

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)	
)	
POWERTECH (USA) INC.,)	Docket No. 40-9075-MLA
)	ASLBP No. 10-898-02-MLA-BD01
(Dewey-Burdock In Situ Uranium Recovery)	
Facility))	

OTLALA SIOUX TRIBE’S MOTION FOR SUMMARY DISPOSITION
NATIONAL ENVIRONMENTAL POLICY ACT
CONTENTIONS 1A AND 6 – MITIGATION MEASURES

I. INTRODUCTION

Pursuant to this Board’s Scheduling Order dated March 4, 2014, the Oglala Sioux Tribe (“Tribe”), through counsel, timely seeks summary disposition of National Environmental Policy Act (“NEPA”) issues in Contentions 1A and 6 regarding the failure to disclose and analyze mitigation measures and the effectiveness of mitigation measures. Both contentions have already been admitted by the Board based on alleged deficiencies in the NRC Staff’s NEPA documents and in Powertech’s application materials.

This Motion for Summary Disposition is based on deficiencies in the NEPA documents prepared by NRC Staff. The proper remedy for NEPA violations is a remand of the FSEIS and vacation of the license until such time as NEPA compliance is attained. Based on the grounds asserted herein, the FSEIS should be remanded to NRC Staff for NEPA compliance, including an opportunity for public review and comment on a lawful DSEIS that includes adequately developed mitigation measures and a reasonable assessment of their effectiveness.

The NEPA requirements to analyze cultural resources impacts identified in Contention 1A are presented in combination with the more general claims in Contention 6. This Motion

addresses Contention 6, which concerns mitigation generally. In short, the undisputed facts in the contentions involve NRC Staff decisions to allow Powertech and NRC Staff to develop and review proposed mitigation measures after the NEPA process completes and after NRC Staff issues the license.

NEPA's prohibition against taking agency action before NEPA compliance provides the legal basis for summary disposition. 42 U.S.C. § 4332(2)(C) *cited by New York v. NRC*, 681 F.3d 471, 476 (D.C. Cir. 2012). Here, NRC Staff violated NEPA requirements that mitigation measures must be developed, disclosed, reviewed, and evaluated for effectiveness throughout the EIS, with the benefit of review and comment by other agencies, the public, and the Tribe. *Id.*; 10 C.F.R. §§ 51.10, 51.70 and 51.71; 40 C.F.R. § 1502.14(d)(include mitigation in alternatives), § 1502.16(h)(examine mitigation in consequences analysis). NEPA disclosure and scrutiny of mitigation must take place before NRC Staff issues a license. *Id.* Otherwise, NEPA's mandate that agencies "shall [...] utilize a systematic, interdisciplinary approach" is reduced to an after-the-fact formality. 42 U.S.C. § 4332(2)(A). NRC Staff's promises of future NEPA compliance cannot remedy an unlawful FSEIS or a license issued before NRC Staff has fulfilled its NEPA duties. *Id.*

NRC Staff had promised to provide a supplemental NEPA comment opportunity to cure the issues raised in admitted DSEIS Contentions 1A and 6 before the FSEIS issued. NRC Staff's Answer to Contentions on DSEIS at 13. However, in November 2013 NRC Staff abandoned its promise to develop, analyze, and disclose cultural resources impacts and develop effective mitigation measures within the NEPA process. NRC Staff Response to FSEIS Contentions at 5. The FSEIS confirms that the FSEIS and license were issued before Powertech or NRC Staff

completed a Programmatic Agreement (“PA”) to establish the newly segregated cultural resources analysis.

The NRC staff is currently developing a PA with all consulting parties to develop measures to avoid, minimize, or mitigate sites that could be impacted such as those listed in Tables 4.9-1 and 4.9-3.

FSEIS at 4-186. The Oglala Sioux Tribe has not signed any PA and NRC Staff has not served or filed a final PA signed by all required parties in the present hearing record. The Tribe’s previous submittals to NRC Staff¹ detail the problems of segregating the cultural resources issues from the NEPA-mandated analysis of agency actions “affecting the quality of the human environment.” 42 U.S.C. § 4332(C).

As a matter of law, summary disposition of the NEPA contentions concerning mitigation measures is appropriate where NRC Staff unlawfully abandoned the NEPA analysis it had committed to, and was required by law to complete, and instead issued Powertech a license based on NRC Staff and Powertech promises to someday “develop measures to avoid, minimize, or mitigate” impacts important to the Oglala Sioux Tribe. FSEIS at 4-186.

II. STANDARDS OF SUMMARY DISPOSITION

This matter is being heard pursuant to Subpart L, which contains a summary disposition provision that incorporates the standards set out in Subpart G. 10 C.F.R § 2.1205(c). Both provisions require “a short and concise statement of material facts for which the moving party contends that there is no genuine issue to be heard.” *Id.* § 2.1205(c).

The operative summary disposition rule provision states, in relevant part:
The presiding officer shall render the decision sought if the filings in the proceeding, depositions, answers to interrogatories, and admissions on file, together with the

¹ See e.g. Exh. 2 to Oglala Sioux Tribe FSEIS Contentions, at 2 (President Bryan V. Brewer, President, Oglala Sioux Tribe, explaining that NRC Staff had abandoned the commitment, made in NRC Staff filings in these proceedings, to comply with NEPA’s public involvement procedures when analyzing cultural resources impacts.).

statements of the parties and the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a decision as a matter of law.

10 C.F.R. § 2.710(d)(2). As a practical matter, this standard establishes a two-part test: first, the Board must determine if any material facts remain genuinely in dispute; and second, if no such disputes remain, the Board must determine if the movant's legal position is correct. *Id.*

The issues forwarded in the present motion involve “[t]he National Environmental Policy Act of 1969 (‘NEPA’), 42 U.S.C. § 4321 et seq., [which] requires federal agencies such as the Commission to examine and report on the environmental consequences of their actions.” *New York v. NRC*, 681 F.3d 471, 476 (D.C. Cir. 2012). The D.C. Circuit, which regularly reviews decisions of the Commission, has “long held that NEPA requires that ‘environmental issues be considered at every important stage in the decision making process concerning a particular action.’” *New York v. NRC*, 681 F.3d 471, 476 (D.C. Cir. 2012) *citing Calvert Cliffs’ Coordinating Comm., Inc. v. Atomic Energy Comm’n*, 449 F.2d 1109, 1118, 146 U.S. App. D.C. 33 (D.C. Cir. 1971).

III. LEGAL ARGUMENT

In the present matter, NRC Staff has taken final action on behalf of the Commission by preparing the required NEPA documentation and granting Powertech's license request without analyzing the effectiveness of proposed mitigation measures, as alleged in admitted Contention 6. Many mitigation measures, particularly those associated with NEPA analysis of cultural resources impacts raised in admitted Contention 1A, remain under development. Although the National Historic Preservation Act, Migratory Bird Treaty Act, Bald and Golden Eagle Protection Act, Clean Air Act, Clean Water Act, and other statutes are related to the NEPA portions of the contentions presented for summary disposition, the Tribe only seeks resolution of the NEPA issues via the present motion for summary disposition.

As summarized by the Board when admitting the relevant contentions, NRC Staff and Powertech have argued that NRC Staff may forego detailed analysis of the effectiveness of mitigation measures and need not go beyond what was contained in the DSEIS. Memorandum and Order on DSEIS Contentions, LBP-13-09, (July 22, 2013) at 35. The Tribe argued that site-specific and detailed analysis of the “expected effectiveness/limitations of each measure, [is] required by NEPA.” *Id.* at 38. The NRC Staff’s refusal to analyze mitigation measures and, separately, its refusal to analyze the effectiveness of proposed mitigation measure can be resolved as a matter of law and is therefore ripe for summary disposition in favor of the Tribe.

A. Disclosing and Analyzing the Effectiveness of Mitigation Measures is a Mandatory Component of NEPA Analysis

The present motion for summary disposition is based on the NEPA-based issues raised in Contention 1A involving cultural resources and the broader set of mitigation issues raised in Contention 6.

As the D.C. Circuit explained, “whether the analysis is generic or site-by-site, it must be thorough and comprehensive.” [...] Thus, the NRC must produce a comprehensive and thorough NEPA analysis of all NEPA issues [...], including mitigation [...], and if the issue is not covered in a generic EIS it must be covered in the site-specific NEPA document.

In re Calvert Cliffs 3 Nuclear Project, LLC, (Calvert Cliffs Nuclear Power Plant, Unit 3), LBP-12-18, 76 N.R.C. 127, 178 (2012) *discussing New York v. NRC*, 681 F.3d at 480-81. NRC precedent confirms the duty to examine mitigation of impacts (including with respect to “environmental justice” communities) in NEPA documents.

We expect NRC EISs, and presiding officers in adjudications, to inquire whether a proposed project has disparate impacts on “environmental justice” communities and whether and how those impacts may be mitigated.

In Re Hydro Resources, 53 N.R.C. 31, 64 (N.R.C. 2001) (emphasis supplied) *citing Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77, 106-110 (1998)(remanding for consideration of mitigation measures).

To satisfy NRC's NEPA duty² to disclose and analyze mitigation measures, the NEPA documents must: (1) "include appropriate mitigation measures not already included in the proposed action or alternatives," and (2) "include discussion of . . . Means to mitigate adverse environmental impacts (if not already covered under 1502.14(f))." 40 C.F.R. § 1502.14(f); 40 C.F.R. § 1502.16(h). "Mitigation" is defined as a way to avoid, minimize, rectify, or compensate for the impact of a potentially harmful action. 40 C.F.R. § 1508.20 (a)-(e), 50 C.F.R. 51.14(b)(adopting CEQ definition). The NEPA duty to include and analyze mitigation measures is applicable directly to NRC actions via the CEQ regulations and via NRC's NEPA regulations. 10 C.F.R. §§ 51.10, 51.70 and 51.71.

NEPA requires that mitigation measures be discussed with "sufficient detail to ensure that environmental consequences have been fairly evaluated." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 352 (1989). "[O]mission of a reasonably complete discussion of possible mitigation measures would undermine the 'action-forcing' function of NEPA. Without such a discussion neither the agency nor other interested groups and individuals can properly evaluate the severity of the adverse effects." *Robertson*, 490 U.S. at 353. Regardless of whether or not mitigation can be legally required, the NEPA discussion of mitigation measures must

²Issues involving NRC Staff promises to later comply with National Historic Preservation Act are irrelevant to summary deposition of NEPA claims where "compliance with the NHPA 'does not relieve a federal agency of the duty of complying with the impact statement requirement 'to the fullest extent possible.''" *Lemon v. McHugh*, 668 F. Supp. 2d 133, 144 (D.D.C. 2009) *quoting Preservation Coalition, Inc. v. Pierce*, 667 F.2d 851 (9th Cir. 1982) *quoting* 42 U.S.C. § 4332.

assess their effectiveness in context of the proposed action and proposed alternatives. 40 C.F.R. § 1502.14(f).

An essential component of a reasonably complete mitigation discussion is an assessment of whether the proposed mitigation measures can be effective. *Compare Neighbors of Cuddy Mountain v. U.S. Forest Serv.*, 137 F.3d 1372, 1381 (9th Cir. 1998) (disapproving an EIS that lacked such an assessment) *with Okanogan Highlands Alliance v. Williams*, 236 F.3d 468, 477 (9th Cir. 2000) (upholding an EIS where “[e]ach mitigation process was evaluated separately and given an effectiveness rating”). The Supreme Court has required a mitigation discussion precisely for evaluating whether anticipated environmental impacts can be avoided. *Robertson*, 490 U.S. at 351-52 (citing 42 U.S.C. § 4332(C)(ii)).

A NEPA-compliant mitigation discussion without at least some evaluation of effectiveness is useless in making that determination. *South Fork Band Council v. U.S. Dep’t of Interior*, 588 F.3d 718, 726 (9th Cir. 2009). Agencies cannot rely on untested mitigation measures:

[T]he Court holds that the Corps’ reliance on mitigation measures that were unsupported by any evidence in the record cannot be given deference under NEPA. The Court remands to the Corps for further findings on cumulative impacts, impacts to ranchlands, and the efficacy of mitigation measures.

Wyoming Outdoor Council v. U.S. Army Corps of Eng’rs, 351 F. Supp. 2d 1232, 1238 (D. Wyo. 2005). This is especially true where the effectiveness of mitigation is challenged in the comments. “The comments submitted by [plaintiff] also call into question the efficacy of the mitigation measures and rely on several scientific studies. In the face of such concerns, it is difficult for this Court to see how the [agency’s] reliance on mitigation is supported by substantial evidence in the record.” *Wyoming Outdoor Council*, 351 F. Supp. 2d at 1251, n. 8.

Simply listing the mitigation measures, and asserting that they may be successful in eliminating or substantially reducing the Project’s adverse impacts, with no scientific evidence or analysis to support those claims, is the definition of an arbitrary and capricious decision. “[T]he Court [cannot] defer to the [agency’s] bald assertions that mitigation will be successful.” *Id.* at 1252. Mitigation must be “supported by ...substantial evidence in the record.” *Id.* Without that support, the agency “was arbitrary and capricious in relying on mitigation to conclude that there would be no significant impact to [environmental resources].” *Id.*

Last, “for contentions based on NEPA, such as the one at issue here, the burden shifts to the Staff, because the NRC, not the applicant, bears the ultimate burden of establishing compliance with NEPA.” *In re Calvert Cliffs 3 Nuclear Project, LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), LBP-12-17, 76 N.R.C. 71, 80 (2012).

B. Contention 1A (mitigation issues only) Effectiveness of Mitigation Measures Regarding Cultural Resource were not Analyzed Where such Mitigation Measures have not yet Been Developed

Here, where attempts to develop cultural resource impacts mitigation is ongoing, there is no dispute of material fact that the DSEIS and FSEIS were prepared and issued before NRC Staff had gathered the information necessary to include cultural resources mitigation within the NEPA process. 40 C.F.R. § 1502.14(f)(requiring mitigation in alternatives). After-the-fact development of mitigation prevents NEPA disclosure and analysis of the effectiveness of unknown mitigation in avoiding, minimizing, rectifying, reducing, or eliminating cultural resources impacts. 40 C.F.R. § 1502.16(h), §1508.20(definition of mitigation). As a matter of law, NRC Staff cannot meet its NEPA duties where cultural resource mitigation admittedly has not yet been developed. *Muckleshoot Indian Tribe v. U.S. Forest Service*, 177 F.3d 800, 805 (9th Cir. 1999). *See also* 36 C.F.R. § 800.8(c)(1)(v)(agency must “[d]evelop in consultation with

identified consulting parties alternatives and proposed measures that might avoid, minimize or mitigate any adverse effects of the undertaking on historic properties and describe them in the [NEPA document].”). These issues were squarely raised in admitted Contentions 1A and 6. Oglala Sioux Tribe Contentions on Draft Supplemental Environmental Impact Statement at 5-7, 9-10 (Contention 1); 24-25 (Contention 6).

NRC Staff confirmed its untenable position in its unsuccessful opposition to the Tribe’s Contention 1A, which included a NRC Staff promise to cure the DSEIS deficiency.

[NRC Staff] is working to facilitate a field survey of the Dewey-Burdock site in order to obtain additional information on historic properties. When the survey is complete, the Staff will supplement its analysis in the DSEIS and circulate the new analysis for public comment.

NRC Staff’s Answer to Contentions on Draft Supplemental Environmental Impact Statement, at 13. Contention 1A was admitted, despite the NRC Staff promise to cure the NEPA violation.

These same concerns and legal issues apply to the FSEIS pursuant to the migration tenant where “the issue raised by Intervenors remains the same -- whether the discussion of mitigation is sufficient to satisfy the requirements of NEPA.” *Detroit Edison Company* (Fermi Nuclear Power Plant, Unit 3), LBP-12-23, 76 N.R.C. 445, 471 (2012).

Instead of curing, NRC Staff compounded the NEPA violations by issuing the FSEIS and license before the still-ongoing cultural resources analysis was prepared, without disclosing the mitigation measures in a NEPA document, without analyzing site-specific mitigation measures or their effectiveness in a NEPA analysis, and without circulating a NEPA analysis of mitigation measures for public comment. There can be no dispute of fact where the FSEIS confirms that NRC Staff decided to abandon representations and commitments made in these proceedings and segregate consideration of cultural resources issues from the NEPA process. FSEIS at 4-186 (“The NRC staff is currently developing a PA [...] to develop measures to avoid, minimize, or

mitigate sites that could be impacted...”). As a matter of law, NRC Staff’s decision to delay mitigation measures until after construction commences and outside the NEPA process does not find support under NEPA, as interpreted and applied by the federal courts. *Muckleshoot Indian Tribe*, 177 F.3d 800, 805 (9th Cir. 1999).

Indeed, NRC Staff’s argument was rejected in another case where NRC Staff delayed disclosure and analysis of impacts to cultural resources. *In the Matter of Hydro Resources, Inc.*, 50 N.R.C. 3 (N.R.C. 1999). There, the Commission eventually excused the NRC Staff’s NEPA violations where a post-EIS analysis and review was completed before licensing. *Id.* at 14 (“Even if one assumes that the FEIS did not contain all the information considered by the Staff in its decision, the overall record for the licensing action includes a complete analysis of the cultural resources for Section 8.”).

More recently, “the Staff used the NEPA process and documentation required for the preparation of an EIS/ROD to comply with NHPA Section 106, as it is permitted to do,” *In re Detroit Edison Co.* (Fermi Nuclear Power Plant, Unit 3), LBP-12-23, 76 N.R.C. 445, 488 (2012). However, the converse is not true, as “compliance with the NHPA ‘does not relieve a federal agency of the duty of complying with the impact statement requirement ‘to the fullest extent possible.’” *Lemon v. McHugh*, 668 F. Supp. 2d 133, 144 (D.D.C. 2009) quoting *Preservation Coalition, Inc. v. Pierce*, 667 F.2d 851 (9th Cir. 1982) quoting 42 U.S.C. § 4332.

Assuming, *arguendo*, that NEPA duties could be fulfilled during the hearing process, a complete analysis of the cultural resources does not exist in the present matter. Moreover, NHPA-generated mitigation and analysis submitted during the hearing cannot remedy a NEPA violation.

The preparation of an EIS also entails similar public and interagency participation. [. . .] This cross-pollination of views could not occur within the enclosed environs of a

courtroom.

Sierra Club v. Hodel, 848 F.2d 1068, 1094 (10th Cir. 1988) citing 40 C.F.R. §§ 1503.1(a)(4), 1506.6, *overruled in part on other grounds*, *Los Ranchos de Albuquerque v. Marsh*, 956 F.2d 970 (10th Cir. 1992).

Here, NRC Staff can present no excuse for delaying a complete analysis of the cultural resources or mitigation measures required by NEPA.

C. Contention 6: Except for Air, Disclosure and Adequate Analysis of the Effectiveness of Mitigation Measures Was not Provided in the FSEIS

Where mining impacts are concerned, federal courts hold that NEPA also requires that the agency fully review whether the mitigation will be effective. *See South Fork Band Council v. Dept. of Interior*, 588 F.3d 718, 728 (9th Cir. 2009). The FSEIS's reliance on a future, as yet-unsubmitted, mitigation to prevent/mitigate adverse impacts to these resources also violates NRC duties under NEPA and the National Historic Preservation Act [NHPA]. The NHPA, and its implementing regulations, require full review of these impacts as part of the public review process – something which has not occurred here.

The omitted and inadequate analysis of mitigation measures in the remainder of the FSEIS are illustrated by discussion of air emission mitigation in Chapter 2 (Alternatives), which is the single category where the effectiveness of mitigation measures were, at least partially, analyzed and quantified. FSEIS at 2-46 (“These mitigation commitments are described in SEIS Section 4.7, and the manner in which the mitigation was incorporated into the calculation of the emission inventory is provided in Appendix C Section C2.1.”) The FSEIS, but not the DSEIS, partially described the effectiveness of air mitigation by presenting a percentage reduction of emissions based on the type of mitigation measure being implemented. FSEIS at C-8 (“Table C-5 describes the effectiveness (i.e., the percent that the emissions are reduced) of the different tier

levels based on the associated emission factors.”). However, even the analysis of air mitigation measures was not completed. FSEIS at 4-130 (“The applicant identified other mitigation measures it will implement (see Table 6.2-1); however, these other measures are not incorporated in the calculation of the revised emissions inventory.”). The FSEIS relies on vague references where “[t]he calculation of the mobile emission inventory in Table 2.1-2 incorporates some of the mitigation that the applicant has committed to perform.” FSEIS at 2-44. Although NRC precedent allows bounding for disclosure of impacts, “broad generalizations and vague references to mitigation measures ... do not constitute the detail as to mitigation measures that would be undertaken, and their effectiveness, that the [agency] is required to provide.” *Neighbors of Cuddy Mountain v. U.S. Forest Service*, 137 F.3d 1372, 1380-81 (9th Cir. 1998).

NRC Staff’s recent filings in the contention pleading context rely on the number of times the word “mitigation” is used in the later chapters, but it is absent from the non-air portions of the alternatives. NRC Staff Response to FSEIS Contentions at 23-24 (“Chapter 6 is only a summary of proposed measures. In Chapter 4 the Staff explains how these measures will reduce environmental impacts in various resource areas.”). In the FSEIS Chapter 2 (Alternatives), the word “mitigation” and its variants are not mentioned outside the air emission context. In the present matter, there was no attempt to include mitigation measures in any NEPA alternative or to analyze the effectiveness of mitigation. Instead, NRC Staff segregated mitigation into a separate, stand-alone Chapter 6 and provided conclusory statements in Chapter 4 instead of the NEPA-mandated interdisciplinary analysis across alternatives to determine effectiveness. There is no dispute that NRC Staff did not include non-air mitigation measures in the alternatives, which prevents the reasonably complete discussion of mitigation required by NEPA. 40 C.F.R. § 1502.14(f)(requiring mitigation in alternatives).

In contrast to what NRC Staff describe as a “summary of proposed mitigation” in the present FSEIS, the duty to timely propose and analyze the effectiveness of a range of possible mitigation measures in an EIS has been recognized by NRC precedent.

Under NEPA, an EIS must discuss “any adverse environmental effects which cannot be avoided should the proposal be implemented [...],” and must provide “a reasonably complete discussion of possible mitigation measures.”

In re Detroit Edison Co. (Fermi Nuclear Power Plant, Unit 3), LBP-12-23, 76 N.R.C. 445, 486 (2012) quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 351-52 (1989). In confirming that already admitted NEPA contentions migrated from the draft to final EIS stage, the *Detroit Edison* opinion confirms that “the revised site layout and draft mitigation plan constitute alternatives to the project as originally proposed that might, if implemented, reduce impacts to the species.” *Id.* at 467 (emphasis supplied). The matter went to hearing on the question of whether the proposed alternative mitigation measures received a “reasonably complete discussion.” *Id.* No such mitigation plan exists here, where NRC Staff admits that Chapter 6 provides “only a summary of proposed measures.” NRC Staff Response to FSEIS Contentions at 23-24.

Here, there is no dispute of fact preventing resolution of Contention 6. Review of the FSEIS filed in this matter, in light of NRC Staff’s statements and other filings, confirms that the FSEIS includes vaguely identified potential mitigation measures, but does not analyze their effectiveness according to NEPA procedures. The attached statement of undisputed facts lists and confirms that the FSEIS’s “broad generalizations and vague references to mitigation measures ... do not constitute the detail as to mitigation measures that would be undertaken, and their effectiveness, that the [agency] is required to provide.” *Neighbors of Cuddy Mountain v. U.S. Forest Service*, 137 F.3d 1372, 1380-81 (9th Cir. 1998).

Last, as a matter of law, an FSEIS cannot rely on other agencies, later preparation of mitigation, and “only a summary of proposed measures” to satisfy NEPA mandates. NRC Staff Response to FSEIS Contentions at 23-24, *see supra* Section IIIA (setting forth NEPA mitigation standards). Taken as a whole, the FSEIS does not use mandatory NEPA procedures to document and avoid impacts via mitigation measures. Specific examples of mitigation measures that are vaguely and inadequately referenced in the FSEIS and filed materials but fall short of the NEPA standards are listed in the statement of facts, and include:

- Reliance on the future submission and potential issuance of a National Pollution Discharge Elimination Standards (“NPDES”) permit to specify mitigation measures and best management practices (“BMPs”) to prevent and clean up spills. FSEIS at 4-57.
- A Fish and Wildlife Service (“FWS”) raptor monitoring and mitigation plan has not been developed despite confirmed raptor activity in the project area. FSEIS at 4-151 *compare* at 4-91 (“Map of Raptor Nest Locations in the Dewey-Burdock Project Area and Planned Facilities for the Deep Class V Injection Well Disposal Option”).
- FWS permits to avoid and mitigate impacts to Bald Eagles’ use of three existing Bald Eagle nests were not provided by Powertech and were not analyzed by NRC Staff in the FSEIS. FSEIS at 3-46, 4-88, *accord* Powertech Response to FEIS Contentions at 21 quoting FRN at Vol. 74, No. 175 (September 11, 2009)(asserting Powertech must obtain take permits).
- Ongoing non-NEPA development of mitigation plans for listed species. *Id.* at 21 (“Powertech also is developing mitigation plans for bald eagles and other MBTA-species for each phase of the proposed project based on collaboration with South Dakota Department of Game, Fish, and Parks (SDGFP) and FWS.”).
- Generic reference to working BLM mitigation and reclamation guidelines (BLM, 2012a) that NRC Staff incorporated into the FSEIS without analysis. FSEIS at 4-80.
- Vaguely referenced and unspecified sound abatement controls. FSEIS at 4-149.
- Generically referenced mitigation of evaporation pond impacts that are and deferred to later analysis by the Environmental Protection Agencies pursuant to the Clean Air Act’s Hazardous Air Pollution provisions. FSEIS 4-248.

- The FSEIS did not examine groundwater mitigation where Powertech excluded such mitigation measures from its proposal. Powertech Response in Opposition to FSEIS Contentions at 15. (“Groundwater restoration mitigation measures” pursuant to 10 CFR Part 40, Appendix A, Criterion 5(B)(5) “are irrelevant in this proceeding and outside the scope of Powertech’s proposed action.”)(emphasis supplied).
- The FSEIS included mitigation measures involving groundwater restoration as within the scope of the action, and instead of analysis, merely assumed that Powertech will comply with NRC regulations. FSEIS at 4-46.

As these examples demonstrate, each section of the FSEIS relies on vague and general references to mitigation measures that either do not exist or will be prepared in the future. *See* Statement of Undisputed Material Facts (filed with the present motion).

Review of the FSEIS confirms that NRC staff cannot satisfy its “ultimate burden of establishing compliance with NEPA.” *In re Calvert Cliffs 3 Nuclear Project, LLC*, 76 N.R.C. 71 (NRC 2012) *compare Okanogan Highlands Alliance v. Williams*, 236 F.3d 468, 477 (9th Cir. 2000) (upholding an EIS where “[e]ach mitigation process was evaluated separately and given an effectiveness rating”). In *Okanogan Highlands*, the Forest Service carried its burden where the sections of the NEPA analysis relying on other agencies’ permits “consider and discuss mitigation responsibilities directly and at length.” *Id.* Here, NRC Staff cannot meet its burden to demonstrate the proposed mitigation measures summarized in the FSEIS were evaluated separately, considered directly, or discussed at length. *Id.*

The Tribe’s NEPA Contention 6 addresses an FSEIS that does not provide NEPA-compliant discussion of “any adverse environmental effects which cannot be avoided should the proposal be implemented [...],” and “a reasonably complete discussion of possible mitigation measures.” *In re Detroit Edison Co.*, (Fermi Nuclear Power Plant, Unit 3), LBP-12-23, 76 N.R.C. 445, 486, (2012) *quoting Robertson v. Methow Valley Citizens Council*, 490 U.S. 332,

351-52 (1989). Summary disposition on Contention 6 should be granted, as a matter of law, based on the materials already filed in the present matter.

IV. RELIEF REQUESTED – INVALIDATE THE FSEIS AND LICENSE, AND REMAND FOR FURTHER STAFF CONSIDERATION

The proper remedy in NEPA cases is to invalidate the NEPA analysis and any action taken, along with a remand for further proceedings. *Wyoming Outdoor Council v. U.S. Army Corps of Eng'rs*, 351 F. Supp. 2d 1232, 1238 (D. Wyo. 2005); *Louisiana Energy Services, L.P. (Claiborne Enrichment Center)*, CLI-98-3, 47 N.R.C. 77, 106-110 (1998)(remanding for consideration of mitigation measures). Invalidation of the license and any other action taken in reliance on the invalid NEPA analysis is appropriate where “NEPA procedures must ensure that environmental information is available to public officials and citizens before decisions are made and before actions are taken.” 40 C.F.R. § 1500.1(b).

Here, NRC Staff’s ongoing violation of NEPA involving mitigation measures first occurred when the DSEIS was issued and continued through the FSEIS, as confirmed by materials filed in support of admitted Contentions 1A and 6. The deficient FSEIS poisoned all following NRC Staff actions (license) and requires a new NEPA process that is not contaminated by the violations addressed herein. On the facts of the present case, given the breadth of the failure to review mitigation measures and their effectiveness, invalidation of the FSEIS should be accompanied by remand to NRC Staff with directions to reissue its Notice of Intent to begin the NEPA process anew, so that NEPA procedures precede the license is issued. 40 C.F.R. § 1500.1(b).

V. CONCLUSION

NRC Staff has not, and cannot, meet its burden to show it has met the NEPA duties to regarding mitigation measures for cultural resources impacts identified in Contention 1A and the

full range of impacts and mitigation addressed in Contention 6. In short, NEPA requires reasonably complete disclosure of mitigation measures and careful analysis of their effectiveness, but the FSEIS contains “only a summary of proposed measures” to mitigate confirmed impacts. NRC Staff Response to FSEIS Contentions at 23-24. The Oglala Sioux Tribe respectfully requests that the Board grant summary disposition by an order that invalidates the NRC Staff’s NEPA analysis, vacates the license, and remands to NRC Staff for further action consistent with such order.

Respectfully Submitted,

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Dated at Lyons, Colorado
this 11th day of April, 2014

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Facility))	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Motion for Summary Disposition in the captioned proceeding were served via the Electronic Information Exchange (“EIE”) on the 11th day of April 2014, and via email to those parties for which the Board has approved service via email, which to the best of my knowledge resulted in transmittal of same to those on the EIE Service List for the captioned proceeding.

/s/ signed electronically by _____
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