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NUCLEAR REGULATORY COMMISSION

Title: Powertech USA, Inc.

Docket Number: 40-9075-MLA

ASLBP Number: 10-898-02-MLA-BD01

Location: teleconference

Date: Monday, November 7, 2016

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Pages 1-61

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UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

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ATOMIC SAFETY AND LICENSING BOARD PANEL

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SCHEDULING TELEPHONIC STATUS CONFERENCE

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

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Monday, November 7, 2016

Teleconference

BEFORE:

WILLIAM J. FROEHLICH, Chair

DR. MARK O. BARNETT, Administrative Judge

G. PAUL BOLLWERK, III, Administrative Judge

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P R O C E E D I N G S

2:03 p.m.

CHAIR FROEHLICH: Good afternoon all. It's 2:03 p.m. Eastern time. This is Judge Froehlich in Rockville, Maryland.

With me is Judge Bollwerk. And on the telephone line is Judge Barnett. Also with me is our law clerk, Mr. Cooper Strickland. Who has been instrumental in helping the Board arrange today's teleconference.

This teleconference was convened pursuant to public notice issued on October 24, 2016, for the purpose of informing the Board of the status of the Government to Government consultation which has taken place since the issuance of the Board's partial initial decision in LBP-15-16 on April 30, 2015.

At this time I would like to take the appearances of the parties to the proceeding. Is the Licensee, Powertech or its counsel on the line?

MR. PUGSLEY: Yes, Your Honor. Christopher Pugsley for Powertech.

CHAIR FROEHLICH: Thank you, Mr. Pugsley. And for the Intervenor, the Oglala Sioux Tribe?

MR. PARSONS: Yes, Your Honor. Jeff Parsons on behalf of the Oglala Sioux Tribe. With me

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1 I believe is Travis Stills on the line.

2 CHAIR FROEHLICH: Thank you. And for the
3 Consolidated Intervenors?

4 MR. FRANKEL: Judge, David Frankel here
5 for Consolidated Intervenors.

6 CHAIR FROEHLICH: Thank you. Okay. And
7 for the NRC Staff?

8 MS. MONTEITH: This is Emily Monteith for
9 the NRC Staff. With me in the room is Molly Marsh and
10 our paralegal, Sabrina Allen.

11 CHAIR FROEHLICH: Okay. Thank you. I am
12 assuming we are on the record. And proceeding from
13 that, just give a brief background of what the broader
14 suit is called today.

15 On August 10 --

16 MR. THOMPSON: Excuse me, Judge -- Judge
17 Froehlich, I just wanted to address. I don't know
18 whether you got, but Anthony Thompson is also here for
19 Powertech.

20 CHAIR FROEHLICH: Okay. Thank you. And
21 as we proceed through this call, if the parties would
22 identify themselves before they speak, it will make
23 things easier for the Court Reporter. And we'll have
24 a better record of this.

25 All right. A brief background. On August

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1 10, 2009, Powertech submitted the Dewey-Burdock
2 license application to the NRC. It was accepted for
3 docketing October 2, 2009.

4 After that and then after public notice,
5 a number of contentions were submitted -- admitted and
6 set for hearing. Prior to the hearing a Programmatic
7 Agreement was signed on April 7, 2014. And the NRC
8 Staff issued Powertech License SUA-1600 on April 8,
9 2014.

10 A hearing on the admitted contentions was
11 held in Rapid City, South Dakota August 19, 20, 21,
12 2014. The Board issued a partial initial decision,
13 LBP-15-16 on April 30, 2015. Petitions for Review of
14 that LBP and Responses were filed on May 6, 2015 and
15 June 22, 2015 respectively.

16 The Board's partial initial decision, LBP-
17 15-16 resolved contentions two, three, four, six, and
18 nine in favor of the NRC Staff and Powertech. The
19 Board found in favor of the Oglala Sioux and
20 Consolidated Intervenors on Contentions 1-A and 1-B.

21 As to Contention 1-A, the Board found that
22 the environmental documents do not satisfy the
23 requirements of NEPA as they don't adequately address
24 Sioux tribal cultural, historic and religious
25 resources.

1 The NRC Staff can remedy this decision and
2 the record of the decision in this proceeding by
3 properly initiating a Government to Government
4 consultation with the Oglala Sioux Tribe to identify
5 any adverse effect to cultural, historical, religious
6 sites of significance to the Oglala Sioux Tribe, which
7 may be impacted by the Powertech Dewey-Burdock
8 project, and to adopt measures to mitigate such
9 adverse effect as necessary.

10 The FSEIS and Record of Decision in this
11 case must be supplemented, if necessary, to include
12 any cultural, historic, or religious sites identified.
13 And to discuss any mitigation measures necessary in
14 order to avert, avoid adverse effects.

15 As to Contention 1-B, the Board found
16 meaningful consultation as required by the Statute had
17 not occurred. The NRC Staff can remedy this
18 deficiency in the Record of Decision in this by
19 promptly initiating a Government to Government
20 consultation with the Oglala Sioux Tribe to identify
21 any adverse effects to cultural, historic, or
22 religious sites of significance to the tribe which may
23 be impacted by the Powertech Dewey-Burdock project and
24 to adapt measures to mitigate such adverse effects.

25 The Licensing Board retained jurisdiction

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1 over the final resolution of Contentions 1-A and 1-B.
2 And directed the NRC Staff to file a monthly report
3 with the Board on its progress in addressing the
4 outstanding issues in Contentions 1-A and 1-B.

5 The Board contemplated that the NRC
6 Staff's final monthly report should demonstrate that
7 the FSEIS complies with NEPA and with 10 CFR Part 40.
8 And include an agreement reflecting the parties'
9 settlements of their disputes regarding a Contention,
10 or a Motion for Summary Disposition of Contentions 1-A
11 and 1-B.

12 The Staff's July 2015 monthly report
13 revealed a June 23, 2015 letter to John Yellow Bird
14 Steele, President of the Oglala Sioux Tribe with a
15 copy to his Tribal Historic Preservation Officer,
16 wherein the NRC Staff took the opportunity to
17 reiterate that the complication process between the
18 NRC Staff and the Oglala Sioux Tribe as it relates to
19 the Dewey-Burdock ISR Project is an ongoing effort.

20 That letter further indicated that the
21 Oglala Sioux Tribe would have the option to
22 participate in consultation for the future
23 identification and evaluation of historic property.
24 The letter concluded that the NRC Staff renewed this
25 request for your use, the use of the Tribe, regarding

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1 any Sioux cultural, historical, or religious sites
2 that may be impacted by the Dewey-Burdock Project.

3 The Board issued an Order convening this,
4 our telephone conference, on October 24, 2016. And
5 indicated six areas we'd like to hear about from the
6 parties.

7 What I'd like to do at this point is
8 perhaps move through those six items seriatim. And
9 hear from the parties to the case. And bring the
10 Board up to speed on the status of what's been going
11 on since the issuance of the LBP in this docket.

12 Mr. Pugsley, I wonder if you could address
13 the status of development activities at the Dewey-
14 Burdock site?

15 MR. PUGSLEY: Yes, Your Honor. Chris
16 Pugsley for Powertech. Essentially, Your Honor,
17 development activities at the Dewey-Burdock site have
18 not occurred in terms of developing the project itself
19 under the existing NRC License.

20 No well fields have been constructed. No
21 central processing plant has been constructed, et
22 cetera. And we have numerous reasons for that.

23 One is that we are still working in
24 concert with two other regulatory agencies. The
25 Environmental Protection Agency for our Safe Drinking

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1 Water Act underground injection control permits. They
2 have not yet been issued in draft form. And we are
3 not aware of when that will occur.

4 Secondly, the State of South Dakota has
5 its own administrative processes for permits for the
6 project. So, we are not, and cannot move forward with
7 those sorts of activities until we obtain those
8 permits.

9 So, that is the reason that we have not
10 engaged in any project development activities at the
11 site.

12 CHAIR FROEHLICH: And am I correct, or I
13 think from one of the reports, or maybe it was from
14 the Briefs that were filed with the Commission in
15 opposition to the Consolidated Intervenors and the
16 Oglala Sioux Tribe's Petition for Review, those
17 permits that you require from the State of South
18 Dakota and from the EPA, those can't be issued? Or
19 work can't be done on them until the NRC acts?

20 How does the NRC -- I mean, the
21 Commission's final resolution of this case affects the
22 timing of those permits?

23 MR. PUGSLEY: Your Honor, Chris Pugsley
24 again for Powertech. Let me start with EPA. With
25 them, they have begun a consultation process on their

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1 own.

2 And they have been looking to, at least we
3 think, we don't know for sure. But we think that they
4 have been monitoring what the Commission is doing on
5 the appeal for this.

6 CHAIR FROEHLICH: Um-hum.

7 MR. PUGSLEY: As well as what the Board is
8 doing in terms of resolution of Contentions 1-A and 1-
9 B, as you discussed earlier.

10 So, we do not -- we have not -- we
11 suspect, we don't know. But we suspect that that's
12 the reason we haven't seen a draft permit. Whether
13 that's the case or not, we don't really know the
14 answer to that.

15 But, with respect to the State of South
16 Dakota, it is our impression that they are waiting for
17 resolution of this situation to move forward with
18 their administrative processes. To make sure that
19 their requirements are satisfied as well.

20 I believe that's the best information I
21 have at this time.

22 CHAIR FROEHLICH: I appreciate that Mr.
23 Pugsley. Thank you. Does Staff counsel have any
24 information on either of the other two agencies'
25 timing or efforts on the permits that Powertech has

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1 requested?

2 MS. MONTEITH: Your Honor, Emily Monteith
3 for the NRC Staff. We have no further information to
4 add to that.

5 CHAIR FROEHLICH: While I have you, Ms.
6 Monteith, is there any coordination or discussion
7 between the NRC Staff and those other two agencies
8 having to do with consultation or any of the items as
9 part of the EPA process?

10 MS. MONTEITH: If I can have just a
11 moment, Your Honor, I want to confer -- I have by the
12 way Kellee Jamerson from the NRC Staff and Brian Smith
13 is on this call, just for the record.

14 CHAIR FROEHLICH: Thank you.

15 MS. MONTEITH: But let me just clarify
16 that with the Staff for a moment.

17 Okay, Your Honor, we have no program
18 information regarding issuance of the permits by EPA
19 or the draft permits. I think there have been some
20 informal discussions regarding EPA joining the
21 Programmatic Agreement potentially for this project.

22 But, it's on an informal level. We
23 haven't, I mean, moved forward with any actions
24 related to that. And we haven't engaged them formally
25 in that manner.

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1 CHAIR FROEHLICH: I see.

2 JUDGE BOLLWERK: This is Judge Bollwerk.
3 Is it, I mean, are there other instances where you've
4 gone together on a Programmatic Agreement with another
5 agency? And for other ISR sites in say Wyoming or
6 somewhere else?

7 MS. MONTEITH: Your Honor, we have --
8 typically we -- when we have a cooperating agency on
9 a Programmatic Agreement, they would be involved at
10 the outset. For example the Bureau of Land Management
11 was a cooperating agency in the -- our last project.

12 And they were a signatory to the Federal
13 Programmatic Agreement. That is well contemplated by
14 NHPA in its regulations implementing Section 106.

15 Other agencies I believe are entitled to
16 join Section 106 or adopt Section 106 after they're
17 implemented by other agencies. Does that answer your
18 question, Your Honor?

19 JUDGE BOLLWERK: So, it would not be
20 unprecedented if the -- notwithstanding the fact they
21 weren't involved with this from the get go for EPA to
22 become part of this process at some point if they
23 wanted to.

24 MS. MONTEITH: I believe that there's a
25 specific mechanism in the Programmatic Agreement that

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1 will allow them to adopt it for themselves. And that
2 would be sort of a matter for their counsel to work
3 through with us.

4 It wouldn't necessarily be that they would
5 then join solely with us in consultation with the
6 Tribe. I think we might -- we haven't actually work
7 that out.

8 We've just sort, I believe, been
9 approached by them initially to kind of start the
10 conversation of whether they can adopt the
11 Programmatic Agreement in order to satisfy their
12 requirements under Section 106 of the NHPA.

13 But that's as far as we've gotten with
14 this particular issue.

15 JUDGE BOLLWERK: All right. Thank you.

16 CHAIR FROEHLICH: Ms. Monteith, could you
17 tell me, this is Judge Froehlich. Could you tell me
18 of the schedule of any upcoming Government to
19 Government consultations between the Tribe and Staff?

20 MS. MONTEITH: Certainly, Your Honor.
21 Emily Monteith again for the Staff. As you know, I
22 believe, you should note through our Staff objectives,
23 we have a meeting with the Oglala Sioux Tribe in May
24 of this year.

25 And further to that there were certain

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1 issues raised. Several of them that we reported in
2 the summary of that meeting that was issued.

3 And we have -- our intention is to -- or
4 our desire is to hold another teleconference at least
5 with the Tribe to go through some of the issues that
6 they raised. And to discuss those and hopefully take
7 another step further towards effectuating a site
8 survey of the Dewey-Burdock site.

9 But we have no specific dates set for
10 that. We reached out by telephone a few times. And
11 were unable to leave a message, and by email.

12 And we were fortunate to speak with Mr.
13 Parsons and Mr. Stills a couple of weeks ago, who
14 provided us with some tips on sort of better
15 effectuating that communication. So we hope going
16 forward that we will be successful in arriving at an
17 opportunity to have that discussion with them.

18 But to answer your question directly, we
19 have no dates set for another such conversation. But
20 we are hopeful with that.

21 CHAIR FROEHLICH: So, just so it's clear
22 to me. That May 19, 2016 meeting was the first and
23 only face to face meeting that's been held between the
24 Staff and the Oglala Sioux Tribe?

25 MS. MONTEITH: Yes, Your Honor. As

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1 requested in the status updates, there was a great
2 deal of back and forth between the Staff and the Tribe
3 on arriving at a mutually beneficial, or available
4 date for both parties. And that date was not able to
5 be set until the May 19 meeting.

6 CHAIR FROEHLICH: And going forward from
7 that May 19, which was the start of that dialog, there
8 has not been a second or a follow up meeting held or
9 even scheduled at this point? Is that correct?

10 MS. MONTEITH: That's correct, Your Honor.
11 We're attempting to develop a second meeting at this
12 time.

13 CHAIR FROEHLICH: Okay. Perhaps I could
14 hear from Mr. Parsons or one of the other
15 representatives from the Tribe. And tell me why it
16 has taken so long to have just one meeting and none
17 subsequent?

18 MR. PARSONS: Sure. Thank you, Your
19 Honor. This is Jeff Parsons on behalf of the Oglala
20 Sioux Tribe.

21 As far as the meetings, we were in
22 communication with NRC Staff in terms of scheduling
23 those meetings. There were letters back and forth
24 that I think are part of the -- part of the record.

25 And you can see those communications when

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1 we had that -- had scheduled the -- I think that part
2 of the issues was that there were some fairly
3 significant changes.

4 And the NRC Staff can certainly comment,
5 not to put words in their mouth, but some significant
6 turn over or reorganization I should say in the NRC
7 Staff set up essentially. As well as new staff at the
8 Oglala Sioux Tribe Tribal Historic Preservation
9 Office.

10 When those sort of staff changes and
11 organizational changes were completed, that
12 essentially happened just before that May 19 meeting.
13 At the May 19 meeting, which Staff included a summary
14 of that meeting, that May 19 meeting in their -- in
15 the record, it was a productive discussion.

16 I would characterize it as cordial and
17 productive. And the tribe asked several questions.
18 Had some suggestions for how to go forward.

19 I think those are reflected in the meeting
20 notes dealing with addressing concerns the Tribe has
21 with the Programmatic Agreement as well as moving
22 forward on discussions regarding a site survey for the
23 -- identifying cultural resources. And also
24 addressing concerns the Tribe had with having an
25 active license while these problems are continued in

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1 terms of compliance with NEPA and the National
2 Historic Preservation Act.

3 The Tribe had expected some, and it
4 appears that maybe forth coming, was under the
5 impression -- was expecting some response back from
6 the NRC Staff as to whether those suggestions or
7 components could be part of an ongoing dialog to try
8 to resolve the issues identified in the Board's Order.

9 So, this is a -- we did have a
10 conversation with the Staff counsel a couple of weeks
11 ago. That is to say Mr. Stills and myself had a
12 discussion with counsel for Staff a couple of weeks
13 ago.

14 And my -- and again, not to put words in
15 their mouth, but my impression of that call was that
16 they were, the Staff that is, was going to get back to
17 the Tribe as far as responding to the suggestions that
18 we made at that May 19 meeting.

19 And so we've sort of been waiting for
20 Staff to respond.

21 CHAIR FROEHLICH: Okay.

22 JUDGE BOLLWERK: This is Judge Bollwerk.
23 What does the Staff have to say about that? If
24 anything.

25 MS. MONTEITH: Your Honor, Emily Monteith

1 for the Staff. We were privileged to have a
2 conversation with Mr. Stills and Mr. Parsons, previous
3 counsel and myself.

4 And we are -- as he indicated that we had
5 not been greatly successful in obtaining our --
6 getting in touch I should say with the SHPO and with
7 the Oglala Sioux Tribe. Because we wanted to have
8 these conversations.

9 But I think at this point we are
10 contemplating drafting a formal letter inviting them
11 to have another conference call, apparently because
12 that's considering the weather, I think, you know,
13 arising in their area. And we would hope to address
14 the issues that are described. The big raise and the
15 meeting summary of the May 19 meeting.

16 So, I think I would agree that they
17 characterized that conversation accurately. And that
18 we would like to further that discussion.

19 At this point if we're not able to obtain
20 a teleconference with them, we would certainly be able
21 to put some views down on paper. But we think that it
22 would be beneficial to continue discussions.
23 Particularly regarding a site survey.

24 We are also interested in obtaining more
25 information about the treaties that Mr. Stills and Mr.

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1 Parsons alluded to as impacting -- that they would
2 like us to consider in our discussions in this area.

3 So, that was I think one of the ques -- I
4 speak now on behalf of this, but I believe that was
5 one of the things that the Staff had saw in an email
6 that they sent to the SHPO of in, I believe, September
7 of this year.

8 JUDGE BOLLWERK: This is Judge Bollwerk.
9 So, assuming this formal letter goes out, how long is
10 it going to take?

11 MS. MONTEITH: I cannot speak to the
12 concurrence process, Your Honor. But I believe there
13 is -- we can draft one quickly. But, these things do
14 take time.

15 And unfortunately, the MNNS Office that we
16 work with is experiencing resource issues at the
17 moment.

18 JUDGE BOLLWERK: Is this going to get done
19 this calendar year?

20 MS. MONTEITH: Yes, sir.

21 JUDGE BOLLWERK: Is it going to get done
22 in November?

23 MS. MONTEITH: I cannot defend that. But
24 I would certainly hope that we can support that by
25 that time.

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1 JUDGE BOLLWERK: Okay. Thank you.

2 CHAIR FROEHLICH: Ms. Monteith, I'd like
3 to ask you about another case that I believe you're
4 on. And that's the Crow Butte Resources.

5 Where a partial initial decision was
6 issued in May -- on May 26, 2016 in Docket 48943,
7 having to do with an ISO operation in Crawford,
8 Nebraska. Which I believe also involved the Oglala
9 Sioux Tribe.

10 Are you familiar with that proceeding?

11 MS. MONTEITH: Your Honor, I am familiar.
12 I should caveat that I am not lead for our response in
13 that contention. But I do have familiarity with it.

14 So, I mean, I am hopeful I am able to
15 answer any questions any questions related to it. But
16 I may not be able too fully.

17 CHAIR FROEHLICH: My question is really
18 quite basic. I've been watching the monthly reports
19 that have been submitted in that Docket. And I noted
20 in that Docket that there were weekly phone calls
21 between the Staff and the Tribe.

22 And that work seems to be moving forward
23 to address some of the issues relating to the cultural
24 resources in the Crow Butte case. Indeed, you know,
25 a Statement of Work seems to have been prepared.

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1 And I understand that Staff awarded a
2 contract to move forward and make such an
3 investigation. All of this within six months of that
4 partial initial decision.

5 Can you tell me what's different about
6 that proceeding and this as to the timetable of, you
7 know, resolving these type of issues?

8 MS. MONTEITH: That is a difficult
9 question to answer, Your Honor. I alluded to resource
10 issues recently. And that for some reason was given
11 priority to the potential detriment a little bit of
12 this case.

13 But, I should also add that the record in
14 this case is, I think, similar if not to that level in
15 terms of engagement with the Oglala Sioux Tribe right
16 out of the gate after issuance of the initial partial
17 decision.

18 And the Staff was able to obtain -- they
19 have carryover funding or something that enabled them
20 to issue that contract very quickly. But it was also
21 specific in its response to the particulars of that
22 initial partial initial decision, Your Honor.

23 In this case I feel that the partial
24 initial decision directed consultation activities.
25 Whereas in the Crow Butte decision, the Board ruled in

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1 favor of the Staff on consultation. And directed them
2 to develop information by any means necessary.

3 I and the Staff are of the view that an
4 order to obtain information for the Dewey-Burdock site
5 of resources that are of cultural and historical
6 importance to the Oglala Sioux Tribe, it is with the
7 Tribe only to engage directly in order to obtain that
8 information. So the hiring of a contractor is not an
9 adequate substitute in this case for obtaining that
10 information on traditional cultural properties.

11 CHAIR FROEHLICH: Thank you. While I have
12 Mr. Frankel on the line, can you comment or explain
13 for us the similarities or differences between these
14 two cases? I believe you're involved in both of them
15 as well.

16 MR. FRANKEL: Yes, Your Honor. David
17 Frankel for Consolidated Intervenors.

18 I am counsel in both cases for the similar
19 but not identical, but somewhat overlapping group of
20 intervenors. And I'd be happy to answer your
21 questions.

22 I don't know what the inner workings are
23 of the NRC Staff. I will note that there was a
24 conference call among the parties that is in the
25 Docket that was on the record in Crow Butte that had

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1 to do with a report.

2 And during that call we were made aware
3 that there was a request for proposal out at the time.
4 It is new knowledge to me that a contract was issued.
5 And that these processes have been ongoing.

6 I myself am not counsel to the Oglala
7 Sioux Tribe. There is a lawyer for the Oglala Sioux
8 Tribe, Andy Reed. And he maybe on a listen in line.
9 And I could offer him a party line if you want him to
10 attend this call. But him not being a counsel of
11 record, he's just listening in, I believe, on this
12 call.

13 It was an observation. There was a great
14 degree of resistance by counsel for Crow Butte to
15 engaging the services of a contractor, until they
16 found out that it would be at the NRC's cost.

17 They mentioned in their Petition for
18 Review to the Commission that they had been billed
19 approximately three hundred thousand dollars in costs
20 for the cultural surveys that were thrown out by the
21 Board in that case. And they were resistant to doing
22 anything.

23 However, that resistance seemed to
24 disappear when it was revealed that it would not
25 affect their company's budget. We would refer you to

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1 their Petition for Review, footnote six for that three
2 hundred thousand dollars reference.

3 If you have something further, Your Honor,
4 I could answer your question. But I'm really not sure
5 what your questions are in addition to that.

6 JUDGE BOLLWERK: This is Judge Bollwerk.
7 Before we get too far, actually I just wanted to know
8 before that. I was just wondering. Okay.

9 Well, we didn't hear anything from either
10 of the Intervenors about questions one or two dealing
11 with the EPA. I just wanted to give you a chance if
12 you had anything you wanted to say about -- or the
13 State of South Dakota, anything you wanted to say on
14 those items.

15 This would be good time to perhaps give us
16 your thoughts.

17 CHAIR FROEHLICH: Mr. Parsons, would you
18 like to chime in first for the Tribe?

19 MR. PARSONS: Sure. From our perspective,
20 we're not aware of any -- any activities at the Dewey-
21 Burdock site. Obviously Mr. Pugsley indicated that
22 there's been none. That's consistent with our
23 understanding.

24 As far as the status of the permitting
25 from EPA and South Dakota, I think Mr. Pugsley's

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1 synopsis was accurate as far as we are aware. That
2 EPA has not issued a draft underground injection
3 control permit as of yet.

4 And I'm not aware of any further action
5 with the State of South Dakota either.

6 CHAIR FROEHLICH: Any of the other
7 Intervenors care to be heard on questions one or two?

8 MR. FRANKEL: David Frankel here for
9 Consolidated Intervenors. I have nothing to add, Your
10 Honor.

11 CHAIR FROEHLICH: Thank you. Ms.
12 Monteith, in the most recent monthly report from the
13 Staff, there was reference to some change in billing
14 of costs to Powertech and a reference to the Chief
15 Financial Officer or whatever of the Agency.

16 What does -- I guess, what does that mean?
17 Or what does that have to do with Government to
18 Government consultations if anything?

19 MS. MONTEITH: Your Honor, that was
20 included more out of an abundance of caution I
21 suppose, to be conservative in the type of information
22 we give you. Because it was represented on the record
23 in the previous proceeding, as Mr. Frankel alluded to
24 that the Applicant would not be billed for post-
25 hearing work of this nature.

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1 And it was subsequently discovered and
2 determined by the CFO that that was not the case. We
3 thought it best to correct on the record in this
4 proceeding, or acknowledge on the record in the
5 proceeding that the outcome of the CFO's decision.

6 I'm not sure that it has any bearing on
7 the future of consultation with the Tribe. We intend
8 to proceed as we have been.

9 And with that said, that is simply why we
10 included that information.

11 JUDGE BOLLWERK: Just so I understand.
12 This is Judge Bollwerk. So, but that applies -- what
13 you just indicated about the CFO's decision, that
14 applies both to Powertech and to Crow Butte?

15 MS. MONTEITH: Yes, Your Honor.

16 JUDGE BOLLWERK: Okay. So, what we just
17 heard about the Applicant, there is -- their
18 objections going away may come back?

19 MS. MONTEITH: In that case. I cannot
20 speak for that Applicant of course. But we wanted to
21 raise that here definitely.

22 JUDGE BOLLWERK: Okay. Thank you.

23 CHAIR FROEHLICH: Judge Bollwerk or Judge
24 Barnett, do you have any other questions relating to
25 any of the first three items that were in our Notice?

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1 JUDGE BOLLWERK: This is Judge Bollwerk.
2 Let me -- I'll just mention that this sort of seems
3 like with the State of South Dakota and EPA and
4 Powertech doing anything in this case, it's sort of
5 the chicken and the egg question in terms of who's
6 going to move first.

7 The EPA's waiting for NRC. Powertech's
8 waiting for EPA. And South Dakota they both seem to
9 be waiting for NRC. And I take it, it looks like they
10 have this -- the ball's in the NRC's court.

11 Am I correct on that? On the ultimate?

12 MR. PUGSLEY: Judge Bollwerk? Yes, Judge
13 Bollwerk, this is Chris Pugsley. If I can address
14 your question.

15 Basically the way that this sets up is
16 South Dakota has essentially said that they cannot
17 move forward on large scale mining permit hearings
18 until EPA issues final UIC permits under the Safe
19 Drinking Water Act.

20 So essentially, you are correct. The ball
21 is in NRC's court most -- for South Dakota because
22 that's what their policies dictate. And for EPA it's
23 because they want to see what either the Board does or
24 the Commission does.

25 JUDGE BOLLWERK: And I take it this the --

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1 and I'm also the Chair of both the Marsland and the
2 North Trend Extension Cases for Crow Butte. And I
3 know in that case the Applicant basically asked the
4 Staff to back off relative to North Trend and allow
5 the Staff to do its work in Marsland based on, I
6 guess, their own feelings about how they wanted the
7 two cases to proceed.

8 But I take it Powertech has not sent that
9 sort of message to the Staff in anyway?

10 MR. PUGSLEY: Your Honor, Chris Pugsley
11 again. That is correct. We have not sent that
12 message.

13 And I believe that the reason for that is,
14 Pamoco Resources is a company that has multiple
15 locations for uranium recovery. And they can
16 obviously make decisions based on which things they
17 want to see developing first.

18 I certainly cannot speak for them.
19 Because neither Mr. Thompson nor myself represent them
20 in any of those litigations.

21 However, I can say that this is
22 Powertech's flagship project. And we are interested
23 in the resolution of the situation. So, we are not in
24 a position to send any such message.

25 JUDGE BOLLWERK: Okay. Thank you.

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1 CHAIR FROEHLICH: I'd like to ask counsel
2 for the Oglala Sioux Tribe and then followed by the
3 Staff, on the party's collective or independent effort
4 to identify cultural, religious, and historic
5 resources which are significant to the tribe.

6 Has there been any effort by the Tribe to
7 try to come up with a listing of an approach, a way of
8 identifying those things that the -- are of
9 significance to the Tribe?

10 MR. PARSONS: This is Jeff Parsons on
11 behalf of the Oglala Sioux Tribe. Thank you.

12 Not specifically, we have, as we discussed
13 at that May 19th meeting, talked with the NRC staff
14 about a survey, and as part of that discussion, we
15 discussed, you know, the need to develop a protocol
16 and those types of issues you're talking about, how to
17 go about making sure that this survey that is
18 conducted is done in an appropriate manner to -- to
19 yield results that are, you know, credible and -- and
20 satisfactory. So I think that that is part of those
21 discussions with -- with NRC staff, but none of that
22 has been developed in any detail.

23 CHAIR FROEHLICH: I noticed in the
24 correspondence between the staff and the Tribe that
25 the possibility of another survey opportunity appears

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1 a number of times, and that a survey is still under
2 consideration. What kind of consideration is it
3 under? I mean, what work has there been done to come
4 up with the type of survey that would be -- that the
5 Tribe would -- would desire, or that the staff would
6 require, to do this? I mean, has there been anyone
7 looking at the parameters of a study that would
8 satisfy, identify the items of interest to the Tribe
9 and also the staff to fulfill or supplement the record
10 in this case?

11 MR. PARSONS: Thank you, Your Honor. This
12 is Jeff Parsons again. At that May 19th meeting, the
13 Tribe suggested several ways, three steps we thought
14 would be appropriate to help resolve the issues
15 identified by the Board. One would be to revisit the
16 programmatic agreement. The second would be to
17 conduct a site survey. And as I mentioned, we also
18 raised the issue of having the license not be in
19 effect to keep the terms on our side.

20 And we suggested those as ways to move
21 forward, and NRC staff indicated that they would
22 consider those and get back to us. And so that is
23 where it has sat since that meeting. We, as I
24 indicated earlier, and it sounds like it is
25 forthcoming, are expecting to hear some views of NRC

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1 staff, whether those -- and how those fit into their
2 priorities and understanding --

3 CHAIR FROEHLICH: Has there been --

4 MR. PARSONS: -- as to --

5 (Simultaneous speaking.)

6 CHAIR FROEHLICH: I am sorry, Mr. Parsons.
7 Has there been any effort by the Tribe to identify or
8 -- or set forth a framework for the identification of,
9 you know, cultural, religious, or historic resources
10 at the site?

11 MR. PARSONS: I think, Your Honor -- this
12 is Jeff Parsons again -- if you recall from the record
13 during the -- the hearing, there was discussion about
14 how the Tribe had put together a protocol and had a
15 contractor lined up for a survey approach that they
16 thought was adequate, and that was rejected by NRC
17 staff. And so the Tribe had done a fair amount of
18 work down that line to put together a protocol, but
19 that was rejected, as I had mentioned.

20 And so that work would have to be sort of
21 recreated in order to make sure that all the parties
22 are on the same page as far as how the survey is going
23 to occur, so the short answer to your question is
24 "no."

25 CHAIR FROEHLICH: Could the staff respond

1 to what we just heard, as I have -- as to the efforts
2 to come up with a way to address the cultural and
3 religious sites that are of significance to the Tribe
4 in the context of, you know, resolving this case?

5 MS. MONTEITH: Your Honor, as we
6 previously stated, we -- we don't believe that we can
7 independently arrive at any understanding of the
8 Oglala Sioux Tribe cultural sites of significance to
9 them without their involvement, so we have not made
10 any of our own independent steps towards identifying
11 them without their involvement.

12 What we're hoping, again, is to further
13 our conversation that we were able to have in May, to
14 have a meeting to discuss specifically the parameters
15 of the site survey that we are discussing as the
16 primary path forward.

17 We would also welcome the submission of
18 information on cultural and historic and religious
19 properties of the Oglala Sioux by any means if they
20 wish to provide it, but my understanding is the
21 discussions have centered on an additional site
22 survey.

23 We recently spoke with Powertech and
24 discussed the possibility of having such a survey on
25 their site, and I will allow Mr. Pugsley to speak to

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1 that, but our -- our initiative has been focused on
2 furthering these conversations, specifically the issue
3 of the framework for identification of these sites
4 within the context of the site survey.

5 CHAIR FROEHLICH: Okay.

6 MS. MONTEITH: And we will -- and to add
7 to Mr. Parsons' comments, we can and we will issue a
8 letter to them, but our hope is to again have this
9 conversation. Rather than a back-and-forth of
10 letters, I think it would be more productive to engage
11 in a conversation with them to understand their
12 specific concerns with regard to a methodology for a
13 site survey and how to address those.

14 CHAIR FROEHLICH: Thank you. Mr. Pugsley,
15 did you want to address the position of Powertech on
16 an additional survey or some type of investigation I
17 guess at the site?

18 MR. PUGSLEY: Yes, Your Honor, Chris
19 Pugsley for Powertech.

20 A couple of background details: first,
21 subsequent to the -- the meeting in May, Powertech did
22 raise with NRC staff some questions that we had
23 regarding the parameters associated with opening the
24 site up for the Oglala Sioux Tribe to come and perform
25 a site survey. We have not heard anything on that

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1 yet, and I am sure that that is part of what Ms.
2 Monteith was opining on earlier regarding
3 communication with the Tribe.

4 But I will say this, that Powertech has
5 informed Mr. Thompson and myself that essentially, the
6 position of the company is previously, we've had
7 tribes out to the site, Native American tribes out to
8 the site, where we had a scope of work, we had
9 parameters, accommodations, et cetera, that were going
10 to be proffered by the company in order for whatever
11 tribe it may be that came out.

12 Certainly, it is our position that the
13 Board's order directs us to try to work together to
14 try and get the Oglala Sioux Tribe to come and
15 participate in a site survey, and the position of the
16 company is that we will -- we would open the site for
17 a survey under the previously deemed acceptable scope
18 of work by numerous tribes, either that did or did not
19 submit site survey reports to NRC, for purposes of not
20 only bolstering the FSEIS and the administrative
21 record, but as well as helping the development of the
22 programmatic agreement, which the ACHP signed and
23 approved.

24 And we are open to the -- to the same
25 parameters associated with whether it be -- however

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1 you'd like to term it, compensation or a per diem,
2 whatever it may be, we are open to that, short of --
3 above that, our position is we don't think anything
4 else is necessary associated with this. We think that
5 what was deemed acceptable previously is acceptable
6 now and that if the Oglala Sioux Tribe is willing to
7 accept those -- those parameters, we are prepared to
8 work with them to find an acceptable time for them to
9 come out and perform a survey under those parameters.

10 CHAIR FROEHLICH: Just, Mr. Parsons, did
11 you want to respond to that in any way?

12 MR. PARSONS: This is -- thank you, Your
13 Honor. This is Jeff Parsons for the Oglala Sioux
14 Tribe. This is the first I have heard that position
15 stated. It seems to me that that is greatly
16 disappointing, and I guess I would -- you know, and I
17 understand that it is hopeful to have Powertech assent
18 as to how the -- the survey might be conducted.

19 However, it is NRC staff's prerogative to
20 comply with NEPA and the National Historic
21 Preservation Act, and so I would hope that NRC staff
22 would not allow Powertech to dictate the terms of a
23 government-to-government consultation process. So we
24 find the -- the methodology that we previously
25 rejected and I think led us down the road to where we

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1 are today to be, at first blush anyway, an
2 unacceptable sort of demand.

3 It seems that there is -- from Powertech's
4 side, there is no room to negotiate or have additional
5 conversations about it, so I am not sure where that
6 leaves us except for the -- the staff and the Tribe to
7 work out an arrangement and try to reach an agreement,
8 and as I said, I think the staff has the authority to
9 impose that, as it is their prerogative to comply with
10 the federal statutes.

11 MR. THOMPSON: Your Honor, this is Mr.
12 Thompson for Powertech.

13 We had a number of tribes that came to the
14 site, and -- and the position of all of those tribes
15 was they were going to do the survey based on how they
16 thought the survey should be done. They were given
17 the freedom to do that.

18 It seems to me it would be grossly unfair
19 to provide the Oglala Sioux at this point in time with
20 what essentially would be some sort of favoritism over
21 what the rest of the tribes were faced with, and with
22 which they agreed.

23 JUDGE BOLLWERK: Well, this is Judge
24 Bollwerk, and since I'm new to this case, maybe
25 somebody could give me a specific example of -- I

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1 guess I look to the Tribe first -- as to what is too
2 narrow about what Powertech has just proposed or
3 indicated they're willing to do.

4 MR. PARSONS: Thank you, Your Honor. This
5 is Jeff Parsons with the Oglala Sioux Tribe.

6 I think the record is replete with letters
7 and communication between the Tribe and the NRC staff
8 about the specifics. It should be noted that not a
9 single tribe signed onto the programmatic agreement.
10 Not a single Sioux tribe found it acceptable
11 previously to conduct a -- a field study with no
12 protocol established, with no parameters established.

13 I think that those -- those letters and
14 documents are in the record and can detail it in --
15 better than I can in the -- in terms of this, sitting
16 here at this phone call at the moment. I am happy to
17 point the Board to those citations in the record, but
18 that -- those discussions were held in depth, and that
19 is reflected in the record.

20 The Tribe -- just to finish, I mean, the
21 Tribe had a protocol that they put together and
22 submitted to NRC staff and said this would be
23 acceptable, this is what we'd like to see. There was
24 -- there was no response to that, detailed response to
25 that document in terms of getting into the details.

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1 It was simply rejected in favor of Powertech's
2 proposal, and so that -- you know, that work has been
3 done by the Tribe. There was a lot of time spent
4 putting together those protocols and that proposal
5 initially.

6 Now, this was several years ago now, but,
7 you know, it's not as if the Tribe was not working
8 toward it, but it was -- the Tribe was disappointed
9 when the NRC staff, without giving, you know, a
10 substantive response to the proposal, rejected it and
11 instead just said we're going to do what Powertech
12 would like to do. And so --

13 MR. PUGSLEY: Judge Bollwerk, this is
14 Chris Pugsley from Powertech. If I may just add
15 something to this?

16 At no point when asked the question did
17 Powertech, either Mr. Thompson or myself, indicate
18 that we would refuse discussions with NRC as the lead
19 agency for the NHPA Section 106 process. We certainly
20 are -- if Ms. Monteith and her staff want to have
21 discussions with us and with the Tribe, we are open to
22 listening to what they have to say.

23 But the question asked to counsel was what
24 is our company's -- the current licensee's, I
25 apologize -- our current position on the issue? And

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1 that is what we laid out. If there are to be further
2 discussions per the Board's order, I am confident that
3 the licensee will listen to everything that has to be
4 said.

5 But at the end of the day, the staff,
6 while they are the lead agency, it is Powertech's
7 site, and we can -- we can articulate our position how
8 we deem appropriate. However, I want Mr. Parsons to
9 know that if there is an occasion to have a
10 conversation, if the Tribe does engage NRC staff about
11 parameters for a site survey, we will listen.

12 JUDGE BOLLWERK: All right. Let me -- let
13 me --

14 PARTICIPANT: Yes, this is --

15 JUDGE BOLLWERK: -- let me turn and let
16 Ms. Monteith, and then we can hear back from the
17 intervenor. Do you want to say anything about this?

18 MS. MONTEITH: Your Honor, we -- we are,
19 to reiterate, interested in engaging with the Oglala
20 Sioux Tribe on the specific issue of the parameters of
21 the site survey.

22 The -- the question that we had, I believe
23 -- I was not counsel for this proceeding at the time
24 of the May 2015 meeting -- but my understanding was we
25 had spoken about going back to Powertech and

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1 determining whether such a site survey would be
2 possible given that they control access to the site.
3 We just heard that that is the case, and so we would
4 like to engage further on the parameters of what such
5 a survey would be like.

6 JUDGE BOLLWERK: So I am hearing --

7 MR. THOMPSON: Judge Bollwerk?

8 (Simultaneous speaking.)

9 MR. THOMPSON: Judge Bollwerk?

10 JUDGE BOLLWERK: Yes, go ahead.

11 MR. THOMPSON: This is Anthony Thompson.

12 I would just -- the record will reflect that there
13 were numerous references by the Oglala Sioux to
14 established protocols for traditional cultural
15 resource evaluations, and in fact, that is not so. It
16 is not correct. It is correct with respect to
17 archeological surveys, but there are no such things as
18 -- for traditional cultural surveys.

19 They are in the eye of the beholding
20 Native American tribe, and the tribes who came to the
21 site went at it the way they wanted. They were given
22 the freedom. They had the whole site. They -- they
23 were given the time frame that they needed to do it,
24 and they did it.

25 MR. PARSONS: On behalf of the Oglala

1 Sioux Tribe, this is Jeff Parsons. I would -- I would
2 suggest that the -- Mr. Thompson is not a technical
3 expert in this -- in this case and should not be
4 essentially presenting his -- his expert opinion on --
5 on cultural and archeological surveys. I think the
6 record is well-established in this case, and I will
7 leave it at that. Thank you.

8 JUDGE BOLLWERK: Thank you. Mr. Parsons,
9 just so that I am clear on the -- on the position of
10 the Tribe, is the approach that the Tribe is advancing
11 the only approach that would be acceptable to the
12 Tribe, or is this just one approach that we have a lot
13 of material on in the record that was not taken at the
14 time it was initially proposed? Is the Tribe willing
15 to consider a survey, research other than the -- the
16 position that was outlined during the hearing and that
17 was not -- not accepted by the -- by the staff?

18 MR. PARSONS: Thank you, Your Honor, Jeff
19 Parsons on behalf of the Tribe.

20 Of course the Tribe is -- is more than
21 willing to -- to negotiate and consider any -- any
22 viable approaches. As I think we -- in our dialogue
23 with NRC staff, it made sense to us to look at that
24 approach that we had previously developed as a
25 starting point, certainly, for discussion, but the

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1 Tribe is more than open to -- to further consideration
2 of any methodology that is appropriate.

3 CHAIR FROEHLICH: And so the staff -- if
4 the staff were to come forward with surveys or
5 approaches used, let's say, in other cases, or by
6 other tribes, the Oglala Sioux would be willing to
7 consider these as a potential resolution to this -- to
8 this case and this issue?

9 MR. PARSONS: Yes, Your Honor. I think
10 the discussion we had in May was very much aligned
11 with us, and we expect those discussions to continue.

12 JUDGE BOLLWERK: And I think --
13 (Simultaneous speaking.)

14 JUDGE BOLLWERK: This is Judge Bollwerk.
15 I think I also heard the staff and Powertech indicate
16 that in fact they were willing at least to take the
17 information that had been provided before and look at
18 it again?

19 MS. MONTEITH: Your Honor, this is Emily
20 Monteith for the staff. We are willing to take any
21 information that the Oglala Sioux Tribe is willing to
22 provide on their traditional cultural properties,
23 otherwise put as historic and cultural resources of
24 interest to them. Anything that they are willing to
25 provide, we would be thrilled to have.

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1 We have simply been focusing our efforts
2 on discussions of the site survey in particular
3 recently, but we -- I think the issue in this case is
4 that we have not received anything, and that is why we
5 were not able to document -- specific to the Oglala
6 Sioux Tribe, and that's why we were not able to
7 document it as a NEPA analysis, so any information
8 would be of great value to us and would enable us to
9 protect this through mitigation measures, through the
10 programmatic agreement, et cetera.

11 MR. PUGSLEY: Judge Bollwerk, Chris
12 Pugsley from Powertech. If I may reiterate two
13 points? One, we are certainly willing to listen to
14 whatever the staff and the Oglala Sioux Tribe were to
15 come up with, but what I would like to ask Judge
16 Bollwerk if I could, sir, can we find out for the
17 record whether or not the -- the Tribe, and I guess I
18 am directing -- I am sorry, Mr. Parsons, I am
19 directing this question to you -- is -- is a site
20 survey that would be conducted under the parameters
21 used by I believe it was seven tribes, including two
22 Sioux tribes, previously, is that rejected out of
23 hand?

24 CHAIR FROEHLICH: Mr. Parsons, I have no
25 objection to you answering that if you know the

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1 answer.

2 MR. PARSONS: Thank you, Your Honor. This
3 is Jeff Parsons again.

4 That's a discussion I'd have to have, you
5 know, with -- with my client. Obviously, there was
6 some -- as the record reflects, some strenuous
7 objections to that approach previously. It is always
8 -- you know, it is always worth working at things
9 anew, certainly, but my impression is that it is
10 unlikely that the conditions have changed so
11 dramatically that something that was unacceptable
12 previously, with no changes and no additional
13 components, would now be just fine, essentially.

14 So I think we -- we would want to have
15 that discussion in a -- in a setting that allows the
16 Tribal Historic Preservation Office, staff and experts
17 there, to -- to be part of that analysis.

18 MR. PUGSLEY: Chris Pugsley from
19 Powertech. Mr. Parsons, thank you. I appreciate you
20 answering that.

21 CHAIR FROEHLICH: Ms. Monteith, assuming
22 that there can be an agreement on an approach to a
23 survey or a cultural resource identification effort,
24 is it the staff's plan to supplement the SEIS in this
25 case to reflect the cultural, historical, and

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1 religious resources of significance to the Tribe?

2 MS. MONTEITH: Your Honor, should we be so
3 fortunate to identify these resources, yes, the
4 staff's intention is to supplement the SEIS with that
5 information, and I believe in accordance with our
6 guidance, we would also revise the record of decision
7 to reflect the Board's ultimate ruling subsequent to
8 that for supplementation of the EIS.

9 (Pause.)

10 CHAIR FROEHLICH: Has -- has there been
11 any activities associated with the programmatic
12 agreement? Have any activities been undertaken since
13 -- since the partial initial decision in this case?

14 MS. MONTEITH: Your Honor, Emily Monteith
15 for the staff. There have been no activities
16 undertaken pursuant to the programmatic agreement yet.

17 CHAIR FROEHLICH: Okay. All right. At
18 this point, I'd ask the last question that we had I
19 guess put in our notice of this conference, and that
20 is really the request that the parties share with us
21 their ideas on how this case can be resolved and what
22 the prospects are going forward. And we have heard a
23 lot about the events leading up to the sole meeting,
24 and I guess we've heard something about the plans
25 going forward, at least the intentions to go forward.

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1 I would like to hear, if the parties are
2 prepared at this point, to -- to hear their views on
3 how this case can resolve, and perhaps in what time
4 frame we could expect a resolution. I don't know who
5 wants to go first. Perhaps Mr. Pugsley? Why don't we
6 start with the licensee?

7 MR. PUGSLEY: Yes, Your Honor, Chris
8 Pugsley for Powertech.

9 Well, as I am sure you are well aware, we
10 are 16 months since all papers filed with the
11 Commission with the appeal. We have no indication of
12 when that is going to happen, and there is no way any
13 of us can know exactly when that decision will come
14 down.

15 As Mr. Thompson and myself have indicated
16 on this call, we have articulated to all parties the
17 licensee's position on resolution of this matter, but
18 we have not ruled out listening to what is to be said
19 by both the lead agency, NRC, as well as the Oglala
20 Sioux Tribe and the Consolidated Intervenors.

21 We -- basically, since we are not -- we
22 don't have the federal responsibility to engage in
23 this government-to-government consultation, it is our
24 view, Mr. Thompson and myself, that we are going to
25 just wait to hear from NRC staff as to what is -- what

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1 is being done, what is being proposed, if there are
2 answers to any questions that we have raised over the
3 past I would say three months, most notably in August,
4 when we were trying to determine exactly what type of
5 approach to resolving this issue in terms of resolving
6 the Oglala Sioux Tribe to the site to do a survey,
7 what those parameters will be. We will wait for the
8 agency to contact us, and we will see what -- what
9 transpires.

10 CHAIR FROEHLICH: Thank you, Mr. Pugsley.
11 Perhaps from the Oglala Sioux Tribe at this point.
12 Mr. Parsons?

13 MR. PARSONS: Thank you, Your Honor. This
14 is Jeff Parsons.

15 I -- it sounds that the NRC staff and the
16 Oglala Sioux Tribe will continue their discussions.
17 Frankly, the May meeting was -- we felt was a
18 productive one and I think laid the groundwork for
19 effective communication between staff and the -- and
20 the Tribe.

21 We would like to continue those -- those
22 discussions. I think Ms. Monteith was correct that it
23 -- having face-to-face meetings or phone calls, we
24 certainly appreciate face-to-face meetings, certainly.
25 Those tend to be more productive than formal letter

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1 writing.

2 The -- the nature of the work with the
3 Tribal Historic Preservation Office, it is an
4 extremely busy office that -- that does not, you know,
5 have the resources necessary to, you know, be -- be,
6 you know, on call all the time, given the number of
7 projects that they have to deal with and issues they
8 have to contend with, but this is certainly a high
9 priority within the office. The fact that they are
10 difficult to -- to reach at times should not be
11 construed as an unwillingness to -- to communicate,
12 and I have offered my help to improve those lines of
13 communication, and I hope we can go further down the
14 road of working out a -- a way to conduct a survey,
15 which we do think is the best way to determine the
16 nature of the impacts to the Tribe's cultural
17 resources at the site.

18 I guess we are -- still have some
19 frustration associated with having the license in
20 place. I think it results in a -- a disincentive
21 perhaps for the company to engage because all they
22 have to do is nothing, and they have an effective stay
23 of the Board's decision pending appeal. We are in a
24 position where without the EPA or state permits, the
25 -- the standard, the irreparable harm standard, as we

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1 found out throughout the proceeding, is a difficult
2 one for us to meet, so having that license in place
3 may not be as effective of a way to encourage the
4 parties to move forward, and we hope the Board might
5 reconsider that particular aspect of its -- of its
6 order.

7 It was released, that was requested, and
8 we believe the Board has authority to -- to vacate
9 that license and -- and remand back to the agency to
10 conduct their additional compliance with the National
11 Environmental Policy Act and National Historic
12 Preservation Act.

13 CHAIR FROEHLICH: Mr. Parsons, isn't that
14 in effect where we are at this point, even without any
15 action? We are trying to resolve those issues that --
16 that deal with the cultural resources and the
17 identification of them, and remanding it, the order
18 that is, really puts us in the same position we're in
19 at this moment.

20 MR. PARSONS: Thank you, Your Honor. I
21 appreciate that. I think that that is generally true,
22 but when the license remains in flux, I think it -- it
23 -- the incentive to -- to get busy, essentially, and
24 to consider additional surveys and -- and issues
25 associated with that, as we heard today, I think those

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1 -- with that license in place and effective, the
2 incentives are not quite as heightened as they would
3 be without a license in place. That's all I am
4 saying.

5 CHAIR FROEHLICH: All right. Now Mr.
6 Parsons, the -- the approach that the staff has taken
7 in the Crow Butte case that I had mentioned earlier,
8 and the ISO proceeding involving the Crawford,
9 Nebraska, there was a contract awarded to support the
10 identification of cultural resources, and that -- that
11 I guess contract was -- for the benefit of identifying
12 items of significance to the Oglala Sioux Tribe, would
13 something along that line be an avenue for resolving
14 this case, I mean, a similar type of -- of survey and
15 cultural resources identification effort?

16 MR. PARSONS: Thank you, Your Honor. This
17 is Jeff Parsons. I am not counsel on the Crow Butte
18 case. I am not familiar with that contract or the
19 parameters or protocols engaged, or the site itself
20 and how it -- it might be distinct from the site of
21 the Dewey-Burdock, so I am ill-equipped to answer that
22 question.

23 I will say that when -- when we previously
24 -- before the -- the hearing, when -- when, as I
25 explained earlier, the Tribe had prepared a protocol

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1 and had a third-party contractor ready, submitting --
2 had submitted a proposal, and that's what the Tribe
3 has submitted to the NRC, so that was a similar -- at
4 least in terms of the contractor and -- and that
5 process was similar, so I would assume that that would
6 be certainly on the -- you know, on the table.

7 But as far as the particulars of the
8 contract that was signed in the Crow Butte case, I
9 just cannot speak to that because I have no knowledge.

10 CHAIR FROEHLICH: Okay. Thank you, Mr.
11 Parsons.

12 Finally, I'd like to hear from staff
13 counsel on how -- how to proceed from here, or what is
14 the -- what is the best way to resolve this case?

15 MS. MONTEITH: Your Honor, regarding your
16 specific question regarding the parties' positions
17 regarding procedural course you should take, the staff
18 really has no position on that particular question
19 except to say that, again, to reiterate that we hope
20 to continue discussions with the Oglala Sioux Tribe
21 regarding the potential site visit, regarding any
22 other methodologies that they may wish to put forward
23 for the provision of information on these cultural
24 resources' importance to the Tribe.

25 I would also like to add that I -- we

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1 recognize that the pace of this has probably not been
2 what the Board had contemplated, and we do not want to
3 lay all of the blame at the feet of the Tribe, and we
4 recognize and acknowledge that the Tribal Historic
5 Preservation Office is indeed a busy office. We are
6 consulting with them on other licensing matters as
7 well, and we are appreciative of the time that they
8 have taken to meet with us in person, to respond to
9 our letters, and for their counsel to talk to us, so
10 we -- we greatly appreciate that, and we hope to move
11 these conversations forward.

12 So from -- from this discussion, from the
13 others that we've had, and from the staff's discussion
14 with the Tribe in May, we -- our next step we believe
15 is to have hopefully a teleconference with the Tribe
16 in order to discuss their views on a site visit in
17 particular and for us to address the issues that they
18 have raised in their last meeting. Of course, we will
19 endeavor to do that to the extent we are able to
20 before then by a letter. Does that answer your
21 question, Your Honor?

22 CHAIR FROEHLICH: Yes, and I appreciate
23 that and the efforts of the staff to -- to resolve and
24 finish up this case. I -- I guess I would point out
25 to the parties that the Commission's regulations at 10

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1 CFR 2.338 provide for the appointment of a settlement
2 judge if the parties should think, as you move
3 forward, that that might be helpful to resolving this
4 case, that that remains available to the parties to
5 make such a request if you think it would help.

6 Ms. Monteith, you were correct that the
7 Board has been somewhat surprised at the pace at which
8 this -- this case has gone forward, and we just
9 appreciate the -- the efforts I guess that -- that you
10 have just articulated about perhaps moving forward
11 with phone calls to the Tribe and sort of re-engaging
12 the process to try to resolve this.

13 JUDGE BOLLWERK: This is Judge Bollwerk.
14 I just had a question. The next -- assuming the next
15 teleconference you're talking about, is that something
16 that Powertech would be involved in, or are they not
17 yet into the process in terms of their ability to --
18 to be a part of the process?

19 MS. MONTEITH: Your Honor, Emily Monteith
20 for the staff. Is that directed to the staff as a
21 question?

22 JUDGE BOLLWERK: Yes, please, I am sorry.

23 MS. MONTEITH: Okay. I think out of
24 sensitivity to the Tribe, we contemplated this as
25 another government-to-government consultation. I

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1 think in that sense, we would like to have candid
2 conversations with them as the two parties involved,
3 but we would also be open to holding a public meeting
4 with Powertech subsequent to that to discuss the
5 particulars of the results of any teleconference we
6 are able to have with the Tribe.

7 And to the extent that the Tribe and
8 Powertech have views on how we should engage the other
9 party, one another, I suppose we would be happy to
10 accept those views as well and to accommodate that.

11 JUDGE BOLLWERK: And I know, particularly
12 with the Tribe, sometimes information technology
13 resources are an issue, but would your next conference
14 help any, if somebody -- I don't know if it is Skype
15 or GoToMeeting or anything like that is available?

16 MR. PARSONS: This is Jeff Parsons on
17 behalf of the Tribe. I think those are possibilities.
18 I am not sure what -- frankly, what capacity they have
19 there in the Tribal Historic Preservation Office, but
20 I think we would be open to any suggestions.

21 Obviously, sometimes, being able to --
22 like we experienced in May, being able to sit down
23 with someone in more or less a personal arrangement I
24 think aids in these discussions, certainly.

25 JUDGE BOLLWERK: Right. I agree, but the

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1 weather is becoming more problematic, and I'd hate to
2 see this get held up because of that issue, especially
3 if there's other possibilities. Maybe not as -- as,
4 you know, first choice might be a face-to-face
5 meeting, but second choice, if you could do something
6 with Skype or GoToMeeting where at least you could be
7 face-to-face in terms of the across a computer screen,
8 not maybe the optimal, but certainly might help things
9 move along. Just something to think about, and again,
10 that's a possibility.

11 MR. PARSONS: Thank you, Your Honor.

12 MS. MONTEITH: Your Honor, Emily Monteith
13 for the staff, and we would like to say that if the
14 Tribe has any other suggestions for how we might best
15 go about it, we are happy to accept those and attempt
16 to accommodate them to the extent we are able to.

17 CHAIR FROEHLICH: This -- this concludes
18 the questions I guess that -- that I had for the
19 parties at this point. Is there anything that any of
20 the parties wishes to state, say for the -- for the
21 benefit of the Board before we conclude today's
22 teleconference?

23 MR. PUGSLEY: Your Honor, Chris Pugsley
24 from Powertech. No further comment. Thank you.

25 CHAIR FROEHLICH: Thank you, Mr. Pugsley.

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1 From the Tribe or any of the intervenors?

2 MR. PARSONS: Thank you, Your Honor, Jeff
3 Parsons on behalf of the Tribe. We have no further
4 questions either.

5 CHAIR FROEHLICH: Then the ball goes to
6 the staff. The NRC staff, please?

7 MS. MONTEITH: Your Honor, we have no
8 further questions.

9 CHAIR FROEHLICH: Okay.

10 MR. FRANKEL: David Frankel for
11 Consolidated Intervenors. Thank you, Your Honor. We
12 have no further questions.

13 CHAIR FROEHLICH: Okay. I thank the
14 parties for their answers and participation in this
15 telephone conference. The Board appreciates this
16 update to the -- to the status reports that are coming
17 monthly, and we hope that the pace of the discussions
18 will pick up and that the parties will move towards a
19 resolution of this case contemplated in the LBT.
20 Judge Bollwerk?

21 JUDGE BOLLWERK: This is Judge Bollwerk.
22 I am going to state the obvious here, what the heck.
23 Obviously, the Commission has this case in front of
24 it. It has the Crow Butte case in front of it. My
25 assumption is, may be wrong, may be right, that

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1 whatever -- they are trying to make sure that whatever
2 they rule in one case is consistent with the other
3 case, probably. How long that will take I don't know.
4 As I think Mr. Pugsley indicated, none of us know.

5 And right now, the parties have an
6 opportunity to settle this case or to come to a
7 resolution in a way that fits all their needs. If the
8 Commission rules, depending on what it is, someone may
9 not be too happy and may end up in the court of
10 appeals, which would be the next step, which may take
11 considerably longer to get a resolution, so there
12 still is a window here for you all to kind of work
13 through this to the degree you can, but once the
14 Commission rules, then other things are going to begin
15 to take over, and unfortunately, probably -- this is
16 generally the case -- there are going to be some
17 people that are happy and some people that are
18 unhappy.

19 So there is an opportunity to make
20 everybody here. I would certainly encourage you to
21 think about that and try to move this forward. It may
22 be to everyone's benefit to try to reach that
23 resolution in this window because that window will
24 close in theory at some point.

25 CHAIR FROEHLICH: Thank you, Judge

1 Bollwerk, and I thank the parties. If there is
2 nothing further, we will adjourn. Thank you.

3 (Whereupon, the above-entitled matter went
4 off the record at 3:20 p.m.)

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