

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

**BEFORE THE ATOMIC SAFETY AND LICENSING BOARD**

In the Matter of

POWERTECH (USA) INC.

(Dewey-Burdock In Situ Uranium  
Recovery Facility)

Docket No. 40-9075-MLA

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NRC STAFF'S INITIAL STATEMENT OF POSITION ON CONTENTION 1A

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Lorraine J. Baer  
Robert G. Carpenter  
*Counsel for NRC Staff*

May 17, 2019

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The Staff of the U.S. Nuclear Regulatory Commission submits its Initial Statement of Position on the Oglala Sioux Tribe's and Consolidated Intervenors' (collectively, the Intervenors) Contention 1A. Over the course of many years, the Staff has engaged with the Oglala Sioux Tribe regarding Powertech's application for the Dewey-Burdock in situ uranium recovery (ISR) project site in order to fulfill its obligations under the National Environmental Policy Act (NEPA). In March 2018, after diligent negotiations and consideration of concerns raised by the Tribe, the Staff developed and proceeded to implement an integrated approach to conduct a Tribal cultural resources site survey. However, as with previous attempts, that effort reached an impasse when the Tribe raised an array of further concerns and demands that were fundamentally incompatible with the March 2018 Approach, in terms of both time and expense.

In October 2018, the Board found that the approach adopted by the Staff in March 2018 to obtain additional information on Lakota Sioux cultural resources was a reasonable approach for resolving Contention 1A, but that material questions of fact remained, one of which being the reasonableness of the Staff's proposed methodology for the site survey element of the Staff's approach. The Board stated that should the Staff elect to continue its efforts to implement the

approach with the Oglala Sioux Tribe, further discussions were to be limited only to a methodology for a Tribal cultural resources site survey that conformed to the parameters of the March 2018 Approach.

Consistent with the Board's ruling, the Staff again initiated discussions with the Tribe on the development of a site survey methodology that could be used to conduct the crucial Tribal cultural resources site survey component of the March 2018 Approach. The Staff developed a reasonable approach for obtaining additional information on specific cultural, historic, or religious resources of importance to the Oglala Sioux Tribe and presented it to the Tribe in February 2019 to seek and incorporate the Tribe's input on the methodology and proceed to implement the survey in spring 2019. Once more, however, while representing that it wanted to reach an agreement with the Staff on a compatible methodology, the Tribe instead sought to renegotiate the fundamental parameters of the March 2018 Approach, effectively undoing years of progress that had been made on an approach to obtain cultural resources information that only the Tribe can provide.

Based on the Tribe's sustained adherence to positions that are incompatible with the March 2018 Approach, which the Tribe itself previously characterized as reasonable, the Staff has determined that the additional information on Lakota Sioux cultural resources that it needs to satisfy the NEPA deficiency identified by the Board cannot reasonably be obtained from the Tribe. Nevertheless, through its efforts over several years to accommodate the Tribe's needs and address its concerns in order to meet the Tribe's conditions for providing this information, the Staff has satisfied its duty under NEPA to take a "hard look" at cultural resources that may be impacted by the Dewey-Burdock project. The Board should resolve Contention 1A by finding that the Staff's proposed draft methodology for the conduct of a site survey was reasonable, that the information sought from the Tribe is unavailable, and that the Staff's review of the Dewey-Burdock project complied with NEPA.

Section I of this Statement of Position summarizes the relevant procedural history and background events. Section II describes the applicable legal standards. Section III introduces the Staff's witnesses. Finally, Section IV presents the Staff's position on the resolution of Contention 1A, describing the Staff's testimony regarding the remaining material issues of fact and law and why Contention 1A should be resolved in favor of the Staff.

I. Background

The history of this case is lengthy, and the Staff does not repeat it in full.<sup>1</sup> This Section summarizes the relevant procedural history and events, to provide context for the issues of fact and law remaining to be addressed in this hearing.

A. The First Tribal Site Survey Opportunity

The Oglala Sioux Tribe's (Tribe) first opportunity to participate in a Tribal site survey of the Dewey-Burdock project site occurred in April of 2013. The Staff held a series of government-to-government meetings with invited Tribes in June 2011 and February 2012 to discuss issues related to identifying Tribal cultural resources.<sup>2</sup> The meetings were held on the Tribe's Pine Ridge Reservation and in Rapid City, SD. During these meetings, several Tribal representatives stated that the Tribes could not provide specific information on historic or cultural properties on

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<sup>1</sup> For additional background on Contention 1A and the Staff's NEPA review of impacts to historic and cultural resources, see NRC Staff's Petition for Review of LBP-15-16 at 2–11 (May 26, 2015) (Agencywide Documents Access and Management System Agencywide Documents Access and Management System (ADAMS) Accession No. ML15146A499) ("Staff Petition for Review of LBP-15-16"); Exhibit (Ex.) NRC-001, Initial Testimony and Affidavits from Haimanot Yilma, Kellee L. Jamerson, Thomas Lancaster, James Prikryl, and Amy Hester [hereinafter 2014 Staff Testimony] at A1.1–A.1.19 (June 20, 2014) (ML14246A400); Ex. NRC-008-A-1, NUREG-1910, Supplement 4, "Environmental Impact Statement for the Dewey-Burdock Project in Custer and Fall River Counties, South Dakota: Supplement to the Generic Environmental Impact Statement for In-Situ Leach Uranium Milling Facilities" (Vol. 1) (ML14024A477) at 76–84; Ex. NRC-008-A-2, FSEIS, Vol. 2 (ADAMS Accession No. ML14024A477), at 474–87; Ex. NRC-015, Dewey-Burdock ISR Project Summary of Tribal Outreach (ML14099A010) (summarizing the Staff's consultations with Indian Tribes during the development of the FSEIS).

<sup>2</sup> See Exs. NRC-038-A through C, Informal Information Gathering Meeting – Pine Ridge, SD Invitation to Section 106 Consultation Regarding Dewey-Burdock Project (ADAMS Accession Nos. ML111320251, ML111870622, ML111870623) (July 8, 2011); Ex. NRC-044, 1/19/2012 NRC Invitation Letters to All THPOs for a Planned Feb 2012 Meeting to Discuss How to Best Conduct the TCP Survey (ML12031A280) (Jan. 19, 2012); Ex. NRC-045, February 14-15, 2012 Meeting Agenda (Feb. 14, 2012) (ML120320436).

the Dewey-Burdock site because they had not had access to the site for many years.<sup>3</sup> In response, the Staff began working with Powertech and the Tribes on an approach to perform the necessary surveys.<sup>4</sup> Subsequently the Staff began facilitating the development of a statement of work and held another face-to-face meeting in September 2012 in furtherance of this effort. On September 27, 2012, the Tribe provided its own proposal prepared by Makoche Wowapi/Mentz-Wilson Consultants, LLP, a contractor selected by the Tribe.<sup>5</sup> This approach (hereinafter Makoche Wowapi approach) was estimated to cost approximately \$818,000 and entailed detailed surveys of a portion of the Dewey-Burdock site.<sup>6</sup>

In November 2012, after approximately eight months of negotiations, the Staff determined that Powertech and the Tribe were not going to agree on terms of a statement of work to perform the Tribal site surveys. The Staff therefore proposed an alternative survey methodology consisting of Powertech providing access for Tribes to conduct their own surveys and providing each Tribe with per diem and honorarium.<sup>7</sup> Under this methodology, each Tribe had access to the entire Dewey-Burdock site to employ the methodologies best suited to identify its own cultural and historic resources.<sup>8</sup> From April to May 2013, seven Tribes (including one Sioux Tribe) conducted site surveys at the Dewey-Burdock site using conventional transect

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<sup>3</sup> See Ex. NRC-038-E, Transcript of June 8, 2011, Informal Information-Gathering Meeting Pertaining to Dewey-Burdock, Crow Butte North Trend, & Crow Butte License Renewal, In-Situ Uranium Recovery Projects at 113 (June 8, 2011) (ML14172A048); NRC Staff's Petition for Review of LBP-15-16 at 4–6 (May 26, 2015) (ML15146A499).

<sup>4</sup> See Ex. NRC-008-B-2, NUREG-1910, Supplement 4, Vol. 2, Final Report, Environmental Impact Statement for the Dewey-Burdock Project in Custer and Fall River Counties, South Dakota, at 187–93, 196–98(ML14024A478); Ex. NRC-015 at 4 (ML14099A010); see *generally* Ex. NRC-041, NRC Letter from Powertech and Proposal in Response to the Aug 12, 2011 Request for NHPA Section 106 Info (Aug. 31, 2011) (ML14175B611).

<sup>5</sup> *Powertech (USA), Inc.* (Dewey-Burdock In Situ Uranium Recovery Facility), LBP-17-9, 86 NRC 167, 181 n.66 (2016), *pet. for review denied*, CLI-18-7, 88 NRC 1, 2 (2018).

<sup>6</sup> See *Powertech*, LBP-17-9 at 181, n.66; Ex. NRC-176, Prefiled Direct Testimony of Diana Diaz-Toro and Jerry Spangler, at A.23.

<sup>7</sup> NRC Staff's Petition for Review of LBP-15-16 at 6 (May 26, 2015) (ML15146A499).

<sup>8</sup> *Id.*

survey methods and recording findings with global-positioning-system equipment.<sup>9</sup> However, in a letter dated March 22, 2013, the Tribe informed the NRC that it would not participate in this survey.<sup>10</sup> Notwithstanding, the Tribe informed the NRC Staff that they would participate in the May 2013 government-to-government meeting to discuss the Dewey-Burdock application and other pending uranium recovery applications; the Tribe, however, did not attend this government-to-government meeting.<sup>11</sup>

The participating Tribes provided the results of their surveys to the Staff between June and September 2013.<sup>12</sup> The Staff considered this information in both its NEPA and NHPA reviews. Specifically with respect to NEPA, the Staff used information from the surveys to determine how the Dewey-Burdock project might affect all identified sites within the area of potential effects, not just those eligible for listing on the National Register.<sup>13</sup> The Staff incorporated its impact determinations, as well as recommended mitigation measures, in the Final Supplemental Environmental Impact Statement (FSEIS).<sup>14</sup>

B. The Staff's FSEIS and Consideration of Tribal Cultural Resources Information

In accordance with 10 C.F.R. Part 51, the Staff prepared a FSEIS for the Dewey-Burdock project.<sup>15</sup> In the FSEIS, the Staff evaluated information about Indian Tribes' cultural resources that it was able to obtain without the specific input of the Lakota Sioux Tribes. The information provided to the Staff as a result of the site surveys that were conducted in 2013 was described and included in the Staff's evaluation of the potential impacts of the Dewey-Burdock project in

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<sup>9</sup> *Id.* at 7 (May 26, 2015); Ex. NRC-008-A-1 at 259–263 (ML14024A477); Ex. NRC-176 at A.15.

<sup>10</sup> Ex. OST-017, Letter from Oglala Sioux Tribe to NRC Staff, at 1–2 (Mar. 22, 2013) (ML14247A402).

<sup>11</sup> Ex. NRC-221, Oglala Sioux Tribe Letter to NRC Staff, at 1 (Mar. 29, 2013) (ML13106A197).

<sup>12</sup> NRC Staff's Petition for Review of LBP-15-16, at 8 (ML15146A499).

<sup>13</sup> *Id.*; Ex. NRC-008-A-1 at 259–262 (ML14024A477).

<sup>14</sup> Ex. NRC-176 at A.16–18.

<sup>15</sup> Exs. NRC-008-A-1 through NRC-008-B-2 (hereinafter FSEIS).

the FSEIS. In Chapter 3 of the FSEIS, the Staff described various types of sites that could have been identified as sites of significance to Lakota Sioux Tribes if the Lakota Sioux Tribes had provided information to the Staff regarding site survey results.<sup>16</sup> The Staff described the cultural history of the Black Hills with reference to the Lakota Sioux connection to the area, including the religious and cultural significance of the Black Hills to the Lakota Sioux.<sup>17</sup> In addition, in the FSEIS, the Staff evaluated how the Dewey-Burdock project might affect *all* identified sites within the area of potential effects, not merely those sites that were eligible for listing on the National Register of Historic Places.<sup>18</sup> The Staff presented its impact determinations in the FSEIS, along with its recommended measures to mitigate these impacts.<sup>19</sup> After the Staff completed its evaluations, it provided the impact assessments and mitigation recommendations to all consulting Tribes for comment—including the Oglala Sioux Tribe—as it had committed to doing when it released the Draft SEIS.<sup>20</sup>

The Staff concluded that the overall potential impacts to historic and cultural resources from the Dewey-Burdock project would range from SMALL to LARGE.<sup>21</sup> Further, in accordance

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<sup>16</sup> Ex. NRC-008-A-1, FSEIS, at 257–63; Ex. NRC-176 at A.17.

<sup>17</sup> Ex. NRC-008-A-1, FSEIS, at 247, 257–59.

<sup>18</sup> Ex. NRC-008-A-2, FSEIS, at 466–86; Ex. NRC-176 at A.18.

<sup>19</sup> Ex. NRC-008-A-2, FSEIS, at 466–86. In particular, in Tables 4.9-1 through 4.9-6, the Staff provided its determinations regarding both environmental impacts and National Register of Historic Places eligibility. In these tables the Staff also included a column titled “Management Recommendation/Comments,” which lists its mitigation recommendations under both the NHPA and NEPA. *Id.*

<sup>20</sup> Exs. NRC-058 and NRC-061 through NRC-063. These exhibits include the following documents: Letter to Oglala Sioux Tribe Transmitting TCP Survey Report for Dewey-Burdock Project (Dec. 23, 2013) (ML13357A234); NRC’s Overall Determinations of Eligibility and Assessments of Effects (Dec. 16, 2013) (ML13343A155); NRC NRHP Determinations (Dec. 23, 2013) (ML13343A155); Table 1.0 for Draft PA (Dec. 13, 2012) (ML13354B948). The Staff sent copies of these documents to all consulting Tribes.

<sup>21</sup> Ex. NRC-008-A-1, FSEIS, at 43–44; Ex. NRC-008-A-2, FSEIS, at 462–95, 586. The Staff determined that the overall impacts from other phases of the project, such as operation and aquifer restoration, would range from “SMALL” or “SMALL to MODERATE” impacts on cultural resources because mitigation measures would be imposed before facility construction for both known and any newly discovered cultural resources in accordance with Condition 9.8 of Powertech’s license. Ex. NRC-008-A-1, FSEIS, at 43–44; Ex. NRC-008-A-2, FSEIS, at 462–95, 495; Ex. NRC-012, Powertech Source Material License No. SUA-1600 [hereinafter Powertech License], at 5–6 (ML14043A392). Pursuant to License Condition 9.8, Powertech is required to cease “any work resulting in the discovery of previously unknown cultural

with 36 C.F.R. §§ 800.4(b)(2) and 800.14(b), the Staff finalized a programmatic agreement for the Dewey-Burdock project.<sup>22</sup> The Staff thereafter issued a Record of Decision for its NEPA review and the materials license for the Dewey-Burdock project.<sup>23</sup> The issuance of the Record of Decision and license reflected the Staff's determination that additional information on Lakota Sioux cultural resources was not essential to a reasoned choice among alternatives.<sup>24</sup>

### C. The Board's Findings Regarding the Staff's NEPA Review

An evidentiary hearing was held in this proceeding concerning the adequacy of certain aspects of the Staff's FSEIS.<sup>25</sup> In particular, the Board admitted two contentions proffered by the Oglala Sioux Tribe related to cultural resources.<sup>26</sup> In Contention 1A, as admitted and migrated by the Board, the Tribe and the Consolidated Intervenors asserted that the FSEIS

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artifacts[.]” *Id.* All newly discovered artifacts would be inventoried and evaluated in accordance with 36 C.F.R. Part 800, and work could not restart without authorization to proceed from the NRC, the South Dakota State Historic Preservation Officer (SHPO), and the Bureau of Land Management. *Id.*; Ex. NRC-008-A-2, FSEIS, at 43–44. *See also* Ex. NRC-176 at A.18.

<sup>22</sup> Exs. NRC-018-A through NRC-018-H, Final Programmatic Agreement for the Dewey-Burdock Project (ML14066A347). The Dewey-Burdock Programmatic Agreement documents the steps the NRC will take to protect currently identified historic properties, unevaluated properties, and the approach to be used to protect as-yet unidentified properties that could be affected by implementation of the project. Ex. NRC-018-A at 10–11 (ML14066A347). The signatories to the Programmatic Agreement included the NRC, Powertech, the Advisory Council on Historic Preservation (ACHP), the South Dakota SHPO, and the Bureau of Land Management. Of particular note, upon signing the Programmatic Agreement, the ACHP stated, “based on the background documentation, the issues addressed during consultation, and the processes established in the [Programmatic Agreement], [it] concluded that the content and spirit of the Section 106 process has been met by [the] NRC.” Ex. NRC-031, Letter from John Fowler, Executive Director, ACHP, to Waste’ Win Young, Standing Rock Sioux Tribe Historic Preservation Officer (Apr. 7, 2014) (ML14115A448). The Staff's record of consultation with Tribes, including the Oglala Sioux Tribe, on the Programmatic Agreement—as required by 36 C.F.R. § 800.14(b)(2)(l)—is documented in its prior pleadings, testimony, and exhibits. *See, e.g.*, Ex. NRC-008-A-1, FSEIS, Vol. 1 at 76–84; Ex. NRC-008-A-2, FSEIS, Vol. 1, at 474–87; Ex. NRC-001, 2014 Staff Testimony at A1.1–A.1.19; Ex. NRC-015, Dewey-Burdock ISR Project Summary of Tribal Outreach (ML14099A010); NRC Staff's Petition for Review of LBP-15-16 at 23–25 (May 26, 2015) (ML15146A499); NRC Staff's Motion for Summary Disposition of Contentions 1A and 1B (Aug. 3, 2017) (ML17215B356).

<sup>23</sup> Exs. NRC-011, NRC Record of Decision for the Dewey-Burdock Uranium In-Situ Recovery Project (Apr. 8, 2014) (ML14066A466) and NRC-012, Materials License No. SUA-1600 (ML14043A392).

<sup>24</sup> *See* Ex. NRC-176 at A.56.

<sup>25</sup> *See Powertech USA, Inc.* (Dewey-Burdock Facility), LBP-15-16, 81 NRC 618, 633 (2015).

<sup>26</sup> *Id.* at 629–30.

failed to meet applicable legal requirements regarding protection of historic and cultural resources.<sup>27</sup> Specifically, the Tribe and the Consolidated Intervenors asserted that while 10 C.F.R. §§ 51.71(d), 51.45(b) and NEPA require the FSEIS to include an analysis of cultural impacts, “neither [the applicant nor the NRC Staff] has conducted an adequate and competent cultural resources survey, impacts analysis, or mitigation review.”<sup>28</sup>

Following the evidentiary hearing, the Board issued LBP-15-16, its Partial Initial Decision on the admitted contentions in this proceeding, including Contention 1A.<sup>29</sup> The Board resolved Contention 1A in favor of the Intervenors.<sup>30</sup> The Board held that the Staff failed to meet the “hard look” standard of NEPA when considering how the Dewey-Burdock project may affect Lakota Sioux cultural resources.<sup>31</sup> In resolving Contention 1A, the Board held that the Staff complied with the NHPA requirement to make a good faith and reasonable effort to identify tribal cultural resources.<sup>32</sup> But the Board found that the information required to analyze impacts to sites of cultural, historic, or religious significance to the Oglala Sioux Tribe under NEPA is broader than that required under the NHPA and may not be identified by a traditional Class III survey.<sup>33</sup> Noting that the previously conducted site surveys of the Powertech site “did not contain any tribal ethnographic studies, oral histories or a survey of sites of significance to . . . the Oglala Sioux Tribe,” the Board concluded that the FSEIS was deficient under NEPA.<sup>34</sup> The Board ruled that the Staff could remedy the deficiencies identified by the Board “by promptly

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<sup>27</sup> *Powertech USA, Inc.* (Dewey-Burdock Facility), LBP-14-5, 79 NRC 377, 385, 401 (2014).

<sup>28</sup> *Powertech*, LBP-15-16, 81 NRC at 650 (quoting Oglala Sioux Tribe Post-Hearing Initial Brief at 13) (internal quotations omitted).

<sup>29</sup> *Id.* at 618.

<sup>30</sup> *Id.* at 653–57.

<sup>31</sup> *Id.* at 657.

<sup>32</sup> *Id.* at 654.

<sup>33</sup> *See id.* at 653–55, 657–58.

<sup>34</sup> *Id.* at 655 n.219.

initiating a government-to-government consultation with the Oglala Sioux Tribe to identify any adverse effects to cultural, historic or religious sites of significance to the Oglala Sioux Tribe which may be impacted by the Powertech Dewey-Burdock project” and by adopting measures to mitigate such adverse effects, as necessary.<sup>35</sup> The Board retained jurisdiction of the case pending the Staff’s curing of these deficiencies.<sup>36</sup>

Thereafter, each party submitted a petition for review of LBP-15-16 to the Commission.<sup>37</sup> The Commission took review of these petitions in part and denied each party’s petition for review of the Board’s ruling on Contention 1A.<sup>38</sup> The Commission left in place the Board’s ruling in favor of the Intervenors on the contention and, pursuant to its inherent supervisory authority over agency adjudications, left the proceeding open “for the narrow issue of resolving the deficiencies identified by the Board.”<sup>39</sup>

#### D. The Second Tribal Site Survey Opportunity

On November 23, 2016, in further attempt to reach a mutually acceptable approach to remedy the deficiencies identified by the Board in LBP-15-16, the Staff invited the Tribe to discuss an additional opportunity to survey the Dewey-Burdock site that was specific to the Tribe.<sup>40</sup> As a result, the parties conducted a teleconference on January 31, 2017, during which the Staff proposed an approach to conduct the survey.<sup>41</sup> The Tribe stated during the teleconference that by mid-March of 2017, it would provide specific information on parameters it

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<sup>35</sup> *Id.* at 657–58, 708.

<sup>36</sup> *Id.* at 658.

<sup>37</sup> See Oglala Sioux Tribe’s Petition for Review of LBP-15-16 and Decisions Finding Tribal Contentions Inadmissible (May 26, 2015) (ML15146A500); Consolidated Intervenors’ Petition for Review of LBP-15-16 (May 26, 2015) (ML15147A069); Brief of Powertech (USA), Inc. Petition for Review of LBP-15-16 (May 26, 2015) (ML15146A495); NRC Staff’s Petition for Review of LBP-15-16 (May 26, 2015) (ML15146A499).

<sup>38</sup> *Powertech (USA), Inc.* (Dewey-Burdock Facility), CLI-16-20, 84 NRC 219, 222 (2016).

<sup>39</sup> *Id.* at 242; see also *id.* at 222, 262.

<sup>40</sup> Ex. NRC-176 at A.19.

<sup>41</sup> *Id.*

would find acceptable for the proposed survey.<sup>42</sup> However, the Tribe did not provide further information, and on April 14, 2017, the Staff followed up the teleconference with a letter offering the Tribe a second chance to perform a site survey at the Dewey-Burdock site in a manner consistent with the January 31 teleconference.<sup>43</sup> The proposal consisted of (1) an open site survey of the license area; (2) an opportunity to conduct the survey as early as April or May 2017; (3) per diem and mileage reimbursement for up to three Tribal representatives conducting the survey; and (4) an honorarium of \$10,000 paid to the Oglala Sioux Tribe.<sup>44</sup>

In a May 31, 2017 letter, the Tribe rejected the Staff's proposed approach, criticizing the open-site methodology as an "informal approach" lacking "acceptable protocols and methodologies for cultural site identification."<sup>45</sup> The Tribe rejected the methodology but stated that it was willing to continue negotiations regarding an acceptable methodology.<sup>46</sup> The Tribe also raised the issue of including additional Lakota Sioux Tribes as a prerequisite to developing an approach to conduct a Tribal cultural resources site survey.<sup>47</sup> Because the positions in the May 31 letter appeared to the Staff to be increasingly far apart from the Staff's previous discussions with the Tribe and the offered survey opportunity, and because more than two years of consultation had taken place since the Board's ruling in LBP-15-16, the Staff determined that

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<sup>42</sup> *Id.*

<sup>43</sup> See Ex. NRC-189, NRC Staff April 14, 2017 Letter to Oglala Sioux Tribe - Coordination of Tribal Survey to Identify Cultural Resources (Apr. 14, 2017) (ML17103A500); Ex. NRC-176 at A.19.

<sup>44</sup> Ex. NRC-176 at A.19.

<sup>45</sup> Ex. NRC-190, Oglala Sioux Tribe May 31, 2017 Letter Responding to NRC's April 14, 2017 Letter, at 1–2 (May 31, 2017) (ML17152A109); Ex. NRC-176 at A.19.

<sup>46</sup> Ex. NRC-190 at 1, 9 (ML17152A109).

<sup>47</sup> *Id.* at 3–4.

further negotiation with the Oglala Sioux Tribe would not be likely to result in a mutually acceptable settlement of the dispute regarding Contention 1A.<sup>48</sup>

Accordingly, in August 2017, the Staff sought summary disposition of Contention 1A, which the Board denied.<sup>49</sup> In denying summary disposition of the contention, the Board held that it was unable to conclude that the Staff had fulfilled its NEPA obligation relative to cultural resources of Indian Tribes “because (1) the NRC Staff has yet to conduct [a] study or survey [of tribal cultural resources]—and thus the FSEIS deficiencies remain; and (2) there remains a material factual dispute as to whether the NRC Staff’s chosen methodology for obtaining information on the tribal cultural resources was reasonable.”<sup>50</sup> Specifically, the Board found that “the Oglala Sioux Tribe’s challenge to (1) the scientific integrity and lack of a trained surveyor or ethnographer coordinating the survey; (2) the number of tribal members invited to participate in the survey; (3) the length of time provided for the survey; and (4) the Tribes invited to participate in the survey—establish a significant material factual dispute as to the reasonableness of the NRC Staff’s proposed terms for an open-site survey to assess the identified deficiencies in this FSEIS.”<sup>51</sup> The Board observed that “it certainly is not too late for the NRC Staff to consider an alternative method or framework for assessing impacts to tribal cultural resources and, if appropriate, to move for summary disposition if it opts for an alternative to its currently proposed open-site survey.”<sup>52</sup> The Board stated that if the Staff chooses a methodology that does not include complete information about adverse effects on the Tribe’s cultural resources, the NRC

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<sup>48</sup> NRC Staff’s Motion for Summary Disposition of Contentions 1A and 1B (Aug. 3, 2017) (ML17215B356) at 31–32 (describing, *inter alia*, the Tribe’s citation its May 31 letter of testimony from a former Oglala Sioux Tribe THPO, advocating a site survey requiring “a couple years” to complete).

<sup>49</sup> *Id.* The Staff also moved for summary disposition of Contention 1B, which the Board granted. See *Powertech*, LBP-17-9, 86 NRC at 167.

<sup>50</sup> *Powertech*, LBP-17-9, 86 NRC at 194.

<sup>51</sup> *Id.* at 198.

<sup>52</sup> *Id.*

Staff would need to include an explanation that satisfies the requirements of 40 C.F.R.

§ 1502.22.<sup>53</sup>

E. The Third Tribal Site Survey Opportunity: March 2018 Approach

With the Board's direction in LBP-17-9 in mind, the Staff continued its efforts to resolve Contention 1A. In consultation with the parties, including the Oglala Sioux Tribe, the Staff developed an approach (the "March 2018 Approach") for obtaining additional information on cultural resources of significance to Lakota Sioux Tribes that took into account the material concerns of the Oglala Sioux Tribe as identified by the Board in LBP-17-9.<sup>54</sup> Acknowledging the Tribe's position that a "physical site survey is a fundamental requirement,"<sup>55</sup> the March 2018 Approach provided the Tribe a third opportunity to participate in a site survey of the Dewey-Burdock site.<sup>56</sup> The March 2018 Approach included the following elements: (1) hiring a qualified contractor to help facilitate implementation of the approach; (2) involving other Lakota Sioux Tribes; (3) providing iterative opportunities for the tribal site survey; (4) involving tribal elders; and (5) conducting a site survey using a scientific methodology determined by the contractor in collaboration with the tribes.<sup>57</sup> As the Board subsequently held, "[e]ach of these elements was repeatedly asked for by the Oglala Sioux Tribe, and once these Oglala Sioux Tribe-requested elements were finally included in NRC Staff's plan to resolve Contention 1A, the parties agreed

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<sup>53</sup> *Id.* at 200. On November 13, 2017, Powertech petitioned for review of the Board's decision denying in part and granting in part the Staff's motion for summary disposition of Contentions 1A and 1B. Brief of Licensee Powertech (USA), Inc., Petition for Review of LBP-17-9 (Nov. 13, 2017) (ML17317B565). The Commission denied Powertech's petition, holding that Powertech's petition failed to meet the high standard for interlocutory review and failed to show that the Board erred in denying summary disposition. *Powertech USA, Inc.* (Dewey-Burdock In Situ Uranium Recovery Facility), CLI-18-7, 88 NRC 1, 6–10 (2018).

<sup>54</sup> Ex. NRC-176 at A.19–20.

<sup>55</sup> *Powertech (USA) Inc.* (Dewey Burdock Facility), LBP-18-5, 88 NRC 95, 109; see also Ex. NRC-176 at A.20.

<sup>56</sup> Ex. NRC-176 at A.20.

<sup>57</sup> *Powertech*, LBP-18-5, 88 NRC at 112; see also Ex. NRC-176 at A.20.

the March 2018 Approach was a reasonable method for the NRC Staff to satisfy its NEPA obligation.”<sup>58</sup> In accordance with the parties’ expressions of support for the March 2018 Approach and its included timeline, and in reliance on the Tribe’s representations of reasonableness and intent to participate, the Staff moved forward with implementing the March 2018 Approach.<sup>59</sup>

The March 2018 Approach explicitly did not include a specific methodology for conducting the Tribal cultural resources site survey component of the Approach, because the Tribe had informed the Staff that such a methodology would need to be developed with the Tribe’s input in coordination with the services of the Staff’s expert contractor.<sup>60</sup> However, when the Staff’s contractor offered the Tribe different approaches and a work plan upon which to base discussions for a site survey methodology, the Tribe rejected these options as providing for only an “open-site survey” of the site, and proposed its own approach for providing the information sought by the Staff that was incompatible with the effectuation of the March 2018 Approach.<sup>61</sup> In June 2018, the Staff informed the Tribe that it considered the Tribe’s proposal to be a constructive rejection of the March 2018 Approach, and that based on the Tribe’s position concerning the essential elements of a Tribal cultural resources site survey effort, it did not anticipate reaching an agreement on a site survey methodology.<sup>62</sup>

The Staff and the Tribe then each moved to resolve Contention 1A by summary disposition.<sup>63</sup> In October 2018, the Board denied the Staff’s and the Tribe’s respective motions

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<sup>58</sup> *Powertech*, LBP-18-5, 88 NRC at 112; Ex. NRC-176 at A.20–21.

<sup>59</sup> *Powertech*, LBP-18-5, 88 NRC at 111–112; Ex. NRC-176 at A.21.

<sup>60</sup> Ex. NRC-176 at A.33–35.

<sup>61</sup> Ex. NRC-176 at A.22; *see also* Ex. NRC-198, Oglala Sioux Tribe’s June 15, 2018 Updated Cultural Resources Survey Methodologies Proposal (ML18170A155) (June 15, 2018)(non-public).

<sup>62</sup> Ex. NRC-176 at A.23.

<sup>63</sup> NRC Staff’s Motion for Summary Disposition of Contention 1A (Aug. 17, 2018); Oglala Sioux Tribe’s Motion for Summary Disposition (Aug. 17, 2018); Ex. NRC-176 at A.22.

for summary disposition.<sup>64</sup> In denying the Staff's motion for summary disposition, the Board found that the NEPA "hard look" requirement had not been met.<sup>65</sup> The Board stated that in its previous rulings (LBP-15-16 and LBP-17-9), it "found that the NRC Staff failed to satisfy its NEPA obligation to address the impacts on tribal cultural, historical, and religious sites at the Dewey-Burdock project site."<sup>66</sup> Specifically, the Board concluded that the NRC Staff "must conduct a study or survey of tribal cultural resources before granting a license,"<sup>67</sup> and since "the cultural, historical, and religious sites of the Oglala Sioux Tribe have not been adequately catalogued, the [EIS] does not include mitigation measures sufficient to protect this Native American Tribe's cultural, historical, and religious sites that may be affected by the Powertech project."<sup>68</sup> Because these deficiencies had yet to be properly remedied, the Board found that "the Staff had failed to fulfill its obligation, and there is a material factual dispute as to the reasonableness of the NRC Staff's implementation of the March 2018 Approach."<sup>69</sup>

The Board found that the "Staff's March 2018 Approach, as agreed to by the parties, constituted a valid and reasonable approach for resolving Contention 1A."<sup>70</sup> But because the Staff did not fully carry out the March 2018 Approach and obtain the information it sought via this approach from the Tribe, the Board concluded that the Staff thus had not demonstrated as a matter of law that it had "fulfilled its NEPA obligation to take a 'hard look' at the Dewey-Burdock project's potential adverse impacts to specific cultural, historical, or religious resources of importance to the Oglala Sioux Tribe."<sup>71</sup> The Board also found that the existence of material

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<sup>64</sup> See *Powertech*, LBP-18-5, 88 NRC at 100.

<sup>65</sup> *Id.* at 125–28.

<sup>66</sup> *Id.* at 125.

<sup>67</sup> *Id.* (citing *Powertech*, LBP-15-16, 81 NRC at 653).

<sup>68</sup> *Id.* (citing *Powertech*, LBP-15-16, 81 NRC at 655).

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 127–128.

factual disputes prevented the Staff from invoking 40 C.F.R. § 1502.22 as a basis for the Board to grant summary disposition in its favor.<sup>72</sup>

Having found that the Staff's March 2018 Approach was reasonable, and that Tribe had likewise accepted it as reasonable,<sup>73</sup> the Board concluded that there nevertheless remained issues of material fact with respect to (1) the reasonableness of the methodology proposed by the Staff and its contractor for the site survey component of the March 2018 Approach and (2) the Staff's decision to discontinue work on the March 2018 Approach on June 15, 2018—specifically, whether the Tribe's June 15, 2018 proposal in fact constituted a constructive rejection of the March 2018 Approach, and whether it was reasonable for the Staff to forgo the remaining elements of the March 2018 Approach.<sup>74</sup> The Board "establish[ed] procedures for the resolution of Contention 1A"<sup>75</sup> by identifying two alternate avenues "to conclude expeditiously the litigation of the issues in this case": "(1) the NRC Staff can resume the implementation of its March 2018 Approach, with appropriate adjustments to the dates in the original timetable; or (2) the parties can prepare for a prompt evidentiary hearing, where testimony and evidence will be taken on the questions raised by the motions for summary disposition filed August 17, 2018."<sup>76</sup>

The Board emphasized that under the first alternative—resuming implementation of the March 2018 Approach—"the only aspect of the Approach that is open for discussion is the site survey methodology[;] [t]hat is, any tribal negotiating position or proposal should only encompass the specific scientific method that would fit into the two-week periods set out in the

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<sup>72</sup> *Id.* at 130–134.

<sup>73</sup> *Id.* at 131 ("The Oglala Sioux Tribe accepted the March 2018 Approach as reasonable to resolve Contention 1A and does not challenge the reasonableness of the March 2018 Approach as written.")

<sup>74</sup> *Id.* at 130–134. While finding that a material factual dispute existed on this question, the Board noted that it "acknowledge[d] that while the Oglala Sioux Tribe characterized the June 12 and June 15 proposals as proposals for a 'methodology,' those proposals may have been an attempt to renegotiate the entire approach, per the NRC Staff's interpretation." *Id.* at 132–133.

<sup>75</sup> *Id.* at 134.

<sup>76</sup> *Id.* at 134–135.

March 2018 Approach for visiting the physical site, i.e., how the contractor and Tribe members will walk the site and mark or record located tribal resources.”<sup>77</sup> The Board further emphasized that while it “[understood] the need to be sensitive to the cultural tenets and needs of the Oglala Sioux Tribe, given that the time period for the site survey phases was agreed to by the Oglala Sioux Tribe, and that it is the Oglala Sioux Tribe that has continually pushed for a scientific methodology, negotiations and proposals must remain within these constraints.”<sup>78</sup>

With the Board’s direction in mind, the Staff continued its work to offer the Tribe another opportunity to conduct a tribal site survey of the Dewey-Burdock site. In November 2018, the Staff sent a letter to the Tribe and parties, informing them that it intended to proceed under the Board’s first alternative, with appropriate adjustments to the dates in the original timetable for the March 2018 Approach.<sup>79</sup> In accordance with the Board’s direction in LBP-18-5, the Staff stated that it intended to resume negotiations with the Tribe on a site survey methodology that fit within the constraints of the March 2018 Approach, including the two two-week periods set out in that approach.<sup>80</sup> The Staff sought the input of the Tribe on what it considered the appropriate aspects for a site survey methodology and, with the Tribe’s input in mind – in particular, its concerns regarding the need for a survey methodology that is “scientifically defensible” – developed and provided the Tribe a draft methodology on which to continue these discussions and obtain the Tribe’s approval.<sup>81</sup> As detailed in the Staff’s testimony (described in Section IV below), these discussions did not result in an agreement on a methodology that would be

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<sup>77</sup> *Id.* at 135–136 (internal citations omitted) (emphasis in original). See *also* Ex. NRC-176 at A.22.

<sup>78</sup> *Id.* at 136.

<sup>79</sup> See Ex. NRC-195, NRC November 21, 2018 Letter to Oglala Sioux Tribe Resuming Implementation of the NRC Staff March 16, 2018 Approach at 2, 4, Enclosure 1 (ML18325A029) (Nov. 21, 2018); Ex. NRC-176 at A.24–25.

<sup>80</sup> Ex. NRC-176 at A.24.

<sup>81</sup> *Id.* at A.24–26.

acceptable to the Tribe for conducting a tribal site survey.<sup>82</sup> Accordingly, the Staff filed a motion requesting that the Board set a schedule for an evidentiary hearing in this proceeding, which the Board granted on April 29, 2018.<sup>83</sup>

As specified in the Board's Order, the hearing is to resolve the disputed issues of fact regarding the reasonableness of the NRC Staff's proposed draft methodology for the conduct of a site survey to identify sites of historic, cultural, and religious significance to the Oglala Sioux Tribe, and the reasonableness of the NRC Staff's determination that the information it seeks to obtain from the site survey is unavailable.<sup>84</sup>

## II. Applicable Legal Standards

### A. NEPA's "Hard Look" Standard

Congress enacted NEPA to ensure that federal agencies make a "fully informed and well-considered decision"<sup>85</sup> on all "major Federal actions significantly affecting the quality of the human environment."<sup>86</sup> The Council on Environmental Quality (CEQ) promulgates regulations that provide guidance on agency compliance with NEPA. These regulations are not binding on the NRC where the agency has not expressly adopted them, but the Commission has accorded them considerable deference.<sup>87</sup> The NRC is not bound by those portions of CEQ's NEPA

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<sup>82</sup> *Id.* at A.42–44.

<sup>83</sup> See NRC Staff's Motion to Set Schedule for Evidentiary Hearing (Apr. 3, 2019) (ML19093B813); Order (Granting NRC Staff Motion and Scheduling Evidentiary Hearing) (Apr. 29, 2019) (ML19119A322) [hereinafter April 29 Order].

<sup>84</sup> See April 29 Order at 5.

<sup>85</sup> *Vt. Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 558 (1978).

<sup>86</sup> Cooperation of agencies; reports; availability of information; recommendations; international and national coordination of efforts, National Environmental Policy Act of 1969 § 102, 42 U.S.C. § 4332 (2017).

<sup>87</sup> *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-02-25, 56 NRC 340, 348 n.22 (2002) (citing *Limerick Ecology Action, Inc. v. NRC*, 869 F.2d 719, 743 (3d Cir. 1989)); *Dominion Nuclear North Anna, LLC* (Early Site Permit for North Anna ESP Site), CLI-07-27, 66 NRC 215, 222 n.21 (2007).

regulations that have a substantive—as opposed to procedural—impact on the way in which the Commission performs its regulatory functions.<sup>88</sup>

While NEPA “does not mandate particular results,”<sup>89</sup> it provides the necessary process to ensure that a federal agency takes a “hard look” at the potential environmental impacts of a proposed action<sup>90</sup> and discloses those impacts before moving forward with a planned action.<sup>91</sup> This “hard look” is intended to “foster both informed agency decision-making and informed public participation” so as to ensure that an agency does not act upon “incomplete information, only to regret its decision after it is too late to correct.”<sup>92</sup>

The “hard look” standard, however, is tempered by a “rule of reason,” in that an agency’s EIS need only contain “a reasonably thorough discussion of the significant aspects of the probable environmental consequences” of the proposed action.<sup>93</sup> Under NEPA’s “rule of reason,” an agency need not address every environmental effect that could potentially result from the proposed action. Rather, the agency need only provide “[a] reasonably thorough discussion of the significant aspects of the probable environmental consequences[.]”<sup>94</sup> The Commission has stated that “NEPA ‘should be construed in the light of reason if it is not to

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<sup>88</sup> Environmental Protection Regulations for Domestic Licensing and Related Regulatory Functions and Related Conforming Amendments, 49 Fed. Reg. 9352 (Mar. 12, 1984); *Pac. Gas & Elec. Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-11-11, 74 NRC 427, 443–44 (2011).

<sup>89</sup> *Muckleshoot Indian Tribe v. U.S. Forest Serv.*, 177 F.3d 800, 814 (9th Cir. 1999) (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989)); *Fla. Power & Light Co.* (Turkey Point Nuclear Generating Units 3 and 4), CLI-16-18, 84 NRC 167, 174 (2016) (“NEPA, as a procedural statute, does not require any particular substantive result.”).

<sup>90</sup> See *La. Energy Servs., L.P.* (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77, 87–88 (1998) (LES).

<sup>91</sup> *Pogliani v. U.S. Army Corps of Eng’rs*, 306 F.3d 1235, 1237 (2d Cir. 2002) (citing *Balt. Gas & Electric Co. v. NRDC*, 462 U.S. 87, 100 (1983)).

<sup>92</sup> LES, CLI-98-3, 47 NRC at 88 (quoting *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 371 (1989)).

<sup>93</sup> *Ctr. for Biological Diversity v. U.S. Forest Serv.*, 349 F.3d 1157, 1166 (9th Cir. 2003).

<sup>94</sup> *Trout Unlimited v. Morton*, 509 F.2d 1276, 1283 (9th Cir. 1974); see also *Warm Springs Dam Task Force v. Gribble*, 621 F.2d 1017, 1026–27 (9th Cir. 1980).

demand' virtually infinite study and resources."<sup>95</sup> NEPA does not call for certainty or precision, but rather an *estimate* of anticipated impacts in an EIS.<sup>96</sup> As a consequence, an agency is given broad discretion "to keep [its] inquiries within appropriate and manageable boundaries."<sup>97</sup> In preparing an EIS, which "is not intended to be a 'research document,'"<sup>98</sup> an agency "must have some discretion to draw the line and move forward with decisionmaking."<sup>99</sup> In assessing foreseeable impacts, the agency is not required to use "the best scientific methodology."<sup>100</sup> Rather, the agency is free to "select [its] own methodology as long as that methodology is reasonable."<sup>101</sup>

B. Identification of Sites of Traditional Religious and Cultural Importance to Tribes

The expertise in identifying properties of traditional religious or historic significance to a group, such as an Indian tribe, resides primarily, if not exclusively, with the knowledgeable parties within that group.<sup>102</sup> "[I]n some cases such properties may not be discernible as such to

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<sup>95</sup> *Entergy Nuclear Generation Co. (Pilgrim Nuclear Power Station)*, CLI-10-11, 71 NRC 287, 315 (2010) (quoting *Nat. Res. Def. Council v. Hodel*, 865 F.2d 288, 294 (D.C. Cir. 1988) (footnotes omitted); see also *Nat. Res. Def. Council v. Morton*, 458 F.2d 827, 837 (D.C. Cir. 1972) (NEPA "must be construed in the light of reason if it is not to demand what is, fairly speaking, not meaningfully possible, given the obvious, that the resources of energy and research—and time—available to meet the Nation's needs are not infinite").

<sup>96</sup> *La. Energy Servs., L.P. (National Enrichment Facility)*, CLI-05-20, 62 NRC 523, 536 (2005) (emphasis in original).

<sup>97</sup> *LES*, CLI-98-3, 47 NRC at 103.

<sup>98</sup> *Entergy Nuclear Generation Co. (Pilgrim Nuclear Power Station)*, CLI-10-22, 72 NRC 202, 208 (2010) (quoting *Town of Winthrop v. Fed. Aviation Admin.*, 535 F.3d 1, 13 (1st Cir. 2008)).

<sup>99</sup> *Pilgrim*, CLI-10-11, 71 NRC at 315 (citing *Winthrop*, 535 F.3d at 11–13).

<sup>100</sup> *Pilgrim*, CLI-10-11, 71 NRC at 315 (citing *Hells Canyon All. v. U.S. Forest Serv.*, 227 F.3d 1170, 1185 (9th Cir. 2000)).

<sup>101</sup> *Pilgrim*, CLI-10-11, 71 NRC at 316 (quoting *Winthrop*, 535 F.3d at 13).

<sup>102</sup> Exs. NRC-145-A and NRC-145-B, U.S. Department of the Interior, National Park Service, National Register Bulletin 38, Guidelines for Evaluating and Documenting Traditional Cultural Properties, 7-10 (1998) [hereinafter Bulletin 38]. In 1990, the National Park Service – which administers the National Register program – issued National Register Bulletin 38, "Guidelines for Evaluating and Documenting Traditional Cultural Properties," as "an aid in determining whether properties thought or alleged to have traditional cultural significance are eligible for inclusion in the National Register," giving "special attention to properties of traditional cultural significance to Native American groups, and to discussing the place of religion in the attribution of such significance." *Id.* at 2, 3. Bulletin 38 provides the guidelines for identifying and evaluating traditional cultural properties, including properties that may be of traditional religious and cultural significance to an Indian tribe. See, e.g., *Muckleshoot Indian Tribe*, 177 F.3d at 807

anyone but a knowledgeable member of the group that ascribes significance to them; in such cases it may be impossible even to find the relevant properties, or locate them accurately, without the aid of such parties.”<sup>103</sup> In other words, the fundamental difference between properties of traditional religious or historic significance to a Tribe, and other kinds of historic properties, is that their significance cannot be determined solely by research, archaeological field investigation, and other professional tools absent participation by the community that values them; instead, the existence and significance of such sites must be determined by that community.<sup>104</sup> To this end, the ACHP’s regulations require that the agency must consult with any Indian tribe that attaches religious and cultural significance to historic properties that may be affected by the agency’s undertaking<sup>105</sup> and “acknowledge that Indian tribes . . . possess special expertise in assessing the eligibility of historic properties that may possess religious and cultural significance to them.”<sup>106</sup>

### C. Incomplete and Unavailable Information Under NEPA

While a federal agency must analyze environmental consequences in its environmental review where it is reasonably possible to do so, NEPA’s rule of reason acknowledges that in certain cases an agency may be unable to obtain information to support a complete analysis.<sup>107</sup> CEQ regulations require that when an agency is evaluating reasonably foreseeable significant adverse effects on the human environment in an EIS “and there is incomplete or unavailable

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(“Bulletin 38 provides the recognized criteria for the Forest Service’s identification and assessment of places of cultural significance”).

<sup>103</sup> See Bulletin 38 at 9.

<sup>104</sup> Ex. NRC-222 at 4 (pg. 5 of PDF), Patricia L. Parker, *Traditional Cultural Properties: What You Do and How We Think*, CRM, Vol. 16 (1993).

<sup>105</sup> 54 U.S.C. § 302706(b).

<sup>106</sup> 36 C.F.R. § 800.4(c)(1).

<sup>107</sup> National Environmental Policy Act Regulations; Incomplete or Unavailable Information, 51 Fed. Reg. 15,618, 15,621 (Apr. 25, 1986).

information, the agency shall always make clear that such information is lacking.”<sup>108</sup> If the incomplete or unavailable information is “essential to a reasoned choice among alternatives and the overall costs of obtaining it are not exorbitant,” the agency shall include the information in the EIS.<sup>109</sup> If the overall costs of obtaining the information are exorbitant or the means to obtain it are not known, the agency must include in the EIS:

(1) A statement that such information is incomplete or unavailable; (2) a statement of the relevance of the incomplete or unavailable information to evaluating reasonably foreseeable significant adverse impacts on the human environment; (3) a summary of existing credible scientific evidence which is relevant to evaluating the reasonably foreseeable significant adverse impacts on the human environment, and (4) the agency's evaluation of such impacts based upon theoretical approaches or research methods generally accepted in the scientific community.<sup>110</sup>

CEQ has explained that the term “overall costs” is intended to encompass “financial costs and other costs such as costs in terms of time (delay) and personnel” and that “overall costs” should be interpreted “in light of overall program needs.”<sup>111</sup> CEQ has also stated that “theoretical approaches or research methods generally accepted in the scientific community” includes “commonly accepted professional practices such as literature searches[.]”<sup>112</sup> Federal courts have been “unwilling to give a hyper-technical reading” of 40 C.F.R. § 1502.22 to require the inclusion of a separate, formal statement in the EIS to the effect that information is incomplete or unavailable where the record in the proceeding supplies the relevant information.<sup>113</sup> Further, to demonstrate a violation of NEPA on the basis of 40 C.F.R. § 1502.22,

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<sup>108</sup> 40 C.F.R. § 1502.22.

<sup>109</sup> *Id.* § 1502.22(a).

<sup>110</sup> *Id.* § 1502.22(b).

<sup>111</sup> 51 Fed. Reg. at 15,622.

<sup>112</sup> *Id.*

<sup>113</sup> *Colo. Env'tl. Coal. v. Dombek*, 185 F.3d 1162, 1172–73 (10th Cir. 1999). *See also WildEarth Guardians v. U.S. Forest Serv.*, 828 F. Supp. 2d 1223, 1240 (D. Colo. 2011) (agency satisfied 40 C.F.R. § 1502.22 where it stated that additional information on climate impacts was unavailable but that available information indicates impacts would not be significant); *High Country Conservation Advocates v. U.S. Forest Serv.*, 52

a petitioner “must show (1) the missing information is essential to a reasoned decision between the alternatives, and (2) that the public was unaware of the limitations of the data the [federal agency] relied on.”<sup>114</sup>

The Commission’s “longstanding policy is that the NRC, as an independent regulatory agency, ‘is not bound by those portions of CEQ’s NEPA regulations’ that, like [40 C.F.R. §] 1502.22, ‘have a substantive impact on the way in which the Commission performs its regulatory functions.’”<sup>115</sup> But the Commission does look to CEQ’s regulations as guidance.<sup>116</sup> With respect to the applicability of 40 C.F.R. § 1502.22, the Commission has noted that it may look to 40 C.F.R. § 1502.22 for guidance, but it has specifically declined to declare it binding.<sup>117</sup> For example, the Commission held that a Board erred in its reformulation of a contention that would make 40 C.F.R. § 1502.22 binding on the NRC.<sup>118</sup> The Commission has also noted that its policy of taking account of CEQ regulations voluntarily is tempered by its overriding responsibilities as an independent regulatory agency.<sup>119</sup>

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F. Supp. 3d 1174, 1194 (D. Colo. 2014) (record supplied sufficient information on significance of missing data to satisfy 40 C.F.R. § 1502.22).

<sup>114</sup> *Trout Unlimited v. U.S. Dep’t of Agric.*, 320 F. Supp. 2d 1090, 1110–11 (D. Colo. 2004) (citing *Dombeck*, 185 F.3d at 1172–73). The Commission has cautioned, in the context of severe accident mitigation alternatives (SAMA) analyses, that “[t]here is questionable benefit to spending considerable agency resources in an attempt to fine-tune a NEPA mitigation analysis,” noting that unless a deficiency “could credibly render the SAMA analysis altogether unreasonable under NEPA standards,” “a SAMA-related dispute will not be material to the licensing decision[.]” *Entergy Nuclear Gen. Co. and Entergy Nuclear Operations Inc.* (Pilgrim Nuclear Power Station), CLI-12-1, 75 NRC 39, 57–58 (2012). Although the contention at issue in this proceeding is not a SAMA contention, the principle is fundamental to NEPA’s “rule of reason” in the context of 40 C.F.R. § 1502.22: unless an alleged deficiency in the FSEIS would have a material impact on the agency’s licensing decision, *i.e.*, the decision between alternatives, the dispute over the deficiency is not a material one.

<sup>115</sup> *Diablo Canyon*, CLI-11-11, 74 NRC at 444 (quoting Environmental Protection Regulations for Domestic Licensing and Related Regulatory Functions and Related Conforming Amendments, 49 Fed. Reg. 9352, 9352 (1984)).

<sup>116</sup> *Diablo Canyon*, CLI-11-11, 74 NRC at 444.

<sup>117</sup> See *id.* at 443–44; *North Anna ESP*, CLI-07-27, 66 NRC at 235–36 & n.115; *Pac. Gas & Elec. Co.* (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), CLI-08-1, 67 NRC 1, 12 (2008).

<sup>118</sup> *Diablo Canyon*, CLI-11-11, 74 NRC at 443–44.

<sup>119</sup> See *Diablo Canyon ISFSI*, CLI-08-1, 67 NRC at 12, n.49 (referencing 10 CFR 51.10(b)).

#### D. The Complete NEPA Record

It is well established that in an NRC adjudicatory proceeding, even if a staff environmental document is found to be inadequate in certain respects, the NEPA deficiency can be cured through the Board's findings on the information in the adjudicatory record.<sup>120</sup> "The adjudicatory record and Board decision (and, of course, any Commission appellate decisions) become, in effect, part of the FEIS."<sup>121</sup> The Commission has observed that the hearing process itself "allows for additional and...more rigorous public scrutiny of the [EIS] than does the usual 'circulation for comment.'"<sup>122</sup>

Moreover, Boards have previously looked to the record in a proceeding to supply the information called for by 40 C.F.R. § 1502.22. For example, in the *Vogtle* early site permit proceeding, the Board found sufficient information in the record to determine that the costs of obtaining additional information related to potential impacts from dredging would likely be exorbitant and, further, that the EIS, as supplemented by its decision, provided the additional explanation called for under 40 C.F.R. § 1502.22(b).<sup>123</sup>

#### E. Burden of Proof

As the proponent of the agency action at issue, an applicant generally has the burden of proof in a licensing proceeding.<sup>124</sup> However, the statutory obligation for complying with NEPA

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<sup>120</sup> See, e.g., *Crow Butte Resources, Inc.* (Crawford, Nebraska Facility), CLI-18-8, 88 NRC 141, 168–169 (2018); *La. Energy Servs., L.P.* (National Enrichment Facility), LBP-05-13, 61 NRC 385, 404 (2005), *aff'd*, CLI-06-22, 64 NRC 37 (2006), *petition for review denied sub nom. Nuclear Infor. & Res. Serv. v. NRC*, 509 F.3d 562 (D.C. Cir. 2007).

<sup>121</sup> *LES*, CLI-98-3, 47 NRC 77, 89 (1998). See also *Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-06-15, 63 NRC 687, 707 n.91 (2006); *Strata Energy, Inc.* (Ross In Situ Uranium Recovery Project), CLI-16-13, 83 NRC 566, 595 (2016), *aff'd*, *Nat. Res. Def. Council & Powder River Basin Res. Council v. NRC*, 879 F.3d 1202 (D.C. Cir. 2018) (the "hearing record, and subsequent decision on a contested environmental matter augment the environmental record of decision").

<sup>122</sup> *Hydro Res., Inc.* (Rio Rancho, NM), CLI-01-4, 53 NRC 31, 53 (2001) (quoting *Phila. Elec. Co.* (Limerick Generating Station, Units 1 and 2), ALAB-819, 22 NRC 681, 706–07 (1985)).

<sup>123</sup> *S. Nuclear Operating Co.* (Vogtle ESP Site), LBP-09-7, 69 NRC 613, 702, 731 n.52 (2009).

<sup>124</sup> See 10 C.F.R. § 2.325.

rests with the NRC Staff.<sup>125</sup> Consequently, when a NEPA-based contention is involved, the burden of proof is on the Staff.<sup>126</sup> At the same time, “because the Staff, as a practical matter, relies heavily upon the Applicant’s [Environmental Report] in preparing the [EIS], should the Applicant become a proponent of a particular challenged position set forth in the [EIS], the Applicant, as such a proponent, also has the burden on that matter.”<sup>127</sup> And relative to factual matters arising in connection with an environmental issue, to carry that burden, the Staff and/or the applicant must establish that its position is supported by a preponderance of the evidence.<sup>128</sup>

### III. The Staff’s Expert Witnesses

#### A. Diana Diaz-Toro

Ms. Diana Diaz-Toro is a Project Manager in the NRC’s Office of Nuclear Material Safety and Safeguards (NMSS), Division of Fuel Cycle Safety, Safeguards and Environmental Review, Environmental Review Branch. She has served as co-Project Manager for the environmental review associated with the materials license application for the Dewey-Burdock project since 2015 and as lead Project Manager since 2017. In these roles, she has been responsible for leading the Staff’s efforts to develop and implement an approach to obtain additional information about historic, cultural, and religious resources of significance to the Lakota Sioux Tribes. As the designated contracting officer’s representative for the contract with SC&A, Inc. (SC&A), she has also coordinated the assistance of the Staff’s contractor, SC&A, in support of those efforts.

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<sup>125</sup> See, e.g., *Duke Power Co.* (Catawba Nuclear Station, Units 1 & 2), CLI-83-19, 17 NRC 1041, 1049 (1983).

<sup>126</sup> See *Progress Energy Fla., Inc.* (Levy County Nuclear Power Plant, Units 1 & 2), CLI-10-2, 71 NRC 27, 34 (2010); see also *S. Nuclear Operating Co.* (Vogtle ESP Site), CLI-07-17, 65 NRC 392, 395 (2007) (“[W]hereas NRC hearings on safety issues concern the adequacy of the license application, not the NRC Staff’s work, NRC hearings on NEPA issues focus entirely on the adequacy of the NRC Staff’s work.”).

<sup>127</sup> *La. Energy Servs., L.P.* (Claiborne Enrichment Center), LBP-96-25, 44 NRC 331, 339 (1996) (citing *Pub. Serv. Co. of N.H.* (Seabrook Station, Units 1 & 2), ALAB-471, 7 NRC 477, 489 n.8 (1978)), *rev’d on other grounds*, CLI-97-15, 46 NRC 294 (1997).

<sup>128</sup> See *Pac. Gas and Electric Co.* (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), CLI-08-26, 68 NRC 509, 521 (2008).

As stated in Ms. Diaz-Toro's Statement of Professional Qualifications (Ex. NRC-177), she holds a Bachelor of Science degree in Chemical Engineering from the University of Puerto Rico – Mayagüez Campus, and a Masters degree in Business Administration from American University. She has seventeen years of experience as a project manager, technical reviewer, and regulator at the NRC. Her responsibilities at the NRC include environmental project management of licensing and regulatory actions (e.g., applications for new licenses, license renewals, and license amendments) involving nuclear materials and waste (e.g., applications associated with uranium recovery, spent fuel storage and transportation, uranium enrichment, uranium conversion, and fuel fabrication facilities). Her work in the NEPA and NHPA environments extends over nine years. She is responsible for planning, coordinating and executing NEPA environmental reviews and NHPA Section 106 reviews for complex materials licensing projects. As part of these reviews, she is responsible for preparing environmental review documents, consultation correspondence, and conducting outreach activities and meetings with license applicants, other Federal government agencies, State, local, and Tribal government agencies, and other interested stakeholders. She also provides technical advice on policy and programmatic matters to NRC management related to environmental review matters, and guidance to NRC Staff. She also has extensive experience in managing technical review teams, formulating budgets, and developing, executing, and monitoring contract requirements.

B. Jerry Spangler

Mr. Jerry Spangler is an associate and cultural resource specialist with SC&A, Inc. (SC&A). He has assisted NRC Staff in the design and implementation of a Tribal cultural resources site survey to resolve outstanding issues regarding the Tribal cultural resource Contention 1A. In that role, he has provided guidance and advice to NRC Staff, researched previously conducted cultural resources survey methodologies, and assisted the Staff in developing a proposed draft site survey methodology.

As stated in Mr. Spangler's resume (Ex. NRC-178), he holds a degree (M.S.) in anthropology from Brigham Young University. Mr. Spangler has thirty years' experience developing cultural resource methodologies related to archaeological, historic, and oral history projects. His expertise is in designing and implementing research approaches that maximize the protection of all cultural resources through collaboration. His work includes dozens of small- and medium-scale NHPA Section 106 compliance projects involving public-private land trades, water development projects, road improvements, and mining projects. His research designs have incorporated exhaustive literature reviews, pedestrian survey and eligibility testing methods, and in limited circumstances data recovery (excavation). He has worked closely with multiple conservation groups to develop and implement research designs intended to foster cultural resource preservation on a landscape scale. These efforts contributed to, for example, the establishment of Bears Ears National Monument. He received the 2019 President's Recognition Award from the Society for American Archaeology for his efforts to preserve Grand Staircase-Escalante National Monument. He has written National Register evaluations for more than 1,000 archaeological and historic sites.

Mr. Spangler has also assisted private clients with NEPA compliance by evaluating cultural resource impacts, writing the relevant cultural resources sections of required NEPA environmental assessments and environmental impact statements, and supporting associated close collaboration in the NEPA process with various federal agencies.

His work in these areas includes extensive experience working with Tribes and facilitating the protection of Tribal interests, including with the Lakota Sioux. On diverse projects, Mr. Spangler has advocated and supported tribal positions during consulting party meetings, provided technical analyses to tribal officials to assist in their own formal comments on specific undertakings, and accompanied tribal officials on tours of areas where cultural resources may be impacted. He also manages the Southern Utah Oral History Project that

resulted in the collection of more than 200 oral histories of local ranching families and Indian Tribes with cultural roots in southern Utah and northern Arizona.

#### IV. The Staff's Position and Testimony on Contention 1A

For the reasons described below, as supported by the attached expert testimony (Ex. NRC-176) and exhibits, Contention 1A should be resolved in favor of the Staff. As the Staff explains, it has satisfied its duty under NEPA to take a “hard look” at cultural resources that may be impacted by the Dewey-Burdock project. Under this standard, the Staff must undertake reasonable efforts to acquire missing information that is essential to a reasoned choice among alternatives.<sup>129</sup> As the Board found in LBP-18-5, in the March 2018 Approach, the Staff developed a reasonable approach for obtaining additional information on specific cultural, historic, or religious resources of importance to the Oglala Sioux Tribe.<sup>130</sup> Consistent with the procedures established by the Board in LBP-18-5 for the resolution of Contention 1A, the Staff once more offered the Tribe an opportunity to participate in the March 2018 Approach, and again initiated discussions with the Tribe on a methodology for the Tribal cultural resources site survey component of the approach that would fit within the constraints of the March 2018 Approach, including the two two-week periods set out in that approach. As the Staff's testimony describes, the proposed draft methodology developed by the Staff and provided to the Oglala Sioux Tribe on February 15, 2019, was a reasonable methodology that responded to the concerns of the Tribe regarding what such a methodology should entail. Because the Staff was again unable to reach agreement with the Tribe on a final methodology to carry out the March 2018 Approach, the Staff reasonably determined that the information it has sought from the Tribe from the implementation of the March 2018 Approach is incomplete or unavailable and that the costs of obtaining it are exorbitant. Finally, the Staff explains why the record of this proceeding,

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<sup>129</sup> See *Powertech*, LBP-18-5, 88 NRC at 134 (citing 40 C.F.R. § 1502.22; *Winthrop*, 535 F.3d 1; *Pilgrim*, CLI-10-22, 72 NRC at 208).

<sup>130</sup> *Id.* at 125.

including the Staff's testimony and the analysis already in the FSEIS, shows that the Staff has met the standards of 40 C.F.R. 1502.22 and fulfilled its NEPA responsibilities.

A. The Staff Selected a Reasonable Approach (the March 2018 Approach) for Obtaining Additional Information on Lakota Sioux Cultural Resources

In LBP-18-5, the Board found that the "Staff's March 2018 Approach, as agreed to by the parties, constituted a valid and reasonable approach for resolving Contention 1A."<sup>131</sup> The Board stated that, "In developing the March 2018 Approach, the NRC Staff attempted to address the main concerns previously expressed by the Oglala Sioux Tribe."<sup>132</sup> The Board specifically identified four elements of the March 2018 Approach as demonstrating the reasonableness of the approach.

First, in response to the Tribe's protestations over the lack of a trained surveyor or ethnographer to coordinate the site survey, the Staff hired an expert contractor to facilitate development and implementation of the survey.<sup>133</sup> Second, in response to the Tribe's challenge to the number of tribes invited to participate in the survey, the Staff invited the Standing Rock Sioux Tribe, Rosebud Sioux Tribe, Cheyenne River Sioux Tribe, Yankton Sioux Tribe, Flandreau Santee Sioux Tribe, and Lower Brule Sioux Tribe to take part in the survey. Additionally, the Staff coordinated a webinar and teleconference series and communicated the participation details via letter, email, and telephone call to these tribes.<sup>134</sup> Third, in response to the Tribe's complaints about the length of time provided for the survey, the Staff doubled the amount of time and provided iterative opportunities to survey the site.<sup>135</sup> Finally, the March 2018 Approach

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<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *Id.* at 125–26.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

provided for funding and reimbursement for participating tribes in the amount specified by the Oglala Sioux Tribe as “appropriate” for carrying out the approach.<sup>136</sup>

As the Board noted, the March 2018 Approach was agreed to by the Tribe<sup>137</sup> and the Tribe also described its parameters as reasonable.<sup>138</sup> Indeed, the Board found that “[t]he Oglala Sioux Tribe accepted the March 2018 Approach as reasonable to resolve Contention 1A and does not challenge the reasonableness of the March 2018 Approach as written.”<sup>139</sup> The Board concluded that had the March 2018 Approach “been followed to completion, the NRC Staff’s ‘hard look’ into the cultural, historical, and religious sites of the Oglala Sioux Tribe might well have been satisfied.”<sup>140</sup> Under either of the two alternatives identified by the Board as available to the Staff to resolve Contention 1A, the remaining question regarding the reasonableness of the Staff’s approach concerns the reasonableness, specifically, of the Staff’s proposed draft

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<sup>136</sup> Ex. NRC-176 at A.20–21; Ex. NRC-194, Oglala Sioux Tribe’s February 15, 2018 Responses to NRC Counsel Questions at 5 (ML18046A171) (“The Tribe believes that reimbursement is appropriate for its valuable staff time and resources. As communicated on the February 1, 2018 counsel conference call, it is difficult to respond precisely without knowing what Powertech is prepared to offer and without input on methodology from a qualified contractor. The Tribe would anticipate that an amount on the order of what was proposed previously would be appropriate.”).

<sup>137</sup> *Powertech*, LBP-18-5, 88 NRC at 131; *see also* Tr. at 1389 (counsel for the Tribe stating that the Tribe is “...comfortable with, as we stated multiple times, the approach that the NRC staff has laid out. So we are hopeful that won’t be a problem”), 1432 (“[W]e maintain the position that that March 2018 approach is a reasonable one and would not like to see backsliding to the proposals that have led to this litigation from the start”).

<sup>138</sup> *Powertech*, LBP-18-5, 88 NRC at 131; *see also* Tr. at 1395 (“The Tribe has, I think, been consistent with these dates. Although somewhat tight, I think are achievable. And so the Tribe is, at this point, comfortable with those. We do note that there are some significant components that have not been fully vetted or fully described in terms of the methodology. But at this point, based on what we have in hand, the Tribe is comfortable with that time line.”); Ex. NRC-219, Oglala Sioux Tribe’s March 30, 2018 Response to NRC Staff’s March 16, 2018 Approach, at 1 (ML18089A655) (“Based on the approach described, the Tribe continues to believe these efforts may provide a reasonable path toward NRC satisfying NEPA and resolving the Oglala Sioux Tribe’s long-standing NEPA contention.”).

<sup>139</sup> *Powertech*, LBP-18-5, 88 NRC at 131.

<sup>140</sup> *Id.* at 126.

methodology for conducting the Tribal cultural resources site survey component of the March 2018 Approach.<sup>141</sup>

B. The Staff Proposed a Reasonable Methodology for the Tribal Cultural Resources Site Survey Element of the Selected March 2018 Approach

Under the procedures established by the Board in LBP-18-5, the Staff was provided two alternative avenues “to conclude expeditiously the litigation of the issues in this case”: proceeding to an evidentiary hearing, or continuing negotiations with the Tribe on a methodology for the site survey component of the March 2018 Approach. Under the alternative selected by the Staff—resuming implementation of the March 2018 Approach—the Board directed that “the only aspect of the Approach that is open for discussion is the site survey methodology[;] [t]hat is, any tribal negotiating position or proposal should only encompass the specific scientific method that would fit into the two-week periods set out in the March 2018 Approach for visiting the physical site, i.e., how the contractor and Tribe members will walk the site and mark or record located tribal resources.”<sup>142</sup>

As the Staff’s testimony explains, in February 2019, the Staff provided to the Tribe a draft site survey methodology upon which to base discussions with the Tribe and reach agreement on a final methodology to conduct the site survey under the March 2018 Approach.<sup>143</sup> The draft methodology was designed to work within the parameters laid out in LBP-18-5, and took into account the previously-articulated concerns and objections of the Tribe regarding the requirements for a survey methodology.<sup>144</sup> The Staff explains how, specifically, the draft

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<sup>141</sup> *Id.* at 130–31. The Board also found that, should the Staff elect to proceed to an evidentiary hearing in lieu of further negotiations with the Tribe on a site survey methodology, a material factual dispute also existed with respect to the Staff’s determination that the March 2018 Approach could not be implemented as a result of the Tribe’s constructive rejection of it in the week the first phase of the Tribal cultural resources site survey was due to commence. *Id.* at 132–133.

<sup>142</sup> *Id.* at 135–136 (internal citations omitted) (emphasis in original).

<sup>143</sup> Ex. NRC-176 at A.26; Ex. NRC-214, Proposed Draft Cultural Resources Site Survey Methodology at 2 (Feb. 15, 2019) (ML19058A153).

<sup>144</sup> Ex. NRC-176 at A.26.

methodology responded to the repeatedly-expressed concerns regarding the need for a “scientifically defensible” survey methodology, while also seeking to balance the unique role and expertise of the Tribe in identifying its own traditional cultural resources.<sup>145</sup>

Second, the Staff explains why the draft methodology responds to the Tribe’s objections to an “open-site survey”, in that it provides an essentially complete framework for the survey that incorporates opportunities for the Tribe to provide input or suggest alternatives at every stage.<sup>146</sup>

Third, in response to the Tribe’s apparent objections to the timing and duration of the site survey, the Staff explains why the draft methodology is intended to be accomplishable within the March 2018 parameters, while still providing flexibility for tribal input.<sup>147</sup> And finally, the Staff explains why these and other concerns the Tribe has raised are largely directed to renegotiating the fundamental parameters of the March 2018 Approach, supporting the Staff’s determination that an agreement cannot be reached.<sup>148</sup>

1. The Draft Methodology Is a Scientific Methodology that Balances Unique Considerations of Tribal Autonomy and Expertise

The Tribe has continually asserted that the site survey must employ a scientific methodology, and it has repeatedly rejected proposed methodologies that it considers “open-site” surveys on the basis that they lack “scientific integrity.”<sup>149</sup> The Tribe specifically criticized the methodology offered in the Staff’s proposed plan of work from June 2018 as “contain[ing] no identifiable scientific methodology for a cultural resources survey.”<sup>150</sup> The Board also acknowledged the necessity for a scientific methodology in LBP-18-5; when presenting the

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<sup>145</sup> *Id.*; Ex. NRC-214 at 3.

<sup>146</sup> Ex. NRC-176 at A.26.

<sup>147</sup> *Id.* at A.26, A.40.

<sup>148</sup> *Id.* at A.43–44.

<sup>149</sup> See, e.g., Ex. NRC-186, Summary of May 19, 2016 Pine Ridge Meeting with the Oglala Sioux Tribe at 2 (ML16182A069); Tr. at 1431; Ex. NRC-190 at 1.

<sup>150</sup> Oglala Sioux Tribe’s Response in Opposition to NRC Staff’s Motion for Summary Disposition of Contention 1A at 7 (Sept. 21, 2018) (ML18264A346).

parties the choice to resume efforts to implement the site survey approach, the Board held that “any tribal negotiating position or proposal should only encompass the specific *scientific method* that would fit into the two two-week periods set out in the March 2018 Approach[.]”<sup>151</sup> However, the Tribe has also often stated that Tribal members have the unique expertise to identify and ascribe significance to sites of historic, cultural, and religious significance to the Lakota Sioux Tribes.<sup>152</sup> Specifically regarding the Dewey-Burdock project area, the Tribe has expressed that it recognizes “sacred places here in this country and we are the only ones that can determine those things... [w]e are the ones, and the only ones, that are qualified.”<sup>153</sup> The Staff concurs with the Tribe on this point: as the Staff testifies, “Tribes have unique expertise and are the best authorities to identify, evaluate, and ascribe significance to sites of historic, cultural and religious significance to them.”<sup>154</sup> The Staff’s testimony emphasizes that information on sites of cultural, religious, or historic significance cannot be obtained without the participation of relevant Tribes.<sup>155</sup>

Accordingly, while the Staff took the necessary steps to develop and propose a reasonable and scientifically defensible methodology, that methodology also reflects the Tribe’s position that Tribal members are “the only ones” qualified to actually identify and evaluate relevant cultural resources/sites of significance.<sup>156</sup> As the Staff’s testimony explains, the Staff’s February 2019 draft proposed methodology reasonably balances a scientific methodology for conducting a Tribal cultural resources site survey with the unique considerations of Tribal autonomy and expertise. In particular, the methodology (i) reasonably accounts for the Tribe’s

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<sup>151</sup> *Powertech*, LBP 18-5, 88 NRC at 135 (emphasis added).

<sup>152</sup> Ex. NRC-176 at A.30.

<sup>153</sup> Transcript of Proceedings (Tr.) at 764–66 (Aug. 19, 2014) (ML14234A449).

<sup>154</sup> Ex. NRC-176 at A.38.

<sup>155</sup> *Id.* at A.30, 34, 40, 41.

<sup>156</sup> Ex. NRC-176 at A.41; *Powertech*, LBP-18-5, 88 NRC at 136.

traditional tribal perspectives and values and encourages tribal input; (ii) incorporates principles of the scientific method, including consideration of previous Tribal cultural resources site survey methods that integrated a scientific approach; and (iii) uses a two-pronged approach to appropriately reconcile those interests.

i. The Methodology Reasonably Accounts for the Tribe’s Traditional Tribal Perspectives and Values

The Staff recognizes that “there are fundamental differences in the way that Tribes and non-Tribal individuals view the world around them,” which is especially relevant to the identification and evaluation of historic and cultural resources that may be impacted by the Dewey-Burdock project.<sup>157</sup> In his research to develop the draft proposed methodology, Mr. Spangler found that previously-conducted Tribal cultural resources site surveys “without exception...emphasize the importance of tribal participation because the intangible values are known only to the Tribes.”<sup>158</sup> Therefore, to address this important aspect of any Tribal cultural resources site survey, the draft proposed methodology provides for the Tribes themselves to provide their own research objectives; they would describe the cultural resources within the context of their own world views and indigenous nomenclature, and assign their own significance to the sites.<sup>159</sup>

Accordingly, the proposed draft methodology not only incorporates the traditional cultural knowledge unique to Tribal experts, but also repeatedly encourages Tribal input.<sup>160</sup> For instance, Section 4, “Objectives and Goals of Discussions,” articulates that the survey would be conducted “with Tribal members with traditional knowledge who assign their own traditional

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<sup>157</sup> Ex. NRC-176 at A.38.

<sup>158</sup> *Id.* at A.12.

<sup>159</sup> *Id.* at A.26.

<sup>160</sup> *Id.* at A.31; *see also* Ex. NRC-214 at 6, 8, 10, 11, 12, 14, 16, 17.

cultural significance to traditional landscapes, properties, and sites,”<sup>161</sup> and Section 6, “Cultural Resource Survey Methodology Implementation” affirms that “The Invited Tribes’ input will inform the methods that will be implemented.”<sup>162</sup> These measures again reflect that Tribal members alone are qualified to make the relevant substantive determinations in the field.

ii. The Proposed Draft Methodology Incorporates Principles of the Scientific Method

In accordance with the Tribe’s repeated requests for a scientific methodology, the draft proposed methodology applies scientific principles to the conduct of a Tribal cultural resources site survey.<sup>163</sup> In formulating the draft proposed methodology, the Staff considered that the “fundamental principles or ideals of the scientific method are empirical observation (sometimes referred to as empiricism), skepticism about what is being observed, deduction, and replication of the results.”<sup>164</sup> Therefore, the NRC Staff and contractor “developed a methodology that established a tangible path for gathering and analyzing tribal cultural resource information that considers tribal traditional knowledge, values, and perspectives.”<sup>165</sup> The Tribe, at the February 22, 2019 meeting and again in its March 12, 2019 letter to the Staff, equivocated on its request for a scientific methodology, stating, rather that “[a]n acceptable approach should include scientific principles from the physical and social sciences.”<sup>166</sup> It is not entirely clear what the Tribe means by “principles from the...social sciences,” but the Tribe asserts that an “overly rigid

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<sup>161</sup> Ex. NRC-214 at 8.

<sup>162</sup> *Id.* at 9.

<sup>163</sup> While the Tribe has never elaborated on what it means by “scientific integrity,” Section 3.1 of the proposed draft methodology contemplates that the “scientific process requires the use of defined and articulated instruments to test a hypothesis or series of hypotheses by gathering observable, empirical evidence, and it calls for rigorous adherence to standards and practices accepted by scientific disciplines, such that results are measurable and replicable.” Ex. NRC-176 at A.37.

<sup>164</sup> *Id.* at A.37.

<sup>165</sup> *Id.* at A.37.

<sup>166</sup> Ex. NRC-218, Oglala Sioux Tribe's Summary of the Meeting with NRC Staff on February 22, 2019 in Pine Ridge, SD at 1 (ML19074A247); see also Ex. NRC-211, Oglala Sioux Tribe March 12, 2019 Response to NRC's March 1, 2019 Letter at 2 (ML19074A235) (“The survey must yet be developed in a manner that integrates ecological, social, and natural scientific principles involved in conducting surveys and documenting information, while maintaining relevance to the Lakota culture.”).

definition of ‘scientific’” will cause the Staff to “discount or relegate traditional cultural knowledge and experience to insignificance.”<sup>167</sup> As explained above, the proposed draft methodology does not relegate Tribal knowledge to insignificance, but rather completely relies on that knowledge to facilitate the survey.

The draft proposed methodology incorporates previous Tribal cultural resources site survey methods that integrated a scientific approach. Most importantly, it builds upon the work of Dr. LeBeau, whose work the Tribe specifically requested the Staff to consider.<sup>168</sup> As the Staff testifies, although the Tribe subsequently appeared to reverse its position, the Staff’s use of Dr. LeBeau’s work in crafting the draft proposed methodology was reasonable.<sup>169</sup> Dr. LeBeau’s methodology “carefully defined traditional activities that occur at specific tribal cultural resources locations and how the physical evidence of those activities might be recognized, such as subtle depressions or certain configurations of rocks or a certain type of landform.”<sup>170</sup> Because principles of the scientific method involve empirical observation, deduction, and replication of results, the Staff’s proposed draft methodology proposes methods to describe and measure physical evidence, while also accounting for the spiritual significance of such physical evidence that may otherwise be unobservable to non-Tribal members.<sup>171</sup>

As discussed further below (in Section B.1.iii), the Staff’s draft methodology proposes specific categories of information to be collected and analyzed: “the exact location of TCPs, descriptions of the TCP sufficient to allow non-Tribal members to recognize them, and clear

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<sup>167</sup> Ex. NRC-218 at 1; Ex. NRC-211 at 5.

<sup>168</sup> Ex. NRC-203, Oglala Sioux Tribe’s January 11, 2019 Response to NRC’s November 21, 2018 Letter Proposing to Resume Negotiations at 3 (ML19011A459).

<sup>169</sup> Ex. NRC-176 at A.43; Ex. NRC-218 at 2; Ex. NRC-211 at 6.

<sup>170</sup> Ex. NRC-176 at A.37.

<sup>171</sup> *Id.* at A.37, A.40.

articulation of why the TCP is significant.”<sup>172</sup> It also proposes utilizing site formats for recording observations based on those used by LeBeau, and suggests ways to describe (i.e., measure) the observations.<sup>173</sup> The proposed draft methodology additionally proposes using geographic information system (GIS) software to identify all potential sites of significance in the project area,<sup>174</sup> and culminates in a synthesized report that incorporates the field observations, oral history interviews, and the geo-spatial mapping data.<sup>175</sup> The extent to which the proposed draft methodology incorporates these scientific principles demonstrates that the Staff has reasonably addressed the Tribe’s request that the site survey contain an identifiable scientific methodology.

iii. The Staff’s Proposed Draft Methodology Employs a Two-Pronged Approach To Reasonably Reconcile Scientific Principles with Tribal Perspectives and Values

To address the Tribe’s concerns regarding scientific principles as well as tribal values, the Staff has provided sufficient detail in a scientific methodology, while also recognizing that tribal cultural resources often consist of “something that’s intangible, something that’s specific to practices, beliefs, mores of a tribe or an indigenous group.”<sup>176</sup> The Staff’s testimony explains that, to that end, the draft proposed methodology proposes a two-pronged approach to conducting the survey. First, the survey participants would describe the *observable* characteristics of sites of significance to the Lakota. As Mr. Spangler testifies, and as Dr. LeBeau described, certain attributes of Lakota TCPs can be observable and measurable, such as constructed rock alignments, cairns, and depressions.<sup>177</sup> As part of this step, the TCPs would be “empirically described according to their physical characteristics, their location, and

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<sup>172</sup> Ex. NRC-214 at 10.

<sup>173</sup> *Id.*; Ex. NRC-176 at A.35–36.

<sup>174</sup> Ex. NRC-214 at 12–13; Ex. NRC-176 at A.35–36.

<sup>175</sup> Ex. NRC-214 at 13–14; Ex. NRC-176 at A.35–36.

<sup>176</sup> See Ex. NRC-190 at 5. The Tribe criticized traditional archeological methods as incapable of identifying “intangible” sites of significance to the Tribes. *Id.*

<sup>177</sup> Ex. NRC-176 at A.40; see *also* Ex. NRC-206, LeBeau, Sebastian, “Reconstructing Lakota Ritual in the Landscape: The Identification and Typing System for Traditional Cultural Property Sites” at 90–91 (2009).

their relationship to other TCPs. This is the scientific component of the proposed draft site survey methodology.”<sup>178</sup> The specific questions and formats to be used for collecting this information are discussed in Sections 6.1–6.3 of the proposed draft methodology.<sup>179</sup>

The second prong calls for Tribal members to identify and characterize the unobservable attributes of the sites, including a description of the site’s significance. As Mr. Spangler testifies:

“Only Tribal members can commune with the ancestors, and only Tribal members can see significance where there is no surface evidence of the sacred activities. This component is not measurable and is therefore not scientific. In effect, the proposed draft site survey methodology calls for the Lakota to describe the significance of a TCP within the context of traditional knowledge and without outside skepticism regarding their findings. If the Lakota say it is significant, then it is significant. But the Lakota must also describe that significance in a manner that non-tribal individuals, in particular NRC decision-makers, can understand why it is significant.”<sup>180</sup>

The Staff’s testimony also explains why the Tribe’s subsequent criticisms do not demonstrate any deficiency in the reasonableness and scientific integrity of the draft methodology. For example, in its March 12, 2019 letter, the Tribe highlighted that it has “in the past experienced problems where federal agencies discount traditional cultural and ecological knowledge in the evaluation of cultural resources for inclusion in the National Register of Historic Places based on a perceived need to adhere to an overly rigid definition of ‘scientific’.”<sup>181</sup> However, as the Staff testifies, the proposed draft methodology reconciles the western concept of the scientific method with traditional cultural knowledge with its two-pronged approach to documenting that which is observable and that which is unobservable to non-Lakota individuals.<sup>182</sup> Further, although the Tribe asserted at the teleconference meeting on February 19, 2019 that “social science” should be applied to Tribal cultural resources site

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<sup>178</sup> Ex. NRC-176 at A.40.

<sup>179</sup> Ex. NRC-214 at 9–13.

<sup>180</sup> Ex. NRC-176 at A.40.

<sup>181</sup> Ex. NRC-211 at 5.

<sup>182</sup> Ex. NRC-176 at A.40.

surveys,<sup>183</sup> the basic principles of the scientific method are the same regardless of the specific scientific field.<sup>184</sup> Thus, in its integration of scientific principles, the Staff's draft methodology has appropriately adhered to the Board's direction that a proposal "should only encompass the *specific scientific method* that would fit into the two-week periods set out in the March 2018 Approach for visiting the physical site[.]"<sup>185</sup>

In sum, the Staff's testimony demonstrates how the draft proposed methodology reconciles "the Tribe's traditional perspectives and values with the scientific method by establishing a mechanism for empirical observations that meet the test of the scientific method, and then supplement those observations with Tribal perspectives that might not fit within the rigidity of the scientific method."<sup>186</sup> Specifically, the methodology allows for empirical evidence to be supplemented by non-empirical observation, it frames the problem within the context of Lakota language and nomenclature, and enables Tribes themselves to identify, describe, and determine the significance of TCPs.

2. The Draft Methodology Is Sufficiently Detailed to Provide a Basis for Meaningful Discussion and Agreement and Is Not an "Open-Site Survey"

A persistent criticism the Tribe has levied throughout negotiations is that the original 2013 surveys and the Staff's subsequent proposals have constituted "open-site surveys."<sup>187</sup> The Tribe recently reiterated this complaint at the February 19 and 22, 2019 meetings, as well as in its March 12, 2019 letter.<sup>188</sup> For example, the Tribe stated that "the NRC staff has never

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<sup>183</sup> See Ex. NRC-217, February 19, 2019 Teleconference Call Summary with Oglala Sioux Tribe Comments (Draft) at 2–3 (Feb. 19, 2019) (ML19079A400).

<sup>184</sup> Ex. NRC-176 at A.37.

<sup>185</sup> *Powertech*, LBP-18-5, 88 NRC at 135 (emphasis added).

<sup>186</sup> Ex. NRC-176 at A.40.

<sup>187</sup> Ex. OST-017 at 1; Ex. NRC-188, Summary of NRC Staff and Oglala Sioux Tribe Teleconference Call on January 31, 2017 at 1 (ML17060A260); Ex. NRC-190 at 1; Tr. at 1431 (ML18344A509); Oglala Sioux Tribe's Response in Opposition to NRC Staff's Motion for Summary Disposition of Contention 1A at 7, 9, 11 (Sept. 21, 2018) (ML18264A346).

<sup>188</sup> Ex. NRC-217 at 4; Ex. NRC-218 at 2; Ex. NRC-211 at 6.

proposed an adequate methodology and that the NRC staff has only proposed an open site survey, which the Tribe continues to oppose. The Tribe would like to see a methodology that is more realistic and aligned with the practice of people who conduct TCP surveys.”<sup>189</sup> As the Staff testifies in A.32, the concept of an “open-site” survey involves “an approach that recognizes the special expertise that each individual Tribe possesses. It does not impose or limit the method a Tribe chooses to implement; instead, each Tribe may choose a method that deems culturally appropriate.”<sup>190</sup>

As explained by the Board, an open-site survey “as the term has been used throughout the proceeding and described by counsel for the Oglala Sioux Tribe, is a survey ‘where there is no support from NRC staff or contractor...[a]nd it is essentially opening the site to the tribes to go out and do what they will do and be totally responsible for providing all the data and the analysis with no set protocol or methodology.’”<sup>191</sup> By this definition, to constitute an open-site survey, a proposed methodology would involve 1) no NRC Staff or contractor support, 2) the Tribes being responsible for providing all data and analysis, 3) no set protocol or methodology, and 4) no approach for documenting findings. As the Staff testifies, the draft proposed methodology was especially designed to address these specific points and is therefore demonstrably not an open-site survey.<sup>192</sup>

First, a fundamental element of the March 2018 Approach was utilizing contractor support to facilitate development and implementation of a site survey methodology. The Staff hired SC&A as its contractor, represented now by Mr. Spangler. The contractor's role is to work

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<sup>189</sup> See Ex. NRC-217 at 4. Yet in apparent contradiction with its statements advocating a methodology more aligned with traditional TCP surveys, the Tribe has also heavily criticized scientific (archaeological) methodologies used for traditional TCP surveys as incapable of identifying “intangible” Tribal cultural resources. See Ex. NRC-190 at 5.

<sup>190</sup> Ex. NRC-176 at A.32.

<sup>191</sup> *Powertech*, LBP-18-5, 88 NRC at 117.

<sup>192</sup> Ex. NRC-176 at A.32–A.36.

with the Staff and participating Tribes to develop a survey methodology and conduct the site survey with the Tribes.<sup>193</sup> The Staff's proposed draft methodology therefore addresses the Tribe's previously-raised concern that Staff proposals had no Staff or contractor support.

Second, the Tribes are not fully responsible for providing data and analysis. As thoroughly explained above, the Tribes and Staff agree that only Tribal members are qualified to identify and determine the significance of tribal cultural resources. However, as the Staff has testified, "Section 6.2 of the proposed draft methodology specifies that the NRC Staff and contractor will collaborate with the Tribes to develop methods used to ensure data uniformity and quality, and Section 6.4 specifies that the NRC contractor will work in coordination with the invited Tribes to prepare a report that accurately reflects the significance ascribed to the sites identified by the Tribes."<sup>194</sup> Also, the proposed draft methodology specifies that the Staff and contract Technical Reviewer (Mr. Spangler) will participate in the on-the-ground survey.<sup>195</sup> Thus, the proposed draft methodology balances the Staff and contractor's role with the Tribe's such that the Tribes are not fully responsible for providing the data and analysis.

Third, the draft proposed methodology incorporates set protocols and methodology. The proposed draft methodology "contains well-defined protocols to identify TCPs using the Tribes' own traditional knowledge and expertise."<sup>196</sup> Specifically, Section 8 of the draft proposed methodology contains a "reasonable set of prescriptive steps to accomplish the site survey within two two-week periods. It describes activities to be conducted on a daily basis during the tribal cultural site survey, including opportunities to adjust the methodology, as appropriate."<sup>197</sup>

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<sup>193</sup> *Id.* at A.33; Ex. NRC-214 at 7.

<sup>194</sup> Ex. NRC-176 at A.34; Ex. NRC-214 at 11–12, 13.

<sup>195</sup> Ex. NRC-176 at A.33; Ex. NRC-214 at 7.

<sup>196</sup> Ex. NRC-176 at A.35.

<sup>197</sup> *Id.* The Tribe has also complained about the actual steps that the NRC has proffered for the pedestrian survey. See Ex. NRC-211 at 6 ("Section 8 of the Draft Methodology document...essentially restates an 'open site survey' that was rejected on several occasions during these proceedings.").

While the Tribe has criticized the use of a windshield tour, it is reasonable to perform a preliminary “windshield tour,” essentially a driving tour of the entire site, to familiarize the participants with the project site, landscape, and areas of proposed disturbance. The methodology then proposes that “[t]he survey team would traverse the site, using transects, prioritizing known burial sites and tribal cultural resources, project areas surrounding the previously identified resources, and areas proposed for ground disturbance.”<sup>198</sup> Given the Tribe’s position that its members “are the ones, and the only ones, that are qualified” to identify and evaluate Tribal cultural properties, the Staff’s proposed draft methodology strikes an appropriate balance of suggesting set protocols and methodology, while also accounting for the Tribe’s views regarding the potential significance of unobservable phenomena.

Fourth, the draft proposed methodology includes defined approaches for making and documenting observations. As the Staff testifies, Section 6 contains a suggested format for collecting and evaluating cultural resource information identified during the survey and suggested content for the forms.<sup>199</sup> Specifically, the proposed draft methodology suggests ten discrete pieces of information as a starting point to characterize identified TCPs.<sup>200</sup> These are based on Dr. LeBeau’s cross-cultural format and definitions, which were designed to collect data specifically on Lakota TCPs.<sup>201</sup> Examples include the geospatial location of a TCP, the site type (i.e. the Lakota name of the cultural activity that occurred or could have occurred at the location), the physical attributes of the TCP (if any), and the associated landscape features

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However, given the necessity of conducting the site survey within the two two-week periods, the Staff’s schedule and plan are reasonable. Ex. NRC-176 at A.24.

<sup>198</sup> Ex. NRC-176 at A.35; *see also* Ex. NRC-214 at 15. The Staff further testified that transect lengths, which are normally standardized by the SHPO, are intentionally not specified to allow for Tribal input and site-specific factors, such as terrain, visibility, landscape, and topography. Ex. NRC-176 at A.12, A.35.

<sup>199</sup> *Id.* at A.36.

<sup>200</sup> Ex. NRC-214 at 10–11.

<sup>201</sup> *Id.*; *see also* Ex. NRC-176 at A.37, A.40–41.

visible from the site. As with other aspects of the draft methodology, the data collection format is not rigid and enables Tribes to suggest alternatives to the Staff's proposal.<sup>202</sup>

In sum, contrary to the Tribe's continued criticisms, the draft proposed methodology does not constitute an open-site survey. It is a prescriptive, yet appropriately flexible methodology that fully and reasonably addresses each of the Tribe's stated concerns regarding Staff and contractor support, the Tribe's role, and structure providing a scientific methodology and scientific integrity.

3. The Draft Methodology Is Intended to Be Accomplishable Within the March 2018 Approach Timeframe While Still Addressing Tribal Concerns and Providing Flexibility for Tribal Input

As discussed above, the Board specified in LBP-18-5 that any negotiations regarding the draft proposed methodology must fit within the parameters of the March 2018 Approach. Specifically, the Board stated that the on-the-ground survey methodology must "fit into the two-week periods set out in the March 2018 Approach[.]"<sup>203</sup> As stated in the first section of the Staff's proposed draft methodology, the methodology works within those parameters outlined by the Board.<sup>204</sup> By contrast, the Board found that the Oglala Sioux Tribe's June proposals – the only specific alternatives that have been offered by the Tribe in writing – went "far beyond just suggesting a methodology for the site survey, i.e., a scientific method for how the site should be traversed, catalogued, etc., by expanding the budget, the time frame, and the geographic area involved."<sup>205</sup> The Staff's proposed draft methodology has been specifically designed to address

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<sup>202</sup> See, e.g., Ex. NRC-214 (Methodology) at 10–11. Each section concludes with the following statement: "[This is a working document to be developed in collaboration with the Tribes and based on the Tribes self-determination. Accordingly, additional input regarding [this section] is welcomed and encouraged.]"

<sup>203</sup> Powertech, LBP-18-5, 88 NRC at 135.

<sup>204</sup> Ex. NRC-214 at 2.

<sup>205</sup> Powertech, LBP-18-5, 88 NRC at 133.

the Tribe's major concerns, while also complying with the Board's direction to be consistent with the March 2018 Approach.

As the Staff testifies, the proposed draft methodology "was specifically developed to be consistent with the March 2018 Approach."<sup>206</sup> Tenets of the March 2018 Approach include onboarding a contractor with the experience to facilitate implementation of the March 2018 Approach, involving additional Lakota Sioux Tribes, holding meetings with Tribal Leaders of the Lakota Sioux Tribes, based on their availability and the timeframe for implementing the March 2018 Approach, and involving Tribal Elders via oral history interviews and during the site survey.<sup>207</sup> Additionally, Powertech committed to providing reimbursement and honorarium for the participating Tribes.<sup>208</sup> The proposed draft methodology incorporated each of these aspects of the March 2018 Approach.<sup>209</sup>

The Staff's testimony explains the parameters for the site survey and emphasizes how "the March 2018 Approach provided iterative opportunities to survey the site by providing two non-contiguous, two-week periods for conducting the field survey and access to the entire project site with a focus on the areas of land disturbance. "To the extent possible, the goal was to identify potential project areas to be examined in coordination with the Lakota Sioux Tribes and NRC contractor prior to the field survey."<sup>210</sup> Unlike the written alternative proposals put forth by the Tribe in June 2018<sup>211</sup> and the critiques of the Staff's methodology raised by the Tribe

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<sup>206</sup> Ex. NRC-176 at A.29.

<sup>207</sup> *Id.* at A.20; *see also* Ex. NRC-195 at 1.

<sup>208</sup> Ex. NRC-202, Powertech's December 5, 2018 Response to NRC Staff's November 21, 2018 Letter Confirming Reimbursement and Honoraria at 1 (ML18345A265); Ex. NRC-210, April 11, 2018 Powertech Response to NRC Staff's March 16, 2018 Letter Confirming Reimbursement and Honoraria, at 2 (Apr. 11, 2018) (ML18101A223).

<sup>209</sup> Ex. NRC-176 at A.20.

<sup>210</sup> *Id.*

<sup>211</sup> *See generally* Exs. NRC-197, 198.

at the February 19 and February 22, 2019 meetings,<sup>212</sup> the Staff's methodology accomplishes the goals of the March 2018 Approach within the boundaries framed by the Board. Additionally, as the Staff testifies, the proposed draft methodology is designed to incorporate Tribal input at every point in the process.<sup>213</sup>

4. The Tribe's Criticisms of the Methodology Have Been Largely Directed at Repudiating the March 2018 Parameters

During both meetings that took place after the Staff provided the proposed draft methodology to the Tribe, the Tribe levied criticism of the draft proposed methodology that primarily challenges the Board's direction that the field methodology be limited to a "specific scientific method that would fit into the two-week periods set out in the March 2018 Approach for visiting the physical site."<sup>214</sup> The Board also specifically acknowledged that the Tribe had agreed that Powertech's proposed reimbursement and honorarium, as well as the timeframe for conducting the survey, were reasonable for the effort.<sup>215</sup> As the Staff testifies, the Tribe's subsequent criticism of the proposed draft methodology is nothing more than a repudiation of specific, fundamental elements of the March 2018 Approach.<sup>216</sup>

The meeting summary from the February 19, 2019 teleconference indicates that counsel for the Tribe criticized the Staff for "holding tightly to the language in the Board's Order" with respect to assuring that the survey could be completed in the specified timeframe.<sup>217</sup> On the same teleconference, the Tribe's THPO indicated unambiguously that the two two-week periods

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<sup>212</sup> See generally Exs. NRC-217, 218.

<sup>213</sup> Ex. NRC-176 at A.26, A.31. "[T]he proposed draft methodology not only incorporates the traditional cultural knowledge unique to Tribal experts, but also repeatedly encourages Tribal input." Ex. NRC-176 at A.31.

<sup>214</sup> *Powertech*, LBP-18-5, 88 NRC at 135.

<sup>215</sup> *Id.* at 111–112, 131.

<sup>216</sup> Ex. NRC-176 at A.43.

<sup>217</sup> Ex. NRC-217 at 2; Ex. NRC-176 at A.42–43.

were not “sufficient and adequate.”<sup>218</sup> The Tribe’s own summary of the February 22 face-to-face meeting asserted its position that “a credible methodology [should] be developed...then a time frame and budget determined.”<sup>219</sup> Finally, the Tribe’s March 12, 2019 letter states that the “Tribe has repeatedly reiterated this position that the timelines must be based on the methodology, and that it would be arbitrary and capricious to limit the methodology to timelines created without benefit of a qualified contractor.”<sup>220</sup> The Tribe’s primary argument now seems to be that not only did the Tribe not agree that two two-week periods was reasonable, but that no timeframe or schedule may even be negotiated until the methodology is finalized. This is not consistent with the Board’s direction or the Tribe’s previous position. It accordingly does not alter the reasonableness of the Staff’s proposed draft methodology, which fully conforms to the Board’s direction.

Similarly, during the February 19 and 22, 2019 meetings and again in its March 12, 2019 letter, the Tribe expressed concerns that the amount of the reimbursement and honoraria that Powertech committed to providing to participating Tribes was not sufficient.<sup>221</sup> In the March 12 letter, the Tribe states that it “did not unconditionally agree to any specific dollar amount. Rather, the Tribe unambiguously stated that the methodology required to meet NRC duties must be determined first, and only then could the costs be determined and agreed upon.”<sup>222</sup> As with its repudiation of the time-frame element of the March 2018 Approach, the Tribe now asserts that the methodology must be finalized before it will agree to terms of compensation, despite having previously agreed that the proposed compensation was reasonable.<sup>223</sup> The Tribe’s March 12

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<sup>218</sup> Ex. NRC-176 at A.43.

<sup>219</sup> *Id.*; Ex. NRC-218 at 2.

<sup>220</sup> Ex. NRC-211 at 3.

<sup>221</sup> Ex. NRC-217 at 3; Ex. NRC-218 at 2; Ex. NRC-211 at 2.

<sup>222</sup> Ex. NRC-211 at 2.

<sup>223</sup> Ex. NRC-176 at A.43.

letter also accuses the Staff of selectively quoting the Tribe's February 15, 2018 response; the Tribe relies on its prior statement that "it is difficult to respond precisely without knowing what Powertech is prepared to offer and without input on methodology from a qualified contractor."<sup>224</sup> Regardless of whether the Tribe committed to a "precise" amount in its February 15, 2018 response, it did state that "an amount on the order of what was proposed previously [i.e., by Powertech] would be appropriate."<sup>225</sup> As the Staff testifies, the Tribe's only two proffered alternatives to the Staff's approach have specified approximately \$800,000 and over \$2 million dollars respectively as compensation or reimbursement for the Tribe.<sup>226</sup> Those figures are indisputably not "on the order of what was proposed," and are thus not consistent with the March 2018 Approach. Furthermore, even after receiving the proposed draft methodology, the Tribe has not elaborated on what aspects of the proposed reimbursement and honoraria are inadequate.<sup>227</sup> In addition, the elements the Tribe indicated should be a feature of a tribal site survey were clearly incompatible with the scope of the March 2018 Approach. For example, the Tribe also demanded that the entire 10,000 plus acre project site be surveyed at 10m transects, which would be extremely difficult within the parameters of the March 2018 Approach.<sup>228</sup> Because the Tribe's protestations regarding compensation are based on the future development of a methodology that unequivocally does not fit within the parameters of the March 2018 Approach, the Tribe's rejection of the proposed compensation is further repudiation of the March 2018 Approach.

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<sup>224</sup> Ex. NRC-211 at 2; Ex. NRC-194.

<sup>225</sup> Ex. NRC-194 at 5. The amount that had been previously proposed and agreed upon as reasonable by the Tribe is the exact amount that was proposed in the Staff's February 15, 2019 proposed draft methodology. *Powertech*, LBP-18-5 at 111, 125, 131; Ex. NRC-214 at 7.

<sup>226</sup> Ex. NRC-176 at A.23, 43, 50. The June 2015 figures did not include compensation for other Tribes, but were compensation for the Tribe only. *Id.* at A.23, A.50; Ex. NRC-198.

<sup>227</sup> Ex. NRC-176 at A.43.

<sup>228</sup> *Id.*

Although the Tribe has raised various other criticisms of the proposed draft methodology, those concerns are ultimately peripheral to the determination of whether the methodology is reasonable.<sup>229</sup> And more fundamentally, as the Staff testifies, the Tribe's criticism of the proposed draft methodology does not speak to the reasonableness of the methodology itself, but rather takes issue with the March 2018 Approach.<sup>230</sup> In sum, the Staff proposed a draft methodology that reasonably addressed previous criticisms from the Tribe within the parameters of the March 2018 Approach. However, because the Tribe now describes the agreed-upon parameters of the March 2018 Approach as unacceptable, and because the features that the Tribe seeks to modify or include in the site survey methodology are incompatible with those essential parameters, the Staff determined once again that it will not be able to reach an agreement with the Tribe on an acceptable methodology for the tribal site survey component of the March 2018 Approach.<sup>231</sup> Therefore, as discussed further below in Section IV.C, the reasonableness of the Staff's efforts, together with the Tribe's repudiation of the March 2018 Approach, supports both the Staff's decision to discontinue negotiations and its conclusion that the information sought from the site survey is ultimately incomplete or unavailable.

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<sup>229</sup> For example, the Tribe reiterated the claim that the methodology again proposes an open-site survey. See, e.g., Ex. NRC-211 at 6. As explained in detail in Section IV.B.2 above, this is demonstrably incorrect. The Tribe also makes nebulous claims about reopening the Section 106 process, but as the Tribe itself acknowledges, the NHPA contention has already been resolved in the Staff's favor. See *id.* at 4.

<sup>230</sup> Ex. NRC-176 at A.42, A.43.

<sup>231</sup> *Id.* at A.44. The Tribe has raised other concerns about the draft methodology, such as suggesting that the Tribe was not provided sufficient time to review, and that the draft methodology should have included more specific information such as specific transects for walking the site. These objections from the Tribe are ultimately immaterial because the Tribe's response to the draft methodology reflected a more fundamental incompatibility – that the Tribe does not agree with the overall approach within which the methodology is designed to fit. See *generally* Exs. NRC-217, 218.

C. The Staff Reasonably Determined That the Information It Seeks from the Tribe on its Traditional Cultural Resources is Incomplete or Unavailable and That the Overall Costs of Obtaining It Are Exorbitant

The Staff has repeatedly sought, without success, the Tribe's agreement on a reasonable methodology for conducting a survey of the Dewey-Burdock site for the Tribe's own traditional cultural resources. As described above, the Staff's efforts to develop this methodology have incorporated the reasonable concerns and input of the Tribe, including its criticism of the scientific integrity and specificity of the previous methodologies proposed by the Staff.<sup>232</sup> Furthermore, as requested by the Tribe, the Staff provided a qualified contractor to facilitate development and implementation of the methodology.<sup>233</sup> Mr. Spangler is an expert in developing cultural resource surveys for a wide range of cultural resources that maximize the protection of cultural resources through collaboration, including surveys that depend on direct participation by individuals with detailed knowledge of the specific culture.<sup>234</sup> With Mr. Spangler's expertise, the Staff developed the proposed draft methodology with a structure that would both solicit and fully incorporate the Tribe's cultural knowledge and values, while fitting within the framework of the March 2018 Approach.

However, the Tribe has effectively repudiated the March 2018 Approach, despite the Board's clear direction and the Staff's transparent aim of reaching agreement on a methodology

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<sup>232</sup> Ex. NRC-176 at A.30.

<sup>233</sup> See *id.* at A.3b, A.28.

<sup>234</sup> See *id.* at A.3b, A.28. The Tribe has criticized the Staff's contractor as having no "experience relevant to Oceti Sakowin cultural resources." Ex. NRC-203 at 2. The Tribe did not elaborate on what specific expertise Mr. Spangler lacks or how it demonstrates any deficiency in the proposed methodology. As Mr. Spangler testifies, the Staff and its contractor need not be experts in the culture of an individual Tribe in order to develop a reasonable site survey methodology that satisfies NEPA. Rather, the methodology is reasonable if it provides appropriate opportunities for the Tribe to provide input and to assess the significance of the TCPs in light of its own Tribal values. And Mr. Spangler has extensive experience – in many settings as well as with different Tribes – in working collaboratively to design cultural resource survey methodologies that provide the necessary structure to incorporate those perspectives and protect cultural resources. Accordingly, the Tribe's generalized criticism of Mr. Spangler's Lakota expertise does not demonstrate any genuine dispute with the Staff's approach. Ex. NRC-176 at A.28.

that fits within the established elements of that approach.<sup>235</sup> Even after asserting the reasonableness of the March 2018 Approach, the Tribe has hewn to a position even further removed from a compromise on a methodology than the Tribe advanced under its original Makoche Wowapi proposal.<sup>236</sup> It was reasonable for the Staff to determine under these circumstances—as further reinforced by the similar circumstances faced by the Staff in June 2018—that it will not reach an agreement with the Tribe on an acceptable site survey methodology.<sup>237</sup>

Further, the Staff reasonably determined that without the realistic prospect of an agreement with the Tribe to conduct a tribal site survey, the missing information is not otherwise obtainable. The March 2018 Approach as a whole is premised upon the Tribe’s assertion that a Tribal site survey is necessary to identify the specific information deemed essential to the Staff’s NEPA analysis;<sup>238</sup> as the Staff testifies, the Tribe alone can identify and ascribe significance to its own Tribal cultural resources<sup>239</sup> and without the Tribe’s cooperation and participation, “pursuing other aspects of the March 2018 Approach was not feasible,” and “even if it were, such a compartmentalized approach would not have produced meaningful information for NEPA purposes.”<sup>240</sup>

The Staff’s testimony accordingly explains that, under these circumstances, the Staff has appropriately determined that the information it needs to obtain from the Tribe to satisfy NEPA is

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<sup>235</sup> *Id.* at A.42–43; *see also* Ex. NRC-218 at 1; Ex. NRC-211 at 2, 3, 6.

<sup>236</sup> Ex. NRC-176 at A.43; *Powertech*, LBP-15-16, 81 NRC at 656–57 & n.229 (citing Tr. at 807, 810) (referring in part to “the funds requested to collect tribal cultural information” associated with the Makoche Wowapi proposal and comparable survey efforts); *see also Powertech*, LBP-17-9, 86 NRC at 177 & n.33 (stating “the Board [in LBP-15-16] found that the cost of the survey proposal, estimated at close to \$1 million . . . was unreasonable.”).

<sup>237</sup> Ex. NRC-176 at A.44.

<sup>238</sup> *Id.* at A.20.

<sup>239</sup> *Id.* at A.10.

<sup>240</sup> *Id.* at A.45.

incomplete or unavailable and the overall costs of obtaining it are exorbitant because, despite its offer of a reasonable approach for resolving the concerns raised by the Tribe in this contention, the Tribe has constructively rejected it, and the only alternatives the Tribe has articulated would require costs—in both time and expense—beyond what has already been acknowledged in this proceeding as “patently unreasonable.”<sup>241</sup>

1. The Information Required to Remedy the Board-Identified NEPA Deficiency Must Be Obtained from the Tribe

In LBP-15-16 and LBP-17-9, the Board stated that “[t]o fulfill the agency’s NEPA . . . responsibilities to protect and preserve cultural, religious, and historical sites important to the Native American tribal cultures in the Powertech project area, the NRC Staff must conduct a study or survey of tribal cultural resources before granting a license.”<sup>242</sup> In LBP-17-9, the Board found that because the Staff had yet to conduct “any such study or survey,” the “FSEIS deficiencies remain[.]”<sup>243</sup> The Staff’s approach has always recognized that a Tribal cultural resources site survey with the Tribe’s participation is necessary to obtaining the information on Lakota Sioux cultural resources identified by the Board as necessary to curing the NEPA deficiency in the FSEIS. The Staff’s approach in this regard is consistent with the views expressed by the Tribe. For example, in a 2017 letter to the Staff, the Tribe stated, “it [is] important to recognize that a physical survey of the site must be conducted in order to allow for identification of cultural resources, and that a simple literature review, background check, or some similar effort is not sufficient.”<sup>244</sup> The Tribe added, “[a]iso of great importance is the fact

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<sup>241</sup> *Id.* at A.23, 43, 44, 48–51.

<sup>242</sup> *Powertech*, LBP-15-16, 81 NRC at 653; *Powertech*, LBP-17-9, 86 NRC at 176.

<sup>243</sup> *Powertech*, LBP-17-9, 86 NRC at 194.

<sup>244</sup> Ex. NRC-190 at 3.

that the expertise of the Lakota Sioux is *essential* to a meaningful and comprehensive survey.”<sup>245</sup>

As Mr. Spangler explains, “[t]he intent of a Tribal cultural survey is to allow Tribal members with traditional knowledge to identify locations of cultural and sacred significance to the tribes, which can only be identified and evaluated by the Tribes.”<sup>246</sup> Likewise, while archaeologists may be able to identify physical remains of sites, only Tribes can ascribe significance to these sites.<sup>247</sup> Furthermore, only Tribes can identify “sacred locations that are intangible or not readily identifiable as archaeological sites, such as landforms or places of worship and ceremony.”<sup>248</sup> Thus, without the participation of the Tribe in such a survey, the information to remedy the Board-identified NEPA deficiency cannot be obtained.

## 2. The Tribe Has Effectively Rejected the Staff’s Reasonable Efforts to Obtain This Information

As the Board found in LBP-18-5, “all parties accepted the March 2018 Approach as reasonable, and the NRC Staff began to move forward with its implementation [in 2018], in accordance with the parties’ expressions of support for the March 2018 Approach and its included timeline.”<sup>249</sup> Nevertheless, rather than work with the Staff to incorporate into a site survey methodology any reasonable requirements of the Tribe that the Staff failed to identify in its methodology discussion drafts, the only alternative that the Tribe has specifically proposed was fundamentally incompatible with implementation of the March 2018 Approach.<sup>250</sup> The Oglala Sioux Tribe’s June 2018 Proposal included a wide range of activities and milestones that

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<sup>245</sup> *Id.* at 3 (emphasis added).

<sup>246</sup> Ex. NRC-176 at A.10. As described in IV.B.1.i above and the Staff’s testimony, Ex. NRC-176 at A.40, the Staff’s proposed draft methodology relies on Tribal participation to ensure that it “recognized and respects traditional cultural values.” *Id.* at A.40.

<sup>247</sup> *Id.* at A.10.

<sup>248</sup> *Id.* at A.6.

<sup>249</sup> *Powertech*, LBP-18-5, 88 NRC at 111–112.

<sup>250</sup> *Id.* at 119–122; Ex. NRC-176 at A.22–23.

were not part of the negotiated approach; entailed a significantly larger scope, cost, and time to implement than the selected approach; and did not appear to account for the participation of other tribes or the costs associated with involving other tribes in such an approach.<sup>251</sup>

Accordingly, the Staff determined shortly after the Tribe offered that proposal that the information it sought from the Tribe through implementation of the March 2018 Approach was unavailable.<sup>252</sup>

When the Staff again offered the Tribe an opportunity to participate in the March 2018 Approach, as modified with new milestones for implementation in 2019, the Staff transparently communicated the scope of further negotiations with the Tribe on a site survey methodology—a methodology that conformed to the agreed-upon parameters in the March 2018 Approach.<sup>253</sup> But for the reasons discussed above in IV.B.4 the Tribe’s response to the draft methodology was, as before, not just a rejection of the methodology itself, but a rejection of the previously-negotiated parameters of the March 2018 Approach as a whole.

Indeed, the Tribe made explicit that it does not intend to negotiate a site survey methodology that could be compatible with the March 2018 Approach. In a teleconference arranged by the Board in March 2019 to discuss the parties’ progress on the site survey methodology, the Tribe indicated that the methodology for the site survey should be developed without regard to the parameters of the March 2018 Approach, and the other elements of the approach—i.e. timeframe, cost, duration, and scope—should be renegotiated after the site survey methodology is finalized.<sup>254</sup> Although the Tribe stated that it “never accepted a rigid

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<sup>251</sup> *Id.*

<sup>252</sup> Ex. NRC-176 at A.23. See also NRC Staff’s Motion for Summary Disposition of Contention 1A at 33, 38 (Aug. 17, 2018) (ML18229A343).

<sup>253</sup> Ex. NRC-176 at A.24–A.26.

<sup>254</sup> See, e.g., Tr. at 1576–77, 1590, 1598, 1602-03, 1605, 1612-13.

application”<sup>255</sup> of the March 2018 Approach, this statement is at odds with the Tribe’s involvement in the development of the March 2018 Approach and previous representations that the March 2018 Approach was both reasonable and supportable for the Tribe.<sup>256</sup> The Tribe’s position in negotiations with the Staff on a site survey methodology for the March 2018 Approach, as well as its position in the March 21, 2019 teleconference and in its March 12, 2019 letter, clearly indicate that the Tribe no longer intends to participate in that approach, and instead requires the development of a new approach, much closer in scope to the requirements detailed in its June 2018 proposal.<sup>257</sup> This position would render meaningless the parties’ extensive negotiations to define the parameters of the March 2018 Approach, as well as the Board’s direction in LBP-18-5 regarding the focused scope of negotiations on the site survey methodology.

3. The Staff Reasonably Determined that This Information Cannot Be Obtained by Implementation of Other Elements of the March 2018 Approach

The Staff reasonably determined that without the realistic prospect of an agreement with the Tribe to conduct a tribal site survey, the information it must obtain from the Tribe is not otherwise obtainable through the implementation of other elements of the March 2018 Approach. In its November 2018 letter to the Tribe conveying the fourth opportunity for the Tribe to survey the Dewey-Burdock site, the Staff explained that the elements of the March 2018 Approach were constructed to “work in harmony, rather than in a compartmentalized manner” and that steps rely on successful completion of previous milestones.<sup>258</sup> The Tribe has repeatedly expressed that the only way to obtain the information necessary to cure the Board-identified deficiency in

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<sup>255</sup> Ex. NRC-211 at 2.

<sup>256</sup> See *Powertech*, LBP-18-5, 88 NRC at 111–112, 125, 131; NRC Staff’s Motion for Summary Disposition of Contention 1A at 25–28 (Aug. 17, 2018) (ML18229A343).

<sup>257</sup> Ex. NRC-176 at A.43. The June 2018 proposal has moved even further beyond compromise on a mutually-agreeable approach than its previous Makoche Wowapi proposal. *Id.* at A.51.

<sup>258</sup> Ex. NRC-195 at 1; Ex. NRC-176 at A.45.

the FSEIS is to conduct a site survey of the Dewey-Burdock site.<sup>259</sup> Accordingly, the Tribal cultural resources site survey is, and has been, the key element of the March 2018 Approach. As the Staff testifies, the other elements of the March 2018 Approach cannot substitute for the Tribal cultural resources site survey, and without the Tribe's cooperation and participation, pursuing other aspects of the March 2018 Approach – namely, the oral history interviews, survey report, FSEIS supplement – would neither be feasible nor would it accomplish the NEPA objective.<sup>260</sup> The Staff has previously requested that the Tribe provide any information it may already possess regarding the possible presence of known sites at the Dewey-Burdock project, but the Tribe has not provided any such information to the Staff and continues to assert that an on-the-ground survey is the only way of obtaining this information.<sup>261</sup> Therefore, the Staff reasonably determined that the implementation of the other elements of the March 2018 Approach in the absence of an agreement on a site survey methodology would not provide the information required by the Board to satisfy NEPA.

4. The Staff Reasonably Determined that for Purposes of 40 C.F.R. 1502.22 the Information Required to Remedy the Board-Identified NEPA Deficiency Is Therefore Incomplete or Unavailable and the Costs of Obtaining it Are Exorbitant

In LBP-18-5, the Board stated that if the Staff chose to proceed to an evidentiary hearing, in addition to addressing the reasonableness of the Staff's site survey methodology and its decision to discontinue implementation of the March 2018 Approach, the Staff "must show that proposed tribal alternatives to its March 2018 Approach would be cost prohibitive."<sup>262</sup> In other words, the Staff must justify its determination that the information it needs to satisfy the Board-

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<sup>259</sup> Ex. NRC-176 at A.48.

<sup>260</sup> *Id.* at A.45.

<sup>261</sup> *Id.* at A.46; Ex. NRC-187, NRC November 23, 2016 Letter to the Oglala Sioux Tribe Regarding an Invitation for Teleconference and Continued Consultation, at 1 (Jan. 31, 2017) (ML16327A549); Ex. NRC-188 at 2.

<sup>262</sup> *Powertech*, LBP-18-5, 88 NRC at 136.

identified deficiency in the FSEIS is unavailable in accordance with the requirements of 40 C.F.R. § 1502.22. Section 1502.22 requires that an agency preparing an EIS make clear where information essential to a reasoned choice among alternatives is incomplete or unavailable. If “the overall costs of obtaining the information are not exorbitant,”<sup>263</sup> the agency shall include it in the EIS; if the information “cannot be obtained because the overall costs of obtaining it are exorbitant or the means to obtain it are not known,” the agency must make clear that the information is incomplete or unavailable and address its relevance to the Staff’s evaluation of impacts and the agency’s evaluation of such impacts based on theoretical methods or approaches generally accepted in the scientific community.<sup>264</sup>

As explained in the Staff’s testimony, the costs of the only alternatives that the Tribe has specifically proposed are exorbitant, in terms of both time and expense.<sup>265</sup> The financial expenditures alone would be of a magnitude that the Board has characterized as “patently unreasonable”, and those alternatives would necessitate substantial time delays as well. But even if that were not so, the Tribe’s repudiation of the March 2018 Approach – an approach whose costs the parties, including the Tribe, deemed reasonable, and which would take uncertain (but certainly large) costs to renegotiate – provides sufficient basis to conclude that the information simply cannot be obtained.

- i. The exorbitant cost of the tribal proposals is self-evident in light of the Board’s previous findings

The Staff is aware of two tribal alternatives to the March 2018 Approach promoted by the Oglala Sioux Tribe—the Makoche Wowapi approach proposed by a group of tribes, including

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<sup>263</sup> 40 C.F.R. § 1502.22(a).

<sup>264</sup> 40 C.F.R. § 1502.22(b).

<sup>265</sup> Ex. NRC-176 at A.49–51.

the Oglala Sioux Tribe, in 2012,<sup>266</sup> and the Tribe's June 2018 proposed approach.<sup>267</sup> The Makoche Wowapi proposal was discussed in the 2014 evidentiary hearing in this proceeding and in the Board's partial initial decision, LBP-15-16.<sup>268</sup> The Makoche Wowapi proposal was estimated to cost approximately \$818,000,<sup>269</sup> and would have entailed eight weeks of field work over two sessions to survey just a portion of the Dewey-Burdock site.<sup>270</sup> The Board described its cost as "patently unreasonable"<sup>271</sup> and noted that the Tribe's inflexible adherence to that approach in its negotiations with the Staff was partially responsible for the impasse in reaching agreement on an approach to conduct a site survey.<sup>272</sup> In June 2018, the Tribe proposed an approach that it estimated would cost in excess of \$2 million, and over one year, to implement.<sup>273</sup> The Tribe's estimated cost to implement its June 2018 proposal does not even contemplate or assess the costs associated with the participation of the other tribes it has stated are necessary to its efforts.<sup>274</sup> Based on the Board's previous findings, therefore, the

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<sup>266</sup> *Powertech*, LBP-15-16, 81 NRC at 646.

<sup>267</sup> Exs. NRC-197, 198. The proposal was initially proposed June 12, and was finalized with input from Oglala Sioux Tribe Advisory Council June 15.

<sup>268</sup> *Powertech*, LBP-15-16, 81 NRC at 646.

<sup>269</sup> *Powertech*, LBP-17-9, 86 NRC at 177 n.33.

<sup>270</sup> Ex. NRC-199, Makoche Wowapi / Mentz-Wilson Consultants, Proposal with Cost Estimate for Traditional Cultural Properties Survey for Proposed Dewey-Burdock Project (2012) (Public redacted version) at 1 (Sep. 27, 2012) (ML15244B360).

<sup>271</sup> *Powertech*, LBP-15-16, 81 NRC at 656–57 & n.229 (citing Tr. at 807, 810) (referring in part to "the funds requested to collect tribal cultural information" associated with the Makoche Wowapi proposal and comparable survey efforts); *see also Powertech*, LBP-17-9, 86 NRC at 177 & n.33 (stating "the Board [in LBP-15-16] found that the cost of the survey proposal, estimated at close to \$1 million . . . was unreasonable.").

<sup>272</sup> *Powertech*, LBP-17-9, 86 NRC at 203–205.

<sup>273</sup> Ex. NRC-176 at A.50.

<sup>274</sup> *Id.*

alternatives to the Staff's March 2018 Approach actually proposed by the Tribe are exorbitant on their face.<sup>275</sup>

Notably, CEQ also expressly contemplates that "overall costs" encompasses not just financial costs, but also "costs in terms of time (delay) and personnel."<sup>276</sup> Further, CEQ "intends that the agency interpret 'overall costs' in light of overall program needs."<sup>277</sup> The Tribe's June 2018 proposal contemplates that the Tribe would require more than a year simply to complete the necessary fieldwork.<sup>278</sup> The Tribe's June 2018 proposal likewise does not account for the participation of additional tribes, or the associated impact on the schedule and NRC personnel requirements. Further, given the costs solely in terms of time and delay that the Staff has already incurred to develop the concededly "reasonable" March 2018 Approach and negotiate its implementation and those that would be necessitated by further negotiation of the terms of the site survey methodology with the Tribe, the cost of pursuing any alternative approach at this juncture to obtain the missing information from the Tribe would be exorbitant in light of the agency's needs.<sup>279</sup> The exorbitant cost of pursuing such a path is especially apparent given the FSEIS's disclosure of the range of potential impacts as well as, for example, the existing protections in the license regarding unanticipated discoveries, which are, in effect, mitigation measures for as-yet unidentified cultural resources.<sup>280</sup>

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<sup>275</sup> Although the Board has described the standard as whether obtaining the information is "cost prohibitive," the standard in 1502.22 is a determination that the overall cost of obtaining the information is exorbitant or the means to obtain it are not known. See 40 C.F.R. § 1502.22(a).

<sup>276</sup> 51 Fed. Reg. 15618, 15622 (Apr. 25, 1986); Ex. NRC-176 at A.50.

<sup>277</sup> *Id.*

<sup>278</sup> Ex. NRC-176 at A.50.

<sup>279</sup> *Id.* at A.51.

<sup>280</sup> *Id.* And as the Staff testifies, the information sought from the Tribe "would not have altered the NRC staff's conclusion in the FSEIS that impact determinations for cultural resources of significance to Indian Tribes would range from 'SMALL to LARGE.'" Ex. NRC-176 at A.56. See *also* Ex. NRC-012 at 5–6.

- ii. The overall costs associated with implementation of the Staff’s approach were already deemed reasonable by the Tribe

In this instance, the exorbitance or cost-prohibitiveness of any specific Tribe-proposed alternatives to the March 2018 Approach is immaterial, because the Board and parties have acknowledged that a reasonable, affordable approach exists for obtaining the information the Staff seeks from the Tribe: the March 2018 Approach. In LBP-18-5, the Board found that the March 2018 Approach—which, by its very terms, incorporates the overall financial, time, and resource costs associated with its implementation—constituted a valid and reasonable approach for resolving Contention 1A.<sup>281</sup> Further, the Board found that the Tribe agreed that it was reasonable: “The Oglala Sioux Tribe accepted the March 2018 Approach as reasonable to resolve Contention 1A and does not challenge the reasonableness of the March 2018 Approach as written.”<sup>282</sup> The Board’s finding on this matter was supported by considerable record evidence. For example, in a January 19, 2018, letter, the Tribe informed the Staff that the proposed approach provided a reasonable likelihood of satisfying NEPA and resolving the Tribe’s contention. The Tribe stated that “the components that make up the basic structure of the plan are realistic, logical, and coincide well with the suggestions put forward by the Tribe and the expert testimony provided by NRC Staff and the Tribe in both the Crow Butte and Dewey-Burdock proceedings.”<sup>283</sup> In response to the Staff’s March 16, 2018, letter informing the Tribe of its selection of the approach, the Tribe again stated that the approach appeared

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<sup>281</sup> *Powertech*, LBP-18-5, 88 NRC at 111–112.

<sup>282</sup> *Id.* at 131.

<sup>283</sup> Ex. NRC-193, Oglala Sioux Tribe January 19, 2019 Response to NRC’s December 6, 2018 Letter at 1 (ML18019B267).

reasonable.<sup>284</sup> The Tribe also expressed its support for the timeframe associated with implementing the approach.<sup>285</sup>

Moreover, the Tribe expressly represented that the reimbursement to be provided by Powertech would be appropriate for obtaining the Tribe's participation in the March 2018 Approach. In response to the Staff's direct request that the Tribe specify the amount of reimbursement it contemplated would be necessary to support the Tribe's participation in the March 2018 Approach, the Tribe plainly stated that "an amount on the order of what was proposed previously would be appropriate."<sup>286</sup> As the Staff testifies, Powertech proposed a \$10,000 honorarium per participating tribe, as well as per diem and reimbursement for other associated expenses.<sup>287</sup> In April 2018, Powertech again committed to providing this same amount to the Tribe and other tribes invited to participate in the March 2018 Approach.<sup>288</sup>

In short, there is no dispute that a reasonable, affordable approach for obtaining the necessary information exists, and has been represented by the Tribe as acceptable to it; rather, the issue is that the otherwise reasonable costs cannot be realized because the Tribe has rejected the implementation of the negotiated parameters. Thus, together with the exorbitant cost of the Tribe's proposed alternatives, it is the Tribe's repudiation of its agreement to the March 2018 Approach—on the basis that it now wants an effort that far exceeds in scope, duration, and cost, even the Makoche Wowapi proposal—that forms the basis for the Staff's

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<sup>284</sup> Ex. NRC-219 at 1 ("Based on the approach described, the Tribe continues to believe these efforts may provide a reasonable path toward NRC satisfying NEPA and resolving the Oglala Sioux Tribe's long-standing NEPA contention.").

<sup>285</sup> *Id.* at 4 (describing the proposed timeline as "appearing achievable").

<sup>286</sup> Ex. NRC-176 at A.43; Ex. NRC-194 at 5.

<sup>287</sup> Ex. NRC-176 at A.20; Ex. NRC-210, Powertech Response to NRC Staff's March 16, 2018 Letter Confirming Reimbursement and Honoraria at 2 (ML18101A223).

<sup>288</sup> Ex. NRC-176 at A.30.

determination that it cannot obtain the missing information on cultural resources—information that only the Tribe can provide.<sup>289</sup>

Despite the Board's clear findings regarding the parties' agreement and the narrow focus of further negotiations,<sup>290</sup> and despite the Tribe's stated willingness to negotiate this site survey methodology with the Staff, the Tribe now again (as it did in June 2018) objects to the fundamental parameters of the March 2018 Approach.<sup>291</sup> Where the Tribe has acknowledged that a reasonable, acceptable approach to obtaining this information exists, has agreed to participate in it, and then abruptly changes its position on the most fundamental aspects of the agreed-upon approach, the Tribe cannot reasonably contend that the Staff has failed to demonstrate the cost-prohibitiveness of obtaining the information *that only the Tribe can supply*. Rather, under these circumstances, it is not clear whether the information can be obtained at any cost. That the Tribe has moved even further afield from its previous Makoche Wowapi proposal, rather than closer to a compromise with the Staff, reinforces the reasonableness of this determination. It is this reason, rather than solely the exorbitant cost of the Tribe's alternative proposals, that causes the Staff to determine that the information it seeks is, for purposes of 40 C.F.R. 1502.22, incomplete or unavailable. Accordingly, the Staff explains below in Section IV.D how the record in this proceeding meets the criteria of 40 C.F.R. 1502.22(b) and satisfies NEPA.

D. The Staff's FSEIS, as Supplemented by Information in the Record of This Proceeding, Meets the Criteria of 40 C.F.R. 1502.22 and Satisfies NEPA

Recognizing that the Staff cannot implement the selected approach without the participation of the Tribe, the Staff has appropriately evaluated and documented the existing

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<sup>289</sup> Ex. NRC-176 at A.51.

<sup>290</sup> *Powertech*, LBP-18-5, 88 NRC at 135–136.

<sup>291</sup> Ex. NRC-176 at A.43, A.47–48.

information in the record concerning cultural and historic resources.<sup>292</sup> Although the Tribe has correctly stated that it is the Staff's obligation under NEPA to seek the information necessary to its NEPA analysis,<sup>293</sup> the efforts required of the Staff to obtain this information must be viewed in light of NEPA's rule of reason. In other words, it is the Staff's responsibility to undertake *reasonable* efforts to acquire missing information that is essential to a reasoned choice among alternatives.<sup>294</sup>

In LBP-15-16 and LBP-17-9, the Board stated that until a study or survey of Lakota Sioux cultural resources is conducted, essential information is missing from the FSEIS.<sup>295</sup> And in LBP-17-9, the Board stated that "if the NRC Staff chooses a methodology that does not include complete information about adverse effects on the Tribe's cultural resources, the NRC Staff would need to include an explanation that satisfies the requirements of 40 C.F.R. § 1502.22."<sup>296</sup> The Commission has stated that the Staff can address a deficiency in an environmental review document "if it states that fact, explains how the missing information is relevant, sets forth the existing information, and evaluates the environmental impacts to the best of the agency's ability."<sup>297</sup> Federal courts have been "unwilling to give a hyper-technical reading" of 40 C.F.R. § 1502.22 to require the inclusion of a separate, formal statement in the EIS to the effect that information is incomplete or unavailable where the record in the proceeding supplies the relevant information.<sup>298</sup> To that effect, in an NRC proceeding, a licensing board applied the

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<sup>292</sup> *Id.* at A.54.

<sup>293</sup> *See, e.g.,* Oglala Sioux Tribe's Response in Opposition to NRC Staff Motion for Summary Disposition of Contentions 1A and 1B at 32 (Sep. 1, 2017) (ML17244A910).

<sup>294</sup> *Powertech*, LBP-18-5 at 134 (citing 40 C.F.R. § 1502.22; *Winthrop*, 535 F.3d 1; *Pilgrim*, CLI-10-22, 72 NRC at 208.)

<sup>295</sup> *Powertech*, LBP-17-9, 86 NRC at 200 (citing *Powertech*, LBP-15-16, 81 NRC at 655).

<sup>296</sup> *Powertech*, LBP-17-9, 86 NRC at 200.

<sup>297</sup> *North Anna ESP*, CLI-07-27, 66 NRC at 235–36 (citing § 1502.22(b)).

<sup>298</sup> *Dombeck*, 185 F.3d at 1172–73; *see also WildEarth Guardians*, 828 F. Supp. 2d at 1240 (agency satisfied 40 C.F.R. § 1502.22 where it stated that additional information on climate impacts was unavailable but that available information indicates impacts would not be significant); *High Country*

requirements of 40 C.F.R. § 1502.22 to the Staff's environmental review of an application, and found that the evidentiary record, including testimony, provided the additional explanation required by 40 C.F.R. § 1502.22 to satisfy NEPA.<sup>299</sup>

As determined by the Board in LBP-18-5, and as detailed further in the Staff's Statement of Position and Initial Testimony, the Staff selected a reasonable approach for obtaining the information on cultural resources that the Board found to be missing from the Staff's NEPA analysis. Although the Staff's selected approach was reasonable, the Staff was precluded from fully implementing it by the Tribe's constructive rejection of the approach. As such, the Staff's testimony has explained why the information that the Board found to be inadequate in its merits ruling on Contention 1A is incomplete or unavailable; it is not feasible for the Staff to obtain the information from the Tribe, as the Board contemplated. Therefore, the environmental record of decision in this matter does not include any new information on the presence of sites of historic, cultural, and religious significance to the Lakota Sioux Tribes at the Dewey-Burdock site;<sup>300</sup> any changes to the discussion of potential adverse effects from the Dewey-Burdock project on sites of historic, cultural, and religious significance to the Lakota Sioux Tribes; or any changes to the discussion of potential mitigation measures for such sites.<sup>301</sup> Nonetheless, as discussed below, the information in the FSEIS and in the adjudicatory record provides sufficient information to satisfy the requirements of 40 C.F.R. § 1502.22(b).<sup>302</sup>

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*Conservation Advocates*, 52 F. Supp. 3d at 1194 (record supplied sufficient information on significance of missing data to satisfy 40 C.F.R. § 1502.22).

<sup>299</sup> See *Vogtle*, LBP-09-7, 69 NRC at 720, 731 n.52.

<sup>300</sup> Ex. NRC-176 at A.55.

<sup>301</sup> *Id.* at A.56.

<sup>302</sup> In an NRC adjudicatory proceeding, even if an EIS is found to be inadequate in certain respects, the inadequacy can be cured through the Board's findings on the information in the adjudicatory record. See, e.g., *Crow Butte*, CLI-18-8, 88 NRC at 168–169; *LES*, LBP-05-13, 61 NRC at 404, *aff'd*, CLI-06-22, 64 NRC 37; *Vogtle*, LBP-09-7, 69 NRC at 632.

## 1. The Record Contains a Summary of Available Relevant Information

The FSEIS for the Dewey-Burdock project evaluates the information about Tribal cultural resources that the Staff was able to obtain without the specific input of the Lakota Sioux Tribes.<sup>303</sup> For example, in Chapter 3 of the FSEIS, the Staff described various types of Tribal sites that could have been identified if the Lakota Sioux Tribes had participated in the tribal field survey conducted in 2013.<sup>304</sup> The Staff described the cultural history of the Black Hills with reference to the Lakota Sioux' connection to the area, including the religious and cultural significance of the Black Hills to the Lakota Sioux.<sup>305</sup> In addition, the Staff evaluated in the FSEIS how the Dewey-Burdock project might affect all identified sites within the area of potential effects, not merely those sites that were eligible for listing on the National Register of Historic Places.<sup>306</sup> The Staff presented these impact determinations in the FSEIS, along with its recommended measures to mitigate these impacts.<sup>307</sup> After the Staff completed its evaluations, it provided its impact assessments and mitigation recommendations to all consulting Tribes for comment—including the Oglala Sioux Tribe—as it had committed to doing when it released the Draft SEIS.<sup>308</sup>

In addition, the Staff developed some additional information in the course of the partial implementation of the selected approach. The Staff's contractor prepared a literature review report and provided the report to the Tribes invited to participate in the selected approach as background information for the June site survey effort.<sup>309</sup> The literature review report

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<sup>303</sup> Ex. NRC-176 at A.17, A.55.

<sup>304</sup> Ex. NRC-008-A-1, FSEIS, at 257–63.

<sup>305</sup> *Id.* at 247, 257–59; Ex. NRC-176 at A.17.

<sup>306</sup> Ex. NRC-008-A-2, FSEIS, at 466–86; Ex. NRC-176 at A.18.

<sup>307</sup> Ex. NRC-008-A-2, FSEIS, at 474–86; Ex. NRC-176 at A.16–17.

<sup>308</sup> Exs. NRC-058, NRC-061 through NRC-063.

<sup>309</sup> Ex. NRC-176 at A.54–55.

documented the contractor's review of the existing information on the historic, cultural, and religious resources of significance to the Tribes invited to participate in the selected approach, focusing on information pertaining specifically to the Dewey-Burdock project area and its immediate region.<sup>310</sup> Additionally, during the first week of the June 2018 site survey effort, as the Staff met with the Oglala Sioux Tribe at the Tribe's request to discuss a site survey methodology, the Staff's contractor revisited previously identified tribal sites to precisely identify the tribal site coordinates and document basic descriptive information about them.<sup>311</sup> The Staff's contractor also confirmed the presence of a bald eagle's nest on the Dewey-Burdock site<sup>312</sup> and recorded photographs of viewsheds from the Dewey-Burdock site to confirm that no known place of cultural or religious significance to the Tribes lying beyond the license area boundaries could be seen from within the Dewey-Burdock site.<sup>313</sup> These observations were documented in an additional report from the Staff's contractor to the Staff.<sup>314</sup> These reports, taken together with the FSEIS, reflect the existing relevant scientific evidence regarding the potential impacts of the Dewey-Burdock project on cultural resources.<sup>315</sup>

Finally, 10 C.F.R. § 51.71(b) requires the Staff to include in its EIS "an analysis of significant problems and objections raised by . . . any affected Indian tribes and by other interested persons." The concerns and objections of the Tribe are documented throughout the record of this proceeding, particularly in the Tribe's correspondence with the Staff<sup>316</sup> and its

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<sup>310</sup> *Id.* at A.54; Ex. NRC-224.

<sup>311</sup> Ex. NRC-176 at A.54.

<sup>312</sup> *Id.*; Ex. NRC-196, Summary of Tribal Cultural Heritage Resources Data Acquired in June 2018 at the Dewey-Burdock In Situ Uranium Recovery Project – Fall River and Custer Counties, South Dakota, at 8–9 (July 2018) (ML18211A560).

<sup>313</sup> Ex. NRC-176 at A.54–55.

<sup>314</sup> *Id.* at A.54; Ex. NRC-196.

<sup>315</sup> *Id.* at A.54–55; *see also* 40 C.F.R. § 1502.22(b)(3).

<sup>316</sup> *See generally* Exs. NRC-223, Oglala Sioux Tribe's January 31, 2011 Letter (ML110340107); OST-017; NRC-190; NRC-203; NRC-211; NRC-217; NRC-218.

pleadings, including its responses to the Staff's motions for summary disposition<sup>317</sup> and in its own motion for summary disposition of this contention.<sup>318</sup> The Tribe's significant objections are noted in the rulings of the Board on these motions and in its partial initial decision, LBP-15-16.<sup>319</sup>

2. The Record Addresses the Relevance of the Incomplete or Unavailable Information and Why It Would Not Materially Affect Staff's Evaluation of Impacts to Cultural Resources

The information on Lakota Sioux cultural resources that may have resulted from a Tribal cultural resources site survey of the Dewey-Burdock site would have been relevant to “evaluating reasonably foreseeable significant adverse impacts on the human environment”<sup>320</sup> insofar as the identification of specific cultural resources of significance to the Lakota Sioux Tribes may have enabled the Staff to assess the impacts of the project on those resources and, if appropriate, identify specific mitigation measures for them.<sup>321</sup> Importantly, however, this information would not have materially affected the Staff's determination regarding the adverse impacts to cultural resources. In the FSEIS, the Staff evaluated how the Dewey-Burdock project might affect historic and cultural resources within the area of potential effects<sup>322</sup> and concluded that the potential overall impacts to these resources would be “SMALL to LARGE.”<sup>323</sup> Had the selected approach resulted in the identification of potential impacts to, and mitigation measures for, specific Lakota Sioux cultural resources, this information—at most—might have enabled the Staff to more particularize its assessment of specific cultural resources, including mitigating or

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<sup>317</sup> See generally Oglala Sioux Tribe's Response to the Staff's Motion for Summary Disposition (Sep. 1, 2017) (ML17244A910), Oglala Sioux Tribe's Response to the Staff's Motion for Summary Disposition (Sep. 21, 2018) (ML18264A346).

<sup>318</sup> See generally Oglala Sioux Tribe's Motion for Summary Disposition (Aug. 17, 2018) (ML18229A341).

<sup>319</sup> See, e.g., *Powertech*, LBP-15-16, 81 NRC at 644–51.

<sup>320</sup> 40 C.F.R. § 1502.22(b)(2).

<sup>321</sup> Ex. NRC-176 at A.56.

<sup>322</sup> Ex. NRC-008-A-2, FSEIS, at 466–86.

<sup>323</sup> Ex. NRC-008-A-1, FSEIS, at 43–44; Ex. NRC-008-A-2, FSEIS, at 466–86; Ex. NRC-176 at A.18, A.55–56.

avoiding potential impacts to these resources.<sup>324</sup> But because the Staff had already determined that the issuance of the materials license was the preferred alternative even where the potential impacts to cultural resources may be as great as “LARGE,”<sup>325</sup> this additional information simply would not have been material to the Staff’s determination regarding the potential adverse impacts to cultural resources or its ultimate NEPA decision regarding a preferred alternative.

3. The FSEIS, as Supplemented by the Record of This Proceeding, Evaluates Potential Impacts of the Project on Cultural Resources Based on the Relevant Available Information

In the FSEIS, the Staff determined that the overall potential impacts to historic and cultural resources from the Dewey-Burdock project would range from “SMALL to LARGE.”<sup>326</sup> The Staff’s partial implementation of the selected approach did not result in the identification of new sites of historic, cultural, or religious significance to Lakota Sioux Tribes, or information concerning the significance to the Lakota Sioux Tribes of known tribal sites at the Dewey-Burdock site.<sup>327</sup> Further, the information described in the literature review report and field observations report developed by the Staff’s contractor does not provide a basis for the 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.”<sup>328</sup> This is because the information in these reports is not materially different from the information already assessed by the 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

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<sup>324</sup> Ex. NRC-176 at A.53.

<sup>325</sup> See Ex. NRC-011 at 3; Ex. NRC-008-A-1, FSEIS, at 43–44.

<sup>326</sup> Ex. NRC-008-A-1, FSEIS, at 43–44; Ex. NRC-008-A-2, FSEIS, at 466–86; Ex. NRC-176 at A.18.

<sup>327</sup> Ex. NRC-176 at A.46, A.55.

<sup>328</sup> Ex. NRC-176 at A.55.

significance of known tribal sites to the Lakota Sioux Tribes.<sup>329</sup> Accordingly, the information obtained by the Staff during the partial implementation of the selected approach supplements, but does not materially affect, the Staff's analysis and conclusions in the FSEIS regarding the potential impacts of the Dewey-Burdock project on cultural resources.<sup>330</sup>

4. Requiring Further Analysis To Satisfy 40 C.F.R. § 1502.22 In this Case Would Impose a Substantive Requirement on the Staff

Consistent with the criteria of 40 C.F.R. § 1502.22, the Staff has demonstrated why the information it sought to obtain from the site survey to address the Board-identified NEPA deficiency is incomplete or unavailable. The Staff has also demonstrated why the overall costs of obtaining the information are exorbitant. The record and the Staff's testimony have likewise provided the analysis called for by 1502.22(b) regarding the relevance of the information, the existing evidence relevant to the impact analysis, and the Staff's reasoned evaluation of those impacts.

The Commission does look to CEQ's regulations as guidance.<sup>331</sup> Nevertheless, the Commission's "longstanding policy is that the NRC, as an independent regulatory agency, 'is not bound by those portions of CEQ's NEPA regulations' that, like [40 C.F.R. §] 1502.22, 'have a substantive impact on the way in which the Commission performs its regulatory functions.'"<sup>332</sup> As the Board has previously observed, from a procedural standpoint the Commission has generally viewed § 1502.22's provisions as compatible with the agency's responsibility for deciding whether information that has not been obtained is relevant and, if so, whether it is

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<sup>329</sup> *Id.*

<sup>330</sup> *Id.*; see also 40 C.F.R. § 1502.22(b)(4).

<sup>331</sup> *Diablo Canyon*, CLI-11-11, 74 NRC at 443–44.

<sup>332</sup> *Diablo Canyon*, 74 NRC at 444 (quoting Final Rule, Environmental Protection Regulations for Domestic Licensing and Related Regulatory Functions and Related Conforming Amendments, 49 Fed. Reg. 9352, 9352 (Mar. 12, 1984)).

important to the agency's decision.<sup>333</sup> With respect to the applicability of 40 C.F.R. § 1502.22, the Commission has expressed its intent to follow the standard in § 1502.22(a), but it has noted that "implementation of § 1502.22(a) may present substantive issues, specifically whether information which is not known is (a) relevant to adverse impacts, (b) essential to a reasoned choice among alternatives, and (c) obtainable at a cost which is not exorbitant."<sup>334</sup> In addition, the Commission stated that it "believe[d] that it will seldom, if ever, be called upon to determine whether the cost of obtaining unknown information deemed relevant to adverse impacts and essential to a reasoned choice among alternatives is or is not exorbitant," but "[i]n the unlikely event that the issue is presented, the Commission reserves the right to resolve the matter in a manner which is consistent with the Commission's responsibilities as an independent regulatory agency."<sup>335</sup>

In the ensuing years, the Commission has reiterated that it may look to 40 C.F.R. § 1502.22 for guidance, but it has specifically declined to declare it binding.<sup>336</sup> Notably, the Commission held that a Board erred in its reformulation of a contention that would make 40 C.F.R. § 1502.22 binding on the NRC.<sup>337</sup> The Commission has also noted that its policy of

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<sup>333</sup> See *Powertech*, LBP-18-5, 88 NRC at 129, n.224 (referencing Final Rule, Environmental Protection Regulations for Domestic Licensing and Related Regulatory Functions and Related Conforming Amendments, 49 Fed. Reg. 9352, 9356 (Mar. 12, 1984)).

<sup>334</sup> 49 Fed. Reg. 9352, 9353 (Mar. 12, 1984).

<sup>335</sup> *Id.* at 9353–54. Furthermore, with respect to § 1502.22(b), the Commission observed that to the extent the regulation extends to "specifying what information the agency must consider in order to achieve the NEPA policy goal of minimizing adverse impacts and in order to make a reasoned decision among alternatives, § 1502.22(b) becomes, in essence, a substantive requirement rather than a procedural regulation." *Id.* at 9356. 40 C.F.R. § 1502.22 was subsequently amended, in particular to remove a requirement in 1502.22(b) that if the agency proceeds with the action, the agency must perform a worst case analysis and an indication of the probability or improbability of its occurrence. Final Rule, National Environmental Policy Act, Incomplete or Unavailable Information, 51 Fed. Reg. 15,618, 15,618, 15,621 (Apr. 25, 1986). That revision to 40 C.F.R. § 1502.22 did not materially affect the language or standard in § 1502.22(a). *Id.* at 15,621.

<sup>336</sup> See *Diablo Canyon*, CLI-11-11, 74 NRC at 443–44; *North Anna ESP*, CLI-07-27, 66 NRC at 235–36 & n.115 (2007); *Diablo Canyon ISFSI*, CLI-08-1, 67 NRC at 12.

<sup>337</sup> See *Diablo Canyon*, CLI-11-11, 74 NRC at 443–44.

taking account of CEQ regulations voluntarily is tempered by its overriding responsibilities as an independent regulatory agency.<sup>338</sup>

In this case, the reasonable efforts the Staff has made are more than sufficient under NEPA's overriding "practical rule of reason" to show that the agency has taken the necessary hard look at the potential impacts to cultural resources.<sup>339</sup> Under these circumstances, to interpret 1502.22 to require additional efforts to obtain the incomplete or unavailable information – including further negotiations with the Tribe – would have the effect of imposing substantive requirements on the agency. The record and the Staff's testimony demonstrate that the missing information sought from the site survey can only be obtained from the Tribe (an intervenor opposed to the licensing action), that the Staff has taken an objectively reasonable approach to obtaining the information, and that the Tribe has constructively rejected that reasonable approach.<sup>340</sup> In this situation, § 1502.22 cannot be interpreted to mean that in practice the Staff's NEPA obligations can only be satisfied if the Tribe endorses the reasonableness of those efforts and participates in a survey. To do so would elevate obtaining this information (and the means of obtaining it, in terms of both time and expense) into a substantive obligation.<sup>341</sup>

The record demonstrates the reasonableness of the Staff's efforts. To remain consistent with NEPA's rule of reason, with the agency's ability to move forward with reasoned decisionmaking, with NEPA's procedural rather than substantive requirements, and with the Commission's emphasis that the CEQ regulations will be understood in the context of, and

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<sup>338</sup> See *Diablo Canyon ISFSI*, CLI-08-1, 67 NRC at 12, n.49 (referencing 10 CFR 51.10(b)).

<sup>339</sup> *Pilgrim*, CLI-10-22, 72 NRC at 208 (NEPA requirements are "tempered by a practical rule of reason" (internal citations omitted)).

<sup>340</sup> See Ex. NRC-176 at A.44; Ex. NRC-220, NRC Staff Comments on February 22, 2019 Meeting Summary at 1 (pg. 6 of PDF) (ML19087A343).

<sup>341</sup> *Pilgrim*, CLI-10-11, 71 NRC at 316 (NEPA allows agencies "to select their own methodology as long as that methodology is reasonable." (citing *Winthrop*, 535 F.3d at 13)).

consistent with, its responsibilities as an independent regulatory agency, the determination of what satisfies § 1502.22 in this proceeding cannot logically demand more.<sup>342</sup>

5. The FSEIS, Coupled with the Evidentiary Record, Is the Complete NEPA Record

The Commission has repeatedly affirmed the principle that “the adjudicatory record and Board decision (and, of course, any Commission appellate decisions) become, in effect, part of the FEIS.”<sup>343</sup> NRC hearings provide “in-depth scrutiny of the contested aspects of the Staff’s environmental review,” and the Commission has underscored that evidence in the hearing record “may refine, amplify, or correct” the Staff’s environmental review document.<sup>344</sup> The Board’s conclusion here can be made on the basis of the entire adjudicatory record. As the Staff’s testimony demonstrates, the information that the Staff obtained in the course of seeking to implement the survey did not materially affect the FSEIS’s analysis and conclusions.<sup>345</sup> Likewise, and as discussed above, the information the Staff sought to obtain via the site survey would not have altered either the Staff’s ultimate impact conclusions in the FSEIS or the ultimate decision to issue the license.<sup>346</sup> Accordingly, to require a formal supplement to the FSEIS to present information that ultimately does not alter the Staff’s impact conclusions, but solely confirms what has already been scrutinized in the public forum of this evidentiary hearing—that additional information regarding cultural resources could not be obtained – would

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<sup>342</sup> *Pilgrim*, CLI-10-22, 72 NRC at 208 (NEPA requirements are “tempered by a practical rule of reason” (internal citations omitted)); *Pilgrim*, CLI-10-11, 71 NRC at 315 (agencies “must have some discretion to draw the line and move forward with decisionmaking” (citing *Winthrop*, 535 F.3d at 11)); *Turkey Point*, CLI-16-18, 84 NRC at 174 (“NEPA, as a procedural statute, does not require any particular substantive result.”) (citing *Methow Valley*, 490 U.S. at 350); *Diablo Canyon ISFSI*, CLI-08-1, 67 NRC at 12.

<sup>343</sup> *LES*, CLI-98-3, 47 NRC at 89. *Strata*, CLI-16-13, 83 NRC at 595, *aff’d*, *Nat. Res. Def. Council v. NRC*, 879 F.3d 1202 (D.C. Cir. 2018) (the “hearing record, and subsequent decision on a contested environmental matter augment the environmental record of decision”).

<sup>344</sup> *Crow Butte*, CLI-18-8, 88 NRC at 168–169; *see also Limerick*, ALAB-819, 22 NRC at 707 (the hearing process itself “allows for additional and...more rigorous public scrutiny of the [EIS] than does the usual ‘circulation for comment.’”), *review denied*, CLI-86-5, 23 NRC 125 (1986), *aff’d in part and denied in part on other grounds*, *Limerick Ecology Action, Inc. vs. NRC*, 869 F.2d 719 (3d Cir. 1989).

<sup>345</sup> Ex. NRC-176 at A.55.

<sup>346</sup> *Id.* at A.56.

“serve no important NEPA goal.”<sup>347</sup> In this proceeding, the Board should therefore follow the Commission’s longstanding practice of relying on the Board’s adjudicatory findings to augment the environmental record of decision and resolve Contention 1A by determining that the Staff has complied with NEPA.

V. Conclusion

Based on the record in this proceeding, including the FSEIS and the Staff’s testimony, the Board should conclude that the Staff has taken the necessary “hard look” to meet its NEPA obligations, and it should resolve Contention 1A in the Staff’s favor.

Respectfully submitted,

**/Signed (electronically) by/**

Robert G. Carpenter  
(301) 287-9118  
Robert.Carpenter@nrc.gov

**/Executed in Accord with 10 C.F.R. 2.304(d)/**

Lorraine J. Baer  
(301) 287-9111  
Lorraine.Baer@nrc.gov

Counsel for the NRC Staff  
U.S. Nuclear Regulatory Commission  
Office of the General Counsel  
Mail Stop: O14-A44  
Washington, D.C. 20555-0001

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<sup>347</sup> *Crow Butte*, CLI-18-8, 88 NRC at 170. Cf. *Nat. Res. Def. Council v. NRC*, 879 F.3d at 1210–12 (where Board augmented environmental record of decision with additional information but the information did not alter Board’s conclusion, no “harmful consequence of the supplementation” was identified and there was therefore “nothing to be gained by ... consider[ing] the same information again”); *Friends of the River v. FERC*, 720 F.2d 93, 106 (D.C. Cir. 1983) (declining to remand for new environmental impact statement where agency, in response to public comments, already had investigated and addressed issues in publicly accessible opinion).