

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION  
ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Michael M. Gibson, Chairman  
Dr. Richard E. Wardwell  
Brian K. Hajek

In the Matter of

CROW BUTTE RESOURCES, INC.

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

Docket No. 40-8943

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

May 26, 2016

PARTIAL INITIAL DECISION

## TABLE OF CONTENTS

<b>I. INTRODUCTION .....</b>	<b>4</b>
<u>A. Procedural History .....</u>	<u>4</u>
<u>B. Contention 1 (Consultation &amp; Tribal Cultural Properties).....</u>	<u>7</u>
<b>II. LEGAL STANDARDS.....</b>	<b>8</b>
<u>A. NEPA's Requirements.....</u>	<u>9</u>
1. NEPA's Fundamental "Hard Look" & Disclosure Goals .....	9
2. Distinctions Between an EA and an EIS .....	11
<u>B. The NHPA's Requirements.....</u>	<u>12</u>
1. The NHPA's Basic Requirements .....	12
2. The Impact of the 1992 Amendments to the NHPA .....	13
<b>III. CONTENTION 1 (Tribal Consultation &amp; Identification of Tribal Cultural Properties) ..</b>	<b>16</b>
<u>A. General Discussion of Contention 1 .....</u>	<u>16</u>
1. Contents of the EA .....	16
a. Literature Review & General Background.....	17
b. Previously Identified Cultural Resources .....	18
c. Consultations Undertaken for Current License Renewal.....	19
2. Parties' Positions.....	21
a. Witnesses for the Intervenors .....	21
b. Intervenors' General Position.....	21
c. The NRC Staff's Witnesses.....	25
d. The NRC Staff's General Position.....	25
e. Crow Butte's Witnesses .....	29
f. Crow Butte's General Position .....	29
3. Evaluating Contention 1 .....	30
<u>B. Meeting the NHPA's Consultation Obligations .....</u>	<u>31</u>
1. Consultation Begins in 2011 .....	32
2. Evaluation of NRC Staff's Consultation Approach .....	34
a. The NRC Staff's Grouping of Projects .....	35
b. The NRC Staff's Consulting Efforts at Face-to-Face Meetings .....	38
c. Failure of the TCP Survey.....	46
d. Genuine Attempts at Consultation and the Oglala Sioux Tribe's Lack of Reciprocity ....	52
3. Findings on Consultation Process.....	55
<u>C. Meeting the NHPA's Identification Obligations .....</u>	<u>57</u>
1. Bozell & Pepperl Survey .....	57
2. Literature Reviews and Interviews .....	64
3. June 7–9, 2011 Informal Information-Gathering Meeting & Bus Tour.....	70
4. The November 2012 TCP Survey .....	72
a. Opposition to The NRC Staff's "Open Site" Survey Approach.....	72
b. The Surveyors Were Inappropriate for the Task.....	79
c. The Survey Left Out the License Area .....	81
5. Findings on NHPA's Identification Obligations .....	83
<u>D. Meeting NEPA's Hard Look Requirement .....</u>	<u>84</u>
1. Findings on NEPA's Hard Look Requirement.....	87
<b>IV. NRC Staff Evidentiary Motions.....</b>	<b>87</b>

A. Objections to Board Exhibits.....	87
1. Exhibits Cited in NRC Staff Communications Log.....	89
2. Exhibits To Examine Development of November 2012 TCP Survey .....	90
3. Exhibits To Examine Survey Efforts of Crow Nation and Santee Sioux Nation .....	92
B. Objections to Testimony.....	93
C. Motions in Limine.....	94
<b>V. SUMMARY FINDINGS OF FACT .....</b>	<b>96</b>
<b>VI. CONCLUSIONS OF LAW .....</b>	<b>97</b>
<b>VII. REMEDIES.....</b>	<b>97</b>
<b>VIII. ORDER.....</b>	<b>101</b>

## I. INTRODUCTION

This adjudicatory proceeding arises from a challenge to the application of Crow Butte Resources, Inc. (“Crow Butte”) to renew its Source Materials License No. SUA-1534 for continued operation of its in situ leach (“ISL”) uranium recovery facility near Crawford, Nebraska.<sup>1</sup> Crow Butte’s original materials license was issued in 1988.<sup>2</sup> Thereafter, Crow Butte sought renewal of this license in 1995, which the NRC Staff granted in 1998 for an additional ten-year term.<sup>3</sup>

### A. Procedural History

On November 27, 2007, three months before its renewed license was set to expire, Crow Butte timely filed the instant license renewal application (“LRA”), seeking another ten-year renewal of its license.<sup>4</sup> On March 28, 2008, the NRC Staff accepted the LRA for technical review, and on May 27, 2008, a notice of opportunity for a hearing to contest the LRA was

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<sup>1</sup> Ex. CBR-011, Application for 2007 License Renewal USNRC Source Materials License SUA-1534 Crow Butte License Area (Nov. 27, 2007) [hereinafter “LRA”]. Documents relating to this proceeding are available for public inspection electronically on the NRC’s Electronic Hearing Docket (“EHD”) at <https://adams.nrc.gov/ehd>. For additional information regarding the EHD please see <http://www.nrc.gov/about-nrc/regulatory/adjudicatory.html#ehd> or contact the NRC Public Document Room reference staff by email addressed to [pdr@nrc.gov](mailto:pdr@nrc.gov) or by telephone at (800) 397-4209 or (301) 415-4737. Reference staff are available Monday through Friday between 8:00 AM and 4:00 PM ET, except federal holidays. For additional information regarding the NRC Public Document Room please see <http://www.nrc.gov/reading-rm/pdr.html>. For documents that are not available on EHD, we provide in the citation “ADAMS Accession” numbers, which are unique document identifiers.

<sup>2</sup> See LBP-15-11, 81 NRC 401, 404 (2015).

<sup>3</sup> Ex. NRC-009, Safety Evaluation Report (Revised), License Renewal of the Crow Butte Resources ISR Facility Dawes County, Nebraska Materials License No. SUA-1534, at 10 (Aug. 2014) [hereinafter “SER”].

<sup>4</sup> LRA at 1; LBP-08-24, 68 NRC 691, 699 (2008).

published in the Federal Register.<sup>5</sup> On July 28, 2008, three hearing requests were received in response to that notice.<sup>6</sup>

On August 15, 2008, this Board was established,<sup>7</sup> and on November 21, 2008, we ruled on the three petitions to intervene and requests for a hearing, admitting the Oglala Sioux Tribe (“Tribe”) and Consolidated Intervenors as intervenors (together “Intervenors”).<sup>8</sup> The third petitioner, the Great Sioux Nation Treaty Council, was not admitted as an intervenor, but rather as an interested local governmental body.<sup>9</sup> We admitted, and the Commission affirmed the admission of, four environmental<sup>10</sup> contentions proposed by Intervenors.<sup>11</sup>

Nearly seven years later,<sup>12</sup> on October 27, 2014, the NRC Staff notified the Board and parties that it had completed its Environmental Assessment (“EA”) for the proposed license renewal.<sup>13</sup> Ten days after doing so, the NRC Staff notified the Board that it had issued a

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<sup>5</sup> Notice of Opportunity for Hearing, Crow Butte Resources, Inc., Crawford, NE, In Situ Leach Recovery Facility, 73 Fed. Reg. 30,426 (May 27, 2008).

<sup>6</sup> See Request for Hearing and/or Petition to Intervene, Oglala Sioux Tribe (July 28, 2008); Consolidated Request for Hearing and Petition for Leave to Intervene (July 28, 2008); Request for Hearing and Petition for Leave to Intervene, Oglala Delegation of the Great Sioux Nation Treaty Council (July 28, 2008).

<sup>7</sup> Establishment of Atomic Safety and Licensing Board (Aug. 15, 2008) (unpublished).

<sup>8</sup> LBP-08-24, 68 NRC at 698.

<sup>9</sup> Id. at 715.

<sup>10</sup> Although Contention F was affirmed by the Commission as a “[t]echnical” contention, it challenged the environmental aspects of Crow Butte’s LRA and was thus treated as an environmental contention. See CLI-09-09, 69 NRC 331, 357 (2009). The contention was later migrated as an environmental contention challenging the EA, without objection from the parties. See Tr. at 604–08.

<sup>11</sup> CLI-09-09, 69 NRC at 366; LBP-08-24, 68 NRC at 760.

<sup>12</sup> See LBP-15-2, 81 NRC 48, 59–61 (2015).

<sup>13</sup> Environmental Assessment Availability Notification, Letter from Marcia Simon, NRC Staff Counsel, to Administrative Judges (Oct. 27, 2014); Ex. NRC-010, Final Environmental

renewed license to Crow Butte with an expiration date of November 5, 2024.<sup>14</sup> Although the Intervenor requested a stay of the license, we declined to issue one.<sup>15</sup>

On January 5, 2015, Intervenor moved to admit several new contentions that challenged the analyses performed in the EA.<sup>16</sup> After oral argument on the admissibility of those new contentions, we admitted five of them, and supplemented one of the four previously-admitted contentions.<sup>17</sup> On March 16, 2015, Consolidated Intervenor moved to admit additional contentions based on the United States Environmental Protection Agency's proposed rulemaking on uranium ISL mining,<sup>18</sup> but we declined to admit those contentions.<sup>19</sup>

From August 24 through August 28, 2015, we held an evidentiary hearing using 10 C.F.R. Part 2, Subpart L procedures.<sup>20</sup> During this hearing, new information came to light that raised additional questions and so a supplemental day of hearing was held on October 23, 2015

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Assessment for the License Renewal of U.S. Nuclear Regulatory Commission License No. SUA-1534 (Nov. 2014) [hereinafter "EA"].

<sup>14</sup> License Renewal Notification, Letter from Marcia Simon, NRC Staff Counsel, to Administrative Judges and Parties (Nov. 6, 2014). The renewed license was issued pursuant to 10 C.F.R. § 2.1202(a), which allows certain NRC license applications to be granted at the conclusion of the NRC Staff's review process even though a hearing is pending. A license issued under these circumstances can be revoked, conditioned, modified or affirmed, based on the evidence adduced at a licensing board evidentiary hearing. See infra notes 537–539.

<sup>15</sup> See LBP-15-2, 81 NRC at 58.

<sup>16</sup> The Oglala Sioux Tribe's Renewed and New Contentions Based on the Final Environmental Assessment (October 2014) (Jan. 5, 2015); Consolidated Intervenor's New Contentions Based on the Final Environmental Assessment (October 2014) (Jan. 5, 2015).

<sup>17</sup> LBP-15-11, 81 NRC at 406, petition for interlocutory review denied, CLI-15-17, 82 NRC 33, 47 (2015).

<sup>18</sup> Consolidated Intervenor's Motion For Additional Contentions Based On [Environmental Protection Agency] Proposed Rules (Mar. 16, 2015).

<sup>19</sup> LBP-15-15, 81 NRC 598, 600 (2015).

<sup>20</sup> Tr. 945–2375.

with respect to those matters.<sup>21</sup> We closed the record regarding this proceeding on December 3, 2015.<sup>22</sup>

B. Contention 1 (Consultation & Tribal Cultural Properties)

This Partial Initial Decision contains our ruling only with respect to Contention 1. This contention covers the adequacy of the EA's review of Traditional Cultural Properties ("TCPs")<sup>23</sup> in the license area<sup>24</sup> and the NRC Staff's consultation with Indian tribes regarding those TCPs. This Partial Initial Decision also contains the Board's resolution of the parties' objections and motions in limine insofar as they challenge evidence offered with respect to Contention 1.<sup>25</sup>

Contention 1 states: "Whether the cultural surveys performed and incorporated into the EA formed a sufficient basis on which to renew Crow Butte's permit."<sup>26</sup> Intervenors' contention is in essence a refiling of an earlier contention that was rejected by the Commission as premature: "Failure to Meet Applicable Legal Requirements Regarding Protection of Historical

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<sup>21</sup> Licensing Board Notice of Supplemental Hearing at 3 (Sept. 25, 2015) (unpublished); Tr. at 2404–2640

<sup>22</sup> Licensing Board Order (Adopting Transcript Corrections and Closing Evidentiary Record) (Dec. 3, 2015) (unpublished).

<sup>23</sup> The subset of cultural resources that relate to Native American history and culture is addressed herein with the term "Traditional Cultural Properties," or "TCPs." Oglala Sioux Tribe and Consolidated Intervenors' Joint Filing of Proposed Findings of Fact and Conclusions of Law at 24 (Nov. 23, 2015); see also note 56 (defining "historic property").

<sup>24</sup> The LRA and the EA differ somewhat as to the exact size of the license area. LRA § 1.3; EA §§ 1.3, 2.1, 3.9. For the purposes of this Partial Initial Decision, we define the license area as the facility boundary described by Crow Butte, which appears to be 2,875 acres. See LRA § 1.3.

<sup>25</sup> See infra § IV. The remaining eight contentions (Contentions A, C, D, F, 6, 9, 12, and 14), as well as all challenges to the evidence offered on these contentions, will be resolved in a subsequent Partial Initial Decision.

<sup>26</sup> LBP-15-11, 81 NRC at 451.

and Cultural Resources.”<sup>27</sup> In our order admitting Contention 1, we explained that its resolution would entail a determination of “whether there has been meaningful consultation with the Tribe [pursuant to the National Historic Preservation Act],” and “whether the cultural surveys performed and incorporated into the EA are not adequate support for the EA’s conclusions,”<sup>28</sup> thus implicating concerns under both the National Historic Preservation Act (“NHPA”)<sup>29</sup> and the National Environmental Policy Act (“NEPA”).<sup>30</sup> To address these complex questions, we heard testimony, received and examined documentary evidence, and considered the parties’ legal analyses covering all aspects of the consultation process, as well as the cultural survey process.

After a thorough review of the evidence regarding Contention 1, the Board finds that Contention 1 is resolved in favor of Intervenor, in part. The cultural surveys the NRC Staff performed and incorporated into the EA did not receive the “hard look” required by NEPA and failed to comply with the NRC Staff’s obligations under the NHPA.

## II. LEGAL STANDARDS

This proceeding concerns NEPA, the NHPA, and the regulations implementing these acts.<sup>31</sup>

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<sup>27</sup> Id. at 412. In rejecting this earlier contention as premature, the Commission instructed that the Contention be refiled after the EA was issued. See id. at 414–15.

<sup>28</sup> Id. at 415.

<sup>29</sup> 16 U.S.C. § 470 et seq.

<sup>30</sup> 42 U.S.C. § 4321 et seq.

<sup>31</sup> The NRC promulgates regulations implementing NEPA and the NHPA. See 10 C.F.R. Part 51. However, the U.S. Council on Environmental Quality (“CEQ”) also promulgates regulations concerning NEPA, though its regulatory authority derives, not from statute, but from executive orders. See Exec. Order No. 11,991, 42 Fed. Reg. 26,967 (May 24, 1977); Exec. Order No. 11,514, 35 Fed. Reg. 4248 (Mar. 7, 1970). Nonetheless, the NRC gives CEQ’s regulations “substantial deference.” Dominion Nuclear N. Anna, LLC (Early Site Permit for N. Anna ESP Site), CLI-07-27, 66 NRC 215, 222 n.21 (2007). In addition, the Advisory Council on Historic



## A. NEPA's Requirements

### *1. NEPA's Fundamental "Hard Look" & Disclosure Goals*

NEPA obligates each federal agency to take a "hard look" at the environmental impacts of its actions<sup>32</sup> and to disclose those potential environmental impacts before proceeding with a planned action.<sup>33</sup> While NEPA does not create a substantive requirement that a federal agency affirmatively limit the environmental harms of its actions,<sup>34</sup> NEPA's "hard look" requires informed and reasoned decision-making in which the agency "obtains opinions from its own experts, obtains opinions from experts outside the agency, gives careful scientific scrutiny and responds to all legitimate concerns that are raised."<sup>35</sup>

NEPA casts a wide net with respect to those impacts that an agency must assess in its environmental review.<sup>36</sup> According to the Council on Environmental Quality ("CEQ"), the "impacts" or "effects" that must be accounted for include "ecological . . . , aesthetic, historic, cultural, economic, social, or health, whether direct, indirect, or cumulative."<sup>37</sup> To be sure, the "hard look" requirement is subject to a "rule of reason[]," and agencies may exclude from

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Preservation ("ACHP") is empowered by statute to promulgate binding regulations implementing section 106 of the NHPA. 54 U.S.C.A. § 304108 (West 2016); 36 C.F.R. § 800.1(a).

<sup>32</sup> Sierra Club v. U.S. Army Corps of Eng'rs, 803 F.3d 31, 37 (D.C. Cir. 2015) (quoting Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350–51 (1989)); La. Energy Servs., LP (Claiborne Enrichment Ctr.), CLI-98-3, 47 NRC 77, 87–88 (1998).

<sup>33</sup> Pogliani v. U.S. Army Corps of Eng'rs, 306 F.3d 1235, 1237 (2d Cir. 2002) (citing Balt. Gas & Electric Co. v. Natural Res. Def. Council, 462 U.S. 87, 100 (1983)).

<sup>34</sup> Dep't of Transp. v. Pub. Citizen, 541 U.S. 752, 756–57 (2004)

<sup>35</sup> Hughes River Watershed Conservancy v. Johnson, 165 F.3d 283, 288 (4th Cir. 1999)

<sup>36</sup> Gunpowder Riverkeeper v. FERC, 807 F.3d 267, 276 (D.C. Cir. 2015).

<sup>37</sup> 40 C.F.R. § 1508.8; see also id. § 1508.27(b).

consideration those impacts that are not reasonably foreseeable, but are remote and speculative.<sup>38</sup>

At the heart of the disclosure-forcing function of NEPA is the EA or EIS, which assures the public that the agency has in fact considered all the impacts.<sup>39</sup> The EA or EIS is to provide, not merely the agency's general conclusions, but all relevant considerations that went into reaching those conclusions,<sup>40</sup> such as the underlying data.<sup>41</sup>

Where an adjudicatory hearing tests the adequacy of an EA or EIS, evidence adduced at the hearing may cure a defective NEPA document—because in contested proceedings with a hearing, a licensing board creates the final record of decision under NEPA,<sup>42</sup> i.e., the entire adjudicatory record in addition to the EA or EIS.<sup>43</sup> This allows a licensing board's factual findings, as well as the adjudicatory record, to “become, in effect, part of the [final NEPA document].”<sup>44</sup> To be sure, however, there are limits on the extent to which a licensing board can “cure” a deficient NEPA document. Curing an EA or EIS that made fundamentally erroneous statements, even if corrected later at hearing, would vitiate NEPA's disclosure requirements.<sup>45</sup>

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<sup>38</sup> Limerick Ecology Action, Inc. v. NRC, 869 F.2d 719, 739, 745 (3d Cir. 1989); see also Ground Zero Ctr. for Non-Violent Action v. U.S. Dep't of Navy, 383 F.3d 1082, 1090 (9th Cir. 2004).

<sup>39</sup> Robertson, 490 U.S. at 349.

<sup>40</sup> Te-Moak Tribe of W. Shoshone of Nev. v. U.S. Dep't of Interior, 608 F.3d 592, 601 (9th Cir. 2010).

<sup>41</sup> Jones v. Nat'l Marine Fisheries Serv., 741 F.3d 989, 998 (9th Cir. 2013).

<sup>42</sup> Claiborne, CLI-98-3, 47 NRC at 89; 10 C.F.R. § 51.102.

<sup>43</sup> See La. Energy Servs., LP (Nat'l Enrichment Facility), LBP-05-13, 61 NRC 385, 404 (2005), aff'd, CLI-06-22, 64 NRC 37 (2006); see also S. Nuclear Operating Co. (Early Site Permit for Vogtle ESP Site), LBP-09-7, 69 NRC 613, 733 (2009), petition for review denied, CLI-10-5, 71 NRC 90 (2010).

<sup>44</sup> Claiborne, CLI-98-3, 47 NRC at 89.

<sup>45</sup> See, e.g., Sierra Club v. Marsh, 976 F.2d 763, 770 (1st Cir. 1992).

In addition, even where the contested hearing's record of decision supplements a deficient factual analysis in an EA or EIS, if the end result raises other questions about the sufficiency of the NRC Staff's analysis that should be explored under NEPA, a remand to the NRC Staff would be required to address all such NEPA concerns. Insofar as the NRC Staff seeks to supplement its EA with testimony at a contested hearing, the licensing board should not allow glaring gaps in the NRC Staff's analysis to go unexplored.<sup>46</sup>

## 2. *Distinctions Between an EA and an EIS*

While NEPA requires that an EA or EIS meet the same basic requirements noted above,<sup>47</sup> they are by no means identical documents. An EIS is an expansive document that "provide[s] full and fair discussion of significant environmental impacts and shall inform decisionmakers and the public of the reasonable alternatives."<sup>48</sup> Because an EIS is required for all major NRC licensing efforts "significantly affecting the quality of the human environment,"<sup>49</sup> the EA performs the critical role of first determining whether the proposed federal action may produce any such significant, unmitigated impacts.<sup>50</sup> As such, an EA is a "concise public document" that contains "brief discussions of the need for the proposal, of alternatives as

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<sup>46</sup> See 5 U.S.C. § 556(d); Changes to Adjudicatory Process, Final Rule, 69 Fed. Reg. 2182, 2192 (Jan. 14, 2004); see also 10 C.F.R. § 2.319. Neither the need for a full disclosure of the facts, nor the development of an adequate record, would be served were a licensing board to leave aside glaring gaps in the NRC Staff's analysis of environmental matters. Moreover, such an approach certainly would not constitute a hard look under NEPA.

<sup>47</sup> See, e.g., Pa'ina Haw. LLC, CLI-10-18, 72 NRC 56, 75 (2010).

<sup>48</sup> 40 C.F.R. § 1502.1.

<sup>49</sup> 42 U.S.C. § 4332(2)(C) (emphasis added).

<sup>50</sup> 40 C.F.R. § 1508.9(a); Myersville Citizens, 783 F.3d at 1322.

required by [NEPA] section 102(2)(E), of the environmental impacts of the proposed action and alternatives, and a listing of agencies and persons consulted.”<sup>51</sup>

If the EA concludes there will be a significant impact on the human environment that will not be mitigated, an EIS is needed.<sup>52</sup> If an EIS is not needed, then the NRC Staff must support that determination with a separate document, termed a Finding of No Significant Impact (“FONSI”), which briefly presents “the reasons why an action . . . will not have a significant effect on the human environment and for which an environmental impact statement therefore will not be prepared.”<sup>53</sup> Here, the NRC Staff issued an EA and a FONSI, and therefore declined to write an EIS.<sup>54</sup>

## B. The NHPA’s Requirements

### *1. The NHPA’s Basic Requirements*

Section 106 of the NHPA (“Section 106”), the central provision of the NHPA, requires federal agencies to take into account the effect of an undertaking on any historic property prior to approving an action like the renewal of Crow Butte’s license.<sup>55</sup> In doing so, a federal agency

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<sup>51</sup> 40 C.F.R. § 1508.9.

<sup>52</sup> Id. § 1508.9(a).

<sup>53</sup> Id. §§ 1501.4(e), 1508.13.

<sup>54</sup> Both CEQ and the NRC suggest that where agency staff must draft very long EAs to justify a FONSI determination, it may be an indication that an EIS should be written instead. Ex. NRC-014, Environmental Review Guidance for Licensing Actions Associated with NMSS Programs, NUREG-1748, § 3.2 (Aug. 2003) [hereinafter “NUREG-1748”] (citing 46 Fed. Reg. at 18,037); see also 40 C.F.R. § 1502.7. Additionally, in circumstances where the significance of an action is unclear because of scientific uncertainty, the Commission also advises “that the preferable course of action . . . is to prepare an environmental impact statement.” Va. Electric Power Co. (Surry Nuclear Power Station, Units 1 & 2), CLI-80-4, 11 NRC 405, 406 (1980).

<sup>55</sup> 54 U.S.C.A. § 306108 (West 2016).

must make a “reasonable and good faith effort” to (1) identify historic properties;<sup>56</sup> (2) evaluate the significance of those properties using the criteria for listing within the National Register of Historic Places (“National Register”);<sup>57</sup> (3) assess any potential effects of the undertaking on important aspects of those properties;<sup>58</sup> and (4) avoid or mitigate any adverse effects that are identified (collectively “Identification Obligations”).<sup>59</sup>

There are four basic criteria identified in 36 C.F.R. § 60.4(a) for placing historic properties on the National Register: (1) whether the item is associated with significant contributions to history; (2) whether the item is associated with the lives of important people; (3) whether the item embodies distinguishable characteristics of a particular art, place, or period; or (4) whether the item yields “information important in prehistory or history.”<sup>60</sup>

## 2. *The Impact of the 1992 Amendments to the NHPA*

Changes were made to the NHPA after Crow Butte received its first license in 1988. Of particular significance to our inquiry here are the NHPA amendments enacted in 1992 that bestowed special protections on Native American historic properties (the “1992 NHPA

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<sup>56</sup> 36 C.F.R. § 800.4(b). In NHPA nomenclature, the word “historic property” refers to the subset of “cultural resources,” *supra* note 23, that are included in or eligible for placement in the National Register. 54 U.S.C. § 300308 (West 2016).

<sup>57</sup> *Id.* § 800.4(c). The National Register of Historic Places was created pursuant to section 101 of the NHPA. *See* 54 U.S.C.A. § 302101 (West 2016); 16 U.S.C § 470a (2012).

<sup>58</sup> *Id.* §§ 800.4(d), 800.5(a).

<sup>59</sup> *Id.* § 800.6(b).

<sup>60</sup> *Id.* § 60.4(a).

Amendments”).<sup>61</sup> The 1992 NHPA Amendments also established mechanisms for more meaningful involvement of Indian tribes in agency historic preservation efforts.<sup>62</sup>

Prior to 1992, historic properties could be placed on the National Register only if they met certain regulatory requirements, none of which considered the unique interests and viewpoints of Native Americans.<sup>63</sup> But the 1992 NHPA Amendments added this language to NHPA section 101: “Propert[ies] of traditional religious and cultural importance to an Indian tribe or Native Hawaiian organization may be determined to be eligible for inclusion on the National Register.”<sup>64</sup> The ACHP’s regulations reflect this change in directing how agencies are to apply the National Register criteria to evaluate historic properties: “[t]he agency official shall acknowledge that Indian tribes and Native Hawaiian organizations possess special expertise in assessing the eligibility of historic properties that may possess religious and cultural significance to them.”<sup>65</sup> National Register Bulletin 15 further directs agencies to gather tribal input on TCPs through interviews and discussions with Indian Tribes.<sup>66</sup>

Apart from expanding the Identification Obligations, the 1992 NHPA Amendments also created a role for Indian tribes as consulting parties in the NHPA process. The NHPA was

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<sup>61</sup> National Historic Preservation Act Amendments of 1992 Pub. L. No. 102-575 § XL, 106 Stat. 4600 (Jan. 3, 1992) [hereinafter “1992 NHPA Amendments”].

<sup>62</sup> S. Rep. No. 102-336, at 13 (1992).

<sup>63</sup> See 36 C.F.R. § 60.4 (1991).

<sup>64</sup> 54 U.S.C. § 302706(a) (West 2016); 1992 NHPA Amendments § 4006 (emphasis added); see also Advisory Council on Historic Preservation, Chapter II, The National Historic Preservation Act, in Federal Historic Preservation Case Law, 1966–1996, available at <http://www.achp.gov/book/sectionII.html> (last visited May. 15, 2016).

<sup>65</sup> 36 C.F.R. § 800.4(c)(1).

<sup>66</sup> National Register Bulletin 15, How to Apply the National Register Criteria for Evaluation at 3, 9–10, 13 (1997) [hereinafter “National Register Bulletin 15”], available at <http://www.nps.gov/nr/publications/bulletins/nrb15/>.

amended to add: “[i]n carrying out its responsibilities under [NHPA Section 106], a Federal agency shall consult with any Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to propert[ies]” (“Consultation Obligations”).<sup>67</sup>

The ACHP’s current regulations require each federal agency, during the consultation process, to “[g]ather information from any Indian tribe . . . to assist in identifying properties, including those located off tribal lands, which may be of religious and cultural significance to them and may be eligible for the National Register.”<sup>68</sup> Agency consultation must provide each Indian tribe with “a reasonable opportunity to identify its concerns about historic properties, advise on the identification and evaluation of historic properties, including those of traditional religious and cultural importance, articulate its views on the undertaking’s effects on such properties, and participate in the resolution of adverse effects.”<sup>69</sup> The ACHP’s regulations also state that consultation efforts must “recognize the government-to-government relationship between the Federal Government and Indian tribes,” and be sensitive to the needs of the tribal participants.<sup>70</sup>

In 2009, the NRC Staff Office of Nuclear Material Safety and Safeguards (“NMSS”) began work on a guidance document establishing the protocol for engaging with Indian tribes (“NUREG-2173”), admitted in this proceeding as Ex. NRC-047.<sup>71</sup> After acknowledging that the

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<sup>67</sup> 54 U.S.C.A. § 302706(b) (West 2016); 1992 NPA Amendments § 4006.

<sup>68</sup> 36 C.F.R. § 800.4(a)(4).

<sup>69</sup> Id. § 800.2(c)(2)(ii)(A).

<sup>70</sup> Id. § 800.2(c)(2)(ii)(C).

<sup>71</sup> See Draft Tribal Protocol Manual and Scoping for Proposed Policy Statement, 77 Fed. Reg. 62,269, 62,268 (Oct. 12, 2012), which notes that a draft of NUREG-2173 had been released in September 2012. A revised version was published in 2014. Ex. NRC-047, Division of Material, Safety, States, Tribal, and Rulemaking Programs, NMSS, Tribal Protocol Manual, NUREG-2173 (Dec. 2014) [hereinafter “NUREG-2173”].

NRC has a government-to-government relationship with Indian tribes,<sup>72</sup> NUREG-2173 instructs the NRC Staff to be aware that cultural differences exist between Indian tribes and the agency that could impact the consultation process.<sup>73</sup> It also instructs the NRC Staff to recognize that there may be conflicting priorities of Indian tribes when setting meetings, that tribal elders are to be afforded great respect, and that the NRC is to obtain the opinions of those tribal elders along with those of the tribes' elected government members.<sup>74</sup> Moreover, NUREG-2173 concedes that Indian tribes have a different relationship to the earth and its resources—and therefore to TCPs and other cultural resources—than others may have.<sup>75</sup> As with the ACHP's regulations and guidance, NUREG-2173 states that consultation should start as early as possible in the process.<sup>76</sup>

### **III. CONTENTION 1 (Tribal Consultation & Identification of Tribal Cultural Properties)**

#### **A. General Discussion of Contention 1**

##### *1. Contents of the EA*

In EA § 3.9, the NRC Staff discusses its efforts to identify, assess, and attempt to mitigate adverse impacts to TCPs in the license area and to consult with nearby Indian tribes for the purposes of this license renewal.

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<sup>72</sup> NUREG-2173 at 1; see id. §§ 1.B, 1.E.

<sup>73</sup> Id. § 2.A.

<sup>74</sup> Id.

<sup>75</sup> See id.

<sup>76</sup> Id. § 2.B; 36 C.F.R. § 800.2(c)(2)(ii)(A); see also Advisory Council on Historic Preservation, Consultation with Indian Tribes in the Section 106 Review Process: A Handbook at 3, 7, 29 (Nov. 2008), available at <http://www.achp.gov/regs-tribes2008.pdf>.



*a. Literature Review & General Background*

EA § 3.9's description of the history of western Nebraska is largely based on two sources: NUREG-1910, the "Generic Environmental Impact Statement for In-Situ Leach Uranium Milling Facilities" ("ISL Mining GEIS")<sup>77</sup> and a site-specific cultural resources report of the Crow Butte license area conducted in 1982 and 1987 by John R. Bozell and Robert E. Pepperl (the "Bozell & Pepperl Survey").<sup>78</sup> The history review in EA § 3.9 also draws, to a lesser extent, on archeological studies conducted at a nearby Crow Butte expansion site, and two other, more cursory, archeological studies.<sup>79</sup> In discussing the original inhabitants of western Nebraska, the EA states that the "predominant Tribe in the region" was the Great Sioux Nation, which includes the Lakota. The EA notes that the Fort Laramie Treaty of 1851 defined the territories of the Indian tribes of the area and explains the gradual encroachment of those territories by Euro-American settlers, the breakup of the Indian tribes' communal lands by the U.S. government, and the resulting wars between the Sioux peoples and the U.S. government. It also discusses the construction of Fort Robinson—which the nearby town of Crawford was established to support.<sup>80</sup>

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<sup>77</sup> NRC, Office of Federal and State Materials and Environmental Management Programs, Generic Environmental Impact Statement for In-Situ Leach Uranium Milling Facilities, NUREG-1910, at G-94 (May 2009) [hereinafter "ISL Mining GEIS"]. Ex. NRC-045 is an excerpt from the ISL Mining GEIS.

<sup>78</sup> EA § 3.9.3; Ex. CBR-027, John R. Bozell and Robert E. Pepperl, A Cultural Resources Study of the Crow Butte Uranium Prospect Dawes County, Nebraska (Sept. 1987).

<sup>79</sup> EA § 3.9.3 (referring to the "Späth 2007," "Koch 2000," and "Louis Berger 2005" sources).

<sup>80</sup> Id.

*b. Previously Identified Cultural Resources*

According to the EA, the NRC Staff sought information about pertinent cultural properties from the Bozell & Pepperl Survey, from the National Register, and from the Nebraska Register of Historic Places (“Nebraska Register”), which is an informal state-specific register.<sup>81</sup>

The NRC Staff’s review of the National Register identified only five historic properties of interest. All are American military, government, or settlement sites, and all are located several miles from the project area.<sup>82</sup> The Nebraska Register, on the other hand, lists twenty-one sites in proximity to Crawford, Nebraska, of which “[a]ll but three” are related either to Fort Robinson or to the Red Cloud Agency—although none are located within the license area.<sup>83</sup>

As the National Register and the Nebraska Register identified no properties on the site, the EA relied heavily on the Bozell & Pepperl Survey to identify TCPs within the license area.<sup>84</sup> The EA states that the Bozell & Pepperl Survey involved “[i]ntensive (100-percent coverage) field surveys for historical and archaeological sites within the CBR [Crow Butte] facility.”<sup>85</sup> According to the EA, the Bozell & Pepperl Survey noted twenty-one “prehistoric and historic period archaeological sites” within the license area, of which three Native American and three [Euro-American] properties were identified as “potentially eligible” for inclusion in the National Register.<sup>86</sup> The EA concluded that Crow Butte’s mining operations had successfully avoided

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<sup>81</sup> EA § 3.9.4.

<sup>82</sup> Id.

<sup>83</sup> EA § 3.9.5.

<sup>84</sup> EA § 3.9.6. In total, the Bozell & Pepperl field survey covered 1,350 acres. Ex. CBR-027 at i. While the survey did not cover the entire license area, which is 2,875 acres, it did study those specific areas that Crow Butte expected its activities would impact. See LRA § 1.3; EA §§ 1.3, 2.1.

<sup>85</sup> EA § 3.9.6.

<sup>86</sup> Id. The “historic period,” according to the EA, dates back 400 years. EA § 3.9.3.

contact with these six sites, at least as of 1995.<sup>87</sup> The EA fails to explain what happened to these sites after 1995, but Crow Butte's prefiled testimony reveals that at least one of the sites was subsequently impacted by Crow Butte operations.<sup>88</sup>

*c. Consultations Undertaken for Current License Renewal*

EA § 3.9.7 describes the NRC Staff's communications with Indian tribes pursuant to the consultation requirements of NHPA Section 106. A table in the EA identifies three particular attempts at communication with Indian tribes: (1) an invitation dated January 13, 2011, requesting the tribes to be consulting parties under the NHPA; (2) an invitation to the tribes to attend a June 7–9, 2011 "Informal Information Gathering Meeting" at the Pine Ridge Reservation; and (3) discussions at that June 2011 informal meeting.<sup>89</sup>

According to the EA, out of twenty-four tribes invited, members of six tribes attended the June 2011 meeting that also included a bus tour of both the Crow Butte license area and a new ISL facility under construction in South Dakota, the "Powertech" facility.<sup>90</sup> The EA claims that this June 2011 meeting, "supplemented by literature searches," identified the following four previously unknown TCPs: (1) the Crow Butte geologic formation itself (close to and looking over the license area), which was the site of a legendary battle between the Lakota and Crow

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<sup>87</sup> EA § 3.9.6.

<sup>88</sup> Ex. CBR-027 at 75. In 2003, site 25DW198, one of the three Native American-origin sites, *id.* at 74–75, was alleged by Crow Butte to be found "in an area of new [Crow Butte] well-drilling activities." Crow Butte Resources' Proposed Findings of Fact and Conclusions of Law at 70 (Nov. 23, 2015) [hereinafter "Crow Butte Proposed Findings & Conclusions"] (citing Ex. CBR-032, Carl Späth and Cherie K. Walth, Crow Butte Resources Evaluative Testing of Site 25DW198 Dawes County, Nebraska (June 2003)). The thoroughness of Crow Butte's treatment of this site is discussed *infra* note 157.

<sup>89</sup> EA § 3.9.7, tbl. 3-14.

<sup>90</sup> EA § 3.9.7. The significance of the Powertech facility for this proceeding is discussed *infra* § III.B.2.a.

tribes; (2) a ridge one mile from the Crow Butte site, which is a location for vision quests by tribal members; (3) unspecified medicinal herbs that grow on the license area but purportedly not elsewhere; and (4) the general landscape, as it is steeped in history and dates back to the periods of Fort Robinson, the Red Cloud Agency, and the Great Sioux War.<sup>91</sup> The EA notes that, during the June 2011 meeting, “tribal officials expressed concerns about the identification and preservation of historic properties of traditional religious and cultural importance to tribes,” and they asserted that a TCP survey of the Crow Butte facility should be conducted.<sup>92</sup>

According to the EA, on February 24–25, 2012, the NRC Staff held another meeting attended by nineteen tribes “to continue ongoing consultation and discuss hear [sic] the views of the Tribes about potential Traditional Cultural Properties.”<sup>93</sup> The EA also states that on October 31, 2012, the NRC Staff “invited all the consulting Tribes to complete a TCP field Survey of the CBR [Crow Butte] facility and proposed expansion areas in the vicinity of the” license area (the “November 2012 TCP Survey”).<sup>94</sup> The EA states that representatives of the Santee Sioux Nation and the Crow Nation participated in the November 2012 TCP Survey, but they “concluded that there were no eligible sites of cultural or religious significance to the Tribes at the [Crow Butte] facility and the proposed Marsland and Three Crow expansion areas.”<sup>95</sup> The EA noted that several other tribes disagreed, not only with the purported findings of the November 2012 TCP Survey, but more fundamentally with the NRC Staff’s NHPA review process itself. The EA characterized these criticisms as merely “pertaining to NRC staff’s

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<sup>91</sup> EA § 3.9.8.

<sup>92</sup> EA § 3.9.7.

<sup>93</sup> Id.

<sup>94</sup> EA § 3.9.8.

<sup>95</sup> Id.

overall NHPA consultation” and did not address the criticisms concerning whether TCPs were present on the site.<sup>96</sup>

## 2. *Parties’ Positions*

### a. *Witnesses for the Intervenors*

In support of its contention, Intervenors offered four cultural resource expert witnesses: Michael CatchesEnemy, who during much of the consultation process served as the Tribal Historic Preservation Officer and Director of the Oglala Sioux Tribe Natural Resources Regulatory Agency; Dennis Yellow Thunder, who, as of the date of the hearing, served as the Tribal Historic Preservation Officer for the Oglala Sioux Tribe and Director of the Oglala Sioux Tribe’s Office of Cultural Affairs and Historic Preservation; Louis Redmond, Ph.D., President of Red Feather Archeology, which provides consultation and training to Indian tribes and U.S. government agencies on various cultural and historic preservation laws and programs; and Debra White Plume, a founding member of Owe Aku, an organization dedicated to preserving “Lakota culture and ways of life.”<sup>97</sup> Mr. CatchesEnemy and Mr. Yellow Thunder provided written direct testimony regarding the “ancestral, historic, cultural, religious, and spiritual” significance of the lands in and near the license area, as well as the NRC Staff’s consultation efforts with Indian tribes.<sup>98</sup>

### b. *Intervenors’ General Position*

In general, Intervenors contend that the Crow Butte license area contains multiple TCPs relevant to the Tribe, including “natural ponds, springs, and creeks,” and “prehistoric camp

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<sup>96</sup> Id.

<sup>97</sup> Ex. INT-031, Declaration of Michael CatchesEnemy, ¶ 5 (May 8, 2015); Ex. INT-032, Declaration of Dennis Yellow Thunder, ¶ 4 (May 8, 2015); Ex. INT-061, Resume of Louis Arthur Redmond, at 2 (undated); Ex. INT-021, Statement of Debra White Plume (Apr. 30, 2015).

<sup>98</sup> Ex. INT-031 ¶¶ 13, 14; Ex. INT-032 ¶¶ 10, 11.

sites,” that were not identified in the EA.<sup>99</sup> Intervenor also assert that the license area “was traditionally utilized by the extended family of Lakota Chief Crazy Horse and other Lakota.”<sup>100</sup> Intervenor therefore take issue with the EA’s cultural resources analysis, and in particular criticize the NRC Staff’s effort because “[n]o specific survey was performed for this license renewal.”<sup>101</sup> Likewise, Intervenor criticize the NRC Staff for relying on a thirty-year old archeological survey, contending that the Bozell & Pepperl Survey is too old to be useful, that the authors lacked professional credentials, and that it was conducted without the benefit of any meaningful involvement from Indian tribes.<sup>102</sup> As a result, Intervenor maintain, many sites of archeological significance within the license area potentially were either misunderstood or missed altogether.<sup>103</sup> Intervenor claim that a “proper” survey for TCPs “must involve the Tribal elders of the Lakota people and their extended families and extended site visits by them,” because only they are capable of understanding the historic implications of any sites identified.<sup>104</sup> In contrast with this approach, however, Intervenor allege that “[t]he NRC Staff refused to accept, or fund, the TCP survey design protocol proposed by the tribes as to their own cultural resources.”<sup>105</sup>

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<sup>99</sup> [Intervenor] Joint Filing of Proposed Findings of Fact and Conclusions of Law at 23 (Nov. 23, 2015) [hereinafter “Intervenor’s Proposed Findings & Conclusions”].

<sup>100</sup> Id.

<sup>101</sup> Id. at 24 (citing the Bozell & Pepperl Survey).

<sup>102</sup> Id.; The Oglala Sioux Tribe and Consolidated Intervenor Joint Reply to NRC Staff and [Crow Butte] at 21 (Dec. 11, 2015) [hereinafter “Intervenor’s Reply Findings & Conclusions”].

<sup>103</sup> See Intervenor Proposed Findings & Conclusions at 24; see also Intervenor’s Reply Findings & Conclusions at 21.

<sup>104</sup> Intervenor’s Proposed Findings & Conclusions at 24.

<sup>105</sup> Id. at 32.

Intervenors also contend that the consultation process itself was fundamentally flawed and in violation of the NHPA.<sup>106</sup> Intervenors argue that the NRC Staff's actions fail to demonstrate respect for the government-to-government relationship that exists between Indian tribes and the U.S. government.<sup>107</sup> Intervenors also criticize the lengthy delay between the time that Crow Butte filed its license renewal application (2007) and the time that the NRC Staff initiated the consultation process (2011).<sup>108</sup> Intervenors also take issue with the methods employed by the NRC Staff to consult with the tribes, asserting that "leaving voice messages[,] sending out mass mailings," and relying on contractors—demonstrate the NRC Staff's lack of substance and good faith.<sup>109</sup>

Both witnesses testified that this area was "utilized by the Sioux as an encampment during the period of forced removal by the United States . . . and the 'sign or starve' treaty-making tactics of the United States in the mid to late 1800s," and therefore "it can be reasonably presumed that many sites and artifacts of significant historic and cultural importance to the [Oglala Sioux] Tribe exist in the area."<sup>110</sup> Specifically, these witnesses pointed to the Crow Butte geologic feature itself as sacred to the Oglala Sioux Tribe, and asserted that the "mere presence of industrial activity in the vicinity significantly infringes upon the spiritual experience" and is destructive of the very elements held sacred by the Tribe, "the earth, water, flora, fauna, and the environment."<sup>111</sup> These witnesses also testified that the Bozell & Pepperl Survey was

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<sup>106</sup> Id.

<sup>107</sup> Id. at 22, 28.

<sup>108</sup> Id. at 28.

<sup>109</sup> Intervenors' Reply Findings & Conclusions at 55; Intervenors' Proposed Findings & Conclusions at 29.

<sup>110</sup> Ex. INT-031 ¶ 14; Ex. INT-032 ¶ 11.

<sup>111</sup> Ex. INT-031 ¶ 15; Ex. INT-032 ¶ 12.

insufficiently rigorous to identify and protect TCPs within the license area, as “[a]rcheological surveys are not cultural resources surveys and are not sufficient to identify all sites and resources of historic, cultural, and spiritual significance to tribes.”<sup>112</sup> Both witnesses opined that it is probably for this reason that the Bozell & Pepperl Survey missed TCPs that date back to the “sign or starve” encampments of the late 1800s.<sup>113</sup>

Turning to the consultation process itself, these Intervenor witnesses described the consultation between the NRC Staff and the tribes as a “predetermined” process, which was heavily reliant on Crow Butte’s contractor, the SRI Foundation, and which combined reviews involving multiple mining sites.<sup>114</sup> Mr. CatchesEnemy testified that the tribes sought to enlist “knowledgeable tribal representatives, including tribal elders and spiritual leaders, rather than just archeologists [to] conduct the cultural surveys.”<sup>115</sup> He added that, contrary to the claims of the NRC Staff and Crow Butte, the design of the November 2012 TCP Survey was far too abridged in scope, contained modifications made without discussion with the tribes, and contained elements that “were simply not feasible.”<sup>116</sup> He also testified that the final November 2012 TCP Survey involved only two tribes, was the subject of scorn and ridicule from other tribes that were not involved, and was “just short of a bribe disguised as a token identification effort.”<sup>117</sup> Both Mr. CatchesEnemy and Mr. Yellow Thunder then testified that, after the TCP Survey was conducted, the NRC Staff submitted the final EA without circulating a draft for

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<sup>112</sup> Ex. INT-031 ¶¶ 25, 26; Ex. INT-032 ¶¶ 16, 17.

<sup>113</sup> Ex. INT-031 ¶¶ 25, 26; Ex. INT-032 ¶¶ 16, 17.

<sup>114</sup> Ex. INT-031 ¶¶ 17, 18; Ex. INT-032 ¶ 14.

<sup>115</sup> Ex. INT-031 ¶ 18.

<sup>116</sup> Id. ¶ 19.

<sup>117</sup> Id. ¶¶ 20–22



consideration by the tribes—whereas, Intervenor's allege, had the NRC Staff provided a draft to the tribes, it might have proven useful in resolving the disputes between the tribes and the NRC Staff that ultimately surfaced as a contention in this proceeding.<sup>118</sup>

*c. The NRC Staff's Witnesses*

The NRC Staff offered two witnesses, Nathan Goodman, the lead environmental project manager for the Crow Butte license renewal,<sup>119</sup> and Paul Nickens, Ph.D., a Senior Cultural Resources Specialist for NRC Staff contractor Sanford Cohen and Associates ("SC&A"), who provided cultural resource expert support to Mr. Goodman.<sup>120</sup>

*d. The NRC Staff's General Position*

The NRC Staff defends its cultural resources review by arguing that: (1) the 1980s Bozell & Pepperl Survey is "complete, thorough, and fully adequate" for identifying TCPs;<sup>121</sup> (2) little has changed at the license renewal site since the Bozell & Pepperl Survey was conducted;<sup>122</sup> (3) neither NEPA nor the NHPA require Lakota Tribal elders or their extended families to visit the sites;<sup>123</sup> (4) the Advisory Council on Historic Preservation considers a reasonable effort to identify historic properties as involving "'at a minimum,' simply 'a review of

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<sup>118</sup> Ex. INT-031 ¶ 24; Ex. INT-032 ¶ 15.

<sup>119</sup> Ex. NRC-001-R, NRC Staff's Initial Testimony, at 2 (May 8, 2015). See also Ex. NRC-076-R2, Revised Testimony of David Back, Tianqing Cao, Mark Fuhrmann, Nathan Goodman, Thomas Lancaster, Paul Nickens, and Elise Striz (July 29, 2015); Ex. NRC-004, Statement of Professional Qualifications for Nathan E. Goodman (May 8, 2015).

<sup>120</sup> Ex. NRC-001-R at 2; Tr. at 2039. See also Ex. NRC-076-R2; Ex. NRC-006, Statement of Professional Qualifications for Paul R. Nickens, PhD (May 8, 2015).

<sup>121</sup> NRC Staff's Proposed Findings of Fact and Conclusions of Law at 97, 100 (Nov. 23, 2015) [hereinafter "Staff Proposed Findings & Conclusions"].

<sup>122</sup> Id.

<sup>123</sup> NRC Staff Reply Findings of Fact and Conclusions of Law at 16 (Dec. 11, 2015) [hereinafter "Staff Reply Findings & Conclusions"].

existing information on historic properties that are located or may be located;”<sup>124</sup> (5) the NRC Staff opted for an “open site”<sup>125</sup> TCP survey of the license area, in which “[a]ll consulting Tribes were invited to participate, and two—the Santee Sioux Nation and the Crow Nation—accepted;”<sup>126</sup> and (6) once the representatives from the Crow Nation and Santee Sioux Nation decided the license area was too disturbed to warrant a survey by foot,<sup>127</sup> no further investigation was needed because “where previous or partial surveys ‘and all other evidence, indicate that a complete survey would be fruitless,’ the NHPA does not require a complete survey of the project area.”<sup>128</sup>

While the NRC Staff concedes that it initiated the consultation process “well after” the LRA was submitted, it argues it eventually engaged in a “lengthy and meaningful consultation process” that afforded the tribes an opportunity to offer advice and views on TCPs in and near the license area.<sup>129</sup> The NRC Staff asserts that: (1) it undertook a “reasonable and good-faith effort” to identify interested Indian tribes;<sup>130</sup> (2) it consulted with the tribes through letters, calls,

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<sup>124</sup> Id.

<sup>125</sup> The open site TCP survey approach consisted of leaving the site open for a specified amount of time during which any Indian tribe could enter the site and conduct its own investigation, with limited monitoring or support by Crow Butte personnel. See infra § III.C.4; see also Staff Proposed Findings & Conclusions at 95; Ex. NRC-052, Santee Sioux Nation Tribal Historic Preservation Office, TCP Survey Report for the Crow Butte Project Dawes County Crawford Nebraska, at 2 (2013).

<sup>126</sup> Staff Proposed Findings & Conclusions at 98.

<sup>127</sup> Id.

<sup>128</sup> Id. at 98 (quoting Wilson v. Block, 708 F.2d 735, 754–55 (D.C. Cir. 1983); citing 36 C.F.R. § 800.4(b)(1)).

<sup>129</sup> Id. at 93.

<sup>130</sup> Id.

and face-to-face meetings;<sup>131</sup> (3) its consultation efforts were government-to-government, because the invitation to the June 7–9, 2011 meeting “took the form of a letter from the NRC Division Director responsible for the undertaking to Oglala Sioux Tribe President Theresa Two Bulls, with copy to the” Oglala Sioux Tribe Tribal Historic Preservation Officer;<sup>132</sup> (4) the consultation process consisted not of just one large group meeting, but a series of meetings, phone conferences, letters, and other interactions from 2011 through 2014;<sup>133</sup> (5) the grouping together of multiple facilities during the consultation process is consistent with the practice of other federal agencies and ACHP regulations; and (6) contrary to the claims of the Oglala Sioux Tribe, it was not the NRC Staff—but the Oglala Sioux Tribe itself—that failed to engage meaningfully in the consultation process.<sup>134</sup>

In their testimony, these NRC Staff witnesses asserted that it was not necessary to perform a new cultural resources review of the Crow Butte license area because Crow Butte has no new mine units planned, and thus any impacts to previously undisturbed ground surfaces will be limited.<sup>135</sup> In addition, these witnesses maintained that future reclamation efforts will further reduce any impacts, including impacts to the view from the Crow Butte geologic formation.<sup>136</sup>

The NRC Staff witnesses conceded that “the original license application and environmental review [for the 1988 license] did not adequately address known or potential

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<sup>131</sup> Id. at 93, 95.

<sup>132</sup> Id. at 94.

<sup>133</sup> Staff Reply Findings & Conclusions at 17.

<sup>134</sup> Staff Proposed Findings & Conclusions at 94–95.

<sup>135</sup> Ex. NRC-001-R at 66–67.

<sup>136</sup> Ex. NRC-076-R2 at 61.

places of religious or cultural significance for Tribes,” necessitating the NRC Staff’s more intensive examination in conjunction with this license renewal<sup>137</sup> that is described in the EA as a site visit to the license area, contacting state organizations, and conducting a literature review both to verify all historic sites previously identified and to identify any new potential sites.<sup>138</sup> After conducting this more robust review, the NRC Staff acknowledged, it became clear that the Lakota tribes were the “traditional occupants of the area.” As a result, the NRC Staff witnesses asserted that “special emphasis was given to potential Lakota places of significance, especially for the nearby Oglala Sioux Tribe.”<sup>139</sup> The NRC Staff witnesses also conceded that the universal view of all participating tribes was that a TCP survey would be the “only way to properly identify cultural properties” within the license area.<sup>140</sup>

According to the testimony of these NRC Staff witnesses, the NRC Staff ultimately opted to pursue the open site TCP survey proposed by Crow Butte “that included funding for the Tribes”<sup>141</sup> and afforded any participating tribe an opportunity to conduct its own TCP inventory by foot of the license area.<sup>142</sup> They also disputed Intervenors’ claims that the NRC Staff’s approach was not up to the task, by asserting that, in fact, there are no specific standards governing TCP Surveys.<sup>143</sup>

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<sup>137</sup> Id. at 59; see also Ex. NRC-001-R at 67.

<sup>138</sup> Ex. NRC-001-R at 67–69, 80; Ex. NRC-076-R2 at 59–61.

<sup>139</sup> Ex. NRC-076-R2 at 59.

<sup>140</sup> Ex. NRC-001-R at 63.

<sup>141</sup> Id. at 65, 73.

<sup>142</sup> Id. at 73.

<sup>143</sup> Ex. NRC-076-R2 at 54, 58.

*e. Crow Butte's Witnesses*

Crow Butte offered testimony of Larry Teahon, the Crow Butte facility Safety, Health, Environment, and Quality Manager,<sup>144</sup> whose testimony primarily focused on the Bozell & Pepperl Survey.

*f. Crow Butte's General Position*

While Crow Butte's position is largely consistent with that of the NRC Staff, Crow Butte added several legal arguments in support of the NRC Staff's consultation efforts, namely that: (1) the NRC Staff properly followed NUREG-2173 when it sent a letter from the NRC Division Director to the Oglala Sioux Tribe President and THPO;<sup>145</sup> (2) the ACHP's regulations established that "[c]ommunication with the THPO is, by itself, sufficient to establish that there is a government-to-government communication" with a tribe;<sup>146</sup> (3) the NHPA not only permits the NRC Staff to conduct face-to-face discussions via large multi-tribe and multi-applicant meetings, but that such meetings actually reduce the burden on participating Indian tribes;<sup>147</sup> and (4) the ACHP regulations expressly permit the use of consultants to assist federal agencies in discharging their Consultation Obligations under the NHPA.<sup>148</sup>

With regard to the November 2012 TCP Survey, Crow Butte maintains the NRC Staff chose an "open site" approach because the consulting tribes wanted to be in charge of the TCP

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<sup>144</sup> Ex. CBR-007, Initial Written Testimony of Crow Butte Resources Witness Larry Teahon on Contention 1, at 1 (May 8, 2015); Ex. CBR-051, Rebuttal Testimony of Crow Butte Resources Witness Larry Teahon on Contention 1 (June 8, 2015); see also Ex. CBR-006, Affidavit of Larry Teahon, at 2 (May 8, 2015).

<sup>145</sup> Crow Butte Resources' Proposed Reply Findings of Fact and Conclusions of Law at 25 (Dec. 11, 2015) [hereinafter "Crow Butte Reply Findings & Conclusions"].

<sup>146</sup> Crow Butte Proposed Findings & Conclusions at 72.

<sup>147</sup> Crow Butte Reply Findings & Conclusions at 24, 25.

<sup>148</sup> Crow Butte Proposed Findings & Conclusions at 73 (citing 36 C.F.R. § 800.2(a)(3)); Crow Butte Reply Findings & Conclusions at 25.

Survey, and wanted to conduct the survey all at once and not in a phased approach.<sup>149</sup> As to why the draft EA, incorporating the November 2012 TCP Survey results, was not provided to the Oglala Sioux Tribe but instead to the Nebraska SHPO, Crow Butte counters that the Tribe was afforded an opportunity to respond to the portion of the EA addressing the Section 106 consultation process at an earlier point in time, i.e., when it was posted on the NRC's website, and that this posting is legally sufficient.<sup>150</sup>

Although asserting that the presence of additional tribal resources on the Crow Butte site is pure speculation,<sup>151</sup> Mr. Teahon claimed that License Condition 9.8 of the renewed license obligates Crow Butte, before undertaking any construction activity not previously assessed by the NRC, to conduct a cultural resources inventory and to catalogue any newly discovered artifacts before construction can proceed.<sup>152</sup> He testified that these protections will continue for the duration of the renewed license, including any restoration or decommissioning of the license area.<sup>153</sup>

### *3. Evaluating Contention 1*

The Board thoroughly reviewed the record regarding Contention 1. All other testimony and arguments not referenced herein were reviewed but deemed irrelevant.

We evaluate Contention 1 by looking first to whether the NRC Staff satisfied its Consultation Obligations under the NHPA (§ III.B). Then, we evaluate whether the NRC Staff

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<sup>149</sup> Crow Butte Proposed Findings & Conclusions at 68; Crow Butte Reply Findings & Conclusions at 22.

<sup>150</sup> Crow Butte Proposed Findings & Conclusions at 73.

<sup>151</sup> Ex. CBR-051 at 5.

<sup>152</sup> Ex. CBR-007 at 12; Ex. CBR-051 at 5.

<sup>153</sup> Ex. CBR-007 at 13.

has met its Identification Obligations under the NHPA (§ III.C). Finally, we evaluate whether the EA complies with NEPA (§ III.D).

B. Meeting the NHPA's Consultation Obligations

In determining whether a particular federal agency has complied with its NHPA Consultation Obligations, it is necessary to examine: (1) whether the agency provided an affected Indian tribe with a “reasonable opportunity” to identify its concerns about the preservation of historic properties and to advise the agency on the identification and protection of any such historic properties;<sup>154</sup> (2) whether consultation between the agency and the affected tribe was conducted in a meaningful, accountable, and timely process;<sup>155</sup> and (3) whether the process recognized the “government-to-government” relationship between the agency and the affected tribe.<sup>156</sup>

From the time the 1992 NHPA amendments were passed until 2011, the NRC Staff and the Oglala Sioux Tribe had never actually consulted meaningfully on a government-to-government basis with respect to the Crow Butte mining license for this site.<sup>157</sup> This absence of consultation, especially between 2007 and 2011,<sup>158</sup> has undoubtedly contributed to the troubled

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<sup>154</sup> 36 C.F.R. § 800.2(c)(2)(ii)(A).

<sup>155</sup> Exec. Order No. 13,175, 65 Fed. Reg. 67,249, 67,249–50 (Nov. 6, 2000); see also infra § III.B.2.b.

<sup>156</sup> 36 C.F.R. § 800.2(c)(2)(ii)(C); Tribal Policy Statement, Proposed Policy Statement and Request for Comment, 79 Fed. Reg. 71,136, 71,137 (Dec. 1, 2014).

<sup>157</sup> It is undisputed that the NRC Staff's review of Crow Butte's 1995 LRA failed to meet the NHPA's post-1992 tribal consultation requirements. See Tr. at 2035–36; Ex. CBR-044 at 81-82; Pueblo of Sandia v. United States, 50 F.3d 856, 860 (10th Cir. 1995). Similarly, the NRC Staff failed to meet its NHPA obligations with respect to Crow Butte's reevaluation of site 25DW198 in 2003, before its disturbance due to mining. Supra note 88; Ex. CBR-032.

<sup>158</sup> Although as early as 2008 the NRC Staff informed this Board that it would shortly pursue NHPA consultation with the Oglala Sioux Tribe, Tr. at 363–64, a comprehensive list of all communications indicates that it took more than three years after the LRA was filed before the NRC Staff made any attempt to communicate with the Oglala Sioux Tribe. Ex. NRC-038, List of

relationship between the Oglala Sioux Tribe and the NRC Staff. However, in the end, the NRC Staff did provide a reasonable opportunity for such consultation to occur, and so it fulfilled its Consultation Obligation under the NHPA.

*1. Consultation Begins in 2011*

Consultation efforts relating to the instant case kicked off with a January 13, 2011 letter from Larry Camper, NMSS Division Director, to the president of the Oglala Sioux Tribe,<sup>159</sup> seeking the Tribe's participation as a consulting party with respect to the license renewal.<sup>160</sup> The consultation process consisted of the three face-to-face meetings, (on June 7–9, 2011, February 14–15, 2012, and May 23, 2013) as well as three teleconferences during the spring and summer of 2012.<sup>161</sup> While both the June 2011 and February 2012 meetings were well-staffed by NRC cultural resources experts, no one in an executive position within the NRC Staff attended the meetings.<sup>162</sup> The President of the Oglala Sioux Tribe attended part of the February 2012 meeting.<sup>163</sup>

It is important to keep in mind that once consultation began, the entire effort became focused on the development of a TCP survey of the license area. Not only did the Indian tribes view a TCP survey as the best way to gain an understanding of TCPs and Indian-origin historic

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NRC Staff Communications with the Oglala Sioux Tribe as Part of Section 106 Consultation for the Crow Butte License Renewal, at 1 (entry 1) (May 8, 2015) [hereinafter "NRC Staff Communications Log"]; Tr. at 2015.

<sup>159</sup> NRC Staff Communications Log at 1 (entry 1); Ex. NRC-039, Letter from Larry W. Camper, Director, Division of Waste Management and Environmental Protection, to Theresa Two Bulls, President, Oglala Sioux Tribal Council (Jan. 13, 2011).

<sup>160</sup> Ex. NRC-039 at 1–2.

<sup>161</sup> See infra § III.B.2.b.

<sup>162</sup> See id.; Ex. NRC-042.

<sup>163</sup> Ex. NRC-001-R at 65.



properties on the site, but the NRC Staff had advised the tribes that it shared their view.<sup>164</sup> After the February 2012 meeting, the NRC Staff held three teleconference calls during the spring and summer of 2012, purportedly in hopes of developing a TCP survey that would cover the Crow Butte license area, as well as nearby Crow Butte expansion sites and the Powertech site in South Dakota.<sup>165</sup>

As the summer of 2012 drew to a close, the NRC Staff had still been unable to reach a final agreement on how to conduct TCP surveys for all of these sites.<sup>166</sup> When Crow Butte suggested an alternate “open site” TCP survey approach on October 3, 2012,<sup>167</sup> the NRC Staff adopted it, and on October 31, 2012, the NRC Staff: (1) abruptly separated the Crow Butte projects from the Powertech project;<sup>168</sup> (2) issued an invitation to the tribes to participate in the open site TCP survey that Crow Butte had conceived and that would cover only the Crow Butte license area and Crow Butte expansion sites; and (3) insisted that the survey had to be conducted within just a few weeks thereafter in late November of 2012.<sup>169</sup>

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<sup>164</sup> Ex. NRC-050, SC&A, Inc., Trip Report: Section 106 Information-Gathering Meeting and Site Visits for Crow Butte In Situ Leach License Renewal and North Trend Expansion Area and Dewey-Burdock License Applications June 7–9, 2011, at 4 (June 20, 2011); Tr. at 2082–83, 2097.

<sup>165</sup> See NRC Staff Communications Log at 4 (entries 20–26); Ex. BRD-020, Letter from Kevin Hsueh, Chief, Environmental Review Branch, NRC Office of Federal and State Materials and Environmental Management Programs to Tribal Historic Preservation Officers (Mar. 6, 2012).

<sup>166</sup> Tr. at 2171–73.

<sup>167</sup> Ex. BRD-026, Cameco, Alternative Proposal for the Four Cameco ISR Properties (Oct. 3, 2012).

<sup>168</sup> Tr. at 2175–76, 2256–57.

<sup>169</sup> Ex. BRD-023, Letter from Kevin Hsueh, Chief, Environmental Review Branch, NRC Office of Federal and State Materials and Environmental Management Programs (Oct. 31, 2012).

While only two tribes, the Crow Nation and Santee Sioux Tribe, agreed to participate in the open site process,<sup>170</sup> there is no evidence that either has any meaningful historical connection to the area.<sup>171</sup> Moreover, neither of these two tribes actually surveyed the license area, after themselves concluding that the site was too disturbed to justify an actual TCP survey on the site.<sup>172</sup>

The NRC Staff further attempted to consult face-to-face with the Oglala Sioux Tribe and other tribes about NHPA issues related to the Crow Butte license renewal with its May 23, 2013 meeting, which the NMSS Deputy Director attended.<sup>173</sup> The Oglala Sioux Tribe failed to attend, however, and provided no prior notice that it would not participate.<sup>174</sup> The NRC Staff thereafter effectively ended the consultation process with respect to Crow Butte's license renewal, posting a draft of its NHPA Section 106 review findings online on October 1, 2013, and roughly six months later, providing a hard copy to the Oglala Sioux Tribe, seeking its comments.<sup>175</sup>

## *2. Evaluation of NRC Staff's Consultation Approach*

There were four errors in the consultation process, and our evaluation looks at each one. The first three focus on the NRC Staff's conduct, while the fourth focuses on the Oglala Sioux Tribe's conduct.

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<sup>170</sup> Ex. NRC-052 at 2.

<sup>171</sup> See *infra* § III.C.4.b.

<sup>172</sup> Ex. NRC-001-R at 74; Tr. at 2307–08.

<sup>173</sup> Ex. NRC-043, Letter from Larry W. Camper, Director, Division of Waste Management and Environmental Protection Office of Federal and State Materials and Environmental Management Programs, to Bryan Brewer, President, Oglala Sioux Tribe (Mar. 12, 2013); Ex. NRC-044, Letter from Bryan Brewer, President, Oglala Sioux Tribe (Mar. 29, 2013).

<sup>174</sup> Ex. NRC-001-R at 65–66; Tr. at 2323.

<sup>175</sup> NRC Staff Communications Log at 6 (entries 36, 37).

*a. The NRC Staff's Grouping of Projects*

Contemporaneous with Crow Butte's license renewal application, the NRC received a number of other license applications—including three separate license applications from Crow Butte for expansion sites located near the license area, identified as the Marsland expansion area (centered twelve miles south of Crawford),<sup>176</sup> the Three Crow expansion area (centered six miles south of Crawford),<sup>177</sup> and the North Trend expansion area (centered two miles north of Crawford).<sup>178</sup> For reference, the license area is centered approximately four miles southeast of Crawford.<sup>179</sup> In addition, the NRC Staff attempted to consolidate its consultation efforts to cover another license proceeding, the new Powertech ISL mine, located in Custer and Fall River Counties, South Dakota.<sup>180</sup> While the Crow Butte expansion sites were to have common ownership and are located in close proximity to the license area, the Powertech facility had wholly separate ownership and is located more than sixty-five miles away, in a different state.<sup>181</sup>

Although the NRC Staff paired the Crow Butte license renewal with these four other proceedings for much of its consultation efforts, at one time the NRC Staff envisioned addressing as many as nine facilities, spanning three states, in a single meeting with the Indian tribes.<sup>182</sup> NRC Staff witness Mr. Goodman testified that this multi-tribe, multi-site approach was

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<sup>176</sup> Ex. NRC-054A, Cameco Resources Marsland Expansion Area Uranium Project Class III Cultural Resource Investigation Dawes County, Nebraska at 4 (Apr. 28, 2011).

<sup>177</sup> LRA fig. 1.3-1.

<sup>178</sup> LRA fig. 2.8-3.

<sup>179</sup> LRA fig. 1.3-1.

<sup>180</sup> Powertech USA, Inc. (Dewey Burdock In Situ Uranium Recovery Facility), LBP-15-16, 81 NRC 618, 627 (2015).

<sup>181</sup> EA § 4.13.

<sup>182</sup> Ex. NRC-043 at 10.

intended to assist the tribes by minimizing the amount of time individual tribes would need to devote to the process.<sup>183</sup> While well-intentioned, Mr. CatchesEnemy for the Intervenors testified that grouping several projects into one meta-consultation resulted in confusion on the part of the Oglala Sioux Tribe as to whether the whole set of mining projects, rather than only a single mining project,<sup>184</sup> was the subject of particular consultation or action. That greater clarity in this regard from the NRC Staff would have helped was underlined by Mr. CatchesEnemy's testimony that the Oglala Sioux's Tribal Historic Preservation Office has but one staff person to oversee fifty to seventy-five federal agency projects requesting its participation in NHPA proceedings at any one time.<sup>185</sup> Mr. Yellow Thunder concurred, adding that he had concerns with the NRC Staff lumping the sites together, and that it was difficult for the Tribe to address particular projects, as it was hard enough to get the tribes together at one time for internal discussions, much less for ones with the NRC Staff.<sup>186</sup>

The NRC Staff added to the confusion by treating elements of the consultation jointly at times with the other projects and individually at other times. For instance, Mr. Goodman testified that "at no point did NRC staff say that the projects were not unique entities themselves."<sup>187</sup> While this may be true, there is nothing in the record to indicate the NRC Staff ever articulated to the tribes that these consultation efforts had both a joint and separate aspect. Rather all evidence points to the participating tribes having no such understanding of this intended, but unarticulated, dual purpose.

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<sup>183</sup> Tr. at 2256–57.

<sup>184</sup> Tr. at 2180–82, 2185–86, 2041–42.

<sup>185</sup> Tr. at 2257–58.

<sup>186</sup> Tr. at 2258–59

<sup>187</sup> Tr. at 2257.

An example of this comes from the Oglala Sioux Tribe's submission on September 27, 2012 of a proposed statement of work for a TCP survey, nominally for the Powertech project (the "Makoche Wowapi" proposal).<sup>188</sup> Mr. Goodman's testimony was clear that the NRC Staff treated the Crow Butte license area, the North Trend Expansion, and the Powertech projects as one unified TCP consultation until October 31, 2012.<sup>189</sup> Additionally, written communications from the NRC Staff before each of the three teleconferences in the spring and summer of 2012 stated that it wished to develop one single TCP survey for all three projects.<sup>190</sup> As a result, the Oglala Sioux Tribe would not have been in error in assuming that the Makoche Wowapi TCP Survey proposal, submitted on September 27, 2012, a month before the NRC Staff split apart the consultation, could be useful in determining how to conduct a TCP Survey for the license area. After all, the evidence is clear that the NRC Staff was soliciting proposals, not for just one site, but for all sites at the same time.<sup>191</sup>

Yet, Mr. Goodman for the NRC Staff testified that he did not even consider the details of the tribes' joint September 2012 proposal with respect to Crow Butte because the Powertech site "was not my [Mr Goodman's] project."<sup>192</sup> Even more disappointing is that the NRC Staff

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<sup>188</sup> See Ex. BRD-022, Makoche Wowapi Proposal with Cost Estimate for Traditional Cultural Properties Survey for Proposed Dewey Burdock [Powertech] Project (Sept. 27, 2012); Tr. at 2190.

<sup>189</sup> Tr. at 2175.

<sup>190</sup> Ex. BRD-019, Proposed Agenda for the February 14-15, 2012 Meeting on the Dewey-Burdock and Crow Butte Projects, at 1 (undated); Ex. BRD-020 at 1; Ex. BRD-021, Letter from Kevin Hsueh, Chief, Environmental Review Branch, NRC Office of Federal and State Materials and Environmental Management Programs to Tribal Historic Preservation Officers (April 5, 2012) at 1.

<sup>191</sup> Ex. BRD-020 at 1 (soliciting a "draft [Statement of Work] for the proposed Crow Butte License Renewal, Crow Butte North Trend, and Dewey-Burdock projects").

<sup>192</sup> Tr. at 2253.

went so far as to argue that the Oglala Sioux Tribe “did not engage in plans to develop a process for identifying cultural properties” for the Crow Butte site,<sup>193</sup> because the Makoche Wowapi proposal indicates that the Oglala Sioux Tribe submitted exactly such a proposal—albeit denominated for the Powertech site—well before the NRC Staff claimed it had separated the projects from each other.

In effect, the NRC Staff claims credit for all consultation efforts covering all the projects at the same time that it denies the Indian tribes’ good faith effort to contribute to the development of a TCP survey. The Commission has directed the NRC Staff “to protect Tribal treaty rights, lands, assets, and resources.”<sup>194</sup> The NRC Staff has been much better served when, instead of just checking the boxes to meet some procedural minimums, it has worked with Indian tribes to comply with the substance of NEPA and the NHPA.<sup>195</sup>

*b. The NRC Staff’s Consulting Efforts at Face-to-Face Meetings*

The core of the NRC Staff’s consultation efforts were the three face-to-face meetings. Beginning with the June 7–9, 2011 meeting, there were members from six Indian tribes who

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<sup>193</sup> See NRC Staff’s Initial Statement of Position at 49 (May 8, 2015) [hereinafter “Staff Initial Statement of Position”].

<sup>194</sup> 79 Fed. Reg. at 71,138.

<sup>195</sup> For example, in the Prairie Island independent spent fuel storage installation proceeding, the NRC Staff served as an effective supporter of the cultural concerns of an Indian tribe in a dispute with the license applicants; that proceeding settled without a hearing on apparently amicable terms. See N. States Power Co. (Prairie Island Nuclear Generating Plant, Indep. Spent Fuel Storage Installation), LBP-15-30, 82 NRC 339 (2015). There, the Prairie Island Indian Community settled all of its cultural resource and safety-related contentions with the applicant regarding the renewal of a license for a spent fuel storage facility, which could only have been accomplished with substantial effort on the part of the NRC Staff to work with the local Indian tribe on its concerns. See id.

attended (including staff from the Oglala Sioux's Tribal Historic Preservation Office).<sup>196</sup>

Although Mr. Goodman argued in his testimony that the June 7–9 meeting satisfied all of the NHPA's consultation requirements,<sup>197</sup> it is difficult to square Mr. Goodman's assertion with the report made of this trip.<sup>198</sup>

Insofar as there was any communication that could be considered consultation, it would have occurred during the one-day meeting that was sandwiched between a June 7 bus tour of the two Crow Butte locations and a June 9 bus tour of the Powertech site. The record indicates that the June 7 bus tour did little more than introduce the tribes to the Crow Butte license renewal site for a brief period, as the tour covered four sites, was constrained by driver delays, and did not allow the tribal members to exit the bus.<sup>199</sup> Furthermore, it was widely criticized the next day.<sup>200</sup> It is also unclear from the record what role, if any, the NRC Staff itself played on the bus tour, especially given that the only report of this trip was prepared, not by the NRC Staff, but by Crow Butte's contractor.<sup>201</sup>

Moreover, all evidence about that June 8 meeting indicates it was only an initial informal meeting that was led by the NRC Staff.<sup>202</sup> The evidence is clear that, after introductions, the NRC Staff spent much of the session making a presentation to the Indian tribes about the NRC,

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<sup>196</sup> EA § 3.9.7; Ex. INT-053, Informal Information-Gathering Meeting Pertaining to Dewey-Burdock, Crow Butte North Trend, & Crow Butte License Renewal, In-Situ Uranium Recovery Projects (Transcript), at 2–3, 6 (June 8, 2011).

<sup>197</sup> Tr. at 2083.

<sup>198</sup> See Ex. NRC-050 at 1.

<sup>199</sup> Tr. at 2052–53; Ex. NRC-050 at 6–7.

<sup>200</sup> Ex. INT-053 at 15, 121–122, 181, 183.

<sup>201</sup> Ex. NRC-050 at 1.

<sup>202</sup> See Ex. NRC-050 at 6–7, 10, 25.

about Crow Butte's license renewal and expansion sites, and about the Powertech site.<sup>203</sup> Although there was some time allotted for comments from the Indian tribal members present, the evidence indicates that the NRC Staff did not attempt to guide this process, and so only very general comments were obtained from the tribes—most of which concerned environmental or water contamination issues.<sup>204</sup> There is no evidence that any new information on cultural resources of any type was gathered at this June 8, 2011 meeting.<sup>205</sup> Instead, with this lack of structure to the meeting, and with most of the time allotted for introducing the NRC Staff and Crow Butte to the Indian tribes (instead of the other way around), the goal of the meeting was not—as the NRC Staff now posits—to collect information about identification and preservation of TCPs.

Under ACHP regulations, the consultation process must afford an Indian tribe with “a reasonable opportunity to identify its concerns about historic properties, advise on the identification and evaluation of historic properties, including those of traditional religious and cultural importance, articulate its views on the undertaking's effects on such properties, and participate in the resolution of adverse effects.”<sup>206</sup>

While this three-day event helped inform the tribes of the NRC Staff's planned actions and set the stage for future discussions, it in no way afforded the tribes with a meaningful opportunity to assist in, or share their perspectives regarding, the identification and evaluation of historic properties within the license area. It certainly did not satisfy the consultation

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<sup>203</sup> See, e.g., Ex. INT-053 at 27–61.

<sup>204</sup> See, e.g., id. at 16, 65–66, 79, 81, 87–88, 131, 139–40.

<sup>205</sup> The evidence adduced at the hearing establishes that all of the items that the NRC Staff claims were uncovered during the three-day meeting were the result of the bus tour, not of the June 8, 2011 sit-down session. Tr. at 2066 (Dr. Nickens); Ex. NRC-050 at 8.

<sup>206</sup> 36 C.F.R. § 800.2(c)(2)(ii)(A).



requirements of the NHPA. Rather the June 8 meeting, in conjunction with the June 7 and June 9 bus tours, was intended to be an introductory meeting, the first of many, and the record suggests nothing more.<sup>207</sup>

In contradiction of the NRC's Staff's current claims, NRC Staff witness Mr. Goodman himself advised the tribes at the meeting that this was an "informal" event, that it was "just the first step in the whole 106 process," and that consultation would not stop there.<sup>208</sup> Mr. Goodman reiterated later in the meeting that the NRC Staff was "early on in the Crow Butte 106 consultation process."<sup>209</sup> To the same effect, the NRC trip report noted that "[t]he NRC staff repeatedly stated that the week's activities were only the start of consultation with the Tribes."<sup>210</sup> And while the June 2011 meeting may have been instrumental in initiating the consultation process, it did not satisfy the NHPA's consultation requirements. To argue otherwise is to treat the entire consultation process as a checklist, without examining the substance of the dialogue among the parties to ascertain whether it produced meaningful consultation about TCPs.<sup>211</sup>

The next meeting, on February 14–15, 2012, was convened to "hear the views of the Tribes about potential [TCPs]," and to solicit the tribes' input on how to find cultural resources by using a TCP survey.<sup>212</sup> The evidence indicates that, unlike the June 7–9, 2011 introductory

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<sup>207</sup> See Tr. at 2083–84.

<sup>208</sup> Ex. INT-053 at 102.

<sup>209</sup> Id. at 110; see also id. at 173.

<sup>210</sup> Ex. NRC-050 at 3.

<sup>211</sup> Oglala Sioux Tribe of Indians v. Andrus, 603 F.2d 707, 722 (8th Cir. 1979) ("Failure of the Bureau [of Indian Affairs] to make any real attempt to comply with its own policy of consultation not only violates those general principles which govern administrative decisionmaking, but also violates 'the distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people.'" (citing Morton v. Ruiz, 415 U.S. 199, 236 (1974)) (internal citations omitted)).

<sup>212</sup> EA § 3.9.7.

meeting, the NRC Staff structured the February 14–15, 2012 meeting to gain insights from the Indian tribes about TCPs in the area. In the invitation, the NRC Staff stated that the purpose of this meeting was to gather information on the “historic properties of religious and cultural significance to the Tribes that the Tribes know or believe to be located in the three project areas [the license area, the North Trend Expansion site, and the Powertech site],” and to gather the tribes’ views on how to identify these properties, what potential impacts these projects would pose for such properties, and how such impacts could be avoided.<sup>213</sup> Unlike the introductory nature of the June 7–9, 2011 meeting,<sup>214</sup> this meeting was to target at least some of the requirements of the NHPA.<sup>215</sup>

The NRC Staff’s agenda for the February 14–15, 2012 meeting indicated time would be allocated for discussion on the identification, evaluation, and mitigation of TCPs that might be common to the license area, the Powertech site, and the Crow Butte North Trend expansion site.<sup>216</sup> The evidence suggests that, at this meeting, the NRC Staff made a sincere and meaningful effort conducted in good faith to learn about when TCPs can qualify as historic properties under the NHPA as well as how to identify and mitigate impacts to TCPs.<sup>217</sup>

Regardless, the February 14–15, 2012 meeting—contrary to the NRC Staff’s current assertion<sup>218</sup>—did little to foster the government-to-government relationship between the parties

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<sup>213</sup> Ex. BRD-018, Letter from Kevin Hsueh, Chief, Environmental Review Branch, to Tribal Historic Preservation Officers, at 1 (Jan. 19, 2012).

<sup>214</sup> Ex. NRC-039.

<sup>215</sup> Ex. BRD-018 at 1.

<sup>216</sup> Ex. BRD-019 at 2–3.

<sup>217</sup> Tr. at 2097–98, 2332.

<sup>218</sup> Staff Initial Statement of Position at 51.

as required by the ACHP and Executive Order 13175.<sup>219</sup> Executive Order 13175, which has been embraced by the Commission,<sup>220</sup> emphasizes the “government-to-government” relationship with Indian tribes, and encourages federal agencies “to establish regular and meaningful consultation and collaboration with tribal officials” through “an accountable process” at each agency.<sup>221</sup> While the President of the Oglala Sioux Tribe did come to the meeting,<sup>222</sup> there is no evidence that any executives from the NRC Staff were also in attendance.<sup>223</sup> In light of their absence, it is not surprising that the President of the Oglala Sioux Tribe walked out of the February 14–15, 2012 meeting when the NRC Staff attempted to characterize it as a government-to-government consultation.<sup>224</sup> This example again reflects the NRC Staff’s prioritization of form over substance with respect to the NHPA requirements. The government-to-government relationship is not benefited, and if anything harmed, if the focus does not remain on substantive consultations between equivalent levels of NRC Staff management and Tribal executives.

If the NRC Staff wants tribal leadership to attend, and most especially wants to legitimately claim a tribal leader has attended for the purposes of NHPA consultation, then NRC Staff leadership needs to attend as well. The NRC Staff claims it recognizes<sup>225</sup> that the ACHP

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<sup>219</sup> 36 C.F.R. § 800.2(c)(2)(ii)(C); 65 Fed. Reg. at 67,249–50.

<sup>220</sup> 79 Fed. Reg. at 71,137.

<sup>221</sup> 65 Fed. Reg. at 67,249–50.

<sup>222</sup> Tr. at 2108–09.

<sup>223</sup> Ex. BRD-019 at 4; Ex. NRC-042.

<sup>224</sup> See Tr. at 2109.

<sup>225</sup> 79 Fed. Reg. at 71,137.

mandates a government-to-government relationship between the parties.<sup>226</sup> And yet it argues that it has effectuated this requirement by way of a letter, signed by a NRC Division Director,<sup>227</sup> who never appears again in the process. In support of its minimalist approach, the NRC Staff argues that NUREG-2173 requires only that the initial communication letter be signed by a Division Director, after which all other communications can be with lower-ranked staff members.<sup>228</sup> While this manual certainly does require that the NRC Staff's initial written communication with a tribe be signed by a division director,<sup>229</sup> the Division Director's involvement does not end there. Instead, NUREG-2173 states that "[s]ubsequent interactions with Tribal governments can be conducted by the NRC staff that contact and establish relationships with Tribal representatives who hold similar levels of authority."<sup>230</sup> Here, the president of a nation came, and while we need not delve into the NRC organizational chart to find the exact person within it who would qualify, it is clear that no one present for the NRC Staff at the February 14–15, 2012 meeting would qualify as holding a similar level of authority.

Indian tribes are nations with unique sovereign status that predates the United States.<sup>231</sup> Although not fully independent sovereigns—sometimes referred to as “domestic dependent nations”—the United States Supreme Court has recognized that Indian tribes “remain ‘separate sovereigns pre-existing the Constitution,’” and maintain “their historic sovereign authority.”<sup>232</sup> In

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<sup>226</sup> 36 C.F.R. § 800.2(c)(2)(ii)(C).

<sup>227</sup> Ex. NRC-039.

<sup>228</sup> Staff Proposed Findings & Conclusions at 24–25.

<sup>229</sup> NUREG-2173 § 2.D.

<sup>230</sup> Id. (emphasis added).

<sup>231</sup> Mich. v. Bay Mills Indian Cmty., 134 S. Ct. 2024, 2030 (2014); NUREG-2173 §§ 1.A, 1.C.

<sup>232</sup> Bay Mills Indian Cmty., 134 S. Ct. at 2030 (quoting Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56 (1978)).

accordance with this special status, NUREG-2173 acknowledges that each tribe, like each nation, has a unique history and experience “with its own customs, culture, concerns, interests and needs.” Accordingly, NUREG-2173 acknowledges that federally-recognized Indian tribes should “expect to be treated as sovereign nation representatives” when working with the NRC.<sup>233</sup>

We find there was nothing inappropriate in holding meetings or teleconferences led by mid-level officials and subject-matter experts to design the TCP survey.<sup>234</sup> But, at the same time, we note that such meetings or teleconferences do not satisfy the government-to-government consultation requirements under the NHPA. Letters at the start of the process may be necessary, but they are not sufficient in themselves. Or, as the Powertech licensing board noted, an abundance of letters does not equate to meaningful or reasonable consultation.<sup>235</sup>

To the NRC Staff’s credit, it later recognized its mistake and attempted to cure the otherwise defective consultation by bringing in NMSS Deputy Division Director Aby Mohseni to the May 23, 2013 meeting.<sup>236</sup> Although the Oglala Sioux Tribe never attended that meeting, the Deputy Director’s presence certainly demonstrated that the NRC Staff was genuinely attempting to engage in meaningful government-to-government consultation at the executive-to-executive level. In the Board’s estimation, this May 23, 2013 meeting represents the only moment in time when the government-to-government relationship between the NRC Staff and Oglala Sioux

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<sup>233</sup> NUREG-2173 §§ 1.A, 1.C.

<sup>234</sup> Id. § 2.D.

<sup>235</sup> Powertech, LBP-15-16, 81 NRC at 656.

<sup>236</sup> Tr. at 2328.

Tribe could have been consummated. In fact, Mr. CatchesEnemy admitted in his written testimony that the May 23, 2013 meeting was a government-to-government consultation.<sup>237</sup>

Even after this point, however, there were missteps that failed to accord the Oglala Sioux Tribe the respect that is due a sovereign entity. The EA notes that on March 21, 2014, a copy of the draft EA was sent to NDEQ<sup>238</sup>—but not to the Oglala Sioux Tribe.<sup>239</sup> We agree with the Tribe that providing the draft EA to NDEQ but not the Oglala Sioux Tribe fails to accord the Tribe its proper status as a sovereign entity or meaningful and equal participant,<sup>240</sup> particularly in light of the fact that the NRC Staff witnesses were unable to offer a satisfactory reason for this disparate treatment.<sup>241</sup> Although the Tribe has not demonstrated that it thereby suffered significant harm (e.g., there is no evidence that providing the draft EA would have enabled the Tribe to protect its cultural resources), such slights stain the consultation process.

Still, it is worrisome that the NRC Staff could not admit that this was a simple mistake, and instead defended its failure to send the draft EA to the Tribe by asserting that “there’s no [NRC] regulatory requirement.”<sup>242</sup> We expect that going forward, the NRC Staff will recognize what is required to accord the Tribe its proper status as a sovereign entity.

*c. Failure of the TCP Survey*

As a result of their face-to-face meetings and teleconferences with the tribes, it was clear to the NRC Staff that the Indian tribes participating in the Section 106 consultation wanted to

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<sup>237</sup> Ex. INT-031 ¶ 23.

<sup>238</sup> EA § 5.

<sup>239</sup> Tr. at 2341–42.

<sup>240</sup> Intervenors’ Reply Findings & Conclusions at 22.

<sup>241</sup> Tr. at 2358–59.

<sup>242</sup> Tr. at 2346.

perform a TCP survey of the site. The tribes expressed this interest at the June 7–9, 2011 meeting,<sup>243</sup> and Mr. Goodman for the NRC Staff shared the sentiment.<sup>244</sup> Mr. Goodman testified that the tribes also drove this point home during the February 14–15, 2012 meeting and that “one of the big take aways was that staff felt that it was very important to have a TCP [survey] conducted by the tribes.”<sup>245</sup>

The NRC Staff’s efforts to develop a TCP survey began in earnest after the February 2012 meeting, with the NRC Staff asking both Crow Butte and the Indian tribes to submit draft “statements of work,” that would reflect their respective concepts for conducting such a survey.<sup>246</sup> Contemporaneously, the NRC Staff communicated in writing that it sought to develop a single TCP survey for the Crow Butte license renewal, for some or all of the expansion sites, and for the Powertech project.<sup>247</sup> To develop the final survey statement of work, the NRC Staff conducted three teleconferences with members of local Indian tribes: one on April 24, 2012, one on August 9, 2012, and the last one on August 21, 2012.<sup>248</sup> Nevertheless, the parties ultimately were unable to reach an agreement on a final statement of work a TCP survey for these sites.

Many aspects of what happened during these teleconferences are widely disputed. First, the parties disagree as to who was in attendance. Mr. Goodman testified that members of

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<sup>243</sup> Ex. NRC-050 at 4.

<sup>244</sup> Tr. at 2082–83

<sup>245</sup> Tr. at 2097.

<sup>246</sup> Ex. BRD-020 at 1.

<sup>247</sup> See id.; Ex. BRD-021.

<sup>248</sup> NRC Staff Communications Log at 4 (entries 20–26).

the Oglala Sioux Tribe were present on all the conference calls,<sup>249</sup> although Mr. Yellow Thunder testified that he—in his capacity as Tribal Historic Preservation Officer for the Oglala Sioux Tribe—participated in only one of the calls.<sup>250</sup> Second, the parties dispute the goal of the teleconferences. Mr. Goodman testified that the conference calls covered the design and conduct of a TCP survey for the Crow Butte license area, the North Trend expansion area, and the Powertech project.<sup>251</sup> Mr. Goodman and Mr. Teahon also testified that the SRI Foundation, a contractor for Crow Butte, created a first cut of the TCP survey “statement of work,” and that the teleconferences provided the tribes with a genuine opportunity to discuss the proposal.<sup>252</sup> While Mr. Yellow Thunder agreed that the SRI Foundation provided a scope of work for the TCP survey,<sup>253</sup> he viewed the core topic of the three teleconferences as the development of a programmatic agreement.<sup>254</sup> Although the NRC Staff now asserts that it did not intend to utilize a programmatic agreement for the Crow Butte license area, it is easy to see how this multi-site approach confused the participating tribes.<sup>255</sup>

Third, the parties dispute the role of the SRI Foundation in these teleconferences. Initially, we note that the NHPA does not bar the use of consultants.<sup>256</sup> The dispute here,

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<sup>249</sup> Tr. at 2237.

<sup>250</sup> Tr. at 2179.

<sup>251</sup> Tr. at 2261–62, 2176.

<sup>252</sup> Tr. at 2261–68, 2226–28.

<sup>253</sup> See Tr. at 2182.

<sup>254</sup> Tr. at 2171–74. “A Programmatic Agreement may be used to implement the Section 106 process in situations where the effects to historic properties cannot be fully determined prior to the approval of an undertaking, such as where an applicant proposes a phased approach to developing its project.” Powertech, LBP-15-16, 81 NRC at 640.

<sup>255</sup> Tr. at 2172–73; see also Ex. BRD-026 at 2.

<sup>256</sup> 36 C.F.R. § 800.2(a)(3).



however, involves whether the SRI Foundation managed the process to such an extent that the NRC Staff was not actually overseeing the effort and making final conclusions, as was the view of both Mr. CatchesEnemy and Mr. Yellow Thunder.<sup>257</sup> Mr. Goodman for the NRC Staff and Mr. Teahon for Crow Butte both disputed this, asserting in their testimony that the SRI Foundation was involved “to assist only with data collection.”<sup>258</sup> Mr. Goodman testified that while the SRI Foundation may have fielded questions in the context of its responsibility for completing Crow Butte’s survey, it in no way mediated the design of the TCP Survey itself.<sup>259</sup>

Actual transcripts of these conference calls would have assisted us in evaluating these disputes in the testimony, but the NRC Staff did not provide the transcripts from the teleconferences as part of the record until just before the hearing, at the request of the Board.<sup>260</sup> The Commission has made clear that “the parties are responsible for ensuring that there is sufficient evidence on-the-record to meet their respective burden.”<sup>261</sup> And at the hearing phase, the NRC Staff is the party with the burden of proof.<sup>262</sup> More importantly, the NRC Staff failed even to provide the transcripts for the August 9 and August 21 conference calls in its disclosure

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<sup>257</sup> Ex. INT-031 ¶ 18; Ex. INT-032 ¶ 14; Tr. at 2102.

<sup>258</sup> Tr. at 2259–60; see also Tr. at 2260–67.

<sup>259</sup> Tr. at 2262–63.

<sup>260</sup> Parties’ Joint Response to the Board’s July 31, 2015 Order Regarding Redaction of Documents (Aug. 10, 2015) [hereinafter “Staff Response to Board Document Request”].

<sup>261</sup> 69 Fed. Reg. at 2213.

<sup>262</sup> See Progress Energy Fla., Inc. (Levy County Nuclear Power Plant, Units 1 & 2), CLI-10-2, 71 NRC 27, 34–35 (2010); see also S. Nuclear Operating Co. (Early Site Permit for Vogtle ESP Site), CLI-07-17, 65 NRC 392, 395 (2007).

reports, as a result of which the parties were never afforded an opportunity to examine the transcripts to prepare their case for hearing.<sup>263</sup>

Because the NRC Staff did not provide two of the three teleconference transcripts to the opposing parties as part of its required monthly disclosure obligations, the Board is hesitant to consider them. We find that, in the face of the conflicting claims and the NRC Staff's failure to meet its basic disclosure requirements, the NRC Staff may not rely on the three 2012 teleconference calls in support of its burden of proof. Without the conference calls in evidence, the NRC Staff is unable to rebut any of Intervenors' claims that the TCP survey development process was run mostly by Crow Butte's contractor and failed to engage the tribes in a meaningful way.

What the remaining record suggests is that, in the midst of this contested process in which all parties had devoted considerable time and effort to devise a TCP survey that involved multiple tribes and multiple sites, Crow Butte suggested an alternate "open site"<sup>264</sup> TCP survey approach on October 3, 2012,<sup>265</sup> which the NRC Staff adopted shortly thereafter. Less than a month later on October 31, 2012, the NRC Staff invited the Indian tribes to participate in an open site TCP survey to be conducted in late November of 2012 (i.e., the "November 2012 TCP Survey").<sup>266</sup> The record does not indicate that the NRC Staff attempted to communicate with the Oglala Sioux Tribe (or with any other Indian tribe), between October 3, 2012, when Crow Butte formally proposed its alternative approach, and October 31, 2012, when the NRC Staff sent out

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<sup>263</sup> See NRC Staff Mandatory Hearing File Update 38 (Apr. 26, 2012) (ADAMS Accession No. ML12117A456); NRC Staff Mandatory Hearing File Update 41 (July 26, 2012) (ADAMS Accession No. ML12208A319).

<sup>264</sup> See *infra* § III.C.4.

<sup>265</sup> Ex. BRD-026.

<sup>266</sup> Ex. BRD-023.

its formal NRC Staff 2012 invitation to participate in an open site TCP Survey.<sup>267</sup> In addition to casting a pall on the quality of the final TCP survey itself,<sup>268</sup> this also reflects negatively on the NRC Staff's efforts to engage with the Indian tribes, especially considering the dramatic reversal that the open site approach represented from the previous two years of deliberations between the NRC Staff and the tribes about how to identify and assess TCPs.

Not surprisingly, the November 2012 TCP Survey engendered little meaningful participation by the tribes. Only two tribes participated:<sup>269</sup> the Crow Nation and the Santee Sioux Nation.<sup>270</sup> Mr. CatchesEnemy and Mr. Yellow Thunder opined that neither the Crow Nation nor the Santee Sioux have sufficient historical contact with the license area to identify TCPs that may be of significance to tribes such as the Oglala Sioux Tribe (who have a far deeper historical connection to the area).<sup>271</sup>

We find that the Lakota nations, and specifically the Oglala Sioux Tribe, have a sufficient historic connection to guide the development of a TCP at the license area, as supported by: (1) the NRC Staff's EA;<sup>272</sup> (2) the Bozell & Pepperl Survey;<sup>273</sup> (3) Staff testimony confirming that, of the seven Lakota bands, the Oglala Sioux Tribe is the largest;<sup>274</sup> and (4) testimony from both

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<sup>267</sup> See NRC Staff Communications Log at 4 (entry 27); EA § 3.9.8; Ex. BRD-023.

<sup>268</sup> The November 2012 TCP Survey is addressed in detail infra § III.C.4.

<sup>269</sup> Tr. at 2303–04.

<sup>270</sup> Tr. at 2338; Ex. NRC-052.

<sup>271</sup> Ex. INT-031 ¶ 26; Ex. INT-032 ¶ 17.

<sup>272</sup> EA § 3.9.3; see also EA §3.9.8.

<sup>273</sup> Ex. CBR-027 at 6.

<sup>274</sup> Tr. at 2300–01.

Mr. CatchesEnemy and Mr. Yellow Thunder, supporting the NRC Staff's position in this regard<sup>275</sup> and noting that the Pine Ridge Reservation, the current home of the Oglala Sioux Tribe, is a mere thirty miles from the Crow Butte mine.<sup>276</sup> Consequently, all indications pointed clearly to the importance of consultation with persons having expertise in TCPs of the Oglala Sioux Tribe—i.e., if not a member of that Tribe, then at least someone with expertise in Lakota TCPs. But that was not the course chosen by the NRC Staff. Instead of rethinking its consultation approach, the NRC Staff went ahead with a TCP survey conducted by two tribes with no such expertise in Lakota TCPs.

While we address the adequacy of the November 2012 TCP Survey below, in reference to whether the NRC Staff met its Identification Obligations of the NHPA,<sup>277</sup> the fact that the NRC Staff decided to go ahead with the open site survey approach, based on consultation with two tribes that could not be expected to identify TCPs of value to Lakota tribes or to the Oglala Sioux Tribe, renders consultation with those tribes about TCPs within the license area largely meaningless.

*d. Genuine Attempts at Consultation and the Oglala Sioux Tribe's Lack of Reciprocity*

Sometime after the February 14–15, 2012 meeting, communications soured considerably between the Indian tribes and the NRC Staff. Intervenors characterized this as a complete breakdown.<sup>278</sup> While the NRC Staff's record in this matter is less than stellar, the Oglala Sioux Tribe is by no means blameless. At the hearing, Mr. Yellow Thunder testified that

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<sup>275</sup> Tr. at 2296–329; see also Ex. INT-031 ¶ 8; Ex. INT-032 ¶ 5.

<sup>276</sup> Tr. at 1033, 1508, 1355.

<sup>277</sup> Infra § III.C.4.

<sup>278</sup> Tr. at 2137, 2171–72, 2176, 2219, 2234; see also Ex. INT-031 ¶ 24; Ex. INT-032 ¶ 15.

the Tribe started to pull back from further communications with the NRC Staff in 2012, and eventually actively resisted the consultation process.<sup>279</sup>

The Oglala Sioux Tribe disliked the use of teleconferences, as opposed to face-to-face meetings, for designing the TCP survey.<sup>280</sup> Moreover, by that time, at least some members of the Tribe were convinced the NRC Staff had misinformed other tribes that the Oglala Sioux Tribe was on board with the consultation process in order to get those other tribes to participate.<sup>281</sup> Mr. Yellow Thunder referred to these actions as a “ploy,”<sup>282</sup> and Mr. CatchesEnemy further asserted that the Oglala Sioux Tribe was “misled” by the NRC Staff.<sup>283</sup>

At the same time, however, the record is devoid of any attempt by the Oglala Sioux Tribe to discuss such misgivings with the NRC Staff. According to Mr. Yellow Thunder, instead of explaining the Tribe’s concerns or informing the NRC Staff that the Tribe was going to disengage from the consultation process, the Oglala Sioux Tribe representatives declined to make any effort to work with the NRC Staff.<sup>284</sup> Mr. Yellow Thunder testified that “[w]e were merely listening and not participating to develop” the TCP survey.<sup>285</sup> He added that at some point “we refused to participate in any more conference calls.”<sup>286</sup> Mr. Goodman corroborated this testimony, indicating that during this time phone calls the NRC Staff made to the Oglala

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<sup>279</sup> Tr. at 2171–72.

<sup>280</sup> See Ex. INT-031 ¶ 19; Tr. at 2171–72.

<sup>281</sup> Tr. at 2176–77.

<sup>282</sup> Tr. at 2176–77.

<sup>283</sup> Tr. at 2255–56.

<sup>284</sup> Tr. at 2171–72.

<sup>285</sup> Tr. at 2171.

<sup>286</sup> Tr. at 2172–73.

Sioux Tribe “were not getting returned.”<sup>287</sup> This deterioration in relations culminated with the Oglala Sioux Tribe affirmatively choosing not to participate in the November 2012 open site TCP Survey.<sup>288</sup>

Even though its overtures were repeatedly rebuffed, the NRC Staff persisted in making genuine efforts at consultation. On March 12, 2013, NMSS Division Director Larry Camper sent another invitation for a government-to-government consultation, to be conducted in person, on proposed ISL facility projects in the area.<sup>289</sup> Oglala Sioux President Bryan Brewer of the Oglala Sioux Tribe responded, accepting the invitation to the meeting and acknowledging that it would be a “government-to-government” consultation.<sup>290</sup> A number of NRC Staff members, including NMSS Deputy Division Director Aby Mohseni, flew to attend the meeting.<sup>291</sup>

Yet when the meeting occurred on May 23, 2013, the Oglala Sioux Tribe simply did not show up.<sup>292</sup> This significantly compromised the entire consultation process, because, as Mr. CatchesEnemy explained at the hearing, the Oglala Sioux Tribe is the largest tribe in the area and other tribes often follow its lead.<sup>293</sup> There is no indication in the record that the Oglala Sioux Tribe informed the NRC Staff that it would not attend the meeting, and at the hearing neither Mr.

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<sup>287</sup> Tr. at 2234.

<sup>288</sup> Tr. at 2243–45; 2255–56.

<sup>289</sup> Ex. NRC-043, Letter from Larry W. Camper, Director, Division of Waste Management and Environmental Protection, to Bryan V. Brewer, Sr., President, Oglala Sioux Tribe (Mar. 12, 2013); see also NRC Staff Communications Log at 5.

<sup>290</sup> Ex. NRC-044, Letter from Bryan V. Brewer, Sr., President, Oglala Sioux Tribe, to Larry W. Camper, Director, Division of Waste Management and Environmental Protection, at 1 (Mar. 20, 2013).

<sup>291</sup> Tr. at 2328.

<sup>292</sup> Tr. at 2323.

<sup>293</sup> Tr. at 2177–18, 2298.

CatchesEnemy nor Mr. Yellow Thunder could provide any explanation for why no tribal representatives appeared.<sup>294</sup> This resulted in a significant waste in time and effort for all parties involved.

### *3. Findings on Consultation Process*

The record before the Board presents a close call as to whether the NRC Staff provided a meaningful opportunity for the Indian tribes to consult on the Crow Butte license renewal. We find that the NRC Staff's consultation process suffered from years of inaction and delay, a confusing multi-site project approach, and for most of the process an absence of sincere respect for the government-to-government relationship that exists between Indian tribes and the United States. Nonetheless, in 2013, the NRC Staff attempted to rectify its mistakes by endeavoring to consult meaningfully with affected Indian tribes. Sadly, at that time, the Oglala Sioux Tribe also took steps that undermined the process.

The NHPA requires no more of a federal agency than to afford an opportunity for Indian tribes to consult meaningfully on federal actions that affect properties of religious or cultural significance to an Indian tribe, as well as to advise the agency on identification and evaluation of such properties, and to participate in the resolution of any possible adverse consequences.<sup>295</sup> The NHPA does not empower an Indian tribe to delay or stall a licensing proceeding. After considerable and unreasonable delay, the NRC Staff finally provided the Oglala Sioux Tribe with a meaningful opportunity to be consulted about TCPs within the license area.<sup>296</sup> This includes three face-to-face meetings over the better part of two years, the second of which focused on gaining tribal input, and the third of which a Deputy Division Director attended. While the NRC

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<sup>294</sup> Tr. at 2323; Ex. NRC-001-R at 65–66.

<sup>295</sup> 54 U.S.C.A. § 302706 (West 2016); 36 C.F.R. § 800.2(c)(2)(ii)(A).

<sup>296</sup> 65 Fed. Reg. at 67,250.

Staff could have done a number of things differently, there is no evidence that its mistakes post-2011 were prejudicial.

Moreover, even were the Board to find for Intervenors, there is no evidence that the Oglala Sioux Tribe has any genuine interest in further consultation efforts with the NRC Staff with respect to the license area. While the Oglala Sioux Tribe claims it seeks “a meaningful opportunity to be involved in the assessment or determination of the significance of the identified sites,” the undisputed fact is that, after repeatedly requesting a face-to-face meeting, the Oglala Sioux Tribe was finally given one—and despite assurances it would attend such a meeting, it failed to show up even after the NRC Staff officials flew to Nebraska to consult.

We note that, while facially similar, this proceeding is unlike that before the Powertech licensing board. Certainly, both proceedings involved the same parties, the same meetings, the same teleconferences, and the same consultation process for both pending ISL mining licenses (as well as other planned mining licenses). But what differentiates the two is that the Oglala Sioux Tribe apparently made a good faith attempt to work with the NRC Staff on the Powertech licensing matter, remaining engaged with the NRC Staff there well into 2013.<sup>297</sup> The Powertech licensing board recognized that both sides were at fault for the failure of that consultation process;<sup>298</sup> and while there is certainly plenty of blame to go around in the instant proceeding, the Board finds that the balance weighs against the Oglala Sioux Tribe in this proceeding.

For the foregoing reasons, we find by a preponderance of the evidence that the NRC Staff eventually made a genuine effort to consult with the Oglala Sioux Tribe with respect to the Crow Butte license area, and so it met its Consultation Obligations under the NHPA.

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<sup>297</sup> Powertech, LBP-15-16, 81 NRC at 648.

<sup>298</sup> Id. at 656.



C. Meeting the NHPA's Identification Obligations

We next turn to whether the NRC Staff satisfied its Identification Obligations under the NHPA. Analysis of this issue turns on four efforts: (1) the Bozell & Pepperl Survey; (2) the NRC Staff's literature reviews; (3) the June 7–9, 2011 informal informational gathering session; and (4) the November 2012 TCP Survey. Each is examined seriatim, below.

1. *Bozell & Pepperl Survey*

The Board agrees with the NRC Staff that the Bozell & Pepperl Survey yielded valuable information about historic properties and that, as such, it is clearly pertinent to this license renewal.<sup>299</sup> The Bozell & Pepperl Survey was a Class III archeological survey, which, at least in modern times, is an intensive, professionally conducted study of a target area.<sup>300</sup> The Bozell & Pepperl Survey included a review of previous studies and archival records, and a pedestrian “by-foot” survey of a significant portion of the license area.<sup>301</sup> The pedestrian “by-foot” survey was extensive, with surveyors walking no more than twenty to thirty meters apart, and with a focused survey near creeks and tributaries.<sup>302</sup>

Crow Butte's witness, Mr. Teahon, however, goes further and opines that this survey is sufficient on its own to meet the requirements of the NHPA for this license renewal.<sup>303</sup> We disagree. Federal agencies are now required to assume responsibility for identifying, assessing and attempting to mitigate impacts to tribal cultural resources under the NHPA.<sup>304</sup> But when the

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<sup>299</sup> Staff Initial Statement of Position at 52.

<sup>300</sup> See Mont. Wilderness Ass'n v. Connell, 725 F.3d 988, 1006 (9th Cir. 2013).

<sup>301</sup> Ex. CBR-027 at i, ii, 3.

<sup>302</sup> Id. at 18.

<sup>303</sup> See Ex. CBR-007 at 8.

<sup>304</sup> See supra § II.B.2.

Bozell & Pepperl Survey was conducted in 1988, this NHPA Identification Obligation specific to TCPs had not yet been imposed on federal agencies.<sup>305</sup> Of particular import here, in 1988, the NRC Staff was not obligated to consider the cultural or religious significance that tribes might ascribe to TCPs, as was required in 2007 when Crow Butte applied to renew its license.<sup>306</sup>

To their credit, the authors of the Bozell & Pepperl Survey conducted literature and archival research, using federal and state databases, to obtain historical and prehistorical context for the license area. At the same time, however, the Bozell & Pepperl Survey team made no attempt to communicate with any of the neighboring tribes, such as the Oglala Sioux Tribe (just thirty miles away), to inquire whether those tribes had other literature resources or advice that might bear on the identification or evaluation of historic properties.<sup>307</sup> As a result, the surveyors' understanding of the historical activities of Indian tribes in the region<sup>308</sup> was far less specific than was their understanding of Euro-American activities.<sup>309</sup> For example, homesteads and other American historical sites were described in significant detail, with site measurements and backgrounds of the individual settlements provided,<sup>310</sup> whereas little attempt was made to understand the context of any Indian-origin TCPs.<sup>311</sup> Moreover, no evidence was presented at the hearing that the survey staff for the Bozell & Pepperl Survey had any specific

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<sup>305</sup> 16 U.S.C. § 470(f) (1988).

<sup>306</sup> 54 U.S.C.A. § 302706(a) (West 2016); 1992 NHPA Amendments § 4006; Ex. NRC-083, National Register Bulletin 38, Guidelines for Evaluating and Documenting Traditional Cultural Properties (1998) [hereinafter "National Register Bulletin 38"].

<sup>307</sup> Tr. at 2032; Ex. CBR-027 at 1; Ex. NRC-001-R at 69–70.

<sup>308</sup> See, e.g., Ex. CBR-027 at 6.

<sup>309</sup> See, e.g., id. at 6–7.

<sup>310</sup> See, e.g., id. at 24–26 (descriptions of sites 25DW111 through 25DW113).

<sup>311</sup> See, e.g., id. at 32 (description of site 25DW114).

expertise with Native American TCPs, and a review of the report itself fails to identify any such expertise. While the authors apparently did what was required of them under the NHPA in 1988, their failure to utilize experts in Lakota TCPs, such as Lakota tribal members who could have added to the survey process, is clearly contrary to current regulations.<sup>312</sup>

In addition, when making their final site eligibility determinations, the Bozell & Pepperl surveyors relied significantly on personal judgment calls that were based on an understanding of the NHPA that would not pass muster today. For example, the authors of the Bozell & Pepperl Survey immediately discounted cultural resources that did not have “physical integrity,” stating that “a site’s physical integrity must be established prior to further considerations of eligibility.”<sup>313</sup> But, the value placed on physical integrity in determining site eligibility for the National Register is not the same today as when the Bozell & Pepperl Survey was completed. National Register Bulletin 15 explains the current concept of a historic property’s “integrity” by cataloguing seven separate attributes (i.e. location, design, setting, materials, workmanship, feeling, and association).<sup>314</sup> There is no mention of “physical integrity.”<sup>315</sup> A modern NHPA listing evaluation is far less rigid than was the guidance relied upon by the Bozell & Pepperl Survey team in 1988.<sup>316</sup> As one example that is pertinent here, National Register Bulletin 15 makes clear that even a barren hilltop can be eligible for placement on the National Register, if the oral historical record of an Indian tribe ascribes significance to it.<sup>317</sup>

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<sup>312</sup> Cf. 36 C.F.R. § 800.4(c)(1).

<sup>313</sup> Ex. CBR-027 at 69.

<sup>314</sup> 36 C.F.R § 60.4.

<sup>315</sup> National Register Bulletin 15 at 44.

<sup>316</sup> Id. at 44–46; Ex. CBR-027 at 69.

<sup>317</sup> National Register Bulletin 15 at 13.

Similarly, another guidance document, National Register Bulletin 38,<sup>318</sup> Ex. NRC-083, provides that locations may be eligible for placement in the National Register if religious practitioners have historically traveled there, or if cultural performances have been held there,<sup>319</sup> even if such “cultural uses may have left little or no physical evidence.”<sup>320</sup> Bulletin 38 further states that “[i]t 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.’”<sup>321</sup>

Ultimately, these National Register Bulletins are based on the ACHP's regulations, which in 1981<sup>322</sup> established four criteria for the listing of historic properties:

“(a) that are associated with events that have made a significant contribution to the broad patterns of our history; or (b) that are associated with the lives of persons significant in our past; or (c) that embody the distinctive characteristics of a type, period, or method of construction, or that represent the work of a master, or that possess high artistic values, or that represent a significant and distinguishable entity whose components may lack individual distinction; or (d) that have yielded, or may be likely to yield, information important in prehistory or history.”<sup>323</sup>

Of these four National Register listing criteria, the Bozell & Pepperl surveyors emphasized the cultural resource's ability to yield important historical information.<sup>324</sup> Today, however, there is no indication the fourth criteria is to be given outsized importance.<sup>325</sup> Because the Bozell & Pepperl

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<sup>318</sup> See National Register Bulletin 38 at 5.

<sup>319</sup> Id. National Register Bulletin 38 avers that the 1992 amendments to the NHPA, incorporating the views of Indian tribes into the NHPA, expanded upon the role of “culture” as a determining factor of eligibility in the NHPA. Id.

<sup>320</sup> Id. at 22.

<sup>321</sup> Id. at 8.

<sup>322</sup> National Register of Historic Places, 46 Fed. Reg. 56,183, 56,187 (Nov. 16, 1981).

<sup>323</sup> 36 C.F.R. § 60.4.

<sup>324</sup> Ex. CBR-027 at 69, 74.

<sup>325</sup> See generally National Register Bulletin 15.

Survey focused so heavily on a particular property's ability to yield important historical information, it accordingly gave insufficient consideration to the third ACHP listing criterion, i.e., historic properties "that embody the distinctive characteristics of a type, period, or method of construction, or that represent the work of a master, or that possess high artistic values, or that represent a significant and distinguishable entity whose components may lack individual distinction."<sup>326</sup>

The inadequate significance the Bozell & Pepperl Survey accorded to these cultural considerations was evident in this proceeding. The Oglala Sioux Tribe witnesses opined about a number of important events that occurred within or near the license area, in particular the site's use "as an encampment during [the] period of forced removal by the United States of the Sioux from their ancestral lands and during the existence of Fort Robinson and the 'sign or starve' treaty-making tactics of the United States in the mid to late 1800s."<sup>327</sup> These events have great importance to the Oglala Sioux Tribe and Lakota tribes.<sup>328</sup> By emphasizing the physical integrity and research value of a particular cultural resource to the exclusion of the unique cultural relationship between that resource and the Oglala Sioux Tribe and other Lakota tribes, such properties could be missed by a Class III survey. Although the NRC Staff argues that its literature review places these encampments slightly east of the license area,<sup>329</sup> a literature review is inferior to the expertise<sup>330</sup> of the Oglala Sioux Tribe witnesses who testified to

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<sup>326</sup> 36 C.F.R. § 60.4(c).

<sup>327</sup> Ex. INT-031 ¶¶ 14; Ex. INT-032 ¶ 11; Tr. at 2268.

<sup>328</sup> Ex. INT-031 ¶¶ 14–15, 26; Ex. INT-032 ¶¶ 11–12.

<sup>329</sup> Ex. NRC-076-R2 at 60.

<sup>330</sup> See 36 C.F.R. § 800.4(c)(1).

the contrary. Furthermore, as Crow Butte's own witness Mr. Teahon acknowledged,<sup>331</sup> potentially up to nine Indian-origin cultural sites were identified from the Bozell & Pepperl Survey alone, clearly indicating that the license area is far from barren in historical content.<sup>332</sup>

Compounding these errors, the authors of the Bozell & Pepperl Survey discounted the value of certain Indian sites for reasons that today would be considered improper. The Bozell & Pepperl surveyors discounted tribal burial grounds as mere cemeteries, which at that time were "ordinarily not considered eligible for National Register involvement."<sup>333</sup> This exclusion of cemeteries stemmed from the language of the ACHP regulations at that time: "[o]rdinarily, cemeteries, birthplaces, or graves of historical figures" are not eligible for listing as a historic property, unless the cemetery derives its importance through other means, such as "association with historic events."<sup>334</sup>

Intervenors' testimony confirms that the Oglala Sioux Tribe disputes a number of the conclusions of the Bozell & Pepperl Survey, including the short shrift given to tribal burial grounds. During the hearing, the Oglala Sioux Tribe's witnesses placed special emphasis on the importance of cemeteries<sup>335</sup> due to their unique historical, cultural, and religious role for the Lakota people<sup>336</sup> and opined that there may be burial grounds in or near the license area related to the "sign or starve" encampments as well as to historically important wars.<sup>337</sup> At the hearing,

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<sup>331</sup> Ex. CBR-007 at 7.

<sup>332</sup> Ex. CBR-027 at i, 18; EA § 3.9.8.

<sup>333</sup> Ex. CBR-027 at 69.

<sup>334</sup> 36 C.F.R. § 60.4 (1988); see also Section VII, How to Apply the Criteria Considerations, in National Register Bulletin 15.

<sup>335</sup> Tr. at 2055.

<sup>336</sup> Tr. at 997, 1000–01, 2055, 2269, 2368.

<sup>337</sup> See supra note 327.

tribal representatives also testified that Indian tribes may see significance in “stone features or scatters or hearths or burials” independent of their association with specific past events, people, or research value.

Even though the Bozell & Pepperl Survey may have been compliant with the NHPA as it was in force in 1988, there is little doubt that, after 1992, such carte-blanche exclusion of tribal burial grounds was no longer acceptable. National Register Bulletin 38 states that “it is possible for the birth or burial itself to have been ascribed such cultural importance that its association with the property contributes to its significance.”<sup>338</sup> That cemeteries can have distinct cultural and religious importance to Indian tribes was also made abundantly clear two years before the 1992 amendments to the NHPA, with the passage of the Native American Graves Protection and Repatriation Act.<sup>339</sup> Yet, the tribes’ critique of the Bozell & Pepperl Survey is not confined to burial grounds. They also complain that it does not tie any of the cultural resources identified to the Great Sioux Wars, the Red Cloud Agency, or any other event of great significance to the Lakota people that occurred in the area.<sup>340</sup>

As Mr. Teahon’s testimony recognized, even using the listing criteria acceptable in 1988, the Bozell & Pepperl Survey identified nine potential TCPs of Indian origin,<sup>341</sup> and determined that three of them were potentially eligible for placement in the National Register (and therefore worthy of protection).<sup>342</sup> Had current listing criteria been used instead, we find it is at least

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<sup>338</sup> National Register Bulletin 38 at 20.

<sup>339</sup> Native American Graves Protection and Repatriation Act, Pub.L. No. 101-61, 104 Stat. 3048 (1990) (codified at 25 U.S.C. 3001 et seq.).

<sup>340</sup> See Ex. CBR-027 at 9 (giving scant recognition to these recent historical events).

<sup>341</sup> Id. at i, 18.

<sup>342</sup> Id. at 74–75, 78 (sites 25DW114, 25DW194, 25DW198).

plausible that other Indian-origin historic properties would have been identified within the license area. Even Crow Butte appears to have recognized these deficiencies in the Bozell & Pepperl Survey (although it argued otherwise in this litigation<sup>343</sup>). For example, a letter sent to Indian tribes by Crow Butte in conjunction with the 1998 license renewal acknowledged that the Bozell & Pepperl Survey was inconclusive at recognizing the full scope of TCPs potentially present at the site.<sup>344</sup> In sum, the Bozell & Pepperl Survey does not meet the requirement of the current version of the NHPA with respect to TCPs, and for this reason alone, the NRC Staff cannot rely on the Bozell & Pepperl Survey to meet its Identification Obligation under the NHPA.

## *2. Literature Reviews and Interviews*

In his testimony, Mr. Goodman claims that one of the key steps the NRC Staff undertook to cure any possible deficiencies in the Bozell & Pepperl Survey was to conduct its own literature review, which included interviews of Nebraska and federal archeologists.<sup>345</sup> While such a literature review certainly may have been helpful to the NRC Staff, by no means was it sufficient to comply with the NHPA.

The record establishes that the NRC Staff's 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—which for the most part are recorded orally.<sup>346</sup> Furthermore, it is highly unlikely that literature searches would lead to the identification of specific TCPs within the license area, regardless of whether they could qualify as historic

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<sup>343</sup> See Crow Butte Proposed Findings & Conclusions at 67; Ex. CBR-007 at 9–10.

<sup>344</sup> Ex. CBR-029, Letter from Bartley W. Conroy, Vice President, Resource Technologies Group, Inc., to L. Robert Puschendorf, Deputy Nebraska State Historic Preservation Officer, at 38 (Apr. 3, 1998).

<sup>345</sup> Ex. NRC-076-R2 at 59.

<sup>346</sup> Accord National Register Bulletin 38 at 5; Tr. at 2302.



properties under the NHPA. Dr. Nickens for the NRC Staff testified that literature reviews and historical background checks “should be a corollary” to a TCP study or survey<sup>347</sup> because a literature search cannot “ascribe the cultural meaning” to a TCP “that the Lakota people would.”<sup>348</sup>

As for the interviews that were conducted, Mr. Goodman characterized them as “interviews with local experts in the history and ethnohistory of the area,” that played a critical part in the literature review process.<sup>349</sup> On further review, however, Mr. Goodman’s claim clearly overstates the value of these interviews that Dr. Nickens conducted on a single trip to the area on October 23–25, 2012.<sup>350</sup> Not only did Dr. Nickens’ travel to Nebraska encompass only two days, but his primary focus was, not on the license area itself, but rather on Crow Butte’s expansion sites,<sup>351</sup> with much of those two days devoted to conversations with facility operators and local officials.<sup>352</sup> He did meet with archeology experts on Wednesday, October 24 and Thursday, October 25,<sup>353</sup> which Dr. Nickens described as “very productive in terms of acquiring regional information relevant to both the cultural affiliations of Tribes who historically inhabited

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<sup>347</sup> Tr. at 2024; see also Tr. at 2068.

<sup>348</sup> Tr. at 2277.

<sup>349</sup> Ex. NRC-076-R2 at 59–60 (citing Ex. NRC-051A, SC&A Trip Report on Site Visit for Marsland Expansion Area License Application, Part 1 of 3 (Nov. 6, 2012); Ex. NRC-051C, SC&A Trip Report on Site Visit for Marsland Expansion Area License Application, Part 3 of 3 (Nov. 6, 2012)).

<sup>350</sup> Ex. NRC-001-R at 68 (citing Ex. NRC-051A; Ex. NRC-051C; Ex. NRC-051B, SC&A Trip Report on Site Visit for Marsland Expansion Area License Application, Part 2 of 3 (Nov. 6, 2012)).

<sup>351</sup> Tr. at 2285; see also Ex. NRC-051A at 4.

<sup>352</sup> See Ex. NRC-051A at 3 (agenda of trip report).

<sup>353</sup> Id.; Ex. NRC-051C at 6–10.

the area and for the types of TCPs that might be anticipated to occur in the CBR [Crow Butte] project areas.”<sup>354</sup>

But however productive, there is no evidence that any of these discussions led to the identification of potential specific TCPs or to “specific new information for any [possible TCPs within the Crow Butte] project areas,”<sup>355</sup> which is not surprising, given that the archaeologists with whom Dr. Nickens met did not even know the exact locations of important historical events involving nearby tribes.<sup>356</sup>

We find that Dr. Nickens’ testimony demonstrated considerable expertise regarding TCPs and the traditions and cultures of Indian tribes. However, the purpose of Dr. Nickens’ travel to the Crow Butte sites was not to search for more TCPs or to supplement the Bozell & Pepperl Survey, but only “to gain an awareness of the project operations in relation to previously recorded cultural resource sites based on the Class III archeological survey[,] and [then] to assess the current status of certain cultural sites that were originally designated as being potentially eligible for listing in the National Register of Historic Places (NRHP).”<sup>357</sup> Stated otherwise, the Board finds that the NRC Staff enlisted Dr. Nickens to check on those historic properties that had previously been identified in the Bozell & Pepperl Survey, not to find new TCPs or historic properties within the license area.

If anything, Dr. Nickens’ insights indicate it is plausible that the area contains TCPs and potentially eligible historic properties that have yet to be identified.<sup>358</sup> This is fully consistent with

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<sup>354</sup> Ex. NRC-051C at 6–10.

<sup>355</sup> See id. at 10.

<sup>356</sup> Id.

<sup>357</sup> Ex. NRC-001-R at 68.

<sup>358</sup> See, e.g., Ex. NRC-051C at 9–11 (During this visit to Nebraska, Dr. Nickens learned that there had been a “legendary battle between a party of Crow Indians and a pursuing group of

the ACHP's regulations, which remind agencies that territories ceded by Indian tribes to the U.S. government, such as Black Hills region,<sup>359</sup> are more likely to encounter "historic properties of religious and cultural significance."<sup>360</sup> As stated in National Register Bulletin 38, and as adopted by the courts, "a reasonable effort to identify traditional cultural properties 'depends in part on the likelihood that such properties may be present.'"<sup>361</sup> As indicated by Dr. Nickens' literature review, and acknowledged by the EA, the area around the Crow Butte mine is "steeped in history."<sup>362</sup> This calls for greater scrutiny of the license area, not less.<sup>363</sup>

The NRC Staff argues that a guidance document from ACHP ("ACHP Guidance") provides that the NHPA's requirement for a "reasonable and good faith effort"<sup>364</sup> can be satisfied merely by "a review of existing information on historic properties that are located or may be located within the [area of potential effects]."<sup>365</sup> In fairness, however, this quote from the ACHP Guidance sets the bare minimum needed to investigate historic properties.<sup>366</sup> The ACHP

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Brulé Sioux in the fall of 1849," that "the 1877 camp of the renowned Oglala Lakota leader Crazy Horse might have been located on the White River close to" the North Trend Expansion area, and that a large and important Indian Sun Dance occurred in the area.).

<sup>359</sup> The Oglala Sioux Tribe contends the Black Hills region falls under its tribal territory. LBP-08-24, 68 NRC at 711–12.

<sup>360</sup> 36 C.F.R. § 800.2(c)(2)(ii)(D).

<sup>361</sup> Pueblo of Sandia, 50 F.3d at 861 (quoting National Register Bulletin 38 at 10).

<sup>362</sup> EA § 3.9.8.

<sup>363</sup> Pueblo of Sandia, 50 F.3d at 861.

<sup>364</sup> 36 C.F.R. § 800.4(b)(1).

<sup>365</sup> Staff Reply Findings of Facts & Conclusions of Law at 16 (quoting Meeting the "Reasonable and Good Faith" Identification Standard in Section 106 Review, ACHP, at 1, available at [http://www.achp.gov/docs/reasonable\\_good\\_faith\\_identification.pdf](http://www.achp.gov/docs/reasonable_good_faith_identification.pdf)) (last retrieved Feb. 16, 2016) [hereinafter "ACHP Guidance"] (quotation marks omitted).

<sup>366</sup> See id.

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.”<sup>367</sup> There is no evidence that the NRC Staff enlisted anyone during its literature search, nor interviewed anyone, who met these qualifications.<sup>368</sup> Accordingly, when we consider the ACHP Guidance in its entirety, the Board finds that it effectively negates the NRC Staff’s argument.

Furthermore, the ACHP regulations and the ACHP Guidance envision “field investigations” as a means of compliance with the ACHP.<sup>369</sup> While perhaps not required in every circumstance, field investigations on the ground would be appropriate<sup>370</sup> at a site such as Crow Butte, which the EA itself describes as “steeped in history.”<sup>371</sup> Routinely, federal agencies consider field investigations to be the best method for identifying TCPs and historic properties.<sup>372</sup> And certainly, more recent pronouncements by the NRC Staff likewise point to field investigations as the NRC Staff’s preferred route to investigate TCPs. For example, Crow Butte License Condition 9.8 requires that before any previously un-reviewed portion of the

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<sup>367</sup> ACHP Guidance at 1–2.

<sup>368</sup> See e.g., Tr. at 2277; Ex. NRC-051A at 3 (agenda of trip report). Notably, Dr. Nickens testified that he was not capable of making determinations as to the cultural significance of Indian tribal artifacts in the same way that a tribal elder could. Tr. at 2277.

<sup>369</sup> 36 C.F.R. § 800.4(b); ACHP Guidance at 1.

<sup>370</sup> Pueblo of Sandia, 50 F.3d at 861.

<sup>371</sup> EA § 3.9.8.

<sup>372</sup> See, e.g., Te-Moak Tribe, 608 F.3d at 601.

license area is to be disturbed by operations, Crow Butte “shall administer a cultural resource inventory if such survey has not been previously conducted and submitted to the NRC.”<sup>373</sup> To the same effect is the NRC Staff’s October 31, 2012 invitation soliciting tribes to participate in the November 2012 TCP Survey, which stated “a field study is a reasonable means of identifying properties of cultural and religious significance at” the license area and other Crow Butte sites.<sup>374</sup>

Particularly instructive on this point is a decision of the United States Court of Appeals for the Ninth Circuit in Montana Wilderness Association v. Connell.<sup>375</sup> There, the Bureau of Land Management (“BLM”) created a resource management plan for the Upper Missouri River Breaks National Monument that authorized “roads, airstrips, and motorboats” near the monument.<sup>376</sup> To meet its NHPA obligations, BLM performed a Class I survey, which is akin to a literature review,<sup>377</sup> and relied on Class III surveys from the distant past that were recognized as having flaws.<sup>378</sup> After a challenge from public interest groups, the Ninth Circuit determined that, insofar as there were areas that would be affected by changed operations or new construction, BLM’s literature review and reliance on past surveys was inadequate: “BLM is required to conduct Class III inventories for roads, ways and airstrips that have not been surveyed previously or were surveyed decades ago.”<sup>379</sup>

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<sup>373</sup> See Ex. NRC-012, U.S. NRC Materials License SUA-1534, § 9.8 (Nov. 5, 2014).

<sup>374</sup> Ex. BRD-023 at 1.

<sup>375</sup> 725 F.3d 988 (9th Cir. 2013).

<sup>376</sup> Id. at 993.

<sup>377</sup> See id. at 1005–07.

<sup>378</sup> Id. at 1007.

<sup>379</sup> Id. at 1009.

Similarly, here, a decades-old Class III survey was conducted for the license area using a previous version of the NHPA that is fundamentally less demanding than the current statute, particularly with respect to its treatment of Indian-origin TCPs. We find that a literature review and a couple of brief interviews with historians or archeologists lacking experience in Lakota TCPs cannot cure the shortcomings of the Bozell & Pepperl Survey in a post-1992 era. As Dr. Nickens admitted, the most this will be able to provide is background information.<sup>380</sup> As was the case in Montana Wilderness, a new field investigation appears to be the only “reasonable and good faith effort”<sup>381</sup> for identifying TCPs within the license area.

### *3. June 7–9, 2011 Informal Information-Gathering Meeting & Bus Tour*

We have previously described the June 7–9, 2011 informal information gathering session with six tribes as the first significant attempt by the NRC Staff to solicit information regarding historic properties of possible concern within the license area.<sup>382</sup> But just as this meeting failed to satisfy the Consultation Obligations of the NHPA, so it also failed to satisfy the NRC Staff’s Identification Obligations of the NHPA. While the bus tour may have placed Indian tribal members within the license area, there was never an opportunity for attendees to exit the bus and examine the area.<sup>383</sup>

Although the EA contends that the June 7–9 meeting was nonetheless an effective information gathering tool because it identified four TCPs (the Crow Butte itself, a long ridge adjacent to the butte that serves as a vision quest site, medicinal herbs, and the “cultural

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<sup>380</sup> Tr. at 2024.

<sup>381</sup> 10 C.F.R. § 800.4(b)(1).

<sup>382</sup> Supra § III.B.2.b.

<sup>383</sup> Ex. NRC-050 at 7; Tr. at 2052.

landscape” “steeped in history”),<sup>384</sup> two of these—the Crow Butte geologic feature’s significance and the license area’s location being “steeped in history,”—were matters of common knowledge (even by the NRC Staff), well before the June 7–9 meeting began.<sup>385</sup> As for the second item, the vision quest site, it lies a mile to the east of the project area.<sup>386</sup> Consequently, the only new item identified as relating to the license area was the possible presence of important medicinal and spiritual herbs.<sup>387</sup> Even then, however, Dr. Nickens testified that the NRC Staff did not attempt to locate the herbs or seek further information from the Indian tribes about their location or significance.<sup>388</sup> These efforts and general findings do not suggest adequate TCP identification when considered with the TCPs that Intervenor assert lie in the license area, such as the “sign or starve” encampments,<sup>389</sup> and which can only be found by a field investigation.

Based on the testimony adduced at the hearing, it is abundantly clear the June 7–9, 2012 meeting was inadequate to identify historic properties “within the area of potential effects.”<sup>390</sup> The cursory discussions and the brief bus tour cannot be deemed to meet the

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<sup>384</sup> EA § 3.9.8 (emphasis removed); Tr. at 2066; Ex. NRC-050 at 8; Ex. NRC-051C.

<sup>385</sup> Tr. at 2067, 2070. Dr. Nickens also stated that during the bus tour it was simply pointed out that the Crow Butte geologic feature is culturally important, but the bus tour did not provide an opportunity for the tribes to elucidate on its cultural importance to them. Tr. at 2077.

<sup>386</sup> EA. § 3.9.8.

<sup>387</sup> Tr. at 1129; Ex. NRC-050 at 8.

<sup>388</sup> Tr. at 2070. The NRC Staff performed its own analysis by comparing known plants in the area against a two-decade old study of plants of import to the Lakota people. Tr. at 2069. The NRC Staff appears to have ignored the tribal elders’ warning on the bus tour that non-tribal experts “may not be able to identify the presence of unique medicinal herbs.” Ex. NRC-050 at 3. Cf. 36 C.F.R. § 800.4(c)(1) (requiring agency officials to acknowledge the expertise of Indian tribes in assessment of cultural resources “that may possess religious and cultural significance to them.”).

<sup>389</sup> Ex. INT-031 ¶¶ 25, 26; Ex. INT-032 ¶¶ 16, 17.

<sup>390</sup> See 36 C.F.R. § 800.4.

NHPA's requirements to identify, assess, and attempt to mitigate impacts to potential historic properties of significance to Indian tribes.<sup>391</sup>

#### 4. *The November 2012 TCP Survey*

The NRC Staff claims that, in conjunction with the Bozell & Pepperl Survey and the June 2011 meeting and bus tour, the Crow Butte and Santee Sioux November 2012 TCP Survey met its Identification Obligations under the NHPA.<sup>392</sup> There are three separate reasons why the NRC Staff's claim fails.

##### *a. Opposition to The NRC Staff's "Open Site" Survey Approach*

We turn first to why the design of the November 2012 TCP Survey failed to comply with the NRC Staff's Identification Obligations under the NHPA. The defining feature of this survey is its "open site" approach. Rather than following guidelines or a formal structure, under the open site approach, surveyors would have been allowed onto the license area to search for TCPs as they deemed appropriate.<sup>393</sup> According to Mr. Goodman, the NRC Staff chose the open site approach because it would afford the tribes the freedom to concentrate "on the areas most important to them."<sup>394</sup> He further asserted that "[a]fter receiving input from the tribes and the Applicant" the NRC Staff deemed this the "best approach," even though the tribes were seeking a far more intensive alternative that would have involved "communications and consultations with the history of the site and talk to Tribal Elders."<sup>395</sup>

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<sup>391</sup> 54 U.S.C.A. § 306108 (West 2016); 36 C.F.R § 60.4.

<sup>392</sup> See Staff Initial Statement of Position at 49 (indicating the 2012 TCP survey was a "critical piece[] of the Staff's Section 106 consultation"); id. at 52.

<sup>393</sup> See Ex. BRD-026 at 1; Tr. at 2247.

<sup>394</sup> Ex. NRC-001-R at 65.

<sup>395</sup> See Tr. at 2021–23.



While we do not dispute Mr. Goodman's good faith belief in this regard, there is no record evidence to support Mr. Goodman's purported reasons for selecting and designing the open site approach. Insofar as there is evidence available, it points in the opposite direction.

This is clear from the TCP survey approaches that were being considered by the parties in the time period between their February 2012 meetings and the November 2012 TCP survey. Initially, the parties had established a protocol in which each side—Crow Butte and the Indian tribes—would submit a proposed statement of work, after which the NRC Staff would establish a joint approach with input from all parties.<sup>396</sup> Crow Butte's first proposed statement of work: (1) utilized an hourly rate concept for the field report and presentation, without any honorarium or flat fee;<sup>397</sup> (2) defined a specific level of effort, including time for field identification and services of outside experts;<sup>398</sup> (3) defined the required work products, and stated that assessments of the significance of identified cultural resources would adhere to the National Register 30 C.F.R. § 60.4 criteria and National Register Bulletins 15 and 38;<sup>399</sup> (4) included provisions for access and safety on the site under conditions considered acceptable to Crow Butte;<sup>400</sup> and (5) covered only fifteen percent of the license area that was affected by operations.<sup>401</sup>

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<sup>396</sup> Ex. BRD-021.

<sup>397</sup> Ex. BRD-024, Draft Scope of Work, Identification of Properties of Religious and Cultural Significance, Cameco Resources Crow Butte License Renewal and North Trend License Agreement at 3 (Mar. 8, 2013); Tr. at 2228–29.

<sup>398</sup> Ex. BRD-024 at 3.

<sup>399</sup> See supra §§ II.B, III.C.1 for a discussion of the National Register criteria and the two National Register Bulletins.

<sup>400</sup> Ex. BRD-024 at 3.

<sup>401</sup> Id. at 2.

Crow Butte subsequently updated its proposed statement of work on August 7, 2012.<sup>402</sup> While there was no specific testimony provided by Crow Butte or the NRC Staff about the circumstances that elicited these changes, they appear to have been made in anticipation of a scheduled August 9, 2012 teleconference.<sup>403</sup> This update of Crow Butte's original proposed statement of work is similar in many respects to the prior version, although the level of effort was increased (the March 8, 2012 proposal covered only the license area and North Trend expansion area,<sup>404</sup> while the August 7, 2012 proposal covered all three Crow Butte expansion sites as well as the license area<sup>405</sup>), and the allowable compensation was increased.<sup>406</sup> In addition, the assumptions, expected work products, safety and access were specified in greater detail, indicating a highly structured survey approach with multiple field crews, along with resources provided by Crow Butte.<sup>407</sup> Crow Butte's August 7, 2012 proposal increased by nearly four-fold the portion of the license area that would be covered by the TCP survey.<sup>408</sup> Crow Butte estimated the level of effort would entail fifty person-days to survey the license area alone.<sup>409</sup>

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<sup>402</sup> Tr. at 2229.

<sup>403</sup> Ex. BRD-025, Draft Scope of Work, Identification of Properties of Religious and Cultural Significance, Cameco Resources Crow Butte License Renewal and North Trend, Marsland and Three Crow Amendment Areas at 1 (Aug. 7, 2012).

<sup>404</sup> Ex. BRD-024 at 2.

<sup>405</sup> Ex. BRD-025 at 1–2.

<sup>406</sup> Id. at 4–5.

<sup>407</sup> See generally id.

<sup>408</sup> See Ex. BRD-024 at 2–3; Ex. BRD-025 at 1–3.

<sup>409</sup> See Ex. BRD-024 at 3; Ex. BRD-025 at 4.

Along with these two Crow Butte proposals, a TCP survey proposal was submitted on behalf of several tribes (including the Oglala Sioux) by the Makoche Wowapi, dated September 27, 2012.<sup>410</sup> Though this proposal was nominally submitted for the Powertech site, at that time all parties were discussing—pursuant to the NRC Staff’s instructions—a multi-site, multi-tribe TCP survey.<sup>411</sup> Like the August 7, 2012 Crow Butte proposal, the Makoche Wowapi proposal included: (1) an hourly compensation rate;<sup>412</sup> (2) a highly structured TCP survey process that would require many weeks to complete; (3) field crews and equipment to be provided by Crow Butte; and (4) a detailed report that would be prepared by the Indian tribal survey team.<sup>413</sup>

Unfortunately, there is no evidence that the NRC Staff gave serious consideration to the Makoche Wowapi proposal.<sup>414</sup> Instead, the record indicates that only a few days later, Crow Butte submitted its open site proposal that was to encompass the license area and the Crow Butte expansion sites, but not the Powertech site.<sup>415</sup> This October 3, 2012 Crow Butte open site proposal included “an unconditional grant of \$5,000 to each tribe choosing to participate,”<sup>416</sup> and proposed that Crow Butte employees escort Indian tribe representatives to the project areas, but not interfere with the tribal representatives in their survey efforts.<sup>417</sup> In lieu of a highly

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<sup>410</sup> Tr. at 2255–56; see also Tr. at 2184–85, 2190.

<sup>411</sup> See supra § III.B.2.a.

<sup>412</sup> Ex. BRD-022 at 1. Because the proposal contains proprietary cost information, BRD-022 is a redacted version of the proposal that the tribes made. See Staff Response to Board Document Request at 3.

<sup>413</sup> Ex. BRD-022 at 1.

<sup>414</sup> See supra § III.B.2.a.

<sup>415</sup> Ex. BRD-026 at 1.

<sup>416</sup> Id.

<sup>417</sup> Id.

structured survey program, two or three representatives from each participating tribe would be allowed onto the site to search independently for TCPs under an open site approach.<sup>418</sup> The proposal did not set specific dates for the survey, nor did it estimate how long the survey would take. Rather, it simply proposed that the Crow Butte facility would be open for two weeks in November for any tribes wishing to participate.<sup>419</sup>

Unlike the short shrift given to the Makoche Wowapi proposal,<sup>420</sup> the NRC Staff largely adopted Crow Butte's open site proposal as evidenced by the NRC Staff's October 31, 2012 invitation to the tribes to participate in the November 2012 TCP Survey. The invitation indicated that Crow Butte would: (1) eschew an hourly rate in favor for a flat grant of a \$10,000 "honorarium" to each participating tribe as the major form of compensation to be distributed to the individuals participating in the field work;<sup>421</sup> (2) eliminate a structured survey approach in favor of an open site approach,<sup>422</sup> and (3) limit participation to three representatives per participating tribe.<sup>423</sup> This November 2012 TCP Survey invitation had an extremely short turnaround, allowing only fourteen days within which to respond, and it required that the open site TCP survey be conducted over three weeks in late November and early December.<sup>424</sup>

The evidence establishes that the NRC Staff's open site TCP survey approach was neither in the Indian tribes' best interests, nor that the tribes accepted it. Mr. Goodman testified

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<sup>418</sup> See id.

<sup>419</sup> Id.

<sup>420</sup> See supra § § III.B.2.a.

<sup>421</sup> Ex. BRD-023 at 2.

<sup>422</sup> Ex. BRD-026 at 2.

<sup>423</sup> See Ex. BRD-023 at 1–2.

<sup>424</sup> Id.

that the NRC Staff had attempted to talk with the Oglala Sioux Tribe in August,<sup>425</sup> but he added that none of these calls were ever completed.<sup>426</sup> As a result, there is no evidence that the NRC Staff discussed this new survey approach with the Tribe (or for that matter, with any other Indian tribe), between October 3—when Crow Butte made its new open site proposal to the NRC Staff—and October 31, 2012—when the formal November 2012 TCP Survey invitation was issued.<sup>427</sup>

In the end, Mr. Goodman’s claim that an open site was in the tribes’ best interest can only be supported, if at all, by internal communications among NRC Staff members,<sup>428</sup> none of which were offered in evidence here. However, there is evidence regarding what the tribes viewed as the best method of identifying TCPs, and it is contrary to the open site approach adopted by the NRC Staff.

Thus, on February 20, 2013, the Standing Rock Sioux Tribe’s Tribal Historic Preservation Office heavily criticized a substantially similar open site approach with a \$10,000 honorarium, calling it “just short of a bribe disguised as a token identification effort.”<sup>429</sup> Mr. CatchesEnemy adopted this criticism,<sup>430</sup> testifying that the Oglala Sioux Tribe and other Indian tribes would have preferred a more structured approach, with teams consisting of spiritual advisors and elders, and significant time commitments so as

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<sup>425</sup> Tr. at 2234.

<sup>426</sup> Tr. at 2234–35.

<sup>427</sup> See EA § 3.9.8; NRC Staff Communications Log at 4 (entry 27); Ex. BRD-023.

<sup>428</sup> See Tr. at 2247–48.

<sup>429</sup> Ex. INT-037 at 2–3.

<sup>430</sup> Ex. INT-031 ¶ 21.

not to rush any of the elders.<sup>431</sup> Dr. Nickens, the NRC Staff's own expert, actually acknowledged that a more structured process, with the involvement of tribal elders is a better TCP survey approach.<sup>432</sup> He further stated "[a]nd I agree with [Mr. CatchesEnemy] that a proper TCP survey, as I've stated previously, involves elders and bringing the elders to the field as possible and so forth."<sup>433</sup>

In contrast, and as Mr. Goodman acknowledged, the open site approach that the NRC Staff adopted, included a compensation scheme that incentivized attendance over effort because compensation would have been awarded once the tribal members showed up regardless of how much scrutiny they gave to TCPs on site.<sup>434</sup> Likewise, this open site approach made no effort to encourage tribal elders to participate.

We certainly recognize that the intensive TCP survey preferred by the tribes may well have been infeasible on a cost basis. At the same time, however, we do not agree with the NRC Staff's argument that suddenly scrapping the TCP survey approach, on which it had been working with the Indian tribes for over a year, was done for the benefit of the Indian tribes.<sup>435</sup> Even though this proceeding had then been pending for over four years, and even though the NRC Staff took two more years to complete its EA, the NRC Staff adopted the Crow Butte TCP survey proposal in less than a month, without any effort to consult with the Tribe about this

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<sup>431</sup> Tr. at 2244–45, 2276; see also Ex. INT-031 ¶¶ 19–21.

<sup>432</sup> Tr. at 2023, 2280.

<sup>433</sup> Tr. at 2280.

<sup>434</sup> Tr. at 2232–33.

<sup>435</sup> Tr. at 2104–05.

change, and then pushed a timeline for site reviews to be completed in less than a month thereafter.<sup>436</sup>

*b. The Surveyors Were Inappropriate for the Task*

Even setting aside all of these considerations, however, the November 2012 TCP Survey still cannot satisfy the NRC Staff's Identification Obligations under the NHPA because the TCP surveyors were not appropriate for the task. As discussed above, neither the Crow Nation nor the Santee Sioux Nation, the two groups participating in the November 2012 TCP Survey, are Lakota tribes and neither has a sufficient relationship to the license area.<sup>437</sup> In fact, the Crow Nation had previously advised Crow Butte's contractor of its lack of connection to the license area, a fact that was passed on to the NRC Staff.<sup>438</sup>

We do not dispute that Mr. Goodman and others on the NRC Staff genuinely believed that the Santee Sioux and the Crow Nation could identify the TCPs of tribes other "than just the Santee Sioux Nation and the Crow Nation."<sup>439</sup> But the evidence does not support any such belief. Indian tribes are distinct nations—a concept recognized in the NRC Staff's own NUREG-2173, which notes that each Indian tribe has a unique history and experience "with its own customs, culture, concerns, interests and needs."<sup>440</sup>

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<sup>436</sup> NUREG-2173 emphasizes the need for patience when working with Indian tribes, who are short-staffed and overstretched. NUREG-2173 § 2.H.

<sup>437</sup> Supra § III.B.2.c.

<sup>438</sup> Ex. CBR-029 at 7.

<sup>439</sup> Tr. at 2306.

<sup>440</sup> NUREG-2173 at 7.

Significantly here, the Crow Nation is not a Sioux nation, and therefore it is neither Lakota nor Dakota.<sup>441</sup> Moreover, the Crow Nation reservation is located in southern Montana.<sup>442</sup> Dr. Nickens, the NRC Staff's own expert, acknowledged that, unlike the Oglala Sioux Tribe, which considers the area in and around the Black Hills its ancestral homeland,<sup>443</sup> the Crow Nation had little involvement in Nebraska.<sup>444</sup>

Similarly, although the Santee Sioux Nation is a Sioux nation, and a Dakota tribe, it is not a Lakota tribe.<sup>445</sup> Moreover, the Santee Sioux reservation area is located on the opposite end of Nebraska,<sup>446</sup> 300 miles from the license area,<sup>447</sup> and as Dr. Nickens explained, the Santee Sioux originated in Minnesota.<sup>448</sup> Although it moved westward from Minnesota, it did not move into Nebraska until it was settled on a reservation in the far eastern part of the state.<sup>449</sup>

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<sup>441</sup> As described in the EA, the Crow Nation was an historical enemy of the Lakota peoples. EA § 3.9.8. Dr. Nickens explained that their only involvement in the area near the license area occurred in the form of raids. Tr. at 2302–03.

<sup>442</sup> Ex. BRD-027, Excerpt from 2010 Census Map of American Indian & Alaska Native Reservations, available at [http://www.2.census.gov/geo/maps/special/AIANWall2010/AIAN\\_US\\_2010.pdf](http://www.2.census.gov/geo/maps/special/AIANWall2010/AIAN_US_2010.pdf); Tr. at 2294.

<sup>443</sup> Tr. at 2302. Dr. Nickens concurred with this statement. Tr. at 2303.

<sup>444</sup> Tr. at 2302–03.

<sup>445</sup> Tr. at 2299–2300.

<sup>446</sup> Ex. BRD-027; Tr. at 2294.

<sup>447</sup> Ex. BRD-027.

<sup>448</sup> Tr. at 2303; see also Tr. at 995–96 (Dr. Redmond opined that the Oglala Sioux Tribe used the area around the license area far more than either the Crow Nation or the Santee Sioux Nation.).

<sup>449</sup> Tr. at 2303.



*c. The Survey Left Out the License Area*

But even were either tribe capable of conducting a TCP survey, neither actually surveyed the license area—and this alone renders the November 2012 TCP Survey deficient. The EA states that the Crow Nation and Santee Sioux “concluded that there were no eligible sites of cultural or religious significance to the Tribes at the CBR [Crow Butte] facility.”<sup>450</sup> We find this to be an incorrect statement with respect to the license area because no physical inspection was made,<sup>451</sup> a critical fact not even mentioned in the EA.<sup>452</sup> As Mr. Goodman and Dr. Nickens testified, the 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.”<sup>453</sup> Additionally, it appears the Santee Sioux Nation never visited the license area and simply adopted the Crow Nation’s determination.<sup>454</sup> 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.

Furthermore, the NRC Staff’s reliance on the Crow and Santee Sioux assessment that the ground was disturbed<sup>455</sup> cannot stand as the determining factor as to whether an actual field

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<sup>450</sup> EA § 3.9.8 (emphasis added).

<sup>451</sup> Dr. Nickens testified that some members of the Crow Nation may have stepped out onto the license area, but even if they did so, as will be seen, it was solely for the purpose of ascertaining how much disturbance had occurred on the site. Tr. at 2309. Dr. Nickens specifically testified that the Crow Nation never attempted to conduct a survey for the purpose of identifying TCPs on the license area. See id.

<sup>452</sup> See EA § 3.9.8.

<sup>453</sup> Ex. NRC-001-R at 74.

<sup>454</sup> Id.

<sup>455</sup> Tr. at 2304–05.

investigation was needed for the license area.<sup>456</sup> Certainly, this is inconsistent with National Register Bulletin 15, which explains that, even where TCPs have already been disturbed, there nonetheless may be information they can provide about prehistory or history.<sup>457</sup> Likewise, National Register Bulletin 38 explains that even somewhat damaged TCPs often deserve a closer look, and notes that “a property whose cultural significance has been lost through disturbance may still retain archeological deposits of significance for their information content.”<sup>458</sup> Certainly, there was no evidence presented that the license area was so disturbed as to render it an archeological wasteland. Based on the record as a whole, it is 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.<sup>459</sup>

Moreover, the NRC Staff’s open site approach involved no independent evaluation by the NRC Staff of any decisions the Crow Nation or the Santee Sioux Nation reached as to where to survey.<sup>460</sup> While the use of contractors is by no means prohibited under NEPA,<sup>461</sup> a federal agency cannot impermissibly delegate important NHPA administrative determinations to private parties.<sup>462</sup> In the end, the NRC Staff must make the final determination as to whether there are TCPs and historic properties within the license area other than those identified by the

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<sup>456</sup> NRC Staff’s Rebuttal Statement of Position at 25 (June 8, 2015).

<sup>457</sup> National Register Bulletin 15 at 23; 10 C.F.R. § 60.4(d).

<sup>458</sup> National Register Bulletin 38 at 16.

<sup>459</sup> Supra § III.C.1, note 358.

<sup>460</sup> Tr. at 2305, 2307, 2309.

<sup>461</sup> See, e.g., 40 C.F.R. § 1506.5(c).

<sup>462</sup> See U.S. Telecom Ass’n v. FCC, 359 F.3d 554, 568 (D.C. Cir. 2004) (prohibiting agency subdelegation to private actors and stating that “a federal agency may turn to an outside entity for advice and policy recommendations, provided the agency makes the final decisions itself”).

Bozell & Pepperl Survey, and that determination requires a genuine, reasonable effort to look for them. To date, this has not been done.

While the NRC Staff witnesses noted that Crow Butte is not conducting new mining activities in the license area,<sup>463</sup> this does not permit the NRC Staff to abdicate its responsibilities under the NHPA. Crow Butte has received a ten-year renewed license that does not prohibit future development of the site. In fact, as Crow Butte adds expansion sites near the license area, it has indicated it will continue to use the license area as a centralized processing site.<sup>464</sup> Reclamation activities also present another opportunity to harm unprotected TCPs.<sup>465</sup> No evidence was presented as to the level of environmental or cultural resources review the NRC Staff would give, if any, before such actions commence.<sup>466</sup>

#### *5. Findings on NHPA's Identification Obligations*

While the Bozell & Pepperl Survey was a good start, it fails to satisfy the NHPA's requirement to identify and protect Indian-origin historic properties. The NRC Staff's more general efforts, such as literature reviews and informal meetings, are unable to account for these TCPs and historic properties in the same way that a field investigation can. Because the NRC Staff's sole attempt to resurvey the site in 2012 failed on multiple grounds, potential TCPs and historic properties within the license area have not been identified and assessed, nor have

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<sup>463</sup> NRC-076-R2 at 54.

<sup>464</sup> EA § 1.5.1.

<sup>465</sup> See LRA §§ 6.2.1 to 6.2.2. Crow Butte explains that the goal of its restoration efforts is to re-establish original slope and topography, and "present a natural appearance." LRA § 6.2.1.

<sup>466</sup> License Condition 9.8 requires a cultural resources survey only before disturbing previously un-surveyed sites, which would exclude those areas already encompassed by the surveys discussed herein. Ex. NRC-012 § 9.8.

attempts been made to mitigate potential impacts, in contravention of the NRC Staff's obligations under the NHPA.<sup>467</sup>

For the foregoing reasons, we find by a preponderance of the evidence that the NRC Staff's TCP survey of the Crow Butte License area did not meet its Identification Obligations under the NHPA.

D. Meeting NEPA's Hard Look Requirement

The NHPA and NEPA both impose procedural steps to improve agency decisionmaking, and many of the NHPA's requirements overlap with those of NEPA.<sup>468</sup> Of particular importance here, NEPA requires each federal agency to undertake a "hard look" at the environmental impacts of each major federal action—which would include impacts of license renewal on TCPs. Satisfying NEPA means satisfying, at a minimum, the NHPA's Identification Obligations,<sup>469</sup> and even going further in certain cases.<sup>470</sup> For example, NEPA requires a look at intangible, not just tangible properties,<sup>471</sup> and it is not limited to a focus on historic properties in the same way as the NHPA.

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<sup>467</sup> See 36 C.F.R. § 800.4; Hughes River, 165 F.3d at 288. Because the NRC Staff has met its Consultation Obligations under the NHPA, it need not rely on the Oglala Sioux Tribe to meet its Identification Obligations under the NHPA. Although the evidence in this proceeding has provided a number of good reasons for the NRC Staff to avail itself of the expertise of the elders and other learned members of the Oglala Sioux Tribe, or other Lakota tribes, in surveying potential TCPs within the license area, the NRC Staff's primary requirement at this point is to locate and utilize experts who are knowledgeable about Lakota culture and TCPs.

<sup>468</sup> See Powertech, LBP-15-16, 81 NRC at 654–55.

<sup>469</sup> See Pit River Tribe v. U.S. Forest Serv., 469 F.3d 768, 788 (9th Cir. 2006).

<sup>470</sup> Powertech, LBP-15-16, 81 NRC at 654–55 (citing Hydro Res., Inc. (P.O. Box 777, Crownpoint, New Mexico 87313), LBP-05-26, 62 NRC 442, 472 (2005); Te-Moak Tribe, 608 F.3d at 606, 610).

<sup>471</sup> People Against Nuclear Energy v. NRC, 678 F.2d 222, 228–29 (D.C. Cir.1982).

Initially, we note that the NRC Staff's failure to meet the NHPA's Identification Obligations renders the EA deficient. Moreover, the EA also indicates that short shrift was given to a review of tangible and intangible TCPs that do not rise to the level of historic properties under the NHPA. Although the EA's literature review does briefly discuss the general background and the cultural importance of the license area,<sup>472</sup> it makes little effort to acknowledge, let alone evaluate, the specific TCPs that were identified on the site by the Bozell & Pepperl Survey but that were not categorized at that time as potential historic properties. Also absent is any discussion of the sign or starve encampments or of the NRC Staff's efforts in attempting to locate them. Particularly where, as here, intervening parties proffer admissible contentions challenging the conclusions in the EA that underpin a FONSI determination, the EA must provide a reasonable defense of the NRC Staff's position,<sup>473</sup> or, failing that, the NRC Staff must present credible arguments to cure its deficient EA at an evidentiary hearing.<sup>474</sup>

Dr. Nickens' independent examinations and interviews with experts could help resolve this deficiency, but his notes from his site visit<sup>475</sup> do not cure the EA. In order to ensure that an agency can "respond[] to all legitimate concerns that are raised" under the "hard look" requirement, NEPA insists that high quality environmental information be available to public officials and citizens before decisions are made and before actions are taken.<sup>476</sup> Consistent with this need to make such information available, the NRC Staff's guidance for materials

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<sup>472</sup> EA § 3.9.3.

<sup>473</sup> See Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant), LBP-01-9, 53 NRC 239, 249 (2001).

<sup>474</sup> Claiborne, CLI-98-3, 47 NRC at 89.

<sup>475</sup> See generally Ex. NRC-056.

<sup>476</sup> 40 C.F.R. § 1500.1(b).

licensing actions explicitly provides that analyses made in conjunction with a NEPA document should be disclosed to the public.<sup>477</sup> Furthermore, NUREG-1748 states that: “The NEPA document must be able to stand alone and provide sufficient analysis to allow the decision maker to arrive at a conclusion.”<sup>478</sup>

The NRC Staff’s response to comments filed by the participating Indian tribes after the 2012 TCP Survey, deficient under both the NHPA and NEPA, represent a failure to disclose fully in the EA the cultural resource questions at issue in the license renewal. The EA acknowledged that comments were received objecting to the open site TCP survey, and promised “[a] detailed assessment of the report and the comments in the Environmental Impacts section of the EA.”<sup>479</sup> Yet the Environmental Impacts section of the EA did not discuss these comments by Indian tribes in opposition to the open site TCP Survey approach taken.<sup>480</sup> Instead, the EA cited to an NRC response, which is nothing more than a form letter acknowledging receipt of the comment.<sup>481</sup> The EA devotes even less attention to Indian tribal comments on the overall NHPA review process, merely positing that such comments “were general in nature,” neglecting even to offer citations for those comments.<sup>482</sup>

At a minimum, the NRC Staff was obligated to consider the Indian tribes’ views on the TCP survey process and results, instead of disregarding them. This failure supports the conclusion that the NRC Staff did not take a hard look at the Indian tribes’ opposing views on

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<sup>477</sup> See NUREG-1748 §§ 5.4.4, 5.4.6, 5.4.7.

<sup>478</sup> Id. § 1.6.4.

<sup>479</sup> See EA § 3.9.8.

<sup>480</sup> See EA §§ 4.8, 4.13.8.

<sup>481</sup> EA § 4.13.8.

<sup>482</sup> EA § 3.9.8.

how to conduct a TCP survey.<sup>483</sup> As the Commission has recently emphasized, “responding with appropriate scrutiny and reasoned explanations to ‘opposing views,’” is a NEPA requirement “which includes being able to explain and make available underlying assumptions in our environmental analyses.”<sup>484</sup>

#### *1. Findings on NEPA’s Hard Look Requirement*

We previously found by a preponderance of the evidence that the NRC Staff failed to meet its Identification Obligations under the NHPA. We further find, by a preponderance of the evidence, that the EA is deficient for failing to take a hard look at potential TCPs within the Crow Butte license area, including the EA’s failure to analyze the objections raised by the tribes with respect to the inadequacy of the open site TCP survey.

### **IV. NRC Staff Evidentiary Motions**

#### **A. Objections to Board Exhibits**

The NRC Staff filed objections to eighteen of the fifty-nine Board exhibits<sup>485</sup> admitted in this proceeding, Ex. BRD-011, Ex. BRD-012, Ex. BRD-014, Ex. BRD-015, Ex. BRD-016, and Ex. BRD-018 through Ex. BRD-029. We overrule these objections with respect to Ex. BRD-018 through Ex. BRD-029 for the reasons set forth below. However, we defer ruling on the NRC Staff objections with respect to Ex. BRD-011, Ex. BRD-012, Ex. BRD-014, Ex. BRD-015, and Ex. BRD-016 because they pertain to contentions other than Contention 1 and can best be resolved in conjunction with our disposition of those other contentions in a subsequent Partial Initial Decision.

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<sup>483</sup> See also 10 C.F.R. § 51.71(b).

<sup>484</sup> Entergy Nuclear Operations, Inc. (Indian Point Nuclear Generating Units 2 & 3), CLI-16-07, 83 NRC \_\_, \_\_ (slip op. at 47) (May 4, 2016).

<sup>485</sup> See generally NRC Staff’s Response to Board’s September 10 Order (Sept. 14, 2015) [hereinafter “Staff Objection to Board Exhibits”].

Central to the NRC Staff's objections to these exhibits is this assertion: "[T]he responsibility for developing an adequate record for decision is on the parties, not the presiding officer."<sup>486</sup> Such a claim must be balanced against the Commission's directive that it "expect[s] our licensing boards to examine cited materials" for verification that those materials do, in fact, support a party's claim.<sup>487</sup> "The Board is required to consider, probe, and understand the evidence offered in the proceeding."<sup>488</sup> Licensing boards are not bound by formal rules of evidence,<sup>489</sup> and Congress specifically created licensing boards to serve as a "panel of experts"<sup>490</sup> that brings "all of the accumulated knowledge possessed by both technical members" to bear on the questions before it.<sup>491</sup> In lieu of a hearing process bogged down by time-consuming evidentiary motions of questionable value,<sup>492</sup> the Commission has instead instructed licensing boards simply to "ensure that [the case record] has adequate information to issue a reasoned decision on the contested matters."<sup>493</sup> Developing a complete and accurate record is especially important and helpful to the agency and public when dealing with NEPA

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<sup>486</sup> Id. at 1–2 (quoting 69 Fed. Reg. at 2213) (quotation marks omitted).

<sup>487</sup> USEC Inc. (Am. Centrifuge Plant), CLI-06-10, 63 NRC 451, 457 (2006)

<sup>488</sup> Entergy Nuclear Vt. Yankee, LLC & Entergy Nuclear Operations, Inc. (Vt. Yankee Nuclear Power Station), CLI-10-17, 72 NRC 1, 50 (2010).

<sup>489</sup> 10 C.F.R. § 2.319(d).

<sup>490</sup> Vt. Yankee), CLI-10-17, 72 NRC at 49 (citing 42 U.S.C. § 2241(a)).

<sup>491</sup> Commonwealth Edison Co. (Zion Station, Units 1 & 2), ALAB-222, 8 AEC 229, 236 (1974); see also Vt. Yankee, CLI-10-17, 72 NRC at 49–50.

<sup>492</sup> See GE-Hitachi Global Laser Enrichment, LLC (GLE Commercial Facility), LBP-12-21, 76 NRC 218, 248 n.171 (2012); Calvert Cliffs 3 Nuclear Project, LLC et al. (Calvert Cliffs Nuclear Power Plant, Unit 3), LBP-12-19, 76 NRC 184, 200 (2012); Changes to Adjudicatory Process, Proposed Rule, 66 Fed. Reg. 19,610, 19,616 (Apr. 16, 2001).

<sup>493</sup> Entergy Nuclear Operations, Inc. (Indian Point, Units 2 & 3), CLI-12-18, 76 NRC 371, 376 (2012); see also 69 Fed. Reg. at 2213.



questions that may necessitate a licensing board developing an adjudicatory record that can cure a defective EA, EIS, or FONSI determination.<sup>494</sup>

Here, we used certain exhibits for the purpose of clarifying and verifying the NRC Staff's testimony on several issues,<sup>495</sup> which is in keeping with a Board's duty to "oversee the development of the case record and to ensure that it has adequate information to issue a reasoned decision on the contested matters."<sup>496</sup> Licensing boards have long introduced and relied on these types of exhibits to provide additional context necessary for a well-reasoned decision.<sup>497</sup> Most particularly is this so where the documents at issue were authored by the very party interposing such objections, i.e., the NRC Staff itself.<sup>498</sup>

#### *1. Exhibits Cited in NRC Staff Communications Log*

We overrule the NRC Staff's objections to Ex. BRD-018, Ex. BRD-019, Ex. BRD-020, Ex. BRD-021, and Ex. BRD-023, all of which were documents that the NRC Staff sent to Tribal Historic Preservation Officers. Not only were these documents publicly available on ADAMS,

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<sup>494</sup> Supra notes 42–43.

<sup>495</sup> These documents were marked and distributed at the hearing, offering the parties a chance to verify the documents' accuracy. Moreover, the parties were afforded an opportunity to submit proposed questions on these documents, but the NRC Staff did not pose any questions challenging the accuracy of the documents.

<sup>496</sup> Indian Point, CLI-12-18, 76 NRC at 376.

<sup>497</sup> See, e.g., Pac. Gas & Elec. Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), ALAB-519, 9 NRC 42, 43 n.3 (1979); Progress Energy Fla., Inc. (Levy County Nuclear Power Plant, Units 1 & 2), LBP-13-4, 77 NRC 107, 117 (2013); Commonwealth Edison Co. (Dresden Station, Units 2 & 3), LBP-81-37, 14 NRC 708, 726 (1981); Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant, Units 1, 2, 3, & 4), LBP-78-2, 7 NRC 83, 85 (1978).

<sup>498</sup> See, e.g., Metro. Edison Co. (Three Mile Island Nuclear Station, Unit No. 1), ALAB-807, 21 NRC 1195, 1200 n.12 (1985); Dominion Nuclear N. Anna, LLC (Early Site Permit for N. Anna ESP Site), LBP-07-9, 65 NRC 539, 583 (2007); Wash. Pub. Power Supply Sys. (WPPSS Nuclear Project No. 4), LBP-78-8, 7 NRC 254, 261 (1978) (citing Consumer Power Co. (Midland Plant, Units 1 & 2), ALAB-123, 6 AEC 331, 340 (1973))).

they were all cited by the NRC Staff as evidence of consultation with the Oglala Sioux Tribe in the NRC Staff Communication Log.<sup>499</sup> That NRC Staff Communications Log included only a cryptic description of the subject communication with nothing more than that document's ADAMS accession number provided as a source to verify the NRC Staff's statements. Consistent with our responsibility to examine the record and verify cited materials,<sup>500</sup> we reviewed the cited documents in the NRC Staff Communications Log and marked those as Board exhibits that warranted further consideration at the evidentiary hearing.

The NRC Staff argues that it would be improper to admit these Board Exhibits because it "had no notice prior to the hearing that the Board would be supplying these exhibits or questioning witnesses on them."<sup>501</sup> The NRC Staff's argument fails because of two critical facts: (1) the NRC Staff itself provided the citations to these documents as factual support for its own witnesses' testimony and exhibits; and (2) the NRC Staff witnesses oversaw the very process that produced these exhibits. Moreover, our examination of these witnesses at the hearing verified that they were quite familiar with these exhibits.<sup>502</sup>

## *2. Exhibits To Examine Development of November 2012 TCP Survey*

We overrule the NRC Staff's objections to the introduction of Ex. BRD-022, Ex. BRD-024, Ex. BRD-025, and Ex. BRD-026. These exhibits are likewise publicly available on ADAMS and they provided needed context for the NRC Staff's testimony concerning surveys of cultural

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<sup>499</sup> As provided in the "List of NRC Staff Communications with the Oglala Sioux Tribe as Part of Section 106 Consultation for the Crow Butte License Renewal," Ex. BRD-018, Ex. BRD-019, Ex. BRD-020, Ex. BRD-021, and Ex. BRD-023 are available at ADAMS Accession Nos. ML120330066, ML120320436, ML120670079, ML12130A067, and ML12311A501. See NRC Staff Communications Log at 3–4.

<sup>500</sup> See Am. Centrifuge, CLI-06-10, 63 NRC at 458.

<sup>501</sup> Staff Objection to Board Exhibits at 2.

<sup>502</sup> See, e.g., Tr. at 2014–15, 2088, 2090–91, 2160, 2222.

resources.<sup>503</sup> Ex. BRD-022 is a proposed scope of work for the Powertech site<sup>504</sup> that according to Intervenor, explains much of the confusion and misunderstanding with respect to the NRC Staff's efforts to develop a TCP survey for the Crow Butte license renewal.<sup>505</sup> Ex. BRD-024, Ex. BRD-025, and Ex. BRD-026 are the three draft scopes of work provided by Crow Butte<sup>506</sup> that ultimately produced the November 2012 TCP Survey.<sup>507</sup> Of special importance, the "open site" approach adopted by the NRC Staff<sup>508</sup> originated from Crow Butte's proposal in Ex. BRD-026.<sup>509</sup> These exhibits provided relevant and necessary context for our examination of NRC Staff witnesses regarding the TCP surveys that were undertaken at Crow Butte,<sup>510</sup> helped clarify what the "open site" approach meant to the parties and how it came about,<sup>511</sup> and assisted us in

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<sup>503</sup> As explained in the Parties' Joint Response to the Board's July 31, 2015 Order Regarding Redaction of Documents (Aug. 10, 2015), the documents that were introduced as Ex. BRD-022, Ex. BRD-024, Ex. BRD-025, and Ex. BRD-026 are available at ADAMS Accession Nos. ML12278A189, ML15222B281, ML15222B289, and ML15264A912. Ex. BRD-029 is Volume 1 of the ISL Mining GEIS.

<sup>504</sup> Ex. BRD-022.

<sup>505</sup> See Tr. at 2180–84.

<sup>506</sup> Ex. BRD-024, NRC Staff Draft Scope of Work, Identification of Properties of Religious and Cultural Significance, Cameco Resources Crow Butte License Renewal and North Trend License Amendment (Mar. 8, 2012); Ex. BRD-025, NRC Staff Draft Scope of Work, Identification of Properties of Religious and Cultural Significance, Cameco Resources Crow Butte License Renewal and North Trend, Marsland and Three Crow Amendment Areas (Aug. 7, 2012).

<sup>507</sup> Supra § III.C.4.

<sup>508</sup> See, e.g., Ex. NRC-001-R at 65, 68.

<sup>509</sup> Tr. at 2247.

<sup>510</sup> See, e.g., Tr. at 2228–47.

<sup>511</sup> Supra §§ III.B.2.c, III.C.4.a.

examining and verifying the respective parties' claims as to whether this "open site" survey was consistent with the Tribe's views.<sup>512</sup>

Introduction of these exhibits in order to question the witnesses and better understand their testimony falls within the Board's general authority to regulate the course and conduct of the proceeding.<sup>513</sup> Certainly, the NRC Staff does not have any legitimate claim to being surprised by questions on these exhibits. First, the NRC Staff cultural resource witnesses were involved first-hand in the process that produced these exhibits, and so they had first-hand knowledge of the exhibits based on their personal experience.<sup>514</sup> Second, the Board requested copies of these exhibits prior to the evidentiary hearing and explicitly stated that it "may have occasion to use [the requested] documents at the upcoming August 24, 2015 evidentiary hearing,"<sup>515</sup> and the NRC Staff interposed no objection at that time.<sup>516</sup>

### *3. Exhibits To Examine Survey Efforts of Crow Nation and Santee Sioux Nation*

We overrule the NRC Staff's objections to Ex. BRD-027 and Ex. BRD-028. These exhibits provide basic, background information (none of which is disputed by any party hereto) about American Indian populations and which was necessary for examining the NRC Staff witnesses' assertion that two non-Lakota tribes—the Crow and Santee Sioux Nations—could perform a meaningful search within the license area for Lakota artifacts.<sup>517</sup> Congress

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<sup>512</sup> Supra § III.C.4.a.

<sup>513</sup> See 10 C.F.R. § 2.319; Entergy Nuclear Operations, Inc. (Indian Point Nuclear Generating Unit Nos. 2 & 3), CLI-08-7, 67 NRC 187, 192 (2008).

<sup>514</sup> NRC Staff witnesses' familiarity with the documents was explored in detail for these exhibits. See Tr. at 2215–47.

<sup>515</sup> Licensing Board Order (Redaction of Documents) at 1 (July 31, 2015) (unpublished).

<sup>516</sup> See Staff Response to Board Document Request.

<sup>517</sup> See, e.g., NRC-001-R at 73–74; Tr. at 2306.

specifically created the Atomic Safety and Licensing Boards to serve as a “panel of experts,”<sup>518</sup> and thus the Commission expects the Board to bring its expertise to bear on technical questions.<sup>519</sup> Part of that technical expertise is the ability to synthesize relevant background information that is undisputed by the parties,<sup>520</sup> and to assess the witnesses’ testimony and relevant knowledge.<sup>521</sup> The NRC Staff witnesses, presented as experts on NHPA and cultural resource reviews,<sup>522</sup> acknowledged that they were aware of these foundational facts.<sup>523</sup> Furthermore, by introducing this potentially relevant background information in Board exhibits, we ensured that this information is easily available for public and appellate review, fulfilling the spirit of NEPA’s disclosure goals and the NRC’s transparency requirements.<sup>524</sup>

#### B. Objections to Testimony

The NRC Staff raised certain objections to testimony presented during the hearing. Although for the most part these were addressed at the hearing, we resolve here only the one testimony objection that pertains to Contention 1. We defer ruling on all other objections because they pertain to contentions other than Contention 1 and can best be resolved in

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<sup>518</sup> Vt. Yankee, CLI-10-17, 72 NRC at 49 (citing 42 U.S.C. § 2241(a)).

<sup>519</sup> Id. at 49–50; see also Commonwealth Edison Co. (Zion Station, Units 1 & 2), ALAB-222, 8 AEC at 236.

<sup>520</sup> See Pac. Gas & Elec. Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), ALAB-644, 13 NRC 903, 915 & n.24 (1981).

<sup>521</sup> See Cincinnati Gas & Elec. Co. (Wm. H. Zimmer Nuclear Power Station, Unit 1), LBP-82-48, 15 NRC 1549, 1567 (1982).

<sup>522</sup> Before the hearing commenced, we advised the parties of our understanding that all the witnesses empaneled were to be treated as expert witnesses. See Licensing Board Order (Governing Evidentiary Hearing) at 1–2 (July 13, 2015) (unpublished). The parties provided no indication otherwise, either before or at the hearing.

<sup>523</sup> See Tr. at 2299–2301.

<sup>524</sup> See supra § II.A.1; see also Kerr-McGee Chem. Corp. (Kress Creek Decontamination), ALAB-885, 27 NRC 59, 69 (1988).

conjunction with our disposition of those other contentions in a subsequent Partial Initial Decision.

The NRC Staff objected to our examination of any witness regarding the circumstances surrounding the NRC Staff's providing a copy of the draft EA to NDEQ, on the grounds that it was outside the scope of the cultural resources issues at play in Contention 1. As already discussed, we find that the publication of the draft EA and providing a copy to NDEQ but not to the Oglala Sioux Tribe is relevant to whether the NRC Staff respected the government-to-government relationship due the Tribe, a core part of its obligations under the NHPA. Moreover, the NRC Staff witnesses should have been well-prepared to speak about this event, as both Intervenor cultural resource expert witnesses, Mr. CatchesEnemy and Mr. Yellow Thunder, raised this issue in their initial pre-hearing testimony. For this reason, the objection is overruled.

### C. Motions in Limine

We turn now to the Intervenor exhibits that precipitated a motion in limine from the NRC Staff.<sup>525</sup> Both the Oglala Sioux Tribe and Consolidated Intervenors filed replies.<sup>526</sup> Before the hearing commenced, we struck five of these exhibits in response to the NRC Staff's motions,<sup>527</sup> and deferred ruling on the remaining exhibits.<sup>528</sup> Herein we decide the following:

1. We continue to defer ruling on the NRC Staff's motion to strike Ex. INT-002, Ex. INT-004, Ex. INT-005, Ex. INT-046, Ex. INT-047, Ex. INT-048, Ex. INT-049, Ex. INT-069, Ex. INT-070, Ex. INT-071, Ex. INT-082, Ex. INT-084, and Ex. INT-085, and Ex. OST-001 because they pertain to contentions other than Contention 1 and can best be resolved in conjunction with our disposition of those other contentions in a subsequent Partial Initial Decision; and

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<sup>525</sup> NRC Staff's Motion in Limine to Exclude Certain Exhibits Filed by Consolidated Intervenors and the Oglala Sioux Tribe (June 15, 2015) [hereinafter "Staff Motion in Limine"].

<sup>526</sup> The Oglala Sioux Tribe's Response to NRC Staff's Motion in Limine to Exclude Certain Exhibits Filed by Consolidate[d] Intervenors and the Oglala Sioux Tribe (May 1, 2015).

<sup>527</sup> Licensing Board Order (Memorializing Admitted Exhibits and Providing Final Exhibit List) (Aug. 19, 2015) (unpublished).

<sup>528</sup> Pub. Serv. Co. of N.H. (Seabrook Station, Units 1 & 2), ALAB-520, 9 NRC 48, 50 n.2 (1979).

2. We grant the NRC Staff's motion to strike Ex. INT-023, Ex. INT-024, Ex. INT-025, Ex. INT-027, Ex. INT-028 (in part), and Ex. INT-029.

The first three of these exhibits, Ex. INT-023, Ex. INT-024, and Ex. INT-025, are testimony from witnesses who were not called by Intervenors in this proceeding. In addition, that testimony concerned historical treaty matters between the United States and the Oglala Sioux Tribe—a subject that, as noted repeatedly during the course of this proceeding, is not relevant here.

Ex. INT-027, Ex. INT-028, and Ex. INT-029 are statements that were obtained for a different but related proceeding, the Powertech proceeding. Ex. INT-027 and Ex. INT-028 include statements made by Mr. CatchesEnemy and Dr. Redmond, both of whom were called as witnesses in this proceeding, and Ex. INT-029 concerns a sworn declaration made by Mr. Wilmer Mesteth, a Tribal Historical Preservation Officer for the Oglala Sioux Tribe who passed away before our hearing commenced.<sup>529</sup>

Sworn testimony from previous, related proceedings may be admitted where the same witness appears in the current proceeding<sup>530</sup> (as is the case with Mr. CatchesEnemy and Dr. Redmond), or when a witness passes before the hearing commences<sup>531</sup> (as is the case with Mr. Mesteth). However, the NRC Staff has not interposed objections to these exhibits simply because they were from a prior proceeding—for example, the NRC Staff in its motion left in the record two pages of INT-028 (the transcript from the Powertech proceeding).<sup>532</sup>

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<sup>529</sup> Tr. at 2081.

<sup>530</sup> Fed. R. Civ. P. 32(a)(8).

<sup>531</sup> Fed. R. Evid. 804(a)(4), (b)(1).

<sup>532</sup> Staff Motion in Limine at 9.

Rather, the gravamen of the NRC Staff's objection is that these documents are not relevant because they discuss the cultural resources review for a different site.<sup>533</sup> We agree. Although certain aspects of the Powertech proceeding are clearly related to the instant proceeding, especially in terms of the cultural resources review, these three exhibits either make generic statements that repeat what is already in the record of this proceeding,<sup>534</sup> or they make specific statements about the Powertech site that lack a substantial relationship to the Crow Butte license area.<sup>535</sup> Moreover, Intervenors' witnesses themselves made no effort to connect statements in these three exhibits to the current proceeding. Finally, insofar as questions arose regarding how the Powertech proceeding related to Contention 1, we obtained the necessary testimony by examining the witnesses empaneled during August 24–28, 2015, and had no need to refer to these three exhibits.

#### V. SUMMARY FINDINGS OF FACT

Based on the evidence adduced in this proceeding, and as discussed herein, we make the following findings of fact:

1. We find by a preponderance of the evidence that the NRC Staff made a genuine effort to consult with the Oglala Sioux Tribe with respect to the Crow Butte License area, and so it met its Consultation Obligations under the NHPA;
2. We find by a preponderance of the evidence that the NRC Staff's TCP survey of the Crow Butte License area did not meet its Identification Obligations under the NHPA;
3. Having found by a preponderance of the evidence that the NRC Staff failed to meet its Identification Obligations under the NHPA, we further find, by a preponderance of the evidence, that the EA is deficient under NEPA because it fails to take a "hard look" at potential TCPs within the Crow Butte License area, including failing to

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<sup>533</sup> Id.

<sup>534</sup> See, e.g., Ex. INT-027, Excerpt from Official Transcript of Proceedings, Powertech USA, Inc. (Dewey-Burdock In Situ Uranium Recovery Facility), No. 40-9075-ML, at 809 (Aug. 19, 2014); Ex. INT-028, Official Transcript of Proceedings, Powertech USA, Inc. (Dewey-Burdock In Situ Uranium Recovery Facility), No. 40-9075-ML, at 767 (Aug. 19, 2014).

<sup>535</sup> See, e.g., Ex. INT-029, Declaration of Wilmer Mesteth, ¶ 8 (Apr. 1, 2010).



analyze the objections raised by the tribes with respect to the inadequacy of the open site TCP survey;

4. Having found by a preponderance of the evidence that the NRC Staff met its Consultation Obligations under the NHPA, we further find, by a preponderance of the evidence, that while the EA was deficient in its description of how the NRC Staff met those Consultation Obligations under the NHPA, the evidence in the record of this adjudicatory proceeding cures those deficiencies in the EA, and accordingly, the NRC Staff need do nothing further in this regard.

## VI. CONCLUSIONS OF LAW

With respect to Contention 1, the Board rules that the NRC Staff failed to comply with the NHPA and NEPA.

## VII. REMEDIES

In materials licensing proceedings, licensing boards are empowered to make “findings of fact and conclusions of law on the matters put into controversy by the parties.”<sup>536</sup> After a licensing board has issued an initial decision on those matters, the Director of the NMSS “shall issue, deny, or appropriately condition the permit, license, or license amendment in accordance with the presiding officer’s initial decision.”<sup>537</sup> Although the NRC’s regulations allow the NRC Staff to issue a license before an adjudicatory proceeding is concluded,<sup>538</sup> the Director of NMSS must thereafter deny, or insert appropriate conditions, if any, in the license based on the determinations of the licensing board and the Commission.<sup>539</sup>

We have 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. This failure

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<sup>536</sup> 10 C.F.R § 2.340(e)(1); see also id. § 2.321(a).

<sup>537</sup> Id. § 2.340(e)(2).

<sup>538</sup> Id. §§ 2.340(e)(2)(ii), 2.1202(a).

<sup>539</sup> See id. §§ 2.340(e)(2)(ii), 2.1210(c)(2)–(3); see also id. § 40.41(e).

prevents us from determining whether renewal of the license will result in “no significant impacts,” and therefore places the NRC Staff’s FONSI determination in doubt.<sup>540</sup> The question we face here is what actions are possible to address this deficiency.

Where an agency fails to comply with procedural statutes such as NEPA or the NHPA, an injunction is sometimes the proper recourse.<sup>541</sup> The equivalent of an injunction here would be not granting the license extension. The United States Supreme Court has made clear that such injunctive relief is only warranted when the traditional test justifying it is met, i.e.,

(1) that [Intervenors have] suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between [Intervenors] and [Crow Butte], a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.<sup>542</sup>

We first examine monetary damages. Monetary remedies are not possible in the NRC licensing context, and a failure to comply with NEPA presumptively implies environmental harms that money cannot fix.<sup>543</sup> The loss of historic properties represents irreversible damage to our “American heritage,”<sup>544</sup> and damages to TCPs are “deeply offensive” to Indian tribes.<sup>545</sup> Accordingly, this prong weighs towards the Intervenors.

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<sup>540</sup> See LBP-15-11, 81 NRC at 415.

<sup>541</sup> See, e.g., Monsanto Co. v. Geertson Seed Farms, 561 U.S. 139, 156–57 (2010); League of Wilderness Defenders/Blue Mountains Biodiversity Project v. Connaughton, 752 F.3d 755, 761, 767 (9th Cir. 2014); Neighborhood Ass’n of the Back Bay, Inc. v. Fed. Transit Admin., 463 F.3d 50, 58 (1st Cir. 2006).

<sup>542</sup> Monsanto, 561 U.S. at 156–57; Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7, 20 (2008).

<sup>543</sup> Sierra Club v. U.S. Army Corps of Eng’rs, 645 F.3d 978, 995 (8th Cir. 2011); Davis v. Mineta, 302 F.3d 1104, 1114 (10th Cir. 2002).

<sup>544</sup> National Register Bulletin 15 at i.

<sup>545</sup> National Register Bulletin 38 at 6.

The irreparable injury and balance-of-hardships prongs, however, weigh against Intervenor. The Supreme Court in Winter v. Natural Resources Defense Council explained that irreparable injury must be likely, not merely possible, without an injunction.<sup>546</sup> We find that, while the site's condition and status as an already-operating mine do not excuse a meaningful search for historic properties and other TCPs as Intervenor seek under Contention 1, the site's condition can inform the NRC Staff about the likelihood of damage to TCPs. Intervenor have presented no evidence that imminent harm would result from granting the license extension before the NRC Staff fulfills its NEPA and NHPA requirements.

The third prong, balance of hardships, also weighs against Intervenor in light of their unwillingness to continue to participate in the consultation process. Moreover, we recognize that the Commission has disfavored imposing "a draconian remedy when less drastic relief will suffice."<sup>547</sup> Not granting the license extension appears not only to be an undue hardship, but also unnecessary to cure the potential harms at issue. In Powertech, the licensing board similarly declined to stay the effectiveness of a license upon a showing of a NEPA and NHPA violation, instead expressing confidence that the NRC Staff would take steps to rectify the deficiency and suggesting that "promptly initiating a government-to-government consultation" would achieve these results.<sup>548</sup> Because of our conviction that the NRC Staff will act with dispatch to cure these NEPA and NHPA deficiencies, we likewise conclude that it would not be appropriate under the circumstances either to lift the effectiveness of the NRC Staff's action granting the Crow Butte license extension, in accordance with section 2.1213, or to direct that

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<sup>546</sup> Winter, 555 U.S. at 8.

<sup>547</sup> Hydro Res., Inc. (2929 Coors Road, Suite 101, Albuquerque, NM 87120), CLI-00-8, 51 NRC 227, 241 (2000).

<sup>548</sup> Powertech, LBP-15-16, 81 NRC at 657–58.

the NMSS Director deny the Crow Butte license extension, in accordance with section 2.340(e)(2).

While this Partial Initial Decision makes clear that the NRC Staff has not complied with its obligations under NEPA and the NHPA, we do not direct the NRC Staff regarding the specifics as to how it should achieve such compliance. In our estimation, however, the most efficient method for curing these NEPA and NHPA deficiencies would be for the NRC Staff to publicly supplement its EA with additional analyses and findings with respect to possible TCPs and historic properties within the license area, as well as to correct any inaccurate statements about either the consultation process or the identification of TCPs and cultural resources within the license area. And certainly, insofar as the NRC Staff performs additional analyses and surveys, any failure to amend or supplement the EA to incorporate these findings could violate the disclosure goals of NEPA and the transparency goals of the NRC. Nonetheless, we leave it to the NRC Staff to identify how it wishes to proceed in light of our rulings herein.

And to that end, we will convene a conference call at a time and date to be determined to discuss with the NRC Staff and the other parties the next steps in addressing the concerns we outline in this decision. Moreover, once the NRC Staff revises or supplements its EA, Intervenor will be afforded an opportunity to file new contentions to contest the adequacy of the NRC Staff's chosen actions, including any revised EA (or EA supplement), and any new information that may result from the NRC Staff's actions, with additional adjudication before the Board thereafter as is necessary to resolve any admitted contentions. Any new contentions must comply with applicable timeliness and contention admissibility requirements set forth in 10 C.F.R. § 2.309.

Whenever the NRC Staff makes public its curative actions relating to Contention 1, including any revised EA (or EA supplement), it shall notify the Board and parties by letter through the Electronic Hearing Docket. We shall retain jurisdiction for this limited purpose, until the Commission "orders otherwise," or "when the period within which the Commission may

direct that the record be certified to it for final decision expires, [or] when the Commission renders a final decision.”<sup>549</sup> And until its curative actions regarding Contention 1 are completed, the NRC Staff shall provide monthly status reports on the first day of every month updating the Board and the parties as to its activities, including the status of any revised EA (or EA supplement).

## VIII. ORDER

Pursuant to 10 C.F.R. § 2.1210(a), the Board directs the following:

- A. Contention 1 is resolved in favor of Intervenors. The NRC Staff has not met its Identification Obligations under the NHPA, nor has the NRC Staff in its EA undertaken a hard look under NEPA at cultural resources within the license area, as described above. While the NRC Staff attempts to remedy its noncompliance with the dictates of NEPA and the NHPA, as outlined in this decision, or until the Commission directs otherwise, this remains an open matter before the Board.
- B. The NRC Staff’s objections and motions in limine regarding Contention 1 are granted or denied, as discussed above, with resolution of the balance of the NRC Staff’s evidentiary objections deferred until issuance of a subsequent Partial Initial Decision.
- C. The parties shall jointly propose by June 10, 2016 three possible dates for a telephone conference with the Board to discuss the NRC Staff’s plan for going forward relative to addressing the deficiencies associated with Contention 1 in accordance with this decision, including any NRC Staff plans to revise or supplement the EA for this proceeding.

In accordance with 10 C.F.R. § 2.1210, this Partial Initial Decision will constitute a final decision of the Commission 120 days from the date of issuance, May 26, 2016.<sup>550</sup> Any party may petition for review of this Partial Initial Decision pursuant to 10 C.F.R. § 2.341(b)(4).<sup>551</sup>

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<sup>549</sup> 10 C.F.R. § 2.318; see also Powertech, LBP-15-16, 81 NRC at 710 (taking a similar approach).

<sup>550</sup> This Partial Initial Decision has been served this date by the Office of the Secretary on those designated in the accompanying service list through the agency’s E-Filing system and by e-mail.

<sup>551</sup> Partial initial decisions are reviewable under 10 C.F.R. § 2.341(b)(1) because they are considered final decisions. Progress Energy Fla., Inc. (Levy County Nuclear Power Plant, Units 1 & 2), CLI-11-10, 74 NRC 251, 255 (2011); Entergy Nuclear Generation Co. (Pilgrim Nuclear Power Station), CLI-08-2, 67 NRC 31, 34–35 (2008).

NRC regulations require that any petition for review must be filed within twenty-five days from service of this Partial Initial Decision, which is June 20, 2016.<sup>552</sup> Unless otherwise authorized by law, the filing of a petition for review is mandatory for a party to have exhausted its administrative remedies before seeking judicial review.<sup>553</sup>

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<sup>552</sup> 10 C.F.R. § 2.341(b)(1).

<sup>553</sup> Id.

The Board expects to issue a subsequent Partial Initial Decision on the remaining contentions later this year.

It is so ORDERED.

THE ATOMIC SAFETY  
AND LICENSING BOARD<sup>554</sup>

*/RA/*

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Michael M. Gibson, Chair  
ADMINISTRATIVE JUDGE

*/RA/*

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Dr. Richard E. Wardwell  
ADMINISTRATIVE JUDGE

*/RA/*

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Brian K. Hajek  
ADMINISTRATIVE JUDGE

Rockville, Maryland  
May 26, 2016

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<sup>554</sup> Judge Alan Rosenthal was a special assistant to this Licensing Board from its inception, and participated in all of its decisions up to and including the August 2015 evidentiary hearing. He passed away on September 25, 2015. Judge Rosenthal had a long and distinguished tenure as a governmental lawyer and an NRC administrative judge. After his service in World War II, he attended Yale Law School. After graduating in 1951, he began his legal career at the Appellate Section of the Civil Division at the U.S. Department of Justice (“DOJ”), where he helped prepare the Federal Government’s Supreme Court briefs in the landmark case of Brown v. Board of Education. During his twenty years of service at DOJ, Judge Rosenthal presented nine arguments in the U.S. Supreme Court and over 200 arguments in U.S. Courts of Appeals. In 1972, he was appointed by the Atomic Energy Commission to be the Chairman of the agency’s appellate tribunal, the Atomic Safety and Licensing Appeal Panel (Appeal Panel). With the NRC’s creation in 1975, he continued in that position until his retirement from full-time service in 1988—although he served as a part-time Appeal Panel judge until the Panel’s abolition in 1991. In 1999, Judge Rosenthal returned to the NRC as a part-time judge on the Atomic Safety and Licensing Board Panel, a position he held at the time of his death. During Judge Rosenthal’s thirty-five years of service as an NRC judge, not only was he an intellectual force in the development of NRC’s jurisprudence, he was at all times an eminently fair adjudicator who could be counted on to deliver a succinct, well-reasoned judgment. He will be greatly missed.

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 **PARTIAL INITIAL DECISION (LBP-16-07)** have been served upon the following persons by Electronic Information Exchange and by electronic mail.

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DOCKET NO. 40-8943-OLA  
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[Original signed by Clara Sola ]  
Office of the Secretary of the Commission

Dated at Rockville, Maryland  
this 26<sup>th</sup> day of May 2016