

September 21, 2018

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
)
(Dewey-Burdock)
In Situ Uranium Recovery Facility))

NRC STAFF'S RESPONSE TO OGLALA SIOUX TRIBE'S MOTION
FOR SUMMARY DISPOSITION OF CONTENTION 1A

Pursuant to 10 C.F.R. § 2.1205 and the Atomic Safety and Licensing Board's Order Establishing Procedures for Filing Motions for Summary Disposition,¹ the Staff of the U.S. Nuclear Regulatory Commission responds to the Oglala Sioux Tribe's Motion for Summary Disposition of Contention 1A. In its motion, the Tribe asserts that no genuine issue of material fact exists, thereby entitling the Tribe to a decision as a matter of law.² Specifically, the Tribe claims that the Staff has not complied with the National Environmental Policy Act (NEPA) because the Staff has not conducted a survey to catalogue Native American (particularly Lakota Sioux) cultural, historic, and religious resources that may be impacted by the Dewey-Burdock project. Without such a survey, the Tribe reasons, NEPA has been violated because no

¹ Order (Establishing Procedures for Filing Motions for Summary Disposition) at 4, 7 (unpublished) (ADAMS Accession No. ML18200A329).

² See Oglala Sioux Tribe's Motion for Summary Disposition at 1 (Aug. 17, 2018) (ML18229A341) (Tribe's Motion).

analysis of the impacts and mitigation measures specific to those resources has been completed.³

The Staff opposes the Tribe's motion because it is not supported by federal and NRC case law and is premised on immaterial, unsupported, or inaccurate facts. Because the case law and material facts cited by the Tribe do not show that the Tribe is entitled to judgment as a matter of law, the Board should deny the Tribe's motion.

I. The Cases Cited by the Tribe Do Not Demonstrate That the Tribe Is Entitled to Judgment as a Matter of Law

The Tribe claims that certain Board and Commission decisions in this proceeding, as well as federal case law, compel the Board to find that the Staff has not complied with NEPA. This is so, the Tribe argues, because the Staff has not conducted a study or survey of Lakota Sioux cultural resources and has not supplemented the Final Supplemental Environmental Impact Statement (FSEIS) for the Dewey-Burdock project with additional information on the potential impacts of the project on Lakota Sioux cultural resources, as well as mitigation measures specific to such resources. However, the decisions cited by the Tribe do not support this proposition.

Quoting portions of the Board's 2015 Partial Initial Decision, LBP-17-9, and a 2018 Commission decision denying review of a different Board ruling, CLI-18-7,⁴ the Tribe asserts that, without "any surveys to catalogue Native American (particularly Lakota) cultural, historic and religious resources, and no NEPA analyses of the impacts to cultural, historic and religious resources from the project, or mitigation measures," the Staff has violated NEPA, and "without

³ See Tribe's Motion at 4–5.

⁴ In CLI-18-7, the Commission denied Powertech's appeal of LBP-17-9 on procedural grounds: its appeal did not meet the standard for interlocutory review and did not show that the Board erred in denying summary disposition. The Commission did not make any findings regarding the merits of Contention 1A. See *Powertech USA, Inc.* (Dewey-Burdock In Situ Uranium Recovery Facility), CLI-18-7, 88 NRC __, __ (July 24, 2018) (slip op. at 7–12).

these NEPA analyses, there is no set of facts that can excuse this legal violation.”⁵ The Tribe’s selective quotation of these two decisions, however, misconstrues the appropriate standard by which the Staff’s compliance with NEPA is measured.

As the Board explained in LBP-17-9, the relevant legal standard is the “reasonableness of [the Staff’s] method for assessing impacts from the Dewey-Burdock project on Sioux tribal cultural resources.”⁶ In other words, the appropriate inquiry is whether the Staff made a reasonable effort to obtain the information sought. The test is not, as suggested by the Tribe, whether—independent of the reasonableness of the Staff’s efforts—the Staff was ultimately successful in its ability to obtain, describe, and assess such information in a FSEIS. The Board also stated that if the Staff’s approach to obtaining additional information on Lakota Sioux cultural resources did “not yield information on the identified deficiencies in the FSEIS, the NRC Staff would need to include an explanation that satisfies the requirements of 40 C.F.R. § 1502.22.”⁷ If, as the Tribe suggests, the Staff can only satisfy NEPA by successfully conducting a survey of Lakota Sioux cultural resources and assessing the resulting information in the FSEIS, then 40 C.F.R. § 1502.22 would be rendered superfluous. But as evidenced by the existence of a failsafe in 40 C.F.R. § 1502.22, NEPA does not compel an agency to obtain information where it is cost-prohibitive to obtain or effectively unavailable.

⁵ Tribe’s Motion at 4–5.

⁶ See *Powertech (USA), Inc.* (Dewey-Burdock In Situ Uranium Recovery Facility), LBP-17-9, 86 NRC 167, 174; see also *id.* at 199–201 (2017) (“[T]he NRC Staff is not required to use ‘the best scientific methodology’ to assess environmental impacts, but it *is* required to use a reasonable methodology. Thus, the NRC Staff may wish to consider available alternatives to determine if there is a reasonable method . . . capable of yielding the information on the cultural resources of the Lakota Sioux Tribes.”) (citing *Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-10-11, 71 NRC 287, 315 (2010)) (emphasis in original)).

⁷ *Powertech*, LBP-17-9, 86 NRC at 200. As the Staff sets forth in its Motion, the adjudicatory record supplies the information necessary to satisfy the requirements of 40 C.F.R. § 1502.22. See NRC Staff’s Motion for Summary Disposition at 33–38 (Aug. 17, 2018) (ML18229A343) (Staff’s Motion).

In LBP-17-9, the Board identified four material concerns raised by the Tribe that were still in dispute regarding the reasonableness of the Staff's previous efforts to obtain additional information on Lakota Sioux cultural resources to describe and assess in the FSEIS. In response to the Tribe's concerns, the Staff selected and attempted to implement a reasonable approach to obtain additional information on Lakota Sioux cultural resources that responded to these concerns.⁸ After the Tribe's constructive rejection of the Staff's approach precluded its full implementation, however, the Staff determined that it could not reasonably obtain this information from the Tribe.⁹ Having concluded that the information is unavailable, in its motion the Staff addressed the requirements of 40 C.F.R. § 1502.22 and explained that the information necessary to satisfy these requirements already exists in the adjudicatory record of this proceeding.¹⁰ Accordingly, as discussed in the Staff's motion, the Staff has satisfied the appropriate legal standards under NEPA.

The Tribe also relies on a recent decision of the D.C. Circuit Court of Appeals on a petition for review filed by the Tribe. In that decision, the court ruled on only one claim raised by the Tribe: the legality of the NRC's determination to leave Powertech's license in effect notwithstanding a finding that the Staff's review was in certain limited aspects not in compliance with NEPA. The court found that the NRC's decision to leave the license in place was inconsistent with NEPA, and it remanded the matter to the NRC.¹¹ This decision does not

⁸ See Staff's Motion at 8–9, 16–24.

⁹ See *id.* at 33–34. The Tribe constructively rejected the approach despite repeatedly acknowledging that the approach was a reasonable methodology for obtaining this information. See *id.* at 25–33.

¹⁰ See *id.* at 33–38.

¹¹ The parties have been invited to provide their views on how the agency should respond to the court's remand. *Powertech (USA), Inc.* (Dewey-Burdock In Situ Uranium Recovery Facility), Order (Aug. 30, 2018) (unpublished). The Staff respectfully requests that the Board decline to act on the Tribe's request for an order vacating, or otherwise staying the effect of, the Powertech license, as that question is pending before the Commission itself.

support the Tribe's position that the Staff's efforts to resolve Contention 1A are insufficient. The court explicitly stated that it was not making any findings regarding the merits of Contention 1A.¹² Rather, as noted above, the court found that, based on Board's and Commission's own characterizations of the deficiencies in the FSEIS, the decision to leave the license in effect was not supported by law.¹³ The court's discussion of the Board and Commission decisions in LBP-15-16 and CLI-16-20, respectively, was for the sole purpose of establishing that the Board and the Commission had described the deficiencies in the FSEIS as "significant." The court observed that the "irreparable harm" standard associated with the question of license effectiveness "has no bearing on its ultimate resolution of the merits of the Tribe's multiple contentions, including whether NEPA actually has been (or subsequently will be) satisfied."¹⁴ Moreover, the decisions challenged by the Tribe before the D.C. Circuit did not reflect the complete adjudicatory record here. As set forth at length in the Staff's subsequent motions for summary disposition, the Staff has undertaken significant additional efforts to obtain additional information on Lakota Sioux cultural resources since the issuance of the decisions challenged before the D.C. Circuit.¹⁵

The Tribe's reliance on *Pub. Empls. for Envtl. Responsibility v. Hopper* is similarly misplaced. The Tribe cites *Hopper*, in which the D.C. Circuit found that Bureau of Ocean Energy Management's (BOEM) reliance on inadequate geological surveys violated NEPA, to suggest that the Staff's inability to successfully carry out a survey for Lakota Sioux cultural

¹² *Oglala Sioux Tribe v. NRC*, 896 F.3d 520, 531 (D.C. Cir. 2018).

¹³ *Id.* at 523, 538–39.

¹⁴ *Id.* at 528. And in any event, the record before the court contained no evidence concerning the Staff's efforts to resolve Contention 1A after the issuance of LBP-15-16.

¹⁵ See Staff's Motion; see also NRC Staff's Motion for Summary Disposition of Contentions 1A and 1B (Aug. 3, 2017) (ML17215B356).

resources and supplement the FSEIS with the resulting information is likewise a *de facto* violation of NEPA.¹⁶ But *Hopper* is distinguishable from the facts in this proceeding. In *Hopper*, the D.C. Circuit found that the discussion of geological surveys in the BOEM's EIS was deficient under NEPA. In that case, BOEM conceded that the geophysical data it relied on at the time of license issuance was inadequate, but it asserted that it could nevertheless consider the consequences of the licensing decision based on later surveys that took place after the project was authorized.¹⁷ Under these circumstances, the absence of data led the court to conclude that BOEM did not “consider every significant aspect of the environmental impact” of the project, because BOEM could not ensure that the sea floor would be able to support wind turbines.¹⁸

Here, unlike the agency in *Hopper*, the Staff has made a reasonable effort to obtain information that is in the exclusive control of external parties—the Lakota Sioux Tribes, including the Oglala Sioux Tribe.¹⁹ The Staff's efforts to obtain that information, although acknowledged as reasonable by the Tribe, were nevertheless constructively rejected by the Tribe.²⁰ These circumstances are distinct from the circumstances in *Hopper*, where the missing information was legally available to the agency.

Finally, the Tribe asserts that a NEPA “analysis of impacts—including analysis and disclosure of the shortcomings of the assumptions relied upon by the agency—must be found in the NEPA document itself, not in supplemental documentation, nor even buried somewhere in

¹⁶ See Tribe's Motion at 3.

¹⁷ *Public Empls. for Env'tl. Responsibility v. Hopper*, 827 F.3d 1077, 1083 (D.C. Cir. 2016).

¹⁸ *Hopper*, 827 F.3d 1077 at 1081–82 (quoting *Balt. Gas & Elec. Co. v. NRDC*, 462 U.S. 87, 97 (1983)).

¹⁹ The Tribe has acknowledged that “there may well be more [cultural resources beyond those identified in Powertech's license application] that only the Tribe can identify[.]” Ex. OST-014-00-BD01, Declaration of Michael CatchesEnemy at 2 (Apr. 14, 2014) (ML14241A446); Ex. OST-015-00-BD01, Declaration of Wilmer Mesteth at 2 (Apr. 1, 2010) (ML14247A336).

²⁰ Staff's Motion at 16, 25–33.

the administrative record.”²¹ In other words, the Tribe asserts that the adjudicatory record in this proceeding cannot provide a basis for finding that the Staff has satisfied NEPA—in order to satisfy NEPA, the Staff must obtain the missing information and supplement the FSEIS with it. The Tribe further asserts that the Staff’s approach is an impermissible attempt “to use post-EIS analyses to confirm or otherwise ratify previously identified gaps in a NEPA analysis,” citing the D.C. Circuit’s recent *Powertech* decision and federal case law disapproving agencies’ arguments that evaluation of information post-dating the issuance of an EIS can satisfy NEPA.²²

The Tribe’s views are contrary to well-established case law governing this agency’s NEPA process. The NRC’s adjudicatory process contemplates that intervenors can, through their admitted contentions, take part in the agency’s development of its NEPA record of decision. The NEPA record of decision remains open and is subject to adjudicatory supplementation relative to matters associated with any pending admitted NEPA contention until the hearing record is closed and the final agency adjudicatory decision is issued.²³ In that way, “in the context of an NRC adjudicatory proceeding, even if an [EIS] prepared by the Staff is found to be inadequate in certain respects, the Board’s findings, as well as the adjudicatory record, ‘become, in effect, part of the [final EIS].’” Thus, the Board’s ultimate NEPA judgments

²¹ Tribe’s Motion at 6.

²² *Id.* at 7–8.

²³ *Strata Energy, Inc.* (Ross In Situ Recovery Uranium Project), LBP-15-3, 81 NRC 65, 122 n.49 (2015), *rev. denied*, CLI-16-13, 83 NRC 566 (2016), *rev. denied sub nom, NRDC v. NRC*, 879 F.3d 1202 (2018). *But see Strata*, LBP-15-3, 81 NRC 566 (Commissioner Baran, concurring in part and dissenting in part) (dissenting from denial of review of intervenors’ claim that the Board erred in resolving contention by allowing its Initial Decision to supplement the Final Supplemental Environmental Impact Statement (FSEIS) after issuance of the license); *Powertech (USA) Inc.* (Dewey-Burdock In Situ Uranium Recovery Facility), CLI-16-20, 84 NRC 219 (2016) (Commissioner Baran, dissenting in part) (dissenting from denial of review of intervenor’s claim that the Board erred by not vacating the license for failure to complete an adequate NEPA review). The Staff’s record of decision for the Dewey-Burdock project explicitly references the fact that the adjudicatory record may affect the final decision, stating, “This ROD may be revised in accordance with any ASLBP decision on those issues [that are the subject of hearing].” Ex. NRC-011, NRC Record of Decision for the Dewey-Burdock Uranium In-Situ Recovery Project (ML14066A466) (Apr. 8, 2014), at 1.

can be made on the basis of the entire adjudicatory record in addition to the Staff's [final EIS]."²⁴

In this proceeding, unlike the cases the Tribe relies on, no final agency action has yet taken place with respect to Contention 1A.²⁵ Therefore, the Board's findings, as well as the adjudicatory record, can serve to supplement the Staff's FSEIS.

Further, the Tribe overlooks the critical distinction between the role of the adjudicators in the cases it cites and the role of the Board in the present proceeding. In this case, the Board serves as a fact-finding body, and has the authority to develop an evidentiary record. In the cases cited by the Tribe, the courts served in a reviewing capacity, and generally were limited in their authority to further develop the evidentiary record.²⁶ Even so, such courts have found support in an existing evidentiary record to conclude that an agency's EIS satisfies NEPA. As the Staff noted in its motion, where courts have found support in the adjudicatory record to demonstrate that an agency has satisfied the requirements of 40 C.F.R. § 1502.22, they have been reluctant to require agencies to submit a separate, formal statement explaining that data is incomplete or unavailable.²⁷

²⁴ *S. Nuclear Operating Co.* (Early Site Permit for Vogtle ESP Site), LBP-09-7, 69 NRC 613, 632 (2009) (quoting *Hydro Res., Inc.* (Rio Rancho, NM), CLI-01-4, 53 NRC 31, 53 (2001)).

²⁵ See *Oglala Sioux Tribe*, 869 F.3d at 527 ("Applying [the D.C. Circuit's standard for determining Hobbs Act jurisdiction], we conclude that the Commission's order, as a whole, is not final.") The D.C. Circuit took review solely of the decision to leave the license in effect, based on the "collateral order doctrine," which permits appellate review of a small category of issues even where litigation before the agency is not otherwise final. See *id.* at 527–30.

²⁶ See *Hydro Res., Inc.* (Rio Rancho, NM), CLI-01-4, 53 NRC at 53 (quoting *La. Energy Servs., L.P.* (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77, 89 (1998) ("The adjudicatory record and Board decision (and, of course, any Commission appellate decisions) become, in effect, part of the FEIS."); *Strata*, LBP-15-3, 81 NRC at 122 n.49 (citing *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 743–44 (1985) (distinguishing a district court with "factfinding powers" from a reviewing court whose task is "to apply the appropriate [Administrative Procedure Act] standard of review, 5 U.S.C. § 706, to the agency decision based on the record the agency presents to the reviewing court.")).

²⁷ Staff's Motion at 13–14; see *Colo. Env'tl. Coal. v. Dornbeck*, 185 F.3d 1162, 1172–73 (10th Cir. 1999); see also *WildEarth Guardians v. U.S. Forest Serv.*, 828 F. Supp. 2d 1223, 1240 (D. Colo. 2011) (agency satisfied 40 C.F.R. § 1502.22 where it stated that additional information on climate impacts was unavailable but that available information indicates impacts would not be significant); *High Country*

In sum, the Oglala Sioux Tribe's motion is not supported by applicable law, and should therefore be denied.

II. The Tribe's Statement of Material Facts Does Not Support Its Motion Because It Consists of Immaterial, Unsupported, or Inaccurate Facts and Assertions

The Tribe also makes a number of unsupported claims in the statement of material facts underlying its assertion that the Staff has not complied with NEPA. For example, the Tribe claims that the Board is obliged to set aside Powertech's license in part because of alleged statements by Powertech that "Powertech considers NEPA compliance an undue expense."²⁸ The Tribe further asserts that the "Staff has not conducted any surveys to catalogue Native American (particularly Lakota) cultural, historic and religious resources" or described potential impacts and mitigation measures thereto "[i]n part due to Powertech's opposition to the cost of NEPA compliance,"²⁹ and that "[d]uring the conference calls, [the] NRC Staff and Powertech asserted they were not willing to spend the money required to achieve NEPA compliance."³⁰ The Tribe neither pleads facts to support these assertions nor provides citations for these statements in the adjudicatory record. On the contrary, as set forth in the Staff's Statement of Material Facts, Powertech committed to providing the funding observed by the Tribe to be sufficient for carrying out the selected approach.³¹ This commitment encompassed

Conservation Advocates v. U.S. Forest Serv., 52 F. Supp. 3d 1174, 1194 (D. Colo. 2014) (record supplied sufficient information on significance of missing data to satisfy 40 C.F.R. § 1502.22).

²⁸ Tribe's Motion at 4.

²⁹ *Id.*

³⁰ *Id.* at 9.

³¹ Staff's Statement of Material Facts ¶¶ 19, 26, 42 (Aug. 17, 2018) (ML18229A343) (Staff's Statement of Material Facts).

reimbursements to the Tribe for its participation in the field survey, including funds for lodging, meals, transportation, and a \$10,000 honorarium per Tribe.³²

The Tribe also asserts that the Staff “abandoned” its March 16, 2018, selected approach to identify Lakota Sioux cultural resources, and it claims that the Staff has relied on a literature review report and field observations report “as a basis for its argument that it has now satisfied NEPA[.]”³³ The Tribe contends that these two reports “have [not] been subjected to the ‘hard look’ procedures required for NEPA compliance” and states that “neither of these documents contain any new information related to a cataloguing of Native American cultural, historical, or religious resources on the site, as required by this Board’s Order in [LBP]-15-16.”³⁴

As explained in the Staff’s motion, the Staff did not “abandon” the selected approach. Rather, after months of extensive negotiation with the parties, the Staff selected and began implementing an approach that the Tribe itself had repeatedly acknowledged as reasonable.³⁵ Despite the Tribe’s frequent observations that the approach was reasonable, during the first week of the field survey the Tribe abruptly provided its own cultural resources survey proposal that was so incompatible with the Staff’s selected approach as to constitute a constructive rejection of that approach.³⁶ The Staff informed the Tribe that its participation in the selected approach was essential to that approach, and given how far apart the Tribe’s proposal was from

³² See *id.* ¶ 42; see also *id.* ¶¶ 19 (explaining the Staff’s cost estimate for implementing the selected approach), 26 (quoting the Tribe as stating, “The Tribe would anticipate that an amount on the order of what was proposed previously would be appropriate.”), 41 (quoting the Tribe expressing that their objections concerning reimbursement would not prevent the Tribe from participating in the selected approach), 42 (restating the details of Powertech’s commitment to providing reimbursement to the Tribe for their participation in the field survey).

³³ Tribe’s Motion at 5.

³⁴ *Id.*

³⁵ See Staff’s Motion at 25–28; Staff’s Statement of Material Facts ¶¶ 17, 21, 24, 26, 39, 38, 41.

³⁶ See Staff’s Motion at 29–33; Staff’s Statement of Material Facts ¶¶ 58–59, 62–63.

the selected approach, the Staff had determined that it could not reach alignment with the Tribe on an approach to resolve the outstanding contention in this proceeding. The Staff accordingly informed the Tribe and other invited Tribes that it was discontinuing its efforts to implement the selected approach.³⁷

In addition, the Tribe has not shown how the lack of a supplement to the FSEIS or opportunity for “public comment on any NEPA document” support summary disposition in favor of the Tribe. As the Staff explains in its motion and in its answer to the Tribe’s statement of material facts, the Staff agrees with the Tribe that the two reports developed by the Staff’s contractor during the partial implementation of the selected approach do not contain “information related to a cataloguing of Native American cultural, historical, or religious resources on the site.”³⁸ As reflected in the Staff’s March 16, 2018, letter to the Oglala Sioux Tribe, the Staff intended to supplement the FSEIS with any information provided by the invited Tribes concerning sites of historic, cultural, and religious significance to the Lakota Sioux Tribes.³⁹ However, the reports developed by the Staff’s contractor do not contain information from the Tribes concerning such sites.⁴⁰ Because the Tribe constructively rejected the selected approach, and the partial implementation of the selected approach did not result in the Tribes providing such information,⁴¹ the Staff has not drafted or issued for public comment a supplement to the FSEIS. Instead, in accordance with 40 C.F.R. § 1502.22, the Staff has disclosed that it has not obtained this additional information and has explained how the

³⁷ See Staff’s Statement of Material Facts ¶¶ 65, 67.

³⁸ Tribe’s Motion at 5; see *also* Staff’s Motion at 33–34, 35–37.

³⁹ See Staff’s Statement of Material Facts ¶ 28.

⁴⁰ See Staff’s Motion at 36–37; Staff’s Statement of Material Facts ¶ 52, 66; Affidavit of Diana Diaz-Toro Concerning the NRC Staff’s Motion for Summary Disposition of Contention 1A ¶¶ 8, 10 (Aug. 17, 2018) (ADAMS Accession No. ML18229A343) (Diaz-Toro Affidavit).

⁴¹ See Staff’s Motion at 29–34, 35–37; Diaz-Toro Affidavit ¶¶ 8–11.

information that the Staff did obtain satisfies NEPA.⁴² Accordingly, the Tribe has not shown how these facts are material to the resolution of Contention 1A.

III. Conclusion

Because the Tribe's position is based on inapplicable federal and NRC case law and immaterial, unsupported, or inaccurate facts, the Tribe has not shown that it is entitled to judgment as a matter of law on Contention 1A.⁴³ Accordingly, the Tribe's motion should be denied.

Respectfully submitted,

*/Signed (electronically) by/
Emily Monteith
Emily Monteith
Counsel for the NRC Staff*

*/Signed (electronically) by/
Lorraine Baer
Lorraine Baer
Counsel for the NRC Staff*

Dated at Lisle, Illinois
this 21st day of September, 2018

⁴² See Staff's Motion at 33–38; Diaz-Toro Affidavit ¶¶ 8–11.

⁴³ For these reasons, the Tribe's motion and Statement of Material Facts likewise have not called into question the bases for the Staff's own motion for summary disposition.

September 21, 2018

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

NRC STAFF’S ANSWER TO OGLALA SIOUX TRIBE’S STATEMENT OF MATERIAL FACTS
FOR CONTENTION 1A

1. The Tribe has concrete and particularized interests that will be impacted by the issuance of the license. See Affidavit of Wilmer Mesteth (Apr. 1, 2010), Affidavit of Denise Mesteth (Apr. 1, 2010), Petition to Intervene and Request for Hearing of the Oglala Sioux Tribe (Apr. 6, 2010) (ADAMS Accession No. ML100960645).

Response: Admitted in part and denied in part. To the extent that this statement is simply reiterating the Oglala Sioux Tribe’s standing to intervene, the NRC Staff agrees that the Tribe has met the legal requirements for standing, and has never argued otherwise.¹ To the extent this statement is intended to demonstrate ongoing harm to the Tribe relevant to the present resolution of Contention 1A, the statement is insufficiently specific to constitute a material fact. In that regard, the eight year-old affidavits referenced in this statement predate both the review of the application and the extensive consultation, outreach, and analyses that have taken place since 2010.²

2. The impacts to the Tribe’s interests are further injured where NRC does not adhere to the required NEPA disclosure and analysis of the effectiveness of mitigation measures that may avoid, reduce, or mitigate impacts to the cultural interests of the Tribe. See e.g. Exh. 2 to Oglala Sioux Tribe FSEIS Contentions at 2 (President Bryan V. Brewer, President, Oglala Sioux Tribe).

Response: Denied. This statement is insufficiently specific to constitute a material fact. It neither identifies the “further injury” nor states facts that demonstrate that the Staff has not complied with NEPA. As explained in the Staff’s motion for summary disposition, and as supported by the Staff’s Statement of Material Facts and the affidavit of Diana Diaz-Toro, the Staff has satisfied NEPA’s requirements by explaining why the information on Lakota Sioux

¹ See NRC Staff’s Response to Oglala Sioux Tribe’s Hearing Request at 1, 7 (May 3, 2010) (ADAMS Accession No. ML101230726).

² See NRC Staff’s Statement of Material Facts ¶¶ 1, 2, 6–14, 16–17, 20–21, 24–36, 38–39, 41, 43–66 (Aug. 17, 2018) (ML18229A343) (Staff’s Statement of Material Facts).

cultural resources is unavailable: although the environmental record of decision in this matter does not include any new information on the presence of sites of historic, cultural, and religious significance to the Lakota Sioux Tribes at the Dewey-Burdock site, including potential adverse effects or potential mitigation measures for such sites, the FSEIS and the adjudicatory record nonetheless satisfy NEPA's requirements.³ Finally, both the license and the Programmatic Agreement include protective measures for any newly discovered cultural resources.⁴

3. The Board, Commission, and D.C. Circuit have confirmed that the NEPA process used to date by NRC Staff does not meet NEPA's "hard look" mandate. See Partial Initial Decision, LBP-15-16, 81 NRC 618 (2015); Memorandum and Order, LBP-17-09 (October 19, 2017); Memorandum and Order, CLI-16-20, 84 NRC 219 (2016); Memorandum and Order, CLI-18-07 (July 24, 2018); *Oglala Sioux Tribe v. NRC*, et al. _____ F.3d. _____ (D.C. Cir., July 20, 2018).

Response: Denied. Neither the Board nor the Commission nor the D.C. Circuit has considered the record of the Staff's extensive efforts to resolve Contention 1A following the Board's denial of summary disposition of Contention 1A in 2017. Accordingly, no adjudicator has reached a conclusion on the merits of whether the Staff's process "to date" complies with NEPA's "hard look."

The most recent Board decision that the Tribe cites (LBP-17-9) only considered the Staff's NEPA efforts through July 2017.⁵ In that decision, the Board stated that a material dispute remained as to whether the Staff's April 2017 methodology to obtain information on Lakota Sioux cultural resources was reasonable.⁶ That decision does not account for the events that have taken place since July 2017. As explained in the Staff's Statement of Material Facts, in March 2018, after extensive outreach to the Tribe and parties in this proceeding, the Staff selected a different methodology to obtain this information. The Tribe repeatedly represented to both the Board and the Staff that this methodology was reasonable, and committed to participating in it.⁷ However, in the midst of the Staff's efforts to implement this approach, the Tribe proposed its own cultural resources survey approach.⁸ The Staff determined that the Tribe's proposal was incompatible with further implementation of the

³ See Staff's Statement of Material Facts ¶¶ 62–65; Affidavit of Diana Diaz-Toro Concerning the NRC Staff's Motion for Summary Disposition of Contention 1A ¶¶ 6–11 (Aug. 17, 2018) (ML18229A343) (Diaz-Toro Affidavit).

⁴ Pursuant to License Condition 9.8, Powertech is required to cease "any work resulting in the discovery of previously unknown cultural artifacts[.]" Ex. NRC-012, Powertech Source Material License No. SUA-1600, at 5–6. All newly discovered artifacts would be inventoried and evaluated in accordance with 36 C.F.R. Part 800, and work could not restart without authorization to proceed from the NRC, the South Dakota State Historic Preservation Officer (SHPO), and the Bureau of Land Management. Ex. NRC-008-A-2, FSEIS, at 43–44; Ex. NRC-012, Powertech License, at 5–6. The Programmatic Agreement documents the steps the NRC will take to protect currently identified historic properties, unevaluated properties, and the approach to be used to protect as-yet unidentified properties that could be affected by implementation of the project. See Exs. NRC-018-A through NRC-018-H, Final Programmatic Agreement for the Dewey-Burdock Project.

⁵ See *Powertech (USA), Inc.* (Dewey-Burdock In Situ Uranium Recovery Facility), LBP-17-9, 86 NRC 167, 179–82 (2017).

⁶ See *id.*, LBP-17-9, 86 NRC at 198 ("We conclude that these points . . . establish a significant material factual dispute as to the reasonableness of the NRC Staff's proposed terms for an open-site survey to assess the identified deficiencies in this FSEIS.").

⁷ See Staff's Statement of Material Facts ¶¶ 17, 21, 24, 26, 38–39, 41.

⁸ See *id.* ¶¶ 59, 62.

selected approach and, given how far apart the Tribe's proposal was from the selected approach, determined that the Staff could not reach alignment with the Tribe on an approach to resolve the outstanding contention in this proceeding.⁹ These developments are the focus of the Staff's new motion for summary disposition of Contention 1A, which constitutes the Board's first opportunity to consider whether the totality of the process "to date" complies with NEPA.

The Commission likewise has not addressed the merits of the Staff's further efforts to resolve Contention 1A. In CLI-16-20, the Commission upheld the Board's decision in LBP-15-16 with respect to Contention 1A,¹⁰ and in CLI-18-7, found (in part) that the Board had not erred in its determination that a material dispute remained with respect to Contention 1A.¹¹ However, the Commission has not reached the specific question of whether the Staff's efforts since April 2015 (the date of the Board's decision in LBP-15-16) were sufficient to satisfy NEPA's "hard look" requirement.¹²

Finally, because the D.C. Circuit's ruling concerned the Commission's decision upholding LBP-15-16, the court also has not reviewed any activities the Staff has undertaken since April 2015 to resolve Contention 1A.¹³ And the D.C. Circuit specified that its ruling did not address the merits of the Board's ruling on Contention 1A or whether the Staff had in fact taken a "hard look" at cultural resources under NEPA.¹⁴ In sum, the reasonableness of the entirety of the Staff's efforts "to date"—including the post-2017 developments which, as explained in the Staff's motion, are sufficient to demonstrate the Staff's compliance with NEPA and resolve Contention 1A—has not been adjudicated by the Board, the Commission, or the D.C. Circuit.

4. NRC Staff has abandoned the March 2018 schedule to develop and implement a scientifically sound cultural resources methodology to inform its NEPA duties.

Response: Admitted in part and denied in part. The Staff admits that the purpose of the March 16, 2018 selected approach was, in part, to develop and implement a "scientifically sound cultural resources methodology."

The Staff denies that it "abandoned" the selected approach. The Staff was in the process of implementing the selected approach when the Tribe proposed its own cultural resources survey.¹⁵ The Staff determined that the Tribe's proposal was incompatible with further implementation of the selected approach and, given how far apart the Tribe's proposal was from the selected approach, determined that the Staff could not reach alignment with the

⁹ See *id.* ¶ 65.

¹⁰ *Powertech (USA), Inc.* (Dewey-Burdock In Situ Uranium Recovery Facility), CLI-16-20, 84 NRC 219, 222 (2016).

¹¹ *Powertech USA, Inc.* (Dewey-Burdock In Situ Uranium Recovery Facility), CLI-18-7, 88 NRC ___, ___ (July 24, 2018) (slip op. at 1, 7–8).

¹² Although the Commission's decision in CLI-18-7 was issued after April 2015, that limited decision only found that Powertech had not met the standard for summary disposition and did not examine the merits of the reasonableness of the Staff's approach. *Powertech USA, Inc.* (Dewey-Burdock In Situ Uranium Recovery Facility), CLI-18-7, 88 NRC at ___ (slip op. at 7–11).

¹³ See *Oglala Sioux Tribe v. NRC*, 896 F.3d 520, 525–26 (D.C. Cir. 2018).

¹⁴ *Oglala Sioux Tribe*, 896 F.3d at 528 (explaining that the Court has authority to review the Commission's decision because the Commission decision "has no bearing on its ultimate resolution of the merits of the Tribe's multiple contentions, including whether NEPA actually has been (or subsequently will be) satisfied"), 531 ("For the purposes of our review, we accept the Board's finding—undisturbed by the Commission—that the agency did not fulfill its NEPA responsibilities. *We do not review the merits of that conclusion.*" (emphasis added)).

¹⁵ See Staff's Statement of Material Facts ¶¶ 59, 62, 64.

Tribe on an approach to resolve the outstanding contention in this proceeding.¹⁶ Accordingly, the Staff informed the Tribe and the other invited Tribes that it had determined it necessary to discontinue implementing the selected approach.¹⁷

5. NRC Staff has not prepared any NEPA document since the FSEIS for the Dewey-Burdock proposal was finalized in January 2014, nor any supplement to the FSEIS.

Response: Admitted. As explained in the Staff's motion for summary disposition of Contention 1A and the Diaz-Toro affidavit, the partial implementation of the selected approach did not result in any new information on the presence of sites of historic, cultural, and religious significance to the Lakota Sioux Tribes that may be impacted by the Dewey-Burdock project.¹⁸ The Tribe proposed its own cultural resources survey during the first week of the June 2018 tribal field survey effort, which the Staff determined was fundamentally incompatible with the selected approach.¹⁹ Because the Staff has determined that the information it sought to obtain is unavailable for purposes of further NEPA review,²⁰ the Staff has not prepared a supplement to the FSEIS for the Dewey-Burdock project. Nevertheless, the FSEIS already evaluates the information about Native American cultural resources that the Staff obtained without specific input from the Lakota Sioux Tribes, and is supplemented by the information in the adjudicatory record, which, as the Staff explains in its motion, is sufficient to satisfy the requirements of 40 C.F.R. § 1502.22.²¹

6. NRC Staff has not sought public comment on any NEPA document since January 2013 when NRC Staff sought input on the Draft SEIS for the Dewey-Burdock Project.

Response: Admitted. As explained in the Staff's response to the Tribe's Statement of Material Facts ¶ 5, the Staff has not prepared a supplement to the FSEIS for the Dewey-Burdock project on which public comment would be sought.

7. NRC Staff has not prepared any NEPA document that could provide the "hard look" at cultural resource impacts, alternatives, and mitigation measures required by the Board and Commission rulings.

Response: Admitted in part and denied in part. The Staff admits that it has not prepared any supplement to the FSEIS for the Dewey-Burdock project, as explained in the Staff's responses to the Tribe's Statement of Material Facts ¶¶ 5 and 6.

The Staff denies the remainder of this statement. The record in this proceeding demonstrates that the Staff has taken a "hard look" at cultural resources under NEPA. In LBP-17-9, the Board found that a material dispute remained as to whether the methodology the Staff employed in 2017 to obtain information on Lakota Sioux cultural resources was reasonable, and thus, whether the Staff had taken the requisite "hard look" at cultural resources under NEPA.²² As explained in the Staff's motion, however, after continued extensive outreach to the parties,

¹⁶ See *id.* ¶ 65.

¹⁷ See *id.* ¶¶ 65, 67.

¹⁸ See NRC Staff's Motion for Summary Disposition of Contention 1A at 33–35 (Aug. 17, 2018) (ML18229A343) (Staff's Motion); Diaz-Toro Affidavit ¶¶ 8–11.

¹⁹ See Staff's Motion at 33–35; Diaz-Toro Affidavit ¶¶ 8–11.

²⁰ See Staff's Motion at 33–34, 38; Staff's Statement of Material Facts ¶¶ 59, 62, 64–65, 67.

²¹ See Staff's Motion at 33–38; Diaz-Toro Affidavit ¶ 6.

²² See *Powertech*, LBP-17-9, 86 NRC at 179–82.

the Staff selected a reasonable methodology to obtain information on Lakota Sioux cultural resources that responded to the material concerns of the Tribe.²³ The Tribe itself described the selected approach as reasonable, and repeatedly expressed its commitment to participate in implementing the approach.²⁴

In LBP-17-9, the Board also stated that “if the NRC Staff chooses a methodology that does not include complete information about adverse effects on the Tribe’s cultural resources, the NRC Staff would need to include an explanation that satisfies the requirements of 40 C.F.R. § 1502.22.”²⁵ The partial implementation of the selected approach did not result in any new information on sites of historic, cultural, and religious significance to the Lakota Sioux Tribes that may be impacted by the Dewey-Burdock project. Therefore, the Staff has not prepared a supplement to the FSEIS for the Dewey-Burdock project. Rather, consistent with 40 C.F.R. § 1502.22, the Staff has explained why additional information is unavailable.²⁶ That explanation is provided as part of the adjudicatory record.²⁷

²³ See Staff’s Motion at 17–24; Staff’s Statement of Material Facts ¶¶ 5–26.

²⁴ See Staff’s Statement of Material Facts ¶¶ 21, 24, 26.

²⁵ *Powertech*, LBP-17-9, 86 NRC at 200 (citing *Powertech*, LBP-15-16, 81 NRC at 655).

²⁶ 40 C.F.R. § 1502.22. Pursuant to this regulation, the agency must provide: “(1) A statement of the relevance of the incomplete or unavailable information to evaluating reasonably foreseeable significant adverse impacts on the human environment; (3) a summary of existing credible scientific evidence which is relevant to evaluating the reasonably foreseeable significant adverse impacts on the human environment, and (4) the agency’s evaluation of such impacts based upon theoretical approaches or research methods generally accepted in the scientific community.” *Id.* § 1502.22(b).

²⁷ See Staff’s Motion at 33–38; Diaz-Toro Affidavit ¶¶ 3–11.

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
)	
(Dewey-Burdock In Situ Uranium Recovery)	Date: September 21, 2018
Facility))	

CERTIFICATE OF SERVICE

Pursuant to 10 C.F.R. § 2.305, I hereby certify that copies of the “NRC Staff’s Response to Oglala Sioux Tribe’s Motion for Summary Disposition of Contention 1A” in this proceeding have been served via the Electronic Information Exchange (EIE), the NRC’s E-Filing System, this 21st day of September, 2018. Counsel for the Staff served those representatives exempted from filing through the EIE with copies of its update by electronic mail, also on September 21, 2018.

***/Signed (electronically) by/
Emily Monteith***

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