UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of:	)	
	)	Docket No.: 40-9075-MLA
POWERTECH (USA), INC.	)	Date: September 21, 2018
(Dewey-Burdock In Situ Uranium Recovery Facility)	)	

POWERTECH (USA) INC'S RESPONSE IN OPPOSITION TO THE OGLALA SIOUX TRIBE'S MOTION FOR SUMMARY DISPOSITION OF CONTENTION 1A

I. INTRODUCTION

Pursuant to 10 C.F.R. § 2.1205, Powertech (USA), Inc. (hereinafter referred to as "Powertech" or the "Licensee") hereby submits this Response in Opposition to the Oglala Sioux Tribe's (hereinafter the "Tribe") Motion for Summary Disposition of one final admitted contention regarding Powertech's NRC License No. SUA-1600 (the "Motion"). For the reasons discussed below, Powertech opposes the Tribe's Motion and respectfully requests that the Licensing Board deny the Tribe judgment as a matter of law on admitted Contention 1A in this proceeding.

II. BACKGROUND AND PROCEDURAL HISTORY

On February 25, 2009, Powertech submitted a license application for an Atomic Energy Act of 1954, as amended (hereinafter the "AEA"), combined source and 11e.(2) byproduct material license to construct and operate its proposed Dewey-Burdock In-Situ Recovery (ISR) project in South Dakota. After the Dewey-Burdock license application was made publicly available, on January 5, 2010, NRC Staff issued a Federal Register notice providing interested

stakeholders and other members of the public with an opportunity to request a hearing on the application and to request access to sensitive unclassified non-safeguards information (SUNSI) associated with such application.[1] On March 8 and 9, 2010, and April 6, 2010, Consolidated Intervenors (CI) and the Tribe respectively submitted requests for a hearing including proposed contentions for admission to such a hearing. On April 12 and May 3, 2010, Powertech and NRC Staff respectively submitted responses to CI's and the Tribe's requests and argued that most, if not all, of the proffered contentions were not admissible under NRC regulations at 10 CFR Part 2.309.

On August 5, 2010, the Licensing Board issued LBP-10-16[2] in which CI and the Tribe each were granted standing to intervene and several contentions for both parties were admitted. On November 26, 2012, NRC Staff issued the DSEIS for the proposed Dewey-Burdock project. By rule, CI and the Tribe were entitled to thirty days to file new or amended contentions. In compliance with this opportunity and after receiving an extension from December 31, 2012 to January 25, 2013, both CI and the Tribe filed requests to admit several new or amended contentions. On March 11, 2013, Powertech and NRC Staff filed responses to the CI and Tribe pleadings. On March 25, 2013, CI and the Tribe filed replies to these pleadings. Then, on July 22, 2013, the Licensing Board issued a decision admitting certain new or amended contentions for various reasons and denying others.[3]

On March 20, 2013, NRC Staff issued its final Safety Evaluation Report (SER) for the proposed Dewey-Burdock ISR project (ML13052A182) and found that, "issuance of the license

[1] *See* 75 Fed. Reg. 467 (January 5, 2010).
[2] *See In the Matter of Powertech (USA), Inc.* (Dewey-Burdock ISR Project), LBP-10-16, 72 NRC 361 (2010).
[3] *See In the Matter of Powertech (USA), Inc.* (Dewey-Burdock ISR Project), LBP-13-9, 78 NRC 37 (2013).

will not be inimical to the common defense and security or to the health and safety of the public." SER at 1. On January 29, 2014, the Final Supplemental Environmental Impact Statement (FSEIS)[4] was issued recommending that, absent a safety-related issue to the contrary, Powertech's requested license should be issued. On April 8, 2014, NRC issued Powertech's requested license (NRC License No. SUA-1600) and the Record of Decision (ROD).

After it reviewed all administrative materials and pleadings offered by all parties, the Licensing Board issued LBP-15-16[5] where it was determined that, amongst other conclusions, Contentions 1A and 1B related to NEPA and the NHPA respectively should be sustained on behalf of the Tribe and CI. Powertech and NRC Staff both appealed this determination to the Commission and, in CLI-16-20,[6] the Commission determined that the Licensing Board's determinations on these two admitted contentions should be sustained. CLI-16-20 included a dissenting opinion from now-Chairman Svinicki in which she stated that the Licensing Board overruled the Advisory Council on Historic Preservation (ACHP), and that information needed to address the alleged deficiencies in the FSEIS were not "reasonably available" and which would have concluded the proceeding, as NRC Staff would have possessed enough information to have produced an adequate FSEIS and the NHPA also would have been satisfied. Subsequent to the issuance of CLI-16-20, the Licensing Board granted an NRC Staff motion for summary disposition of Contention 1B concluding that the NRC Staff's Tribal consultation process had satisfied the NHPA. *See In the Matter of Powertech (USA), Inc.* (Dewey-Burdock ISR Project), LBP-17-09, 86 NRC 167 (2017).

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[4] *See generally* United States Nuclear Regulatory Commission, NUREG-1910, *Generic Environmental Impact Statement for In-Situ Leach Uranium Milling Facilities,* Supplement 4 (2014).
[5] *See In the Matter of Powertech (USA), Inc.* (Dewey-Burdock ISR Project), LBP-15-16, 81 NRC 618 (2015), *aff'd* CLI-16-20, 84 NRC 219 (2016).
[6] *See In the Matter of Powertech (USA), Inc.* (Dewey-Burdock ISR Project), CLI-16-20, 2016 NRC LEXIS 36 (2016).

During the course of this proceeding and after issuance of LBP-15-16, NRC Staff engaged in two (2) more attempts to obtain additional information from the Tribe using a comprehensive site survey approach coupled with other information gathering actions. More specifically, NRC Staff's second attempt after issuance of LBP-15-16 included an NHPA-like approach as defined under 40 CFR 1502.22. Yet, even though Powertech initially argued that the proposal was "cost-prohibitive" and would represent a significant financial burden from a total program cost perspective, ultimately it agreed to the terms and conditions of said proposal. The Tribe asserts in its filing that Powertech were not willing to spend the money required to achieve NEPA compliance; however, Powertech agreed to support and fund the proposal selected by the NRC Staff and described by the Tribe as presenting a reasonable path towards satisfying NEPA, which was subsequently effectively rejected by the Tribe. As has happened in the past, the Tribe once again attempted to impose additional requirements on the already wide-ranging scope of this proposal, which would have resulted in costs nearly three times the cost of an approach previously described by the Board as "patently unreasonable" – the Makoche Wowapi proposal and, as a result, NRC Staff abandoned its efforts to conduct the entirety of this proposal.

After the Commission issued CLI-16-20 in 2016, the Tribe appealed the Commission's determination to the United States Court of Appeals for the District of Columbia Circuit (hereinafter "DC Circuit"). For purposes of the Tribe's motion, the relevant portion of the DC Circuit's opinion, issued on July 20, 2018, addresses the finding by the Licensing Board regarding Contention 1A. In its opinion, the DC Circuit found that the *procedural* defect identified by the Licensing Board and upheld by the Commission with respect to historic and cultural resources for the Tribe was significant enough to require remand of the issue to NRC

(i.e., the Commission) for further proceedings in accordance with its decision. *See Oglala Sioux Tribe v. U.S. Nuclear Regulatory Commission and United States of America*, No. 17-1059, slip op. at 32-33 (July 20, 2018). While the Court did make this finding, it did not give specific direction to the Commission as to how to decide whether, in light of the specific facts of the instant proceeding, the identified *procedural* defect should result in Powertech's license being stayed or vacated.

On August 17, 2018, both NRC Staff and the Tribe filed motions for summary disposition of Contention 1A based on their different perspectives. For the reasons set forth below, Powertech hereby submits this Response to the Tribe's motion and respectfully requests that the Licensing Board deny said motion for judgment as a matter of law on Contention 1A.

III. STATEMENT OF LAW

Under NRC regulations for this proceeding, parties are permitted to file for summary disposition to address issues prior to and during the conduct of a Subpart L administrative hearing. Under 10 CFR § 2.1205(c), the Licensing Board may consider motions for summary disposition using criteria outlined in 10 CFR Part 2, Subpart G which states, "[t]he presiding officer need not consider a motion for summary disposition unless its resolution will serve to expedite the proceeding if the motion is granted." *See* 10 CFR § 2.710(d)(1). In motions for summary disposition, a moving party must make a showing that (1) there is "no genuine issue as to any material fact," and (2) "the moving party is entitled to a decision as a matter of law." *See e.g.*, *Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 and 3), CLI-11-14, 74 NRC 801, 805-806 (2011). In a summary disposition motion, the moving party also must provide a "short and concise statement of material facts for which the moving party contends that there is no genuine issue to be heard." *See* 10 CFR § 2.1205(a). After a moving party submits

its motion, the Licensing Board may summarily dispose of arguments within such motion if the opposing party cannot make a showing that there is a genuine issue of material fact. *See Advanced Medical Systems, Inc.* (One Factor Row, Geneva, Ohio), CLI-93-22, 38 NRC 98, 102 (1993).

The regulations do not require merely the showing of a "material issue of fact" or an "issue of fact." *See Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-10-11, 71 NRC __ (March 26, 2010)(slip op. at 12). The issue in dispute must be a genuine issue of material fact. To be genuine, the factual record considered in its entirety, must be enough in doubt so that there is a reason to hold a hearing to resolve the issue. *See Cleveland Elec. Illuminating Co.*, (Perry Nuclear Power Plant, Units 1 & 2), LBP-83-46, 18 NRC 218, 223 (1983). Absent any probative evidence supporting the claim, mere assertions of a dispute as to material facts does not invalidate the licensing Board's grant of summary disposition. *Advanced Med. Sys., Inc.*, (One Factory Row, Geneva, Ohio 44041), CLI-94-6, 39 NRC 285, 309-10 (1994), *aff'd, Advanced Med. Sys., Inc. v. NRC*, 61 F.3d 903 (6th Cir. 1995) (Table); *Safety Light Corp.* (Bloomsburg Site Decommissioning and License Renewal Denials), LBP-95-9, 41 NRC 412, 449 n.167, citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

The following additional legal standards are applicable to Powertech's opposition to the Tribe's motion and to the Tribe's citation to the recent July 20, 2018, DC Circuit opinion. A Licensing Board has only the jurisdiction and power which the Commission delegates to it. *See e.g., Pub. Serv. Co. of Ind.,* (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-316, 3 NRC 167 (1976); *Duke Power Co.,* (Catawba Nuclear Station, Units 1 & 2), ALAB-825, 22 NRC 785, 790 (1985). A Licensing Board generally can neither enlarge nor contract the

jurisdiction conferred by the Commission. Catawba, ALAB-825, 22 NRC at 790, *citing Consumers Power Co.,* (Midland Plant, Units 1 & 2), ALAB-235, 8 AEC 645, 647 (1974).

IV. ARGUMENT

For the reasons set forth below, Powertech believes that the Tribe has not satisfied the standards for grant of summary disposition and issuance of a judgment as a matter of law in its favor on Contention 1A. Thus, Powertech respectfully requests that the Licensing Board deny the Tribe's motion.

A. The Tribe's Argument Related to the Applicability of the DC Circuit's Recent Opinion is Irrelevant to Its Motion

The Tribe's motion makes multiple references to findings made by the DC Circuit in July of 2018, and goes as far as including a request to the Licensing Board to vacate Powertech's license. What the Tribe fails to note is that the DC Circuit did not give specific direction to the Commission as to how to decide whether the license should be stayed or vacated. Indeed, the DC Circuit specifically stated:

> "To be clear, today we hold only that, once the NRC determines there is a significant deficiency in its NEPA compliance, it may not permit a project to continue in a manner that puts at risk the values NEPA protects simply because no intervenor can show irreparable harm. We do not decide that the Commission may never leave in place a license that its Staff previously issued but that the Commission later finds NEPA-deficient. That is, we do not decide that there is no version of a harmless error rule that the Commission may apply."

Oglala Sioux Tribe, No 17-1059, slip op. at 32-33.

This mandate from the DC Circuit is intended for action by the Commission and not by the Licensing Board and, therefore, has no place in this Licensing Board proceeding.[7] Further, the Tribe's motion as it relates to the actual determination of the legal effect of the DC Circuit's remand to the Commission is irrelevant to the instant motion for summary disposition. Indeed,

[7] Indeed, on August 30, 2018, the Commission issued an Order requesting the parties input on the legal standard

NRC Staff's August 17, 2018, motion for summary disposition is squarely focused on the fact that the information identified by the Licensing Board and that was the subject of the DC Circuit's opinion is unavailable. This conclusion is based on appropriate Council on Environmental Quality (CEQ) NEPA regulations at 40 CFR § 1502.22, as a result of the Tribe's continuing failure to participate in an approach to information gathering. Further, NRC Staff engaged a contractor to prepare a literature review report and provided the report to the Native American Tribes invited to participate in the selected approach as background information for the June tribal field survey effort. The information described in the literature review report and field observations report developed by NRC Staff's contractor does not provide a basis for the NRC Staff to alter its evaluation regarding the potential impacts to cultural resources from the Dewey-Burdock project or its conclusion that such impacts would range from "SMALL to LARGE." This is because the information in these reports is not materially different from the information already assessed by the NRC Staff in the FSEIS, and because the reports do not provide any additional information about the presence of sites of historic, cultural, and religious significance to the Lakota Sioux Tribes at the Dewey-Burdock project site, or additional information about the significance of known tribal sites to the Lakota Sioux Tribes. Accordingly, the information obtained by the NRC Staff during the partial implementation of the selected approach supplements, but does not materially affect, NRC Staff's analysis and conclusions in the FSEIS regarding the potential impacts of the Dewey-Burdock project on cultural resources. Therefore, any references to the DC Circuit's remand to the Commission regarding the potential stay or vacatur of the license is irrelevant to the instant motion.

In addition, should the Licensing Board determine that the Tribe's August 17, 2018, motion lacks merit, but NRC Staff's motion is meritorious, the DC Circuit's remand to the

Commission for further action will be rendered moot.[8] As stated by the DC Circuit, its remand is based on an alleged *procedural* defect that could be remedied by NRC:[9]

> "But we have not been given any reason to expect that the agency will be unable to correct those deficiencies, and we are concerned about the disruptive consequences of vacating the license *while the agency proceeds to satisfy NEPA*."

Id., slip op. at 33.

The key here is that, while the Tribe intimates that the only way to satisfy NEPA is "cataloguing of Native American cultural, historical, or religious resources on the site…," the mandate cited by the DC Circuit does not require this; but rather, requires that the Commission *satisfy NEPA*.[10] NRC Staff's August 17, 2018, motion for summary disposition shows that NEPA indeed has been satisfied, because the Tribe's actions to date have resulted in a complete frustration of extensive efforts to obtain this information which is, thus, "unavailable" under 40 CFR § 1502.22.[11] Therefore, since CEQ guidelines allow for the selection of a "reasonable" approach, but where the overall costs are exorbitant and/or the methodology to obtain it is unavailable, 40

[8] Accordingly, the Tribe's statement that "so long as the license remains in effect, NRC Staff and Powertech will continue to spend resources on this litigation instead of spending those resources on NEPA compliance." *See* Tribe Motion at 5. NRC Staff proposed a comprehensive, albeit extremely costly, approach to remedying the alleged NEPA defect identified by the DC Circuit and *Powertech agreed to pay for it.* Despite ongoing litigation, Powertech had agreed to cover the costs of this third proposed approach. It is not the actions of Powertech and NRC Staff that have caused this process to result in "unavailable" information; but rather, it is the Tribe that is responsible for this result.

[9] Indeed, the Tribe expressly recognizes this fact in its motion: "The DC Circuit rejected NRC's unique approach to NEPA, confirming that NRC Staff must comply with NEPA's procedural requirements before taking action." Tribe Motion at 7. It is worth noting, however, that this alleged procedural defect did not rise to the level where it would unilaterally direct the Commission to vacate, or even stay, Powertech's license. *See Oglala Sioux Tribe*, No-17-1059, slip op. at 32-34.

[10] The Tribe's Motion at Page 3 also states that the DC Circuit directed the Commission to assess items such as impacts, alternatives, and mitigation measures. The FSEIS did indeed address these items and continues to do so with the information previously available.

[11] The Tribe's reliance on *Blue Mountains Biodiversity Project v. Blackwood* is also misguided as it cites no evidence that this case ever evaluated an alleged absence of information for a NEPA analysis because the information sought that was "unavailable" under 40 CFR § 1502.22; but merely, the Tribe states that an argument that information which is contained in an administrative record rather than an environmental assessment (EA) is inadequate.

CFR § 1502.22 prescribes a specific roadmap for discussing such factors in an EIS, which can satisfy NEPA. *See* NRC Staff Motion for Summary Disposition at 13, *citing* 40 CFR § 1502.22. Further, as noted by the Licensing Board in its previous rulings, the NRC Staff must conduct a study or survey of Tribal cultural resources. As noted above, the NRC Staff's contractors completed a literature study, which determined the information in these studies is not materially different from the information already assessed by the NRC Staff in the FSEIS. As such, the DC Circuit's mandate in its July 20, 2018, decision will be satisfied assuming grant of NRC Staff's motion.

B. The Tribe's Motion As It Relates to References by the DC Circuit to the Need for a Site Survey and Additional NEPA Analysis Does Not Reach the Question of Whether the Identified Information is Unavailable

The Tribe's motion states that "[t]he DC Circuit rejected NRC's unique approach to NEPA, confirming that NRC Staff must comply with NEPA's procedural requirements before taking action. Tribe Motion at 7, *citing Oglala Sioux Tribe*, No. 17-1059, slip op. at 26. Its motion attempts to defend its argument that there is no genuine dispute of material fact by claiming that "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." Tribe Motion, Statement of Material Facts at 2, #5.[12] But, as stated in NRC Staff's motion for summary disposition, the fact that no additional NEPA document has been produced is *prima facie* evidence that NRC Staff's three (3) attempts over more than eight (8) years to obtain information from the Tribe for such analysis have been unsuccessful. More specifically, this is the case because, NRC Staff's third attempt, which resembled a NHPA-like information gathering process, incorporated requests made by the Tribe to achieve a proposal described by

[12] The same argument applies to #6 in the Statement of Material Facts which claims no new NEPA document has been issued for public comment.

the Tribe as presenting a reasonable path towards satisfying NEPA and was agreed by Powertech, NRC Staff and the Tribe. This third proposal was vetted for over half a year, with oversight of the Licensing Board. Despite this, the Tribe effectively rejected the proposal in the 11th hour, and as has happened in the past, the Tribe once again attempted to impose additional requirements on the already wide-ranging scope of this proposal, which would have resulted in costs nearly three times the cost of an approach previously described by the Licensing Board as "patently unreasonable" – the Makoche Wowapi proposal. Thus, as a result, NRC Staff withdrew from its efforts to conduct the entirety of this proposal. Such actions continue to result in significant costs being pushed onto Powertech, and after over eight years of efforts, support NRC Staff's conclusion, as provided under the regulations and as established by the Licensing Board's direction, that it is not reasonably feasible for NRC Staff to obtain the information from the Tribe and that there is no genuine dispute of material fact because this information is unavailable. *See* NRC Staff Motion at 33. Further, as noted above, the NRC Staff's contractors completed a literature study, which determined the information in these studies is not materially different from the information already assessed by the NRC Staff in the FSEIS. Thus, Powertech asserts that the Tribe has failed to show that it should be granted summary disposition and judgment as a matter of law on Contention 1A.

The same approach applies to the Tribe's Statement of Material Facts at #3 where the Tribe alleges that "[t]he Board, Commission, and DC Circuit have confirmed to date that the NEPA process used to date by NRC Staff does not meet NEPA's 'hard look' mandate. This Statement is further argued by the Tribe when it states that:

> "[t]he continued reliance on previous NEPA analysis found deficient by the Board, Commission, and DC Circuit is in direct contrast to the proposal set forth by NRC Staff in March 2018."

Tribe Motion at 6.

While the DC Circuit's opinion was dated July 20, 2018, the argument for the NEPA process being inadequate here rests with the status of the NEPA process as completed after the issuance of LBP-15-16 dated 2015 and CLI-16-20 dated 2016, not the more recent third proposal to resolve contention 1A. Further, the DC Circuit clearly made no decision on the sufficiency of the NEPA process due to a lack of jurisdiction and only commented on the matter of the license being upheld in the face of a pending and unresolved NEPA deficiency directed towards the NRC Commission. See *Oglala Sioux Tribe*, No 17-1059, slip op. at 12. To this point, the Tribe's Statement of Material Facts #3 also cites to the Commission's recent CLI-18-7 ruling of Powertech's interlocutory appeal of LBP-17-09, following the agency's *second attempt* to obtain information on the Tribe's historic and cultural resources. However, these statements also fail to account for NRC Staff's *third attempt* in 2018, which the Tribe agreed provided a reasonable path towards satisfying NEPA and incorporated concerns raised with previous proposals by the Tribe. *See* NRC Staff Motion, Statement of Material Facts #17, 27, 29, & 41 at 5, 10, & 13-14. Further, the Tribe's statement that "continued reliance" on pre-existing NEPA analyses is improper cannot be sustained in its motion, because it does not include one pivotal factor: the Tribe has rendered any information to be obtained through NRC Staff's third approach "unavailable." Further, as noted above, the NRC Staff's contractors completed a literature study, which determined the information in these studies is not materially different from the information already assessed by the NRC Staff in the FSEIS. Thus, this Statement is factually incorrect for purposes of a motion for summary disposition as there must be a genuine issue of

material fact if the Licensing Board has not yet had a chance to rule on NRC Staff's motion for summary disposition based on actions taken after issuance of LBP-17-09.

The Tribe's Statement of Material Fact #4 demonstrates the abject failure of the Tribe to participate in an information gathering process in order to satisfy its alleged concerns associated with the NEPA process. In this Statement, the Tribe notes: "NRC Staff has abandoned the March, 2018 schedule to develop and implement a scientifically sound cultural resources methodology to inform its NEPA duties." The Tribe fails to note that the Tribe agreed that the third *attempt* presented a reasonable path towards satisfying NEPA, which was subsequently effectively rejected by the Tribe. As has happened in the past, the Tribe once again attempted to impose additional requirements on the already wide-ranging scope of this proposal, which would have resulted in costs nearly three times the cost of an approach previously described by the Licensing Board as "patently unreasonable" – the Makoche Wowapi proposal and, as a result, NRC Staff withdrew from its efforts to conduct the entirety of this proposal. NRC Staff Motion, Statement of Material Facts 65€ & 67, at 23-24. Further, NEPA allows agencies "to select their own methodology as long as that methodology is reasonable. As stated in its motion in support of NRC Staff's motion for summary disposition, Powertech historic and cultural resource expert Dr. Lynne Sebastian, a former State of New Mexico Historic Preservation Officer (SHPO) and a member of the Advisory Council on Historic Preservation (ACHP), stated that there is no such uniform scientific methodology for gathering information on traditional historical and cultural resources and traditional cultural properties (TCP),[13] as each tribe or other traditional community will have its own views on appropriate methods of identification and NRC Staff did not try to impose a uniform set of methods on identification of places of religious and cultural significance:

[13] This situation is directly in opposite of the fact of established scientific and methodological criteria that exist for an archaeological evaluation.

> "NRC did not try to impose a uniform set of methods on the identification of properties of religious and cultural significance. Instead, the agency made the assumption that each tribe would know best how to identify the properties of significance to their people and offered all of the tribes the opportunity to come to the project area, with financial and logistical support from the applicant, and carry out whatever identification activities were deemed culturally appropriate by that tribe."

See Powertech Ex. APP-063 at 7, ¶ A.9.

The Tribe has maintained this argument despite expert testimony to the contrary and NRC Staff's flexibility regarding any tribe's preferred approach.

Even though NRC Staff's *third attempt* to gather such information was agreed to *by all parties*, the Tribe attempted to enlarge the scope of the effort while claiming there is no methodology developed by NRC Staff. Indeed, the agreement amongst the parties on the third proposed approach, demonstrates that a methodology indeed was developed. But, instead of proceeding with its implementation in the field, the Tribe has conducted itself in a manner demonstrating that it maintains its opposition to the Dewey-Burdock project. If the Licensing Board does not deny the Tribe's motion and fails to grant NRC Staff's counterpart motion, then the Tribe will have succeeded in delaying this proceeding once again into another season and needlessly extending the timeline for its completion, which already involved more than half a year of preparation and is hampered during inclement weather during the winter months. Further, as noted above, the NRC Staff's contractors completed a literature study, which determined the information in these studies is not materially different from the information already assessed by the NRC Staff in the FSEIS. Thus, Statement #4 represents grounds upon which the Licensing Board may rest denial of the Tribe's motion and the grant of NRC Staff's motion.

The Tribe's Statement of Material Fact #7 cannot serve as grounds for summary disposition. Statement #7 alleges that "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." Tribe Motion, Statement of Material Facts #7 at 2. The Tribe's statement here does not acknowledge the fact that the information sought by NRC Staff through three attempts is not reasonably obtainable and, thus, the "hard look" requirement has been satisfied under 40 CFR § 1502.22 as argued by NRC Staff. Yet, even as part of the *third attempt,* at the request of the Tribe and agreed to by Powertech and NRC Staff, also sought the participation of four (4) other Lakota Sioux Tribes and three (3) other Native American Tribes, however, none of these Native American Tribes chose to participate in this third attempt. As stated by the Licensing Board, NRC Staff is free to choose whichever approach it sees fit to obtain this information and how to supplement the FSEIS. NRC Staff chose a method, all parties agreed to it, and then the Tribe decided to further delay the process by adding unreasonable additional requirements, after the methodology had been established, for the third attempt. These additions were so egregious that NRC Staff, the party that had composed a greatly expanded scope of work, specifically designed to address each of the Tribe's stated concerns, determined that further efforts would not yield any positive results. As such, NRC Staff concluded that the requested information was "unavailable" under 40 CFR § 1502.22. Further, as noted above, the NRC Staff's contractors completed a literature study, which determined the information in these studies is not materially different from the information already assessed by the NRC Staff in the FSEIS. Thus, the Tribe's Statement of Material Fact #7 cannot serve as grounds for summary disposition because the entire record following LBP-17-09 must be considered.

Even if the Tribe's statements in its motion have any merit, which they do not, the lack of public comment identified in Statement of Material Fact #6 is inconsistent with regulations and

the analysis included in the NRC Staff's motion for summary disposition. NRC Staff does not need to disturb the entire, extensive assessment of historic and cultural resources in the current FSEIS, as there is a more-than-adequate record of public comment on its contents, which is part of the administrative record. It is not necessary to obtain public comment on information that, by the Tribe's own actions, was rendered "unavailable." See 40 CFR § 1502.22. Also, NRC Staff has already supplemented the NEPA record with additional documents as cited in its correspondence during its third attempt and cited by the Tribe. Further, as noted above, the NRC Staff's contractors completed a literature study, which determined the information in these studies is not materially different from the information already assessed by the NRC Staff in the FSEIS. *See* Tribe Motion at 5.

C. The Tribe's Argument That Its Interests Will Be Impacted and Further Injured is Unfounded (Tribe's Statement of Material Facts #1 and #2)

The Tribe's statements here ignore the protective measures already in place with the programmatic agreement and existing measures within the FSEIS which protect all cultural resources within the Dewey-Burdock project and activities which are subject to the review and approval of NRC Staff before and during any disturbance occurs at the site. See NUREG-1910, *Generic Environmental Impact Statement for In-Situ Leach Uranium Milling Facilities,* Supplement 4, Volumes 1-2 at Sections 4.9, 6.2, and 6.3 & License Condition 9.8. The Tribe fails to demonstrate how those resources will be impacted given the mitigation measures that are already in place, which also include continued consultation with Native American Tribes.

V. CONCLUSION

For the reasons described above, Powertech respectfully requests that the Licensing Board deny the Tribe's motion for summary disposition and deny the Tribe judgment as a matter of law on admitted Contention 1A in this proceeding.

Respectfully Submitted,

/Executed (electronically) by and in accord with 10 C.F.R. § 2.304(d)/ Christopher S. Pugsley, Esq.

_____

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Dated: September 21, 2018

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **"POWERTECH (USA) INC'S RESPONSE IN OPPOSITION TO THE OGLALA SIOUX TRIBE'S MOTION FOR SUMMARY DISPOSITION "** in the above-captioned proceeding have been served via the Electronic Information Exchange (EIE) this 21st day of September 2018, which to the best of my knowledge resulted in transmittal of the foregoing to those on the EIE Service List for the above captioned proceeding.

Respectfully Submitted,

/Executed (electronically) by and in accord with 10 C.F.R. § 2.304(d)/
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