasible.

The Board also faulted the EA for not adequately responding to comments objecting to the results of the TCP Survey.[40] By emphasizing the Staff's failure to analyze comments in the EA, the Board seeks to impose further requirements on the Staff that are not found within the four corners of the NEPA Statute or within our implementing regulations.[41] While the Staff is required to submit a request for comments on draft environmental impact statements,[42] no such

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[38] *Id*. at 382-83.

[39] *Id.* at 381 (noting that the Oglala Sioux Tribe "eventually actively resisted the consultation process"); *id.* at 398 (noting that "the intensive TCP survey preferred by the tribes may well have been infeasible on a cost basis").

[40] *Id*. at 402-03.

[41] *See* Tr. at 2341.

[42] 10 C.F.R. § 51.73.

requirement exists for environmental assessments.[43] Thus it was also improper for the Board to find lacking the Staff's comment response in the EA when none is required.[44]

B. No Clear Path to Resolution

The majority declines to apply these well-established legal principles to resolve this proceeding. The majority avoids the question of whether the Board wrongly found that NEPA and NHPA required a new field investigation and instead considers whether Crow Butte's appeal demonstrates the Board committed a factual error in weighing the evidence before it.[45] But this approach places the cart before the horse: if the Board selected the wrong legal standard, then whether it erred in weighing the evidence is irrelevant. The Board's analysis was flawed from the start because it solely focused on whether the Staff successfully completed a

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[43] *See id.* at § 51.33 ("[T]he appropriate NRC staff director *may* make a determination to prepare and issue a draft finding of no significant impact for public review and comment before making a final determination") (emphasis added).

[44] Additionally, while the EA may not address the comments at issue, the record establishes that the Staff did consider those comments and they had no bearing on the Staff's ultimate conclusions in the EA. At hearing, Staff's witness explained that the comments were "general in nature and so far out of scope of the overall NEPA process and the specific Section 106 review pertaining to Crow Butte license renewal, that staff did not feel that that was necessary nor ignoring any obligations it had in any of the regulations." Tr. at 2342. Thus, Staff clarified during the adjudicatory proceeding that it had evaluated the comments and that the comments did not influence the Staff's ultimate conclusion.

[45] Majority Opinion at 23-29. Commissioner Wright argues that Board did not err legally because it did "'not direct the NRC Staff regarding the specifics as to how it should achieve [compliance with NEPA and the NHPA].'" Additional Views of Commissioner Wright at 1 (*quoting* LBP-16-7, 83 NRC at 414 (alteration in original)). While the Board may not have demanded specific actions to complete a new field investigation, as explained above, it unduly expand the requirements of NEPA and NHPA in this proceeding by concluding that "a new field investigation appears to be the *only* 'reasonable and good faith effort' for identifying TCPs within the license area." LBP-16-7, 83 NRC at 393 (emphasis added). Moreover, Commissioner Wright contends that the majority opinion will not set a precedent for future proceedings; rather he suggests that this case is unique "based on the standard of review set forth in our regulations, these Board decisions, Crow Butte's petition for review, and the record in this case." Additional Views of Commissioner Wright at 2. However, because the record, regulations, and standard of review in this case overlap significantly with other NRC proceedings, we are not similarly comforted.

new field investigation, not whether the Staff made a reasonable attempt to do so. Moreover, the Board's opinion leaves the Staff with no clear path toward resolving this proceeding.

As noted above, the Commission came to a similar result in the *Powertech* proceeding, in which the remanded hearing has only recently concluded. Examining that opinion further illustrates the infirmities in the majority's approach. In that case, which also involved failed coordination with the Oglala Sioux Tribe to identify TCPs, the Staff argued that "the Board misapplied NEPA's hard-look standard as a matter of law, under which the Board should assess whether the Staff 'made reasonable efforts' to obtain complete information on the cultural resources at issue here."[46] Similar to the majority opinion here, the Commission in *Powertech* avoided addressing this legal appeal by concluding, "the fundamental issue here – whether the Staff complied with NEPA – is inherently factual."[47] By taking this approach, the Commission provided the staff with no explanation on what efforts were reasonable, which in turn led to the parties floundering through an additional four years of efforts to agree on an approach to identify TCPs. Throughout that time, the Staff and Tribe engaged in a process where the parties would apparently reach consensus only to have the Tribe shift away from that agreement.[48] Ultimately, the Staff was unable to effectuate an agreement with the Oglala Sioux Tribe to identify TCPs, despite nearly a decade of effort to do so.[49]

This path was enabled by the Board's treatment of the Oglala Sioux Tribe's expertise regarding historic properties. After years of weighing evidence on TCPs, the Board noted the

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[46] CLI-16-20, 84 NRC at 247 (quoting *NRC Staff's Petition for Review of LBP-15-16* (May 26, 2016) at 17-18).

[47] *Id*.

[48] *Powertech (USA), Inc.* (Dewey-Burdock *In Situ* Uranium Recovery Facility), LBP-19-10, 90 NRC at __ (Dec. 12, 2019) (slip op. at 43-49).

[49] *Id.* at 3-19.

Staff's conclusion that while a contractor archaeologist "'might be able to identify physical remains of certain activities, . . . *only Tribal members* can assign significance to those sites' and identify 'sacred locations that are intangible or not readily identifiable as archaeological sites, such as landforms or places of worship and ceremony.'"[50] The *Powertech* Board thus held, the "NRC Staff thus concluded, and we find reasonably so, that it could not complete [the field investigation] without the cooperation and participation of the Oglala Sioux Tribe."[51]

The majority's opinion in this proceeding similarly positions the agency for failure. By declining to overturn the Board's conclusion that a new field investigation is necessary, the majority supplants the correct legal standard of reasonableness with a new standard focusing solely on identification. By endorsing this new standard, the majority leaves the Staff in the unenviable position of needing to do more without any notion of what is actually reasonable and adequate. Further, the parties to this proceeding significantly overlap the parties in the *Powertech* case; thus, there is little reason to think the Staff will be successful in additional efforts. Requiring the Staff and Oglala Sioux Tribe to come to terms on an approach to identify TCPs brings to mind the saying about repeatedly undertaking the same action and expecting a different result.

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[50] LBP-19-10, 90 NRC at __ (slip op. at 49-50) (*quoting* NRC-176-R, NRC Staff Direct Testimony, at 5-6, 7 (alterations in original) (emphasis added)). The Board in this proceeding similarly emphasized the Tribe's expertise. *See id.* at 387 ("[A] literature review is inferior to the expertise of the Oglala Sioux Tribe witnesses who testified to the contrary"); *Id.* at 391 ("The ACHP Guidance goes on to explain that the 'reasonable and good faith effort" required of each federal agency envisions specific identification carried out by qualified individuals who "have a demonstrated familiarity with the range of potentially historic properties that may be encountered, and their characteristics,' and who acknowledge 'the special expertise possessed by Indian tribes . . . in assessing the eligibility of historic properties that may possess religious and cultural significance to them.'") (citing ACHP Guidance at 2). Similarly, the Board faulted the open site approach as not including the expertise of tribal elders. *Id.* at 398 ("[A] proper TCP survey . . . involves elders and bringing the elders to the field") (quoting Tr. at 2280).

[51] LBP-19-10, 90 NRC at __ (slip op. at 50).

The majority claims that "the Board's decision does not conclude that identification efforts can only be satisfied by a field investigation conducted by Oglala Sioux Tribe members. In fact, the Board acknowledged that the Staff 'need not rely on the Oglala Sioux Tribe to meet its Identification Obligations under the NHPA.'"[52] In light of the Board's treatment of tribal expertise in *Powertech*, such pronouncements ring hollow. Consequently, the proposition that the Staff could remedy the lack of information on TCPs without engaging Tribal expertise appears naïve at best. Rather, as the Board itself observed earlier in this proceeding, "'It would be ethnocentric in the extreme to say that 'whatever the Native American group says about this place, I can't see anything here so it is not significant.'"[53] However, the majority's opinion places the Staff squarely in the dilemma of either risking such ethnocentrism by undertaking a field investigation without the Tribe or following in the footsteps of the failed *Powertech* process and seeking to design a field investigation in which the Tribe, who actively resisted consultation in this proceeding, *might* participate. Neither approach presents a viable alternative for concluding this proceeding.

As evidenced in *Powertech*, the majority's opinion also shifts effective control of these reviews solely into the hands of a third-party with "necessary" expertise. Rather than an NHPA review proceeding as a partnership between federal agencies and affected stakeholders, as envisioned by the NHPA and its regulations,[54] the majority's position would provide the means for a party to halt an agency's environmental review and licensing process as a whole by withholding support and expertise necessary to complete an adequate site survey. We find no

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[52] Majority Opinion at 29 (*quoting* LBP-16-7, 83 NRC at 398).

[53] LBP-16-7, 83 NRC at 386 (*quoting* National Register Bulletin 38, Guidelines for Evaluating and Documenting Traditional Cultural Properties (1998), at 8).

[54] *See* 36 C.F.R. § 800.2(c)(2).

support for this shift that would grant an adverse party such a stranglehold over NRC licensing proceedings.

C. An Unworkable Framework for Future NRC Adjudications

The issue of preparing NEPA documentation in the face of incomplete or unavailable information has arisen with regularity in NRC adjudications.[55] But Federal precedent on this topic generally focuses on whether the missing information is "essential" to the NEPA analysis as opposed to whether the agency efforts to acquire such information were reasonable.[56] Therefore, determining what constitutes a reasonable effort may prove difficult in the future. In our view, under the established legal standard the Staff's initial efforts to obtain cultural resources information in this proceeding illustrate a reasonable effort to obtain the missing information. First, the Staff sent letters to 18 Tribes, including the Oglala Sioux Tribe, on January 18, 2011, that invited the Tribes to participate in formal consultation and provide "any known information on any areas on the project site that the Tribes believe have religious and cultural significance."[57] Second, the Staff took steps that were likely to lead to obtaining the missing information, in this case by seeking to conduct an on-site cultural resources survey.[58]

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[55] *E.g.*, *Pacific Gas and Elec. Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-11-11, 74 NRC 427, 438-44 (2011) (considering claim that applicant must provide a probabilistic analysis of new seismic information or show that the cost of such analysis would be exorbitant); *Pacific Gas and Elec. Co.* (Diablo Canyon Nuclear Power Plant Independent Spent Fuel Storage Installation), CLI-08-1, 67 NRC 1, (2008) (considering claim that NRC did not fully disclose potential radiological impacts of a terrorist attack in its supplemental environmental impact statement); *Dominion Nuclear North Anna, LLC* (Early Site Permit for North Anna ESP Site), CLI-07-27, 66 NRC 215, 235-36 (2007) (discussing the extent to which missing information constitutes a "fatal flaw" to a NEPA analysis for an Early Site Permit).

[56] *E.g.*, *Friends of Animals v. Romero*, 948 F.3d 579, 586 (2nd Cir. 2020) (determining that EIS was not deficient under 40 C.F.R. § 1502.22 despite lacking information on deer movement because that information was not essential to selecting between alternatives).

[57] EA at 55.

[58] *Id*. at 55-57.

Finally, the Staff discontinued further efforts upon learning that the information could not be reasonably obtained.[59] In our view, these are the required elements that an approach satisfying a "rule of reason" (at least one worthy of the name) should contain when needed information is unavailable under NEPA. Moreover, as explained in our additional views to the order in *Powertech* issued today, had the Commission applied these basic principles earlier in that proceeding, the agency would have spared the parties years of wasted effort and time.[60] The same will likely prove true in this proceeding. Additionally, as discussed above, the Staff's efforts clearly constitute "a reasonable and good faith effort" to identify historic properties under NHPA.[61]

Developing a legal framework for agency adjudicators to respond to claims of incomplete information is critical. The agency expects to receive a number of complex applications for advanced reactor designs in the near future. Congress recently passed legislation seeking to streamline our safety review for such applications, suggesting that the efficient and effective review of these applications is a national priority.[62] However, commenters remain concerned that without similar efforts to seek efficiency in our NEPA process, these efforts will prove ineffective.[63] They note that the length and cost of our existing NEPA process pose a steep and

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[59] LBP-16-7, 83 NRC at 398 (noting that "the intensive TCP survey preferred by the tribes may well have been infeasible on a cost basis").

[60] *Powertech (USA), Inc.* (Dewey-Burdock *In Situ* Uranium Recovery Facility), CLI-20-__, 92 NRC __, __ (2020) (slip op. at __) (Additional Views of Chairman Svinicki and Commissioner Caputo).

[61] *Muckleshoot Indian Tribe*, 177 F.3d at 807.

[62] Nuclear Energy Innovation and Modernization Act, Pub. L. 115-439, Section 103, 132 Stat. 5565, 5572 (2019).

[63] Nuclear Innovation Alliance, Nuclear Innovation and NEPA: Streamlining NRC NEPA Reviews for Advanced Reactor Demonstration Projects While Safeguarding Environmental

potentially insurmountable obstacle to advanced reactors.[64] Given the novel nature of these designs and their deployment, some agency NEPA reviews for advanced reactor applications will likely touch on areas where environmental information is undeveloped or unavailable. Consequently, it is beyond time for the Commission to issue a definitive statement to parties in NRC NEPA litigation defining the elements of demonstrable sufficiency in efforts to acquire missing information. The majority's opinion does not accomplish that but further muddies the water on what parties must do to meet their environmental responsibilities and sets a precedent that third parties have the ability to hold reviews hostage. Applicants and Staff now face the continued prospect, demonstrated by this proceeding, that they will be asked to spend years chasing the mirage of complete information until agency adjudicators or intervenors decide the effort is sufficient or, more troublingly, those applicants simply decide to abandon their efforts in the face of this Gordian knot of ambiguity that the Commission continues to leave unresolved as a puzzle for the future.

Protection, 5-6 (Sep. 2019) (available at nuclearinnovationalliance.org/resources) (last visited Aug. 3, 2020).

[64] *Id*. at 26.

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 **COMMISSION MEMORANDUM AND ORDER (CLI-20-08)** have been served upon the following persons by Electronic Information Exchange, and by electronic mail as indicated by an asterisk.

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Office of the Secretary of the Commission

Dated at Rockville, Maryland,
this 8th day of October 2020.