

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

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

In the Matter of

CROW BUTTE RESOURCES, INC.

(Marsland Expansion Area)

Docket No. 40-8943-MLA-2

**CLI-20-01**

**MEMORANDUM AND ORDER**

The Oglala Sioux Tribe has petitioned for review of the Atomic Safety and Licensing Board's Initial Decision and two interlocutory orders in this proceeding.<sup>1</sup> The NRC Staff and licensee, Crow Butte Resources, Inc. (Crow Butte), oppose the petition.<sup>2</sup> For the reasons described below, we deny the petition for review.

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<sup>1</sup> *Intervenor Oglala Sioux Tribe Petition for Review* (Mar. 25, 2019) (Petition); *see also* LBP-19-2, 89 NRC \_\_\_ (Feb. 28, 2019) (slip op.); LBP-18-3, 88 NRC 13 (2018); Memorandum and Order (Ruling on Motion for Summary Disposition Regarding Oglala Sioux Tribe Contention 1) (Oct. 22, 2014) (unpublished) (Summary Disposition Order).

<sup>2</sup> *See NRC Staff's Answer Opposing the Oglala Sioux Tribe's Petition for Review of LBP-19-2, LBP-18-3, and Memorandum and Order Dismissing Contention 1* (Apr. 19, 2019) (Staff Answer); *Crow Butte Response to OST Petition for Review* (Apr. 19, 2019); *Oglala Sioux Tribe's Reply in Support of its Petition for Review* (Apr. 29, 2019) (Tribe Reply).

## I. BACKGROUND

### A. Crow Butte's Application

In May 2012, Crow Butte filed an application to amend its *in situ* uranium recovery (ISR) license to authorize the construction and operation of a satellite facility in the Marsland Expansion Area (MEA).<sup>3</sup> The proposed MEA is in Dawes, Nebraska, approximately eleven miles southeast of Crow Butte's existing ISR facility in Crawford, Nebraska.

The uranium-bearing sandstone that Crow Butte mines at its existing facility and intends to mine in the MEA is known as the Basal Chadron/Chamberlain Pass Formation.<sup>4</sup> It underlies (starting from the surface) the alluvium, the Arikaree Group, the Brule Formation, and the Upper and Middle Chadron Formations.<sup>5</sup> The Basal Chadron overlies the Pierre Shale.<sup>6</sup>

### B. The Contested Rulings

The Tribe sought intervention and was granted a hearing on two contentions.<sup>7</sup> As admitted by the Board, the contentions were as follows:

#### 1. OST Contention 1: Failure to Meet Applicable Legal Requirements Regarding Protection of Historical and Cultural Resources

The [a]pplication fails to meet the requirements of 10 C.F.R. §§ 51.60 and 51.45, the National Environmental Policy Act, the National Historic Preservation Act, and the relevant portions of NRC guidance included at NUREG-1569 section 2.4[], in that it lacks an adequate description of either the affected environment or the impacts of the project on archaeological, historical, and traditional cultural resources.

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<sup>3</sup> See Letter from John Leftwich, Cameco, to Keith McConnell, NRC (May 16, 2012) (ADAMS accession no. ML12160A512).

<sup>4</sup> See LBP-19-2, 89 NRC at \_\_\_ (slip op. at 20).

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> LBP-13-6, 77 NRC 253 (2013), *aff'd* CLI-14-2, 79 NRC 11 (2014).

**2. OST Contention 2: Failure to Include Adequate Hydrogeological Information to Demonstrate Ability to Contain Fluid Migration**

The application fails to provide sufficient information regarding the geological setting of the area to meet the requirements of 10 C.F.R. § 40.31(f); 10 C.F.R. § 51.45; 10 C.F.R. § 51.60; 10 C.F.R. Part 40, Appendix A, Criteria 4(e) and 5G(2); the National Environmental Policy Act; and NUREG-1569 section 2.6. The application similarly fails to provide sufficient information to establish potential effects of the project on the adjacent surface and ground-water resources, as required by 10 C.F.R. § 51.45, NUREG-1569 section 2.7, and the National Environmental Policy Act.<sup>8</sup>

NRC regulations require that potential intervenors must base contentions arising under the National Environmental Policy Act (NEPA) on the applicant's environmental report (ER).<sup>9</sup> Later, if necessary, an intervenor may update the contentions when the information in the Staff's draft or final environmental documents differs materially from the information in the ER.<sup>10</sup> If the information is unchanged, the Board will "migrate" the contention to apply to the Staff's environmental documents.

Contention 1 was based on Crow Butte's ER, which stated that Crow Butte's contractor had conducted a three-month-long survey of the MEA site and discovered no Native American cultural resources at the site.<sup>11</sup> After the ER was submitted, however, a survey performed by representatives of the Santee Sioux Nation and the Crow Nation of Montana found twelve places of potential religious or cultural significance to Native Americans.<sup>12</sup> The Staff's

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<sup>8</sup> LBP-13-6, 77 NRC at 306.

<sup>9</sup> 10 C.F.R. § 2.309(f)(2).

<sup>10</sup> *Id.*

<sup>11</sup> See Ex. CBR005A-R, Application for Amendment of USNRC Source Materials License SUA-1534, Marsland Expansion Area, Crawford, Nebraska, Vol. I, Environmental Report (May 2012), at 3-80 to 3-81 (ML18306A698).

<sup>12</sup> See Santee Sioux Nation, Tribal Historic Preservation Office, "Crow Butte Project, Dawes County, Crawford Nebraska" (ML13093A123) (Santee Sioux Survey).

contractor further investigated the sites in light of this additional information. The Staff incorporated findings from the Santee Sioux Survey and its contractor's investigation, as well as information concerning its consultation with affected Native American Tribes, into a draft of the cultural resources section of its environmental assessment, which it released in June of 2014.<sup>13</sup> The Staff concluded in the Draft Cultural Resources Assessment that the impacts from the proposed operation on the cultural resources found at the site would be small.<sup>14</sup>

The Tribe did not update Contention 1 to contest the information in the Draft Cultural Resources Assessment. The Staff moved for summary disposition of the contention, and the Tribe did not respond.<sup>15</sup> The Board found that the information in the Draft Cultural Resources Assessment differed significantly from the information in the ER and "the issues raised in the original contention no longer frame[d] a dispute material to this proceeding."<sup>16</sup> The Board therefore granted the Staff's motion, resolving Contention 1 in the Staff's favor.<sup>17</sup> The Tribe now challenges the Board's 2014 summary disposition order, arguing that it was without counsel at the time the Draft Cultural Resources Assessment was issued and that dismissal of Contention 1 "failed to safeguard the Tribe's demonstrated interest in identifying and protecting its cultural resources."<sup>18</sup>

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<sup>13</sup> See Crow Butte Resources Proposed Marsland Expansion Area NRC Documentation of NHPA Section 106 Review (Draft Cultural Resources Sections of Environmental Assessment), at 12 (ML14176B129) (Draft Cultural Resources Assessment).

<sup>14</sup> *Id.* at 14.

<sup>15</sup> *NRC Staff's Motion for Summary Disposition of Contention 1* (Aug. 6, 2014).

<sup>16</sup> Summary Disposition Order at 13.

<sup>17</sup> *Id.* at 13-14.

<sup>18</sup> Petition at 16-17.

Contention 2 was a hybrid contention that raised both environmental and safety issues related to the site hydrogeology and Crow Butte's ability to contain fluid migration.<sup>19</sup> To the extent that the Tribe raised environmental issues in Contention 2, it based them on the ER.

In December 2017, the Staff published its draft Environmental Assessment (Draft EA) (which included the cultural resources section that it made publicly available in 2014).<sup>20</sup> When the Tribe did not file new or amended contentions based on the Draft EA, the Staff moved to "deny migration" of Contention 2 to the extent that it raised environmental issues.<sup>21</sup> But the Board found that, for the most part, the information in the Draft EA did not differ significantly from the previously available information.<sup>22</sup> Therefore, the Board found that Contention 2 was moot only to the extent that it had argued that information was absent from the ER and the Draft EA cured the omission; the remainder of Contention 2 would migrate.<sup>23</sup>

The Staff issued the final Environmental Assessment (Final EA) in April 2018 and the amended license in May 2018.<sup>24</sup> In response, the Tribe submitted a "migration declaration," in which it argued that Contention 2 should be deemed to challenge the Final EA.<sup>25</sup> It also

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<sup>19</sup> See LBP-13-6, 77 NRC at 289-95.

<sup>20</sup> Draft Environmental Assessment for the Marsland Expansion Area License Amendment Application (Dec. 2017) (ML17334A870).

<sup>21</sup> *NRC Staff's Motion to Deny Migration of Environmental Portion of Contention 2* (Jan. 26, 2018). Because the contention raised both safety and environmental issues, the Staff's motion did not argue that the contention was wholly mooted by the Draft EA.

<sup>22</sup> LBP-18-2, 87 NRC 21, 33-35 (2018).

<sup>23</sup> *Id.* at 35-36.

<sup>24</sup> Ex. NRC006, Final Environmental Assessment (April 2018) (ML18102A145); Ex. NRC009, NRC Materials License SUA-1534, Amendment 3 (with License Condition Reference Sheet) (May 23, 2018) (ML18306A686) (License).

<sup>25</sup> *The Oglala Sioux Tribe's Migrated, Renewed, and New Marsland Expansion Final Environmental Assessment Contentions* (May 30, 2018) (Tribe Final EA Contentions).

submitted fourteen “new and renewed” contentions.<sup>26</sup> The Board found that Contention 2 would migrate, but it denied admission of the “new and renewed” contentions as untimely and for other reasons.<sup>27</sup> The Tribe argues in its petition for review that the Board erroneously excluded six of these contentions.<sup>28</sup>

Starting on October 30, 2018, the Board held a three-day evidentiary hearing on Contention 2 in Crawford, Nebraska.<sup>29</sup> In LBP-19-2, the Board resolved Contention 2 in favor of Crow Butte and the Staff. The Tribe challenges the merits decision by arguing that the Board shifted the burden of proof in several respects and assumed facts that were not in evidence.<sup>30</sup>

## II. DISCUSSION

### A. Standard of Review

The Tribe primarily raises issues with the Board’s merits decision in LBP-19-2. But because our rules of practice disfavor interlocutory review, the Tribe now also has appropriately requested our review of interlocutory Board decisions. We have discretion to take review, giving due weight to whether a petitioner raises a “substantial question” with respect to the following considerations:

- (i) A finding of material fact is clearly erroneous or in conflict with a finding as to the same fact in a different proceeding;
- (ii) A necessary legal conclusion is without governing precedent or is a departure from or contrary to established law;
- (iii) A substantial and important question of law, policy, or discretion has been raised;
- (iv) The conduct of the proceeding involved a prejudicial procedural error; or

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<sup>26</sup> *Id.*

<sup>27</sup> LBP-18-3, 88 NRC at 24-25, 29-52.

<sup>28</sup> Petition at 10-16.

<sup>29</sup> See Memorandum and Order (Adopting Transcript Corrections, Providing Final Exhibit List, and Closing Evidentiary Record) (Nov. 26, 2018) (unpublished).

<sup>30</sup> Petition at 5-9.

- (v) Any other consideration which the Commission may deem to be in the public interest.<sup>31</sup>

We review questions of law *de novo*.<sup>32</sup> We defer to the Board's fact finding unless the standard of "clear error" is met. The standard for finding "clear error" of fact is high; "clear error" requires a showing that the ruling is "not even plausible" in light of the record as a whole."<sup>33</sup> Similarly, we defer to the Board on whether a contention has sufficient factual support to be admitted and review contention admissibility decisions only where there is an error of law or abuse of discretion.<sup>34</sup> We generally do not review disputes over how a Board weighed evidence in a merits decision.<sup>35</sup>

## **B. The Tribe Has Not Raised a Substantial Question of Board Error**

### *1. Initial Decision LBP-19-2*

The Tribe argues that in its merits decision, the Board erred by shifting the burden of proof to the Tribe with respect to various aspects of Contention 2.<sup>36</sup> The Tribe asserts that its only burden was to provide sufficient facts to meet the contention admissibility standards.<sup>37</sup> However, under our regulations each party has the responsibility to ensure that the record

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<sup>31</sup> 10 C.F.R. § 2.341(b)(4).

<sup>32</sup> *See, e.g., Strata Energy, Inc. (Ross In Situ Uranium Recovery Project)*, CLI-16-13, 83 NRC 566, 573 (2016).

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> Petition at 5.

<sup>37</sup> *See id.*

contains sufficient evidence to support their positions.<sup>38</sup> The proponent of a contention has a responsibility to put forth evidence of its claim:

[W]here ... one of the other parties contends that, for a specific reason ... the permit or license should be denied, that party has the *burden of going forward* with evidence to buttress that contention. Once he has introduced sufficient evidence to establish a *prima facie* case, the burden shifts to the applicant, who, as part of his overall burden of proof, must provide a sufficient rebuttal to satisfy the Board that it should reject the contention as a basis for denial of the permit or license.<sup>39</sup>

With that in mind, we consider each argument with respect to the Board's merits decision, LBP-19-2.

a. *Baseline Restoration Wells*

On appeal, the Tribe questions the Board's findings concerning when Crow Butte must gather background water quality data to be used to set the groundwater protection values for restoration.<sup>40</sup> The Tribe argued at the hearing that baseline monitoring wells should be installed and sampled throughout the site before mining is conducted anywhere in the MEA.<sup>41</sup> But the Staff and Crow Butte argued—and the Board agreed—that it is acceptable for baseline values to be developed for each mining unit just prior to mining in that unit.<sup>42</sup> In its petition for review, the Tribe argues that the Board shifted the burden of proof to the Tribe to show that the wells

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<sup>38</sup> See Changes to Adjudicatory Process; Final Rule, 69 Fed. Reg. 2182, 2213 (Jan. 14, 2004) (“[E]ach party must bear its burden by going forward with affirmative evidentiary presentations and testimony”).

<sup>39</sup> *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-09-7, 69 NRC 235, 269 (2009) (quoting *Louisiana Power & Light Co. (Waterford Steam Electric Station, Unit 3)*, ALAB-732, 17 NRC 1076, 1093 (1983)) (second and third alterations in original).

<sup>40</sup> Petition at 5-8.

<sup>41</sup> See LBP-19-2, 89 NRC at \_\_ (slip op. at 133).

<sup>42</sup> *Id.* at \_\_ (slip op. at 131-36).

should be installed first, rather than keeping the burden on Crow Butte to show that restoration wells can be deferred until later.<sup>43</sup>

Crow Butte intends to operate up to eleven mining units in the MEA, but it does not plan to develop all mining units at the same time.<sup>44</sup> Therefore, when a new mining unit is developed, an adjacent mining unit may be in mid-operation or undergoing restoration.<sup>45</sup> After extraction operations cease at each mining unit, the restoration process begins with the goal of restoring the water quality in the ore zone to background, meaning that which existed prior to operations.<sup>46</sup> Conditions in Crow Butte's amended license require background water quality data for the ore zone and overlying aquifers to be established prior to injection of lixiviant for each mining unit.<sup>47</sup> In order to establish background water protection standards, a minimum of six baseline restoration wells will be installed per mining unit, and each well will be sampled four times at least fourteen days apart.<sup>48</sup>

The Tribe's witness for this subject was Michael Wireman, a hydrogeologist with thirty years' experience.<sup>49</sup> In his pre-filed written testimony, Mr. Wireman alleged that the site has not been adequately characterized to ensure fluid containment and to conduct groundwater restoration because all restoration wells throughout the site have not been installed and

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<sup>43</sup> Petition at 5-6.

<sup>44</sup> See Ex. CBR006, Crow Butte Resources Technical Report Marsland Expansion Area, at 1-6 (ML18306A614) (Technical Report).

<sup>45</sup> *Id.* at 1-11.

<sup>46</sup> See *id.*

<sup>47</sup> See Ex. NRC009, License at 14 (License Condition 11.1.3).

<sup>48</sup> See Ex. CBR006, Technical Report, at 6-5.

<sup>49</sup> See Ex. OST002, Michael Wireman Curriculum Vitae (ML18306A690).

sampled.<sup>50</sup> At the hearing, Mr. Wireman testified that a “baseline” value must be conducted before any mining operations take place and that operations in one mining unit would affect the chemistry in the adjacent mining units.<sup>51</sup> Mr. Wireman testified that “as soon as you’ve moved water from a mined unit that’s been impacted by the mining, downgradient into an unmined unit, you’ve altered that chemistry and it’s no longer baseline.”<sup>52</sup>

During the hearing, the Staff’s witness, Dr. Elize Stritz, testified that each operating mine unit maintains an inward hydraulic pressure gradient that would prevent hazardous constituents from moving to an adjacent area.<sup>53</sup> In addition, Dr. Stritz testified that each mine unit has perimeter monitoring wells, which are sampled every two weeks to detect excursions.<sup>54</sup>

The Board found that “[Crow Butte] and the Staff have proffered sufficient evidence to support their position that it is suitable to wait to install and sample these restoration wells as each [mining unit] is developed.”<sup>55</sup> It also found that “Mr. Wireman failed to provide any evidence justifying the installation of such restoration wells at this time.”<sup>56</sup> Citing Dr. Stritz, the Board concluded that “movement of production fluids between the developed and undeveloped [mining units] is not plausible due to the required inward hydraulic gradients.”<sup>57</sup>

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<sup>50</sup> Ex. OST004-R, Mike Wireman August 16, 2018 Opinion (Revised October 3, 2018), at 2-3 (ML18306A714) (Wireman Initial Testimony).

<sup>51</sup> See Tr. at 661-62 (Mr. Wireman).

<sup>52</sup> *Id.* at 662 (Mr. Wireman).

<sup>53</sup> See Tr. at 665-667 (Dr. Stritz); see also Ex. NRC004, Statement of Professional Qualifications of Elise Stritz (Aug. 17, 2018) (ML18306A679).

<sup>54</sup> Tr. at 666 (Dr. Stritz), 656 (Mr. Nelson); see Ex. NRC009, License at 14 (License Condition 11.1.3).

<sup>55</sup> LBP-19-2, 89 NRC at \_\_ (slip op. at 135).

<sup>56</sup> *Id.* at \_\_ (slip op. at 134).

<sup>57</sup> *Id.* at \_\_ (slip. op. at 136) (citing Tr. at 666-67).

We disagree that the Board improperly shifted the burden of proof to the Tribe. The pertinent issue was whether the levels for various hazardous constituents would be changed for areas outside a mining unit once mining begins anywhere in the MEA.<sup>58</sup> The Staff and Crow Butte explained with specificity why they believe diffusion of oxidizing lixiviant—and the hazardous constituents that would be mobilized by the lixiviant—against the inward hydraulic gradient maintained during operation is not plausible. While Mr. Wireman testified that he had a “hard time” believing this, he did not directly contradict the testimony presented by the Staff and Crow Butte about the inward hydraulic gradient.<sup>59</sup> In short, the Tribe disputes how the Board weighed the evidence. A dispute with how a board weighed the evidence is a factual dispute, not a legal one, and therefore the Board is entitled to deference.<sup>60</sup> Given that the Board discussed and considered the evidence on both sides, we will not disturb its decision.<sup>61</sup>

The Tribe argues that the Board “created a new standard” for baseline water quality when it found that it was not necessary for Crow Butte to obtain water quality data for all mining units before it begins mining at any of them.<sup>62</sup> The Tribe argues that the Board erred because

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<sup>58</sup> The license calls for analyzing for ammonia, arsenic, barium, cadmium, calcium, chloride, copper, fluoride, iron, lead, magnesium, manganese, mercury, molybdenum, nickel, nitrate, pH, potassium, radium-226, selenium, sodium, sulfate, total carbonate, total dissolved solids, uranium, vanadium, zinc and gross alpha. See Ex. NRC009, License at 14 (License Condition 11.1.3).

<sup>59</sup> See Tr. at 662 (“[I]t’s really hard for me to imagine a scenario where the mine unit that’s already been mined and water quality has been altered, that none of that water gets into the next mine unit. I just have a real hard time with that.” (Mr. Wireman)).

<sup>60</sup> See e.g., *Powertech (USA), Inc.* (Dewey-Burdock *In Situ* Uranium Recovery Facility), CLI-16-20, 84 NRC 219, 254-55 (2016); *In the Matter of David Geisen*, CLI-10-23, 72 NRC 210, 224 (2010).

<sup>61</sup> See e.g., *Strata*, CLI-16-13, 83 NRC at 584 (“When considering challenges to how the Board weighed the evidence, we ‘defer to the Board’s expertise as the fact finder and decline to substitute the judgment [of an Intervenor’s expert] for that of the Board.’” (quoting *Oyster Creek*, CLI-09-7, 69 NRC at 266)).

<sup>62</sup> Petition at 7-8 (citing LBP-19-2, 89 NRC at \_\_ (slip op. at 135)).

Mr. Wireman testified that once operations have begun anywhere in the MEA, “oxidation levels” will have been altered throughout the MEA.<sup>63</sup>

We disagree that the Board created a new standard for baseline when it stated that it was “questionable that water quality data should be obtained before [*in situ* recovery] operations begin.”<sup>64</sup> The Board does not state that it is acceptable to use baseline water quality data after it has been altered by operations in another area. Rather, the Board found that, given the measures employed to ensure containment, it was not plausible that water quality in adjacent areas would be altered by operations in an active mining unit.

The Tribe argues that the Board misinterpreted our 2016 decision in *Strata*, but that decision does not support the Tribe’s view.<sup>65</sup> In *Strata*, the issue before us was whether the extensive sampling required to establish baseline restoration values under our regulations was required to properly characterize the site under NEPA.<sup>66</sup> The *Strata* Board found that such testing was not required under NEPA (and therefore not required before final agency action on the license), and we found no error in its ruling.<sup>67</sup> Here, in contrast, the Board is considering whether Crow Butte’s plan to conduct baseline water quality testing for each mining unit as it goes along is consistent with our safety regulations promulgated under the Atomic Energy Act of 1954, as amended (AEA). The Board did not misinterpret *Strata*; rather, it was pointing out that

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<sup>63</sup> *Id.* at 8. The Tribe does not point to where Mr. Wireman testified to this, in either his pre-filed written testimony, rebuttal testimony, or during the hearing. When Judge Wardwell asked Mr. Wireman about oxidation during the hearing, Mr. Wireman stated that mining in one unit could “lower the water levels and expos[e] previously-saturated materials to an unsaturated condition” [in an adjacent area]. See Tr. at 663. But this discussion does not explain how an unsaturated condition would mobilize hazardous constituents in the unmined area. See *id.* at 661-64.

<sup>64</sup> See Petition at 7-8 (quoting LBP-19-2, 89 NRC at \_\_\_ (slip op. at 135)).

<sup>65</sup> *Id.* (citing *Strata*, CLI-16-13, 83 NRC at 583-84).

<sup>66</sup> See 10 C.F.R. Part 40, app. A, Criteria 5, 7A.

<sup>67</sup> *Strata*, CLI-16-13, 83 NRC at 582-84.

Crow Butte's plan is similar to the one implicitly approved in *Strata*.<sup>68</sup> The *Strata* decision does not hold that baseline restoration values must be established for all potential mining units before operations begin at any of them.

*b. Fractures and Faulting*

The Tribe argues that the Board erred in finding that there were no known faults in the MEA because the area has not been subject to fracture testing.<sup>69</sup> The Tribe argues that Crow Butte did not test or look for faults, and, therefore, the fact that no faults are "known" is not evidence that no faults exist at the site.<sup>70</sup> The Tribe asserts that "the only way to state with scientific confidence that there are no fractures is to do fracture analysis."<sup>71</sup> Relatedly, the Tribe argues that the Board "provided its own evidence . . . that was not in the record" when it "assumed" that there were no fractures in the MEA that were sufficiently transmissive to conduct contaminants between the aquifers.<sup>72</sup>

The Board found that the essential issue was not whether fractures exist in the MEA, but whether, even assuming that these fractures exist, it is reasonably likely that any fractures in the

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<sup>68</sup> *Strata Energy* also intends to develop the mining units at its Ross facility sequentially, and its license contains a similar license condition regarding the establishment of baseline restoration values "prior to injection of lixiviant for each min[ing] unit." See License Number SUA-1601, *Strata Energy Inc.*, at 12 (ML14069A335).

<sup>69</sup> See Petition at 7.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> Petition at 9 (citing LBP-19-2, 89 NRC at \_\_\_ (slip op. at 98)). The Tribe does not cite to portions of the record where its witnesses testified about fracture testing or describe what other evidence it presented regarding the necessity for fracture testing. It does not explain the significance of the presence or absence of faults or fractures to the Board's findings. In this respect its brief is inadequate, and we would be justified in rejecting the argument on this basis alone. See *Strata*, CLI-16-13, 83 NRC at 592; *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-947, 33 NRC 299, 322 (1991); *Carolina Power & Light Co. and North Carolina Eastern Municipal Power Agency* (Shearon Harris Nuclear Power Plant), ALAB-843, 24 NRC 200, 204 (1986).

MEA *could* transmit contaminants to the overlying aquifers.<sup>73</sup> With regard to faulting and fracturing, the Board observed that “all the parties agreed to a greater or lesser degree that in assessing a facility such as the MEA, it is not the mere presence of a fracture that is important but its transmissivity.”<sup>74</sup> In discussing possible contaminant pathways, the Board noted Crow Butte’s experts’ testimony that there is “no evidence of a fault or fracture in the MEA that is sufficiently transmissive to serve as a conduit for potential contaminant migration.”<sup>75</sup> The Board pointed to Crow Butte’s pre-filed rebuttal testimony explaining that (1) “based on undisputed evidence of confinement of the [mined] Basal Chadron aquifer, it is highly unlikely that the MEA contains a fault or a connected pathway ... capable of transmitting contaminants,” (2) even if minor fractures were to develop in the MEA, they would “close up quickly (i.e., be essentially self-sealing) as a result of overburden pressure from the weight of overlying strata,” and (3) the strong downward hydraulic gradient would preclude contaminants in the mined aquifer moving upward into the surficial aquifers.<sup>76</sup> Considering all the evidence, the Board found that there was no evidence of a fracture or fault with “sufficient transmissivity to serve as a potential contaminant pathway.”<sup>77</sup>

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<sup>73</sup> The Board found that “while there is likely some degree of structural fracturing of the geologic strata underlying the MEA, the mere presence of fractures is not the issue. Instead, the transmissivity of the strata is the critical factor.” LBP-19-2, 89 NRC at \_\_\_ (slip op. at 70).

<sup>74</sup> *Id.* at \_\_\_ (slip op. at 266).

<sup>75</sup> *Id.* at \_\_\_ (slip op. at 98) (citing Ex. CBR033, Written Testimony of Crow Butte Witnesses Robert Lewis, Walter Nelson, Douglas Pavlick, and James Striver on Contention 2 (Sept. 7, 2018), at 23 (ML18306A706) (Crow Butte Rebuttal Testimony); Ex. CBR012, Technical Report app. AA-3, Letter from Robert Lewis, AquiferTek, to Doug Pavlick and Larry Teahon, Cameco Resources (Dec. 17, 2014) (ML18306A619)).

<sup>76</sup> See Crow Butte Rebuttal Testimony at 23.

<sup>77</sup> LBP-19-2, 89 NRC at \_\_\_ (slip op. at 100).

We therefore disagree that the Board either assumed that there were no faults or fractures in the MEA or shifted the burden of proof to the Tribe to show the existence of transmissive faults there.

*c. MEA Coverage from a Single Pumping Test*

The Tribe also argues that the Board improperly shifted the burden of proof to the Tribe with respect to whether pumping tests must be conducted covering the entire MEA prior to licensing.<sup>78</sup> The Tribe points out that the hydraulic pumping test submitted with the application would only cover four mining units out of the eleven mining units planned in the MEA.<sup>79</sup> The Tribe refers to the Board's statement that "OST has not provided sufficient evidence to establish the need during the pre-licensing phase to place the large financial and time burden on [Crow Butte] to perform the pumping tests for all eleven of the MEA [mining units]."<sup>80</sup>

Between May 16 and May 20, 2011, Crow Butte conducted a pumping test to determine, among other things, the degree of hydrologic confinement between the production zone of the mined (Basal Chadron) aquifer and the overlying (Brule Formation) aquifer.<sup>81</sup> The test utilized one pumping well in the Basal Chadron, nine observation wells in the Basal Chadron, and three observation wells in the Brule Formation.<sup>82</sup> The radius of influence of the test was 8800 feet (approximately 1.6 miles).<sup>83</sup> In pre-filed written testimony, two of the Tribe's witnesses testified that a single pumping test across less than half of the MEA is insufficient to assess hydraulic

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<sup>78</sup> Petition at 7 (citing LBP-19-2, 89 NRC at \_\_ (slip op. at 179)).

<sup>79</sup> *Id.*; see Ex. CBR016, Technical Report, app. F, Aqui-Ver, Inc., Marsland Hydrologic Testing Report - Test #8 (revised Oct. 28, 2015) (Marsland Testing Report).

<sup>80</sup> LBP-19-2, 89 NRC at \_\_ (slip op. at 179).

<sup>81</sup> See Ex. CBR016, app. F, Marsland Testing Report. The test ran continuously for 103 hours. *Id.* at 8.

<sup>82</sup> *Id.* at 1.

<sup>83</sup> See *id.*

conditions.<sup>84</sup> The Board concluded, however, that the pumping test covered “almost half” of the MEA.<sup>85</sup>

Testimony offered by the Staff and Crow Butte indicated that conducting pumping tests across the entire MEA prior to licensing was unnecessary to confirm confinement of the aquifer. In pre-filed rebuttal testimony, Crow Butte’s witnesses stated that the pumping test was intended only to cover the first four mining units that Crow Butte plans to develop and this is a common industry practice that is allowed by NRC guidance.<sup>86</sup> For the other mining units, License Condition 11.3.4 requires additional site-specific pumping tests for each mining unit as it is developed.<sup>87</sup> The Staff pointed to multiple lines of evidence supporting hydraulic isolation between the mined and overlying aquifers within the MEA:

(1) hydrologic characteristics of the upper and lower confining units; (2) aquifer pumping test results; (3) the potentiometric surface of the Basal Chadron Sandstone aquifer; (4) differences in potentiometric surfaces between the Basal Chadron Sandstone aquifer and the overlying Brule aquifer; (5) water quality differences between the Basal Chadron Sandstone aquifer and the overlying Brule aquifer; and (6) isotopic age differences between water in the Brule and Basal Chadron Sandstone.<sup>88</sup>

The Board questioned the witnesses closely on this subject during the evidentiary hearing.<sup>89</sup> Staff witness David Back testified that there is a great deal of data taken throughout

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<sup>84</sup> See Ex. OST003, Expert Opinion Testimony of David K. Creamer, at 2 (Aug. 16, 2018) (ML19306A692); Ex. OST004-R, Wireman Initial Testimony, at 4.

<sup>85</sup> See LBP-19-2, 89 NRC at \_\_\_ (slip op. at 179).

<sup>86</sup> See Ex. CBR033, Crow Butte Rebuttal Testimony, at 7-8 (witnesses Mr. Lewis, Mr. Nelson, Mr. Pavlick) (citing Ex. NRC010, “Standard Review Plan for *In Situ* Leach Uranium Extraction License Applications” (Final Report) NUREG-1569, (June 2003), at 2-24 (ML18306A659) (Standard Review Plan)).

<sup>87</sup> See Ex. NRC009, License, at 19.

<sup>88</sup> Ex. NRC001, Testimony of David Back, Thomas Lancaster, Elise Stritz, and Jean Trefethen (Aug. 17, 2018), at 28 (ML18306A658).

<sup>89</sup> See Tr. at 434-44.

the MEA, including borehole data, geophysical logs, and field water-level measurements, which confirm that site conditions supporting adequate containment are consistent throughout the site.<sup>90</sup>

The Board found that the pumping test was only one piece of evidence used to establish confinement and that there were “multiple lines of evidence supporting containment across the MEA site, independent of the pumping test results.”<sup>91</sup> The Board cited evidence including “geological cross-sections and hydrogeological isopach, structural contour, and potentiometric contour mapping based on the stratigraphic cuttings and geophysical logging of over 1600 boreholes drilled within the MEA.”<sup>92</sup> It further pointed out that if the pre-operational tests discover any “previously undetected hydrogeologic anomaly,” License Condition 9.4 would require Crow Butte to “develop a plan for safe operations in those conditions, and submit a license amendment” application.<sup>93</sup>

We do not agree that the Board shifted the burden of proof to the Tribe when it found that the Tribe had not provided sufficient evidence that additional pumping tests were needed. Crow Butte had the burden of proof with respect to its license application, and here, it had the burden specifically with respect to whether there is hydrologic isolation between the Basal Chadron and the overlying Brule and Arikaree aquifers. Crow Butte and the Staff provided evidence of isolation between the aquifers within the MEA. In our view, the Board considered all of the evidence and found Crow Butte’s and the Staff’s evidence to be persuasive. The Tribe’s burden-shifting argument, “[a]lthough couched in legal terms, ... [is] at bottom a factual

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<sup>90</sup> Tr. at 442.

<sup>91</sup> LBP-19-2, 89 NRC at \_\_ (slip op. at 179).

<sup>92</sup> *Id.*

<sup>93</sup> *Id.* at (slip op. at 180).

challenge to the way the Board weighed and balanced the conflicting evidence.”<sup>94</sup> We therefore decline to review the Board’s ruling.

In conclusion, we find that the Tribe has not shown a substantial question of Board error in LBP-19-2.

## 2. *Issuance of License Amendment Prior to Final Decision*

The Tribe additionally argues that the Board erred when it “upheld” the Staff’s decision to issue the license amendment prior to the evidentiary hearing. According to the Tribe, this violates NEPA’s dictate to ensure that environmental information is available to the decision maker before actions are taken.<sup>95</sup> We disagree.

As an initial matter, no particular Board decision upheld the Staff’s decision to issue the license. Our regulations state that the Staff is expected to issue the license or amendment when it has completed its review of the materials application regardless of the pendency of an adjudication.<sup>96</sup> The Staff must notify the Board and other parties and explain how the public health and safety are protected despite the pendency of the adjudication, but the Staff does not require the Board’s permission before issuing the license.<sup>97</sup> Therefore, the Tribe’s petition neither points to any Board ruling allowing the license to issue prior to the hearing nor any Board error.

We are not persuaded by the Tribe’s argument that our regulation allowing the pre-hearing issuance of a license on its face violates NEPA. Our rules of procedure do not permit parties to challenge NRC regulations during adjudicatory proceedings absent a waiver, which

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<sup>94</sup> *In the Matter of David Geisen*, CLI-10-23, 72 NRC 210, 224 (2010).

<sup>95</sup> Petition at 9-10.

<sup>96</sup> 10 C.F.R. § 2.1202(a).

<sup>97</sup> *Id.*

the Tribe has not sought.<sup>98</sup> Rather, in general, petitioners should bring challenges to agency rules through the petition for rulemaking process.<sup>99</sup>

Even if we considered the Tribe's argument that our regulations are inconsistent with NEPA, the federal court decisions relied on by the Tribe, are distinguishable from the situation here.<sup>100</sup> Both of those matters, in contrast to the instant case, involved situations where the Board found a deficiency in the Staff's NEPA document, and neither concluded that in the absence of such a deficiency our practice of issuing a license as soon as the Staff completes its review contravenes NEPA.<sup>101</sup> In *Natural Resources Defense Council v. NRC*, the U.S. Court of Appeals for the D.C. Circuit rejected an intervenor's argument that because the Board found the environmental impact statement (EIS) deficient in one respect, the license should be revoked until the Staff had formally supplemented the EIS.<sup>102</sup> That Board found that although the EIS had not sufficiently discussed certain environmental concerns, the information adduced at hearing had adequately explained the facts and effectively supplemented the EIS.<sup>103</sup> The appeals court upheld the agency decision because the Board "came to the same decision [as the Staff] after it had considered the supplemental information" and the adjudicatory record had

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<sup>98</sup> In general, an individual adjudication is not the proper forum for challenging an agency rule. See 10 C.F.R. § 2.335(a).

<sup>99</sup> 10 C.F.R. § 2.802.

<sup>100</sup> *Natural Res. Def. Council v. NRC*, 879 F.3d 1202 (D.C. Cir. 2018); *Oglala Sioux Tribe v. NRC*, 896 F.3d 520 (D.C. Cir. 2018) (both proceedings involved ISR uranium projects).

<sup>101</sup> If any environmental or safety hazards come to light in a hearing, the license could be appropriately conditioned or revoked. 10 C.F.R. § 2.340(e)(2); see, e.g., *Strata Energy, Inc.* (Ross *In Situ* Uranium Recovery Project), LBP-15-3, 81 NRC 65, 142-44, 153-54 (2015) (Board decision revised license condition to require licensee to locate and properly abandon historic boreholes); *Powertech (USA), Inc.* (Dewey-Burdock *In Situ* Uranium Recovery Facility), LBP-15-16, 81 NRC 618, 679, 709 (2015) (Board decision imposed license condition to require licensee to locate and properly abandon historic boreholes).

<sup>102</sup> See *Natural Res. Def. Council*, 879 F.3d at 1209-13.

<sup>103</sup> See *Strata*, LBP-15-3, 81 NRC at 153-54.

remedied the NEPA deficiency.<sup>104</sup> Six months later, the same appeals court considered a different set of facts, involving a board decision that denied a motion to suspend a license absent a showing of irreparable harm even after finding that the underlying EIS suffered from a deficiency that had not been remedied through the adjudicatory process itself.<sup>105</sup> The appeals court found that “once the NRC determines there is a significant deficiency in its NEPA compliance, it may not permit a project to continue in a manner that puts at risk the values NEPA protects simply because no intervenor can show irreparable harm.”<sup>106</sup>

These appeals court decisions do not support the Tribe’s position. The question in each was whether the license should be suspended after the Board found a deficiency in the Staff’s environmental review document. But here, after considering the extensive evidence provided by all parties, the Board found that the Staff’s environmental analysis was sufficient. Thus, we conclude that the Tribe has not shown that the issuance of the license prior to completion of the adjudicatory hearing provides a sufficient basis for Commission review.

### 3. *2014 Summary Disposition Order*

The Tribe argues that the Board should not have dismissed its cultural resources contention, Contention 1, because the Tribe was without counsel during that time and because the Staff was well aware of the Tribe’s interest in preserving cultural resources.<sup>107</sup> The Tribe points out that its Tribal Historic Preservation Office and Tribal Council were participating in five licensing actions pending before the NRC at the same time and asserted cultural resources concerns in those proceedings. But the Tribe identifies no Board error.

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<sup>104</sup> *Natural Res. Def. Council*, 879 F.3d at 1210-11.

<sup>105</sup> *Oglala Sioux Tribe*, 896 F.3d at 527-39.

<sup>106</sup> *Id.* at 538.

<sup>107</sup> Petition at 16-18.

We find unpersuasive the Tribe's argument that summary disposition was inappropriate because it "should have been clear to both the NRC Staff and Board" that the Tribe was without counsel when the Draft Cultural Resources Assessment was issued.<sup>108</sup> We are aware that the Tribe was relying on *pro bono* counsel for participation in this matter. But the Tribe had counsel of record when it filed its contentions, and that attorney did not file a notice of withdrawal as counsel. We therefore do not agree that it should have been obvious to the Board and Staff that the Tribe was without counsel. It was not the Board's responsibility to ensure the Tribe had representation: "[I]t is the responsibility of the party itself not merely to decide whether it wishes to have counsel, but, in addition, to take the necessary steps to implement its decision."<sup>109</sup> Moreover, the Tribe did not offer a new contention based on the Draft Cultural Resources Assessment, nor did it ask for reconsideration of the Summary Disposition Order after it retained counsel shortly following the Board's ruling.<sup>110</sup>

Moreover, the Board's Summary Disposition Order was not based on the Tribe's failure to respond to the Staff's motion. In its analysis, the Board observed that our rules of procedure do not "direct that an unopposed motion for summary disposition must automatically be granted."<sup>111</sup> Instead, the Board examined the Tribe's original contention vis-à-vis the information in the Draft Cultural Resources Assessment to determine whether the contention

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<sup>108</sup> *Id.* at 16.

<sup>109</sup> See *Cleveland Elec. Illuminating Co.* (Perry Nuclear Power Plant, Units 1 and 2), ALAB-802, 21 NRC 490, 498 (1985).

<sup>110</sup> The Tribe obtained new counsel on October 27, 2014. See *Tribe's Motion for Extension of Time to Respond to Show Cause Order, and Response of the Oglala Sioux Tribe to Show Cause Order* (Dec. 4, 2014) at 1. In its motion, the Tribe appeared to concede that it had waived prosecution of Contention 1. See *id.* at 3.

<sup>111</sup> Summary Disposition Order at 5 (citing *Cleveland Elec. Illuminating Co.* (Perry Nuclear Power Plant, Units 1 and 2), ALAB-443, 6 NRC 741, 753-54 (1977)).

could “migrate,” that is, be deemed to apply to the Draft Cultural Resources Assessment the same as to Crow Butte’s ER.<sup>112</sup>

The Board found that the information contained in the Draft Cultural Resources Assessment differed significantly from that in the ER.<sup>113</sup> The ER described a three-month survey that found no Native American cultural resources on the site. The Draft Cultural Resources Assessment, in contrast, included a description of the results of the Santee Sioux Survey (which discovered twelve places of religious or cultural significance), the field survey study by a cultural resources expert hired by the Staff, and a description of the tribal consultation process.<sup>114</sup> Thus, the Board reasonably held that Contention 1 could not migrate to apply to the Draft Cultural Resources Assessment.<sup>115</sup>

We therefore find no Board error in dismissing Contention 1. Given the Staff’s efforts to consult with the interested tribes and to characterize traditional cultural properties at the site, as well as the lack of an updated cultural resources contention, the Board had every reason to find Contention 1 moot. There was no reason for the Board to assume that, despite all the new information in the Draft Cultural Resources Assessment, the Tribe would still find it lacking. And it would be improper for the Board to keep Contention 1 in the proceeding as a generalized attack on the Staff’s work, with the details to be filled in later. We do not allow the admission of

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<sup>112</sup> Although the Board’s Summary Disposition order refers to the “Draft EA,” the Board was in fact referring to the Draft Cultural Resources Assessment, intended for incorporation into the larger Draft EA published in 2017.

<sup>113</sup> Summary Disposition Order at 12. The Tribe concedes that the dismissal was “in accordance with NRC regulations and rules of practice.” Petition at 17.

<sup>114</sup> See Draft Cultural Resources Assessment at 8-12.

<sup>115</sup> Summary Disposition Order at 13.

vague, unparticularized, or open-ended contentions in our proceedings.<sup>116</sup> In addition, the Board had no authority to raise issues *sua sponte* without prior Commission permission<sup>117</sup> or to rewrite the contention to supply bases that the Tribe had not articulated itself.<sup>118</sup> Therefore, the Board did not err in granting summary disposition of Contention 1.

4. *LBP-18-3: Denial of New and Renewed Contentions*

The Tribe challenges the Board's ruling denying admission of several late filed contentions after the Staff issued the Final EA in 2018.

a. *Untimeliness*

The Board found several of the Tribe's proposed contentions untimely because the analysis in the Final EA was substantially unchanged from what was in the Draft EA.<sup>119</sup> The Tribe challenges the Board's timeliness ruling with respect to its proposed Contentions L, M, and N.<sup>120</sup> Contentions L and M related to the concerns that had been dismissed four years earlier with Contention 1. The Tribe argued in Contention L that the Final EA failed to take a "hard look" at the historic, cultural, and spiritual resources at the MEA.<sup>121</sup> In Contention M, the

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<sup>116</sup> See, e.g., *Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-10-15, 71 NRC 479, 482 (2010); *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349, 358-59 (2001).

<sup>117</sup> 10 C.F.R. § 2.340(a).

<sup>118</sup> See *Crow Butte Resources, Inc.* (North Trend Expansion Project), CLI-09-12, 69 NRC 535, 552-53 (2009); *Andrew Siemaszko*, CLI-06-16, 63 NRC 708, 720-21 (2006).

<sup>119</sup> See LBP-18-3, 88 NRC at 48-51.

<sup>120</sup> Petition at 14-16.

<sup>121</sup> Tribe Final EA Contentions at 56-65.

Tribe argued that the Staff failed to adequately consult with the Tribe.<sup>122</sup> And in Contention N, the Tribe claimed that the Staff's environmental justice analysis was inadequate.<sup>123</sup>

The Tribe argues that it was not required to submit these contentions prior to the release of the Final EA and that any contentions submitted on the basis of the Draft EA would suffer from a lack of "ripeness."<sup>124</sup> The Tribe further suggests that its comments on the draft EA were sufficient to raise its concerns to the Staff.<sup>125</sup> It does not provide support for this legal argument, which is contrary to our regulations.

Our regulations provide that a new or amended environmental contention may be filed based on new information in the Staff's draft or final environmental documents, but only if the contention is timely based on the availability of the new information.<sup>126</sup> A contention must be filed at its earliest opportunity. Therefore, a petitioner who waits until the issuance of a final document to raise a contention risks the possibility that there will not be a material difference between the draft and final document.<sup>127</sup>

As described above, the Board found that the Tribe's original cultural resources contention (Contention 1) was mooted when the information in the Draft Cultural Resources Assessment differed substantially from the information in Crow Butte's ER.<sup>128</sup> Had the cultural resources information in the Final EA been materially different from that available in the Draft EA (Draft Cultural Resources Assessment), then the Tribe would have had the opportunity to

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<sup>122</sup> *Id.* at 65-79.

<sup>123</sup> *Id.* at 79-84.

<sup>124</sup> Petition at 15.

<sup>125</sup> *Id.*

<sup>126</sup> 10 C.F.R. § 2.309(c), (f)(2).

<sup>127</sup> *DTE Electric Co.* (Fermi Nuclear Power Plant, Unit 3), CLI-15-1, 81 NRC 1, 7-8 (2015).

<sup>128</sup> See Summary Disposition Order at 10-13.

submit a new contention challenging that information.<sup>129</sup> But the Board found that the cultural resources information on which each contention was based was not changed between the Draft EA and the Final EA.<sup>130</sup> Therefore, the Board's ruling that the contentions were untimely was not in error.

We are not swayed by the Tribe's arguments that the Board failed to safeguard the Tribe's interests.<sup>131</sup> "[A] person who invokes the right to participate in an NRC proceeding also voluntarily accepts the obligations attendant upon such participation[, and] it is reasonable to expect intervenors to shoulder the same burden carried by any other party to a Commission proceeding."<sup>132</sup> Thus, our rules do not require a Board to take extraordinary measures to ensure that parties are fully aware of relevant factual details in a proceeding, such as the release of new or updated reports. Nonetheless, the Board made every effort to ensure the Tribe was aware of our procedural regulations and not taken by surprise by the release of the Draft Cultural Resources Assessment. As is customary in our adjudicatory proceedings, the Board directed the Staff to provide updates on the schedule for the expected release of its draft and final review documents.<sup>133</sup> Well in advance of the release of the Draft Cultural Resources Assessment, the Board issued a series of schedules for the conduct of the proceeding which included a timeline for a motion for new or amended cultural resource contentions within one

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<sup>129</sup> See 10 C.F.R. § 2.309(c)(ii).

<sup>130</sup> See LBP-18-3, 88 NRC at 48-51.

<sup>131</sup> See Petition at 17.

<sup>132</sup> *Duke Power Company* (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC 1041, 1048 (1983).

<sup>133</sup> See Memorandum and Order (Initial Prehearing Order), at 3 (Feb. 8, 2014) (unpublished); See also Memorandum and Order (Initial Prehearing Conference and Scheduling Order), at 12 (June 14, 2013) (unpublished) (Initial Prehearing Conference Order).

month following the release of that draft.<sup>134</sup> Although these measures are not out of the ordinary for our boards, they show that the Tribe had more than a fair opportunity to participate in our hearing process.

*b. Federal Jurisdiction Over the Marsland Expansion Area*

The Tribe reiterates its proposed Contentions J and K, in which it argued that the MEA is located on land belonging by treaty to the Tribe.<sup>135</sup> In Contention J, the Tribe observed that the 1868 Fort Laramie Treaty recognized the land on which the MEA sits as part of the Great Sioux Reservation. The Tribe therefore claimed that the proposed expansion site is owned by the Tribe and that neither the federal government, nor the NRC through it, has jurisdiction over the MEA.<sup>136</sup> Similarly, in Contention K, the Tribe argued that the 1868 Fort Laramie Treaty as well as international law require the Tribe's consent to enter the MEA.<sup>137</sup> According to the Tribe, the treaty specifically provided that no persons would be authorized to "pass over, settle upon, or reside in the territory described" in the treaty as part of the reservation without the Tribe's permission.<sup>138</sup>

The Board rejected these contentions both because they were not timely filed and were outside the scope of the proceeding. The Board observed that, according to U.S. Supreme Court precedent, the 1868 Fort Laramie Treaty is no longer in effect.<sup>139</sup> With regard to

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<sup>134</sup> See Memorandum and Order (Revised General Schedule) (April 30, 2014) (unpublished). The Board issued similar orders on October 30, 2013, March 11, 2014, and March 20, 2014. See *also* Initial Prehearing Conference Order, at 5-7, app. A.

<sup>135</sup> Petition at 10-12.

<sup>136</sup> See Tribe Final EA Contentions at 38-53.

<sup>137</sup> *Id.* at 53-56.

<sup>138</sup> *Id.* at 53.

<sup>139</sup> LBP-18-3, 88 NRC at 45-46 (citing *United States v. Sioux Nation of Indians*, 448 U.S. 371 (1980)).

timeliness, the Board noted that the facts on which the contentions were based were known to the Tribe from the outset of the proceeding and that, therefore, the Tribe could not show good cause for waiting to file them.<sup>140</sup>

The Tribe cites two federal cases to support its position, but neither case holds, as the Tribe suggests, that a tribe has jurisdiction to exclude activities from its former territory. In *Knighton v. Cedarville Rancheria of Northern Paiute Indians*, the U.S. Court of Appeals for the Ninth Circuit held that a tribal court had jurisdiction to adjudicate tribal claims against a non-member former employee.<sup>141</sup> And the U.S. Supreme Court case the Tribe cites in fact limits tribal jurisdiction over reservation land. In *Montana v. United States*, the Court held that a tribe could not prohibit hunting and fishing by a non-member who held title in fee to property located within the reservation.<sup>142</sup> Neither case holds that a tribe's sovereignty extends to former treaty lands such as the MEA.

We find that the Board correctly relied on Supreme Court precedent in rejecting the argument that the Tribe and not the United States has jurisdiction over this license proceeding.<sup>143</sup> We see no error in the Board's decision, and we deny review.

*c. Significance of Board Rulings in Other Proceedings*

The Tribe argues that the Board erred in dismissing Contentions D, L, and M, all of which concern Native American cultural resources in the MEA.<sup>144</sup> The Tribe argues that rulings by other boards (namely, the Board in the *Crow Butte* license renewal proceeding and the

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<sup>140</sup> *Id.* at 45, 47 (citing 10 C.F.R. § 2.309(c)(1)(i)).

<sup>141</sup> 913 F.3d 660, *withdrawn and superseded on reh'g*, 2019 WL 1781404 (2019).

<sup>142</sup> 450 U.S. 544, 564 (1981).

<sup>143</sup> We have had occasion to consider this issue previously. See *Crow Butte Resources, Inc.* (In Situ Leach Facility, Crawford, Nebraska), CLI-09-9, 69 NRC 331, 337 (2009).

<sup>144</sup> Petition at 12-18; see Tribe Final EA Contentions at 23-25, 56-79.

Board for the *Powertech* ISR license proceeding) found that the Staff's efforts to characterize the cultural resources at those sites under NEPA were inadequate in some respects.<sup>145</sup> The Tribe argues that the Staff used "identical methodology" to characterize cultural resources in the other proceedings as it did here; therefore, the cultural resource analysis in this proceeding should also be deemed insufficient to satisfy NEPA.

We have the discretion to exercise review where a board finding of fact is "in conflict with a finding as to the same fact in a different proceeding."<sup>146</sup> But the Board here made no factual finding that is in conflict with the findings of the other boards.

Rather, the Board rejected these contentions on timeliness. Contentions L and M sought to reassert the cultural resources claims that were initially raised in Contention 1 and dismissed after the issuance of the Draft Cultural Resources Assessment. Moreover, the fact that other boards found environmental analyses deficient in other proceedings is of limited probative value in this one.

The Tribe offers no argument specific to Contention D, and we find no error in the Board's ruling. Contention D pointed to an apparent agreement reached in March 2018 between the Staff, the Tribe, and a different applicant in another ISR license proceeding, to conduct a cultural resources survey at the Dewey-Burdock site that is the subject of the *Powertech* proceedings.<sup>147</sup> The Tribe argued that the Final EA should include a statement "whether [the Staff] would employ the same approach at the Marsland site."<sup>148</sup> The Board

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<sup>145</sup> Petition at 13.

<sup>146</sup> 10 C.F.R. § 2.341(b)(4)(i).

<sup>147</sup> See Tribe Final EA Contentions at 23-25, Ex. A, Letter from Cinthya I. Román, NRC, to Trina Lone Hill, Oglala Sioux Tribe (Mar. 16, 2018) (regarding approach to identifying historic, cultural, and religious sites at the Dewey-Burdock ISR site in Fall River and Custer County, South Dakota).

<sup>148</sup> Tribe Final EA Contentions at 24.

rejected proposed Contention D as lacking factual support because the March 2018 agreement for a survey at the Dewey-Burdock site was never carried out: “Given the stated factual underpinning for this contention is no longer accurate, the contention lacks a sufficient basis.”<sup>149</sup> The Tribe does not offer a reason why this ruling was in error, and we discern none.

*d. Status of Tribe as a Sovereign Nation and NRC’s Trust Responsibility*

The Tribe repeatedly asserts that our “unquestionably Byzantine” procedures should not be applied to it because of its status as a Native American Tribe.<sup>150</sup> It argues that its concerns deserve higher deference than it would if it were “a concerned individual, an interested property owner, an environmental group, or a corporation.”<sup>151</sup> It also claims that the NRC bears a “trust responsibility in its dealings with tribal nations.”<sup>152</sup>

The Tribe is correct that as an agency of the federal government, the NRC owes a fiduciary duty to the Native American tribes affected by its decisions.<sup>153</sup> But unless there is a specific duty that has been placed on us with respect to Native American tribes, we discharge this duty by compliance with the AEA and NEPA.<sup>154</sup> The Tribe is not entitled to greater rights than it would otherwise have under those statutes as an interested party.<sup>155</sup>

The Tribe has not shown that the Board denied it a fair process or that the Staff failed in its duties under the AEA or NEPA. The Tribe does not raise a substantial question for our review with respect to its rejection of its “new and renewed” contentions.

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<sup>149</sup> LBP-18-3, 88 NRC at 37.

<sup>150</sup> See Petition at 4, 16-17; Tribe Reply.

<sup>151</sup> Tribe Reply at 3.

<sup>152</sup> Petition at 16.

<sup>153</sup> See, e.g., *Morongo Band of Mission Indians v. FAA*, 161 F.3d 569, 573-74 (9th Cir. 1998); *Skokomish Indian Tribe v. FERC*, 121 F.3d 1303, 1308 (9th Cir. 1997).

<sup>154</sup> See *Morongo Band*, 161 F.3d at 574; *Skokomish Indian Tribe*, 121 F.3d at 1308-09.

<sup>155</sup> See *Skokomish Indian Tribe*, 121 F.3d at 1308-09.

**III. CONCLUSION**

For the foregoing reasons, we *deny* review of the Board's decisions in LBP-19-2, LBP-18-3, and the Summary Disposition Order.

IT IS SO ORDERED.

For the Commission

**NRC Seal**

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Annette L. Vietti-Cook  
Secretary of the Commission

Dated at Rockville, Maryland,  
this 13<sup>th</sup> day of April 2020.

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

In the Matter of	)	
	)	
CROW BUTTE RESOURCES, INC.	)	Docket No. 40-8943-MLA-2
	)	
In-Situ Leach Uranium Recovery Facility, Crawford, Nebraska	)	ASLBP No. 13-926-01-MLA-BD01
	)	
(License Amendment – Marsland Expansion Area)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **COMMISSION MEMORANDUM AND ORDER (CLI-20-01)** have been served upon the following persons by Electronic Information Exchange.

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Crow Butte Resources, Inc., Docket No. 40-8943-MLA-2  
**COMMISSION MEMORANDUM AND ORDER (CLI-20-01)**

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[Original signed by Clara Sola]  
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Dated at Rockville, Maryland  
this 13<sup>th</sup> day of April, 2020