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NUCLEAR REGULATORY COMMISSION

Title: Powertech USA, Inc.
Dewey-Burdoch In Situ Uranium
Recovery Facility

Docket Number: 40-9075-MLA

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

Location: teleconference

Date: Thursday, March 21, 2019

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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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HEARING

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

In Situ Uranium :
Recovery Facility) :

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Thursday, March 21, 2019

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

2:02 p.m.

1
2
3 JUDGE FROEHLICH: Good afternoon, all.
4 It's about 2:02 p.m. Eastern time. This is Judge
5 Froehlich in Rockville, Maryland. With me is Judge
6 Bollwerk and on the telephone line we have Judge
7 Barnett.

8 Also with me here in Rockville are
9 reports, Taylor Mayhall and Joe McManus, who have been
10 instrumental in helping the Board arrange today's
11 teleconference.

12 This is a telephone status conference call
13 in the matter of Powertech U.S.A. Inc., Docket Number
14 40-9075-MLA concerning the Dewey-Burdock In Situ
15 Uranium Recovery Facility.

16 Today's conference call is the third
17 status call among the parties and the Board concerning
18 the progress to implement what's been called the March
19 2018 approach to resolve the cultural resources aspect
20 of the environmental impact statement in this case.

21 A public notice signaling this telephone
22 conference was issued on March 18, 2019 and provisions
23 have been made for a bridge line for all the parties
24 in this case and for a listen-only line for interested
25 members of the public.

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1 At this time I'd like to take the
2 appearances of the parties in the proceeding. Is the
3 licensee, Powertech, and his Counsel on the line?

4 MR. PUGSLEY: Christopher Pugsley, Counsel
5 for Powertech.

6 (Simultaneous Speaking.)

7 MR. THOMPSON: Anthony Thompson, Counsel
8 for Powertech.

9 JUDGE FROEHLICH: Good afternoon. Mr.
10 Pugsley and Mr. Thompson, welcome. And for the
11 intervener, the Oglala Sioux Tribe?

12 MR. PARSONS: Thank you, Your Honor, this
13 is Jeff Parsons on behalf of Oglala Sioux Tribe.

14 MR. STILLS: Good morning, Your Honor,
15 Travis Stills on behalf of the Oglala Sioux Tribe.

16 JUDGE FROEHLICH: Thank you, Mr. Parsons
17 and Mr. Stills. And for the consolidated interveners?

18 MR. BALLANCO: Thank you, Your Honor, this
19 is Tom Ballanco for the consolidated interveners.

20 JUDGE FROEHLICH: Mr. Frankel, are you
21 with us?

22 MR. FRANKEL: Yes, I am. Thank you,
23 sorry, I was on mute. I am here. Thank you,
24 everybody

25 JUDGE FROEHLICH: Welcome Mr. Frankel and

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1 Mr. Ballanco. And lastly, the Commission Staff, who do
2 we have on the line?

3 MS. BAER: Good afternoon, Your Honor,
4 this is Lorraine Baer, Counsel for the NRC Staff.

5 With me in the room is Diana Diaz-Toro, my
6 co-counsel Emily Monteith is also on the speaking
7 line, and on the listen-only lines we've got Jean
8 Trefethen and Cinthya Roman.

9 JUDGE FROEHLICH: Thank you very much, Ms.
10 Baer. Thank you all.

11 As we proceed through this call, if the
12 parties could identify themselves before they speak it
13 would make things easier for our court reporter and
14 we'll have a better record of the conference call.

15 We're holding this telephonic status call
16 today because the Board wants to get a feel for where
17 the parties are in their efforts to implement the
18 March 2018 approach.

19 We've seen the pleadings that have been
20 filed most recently and this is really an opportunity
21 for us to get a feel as some critical deadlines are
22 approaching on how well things are going among the
23 parties and what the prospects are for resolving the
24 issues in this case on something close to the schedule
25 or timeline that we're supposed to and is a part of

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1 that March 2018 approach.

2 The discussion today I think should pick
3 up where we left off in our last telephone status
4 conference call, which was on January 29th.

5 And if we could, the Board would like to
6 get a feel for the progress that was made leading up
7 to the two meetings or more that were held including
8 the status -- I'm sorry, the telephone conference call
9 among the parties on February 19th and the in-person
10 meetings or meetings that took place in South Dakota
11 on or about February 22nd.

12 I wonder if include prevail on Commission
13 Staff to keep me or give the Board your overall
14 impression on where we are or where the parties are in
15 their negotiations to come up with a methodology to
16 enable the Staff to meet its obligations under NEPA.

17 And then we'll go through the sections
18 that the Board put forth in the notice that was issued
19 in this case.

20 Ms. Baer, could you lead off for us?

21 MS. BAER: Certainly, Your Honor. This is
22 Lorraine Baer for the Staff. I'm just going to
23 briefly run through everything that has transpired
24 since our last teleconference meeting.

25 And that begins with we had telephone

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1 meetings with the tribes which were facilitated by a
2 Member of the Federal State and Tribal Liaison Branch.

3 We had one on February 8th that was
4 basically introductory, laid out the process and
5 ground rules for future meetings, and we held another
6 one on February 19th in which we discussed the content
7 of the Staff and contractor's proposed draft
8 methodology, which was sent to the tribe on February
9 15th.

10 We met the tribe at the Tribal Historic
11 Preservation on February 22nd.

12 The attendees of that meeting included
13 members of the overall Sioux Tribal Historic
14 Preservation Advisory Council and also Tribal Historic
15 Preservation officers from the Standing Rock Sioux
16 Tribe, the Rosebud Sioux Tribe, and the Cheyenne River
17 Sioux Tribe, the overall Sioux Tribe's Counsel, and
18 then it was 12 Diana Diaz-Toro and Cinthya Roman,
19 Jerry Spangler, our contractor, and myself.

20 At that meeting, the tribes raised
21 concerns and objections regarding the NRC Staff's
22 draft survey methodology.

23 Based on the concerns we heard at that
24 meeting, it indicated to the staff that there were
25 some fundamental disagreements on the basic parameters

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1 of negotiations on the methodology, such as the two
2 two-week periods to carry out the survey and the
3 amount of reimbursements being provided to the
4 participating tribes.

5 So after considering those concerns that
6 we had heard, the Staff felt it necessary to
7 understand whether the tribe was willing to continue
8 finalizing the methodology based on the previously
9 negotiated parameters.

10 We had a teleconference planned for March
11 5th but the tribe had informed us 15 minutes before it
12 was scheduled to begin that they would not be joining
13 the call. So on March 11th we received the tribe's
14 summary of the February 22nd meeting in Pine Ridge.

15 It summarized many of the tribes' concerns
16 that we had also highlighted in our March 1st letter,
17 although, the Staff has not had their opportunity to
18 comment on that summary yet.

19 So they do have some disagreements with
20 how certain things were characterized, but the main
21 point is that a lot of the tribes' concerns that we
22 highlighted in the March 1st letter were consistent
23 with what the Staff had heard.

24 So based on the contents of that response,
25 it was the Staff's impression that the differences

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1 that remain were so fundamental that it was not
2 feasible to have further negotiation meetings,
3 particularly given that it was mid-March and the first
4 survey effort was to take place in early April.

5 As such, the Staff notified the tribe via
6 email on March 15th that it would not be productive to
7 proceed with additional meetings.

8 JUDGE FROEHLICH: And that remains the
9 Staff's position as of today, the 21st of March, that
10 it would not be feasible, not productive, to go
11 forward with the timeline that existed in the March
12 2018 approach?

13 MS. BAER: Yes, Your Honor.

14 As I said, given the timeline, where we
15 are now and the nature and extent of the concerns that
16 we've heard at the meetings and through various
17 correspondence over the past few weeks, we do not feel
18 that those negotiation meetings would be productive or
19 feasible.

20 MS. BAER: I'd like to hear a short
21 response from Mr. Parsons and his perspective on what
22 Ms. Baer has just conveyed as well as the items that
23 were laid out in the Staff's letter of March 1st.

24 MR. PARSONS: Thank you, Your Honor. This
25 is Jeff Parsons on behalf of the Oglala Sioux Tribe.

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1 I guess to start, we have some differing impressions
2 of how things have come about and where they sit.

3 I will say just to clarify the record with
4 regards to the February 19th conference call, Ms. Baer
5 suggested -- at that meeting the proposed survey
6 methodology that was provided on February 15th was
7 discussed but the fact is that it was discussed only
8 partially.

9 In fact, only about a third of the
10 methodology components were addressed during that
11 conference call and to date, in fact, that is the
12 extent of the discussion.

13 In terms of that document, the NRC Staff
14 has again unilaterally discontinued discussions before
15 we even had a chance to go through that entire
16 document with Mr. Spangler, who was the Staff's
17 contractor. So that I think is important to note.

18 With respect to the February 22nd meeting
19 on Pine Ridge, it is true that the Tribal historic
20 preservation officer for the Standing Rock Sioux
21 Tribe, the Rosebud Sioux Tribe, and the Cheyenne River
22 Sioux Tribe, the overall Sioux Tribe were there in
23 addition.

24 There were multiple Members of the overall
25 Sioux Tribe Tribal Historic Advisory Committee

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1 present. The Board may note, I think you alluded to
2 it earlier, Your Honor, that you're fundamental or
3 have read the pleadings most recently submitted.

4 Hopefully you were referring to the
5 submissions to the Hearing file that we submitted, the
6 Tribe submitted, yesterday.

7 Those include the draft meeting notes from
8 the February 22nd meeting on the Pine Ridge
9 Reservation, which details all of the participants, so
10 I'd certainly refer to that for a full list.

11 Ms. Baer suggested that the tribe cancel
12 the March 5th discussion 15 minutes before the call
13 started, however, I think it's important to note that
14 the NRC Staff sent the tribe a detailed six-page
15 letter on the Friday prior, knowing from previous
16 discussions that Counsel for the tribe was out of town
17 and unavailable through the weekend.

18 And on the morning of March 5th prior to
19 the call, they sent a proposed agenda which included
20 essentially in its entirety an expectation that the
21 tribe would lay out its full and comprehensive
22 response to that March 1st letter.

23 The tribe officers and Counsel had only
24 begun to review that letter and so we felt it was
25 unreasonable for the tribe to be able to completely

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1 describe its position with respect to that detailed
2 letter in that short timeframe.

3 In fact, the tribe and its Counsel had yet
4 to even fully vet and review that letter between the
5 client and Counsel prior to that call.

6 So I just want to correct that implication
7 that somehow the tribe was on short notice canceling
8 meetings when, in fact, it was NRC Staff who submitted
9 that detailed letter and then expected the tribe to
10 respond in full on that tight timeframe.

11 JUDGE FROEHLICH: Mr. Parsons, can I just
12 ask a couple of questions of you?

13 The responses I guess that the Staff were
14 seeking and the discussion at the meeting all teed off
15 from the proposed draft cultural resources site survey
16 and methodology, which was dated February -- I'm not
17 talking about the specific letter, but the outline and
18 proposed methodology or approach that the Staff was
19 intending to advance was contained or transmitted in
20 February.

21 Is that right?

22 MR. PARSONS: Yes, Your Honor, February
23 15th I believe. The record could correct me but I
24 believe it's February 15th when that document was
25 first presented to the tribes.

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1 JUDGE FROEHLICH: And there was a
2 conference call I guess scheduled for February 19th
3 and the duration was initially to be three hours in
4 length, is that right?

5 MR. PARSONS: Thank you, Your Honor. The
6 NRC Staff did not inform the tribes as to any length
7 of that meeting. That was frankly a surprise to the
8 tribe. We did not have that time allocated.

9 I think we spent close to two hours on
10 that call starting to go through the methodology with
11 Mr. Spangler going essentially page by page through
12 his document and in that time we got through about a
13 third -- if my recollection is correct, we got through
14 about a third of the document during that call.

15 JUDGE FROEHLICH: All right, and was it
16 the intent at the end of that call to pick up where
17 you left off after that one-third and move into the
18 details or sections that followed at the meeting at
19 Pine Ridge on the 22nd?

20 Was that the intent or the agenda going
21 forward after the conference call of the 19th?

22 Thank you, Your Honor, Jeff Parsons again.
23 Yes, I think that was included in the proposed agenda
24 for the meeting on the 22nd. Obviously when you've
25 got all of those important and well-trained experts on

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1 cultural resources and surveys in the room, the
2 discussion was sort of dictated by those experts.

3 Frankly, we thought that discussion was
4 extremely productive. The meeting notes that we
5 provided I think go into the level of detail that was
6 included in that meeting.

7 I will say that the document that was
8 presented, the draft methodology, really contained no
9 on-the-ground actual methodology.

10 It had a significant background section,
11 it talked about some of the principles and concepts
12 that would inform a cultural resources methodology but
13 there was nothing in that document that spoke to an
14 actual on-the-ground process.

15 And so at the February 22nd meeting, Mr.
16 Spangler was very forthright and conceded that he had
17 no experience with Lakota culture and would rely on
18 the tribes to provide the expertise necessary to put
19 together the actual on-the-ground methodology.

20 So that was where the discussion from
21 February 22nd really started to take off, and frankly,
22 the Tribal Historic Preservation Officers in the room
23 and Mr. Spangler both expressed optimism and a sincere
24 desire to really roll up their sleeves and get to work
25 and put together a methodology that would work.

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1 JUDGE FROEHLICH: Okay, let me interrupt
2 you if I may, Mr. Parsons.

3 In coming forth I guess the Staff was
4 intending to solicit at that meeting in Pine Ridge the
5 views and the perspective of the tribes on a
6 methodology that would be acceptable to the Lakota
7 culture.

8 Were there any discussions from the tribes
9 saying what type of ground survey would be consistent
10 with a tribal approach to the on-the-ground
11 methodology?

12 MR. PARSONS: Thank you, Your Honor. Yes,
13 there was. I think that was reflected in the meeting
14 notes and that was a strong component of that meeting.

15 And it was clear that there was
16 significant additional discussion that was needed and
17 so the tribes collectively proposed to again roll up
18 their sleeves and really get to work proposing a
19 multi-day session to have Mr. Spangler come back out,
20 have the Tribal Historic Preservation Officers and
21 their offices engage and to really hammer out those
22 details.

23 JUDGE FROEHLICH: Mr. Parsons, I'm working
24 from your notes. That meeting in Pine Ridge on the
25 22nd, what was the schedule for it or when did it

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1 begin and when was the end?

2 How many hours are we talking about the
3 parties being together to actually discuss the on-the-
4 ground methodology?

5 MR. PARSONS: Thank you, Your Honor, I'm
6 trying to recollect.

7 I think the discussion started in earnest
8 probably about 1:00 p.m. or 1:30 p.m. and wrapped up
9 about 5:00 p.m. or 5:30 p.m. but I'd have to check my
10 notes and confer with others to give a precise answer.

11 That was one of the reasons that we
12 anticipated that there be obviously additional
13 discussions and we wanted to really move forward with
14 that.

15 JUDGE FROEHLICH: I note from the appeal
16 that you filed as part of the 2.336 that the Staff
17 stated that a longer, more structured meeting session
18 should be held to delve deeper into the specific
19 proposed methodology.

20 Did the tribes propose a second day,
21 another day, a future date for the parties to get
22 together on this so that the Staff could learn and
23 understand the support that they could expect from the
24 tribe as part of an on-the-ground methodology?

25 MR. PARSONS: Yes, Your Honor. The tribes

1 proposed that would be the most productive way to go
2 forward and obviously intended that that would occur
3 in a short period of time.

4 And NRC Staff took the position that they
5 would think about it and get back to us on whether
6 that's something they wanted to participate in or not.
7 Although, frankly, at the meeting it appeared from my
8 perspective and everyone involved, that that was
9 something that was going to be in the plans.

10 So the NRC Staff did not commit to that
11 but certainly expressed they would take that back and
12 consider it.

13 JUDGE FROEHLICH: Mr. Parsons, could you
14 just refer me to that portion of the meeting summary
15 that you lodged where the tribal proposal is or what
16 sort of a methodology the tribe was advocating to the
17 Staff at that meeting on the 22nd?

18 MR. PARSONS: Sure, Your Honor. On Page
19 2, starting on Page 1 actually at the bottom of Page
20 1, we start to get into some of the specific topics
21 identified.

22 JUDGE FROEHLICH: What specific topic are
23 you referring to? I have them here in front of me and
24 I'm just trying to get a grasp on what type of on-the-
25 ground approach or survey the tribes are advocating or

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1 urging upon the NRC Staff?

2 MR. PARSONS: Thank you, Your Honor. What
3 I think happened was the tribes were discussing
4 components that needed to be included.

5 For instance, in the summary it speaks
6 about transects and personnel needs, the scope of the
7 survey in terms of the project area, the landscape-
8 level impacts.

9 If I can just finish, all this is in here,
10 it talks about conditional cultural knowledge and
11 protocols. Then further on it talks about issues with
12 identification and evaluation procedures for cultural
13 resources, and it also discusses involvement of the
14 State Historic Preservation Office and Advisory
15 Council on Historic Preservation.

16 And finally, it discusses, and again,
17 these meeting notes, not verbatim, these are
18 components that were discussed in this meeting,
19 additional components.

20 It includes traditional star knowledge
21 accounting for seasonal variations, wildlife, siting
22 of proposed facilities, opportunities for ceremonial
23 activities to aid in site assessments. So those I
24 think are what I would direct the Board to in that
25 regard.

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1 JUDGE FROEHLICH: Thank you, Mr. Parsons.
2 In that regard, I see the words transects and
3 personnel needs. What were the transects that the
4 tribe was proposing and what personnel needs in terms
5 of numbers is the tribe looking for?

6 MR. PARSONS: Thank you, Your Honor.
7 Those were topics that the tribes and NRC Staff I
8 believe identified, Mr. Spangler in particular, as
9 needing to be fleshed out.

10 For instance, there was discussion about
11 how some archeological surveys or other surveys have
12 what are considered by the tribes to be very, I guess
13 you'd say, wide transects, that is 30 meters or so.

14 And again, this gets into the details that
15 a lawyer such as myself don't have the expertise and
16 I think that's one of the problems we've been running
17 into, is the lawyers trying to get involved in the
18 details of the survey methodology that need to be left
19 to the actual experts in that field.

20 From my lay impressions, some surveys
21 discuss or use very wide transects and from the
22 tribe's perspective, that's a poor methodology to use
23 because it often results in missing significant
24 cultural resources on the ground.

25 And so the tribe was discussing a narrower

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1 transect approach and identifying that as an issue
2 that the tribes and the NRC's contractor, Mr.
3 Spangler, would have to discuss and negotiate work out
4 an agreement on.

5 And based on the size of the transects, of
6 course, that affects things like personnel needs and
7 timing.

8 This is a 10,000-acre site so that is a
9 significant area as I understand the discussion that
10 occurred and that requires some real planning in terms
11 of timing and personnel needs depending on the
12 transects and methodologies.

13 In addition, of course, we talked about
14 the star knowledge and the traditional cultural
15 knowledge like that, and the need for ceremonies and
16 those such as culturally relevant issues that need to
17 be incorporated. And so those were issues that were
18 discussed.

19 Again, unfortunately, the NRC Staff's
20 contractor admittedly had no experience in Lakota
21 culture and so was relying on the tribes to provide
22 this information, which was a strong component of that
23 discussion at the meeting but which clearly
24 demonstrated that it's going to require something like
25 a multi-day meeting in order to really dive deep and

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1 negotiate and figure out these details.

2 JUDGE FROEHLICH: All right, thank you,
3 Mr. Parsons.

4 Ms. Baer, I'd like to go back to the
5 questions that the Board had posed in its order
6 setting, the telephone conference, and ask if the
7 Staff has been involving its Tribal Liaison Branch, or
8 representative of that branch, in your discussions and
9 negotiations with the Sioux Tribe and to what extent?

10 MS. BAER: Sure, Your Honor, this is
11 Lorraine Baer with the NRC Staff.

12 We have been involving a member of the
13 Tribal Liaison Branch and her role was as a neutral
14 facilitator during meetings to help develop the site
15 survey methodology and to ensure that the NRC Staff
16 understand the tribe's position and recommendations.

17 So with that in mind, she facilitated the
18 meetings that took place on February 8th and 19th and
19 she had also planned to facilitate the one that was
20 scheduled for March 5th.

21 She did not attend the meeting in Pine
22 Ridge on February 22nd because a) her role was to
23 facilitate NRC-led meetings and as such the Staff did
24 not think it was appropriate for her to facilitate a
25 meeting led by the tribe.

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1 And b) she was unavailable on the day that
2 the tribes scheduled for that meeting.

3 MR. PARSONS: Your Honor, if I may, this
4 is Jeff Parsons. I would love an opportunity to
5 respond to that just briefly.

6 JUDGE FROEHLICH: Okay, Mr. Parsons, what
7 is your comment or observation about the involvement
8 of the tribal liaison?

9 MR. PARSONS: Thank you, Your Honor. When
10 we were first introduced to the tribal liaison, we
11 asked for some information on her background and
12 experience with tribes in working with tribes.

13 What we found was she had, from our
14 perspective, very little experience working with
15 tribes. She identified having spent some time with
16 some Navajo folks some years prior.

17 The idea that she was there just to be a
18 facilitator for NRC-led meetings and not have any
19 other contact or involvement with the tribe and would
20 decline to come out to Pine Ridge and meet and engage
21 with the tribe, unfortunately, despite our hope and
22 the initial substance of the tribal liaison and
23 thankfulness that that was included in the NRC Staff's
24 approach, our impression is that it has not been
25 really a tribal liaison.

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1 But the tribe engages Tribal Liaison
2 Officers from multiple Federal Agencies, and our
3 experience or the tribe's experience in those regard
4 is very different from how this tribal liaison was
5 selected and her participation. And so it has been
6 less than what we had hoped certainly.

7 The tribe would certainly encourage
8 additional communication and involvement of the tribal
9 liaison and would expect her to be present at every
10 meeting and engage with the tribes, and have some
11 experience with tribes such that, in Ms. Baer's words,
12 she would help the Staff understand the tribe's
13 positions.

14 It would certainly help that she would
15 have the communication and involvement with the tribes
16 to enable her to have that role.

17 JUDGE FROEHLICH: Thank you, Mr. Parsons.

18 MS. BAER: If include respond to that,
19 Your Honor?

20 JUDGE FROEHLICH: Sure, go ahead.

21 MS. BAER: I would just like to say that
22 she was assigned to this project because of her
23 experience and qualifications and her role was
24 consistent with the roles and responsibilities policy
25 of the tribal liaison Branch.

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1 She's a member of the NRC's Facilitator
2 Program, she's developed training from NRC Staff on
3 tribal issues and policies, and in her former capacity
4 as an OGC attorney, she helped develop the NRC's
5 tribal policy statement, tribal protocol manual, and
6 consulted with other tribal governments on NRC
7 licensing actions and programs.

8 MR. PARSONS: Your Honor, this is Jeff
9 Parsons. When we ask for any references from any
10 tribes that she could provide us to give her bona fide
11 or any experience, that request was refused.

12 JUDGE FROEHLICH: Thank you, Mr. Parsons.
13 I think we've heard enough on this particular subject.

14 I was wondering and would ask the parties
15 if there's any utility in the parties moving forward
16 with other aspects of what has come to be known as the
17 March 2018 approach that would involve oral histories
18 or a collection of ethnographic material or
19 information while the parties put aside the details of
20 the on-the-ground survey?

21 It appears to me that the parties haven't
22 discussed the detailed elements of doing an
23 appropriate survey and I was curious whether any other
24 aspect of the March 2018 approach could be implemented
25 while the parties should continue negotiating, while

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1 they work out the methodology of the ground survey.

2 Has the Staff considered the feasibility,
3 the practicality, or the ability to work on other
4 aspects of the data collection on this subject before,
5 let's say, the site survey takes place, assuming the
6 site survey could take place?

7 MS. BAER: Thank you, Your Honor.

8 At this point, the additional information
9 we need from the field survey is the existence and
10 nature of any sites of cultural, historic, or
11 religious significance to the tribe.

12 But because they're sites of significance
13 to the tribes, the significance can only be ascribed
14 by the tribes themselves.

15 Without the tribes' agreement and
16 participation in the survey, the NRC Staff and
17 contractor cannot gather this additional information
18 and the way that the March 2018 approach was designed
19 was so that the oral history interviews would be
20 informed by the first phase of the field survey and
21 would then inform the second phase.

22 So, we do not see the feasibility of
23 trying to conduct the oral history interviews separate
24 from the rest of the approach.

25 JUDGE FROEHLICH: Thank you.

1 MR. PARSONS: Your Honor, this is Jeff
2 Parsons. If I may, I think as expressed in our mid-
3 March letter to NRC Staff in response to their March
4 1st letter, the tribe remains ready, willing and able
5 to engage in negotiations over the survey methodology.

6 Unfortunately, in the short time that the
7 NRC Staff has allowed for negotiations on this
8 process, we did not even get to the pages in the
9 proposed methodology with regards to oral interviews.

10 I think Ms. Baer is correct that there's
11 a strong component with the oral interviews informing
12 the site survey but there are additional elements with
13 regards to oral interviews and I think this has been
14 identified for the Board in the past, that these are
15 delicate issues that the tribe has a Research and
16 Review Board when dealing with human subjects that
17 meets.

18 There's a process to be followed there.
19 The tribe is yet to receive any information from Mr.
20 Spangler to the Research and Review Board that would
21 inform their review or analysis of oral interviews.

22 But again, I think as we've expressed
23 repeatedly, the tribe is ready to get to work on this,
24 wants to get to work on this, and was very
25 disappointed to see NRC Staff again, as soon as we get

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1 into the details of working out a survey and we
2 actually have the experts in the room ready to roll up
3 their sleeves, NRC Staff unilaterally abandons the
4 effort.

5 So, again, we stand ready.

6 PARTICIPANT: Yes, sure.

7 JUDGE FROEHLICH: I'm sorry, did I hear
8 something?

9 MR. PARSONS: I'm sorry, somebody is
10 expressing comments under their breath that we can
11 hear on the line. I don't know who it is but I
12 suspect it's not useful so I'd appreciate it if you'd
13 quit it, thank you.

14 MS. BAER: Can I respond to that, Your
15 Honor?

16 JUDGE FROEHLICH: Please, Ms. Baer.

17 MS. BAER: So the NRC Staff's impression
18 of the meeting as productive, I can't say that we
19 necessarily agree with that characterization. We left
20 with a very different understanding of the outcome of
21 that meeting.

22 What we understood is that the tribes were
23 raising concerns and objections that were indicative
24 of a broader, more fundamental difference within the
25 negotiation parameters.

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1 And the tribes objections indicate they
2 want something that is not compatible with the March
3 2018 approach.

4 MR. PARSONS: This is Jeff Parsons, I
5 would just respond and say without doing the necessary
6 work to develop even the basics of an on-the-ground-
7 methodology, it is severely premature to make that
8 determination.

9 JUDGE FROEHLICH: My response is it seems
10 to me as a Member of this Board that the meeting at
11 Pine Ridge was the best and most opportune time for
12 the parties to roll up their sleeves and put on the
13 table or begin a discussion of the specifics of the
14 ground methodology.

15 And from the draft summary notes, it's
16 difficult to see what proposal, if any, as far as
17 specifics were coming from either side. Specifically
18 the concerns that the tribe has raised continually
19 weren't disclosed as far as these specifics.

20 It was my impression that after hearing
21 the telephone calls, conference calls among the
22 parties, that when they got to Pine Ridge where you
23 had the experts from the Staff as well as the
24 contractor and the numerous tribes that had an
25 interest in that, that was the opportunity to discuss,

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1 negotiate the specifics of the ground methodology that
2 would be consistent with the overall scope and
3 parameters of the March 2018 approach.

4 From the notes that have been submitted,
5 it doesn't look like there were any specifics that
6 came about that were discussed, let alone negotiated.
7 And I don't see us significantly in a different place
8 than we were about a year ago.

9 MR. PARSONS: Your Honor, this is Jeff
10 Parsons. I would push back on that interpretation of
11 that meeting.

12 In addition, I think it's significant that
13 the meeting started off with Mr. Spangler conceding
14 that he had no expertise, in fact, no experience with
15 Lakota culture and would rely on the tribes to provide
16 him all information necessary to develop an on-the-
17 ground-methodology which, as I pointed out, the
18 documents submitted contained zero information for the
19 tribes to review or respond to with respect to on the
20 ground methodologies.

21 So these things take time and certainly,
22 without having any details coming from NRC Staff
23 consultants or contractors leaving it to the tribes to
24 develop an on-the-ground-methodology, there were
25 offers in the room.

1 There were several people who were
2 experienced in conducting these types of surveys and
3 expressed their willingness and desire to engage and
4 that was the discussion that we had about specifics.

5 I mentioned the exact meters between the
6 transects, the project area that would need to be
7 surveyed, and how we would go about doing that.

8 And so those details were discussed at
9 that meeting so I would respectfully disagree with
10 that interpretation of the notes.

11 JUDGE BOLLWERK: Let me just ask one
12 question. This is Judge Bollwerk. So, Mr. Parsons
13 has mentioned the possibility of a multi-day meeting.
14 Why didn't that ever take place?

15 MR. PARSONS: This is Jeff Parsons. From
16 the tribes' perspective, within a week of the --

17 JUDGE BOLLWERK: Mr. Parsons, I want to
18 hear from Ms. Baer. Thank you.

19 MS. BAER: Sorry about the confusion, Your
20 Honor. This is Lorraine Baer with the NRC Staff. I
21 would like to agree with what the Board had said about
22 the meeting.

23 We expected that we'd have a specific
24 discussion and more specific input from the tribe
25 while we were out there in person, and although the

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1 methodology was projected on a screen, we never really
2 got an opportunity to go through it.

3 All we heard were broad fundamental
4 objections to indicate that they disagreed with the
5 March 2018 approach.

6 As such, when we got back and were
7 considering our options, we felt that it was necessary
8 to pause and send the March 1st letter to ensure that
9 everybody was operating understand the same
10 parameters. Which is why we did not go forward with
11 a multi-day meeting.

12 JUDGE BOLLWERK: This is Judge Bollwerk.
13 Does the Staff still intend to follow the LeBray --
14 I'm probably mispronouncing that -- methodology?

15 MS. BAER: The LeBeau methodology?

16 JUDGE BOLLWERK: LeBeau methodology, thank
17 you.

18 MS. BAER: Well, while the Staff proposed
19 a methodology that sort of builds on the LeBeau model,
20 it also incorporated aspects from other methodologies
21 that our contractor had research, and also left ample
22 room for tribal input.

23 However, it was based on the March 2018
24 approach and based on everything we're hearing, the
25 tribe is no longer on board with the March 2018

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1 approach.

2 JUDGE BOLLWERK: Wait a second, Mr.
3 Parsons, I'll let you have it in a second.

4 So, notwithstanding the fact that the
5 tribe is not willing to move forward is the Staff
6 willing to move forward on that methodology? Is that
7 the Staff's preferred methodology or does the Staff
8 not have a methodology at this point?

9 MS. BAER: Your Honor, this is Lorraine
10 Baer for the NRC Staff.

11 While we've proposed a methodology that we
12 think is reasonable, the additional information that
13 we need to gather from a field survey is the existence
14 and nature of any place of cultural, historic, or
15 religious significance to the tribe.

16 By their very nature, those are things
17 that can only be identified and the significance can
18 only be ascribed by the tribes themselves. So, for us
19 to go out there without the tribes would not be a
20 productive survey.

21 JUDGE BOLLWERK: And in terms of
22 transects, does the Staff have a vision of whether 10
23 meters or 30 meters is adequate? Or do they have
24 something else they want to propose?

25 MS. BAER: Your Honor, we never got an

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1 opportunity to get to that discussion with the tribes.

2 JUDGE BOLLWERK: What about the question
3 of covering the entire site versus portions of a site?

4 MS. BAER: It would be very difficult to
5 cover the entire site in two two-week periods,
6 depending on the length of the transects.

7 JUDGE BOLLWERK: Mr. Parsons, is there
8 anything you want to say?

9 MR. PARSONS: Yes, Your Honor, thank you
10 very much. I just wanted to again correct the record
11 with respect to the tribe is no longer on board with
12 the March 2018 approach.

13 The March 2018 approach left open the most
14 significant aspect of the project, which is the
15 methodology that would be carried forward.

16 And so what NRC Staff I think is
17 characterizing as rejection of the March 2018 approach
18 is merely a function of having to understand that you
19 have to develop the methodology.

20 As a framework, the March 2018 is viable
21 but it has to be informed, and this is nothing new.
22 The tribe has been saying this for the last year, that
23 the methodology has to be informed -- I'm sorry, the
24 framework and the timing has to be informed by the
25 methodology which is the most significant aspect of

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1 that framework and was left completely blank in the
2 March 2018 approach.

3 It is just that, an approach. It needs to
4 be developed, it needs to be put in front of the
5 experts which is what we're trying to accomplish, and
6 it needs to be flexible enough at least for a
7 reasonable and effective methodology to be developed
8 and be implemented.

9 And if that means there's some movement,
10 then that should be within the bounds of reason. From
11 the tribes' perspective, NRC Staff without any
12 contractor involvement, without any expertise on
13 actually conducting a cultural resources survey,
14 established a timeframe and then regardless of the
15 methodology put it into that timeframe.

16 That is not something the tribes have ever
17 agreed to. What we've agreed to is a framework to
18 work within and then we would develop the methodology
19 with the experts in the room.

20 And that would define and dictate the
21 process going forward and again, we thought that the
22 February 22nd meeting was a strong step in that
23 direction and we had plans in place to, albeit no set
24 in concrete, but plans in place to further that
25 discussion.

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1 Both Mr. Spangler and the Tribal Historic
2 Preservation Officers in the room agreed that would be
3 something they would be very interested in pursuing.
4 So, to say that the tribe has rejected the March 2018
5 framework I think is incorrect.

6 The NRC Staff has left the most critical
7 component completely open, that needs to be informed
8 by the experts in the room.

9 JUDGE FROEHLICH: Mr. Parsons, this is
10 Judge Froehlich.

11 Another way to look at this is that the
12 NRC Staff came to Pine Ridge -- I'm sorry came to
13 South Dakota to meet with the experts among the
14 tribes, seeking from them their inputs on how the
15 ground components of the methodology should be
16 implemented.

17 They came there and said what is it that
18 needs to be done? And from what I read and your draft
19 notes go a little bit into it is that they came
20 seeking from the tribes the best way to gather that
21 information that's known exclusively to the tribes and
22 enable them to incorporate that in their statutory
23 responsibilities to NEPA.

24 And after numerous discussions and face-
25 to- face meetings, this doesn't seem to have even been

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1 discussed. So it's difficult for me at this point.

2 Where the tribe is asking for the Staff to
3 take into account their perspective, they were there
4 and it wasn't forthcoming from the tribes.

5 I'm having trouble how the Staff can go
6 forward with its responsibilities if the tribe or
7 tribes are unable or unwilling to spell out the
8 specifics of how this should be conducted.

9 MR. PARSONS: That's inaccurate, Your
10 Honor. Respectfully, that discussion involved those
11 very details for on the ground.

12 And to be clear, the on- the-ground
13 survey, how you lock the land is not solely within the
14 cultural knowledge of the Oglala Sioux Tribe. What
15 the tribes have is the cultural knowledge to identify
16 and evaluate those sites.

17 So, a cultural resources survey, it's a
18 pedestrian survey. These were discussed, there are
19 specifics with regards to working out the transects,
20 and we discussed this, how large the area needs to be,
21 the affected area that's evaluated, how far apart the
22 pedestrian survey is conducted.

23 Those are the transects. Those were all
24 discussed, those are specifics that were addressed at
25 the meeting.

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1 Now, how you go about incorporating the
2 tribes traditional cultural knowledge into the
3 identification and evaluation of those sites, that's
4 another matter. That has to be addressed as well.

5 So, the specifics were discussed and the
6 tribe, again, did discuss those details and did offer
7 to work out that detailed methodology.

8 Unfortunately, it's not something, those
9 aspects are not, the ceremonial aspects, the oral
10 interviews, how those are going to be conducted,
11 that's not something you can work out in a couple
12 short hours.

13 The first conference call was merely an
14 introduction as laid out on the agenda put forth by
15 the NRC Staff, and the second call, we got through
16 about a third of the documents.

17 And so I think it's unreasonable to expect
18 the tribe, and again, continue to know on-the-ground
19 specifications or proposals of any kind with regards
20 to the cultural resources survey.

21 And so to expect the tribe to have fully
22 vetted and fully prepared, without input from NRC
23 Staff, a cultural resources survey I think is
24 unreasonable.

25 What would have been reasonable is for

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1 that in-person meeting to spawn further in person
2 meetings which is what the tribes invited and proposed
3 in order to flesh this out and get it started.

4 Unfortunately, NRC Staff's response to
5 that meeting was, instead of accepting the invitation
6 to get the experts back in the room to work this out,
7 to send over a letter that required detailed legal
8 review and analysis of the record in order to rebut
9 their mischaracterization frankly.

10 So that isn't exactly what I would
11 consider a productive use of time when we have all
12 these experts ready to get to work. I think that's
13 the more accurate characterization of the meeting.

14 JUDGE FROEHLICH: This is Judge Froehlich.
15 It's difficult for me to imagine or comprehend fully
16 what happened at the face-to-face meeting in South
17 Dakota.

18 Are you telling me that details, like the
19 number of people that the tribe would make available
20 on April 1st and the distance that they would would be
21 saved or the method that they would convert some
22 portion or all of the property were discussed?

23 And there was give and take back and forth
24 among the experts, among the tribes and the NRC's
25 contractor so that something couldn't go forth on or

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1 about April 1st? I don't see that in your notes, in
2 the summary.

3 Did a discussion like that or a dialog
4 take place that covered things like the number of
5 people who would show up, the distance that they would
6 make for the transects, the amount of territory that
7 should be covered in the first day or week and what
8 should be put aside for the second time?

9 Is that what transpired at that meeting?

10 MR. PARSONS: Yes, Your Honor, those
11 components were discussed. Now, of course, the first
12 time that you have someone in the room together,
13 there's a lot of additional discussion and
14 introductions and getting to know each other.

15 That's a necessary component, particularly
16 how the Lakota culture operates in my impression.

17 But, yes, those specifics were talked
18 about and discussed and what was decided or what was
19 the outgrowth of those discussions is that we need to
20 spend more time negotiating those particulars and
21 let's get to work.

22 JUDGE FROEHLICH: If I understood what
23 I've heard, the Staff was ready to basically move
24 forward with this portion of the March approach as
25 soon as they were informed or understood what would be

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1 satisfactory from the tribes' perspective, given the
2 on-the-ground activities or schedule or compensated to
3 take place.

4 And Ms. Baer can correct me if I'm wrong,
5 I'm hearing from the Staff that they didn't get the
6 kind of information that they would need to begin a
7 pedestrian survey or the first elements of the 2018
8 approach from the meeting in South Dakota.

9 Ms. Baer, can you give me your
10 perspective? I'm not really clear on what information
11 the Staff received in South Dakota to enable them to
12 go forward on the 1st of April.

13 MS. BAER: Thank you, Your Honor.

14 I would disagree with the fact that we
15 discussed specifics about the numbers of personnel on
16 the ground or how the actual site survey would be
17 carried out logistically.

18 I do think I recall hearing something
19 about the tribes wanting to traverse the entire
20 project area and some suggestion that sounded much
21 like the June 15th proposal, which was 10-meter
22 transects, which according to the June proposal would
23 have required a year and nearly \$2 million to carry
24 out.

25 The main message that we took away was

1 that the tribe wanted to spend more time figuring out
2 the methodology itself and then formulating the
3 timelines and the budget afterwards, which is
4 inconsistent with the March 2018 approach and the
5 Board's October 30th order.

6 MR. PARSONS: Your Honor, to that point,
7 the meeting notes circulated by NRC Staff from the
8 February 19th meeting, we started talking about those
9 issues and the position from NRC Staff was let's get
10 a methodology together and then we will discuss those
11 issues.

12 So I think there is some inconsistency in
13 that regard and certainly, the March 2018 approach
14 specifically contemplated having to put together the
15 methodology which was left open.

16 So, as Ms. Baer indicates, those
17 discussions began with regard to the specifics and the
18 particulars and everyone understood that that would be
19 negotiation and room for flexibility to work the
20 methodology into an approach that was acceptable from
21 all sides.

22 And unfortunately, the NRC Staff has, from
23 our position, abandoned that effort prior to letting
24 that process play out. But we got a good start at
25 that February 22nd meeting.

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1 MS. BAER: Your Honor, this is Lorraine
2 Baer. What we heard at the February 19th meeting and
3 the February 22nd meeting was that two two-week
4 periods were not adequate.

5 MR. PARSONS: Your Honor, without having
6 a methodology in place it is extremely difficult to
7 set in concrete the amount of time.

8 We understood that was the framework but
9 as we've said throughout, it needs to be informed by
10 the methodology that's determined by the experts, by
11 the people who actually know how to conduct a cultural
12 resources survey.

13 JUDGE BOLLWERK: This is Judge Bollwerk.
14 Let me go back to what I consider some basics here.
15 It strikes me that there were really three parts to
16 the approach.

17 One was the question of methodology, the
18 second was the question of schedule, and the third was
19 the question of reimbursement in some way, shape, or
20 form.

21 There also became a question about the
22 NRC's contractor and the person's expertise which I
23 guess arose because Dr. Nickens is no longer
24 available, although I'm not sure the tribe necessarily
25 believed Dr. Nickens had sufficient expertise himself

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1 as well.

2 But putting that aside, that's frankly
3 been resolved because Mr. Spangler's been retained by
4 the Staff in the event.

5 So, back to the Staff, in terms of let's
6 take schedule first. The schedule is laid out in
7 terms of the methodology.

8 Is it the Staff's position still,
9 including your consultations with Mr. Spangler who is
10 now your contractor and your expert, that the
11 scheduling that was laid out is adequate in the
12 Staff's view?

13 MS. BAER: Yes, Your Honor. We still feel
14 that the schedule that was laid out was appropriate
15 and achievable, and we relied on the March 2018
16 approach as a reasonable framework to carry out that
17 site survey for the past year.

18 JUDGE BOLLWERK: All right, let me go back
19 to the methodology then. Mr. Parsons has indicated
20 that Mr. Spangler, when he talked with the tribe he
21 indicated he needed input from the tribe.

22 Now, we don't have any inputs from the
23 tribe and we don't have a methodology. What's the
24 Staff's position relative to methodology? How does
25 that fall into what you contemplated back in March

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1 2018?

2 MS. BAER: Your Honor, what we presented
3 on February 15th was the Staff's proposal of a
4 reasonable methodology.

5 It incorporated aspects that the tribe
6 specifically asked for, it summarized research
7 conducted by Mr. Spangler, and it was not a final
8 document. It was intended to elicit further
9 discussion with the tribe.

10 It replicated the March 2018 approach's
11 two non-contiguous two-week periods to carry out the
12 survey and proposed amounts of reimbursements that
13 were identical to the March 2018 approach.

14 JUDGE BOLLWERK: I've heard you also say
15 you still don't know what the transects are. Does Mr.
16 Spangler have a view about what the transects should
17 be?

18 MS. BAER: Your Honor, there were so many
19 fundamental details that we heard at the February 22nd
20 meeting and at the other meeting that we never even
21 got to an opportunity where we could discuss those
22 details.

23 As the tribe has repeatedly stated,
24 they're the experts when it comes to identifying these
25 sites and if they are not even on board with the basic

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1 fundamental parameters of the March 2018 approach, we
2 don't see it as productive or feasible to continue
3 those discussions.

4 JUDGE BOLLWERK: So at this point, the
5 Staff really doesn't have a methodology?

6 MS. BAER: No, Your Honor, the methodology
7 is the document that we presented on February 15th.

8 JUDGE BOLLWERK: But, again, I keep
9 hearing they need to be informed by the tribe and the
10 tribe hasn't informed you, therefore do you have a
11 methodology?

12 MS. BAER: It's a working document. We
13 need the acceptance of the tribe in order to carry it
14 out and finalize it.

15 JUDGE BOLLWERK: All right, let's talk
16 about the reimbursement.

17 I think you've already addressed that a
18 second ago but I take it that Staff's position still
19 is that the per diem and the travel that was involved
20 or I guess the reimbursement for use of motor
21 vehicles, those costs as well as the \$10,000
22 honorarium, that's the reimbursements you'd be
23 provided?

24 MS. BAER: Yes, Your Honor, the
25 reimbursement was the result of focused negotiation

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1 among the parties last year and the reimbursement
2 amount that was proposed this time around is identical
3 to what was proposed last year.

4 JUDGE BOLLWERK: All right, Mr. Parsons,
5 let me turn to you and I'm going to talk about the
6 same three items.

7 My impression, and I think you've actually
8 increased my understanding in that respect today, is
9 that when you agreed to the approach, you agreed that
10 there was the same three items that I've identified,
11 which is the methodology, the schedule, and the
12 question of reimbursement?

13 And what you were really agreeing to was
14 to negotiate about all of those items, you weren't
15 agreeing to anything in the Staff's methodology, is
16 that correct? Or if I'm mischaracterizing this please
17 let me know.

18 MR. PARSONS: Thank you, Your Honor.

19 I think what we agreed to was a framework
20 to work within to put together a methodology but, yes,
21 the framework has to be flexible to account for that
22 methodology.

23 It's worth noting, again, that the framework was
24 put together without any information without any
25 expertise associated with conducting a cultural

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1 resources survey.

2 The NRC Staff did not even have a
3 contractor on board at the time they proposed and did
4 not even have a contractor on board when they re-
5 proposed that framework.

6 And so our position is the experts need to
7 figure out a methodology and then that framework,
8 which I think still provides a viable basis, needs to
9 have some flexibility to be able to accommodate the
10 details worked out, negotiated, by the experts.

11 With respect to cost, we have asked Mr.
12 Spangler, as reflected in the notes, to provide us
13 with any examples of survey now that we have NRC's
14 contractor expert on board.

15 Although he admits that he had no
16 experience or expertise in any Lakota culture, we
17 asked him for any information or examples of cultural
18 resources surveys of this nature that have been
19 conducted that sit within a similar budget, and have
20 heard no response.

21 So, we've raised these concerns throughout
22 both with regards to timing and the finances.

23 We've proposed what we thought were some
24 creative potential avenues to bolster those funds to
25 try to work this out and what we find is that NRC

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1 Staff is unwilling to even discuss it, which is
2 unfortunate because we've got the experts in the room
3 who can actually shed light with an informed opinion
4 on what needs to be done, how the methodology, timing,
5 and budget need to be arranged.

6 And so again, the tribe is ready to
7 negotiate and work those issues out and hopes to have
8 the opportunity to do so. I hope that answers your
9 question.

10 JUDGE BOLLWERK: So let me just ask you,
11 I take it from your understanding of the -- again,
12 looking for statements from Mr. White that are in both
13 the meeting summary and the summary of the February
14 19th phone call, do you see any way that you working
15 with the Staff or you alone could develop a
16 methodology that would allow you to complete this
17 cultural survey within the schedule the staff has
18 proposed?

19 MR. PARSONS: Your Honor, this is Jeff
20 Parsons again. The schedule that the Staff proposed
21 goes through the middle of next year and so I think
22 that there's plenty of room for moving dates to
23 negotiate, to figure out a process.

24 I'm aware of no strict deadline on NRC
25 Staff or anybody else for getting this work done.

1 We understand the framework they proposed
2 but it is a mystery to all of us on this side of the
3 fence anyway as to why there is this recalcitrance to
4 allow the experts to inform the schedule or the budget
5 when there is no external factor other than some
6 desire perhaps on behalf of the licensee or NRC Staff
7 to sit within a certain timeframe but no hard
8 deadline.

9 No hard factor that requires that level of
10 recalcitrance, especially when we have the experts
11 ready to do the work and get those details in place.
12 So it doesn't make any sense to us.

13 JUDGE BOLLWERK: Looking at the February
14 22nd meeting summary, and I take it this was prepared
15 by the tribe, right?

16 Because I have a recollection of writing
17 something that said there was going to be a back and
18 forth in terms of who did the meeting summaries. And
19 this is the tribes' summary, is that correct?

20 MR. PARSONS: Your Honor, this is Jeff
21 Parsons, that is absolutely correct. And certainly,
22 NRC Staff, as we agreed, is entitled and should
23 provide us with their response.

24 I submitted that document and the document
25 I submitted yesterday only because it appeared to me

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1 from the questions the Board presented in the order
2 that that information would help Your Honors in order
3 to have a full understanding of the discussions and
4 the communications that have occurred to date.

5 JUDGE BOLLWERK: So that meeting summary
6 indicates that the methodology needs to include
7 traditional star knowledge, accounting for seasonal
8 variations, wildlife, flagging a proposed facility to
9 enable an assessment of impact.

10 And by that I'm assuming you mean there
11 would be flags set out that would show the size of
12 different structures on the site that Powertech would
13 propose to build and that would give you a sense of
14 where they were considering putting different wells or
15 different facilities.

16 And then also opportunities for ceremonial
17 activity at the sites to aid assessment.

18 Given all of that, and that seems to me
19 the things that I think are important to the tribe,
20 those keep coming up, is there any way you could do
21 all that within six months, no matter what the
22 schedule was?

23 MR. PARSONS: Thank you, Your Honor, this
24 is Jeff Parsons. Again, those were components that
25 the tribe indicated, the tribes indicated that should

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1 be considered as part of the methodology. And so
2 that's where the discussion was framed.

3 What kind of specific components should be
4 we consider incorporating into the methodology? Now,
5 again, I'm not an expert on cultural resources survey
6 so, frankly, I do not know what timelines.

7 But with all of those components that are
8 suggested that were put on the table as things that
9 the experts should discuss and figure out, frankly, to
10 expect all those details to have been arranged and set
11 out in detail and agreed upon in one session I think
12 is unreasonable.

13 And that is why we've proposed those
14 additional meetings.

15 So, yes, those were specific components of
16 the methodology that the tribe proposed and should be
17 considered for incorporation into the methodology.
18 And so that's why those were discussed.

19 Just to Judge Froehlich's question, those
20 were the specific aspects that were discussed and laid
21 on the table for the tribe's proposal for what should
22 be incorporated into the methodology and that was to
23 be the basis of those negotiations to flesh out those
24 issues so that, again, the folks who know how to
25 design and frame out a cultural resources survey could

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1 do so.

2 JUDGE BOLLWERK: And are those things the
3 tribe has to have to make the survey work for them?

4 MR. PARSONS: Again, Your Honor, what we
5 need to is for the experts to be in a room and
6 negotiate these things through and to figure out what
7 kind of methodology is going to work.

8 And the tribe understands that it's a
9 negotiation, there were no gauntlets laid down, at
10 least from the tribes' perspective there were no hard
11 -- there were some serious concerns expressed and
12 certainly some strong opinions, but the only party in
13 this negotiation that has made it clear that they are
14 unwilling to negotiate, in our view, is NRC Staff.

15 The tribes put out these specific details
16 as what ought to be incorporated into an on-the-
17 ground-methodology, which again, not even a start to
18 an on-the-ground-methodology was included in the
19 February 15th draft.

20 I don't even know if I'd call it a draft
21 methodology yet. What it is is a background piece
22 which lays out different components, different
23 concepts that different people have used to try to
24 assess Lakota cultural resources like the LeBeau
25 method you referenced.

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1 But again, there's nothing in there that
2 discusses on-the-ground. So that's where the tribes
3 were going with all of those specific details. Here
4 is a list of things that ought to be considered, let's
5 put the experts to work and develop a plan.

6 JUDGE FROEHLICH: Mr. Parsons, this is
7 Judge Froehlich. I keep hearing that the experts have
8 to put this together, have to take these components
9 into consideration and work them into a methodology.
10 Have the experts on your side of the table come up
11 with a proposal that includes these components and
12 presented that to the staff saying, okay, these are
13 the components that we think have to be in the
14 methodology and here is a proposal for accomplishing
15 that?

16 The experts are in the room. Most of them
17 are on your side of the table. Has any of them taken
18 these elements and put it into a proposal as opposed
19 to just identifying them as components that have to be
20 there?

21 MR. PARSONS: Thank you, Your Honor. I
22 really actually appreciate that question. The
23 agreement between NRC staff and tribes when we were
24 reinitiating this process was that NRC staff would
25 provide a draft. They would take a crack at it. They

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1 have an expert on board who was under contract and
2 being paid through this process and would propose the
3 methodology and would send that across.

4 And what we received on February 15th, we
5 think it's still a useful document for what is in it.
6 Although as noted in the meeting notes, there are some
7 issues with heavy reliance on LeBeau, for instance,
8 not that that's not relevant. But there was some
9 concern about, frankly, his qualifications to be
10 laying out the things that he did. That's neither
11 here nor there.

12 But the NRC staff was charged -- their
13 expert was charged with providing that first draft.
14 So on the 15th of February, the tribe received that
15 draft and within a week have this meeting on the Pine
16 Ridge -- the phone call and the meeting on the Pine
17 Ridge Reservation. And that's where the tribes were
18 reviewing that document for the first time. And a
19 week is a fairly short time frame. I hope you'd
20 agree.

21 And so we're identifying components that
22 ought to be worked into a redraft which the document
23 itself specifically says it'd contemplate it. I mean,
24 literally every single section of that report or that
25 draft as you see discusses how we need to work through

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1 this. So that was the charge and the task and the
2 beginnings of that at the February 22nd meeting was to
3 provide that input on that document and what other
4 components might be incorporated, what issues were
5 sort of good in there, what issues needed more work.
6 And again, that was the process that occurred on the
7 22nd and within a week of receiving that draft.

8 So that's how the process was set up. The
9 NRC staff expert or their contractor anyway would
10 provide that first draft. The tribes would respond
11 and would continue to work through it. So the tribes
12 are -- they do have expertise on this.

13 And again, going back to the issues the
14 tribes have identified for some time that they are
15 fully aware of who has -- or at least that some of the
16 parties that have expertise in this realm and should
17 have been considered for NRC staff's contract and can
18 and are willing again to put together those kinds of
19 detail. But it requires NRC staff to come to the
20 table to do so.

21 JUDGE BOLLWERK: This is Judge Bollwerk.
22 Just let me ask you one other question about the three
23 items or the areas in methodology. They're the
24 approach that I mentioned and that's the question of
25 reimbursement. Now some things, there was a reference

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1 in one of your letters, I believe, to federal
2 contractors. There's been some other documents that
3 were provided to us on summary disposition on
4 different reimbursement rates.

5 Admittedly, if you look a reimbursement
6 rate of, say, 50 dollars to 100 dollars an hour for
7 someone who's considered a field technician or a crew
8 chief or a cultural advisor, you're going to eat up a
9 10,000-dollar honorary if you're looking at that being
10 the source by which those folks are paid pretty
11 quickly. Is that something the tribe is concerned
12 about?

13 MR. PARSONS: Yes, Your Honor. That's
14 been expressed throughout the process. We've made no
15 mystery of our concerns, as laid out in our mid-March
16 letter. That's clear in the record that the tribes
17 have been concerned about that issue for some time and
18 understand that that's an issue that needs to be fully
19 vetted.

20 When asked to respond early this year,
21 that was a central component of the document we
22 submitted where we suggested -- the tribes suggested
23 additional possibilities for obtaining funding to
24 better manage this process. And we continue to be
25 willing to investigate and negotiate on that issue.

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1 And we hope NRC staff, of course, would be willing to
2 do the same.

3 JUDGE BOLLWERK: If the staff doesn't
4 change, is that a deal breaker for the tribe?

5 MR. PARSONS: Well, if you've got a survey
6 crew ready to go out and you have 10,000 dollars,
7 there's a serious concern about how much time you're
8 actually -- as you identified, how much time you're
9 going to be able to spend in the field.

10 So it would seem to me that NRC staff,
11 with their statutory duties to take a hard look, would
12 be cognizant of that, would have their experts, which
13 we have, ask their contractor for information on
14 studies, cultural resources, surveys such as this and
15 how much they cost. You would think that would be
16 something that NRC staff would investigate with their
17 own contractor and experts and also have some
18 information on.

19 We have yet to receive any response from
20 those requests as to how NRC staff's contractor views
21 those issues. When we started going through the draft
22 document asking -- he was to give us sort of his
23 thinking on these different components. He, of
24 course, skipped over this aspect of the cost. We
25 asked him to go back to it. And his response was,

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1 well, NRC staff put that section in there and I'll let
2 them address it because I don't know.

3 So I think there's room to discuss it.
4 And that's what we're certainly hoping to do.

5 JUDGE BOLLWERK: All right. Let me just
6 make it clear. One of the reasons I'm asking these
7 questions as well is I'm sort of looking at this case
8 as a possibility of being something the agency may
9 implement on a broader basis if this is the -- if, as
10 Dr. Nickens suggested that there needs to be more
11 input from the tribe in terms of cultural resources.
12 How do you get that? How does it carry forward?

13 MR. PARSONS: Your Honor --

14 MR. PARSONS: Normally under -- well, just
15 one second. Let me finish and I'll let you comment.
16 One of the things that normally happens is the
17 applicant in the first instance has the responsibility
18 to provide the staff with a lot of information. Now
19 frankly from the tribe's perspective, I don't know if
20 they've even be willing to work with the applicant on
21 something like this if they considered it to be sort
22 of something that has to be done government to
23 government as it were. So on a basis like the
24 applicant did here where they contracted with a
25 college group to provide the information.

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1 So I'm just trying to figure out where
2 this is all going and what it portends for the future.
3 Anything you want to say, Mr. Parsons?

4 MR. PARSONS: Thank you, Your Honor. The
5 tribe sees this process in a similar light, that it
6 could very well set a model for future efforts in this
7 regard. And Your Honor, you're correct that typically
8 this work is done on the front end as part of an
9 application process, as part of the initial studies.

10 I mean, it's no mystery that the tribe has
11 been concerned about this issue and has raised the
12 lack of competent cultural resources issue from the
13 very start, including in the comments on the draft
14 final -- excuse me, the draft supplemental
15 environmental impact statement. That would've been a
16 very good time for NRC staff to tell the applicant
17 that they need to conduct these studies and work with
18 the tribe and figure it out.

19 I don't think that opportunity is lost.
20 I mean, I think the tribe has a desire to get this
21 done in a way that's meaningful. And certainly if
22 it's having the licensee at this point involved,
23 clearly there are some issues with regard to
24 confidentiality and such. But the licensee is
25 presumably paying the bill. You would think that

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1 they'd also want it done in a way that's meaningful
2 and does it right so they don't have to continually
3 deal with this as we have.

4 So I think there are other ways to
5 approach it, and we hope NRC staff considers all of
6 them.

7 MR. THOMPSON: Your Honors --

8 JUDGE BOLLWERK: One second. Just let me
9 ask one more question. You raised a question of the
10 confidentiality agreement. Has there been any advance
11 on that front?

12 MR. PARSONS: We have not fleshed that out
13 yet, Your Honor.

14 JUDGE BOLLWERK: All right. Thank you.
15 Go ahead.

16 MR. THOMPSON: Your Honor, this is Anthony
17 Thompson for Powertech. I would just like to point
18 out that there was site walkover by a number of
19 tribes, including I think at least one Sioux tribe.
20 Excuse me for the phone. And we had an expert who was
21 a New Mexico SHPO for 20-plus years and a member of
22 the ACHP who was authorized by NRC to -- with her
23 company, to go out and contact the tribes early to
24 help the licensee put together not just the
25 archeological report but anything else related to the

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1 NHPA, and the tribe said, no, we won't work with that
2 person because it's not government to government.

3 And I would also like to point out that as
4 we have made clear in a number of filings this is not
5 rocket science. And as our expert said unequivocally,
6 a member of the ACHP, while there are clear criteria
7 for archeological studies which the South Dakota
8 University people followed, there are no such thing as
9 scientifically acceptable criteria for this kind of
10 evaluation.

11 It is up to the -- it's the nature of the
12 site. It's what's in the eye of the beholder. And
13 they overall said, we need to -- we can determine what
14 is important to the tribe. And therefore, they need
15 to come forward and say what is important. And so
16 far, all this is, is being strung out and strung out
17 and strung out whereas we did have a successful
18 walkover survey by a number of tribes including one
19 Sioux tribe.

20 Thank you.

21 JUDGE BOLLWERK: Thank you, Mr. Thompson.
22 Judge Froehlich?

23 JUDGE FROEHLICH: I'd like to shift back
24 to the NRC staff and get a handle on what our
25 environmental record looks like at this point. Has

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1 the staff learned anything that could be included in
2 a supplement to the existing EIS over the past year on
3 issues relating to cultural issues in the area of this
4 project?

5 MS. BAER: Thank you, Your Honor. This is
6 Lorraine Baer for the NRC staff. At this point, as I
7 think I've stated earlier, the additional information
8 that we would need from a field survey of the
9 existence and nature of sites of significance to the
10 tribe. And as I have stated and as the council for
11 the tribe has stated, they are -- the sites of
12 significance to the tribe so therefore the
13 significance can only be ascribed by the tribes
14 themselves.

15 So without having carried out a site
16 survey, we have not been able to gather any additional
17 information beyond what we've already gathered from
18 previous surveys.

19 JUDGE FROEHLICH: Ms. Baer, what about any
20 scholarly research that may exist, any other data that
21 was collected on this subject short of a walk the site
22 survey?

23 MS. BAER: Well, we have described some of
24 the research that was conducted as part of putting
25 together the methodology. And what we also have

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1 already done in the past, we described in our motion
2 for summary disposition last summer which is the
3 literature review report and the field survey report
4 prepared by Dr. Nickens last summer.

5 JUDGE BOLLWERK: All right. Ms. Baer,
6 this is Judge Bollwerk. Given my discussion with Mr.
7 Parsons, do you anything further you want to say about
8 anything discussed?

9 MS. BAER: Yes, Your Honor. Thank you for
10 the opportunity. It remains our position that based
11 on everything we've heard up to and including today
12 described the view as that a negotiation over a
13 methodology should, in effect, be a renegotiation of
14 the March 2018 approach as well. That was not our
15 understanding going into these negotiations. And
16 further discussions on this point don't seem to be
17 achievable under the schedule that we've laid out in
18 November. The staff has not the reasonable
19 expectation of agreement with the tribe on this
20 matter.

21 JUDGE BOLLWERK: So I take it you're not
22 willing to talk with the tribe any further?

23 MS. BAER: At this point, we think the
24 appropriate way to document this inability to reach an
25 agreement would probably be on the record of an

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1 evidentiary hearing.

2 JUDGE BOLLWERK: And what would the issues
3 be in the staff's view?

4 MS. BAER: The reasonableness of the
5 staff's proposed methodology.

6 JUDGE BOLLWERK: And that would include
7 the three components that I mentioned before:
8 schedule, methodology, and reimbursement?

9 MS. BAER: One moment, Your Honor, will I
10 confer with my client.

11 (Pause.)

12 MS. BAER: Your Honor, we feel that the
13 reasonableness of the staff methodology is the
14 appropriate way to characterize. That's why we
15 focused on the methodology specifically. So the three
16 items that you mentioned were included in the February
17 15th draft methodology.

18 (Pause.)

19 JUDGE BOLLWERK: Hello? We're back? This
20 is Judge Bollwerk. Are we back with the party? Okay.
21 I have to take -- I pushed the wrong button. I take
22 responsibility. I apologize very much for cutting us
23 off. Thank you very much for your patience. Go
24 ahead. We're waiting to hear from the staff.

25 MS. BAER: I responded. Would you like me

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1 to repeat my answer?

2 JUDGE BOLLWERK: If you would, yes. We
3 didn't hear any of it. Yeah, my deepest apologies for
4 hitting the red button rather than the one that
5 would've muted us, so --

6 MS. BAER: Okay. The staff would like the
7 reasonableness of their proposed methodology to be the
8 subject of the hearing. The three components that you
9 named were included in the draft methodology that we
10 provided to the tribes on February 15th.

11 JUDGE BOLLWERK: All right. Thank you.

12 JUDGE FROEHLICH: Thank you. I guess if
13 that is the direction the NRC staff wishes to take to
14 resolve this last remaining contention, that's your
15 prerogative. Do any of the other parties to the
16 proceeding have any comments on Ms. Baer's proposed --
17 I guess it would be -- ultimately, I guess
18 contemplating a motion from the staff to convene an
19 evidentiary hearing to determine the reasonableness of
20 the proposed methodology. Is that right, Ms. Baer?

21 MR. PUGSLEY: Hi, Your Honor. This is
22 Chris Pugsley for Powertech. If we could be heard at
23 this time. Essentially, the last official position
24 the Board had heard from Powertech was when we had
25 agreed to the March 2018 approach. That involved, as

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1 you all -- every party noted on this call a number of
2 parameters including methodology, reimbursement, and
3 things of that nature.

4 While we have and we do appreciate the
5 party's candor in disclosing the documents that we've
6 had an opportunity to read and to gather the
7 information from the discussions that have been had,
8 these discussions and meetings have been basically for
9 the most part between the staff and the tribes.

10 So I unfortunately can say that Powertech
11 at this time right now is not in a position to offer
12 an official position on what it would desire to see
13 happen. But rest assured that if directed by the
14 Board to provide an opinion on what is the best course
15 of action going forward based on the information
16 before us, we will respond in kind. So we just -- Mr.
17 Thompson and myself just wanted the Board to know that
18 when the time is appropriate and deemed by the Board,
19 we will provide the licensee's position on this.

20 And we do appreciate the discussion today.
21 It's been very informative, and we thank you.

22 JUDGE FROEHLICH: Thank you, Mr. Pugsley.

23 JUDGE BARNETT: This is Judge Barnett.

24 Can we go off the record for just a second?

25 JUDGE FROEHLICH: We'll be off the record

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1 for a moment. We'd like to converse with Judge
2 Barnett.

3 (Whereupon, the above-entitled matter went
4 off the record at 3:42 p.m. and resumed at 3:43 p.m.)

5 JUDGE FROEHLICH: We're back on the
6 record. This is Judge Froehlich. I'd like to hear
7 from Mr. Parsons and Mr. Frankel, the parties to the
8 proceeding, our path going forward.

9 MR. BALLANCO: Your Honor, this is Tom
10 Ballanco for the consolidated intervenors.

11 JUDGE FROEHLICH: I didn't mean to exclude
12 you. Please.

13 MR. BALLANCO: Quite all right, Your
14 Honor. I think in this case Mr. Frankel and I
15 represent consolidated intervenors who are also
16 members of the Oglala Sioux tribe. We're involved in
17 at least four other cases before the NRC where we
18 represent the Oglala Sioux tribe in various aspects,
19 all of which involve cultural resources question.

20 So I think what Judge Bollwerk said is
21 really important to consider that, yes, this case has
22 to be taken on its own face value. But what we're
23 talking about here is the methodology that is
24 necessary to develop. We've got a lot of NRC
25 licensing activity in Lakota historic territory. And

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1 it's important to find the methodology that is going
2 to work. Otherwise, we're going to keep coming back
3 to this roadblock time and time again.

4 So I encourage the staff to buckle down
5 and get through this difficult part. I understand it
6 can be difficult, but I feel like there have been some
7 steps made. And I think every time staff walks away
8 from the table, it's a major setback from the
9 perspective of the tribe.

10 So rather than going back to an
11 evidentiary hearing, I certainly, from our
12 perspective, would love to see the staff dig in to
13 making this methodology work. Again, because there's
14 a lot of factors and I understand them. But I feel if
15 we don't do that, we're just going to be back here
16 again in maybe a different configuration. But the
17 staff and the Oglala Sioux tribe are going to find
18 themselves here again.

19 JUDGE FROEHLICH: Thank you, Mr. Ballanco.
20 Mr. Parsons?

21 MR. PARSONS: Thank you, Your Honor. I
22 think Mr. Ballanco's observation is an astute one.
23 The tribe's position as we've laid out today is that
24 there's lots to talk about between NRC staff and the
25 tribe and its experts. And as far as the NRC staff's

1 proposal just made today about an evidentiary hearing,
2 it still, I have to say, is not clear to me the basis
3 or components of that hearing. And so the tribe would
4 reserve its position with respect to those matters
5 until we see a motion from the staff that more clearly
6 explains its position.

7 JUDGE FROEHLICH: All right. This is
8 Judge Froehlich. As the parties well know, the
9 responsibility for addressing concerns of NEPA while
10 to the NRC staff, the Board cannot direct the staff in
11 any way on how they are to meet their responsibilities
12 under that statute. The Board basically, the ball is
13 back in the staff's court and that should they feel
14 the best way to resolve Contention 1 is a motion to
15 initiate an evidentiary hearing, the parties would all
16 have the opportunity to reply to that motion. And
17 Board will move upon it.

18 I want to express my personal
19 disappointment that our March 2018 approach played out
20 the way it did. I had hoped that the parties would be
21 able to resolve this through negotiations over the
22 past year or so. And with that, I'd ask Judge
23 Bollwerk or Judge Barnett if they have any comments.

24 JUDGE BOLLWERK: My only comment I have is
25 do you want to set a deadline for a motion? No?

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1 JUDGE FROEHLICH: No.

2 JUDGE BOLLWERK: All right.

3 JUDGE FROEHLICH: I'll leave the
4 resolution or the next step with the NRC staff. I
5 don't want to put any pressure on them one way or
6 another to move forward. As I guess any person in a
7 position or capacity would urge the parties to discuss
8 the options that staff has and then ultimately we'll
9 be ready to go on anything that comes before us.

10 JUDGE BOLLWERK: Although, again, if
11 nothing happens on April 1st, obviously the major
12 milestone is not going to have been met.

13 JUDGE FROEHLICH: Right.

14 JUDGE BOLLWERK: It's a big roadblock,
15 right?

16 JUDGE FROEHLICH: Yes. Any other parties
17 wish to say as we conclude this teleconference?

18 MR. PUGSLEY: Chris Pugsley for Powertech,
19 Your Honor. Nothing further from the licensee.

20 JUDGE FROEHLICH: Thank you, Mr. Pugsley.
21 Judge Barnett, did you have anything that you'd like
22 to say or ask of the parties?

23 JUDGE BARNETT: This is Barnett. No
24 comment right now.

25 JUDGE FROEHLICH: Thank you. Any of the

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1 other parties?

2 MS. BAER: Your Honor, this is Lorraine
3 Baer for the NRC staff. We have nothing further to
4 add.

5 JUDGE FROEHLICH: Thank you. All right.
6 Mr. Parsons, anything, any final statements?

7 MR. PARSONS: I don't have anything
8 further. I certainly defer to Mr. Stills if he deems
9 it appropriate to have a word.

10 MR. STILLS: No, I don't. Just thank you
11 for your consideration and patience. And we look
12 forward to moving this forward.

13 JUDGE FROEHLICH: Okay. With that, it's
14 about 3:50 in the afternoon Eastern time. This status
15 conference is concluded. We stand adjourned. Thank
16 you all.

17 (Whereupon, the above-entitled matter went
18 off the record at 3:49 p.m.)

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