UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Allison M. Macfarlane, Chairman
Kristine L. Svinicki
George Apostolakis
William D. Magwood, IV
William C. Ostendorff

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| In the Matter of<br>CROW BUTTE RESOURCES, INC.<br>(Marsland Expansion Area) | Docket No. 40-8943-MLA-2 |

**CLI-14-02**

**MEMORANDUM AND ORDER**

The NRC Staff and the license applicant, Crow Butte Resources, Inc., have appealed the Atomic Safety and Licensing Board's ruling granting a hearing with respect to Crow Butte's application to expand its *in situ* uranium recovery operation in Dawes County, Nebraska.[1] As discussed below, we affirm the Board's rulings on standing and contention admissibility.

## I. BACKGROUND

Crow Butte currently operates an *in situ* uranium recovery facility in Crawford, Nebraska. This proceeding involves a request to amend its materials license to authorize operation of a satellite facility about eleven miles southeast of Crow Butte's central processing facility.[2]

[1] LBP-13-6, 77 NRC 253 (2013).

[2] *See* "Application for Amendment of USNRC Source Materials License SUA-1534 Marsland Expansion Area Crawford, Nebraska," Volume I, Environmental Report, (ADAMS accession

(continued . . .)

In LBP-13-6, the decision being appealed in this case, the Board found that the Tribe had demonstrated standing and admitted two of its proposed contentions in part. It rejected four other proposed contentions in their entirety.[3] In the same order, the Board also found that several other individuals and groups seeking intervention had not established standing.[4]

Both Crow Butte and the Staff contend that the Tribe's intervention petition should have been denied in its entirety. Crow Butte disputes the Tribe's standing in this proceeding, but the Staff does not contest standing on appeal.[5] Both Crow Butte and the Staff argue that neither contention is admissible.[6]

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nos. ML12160A513, ML12160A515, ML12160A517, ML12160A519) (Environmental Report); "Application for Amendment of USNRC Source Materials License SUA-1534, Marsland Expansion Area Crawford, Nebraska," Volume I, Technical Report," (ML12160A527, ML12160A529, ML12160A530, ML12160A531) (Technical Report). In addition to this license application, Crow Butte also has pending an application to renew the license for its central facility and another application to expand its operations into the "North Trend Expansion Area," a site adjacent to and north of Crow Butte's main site. *See generally Crow Butte Resources, Inc.* (In Situ Leach Facility, Crawford, Nebraska), Docket No. 40-8943; *Crow Butte Resources, Inc.* (North Trend Expansion), Docket No. 40-8943-MLA.

[3] The Board rejected four contentions: Contention 3, "Inadequate Analysis of Groundwater Quality Impacts"; Contention 4, "Requiring the Tribe to Formulate Contentions before an EIS is Released Violates NEPA"; Contention 5, "Failure to Consider Connected Actions"; and Contention 6, "Failure to Consider Direct Tornado Strikes." Because the Board granted the hearing request, its decision to reject these contentions may not be appealed until the end of the case. 10 C.F.R. § 2.311(d)(1). *See, e.g.*, *Exelon Generation Co., LLC* (Early Site Permit for the Clinton ESP Site), CLI-04-31, 60 NRC 461 (2004).

[4] Two organizations, Western Nebraska Resources Council and Aligning for Responsible Mining, and three individuals, Antonia Loretta Afraid of Bear Cook, Bruce McIntosh, and Debra White Plume, filed a consolidated intervention petition. The Board considered the standing of each group and individual separately and found that none had made the requisite showing. *See* LBP-13-6, 77 NRC at 269-82. The Board did not consider the admissibility of these contentions. *Id*. at 282. These petitioners have not appealed.

[5] *See Crow Butte Resources Notice of Appeal of LBP-13-06* (June 4, 2013); *Brief in Support of Crow Butte Resources' Appeal from LBP-13-06* (June 4, 2013) (Crow Butte Appeal); *NRC Staff's Notice of Appeal of LBP-13-6, Licensing Board's Order of May 10, 2013, and Accompanying Brief* (June 4, 2013) (Staff Appeal).

[6] Crow Butte Appeal at 9-19, Staff Appeal at 5-18.

## II. DISCUSSION

Our rules of practice provide for an automatic right to appeal a Board decision on the question whether a petition to intervene should have been wholly denied.[7] We give a Board's ruling on standing "substantial deference."[8] Similarly, we defer to a Board's contention admissibility rulings unless the appeal points to an "error of law or abuse of discretion."[9]

As an initial matter, we observe that the Tribe did not answer either appeal and, as noted below, did not fully participate before the Board with respect to the questions at issue. Although we find in the Tribe's favor today, the Tribe's failure to pursue a contention in the future could result in (among other things) dismissal of the contention.[10]

### A. Standing

The Oglala Sioux Tribe is not a new participant to our proceedings. As relevant here, the Tribe has been admitted as a party to the ongoing proceeding associated with Crow Butte's

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[7] *See* 10 C.F.R. § 2.311(d)(1).

[8] *Strata Energy, Inc.* (Ross In Situ Recovery Project), CLI-12-12, 75 NRC 603, 608 (2012); *Calvert Cliffs 3 Nuclear Project, LLC and UniStar Nuclear Operating Services, LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), CLI-09-20, 70 NRC 911, 914 (2009); *Crow Butte Resources, Inc.* (North Trend Expansion Project), CLI-09-12, 69 NRC 535, 543 (2009) (Crow Butte North Trend).

[9] *Crow Butte North Trend*, CLI-09-12, 69 NRC at 543. *See also Crow Butte Resources, Inc.* (In Situ Leach Facility, Crawford, Nebraska), CLI-09-9, 69 NRC 331, 336 (2009); *Southern Nuclear Operating Co.* (Vogtle Electric Generating Plant, Units 3 and 4), CLI-09-16, 70 NRC 33, 35 (2009).

[10] *See, e.g.*, 10 C.F.R. § 2.320 ("If a party fails to file an answer or pleading within the time prescribed in this part or as specified in the notice of hearing or pleading, to appear at a hearing or prehearing conference, to comply with any prehearing order entered by the presiding officer, or to comply with any discovery order entered by the presiding officer, the Commission or the presiding officer may make any orders in regard to the failure that are just . . . ."); *Washington Public Power Supply System* (WPPSS Nuclear Project No. 1), LBP-00-18, 52 NRC 9, 13-14 (2000); *Boston Edison Co.* (Pilgrim Nuclear Generating Station, Unit 2), LBP-76-7, 3 NRC 156, 157 (1976); *Northern Indiana Public Service Co*. (Bailly Generating Station, Nuclear-1), ALAB-224, 8 AEC 244, 250 (1974).

license renewal application.[11] In that proceeding, the Board based the Tribe's standing on the presence onsite of cultural resources that "may be harmed as a result of mining activities."[12] As the license renewal Board found, "Federal law not only recognizes that Native American tribes have a protected interest in cultural resources found on their aboriginal land, but as well has imposed on federal agencies a consultation requirement under the [National Historic Preservation Act] to ensure the protection of tribal interests in cultural resources."[13] The Tribe also is participating as an interested governmental entity in the ongoing license amendment proceeding for the North Trend Expansion Area.[14]

The Board based its standing ruling on the Tribe's asserted interest in protecting cultural resources on the site of the proposed facility.[15] The proposed Marsland Expansion Area, as with the other Crow Butte facilities currently under consideration for NRC licenses, is to be

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[11] *Crow Butte Resources, Inc.* (In Situ Leach Facility, Crawford, Nebraska), LBP-08-24, 68 NRC 691 (2008), *aff'd in part*, *rev'd in part*, CLI-09-9, 69 NRC 331, 336-41 (affirmed as to standing).

[12] *Id*. at 714.

[13] *Id.* at 715.

[14] *See Crow Butte Resources, Inc.* (North Trend Expansion Project), LBP-08-6, 67 NRC 241, 267 (2008), *aff'd in part, rev'd in part on other grounds*, *Crow Butte North Trend*, CLI-09-12, 69 NRC 535.

[15] The Tribe claimed three bases for standing. In addition to the cultural resources claim, it claimed an interest in protecting both the environment on the reservation (particularly groundwater and the White River), and the health of its members. *See Petition to Intervene and Request for Hearing of the Oglala Sioux Tribe* (Jan. 29. 2013), at 9-10 (OST Petition). The White River runs through Dawes County and northeast through the Pine Ridge Reservation. But the Board found that, based on Crow Butte's assertion, the Marsland site is within the watershed of a different river, the Niobrara. LBP-13-6, 77 NRC at 271-72 n.6. The Board therefore expressed "concerns" whether the Tribe had provided sufficient information to support the environmental claim. *Id*. at 271. The Tribe also claimed a procedural injury to its right to be consulted under the NHPA, as both a basis for standing and part of Contention 1. OST Petition at 8-9. The Board rejected the procedural injury claim as part of the proposed contention. LBP-13-6, 77 NRC at 286.

located within the aboriginal territory of the Sioux people.[16] Native American artifacts found on the site therefore are likely to be Sioux in origin. The Tribe argued before the Board that operations on the Marsland site potentially could harm these cultural resources, particularly if Crow Butte does not "properly judge the significance of certain artifacts" that may be present.[17]

The facts relating to standing changed between the time Crow Butte filed its application and the time the Board ruled on the Tribe's intervention petition. Crow Butte's application identified no Native American cultural resources on the site.[18] The Tribe's intervention petition also did not identify any specific resources on the site.[19] But the Tribe supported its petition with a declaration by the Tribe's Tribal Historic Preservation Officer (THPO), Wilmer Mesteth, who stated that artifacts or other cultural resources likely would be discovered if one were to look at extant and extinct water resources.[20] Mr. Mesteth also asserted that any Native American cultural resources found in the Marsland Expansion Area would belong to the Tribe:

> The lands encompassed by the expansion are within the Territory of the Great Sioux Nation, which includes the band of the Oglala Lakota (Oglala Sioux Tribe) aboriginal lands. As a result the cultural resources, artifacts, sites, etc., belong to the Tribe. . . . Any harm done to these artifacts, perhaps because the Applicant did not properly judge the significance of certain artifacts or cultural resources will be an injury to the Tribe. . . .[21]

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[16] The Marsland Expansion Area license application notes: "In the mid-1800s, this region was occupied predominantly by bands of Lakota Sioux and Cheyenne." Environmental Report, § 3.8.1, at 3-76.

[17] *See Declaration of Wilmer Mesteth* ¶¶ 5, 11-12, 16 (Jan. 29, 2013) (Mesteth Declaration), appended to OST Petition. *See also* OST Petition at 8-9.

[18] *See* Environmental Report, § 3.8.1, at 3-77 ("No indigenous people site or artifacts were found in the project area.") (information also found in Technical Report, § 2.4.1, at 2-72).

[19] *See generally* OST Petition.

[20] Mesteth Declaration ¶ 8.

[21] *Id*. ¶ 5.

In responding to the Tribe's intervention petition, both the Staff and Crow Butte argued that the lack of any known Native American cultural resources on the site undermined the Tribe's standing.[22]

The Staff advised the Board in its answer to the Tribe's intervention petition, however, that two Native American tribes—the Santee Sioux Nation and the Crow Tribe of Montana—had performed a cultural resources survey of the sites relevant to Crow Butte's pending applications.[23] The survey was conducted after the Staff invited representatives of several tribes, including the Oglala Sioux Tribe, to examine all of the Crow Butte sites, including Marsland.[24] The two tribes conducted the surveys between mid-November and early December 2012, but the Staff had not received the results as of the time it filed its answer to the Tribe's intervention petition before the Board.[25]

In March, the Board asked the Staff to provide the results of the survey.[26] The Staff provided a complete, non-redacted version of the survey report to all consulting tribes (including

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[22] *See Applicant's Response to Petition to Intervene Filed by the Oglala Sioux Tribe*, at 6-7 (Feb. 25, 2013) (Crow Butte Response); *NRC Staff Response to the Oglala Sioux Tribe's Request for Hearing and Petition to Intervene*, at 11 (Feb. 25, 2013) (NRC Staff Response). The Staff stated at that time that a future discovery of cultural resources of interest to the Tribe could potentially support standing for the Tribe. *Id.*

[23] *See* NRC Staff Response at 4-5 (citing Camper, Larry W., NRC, letter to President John Yellow Bird Steele, Oglala Sioux Tribe (Sept. 5, 2012) (ML12248A299)). The surveys conducted covered four Crow Butte sites, including its central facility, the proposed North Trend Expansion Area, the proposed Marsland Expansion Area, and the proposed Three Crow Expansion Area. The Santee Sioux Nation and the Crow Tribe of Montana are not participants in this adjudication.

[24] *Id.*

[25] *Id.* at 5.

[26] *See* Memorandum and Order (Requesting Additional Information) (Mar. 15, 2013) (unpublished).

the Oglala Sioux Tribe) and then made available to the public a redacted version of the report.[27] The report of the survey findings (designated here as the SSN Report) indicated several sites of Native American origin within the boundaries of the area proposed for the Marsland license amendment that could be affected by activities proposed by Crow Butte.[28]

Because the Board had not yet ruled on standing and contentions at this point, it invited the Staff, Crow Butte, and the petitioners to file briefs addressing the impact of the new information on both standing and contention admissibility.[29] The Staff and Crow Butte filed responsive briefs; the Tribe did not.[30]

The Staff acknowledged that the Marsland Expansion Area lay within the Tribe's aboriginal land and that the sites identified in the SSN Report were of interest to the Tribe.[31] The Staff stated that the question of standing would turn on whether the Tribe had demonstrated an injury to that interest.[32]

In its response to the SSN Report, Crow Butte acknowledged that the Tribe "may have a concrete interest in the newly-discovered sites" but argued that it had not shown a procedural

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[27] *See NRC Staff Response to Board Order Requesting Additional Information* (Mar. 20, 2013) (explaining that the complete report would be available to the interested Native American tribes, with a version to be made publicly available later). Shortly thereafter, the Staff notified the Board, Crow Butte, and the petitioners once the public version of the report was available in ADAMS. Simon, Marcia, Counsel for NRC Staff, letter to the Administrative Judges (Apr. 3, 2013).

[28] Santee Sioux Nation, Crow Butte Project, Dawes County (SSN Report) (ML13093A123) (undated) (redacted).

[29] Memorandum and Order (Establishing Schedule for Additional Pleadings to Address Information in Recent Tribal Cultural Resources Survey Report) (Mar. 22, 2013) (unpublished).

[30] *See generally Applicant's Supplemental Response on Standing* (Apr. 10, 2013) (Crow Butte Supplemental Brief); *NRC Staff's Supplemental Pleading Regarding Santee Sioux Nation Report* (Apr. 10, 2013) (NRC Staff Supplemental Brief).

[31] NRC Staff Supplemental Brief at 3-4.

[32] *Id.* at 4.

injury under the consultation requirements of the National Historic Preservation Act (NHPA).[33] According to Crow Butte, the Tribe's concern was simply that the Staff would, in the future, violate its duty to consult with the Tribe under the NHPA. Crow Butte argued that the Tribe could not base standing "simply on a right to demand government compliance with the law" and that any claim of procedural injury for Staff non-compliance was premature.[34] The Board rejected Crow Butte's argument as an overly narrow reading of the Tribe's standing claim.[35] Instead, the Board found that the Tribe demonstrated standing based on its claimed interest in protecting Native American cultural resources on the Marsland Expansion Area, as indicated by the SSN Report and by the Tribe's historical occupation of the area.[36]

Crow Butte now argues that the Tribe has not shown that it meets the requirements for "organizational standing." In general, an organization may meet this standard by one of two means: either by showing a threat to its organizational interests or as a representative of one or more of its individual members. As an initial matter, we agree that the Tribe did not show representational standing.[37] Indeed, the Board did not predicate the Tribe's standing on its

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[33] Crow Butte Supplemental Brief at 7. The NHPA requires the Staff to consult with interested parties (including Indian Tribes) to identify historic properties, evaluate the potential effects of the project on those properties, and consider mitigation measures. *See* 16 U.S.C. § 470f; 36 C.F.R. § 800.1(a). *See also* 36 C.F.R. § 800.2(c)(ii).

[34] Crow Butte Supplemental Brief at 8.

[35] LBP-13-6, 77 NRC at 273-74.

[36] *Id*. The SSN Report included a request to allow "one or two" tribal monitors on the Marsland site during any drilling and construction near the identified cultural sites "because they are difficult to identify on the surface." SSN Report at 5.

[37] *See* Crow Butte Appeal at 8. Crow Butte's argument that the Tribe did not show that it "uses or visits Marsland" relates to representational standing, and we need not consider it further. Similarly, Crow Butte's assertion that the Tribe did not "suggest that its members have any direct connection with the project area" (by which we assume Crow Butte means no *current* direct connection) relates to representational standing.

representation of individual tribal members. Rather, the Board based standing on the Tribe's interest as a tribe in protecting its heritage—that is, its interest as an organization.[38]

Crow Butte next argues that the Tribe has no organizational interest in the cultural artifacts that may be onsite. In particular, Crow Butte claims that the Tribe has not shown that the Native American cultural resources identified on the site are directly connected with the Tribe. According to Crow Butte, the Tribe's interest in protecting the cultural resources on the site is "no different than the interest *any other person* or organization might have in protecting cultural and historical resources."[39]

Related to this argument, Crow Butte claims that the Board erred in relying on the information in the SSN Report to find a connection between the Tribe and the cultural items at Marsland.[40] It points out that the Tribe neither discussed nor incorporated that document into its pleadings.[41] Crow Butte argues that the Board erred in considering the SSN Report for standing purposes because the Tribe did not amend its petition or update its standing affidavits to indicate a particularized interest in the resources identified in the SSN Report.[42] By this reasoning, the Board should have disregarded the Report because the Tribe did not file a supplemental brief. But it appears to us that the Board viewed the report as additional confirmation of the Tribe's already-demonstrated interest in the proceeding, which it based on the Tribe's historical connection to the site.

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[38] LBP-13-6, 77 NRC at 272.

[39] Crow Butte Appeal at 8-9 (emphasis added).

[40] *Id.* at 9.

[41] *Id.*

[42] *Id.*

The Board found that, "even without the new cultural resources survey information, we would have concluded that [the Tribe] had established its standing to intervene in this proceeding."[43] The Board took the view that as long as relevant cultural resources had been identified within the Tribe's aboriginal lands, as they encompass the Marsland Expansion Area, it did not matter, for standing purposes, which participant first identified them or brought the additional information before it.[44] The Board considered the Report from the standpoint that the Tribe had *already* claimed an interest in any Native American artifacts found on the site. While the Board may be said to have "inferred" that the Native American cultural resources found on the site were connected to the Oglala Sioux Tribe, this connection was one the Tribe had already asserted in its original petition and in the Mesteth Declaration. We understand the Board to have construed the SSN Report as additional factual support—rather than the only support—for the Tribe's assertion that it had an interest in cultural resources that were present on the project site. For the purposes of determining standing, therefore, we find no error of law or abuse of discretion in the Board's decision.[45]

Crow Butte's argument that the Tribe has no "organizational standing" cannot be squared with our previous *Crow Butte License Renewal* ruling concerning the rights of a federally-recognized Indian tribe with respect to cultural resources found within its aboriginal lands. Crow Butte suggests that the cultural resources may have no connection with the Tribe, despite having been found within its aboriginal territory. But we recognized in the *Crow Butte*

[43] LBP-13-6, 77 NRC at 275 n.11.

[44] *Id*. at 275 n.10.

[45] The boards follow a longstanding principle that, in the standing analysis, "we construe the petition in favor of the petitioner." *Georgia Institute of Technology* (Georgia Tech Research Reactor, Atlanta, Georgia), CLI-95-12, 42 NRC 111, 115 (1995). *Accord Duke Energy Carolinas, LLC* (William States Lee III Nuclear Station, Units 1 and 2), LBP-08-17, 68 NRC 431, 439 (2008); *Progress Energy Carolinas, Inc.* (Shearon Harris Nuclear Power Plant, Units 2 and 3), LBP-08-21, 68 NRC 554, 559 (2008).

*License Renewal* proceeding that the Tribe has a cognizable interest in Native American cultural resources that are present within its aboriginal territory.[46] In addition, Crow Butte acknowledged before the Board that the Tribe "may have a concrete interest in the newly-discovered sites."[47] Finally, the Tribe claimed that cultural resources could be potentially harmed by operations at Marsland, particularly if the applicant fails to "properly judge the significance of these artifacts," an assertion that the Board found plausible.[48] The Board found that the Tribe's interest, coupled with a plausible potential injury to that interest, was a sufficient basis for standing.

For these reasons, and consistent with our ruling in the *Crow Butte License Renewal* matter, we defer to the Board's determination that the Tribe has sufficiently demonstrated the requisite potential injury based on its interest in protecting extant cultural resources located on its aboriginal lands. We decline to disturb the Board's finding of standing.

**B. Contention Admissibility**

The Staff joins Crow Butte in arguing that neither Contention 1 nor Contention 2 was properly admitted. As discussed below, we affirm the Board's decision to admit these two contentions.

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

In its Contention 1, as originally submitted, the Tribe argued that the application had failed to describe the environment with respect to cultural resources located in the Marsland Expansion Area.[49]

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[46] *See Crow Butte License Renewal*, CLI-09-9, 69 NRC at 337-39.

[47] Crow Butte Supplemental Brief at 7.

[48] *See* Mesteth Declaration ¶ 5. *See also* LBP-13-6, 77 NRC at 274.

[49] The contention also claimed that the Staff had not complied with the NHPA's requirement to consult with affected Indian tribes. The Board rejected the portion of the contention regarding compliance with the tribal consultation requirements under NHPA section 106, finding that the

(continued . . .)

In support of its contention, the Tribe offered the declaration of Mr. Mesteth. Mr. Mesteth stated that known cultural resources on land to the north of the site (including artifact scatters, "faunal kill and processing sites," and camps) indicate extensive use of the general area by indigenous people.[50] The Tribe argued, essentially, that although the Tribe did not know of any Native American artifacts or sites within the proposed project area (because it had not had the opportunity to look), such material was bound to be there.

Based upon Mr. Mesteth's declaration, the Board admitted that portion of Contention 1 challenging the description of cultural and historical resources at the site, as follows:

> The application fails to meet the requirements of 10 C.F.R. §§ 51.60 and 51.45, the National Environmental Policy Act [NEPA], the National Historic Preservation Act, and the relevant portions or 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.[51]

As discussed above, Crow Butte's application stated that two surveys were performed on the site; these surveys found no Native American cultural sites or artifacts on the site.[52] As stated in the SSN Report, however, a later survey identified nine Native American sites and two items of interest within the proposed Marsland Expansion Area.[53] The Board found a litigable

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concern had been raised prematurely. LBP-13-6, 77 NRC at 287 (citing *Crow Butte North Trend*, CLI-09-12, 69 NRC at 564-66, and *Crow Butte License Renewal*, CLI-09-9, 69 NRC at 348-51). A contention claiming the Staff's consultation was inadequate does not ripen until issuance of the Staff's draft environmental review document. *Crow Butte License Renewal*, CLI-09-9, 69 NRC at 351.

[50] *See* Mesteth Declaration ¶ 11.

[51] LBP-13-6, 77 NRC at 306.

[52] Environmental Report, § 3.8.1, at 3-77; Technical Report, § 2.4.1, at 2-72.

[53] Crow Butte Appeal at 11 n.38.

contention (as narrowed) because the project area contains potential cultural objects and sites that were not accounted for in the application.[54]

The Staff argues that the Board erred in admitting Contention 1 because it "improperly expanded the scope" of what is expected of an applicant under the NRC's regulations implementing the NHPA.[55] In particular, the Staff contends that under 10 C.F.R. § 51.45(c), the applicant is only required to provide information "to aid the Commission in the development of its independent analysis."[56] The Staff cites its own obligations under the NHPA to develop additional information in consultation with Indian tribes. Therefore, "the Applicant's [Environmental Report] will necessarily fail to contain all information relative to cultural resources onsite."[57] The Staff essentially argues that Crow Butte's Environmental Report was not fatally insufficient because the Staff does not expect Crow Butte's cultural resources discussion to be comprehensive.[58]

But the issue here is not whether Crow Butte should have done more to discover cultural resources on the site but whether the Tribe proffered a sufficient challenge to the application as presented. The Staff's reasoning must be reconciled with the provisions in 10 C.F.R. § 2.309(f)(1) and (f)(2), requiring a petitioner to base its environmental contentions on information available at the time its intervention petition is to be filed, including the applicant's

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[54] LBP-13-6, 77 NRC at 288.

[55] Staff Appeal at 6-7 ("Not only does the NHPA provide another avenue for the Staff to obtain information, but the NHPA *requires* the Staff to obtain information from sources other than the Applicant. Government-to-government consultation with tribes is mandatory when historic properties with religious or cultural significance to them may be affected by an undertaking.") (Emphasis in original, footnote omitted).

[56] *Id*.

[57] *Id*. at 7.

[58] *Id*. at 8-9.

environmental report. Our regulations do not contemplate a petitioner waiting for the Staff to perform its responsibilities under the NHPA before the petitioner raises environmental contentions. Although our regulations do allow for contentions based upon the Staff's environmental review documents, a request to admit a new or amended contention requires a petitioner to show that the information upon which it is based was "not previously available" and "materially different from information previously available."[59] The fact that the Staff will develop additional information relevant to cultural resources, as part of its NHPA review, does not preclude a challenge to the completeness of the cultural resources information in the application.

In support of its original contention, as supported by the Mesteth Declaration, the Tribe argued that because the Marsland site contains both current and "extinct water resources," which were "favored camping sites of indigenous peoples, both historically and prehistorically," there is a strong likelihood "that cultural artifacts and evidence of burial grounds exist in these areas" despite the contrary results reported in the Crow Butte's cultural resource survey.[60] Further, the Tribe argued that "those sites need to be identified" and the impact of proposed licensed activities evaluated. The Board determined, "Given the nature of Native American aboriginal culture, in the circumstances this statement, in and of itself, appears sufficient to support this contention."[61] In view of Mr. Mesteth's status as the Tribe's THPO, and the fact that the Marsland Expansion Area is within the Tribe's aboriginal area, we are satisfied that the Tribe has established a genuine dispute with the Marsland application on a material issue of fact.

[59] 10 C.F.R. §§ 2.309(f)(2); (c)(i), (ii).

[60] Mesteth Declaration ¶ 8.

[61] LBP-13-6, 77 NRC at 288.

Crow Butte repeats the argument, here joined by the Staff, that the Board improperly considered the SSN Report in making its contention admissibility determination.[62] The crux of this argument is that the Tribe did not comment on the report's significance or relevance to its contention, even when given the express opportunity to do so; as such, the Board's use of the Report to buttress its finding of contention admissibility was improper.[63] Given that the Board found the contention admissible based on the original statements of Mr. Mesteth, even without the support of the SSN Report, we need not reach the question whether the Board properly relied upon the SSN Report in ruling on the admissibility of Contention 1.[64]

We defer to the Board's decision admitting the contention.

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

We also defer to the Board with respect to its ruling admitting Contention 2. The contention, as described in the Tribe's intervention petition and in the supporting affidavit of Dr. Hannan LaGarry,[65] meets the minimum requirements for contention admissibility.

Contention 2, as admitted, states:

> 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

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[62] Staff Appeal at 10-13; Crow Butte Appeal at 11-12.

[63] The Staff adds that because the petitioner has the burden to explain the significance of a document, the Board should not have considered it in finding the contention admissible. Staff Appeal at 10.

[64] *See* LBP-13-6, 77 NRC at 288 (slip op. at 32). We are not persuaded otherwise by Commissioner Svinicki's dissenting opinion in which she supports a remand to the Board.

[65] OST Petition, Attachment 9, *Expert Opinion on the Environmental Safety of In-Situ Leach Mining of Uranium Near Marsland, Nebraska, Dr. Hannan LaGarry* (LaGarry Declaration).

> resources, as required by 10 C.F.R. § 51.45, NUREG-1569 section 2.7, and the National Environmental Policy Act.[66]

The Board found that Contention 2 challenged the "adequacy of the hydrogeologic information provided in [Crow Butte's] application, claiming the data provided does not demonstrate that [Crow Butte] can contain fluid migration."[67] Specifically, the Board found that the contention comprised four claimed "deficits" in the application: (1) the discussion of the project's proposed effects on surface and groundwater; (2) the application's description of effective porosity, hydraulic conductivity, and hydraulic gradient; (3) the lack of a "conceptual model of site hydrology adequately supported by data," and (4) "unsubstantiated assumptions" concerning confinement of the aquifers.[68] Crow Butte and the Staff, on appeal, argue that these general claims were not supported by citations to the specific portions of the application that the Tribe maintains do not "provide sufficient information" and do not identify particular omissions in the application.[69]

As originally submitted, the contention stated that the application "fails to provide sufficient information regarding the geological setting" to meet the requirements of NEPA, our regulations, and NUREG-1569, the Standard Review Plan for *in situ* leach uranium extraction applications.[70] It continued with a brief discussion of the information relating to hydrology and

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[66] LBP-13-6, 77 NRC at 306.

[67] *Id.* at 289.

[68] *Id*.

[69] *See, e.g*., Crow Butte Appeal at 14, 16-19 (describing the application's discussions of each topic claimed to be "insufficient"); Staff Appeal at 19-20.

[70] OST Petition at 17-18 (citing NUREG-1569, Standard Review Plan for In Situ Leach Uranium Extraction License Applications (Jun. 2003) (ML031550272); 10 C.F.R. §§ 51.45, 51.60). The Standard Review Plan, NUREG-1569, does not in itself impose requirements on an applicant but provides guidance to the Staff in reviewing an application. *See Curators of the University of Missouri*, CLI-95-1, 41 NRC 71, 98 (1995).

geology that should be included in an *in situ* uranium recovery application.[71] The Tribe claimed that the application must include a "description of the affected environment . . . sufficient to establish potential effects . . . on adjacent surface and ground water resources"; a "conceptual model of site hydrology"; a description of "hydrogeology, including the horizontal and vertical hydraulic conductivity"; and a description of the "effective porosity, hydraulic conductivity, and hydraulic gradient."[72] The Tribe also asserted that "the application fail[ed] to present sufficient information in a scientifically defensible manner to adequately characterize the site and off-site hydrology to ensure confinement of the extraction fluids."[73]

In support of this contention, as noted above, the Tribe provided the declaration of Dr. LaGarry, an expert in the geology of the region, to support its claims. Dr. LaGarry's declaration begins with an overview of the stratigraphy of water-bearing rocks of northwestern Nebraska, with specific comments about the occurrence of each formation in the Marsland area.[74] He suggests that some of the information upon which Crow Butte relies is outdated and incorrect: "The recent mapping of the geology of northwestern Nebraska has shown that the simplified, 'layer cake' concept applied by pre-1990s workers is incorrect, and overestimates the thickness and areal extent of many units by 40-60%."[75]

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[71] OST Petition at 17-18. *See* 10 C.F.R pt. 40, app. A. Because the requirements listed in Appendix A were specifically written for conventional uranium recovery facilities, not all requirements found there are applicable to *in situ* leach recovery facilities. NUREG-1569, appendix B provides a table of applicable criteria and the corresponding sections in the review plan where such criteria are addressed.

[72] OST Petition at 17-18.

[73] *Id*.

[74] LaGarry Declaration at 2-4 (unnumbered).

[75] LaGarry Declaration at 4 (unnumbered). *See, e.g.*, Environmental Report, § 3.3.1.1, 3-4 to 3-16.

Dr. LaGarry next identifies three potential pathways through which contaminants could reach the aquifers lying above the mined formation and migrate to the White and Niobrara Rivers: (1) surface leaks and spills, (2) excursions from the injection and extraction wells, and (3) lack of containment caused by faults.[76] With respect to the lack of containment, he states that there are "potential faults in the Marsland area," which "may allow the transmission of mining fluids to travel upward into the aquifer."[77] Dr. LaGarry's declaration includes a large-scale map of western Nebraska showing a single known fault in the Marsland area, but Dr. LaGarry states that, based on his work over the past twenty-five years, "there are likely hundreds more" such faults.[78] He concluded that, because of these potential pathways, it was his opinion that *in situ* leach uranium recovery should not be allowed in the Marsland area.[79]

Crow Butte and the Staff argued before the Board that Contention 2 did not demonstrate a genuine dispute with the application as required by 10 C.F.R. § 2.309(f)(1)(vi). That provision requires a contention to:

> provide sufficient information to show that a genuine dispute exist with the applicant/licensee on a material issue of law or fact. This information must include references to specific portions of the application . . . that the petitioner disputes and the supporting reasons for each dispute.

Both the Staff and Crow Butte pointed out that the application included discussions of each topic listed in Contention 2. Their responses cited the specific sections of the application where each matter was addressed.[80] Crow Butte and the Staff argued that the petition did not address the

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[76] *See* LaGarry Declaration at 4-5 (unnumbered). Two of these pathways (that is, surface leaks and leaks from the injection and extraction wells) do not relate to any subject raised by the petitioners in Contention 2.

[77] *Id.*

[78] *Id*.

[79] *Id*. at 5 (unnumbered).

[80] NRC Staff Response at 26-27, 29; Crow Butte Response at 12-13.

information in the application or identify any information that was purportedly missing or inaccurate.[81] Before the Board, the Tribe claimed that these arguments go to the merits of the contention. The Tribe claimed that the Staff and Crow Butte were essentially asking the Board to consider, at the contention admissibility stage, whether the cited portions of the application were sufficient or not.[82] The Tribe also argued that the regulation does not require the Tribe to discuss "each and every portion of the application that bears any relation to the issue being contested," but requires a "brief explanation" of the argument and a "concise statement" of the relevant facts.[83]

In rejecting the Staff's and Crow Butte's arguments, the Board held that the requirement that a contention refer to "specific portions of the application" has the dual purpose of ensuring that the boards can determine whether the contention is within the scope of the proceeding, and that the applicant knows which portions of the application it must defend.[84] The Board found that the Tribe's "petition makes abundantly clear which section of [Crow Butte's] application it is challenging, namely those sections pertaining to [Crow Butte's] discussion of the hydrogeologic conditions at and around the [Marsland] site and [Crow Butte's] discussion of fluid containment at the site."[85] The Board concluded that the contention was "specific enough to allow [Crow Butte] to understand what portions of its application are being

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[81] *See* NRC Staff Response at 29 ("The Tribe does not explain what it means by 'scientifically defensible' and gives no examples to support that claim"); Crow Butte Response at 14 ("Dr. LaGarry does not address any of the evidence provided by [the application] in support of confinement or even point to any portion of the application that is alleged to be deficient").

[82] *See Reply to NRC Staff and Applicant Responses to the Petition to Intervene and Request for Hearing of the Oglala Sioux Tribe* (Mar. 4, 2013), at 14-15, 16.

[83] *Id.* at 21 (citing 10 C.F.R. § 2.309(f)(1)).

[84] LBP-13-6, 77 NRC at 292-93.

[85] *Id*. at 293.

challenged."[86] The Board found that the Tribe was "essentially pointing to all sections of the application relating to hydrogeology as the source of its concern about alleged inadequacies that [the Tribe] perceives as all-encompassing deficiencies in the application."[87] The Board went on to add that it was "apparent … that [the Tribe] is challenging [Environmental Report] section 3.4.3.2, 'Aquifer Testing and Hydraulic Parameter Identification Information,' and [Environmental Report] section 3.4.3.3, 'Hydrologic Conceptual Model for the Marsland Expansion Area.'"[88]

As we stated at the outset, we afford the Board's rulings on contention admissibility substantial deference. Such deference is appropriate even where we may consider that the support for the contention is weak, or where the claim's materiality presents a "close question."[89] The issue involved in the proposed contention—confinement of the aquifers—is material to the environmental impacts of this licensing action.[90] The Board concluded that the contention was specific enough, and we defer to the Board on that issue. We therefore decline to disturb the Board's decision to admit Contention 2.

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[86] *Id.* at 292.

[87] *Id*.

[88] *Id*. at 293. In Environmental Report § 3.4.3.2, Crow Butte discusses the purpose, conduct, and results of a 2011 pumping test, which it claims (among other things) establishes the hydraulic conductivity of the site and demonstrates adequate confinement of the aquifers. In Environmental Report § 3.4.3.3, it discusses the hydraulic conceptual model for the proposed expansion area and its bases (including core sampling) for that model.

[89] *See, e.g*., *NextEra Energy Seabrook, LLC* (Seabrook Station, Unit 1), CLI-12-5, 75 NRC 301, 326-27, 329 (2012). Although we agree with Commissioner Svinicki that this presents a close question, we instead conclude that deference to the Board's findings is appropriate.

[90] *See* Crow Butte North Trend, CLI-09-12, 69 NRC at 559.

## III. CONCLUSION

Based on the foregoing, we *affirm* LBP-13-6 with respect to its determinations regarding the Oglala Sioux Tribe's standing and the admission of Contentions 1 and 2.

IT IS SO ORDERED.

For the Commission

**NRC Seal**

**/RA/**

Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, Maryland,
this 12th day of February, 2014

Commissioner Svinicki, dissenting in part.

I respectfully dissent with regard to the admissibility of the Tribe's Contentions 1 and 2. I recognize that both contentions raise close questions under our contention admissibility standards and agree with much of the majority's reasoning. But, for the following reasons, I cannot concur in the majority's result.

A. The Board Did Not Fully Consider Whether the Mesteth Declaration Alone Provided Sufficient Support for Contention 1

With respect to Contention 1, I agree with the majority's reluctance to rely on the SSN Report to support the contention.[91] As the majority's opinion notes, the initial hearing request did not cite the SSN Report, which was not available at that time.[92] Rather, the Staff provided the SSN Report in response to the Board's March 15, 2013, request.[93] The Tribe never amended its contention to include the SSN Report[94] and declined to comment on the report's significance when asked to do so by the Board.[95] Therefore, reliance on the SSN Report to establish the admissibility of Contention 1 would depart from our frequently-stated rule that the petitioner, rather than the licensing board, bears the burden of establishing the admissibility of proffered contentions.[96] In keeping with this rule, we have previously overturned board

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[91] *See* p. 15, *supra*.

[92] *Id*. at 5-7, 12.

[93] *Id*. at 6-7 (citing Memorandum and Order (Requesting Additional Information) (Mar. 15, 2013) (unpublished)).

[94] *See* 10 C.F.R. § 2.309(c) (allowing parties to file amended contentions upon discovering new information that lends further support to existing claims).

[95] *See* p. 7 *supra* (noting that the Tribe did not file a brief "addressing the impact of the new information on both standing and contention admissibility").

[96] *E.g.*, *Entergy Generation Co. and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-12-15, 75 NRC 704, 714 (2012).

decisions that revised inadmissible contentions to render them admissible[97] or inferred additional bases for contentions beyond those supplied by the petitioner.[98] In my view, basing Contention 1 on the contents of the SSN report would constitute a similar error. The majority's opinion wisely avoids this result.

However, I do not agree with the majority's determination to uphold the admission of Contention 1 on the grounds that the Board found the Mesteth Declaration alone provided sufficient support.[99] The Board's order indicates that the Mesteth Declaration might support the contention; "Given the nature of Native American aboriginal culture, in these circumstances this statement [(the Mesteth Declaration)], in and of itself, *appears* sufficient to support this contention."[100] But, the Board ultimately stated that the SSN Report obviated the need to determine whether the Mesteth Declaration provided sufficient support for Contention 1 — "to whatever degree it might not be sufficient, the subsequent SSN/CN survey has shown the concern to be well founded."[101] Thus, in admitting Contention 1, the Board concluded that "the recent archaeological survey discovery of potential Native American cultural resource sites on the [Marsland Expansion Area] is sufficient to establish the admissibility" of Contention 1.[102] Moreover, the lack of response to the Staff's objections to the Mesteth Declaration at the contention admissibility stage underscores the incompleteness of the Board's consideration of

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[97] *Progress Energy Carolinas, Inc*. (Shearon Harris Nuclear Power Plant, Units 2 and 3), CLI-09-8, 69 NRC 317, 323-27 (2009).

[98] *Arizona Public Service Co*. (Palo Verde Nuclear Generating Station, Unit Nos. 1, 2, and 3), CLI-91-12, 34 NRC 149, 155 (1991).

[99] *See* p. 15, *supra*.

[100] LBP-13-6, 77 NRC at 288 (emphasis added).

[101] *Id.*

[102] *Id*.

the Mesteth Declaration's adequacy.[103] As a result, I believe the agency has yet to consider fully whether the Mesteth Declaration provides adequate support for Contention 1. Because we generally prefer that licensing boards make initial factual determinations,[104] I would remand Contention 1 to the Board to consider fully whether the Mesteth Declaration alone provides an adequate factual basis for Contention 1.

B. Contention 2 Does Not Show a Genuine Dispute on a Material Issue

With respect to Contention 2, I again concur with much of the majority's reasoning. I agree with the majority's finding that aquifer confinement is a material issue for this proceeding.[105] In addition, I agree with the majority's finding that Dr. LaGarry suggests that some specific references in the Environmental Report may be outdated, particularly those that he asserts rely on an outdated "layer cake" concept or potentially understate the number of faults in Western Nebraska.[106] However, in my view, the connection between these findings is too attenuated to show the genuine dispute on a material issue our regulations require of an admissible contention.

Specifically, our regulations require the proponent of a contention to "provide sufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact."[107] Our requirement that the petitioner show a genuine dispute on a material

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[103] *Compare id. with* NRC Staff Response at 21-23 (claiming that the Mesteth Declaration lacks sufficient specificity, did not adequately challenge the applicant's methodology, and relies on a quotation from the Environmental Report that does not pertain to the Marsland site).

[104] *Washington Public Power Supply System* (WPPSS Nuclear Project Nos. 3 and 5), CLI-77-11, 5 NRC 719, 722-23 (1977).

[105] *See* p. 20, *supra*.

[106] *Id*. at 17-18.

[107] 10 C.F.R. § 2.309(f)(1)(vi).

issue ensures that an "inquiry in depth is appropriate."[108] We have observed that a "dispute at issue is 'material' if its resolution would 'make a difference in the outcome of the licensing proceeding.' "[109]

While the Tribe has shown that aquifer confinement is an important issue, the disputes raised by the Tribe do not contravene Crow Butte's analysis regarding confinement. Therefore, Contention 2 does not establish a genuine dispute on a material issue. At most, the Tribe claimed that some assumptions regarding confinement of mining fluids from the aquifer may not be sound because "there are likely hundreds more" faults in western Nebraska than some scholars have claimed and the "layer cake" model may be outdated.[110] But, Crow Butte does not rely on these assumptions to establish confinement—rather it relies on an aquifer pumping test, among other things.[111] Nothing in the LaGarry Declaration, LBP-13-6, or the majority opinion clearly connects the disputes identified by the Tribe with the analyses Crow Butte relies on to establish confinement. Therefore, even if these disputes were resolved in favor of the Tribe, that resolution would have no evident impact on the results of the environmental analysis. Rather, the disputes raised by Contention 2 appear to be the type of "flyspecking" we have previously found inappropriate for environmental contentions, such as Contention 2.[112] Consequently, Contention 2 does not raise a genuine dispute with the application on a material

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[108] Rules of Practice for Domestic Licensing Proceedings – Procedural Changes in the Hearing Process, 54 Fed. Reg. at 33,168, 33,171 (1989) (quotations omitted).

[109] *Duke Energy Corporation* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 333-34 (1999) (quoting Rules of Practice for Domestic Licensing Proceedings – Procedural Changes in the Hearing Process, 54 Fed. Reg. at 33,168, 33,172 (1989)).

[110] *See* LaGarry Declaration at 4-5 (unnumbered).

[111] *E.g.*, Environmental Report, § 3.4.3.2, at 3-40 to 3-42.

issue, as required by our regulations. In light of this, I also respectfully dissent from the majority's conclusion on the admissibility of Contention 2.

[112] *Hydro Resources, Inc.* (P.O. Box 15910, Rio Rancho, NM 87174), CLI-01-4, 53 NRC 31, 71 (2001).