UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

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

Hearing Exhibit

Exhibit Number: Exhibit OST-053

Exhibit Title: September 21, 2018 Oglala Sioux Tribe Response to Motion for Summary Disposition

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

Pursuant to 10 C.F.R. § 2.1205 and this Board's Order dated July 19, 2018, the Oglala Sioux Tribe ("Tribe") hereby submits this Response in Opposition to the NRC Staff's Motion for Summary Disposition of Contention 1A ("Motion"). Incorporated in this Response is the Tribe's objection to NRC Staff's Statement of Material Facts in support of its Motion for Summary Disposition.

A. Summary Disposition Standards

10 C.F.R. § 2.1205(c) states, "[i]n ruling on motions for summary disposition, the presiding officer shall apply the standards for summary disposition set forth in subpart G of this part." Subpart G, Section 2.710(d)(2), provides, "[t]he presiding officer shall render the decision sought if the filings in the proceeding, depositions, answers to interrogatories, and admissions on file, together with the statements of the parties and the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a decision as a matter of law." As conceded by NRC Staff, the moving party carries the burden of showing that it is entitled to summary disposition. Motion at 9.

Applicable NRC standards governing summary disposition are set forth in 10 C.F.R. § 2.710. The standards are based upon those the federal courts apply to motions for summary judgment under Rule 56 of the Federal Rules of Civil Procedure. *See Advanced Medical Systems, Inc.* (One Factory Row, Geneva, Ohio 44041), CLI-93-22, 38 NRC 98, 102 (1993). Summary disposition is appropriate where relevant documents and affidavits "show that there is no genuine issue as to any material fact and that the moving party is entitled to a decision as a matter of law." 10 C.F.R. § 2.710(d)(2).

The correct inquiry is whether there are material factual issues that "properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Anderson v. Liberty Lobby*, 477 U.S. 242, 250 (1986). At issue is not whether evidence "unmistakably favors one side or the other," but whether "there is sufficient evidence favoring the non-moving party" for a reasonable trier of fact to find in favor of that party. *Id*. at 249-252.

In ruling on a motion for summary disposition a licensing board (or presiding officer), "the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for [hearing]." *Id.* at 249. "The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Id.* at 255. If "reasonable minds could differ as to the import of the evidence," summary disposition is not appropriate. *Id.* at 250-51. Summary disposition is not appropriate if it would require a licensing board to engage in the making of "[c]redibility determinations, the weighing of evidence, [or] the drawing of legitimate inferences from the facts." *Id.* at 255. Caution should be exercised in granting summary disposition, which may be denied if "there is reason to believe that the better course would be to proceed to a full [hearing]." *Id*.

The NRC Motion does not exist in a vacuum, but must be examined in light of the previous rulings and findings of the Board and Commission, notably that "that the FSEIS [had] not adequately addressed the environmental effects of the Dewey-Burdock project on Native American cultural, religious, and historic, resources …" LBP-15-16, 81 NRC 618 (2015). at 655, 657. The Commission confirmed that the Board found that the

> 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.

LBP-17-9, 86 NRC at 193 (citing Tribe Response in Opposition at 33). In denying Powertech's argument "that that the FSEIS was already sufficient before the 2014 evidentiary hearing, it is a challenge to the Board's findings in LBP-15-16 and essentially a late-filed motion for reconsideration of CLI-16-20." CLI-18-07 at 11.

This Board has characterized NRC Staff's duty at this stage in the case in the following terms:

> In our order issued October 19, 2017, we outlined four possible paths to resolve this contention. The Board observed that the parties had the following options:
>
> > (1) in the near term, [the parties] may submit a joint motion to request the appointment of a Settlement Judge to conduct settlement negotiations to assist in the resolution of this dispute pursuant to 10 C.F.R. § 2.338, and pursue that avenue in an attempt to reach a settlement and dismissal of the contention; (2) [the parties] may continue to confer with one another in an attempt to find a method of addressing the deficiencies in the FSEIS that is mutually agreeable to both parties, and, if successful, file a joint motion for dismissal of the contention; (3) the NRC Staff may, without consultation with the Oglala Sioux Tribe, consider and select a method[238] for addressing the FSEIS deficiencies, and file a new motion for summary disposition; or (4) if options one through three do not result in a resolution, prepare for and participate in an evidentiary hearing to resolve Contention 1A on the reasonableness of the terms of the NRC Staff's proposed open-site survey.

* * * * *

> [238] This may be a method entirely different from the currently proposed open-site survey or a version of the open-site survey that the NRC Staff can argue—with adequate legal and factual support—is not subject to the dispute of material fact on the method's reasonableness.

Board's July 19, 2018 Order (Establishing Procedures for Filing Motions for Summary Disposition) at 3-4. NRC Staff have chosen none of the four options above and instead is seeking summary disposition without adopting a method aimed at conducting any further NEPA analysis. In short, NRC Staff has not complied with the Board's Order, and the Board should deny the instant Motion and order NRC Staff to comply with NEPA.

Short of that proper result, this response confirms that there are disputes of material fact regarding the NRC Staff's abandonment of the most recent survey effort and reject any other efforts to establish any other reasonable approach of providing for a Supplemental NEPA analysis.

B. The Facts Presented by NRC Staff are Disputed

NRC Staff asserts that there are no genuine issues of material fact. Motion at 2. In one respect, that is correct. There is no dispute that NRC Staff has not supplemented or otherwise updated the SFEIS and has conducted no further cultural resource surveys or other substantive effort to identify, analyze impacts to, or develop mitigation for cultural resources at the proposed mine site. NRC has proffered no new NEPA-compliant survey, analysis, or other evidence that could rehabilitate the established NEPA violations. Motion at 33 ("the environmental record of decision in this matter does not include any new information").

Because NRC Staff failed to address the issues identified by the ALSB, Commission, and United States Court of Appeals for the D.C. Circuit, denial of the Motion based on NRC Staff's failure to proffer any evidence of NEPA compliance is the proper result.

The facts presented by NRC Staff focus on the same underlying dispute over cultural resources surveys presented at the hearing in Rapid City and are contested. The Statement of Material Facts submitted by NRC Staff contains numerous mischaracterizations and incomplete descriptions of the phone calls, emails, meetings, and other underlying events that NRC Staff relies upon to justify its unilateral abandonment of discussions with the Tribe as to an acceptable methodology for a cultural resources survey. As the previous Board schedule recognized, these questions of fact are properly resolved based on an evidentiary hearing.

C. Material Facts

Contrary to NRC Staff's narrative, the evidence NRC Staff provides is an incomplete account of events that NRC Staff has embellished with unsupported assertions, and disputed facts. The Tribe's account of these activities and rebuttal to NRC Staff assertions confirms a dispute over the facts leading up to NRC Staff's unilateral decision to abandon the survey process and forgo any supplemental NEPA review:

1. NRC Staff asserts that it has taken a "hard look" and "can reasonably do no more" to conduct any efforts to effectuate a survey of cultural resources at the site. Motion at 2. NRC Staff fails to
2. NRC Staff was "precluded from fully effectuating its approach" as a result of negotiations between NRC Staff and the Tribe regarding methodology. Motion at 2. The "approach" specifically contemplated that a survey methodology would be negotiated and developed in coordination with the Tribe. *See* ML18152A676 ("Purpose of Webinar: To develop and discuss the survey methodology to be utilized during the field survey."); ML18075A502 (Enclosure with survey approach timeline). Due to budget and timing constraints, NRC Staff never prepared a methodology. ML18159A192 at 10

(recognizing contractor's services are "being constrained by scope, schedule, and budgetary considerations…."); *see also* Declaration of Kyle White at ¶ 38. Instead, in preparing for the conference calls and webinars for the purposes of going into the field on June 11, 2018, NRC Staff contractors provided only a basic outline of a work plan limited to a "windshield tour" and revisit the poorly documented sites identified by the 2013 survey – without providing for having any survey methodology in place. ML18157A092 (NRC Staff's June 5, 2018 Open Site Survey Proposal); Declaration of Kyle White at ¶ 34.

3. NRC Staff asserts that the FEIS was adequate to comply with NEPA. Motion at 2-3. The NRC Staff revives Powertech's argument "that that the FSEIS was already sufficient before the 2014 evidentiary hearing" which was rejected as "a challenge to the Board's findings in LBP-15-16 and essentially a late-filed motion for reconsideration of CLI-16-20." CLI-18-07 at 11.

4. NRC Staff asserts that it provided an impact assessment and mitigation recommendations to all tribes as it had committed to in the DEIS. Motion at 4. However, to the contrary, as stated in the NRC Staff Answer to Contentions on the Draft Supplemental Environmental Impact Statement with respect to the cultural resources survey issue:

> As the Staff explained when it issued the DSEIS, however, it is working to facilitate a field survey of the Dewey-Burdock site in order to obtain additional information on historic properties. When the survey is complete, the Staff will supplement its analysis in the DSEIS and circulate the new analysis for public comment.

NRC Staff's Answer to Contentions on Draft Supplemental Environmental Impact Statement at 13 (ML13066B030). The promised field survey and information were not provided in the FSEIS or any other NEPA environmental document.

5. NRC Staff asserts that its March 2018 approach presented a "reasonable methodology" for a survey. Motion at 16. However, NRC Staff admits that there was no "methodology" provided at all. Motion at 31-32 N. 154 (acknowledging the "the absence of an agreed-upon tribal field survey methodology"). In fact, no methodology was ever presented by NRC Staff, as the "approach" called for the development of a scientifically defensible methodology before going into the field. ML18075A502 (Enclosure with survey approach timeline calling for meetings between the Tribe and NRC Staff in May-June 2018 "to discuss and establish the survey methodology and the areas to be examined during the field survey."). The initial work plan presented by NRC Staff contained no identifiable scientific methodology for a cultural resources survey. Declaration of Kyle White at ¶ 34. The NRC Staff's plan constituted nothing more than the equivalent to the "open site' survey that the Tribe had repeatedly rejected. *Id*. at ¶¶ 33-35.
6. NRC Staff asserts that the Tribe's engagement in negotiations over a survey methodology constitutes a "constructive rejection" of the NRC Staff's survey approach based on an alleged "eleventh-hour proposal of a significantly different, fundamentally incompatible approach." Motion at 16. However, the Tribe never rejected any approach or delivered any ultimatum of any kind to NRC Staff. Declaration of Kyle White at ¶ 41. Rather, the Tribe's communications with NRC Staff and circulation of the Tribe's June 12 and June 15 proposals were meant to facilitate the discussions and provide NRC Staff and its contractors information on the type of methodologies the Tribe would like to incorporate to the degree possible into the field survey. *Id*. The Tribe expected NRC Staff to review the Tribe's input and continue working on the methodology, while also commencing field activities. *Id*. at ¶ 44. Contrary to NRC Staff's narrative, it was NRC Staff that abruptly

cancelled the survey approach and abandoned any efforts to discuss survey methodologies – despite there being a full week of field survey time available on the NRC Staff approach schedule. *Id*. at ¶¶ 44-45. NRC Staff did not provide, and has yet to provide, the Tribe with any reasoned explanation as to why every single aspect of the Tribe's proposals were "fundamentally incompatible" with the NRC Staff approach and could not be incorporated in any manner or to any degree. *Id*. at ¶¶ 44-45.

7. NRC Staff asserts that it brought in a "qualified contractor" to facilitate the development of the field survey methodology. Motion at 23. However, the contractor possessed no demonstrated Lakota cultural experience and failed to provide the Tribe with any identifiable scientific methodology for conducting the field survey. Declaration of Kyle White at ¶¶ 34-35. Mr. Nickens communicated that the open site approach was not the type of approach he would recommend and that he was constrained in how he could do the job due to budgetary, scope, and timing constraints. *Id*. at ¶¶ 37-38. NRC Staff never released the work plan under which the NRC Staff contractors were working. *Id*. at ¶ 39. The NRC contractor never provided any substantive methodologies for the Tribe to review – forcing the Tribe to create the June 12 and June 15 proposals in order to further the discussion of methodologies. *Id*. at ¶¶ 40-44.
8. NRC Staff asserts that the NRC Staff selected approach "was cut short" by the Tribe. Motion at 23. However, it was the NRC Staff that ended the approach prematurely, despite the Tribe's continued willingness to work to design a field survey methodology. Declaration of Kyle White at ¶¶ 43-45.
9. NRC Staff asserts that its contractor "developed two options for methodology" for the field survey. Motion at 23-24. However, these were one-page outlines, contained no

methodology, and relied on an ad-hoc approach to collecting information. ML18152A676 at 22-23. The NRC Staff contractor did not present any methodology. Declaration of Kyle White at ¶¶ 40-41.

10. NRC Staff asserts that the "Tribe did not object to working with these contractors," and implies that the Tribe therefore endorsed them and was somehow bound to support actions the contractors took. Motion at 24. This is not accurate, as the Tribe repeatedly requested involvement in the decision about selecting a contractor and was denied any participation by NRC Staff. March 30, 2018 Response to NRC Staff's March 16, 2018 Cultural Resources Survey Proposal at 2 (ML18089A655); March 27, 2018 conference call transcript, page 1355, lines 12-18 (ML18087A744). The Tribe never endorsed Dr. Nickens as a contractor. Rather, the Tribe merely pointed out in its May 31, 2017 letter that, as NRC's own witness in the Crow Butte case, Dr. Nickens refuted a survey approach that did not include relevant cultural components as part of an appropriate methodology. May 31, 2017 letter from Tribe to NRC Staff at 3-4 (ML17152A109). The Tribe objected to the NRC Staff contractor's June 5, 2018 one-page work plan, which amounted to an open-site survey approach, immediately. Declaration of Kyle White at ¶ 36.
11. NRC Staff asserts that the Tribe endorsed the March 2018 approach as a reasonable approach that could reasonably be expected to resolve Contention 1A and as such, somehow now cannot reasonably maintain objection to issues regarding a field survey methodology. Motion at 25. However, the March 2018 approach specifically left the issue of development of a methodology to further negotiation. *See* Enclosure 1 to March 16, 2018 letter (ML18075A502)(listing May 28-June 1 as time period "to discuss and

establish the survey methodology and the areas to be examined during the field survey."); April 6, 2018 conference call transcript (ML18100A912) at page 1395, lines 17-25 (Tribe's counsel identifying significant issues that remained to be resolved in the March 2018 proposal, particularly the determination of the field survey methodology).

12. NRC Staff asserts that the Tribe presented NRC Staff with an "abrupt proposal" regarding the field survey methodology. Motion at 28. This is not accurate. Determination of the survey methodology was expressly contemplated as part of the March 2018 proposal's negotiations on methodology and Tribe put its concepts forward because NRC Staff and its contractors brought no discernable scientific methodology to the negotiations for discussion. *See* ML18152A676 at 13 ("Purpose of Webinar: To develop and discuss the survey methodology to be utilized during the field survey."); ML18157A092 (NRC Staff's June 5, 2018 Open Site Survey Proposal); Declaration of Kyle White at ¶ 40. Dr. Stoffle stopped participating after the Webinar and follow up call were completed. *Id*. at ¶ 35.

13. The University of Arizona, after being contacted to establish normal protocols involving ownership and confidentiality of cultural resources information, disavowed any institutional participation. *See* email string, ML18159A504. The University of Arizona protocols confirm that ownership and confidentiality are key aspects of any cultural resource survey methodology:

> Universities and tribes will collaborate in the design of research in which they jointly choose to participate. Each party to the joint research will consult with all other parties regarding confidentiality, ownership of data and results, use of land or other resources, ownership and disposition of any biological materials collected in the course of research, proposed changes in the research, and proposed publications or presentations relating to the research. Each party will strive to communicate in a manner that is reasonably understandable by all parties.

University of Arizona Tribal Protocols (ML18159A623) at 2. NRC Staff disavowed the constraints normally applicable to research and refused to consider their inclusion in the NRC Staff survey methodologies. *See* email from Dr. Nickens to Tribal Historic Preservation Officers (ML18159A504).

14. Confidentiality is critical to Tribe and is subject to tribal codes and ordinances applicable to the NRC Staff and contractors. The Tribe provided these NRC Staff with these provisions with the expectation that they would be applicable to all participants in the survey. Declaration of Kyle White at ¶ 31; *see also* email string forwarding codes (ML18157A381).
15. Despite the Tribe's explanation of the importance of additional confidentiality provision, NRC Staff refused to provide for any expansion of the existing SUNSI orders, nor provide any means to address the Tribe's concerns over ownership of the information collected, both through the survey and through the oral interviews. Declaration of Kyle White at ¶ 32.
16. The Tribe had repeatedly informed NRC Staff that the open site approach was not based on any recognized discipline or methodology and was therefore unacceptable. Declaration of Kyle White at ¶ 33.
17. On January 31, 2017, NRC Staff, Tribe's staff, and counsel, participated in a conference call that mostly reiterated the concepts discussed in May 2016. The call confirmed that NRC Staff would not consider any proposal that exceeded Powertech's willingness and ability to pay. The summary notes from the call specify NRC Staff's proposal for an open-site survey based on the precise same parameters rejected by the Tribe for years and insisted on by Powertech. ML17060A260 at 1.

18. Objections to the open site survey were restated by the Tribe and its counsel during the June 1, 2018 and June 4, 2018 webinars. Declaration of Kyle White at ¶ 33.

19. Dr. Nickens' June 5, 2018 open site survey proposal (ML18157A092) failed to respond to the Tribe's longstanding objections. The proposal called for:

    a. "windshield survey" provided by Powertech driver;

    b. Field visits to 3-5 previously identified sites per day;

    c. Prioritize sites based on some unstated criteria;

    d. Contractor-prepared "daily package" of information explaining why sites to be visited that day were chosen;

20. Dr. Nickens offered to assist the Tribe prepare a methodology. Declaration of Kyle White at ¶ 39. This offer was incorporated into the Tribe's schedule for negotiations and field survey sent to NRC Staff on June 8, 2018. *See,* June 8, 2018 schedule (ML18159A621). NRC Staff accepted the proposal and work to develop a methodology began with face-to-face meetings during the week of June 11, 2018. Declaration of Kyle White at ¶ 40.

21. Given the lack of any discernable scientific methodology presented by NRC Staff or its contractors, the Tribe prepared an initial discussion draft of proposed field methodologies for potential incorporation into the field survey methodology and hand-delivered this document to NRC Staff and contractors in Pine Ridge on June 12, 2018. *Id*. at 41.

22. The proposal was discussed at the June 13, 2018 emergency meeting of the Oglala Sioux Tribe Cultural Affairs and Historic Preservation Advisory Council Meeting. Declaration of Kyle White at ¶ 42; *see also* Agenda for June 13, 2018 meeting of (ML18173A206). Dr. Nickens and NRC Staff attended the meeting.

23. The Tribe believed that progress has been made toward at least a preliminary agreement on the methodology, which the March 2018 approach expressly contemplated would be established before carrying out the survey. Declaration of Kyle White at ¶ 43.

24. The Tribe updated its June 12 discussion draft on June 15, based on the input from its Advisory Council. Upon delivery to NRC Staff, NRC Staff abruptly, and without substantive explanation, rejected the all aspects of all of the methodology developed by the Tribe and its contractors and discussed with NRC Staff during face-to-face meetings as "fundamentally incompatible" with the NRC Staff approach. *Id*. at ¶ 44.

25. NRC Staff asserts that the proposed methodologies submitted to NRC Staff and its contractors constituted an "ultimatum" to NRC Staff. Motion at 30. This is not correct. At no time did the Tribe issue any "ultimatum" of any kind to NRC Staff. Declaration of Kyle White at ¶ 41.

26. Without any attempt to negotiate, and despite the Tribe's request that the field work commence on June 18, 2018, and with a full week left in the original schedule for field work, NRC Staff left Pine Ridge on June 15, 2018. NRC Staff and Dr. Nickens have made no attempt to resolve this matter. Declaration of Kyle White at ¶ 45. The positive steps made by the in-person discussions were curtailed by NRC Staff's decision that NRC Staff would not return to Pine Ridge on June 18, 2018 to continue implementing the plan adopted on June 8, 2018 (ML18159A621). *Id*.

27. NRC Staff asserts that the "Tribe could not have reasonably expected negotiation" over the development of the field survey methodology. Motion at 30. This is incorrect and a contested issue of material fact. *See* Declaration of Kyle White at ¶ 43. The March 2018 approach expressly provided for meetings for negotiation and development of a field

survey methodology. Enclosure 1 to March 16, 2018 letter (ML18075A502)(listing May 28-June 1 as time period "to discuss and establish the survey methodology and the areas to be examined during the field survey."); *see also* April 6, 2018 conference call transcript (ML18100A912) at page 1395, lines 17-25 (Tribe's counsel identifying significant issues that remained to be resolved in the March 2018 proposal, particularly the determination of the field survey methodology).

28. NRC Staff asserts that the Tribe is somehow precluded from raising arguments in response to the NRC Staff Motion because "[a]s acknowledged by the Tribe, NRC Staff selected a reasonable methodology". Motion at 31. This is a mis-reading of the record. As stated, the March 2018 approach did not contain any methodologies, leaving the field survey methodology to be determined in negotiations between the Tribe and NRC Staff.

29. NRC Staff asserts that the costs of conducting any type of NEPA-compliant survey is exorbitant. Motion at 32. However, nowhere in the Statement of Facts or in the affidavit filed in support of the Motion does NRC Staff present any cost evidence, let alone such evidence to overcome its burden to make the required showing for grant of its Motion. Indeed, NRC Staff provided no evidence that each of the concepts, in any configuration, identified in the Tribe's proposals are prohibitively expensive, nor create a cost estimate based on any partial inclusion of the Tribe's proposed methodologies. Further, NRC Staff has provided no data or information on either what it has spent to date, nor any type of information or data on what it or other agencies have spent on such studies in other circumstances. NRC Staff has also not provided any analysis of what it would cost to pursue a cultural resources impact and mitigation analysis in any other manner. Indeed, the most recent information in the Record pertaining to cost is NRC Staff's February 15,

2018 filing with the Board, in which NRC Staff concedes that despite this Board's mandate since April 30, 2015 (LBP-15-16) to resolve Contentions 1A and 1B, "since April 30, 2015, the NRC has billed Powertech $20,073.75 under 10 CFR Part 170 in connection with the NRC Staff's efforts to resolve Contentions 1A and 1B." ML18046B427 at 1. Not surprisingly, NRC Staff does not attempt to argue that $20,073.75 in costs over almost three years is exorbitant.

30. NRC Staff falsely, and without basis or evidence, alleges that the "Tribe deferred discussion of methodology" apparently to train-wreck the negotiations. Motion at 32-33, N. 155. This apparent allegation of bad faith should be forcefully rejected. To the contrary, the Tribe has repeatedly sought development of a field survey methodology with a qualified contractor – something NRC Staff only provided starting in May-June of 2018. *See, i.e.*, May 31, 2017 letter from Tribe to NRC Staff (ML17152A109)) at 4; January 19, 2018 letter from Tribe to NRC Staff (ML18019B267) at 2. Further, even NRC Staff admits that selected approach was approved by NRC Staff despite "the absence of agreed upon tribal field survey" methodology. Motion at 31-32 N. 154.

31. The Tribe, through counsel, repeatedly asked NRC Staff to hire qualified contractors. *See, i.e.*, May 31, 2017 letter from Tribe to NRC Staff (ML17152A109)) at 4; January 19, 2018 letter from Tribe to NRC Staff (ML18019B267) at 2. NRC Staff deferred the hiring until May 2018. Dr. Nickens complained of the NRC Staff work plan and limited time available as a serious impediment to his efforts. The need to hire a contractor was identified in the December 6, 2017 letter from NRC Staff to the Tribe. ML17340B365. The first opportunity for the Tribe's personnel and contractors to meet with the NRC Staff's contractor was during the June 4, 2018 webinar. Declaration of Kyle White at ¶

29. NRC Staff's delay in securing a contractor to develop a methodology with input from the Tribes undermined and ultimately proved fatal to its own "approach" to the cultural survey.

32. NRC Staff's pattern of conduct in this round of negotiation over a cultural resources survey is similar to a failed attempt to develop a methodology in 2017.

    a. On May 31, 2017, as promised, the Tribe sent NRC Staff a detailed response to NRC Staff's April 14, 2017 letter. ML17152A109. The Tribe's letter invited further discussions and sent NRC Staff a detailed, nine-page discussion that addressed NRC Staff's proposal and set out the parameters of what the Tribe saw as a lawful and methodologically sound approach to cultural resources survey. The letter repeatedly made clear that the content was offered as the basis for further discussions with NRC Staff and not an ultimatum, while expressing hope that NRC Staff's proposal was also not intended as an ultimatum, despite the repeated requests from NRC Staff to either accept or reject the proposal. *Id*. at 2. The Tribe's letter provided significant discussion as to the types of methodologies that the Tribe expected would be including in any NRC Staff courses of action to remedy the NEPA and NHPA violations, including references to the desire to engage a contractor to facilitate and coordinate a survey, with involvement of the other Sioux tribes – a position the Tribe had repeatedly expressed to NRC Staff. *Id*. at 3-4. The Tribe also described its strong desire to involve elders in the process, as well as the need for tribal members to carefully consider the survey findings and allow for subsequent trips to the site to ensure an accurate assessment. *Id*.

at 4-5. Notably, the Tribe pointed out that the NRC Staff's own cultural resource expert witnesses had affirmed that these types of protocols represent common, typical, and best practices. *Id*. at 6-7. The Tribe specifically addressed the fact that these protocols were inconsistent with a limited two-week open site approach proposed by Powertech and NRC Staff. *Id*. at 8. While the estimates from the testimony quoted for such a project ranged from 8 months to two years, the Tribe explained that it was not insisting on any specific length of time or timeline, but that the parties needed to engage in "a more detailed discussion of how these components can be incorporated in to a cultural resources survey approach." *Id*. at 8. The Tribe recognized the Makoche Wowapi proposal as one that was previously proposed but acknowledged that NRC Staff and the applicant were not ready to accept that extensive of an effort. *Id*. Lastly, the Tribe communicated its preference for face-to-face meeting and the role of the OST Tribal Council in formal government-to-government consultation, and thus invited NRC Staff, including the NRC Staff-delegated decision-maker, to consider an in-person meeting as was conducted in May of 2016 to facilitate much more progress that can typically be made on a conference call. *Id*. at 8-9.

b. On July 24, 2017, seven weeks after receiving the May 31, 2017 letter, and without making any calls or otherwise attempting to discuss the merits of the Tribe's letter, NRC Staff sent a terse, two-page letter rejecting all further attempts to identify a cultural survey methodology that would form the basis

to remedy the NRC's Staff's failure to satisfy NHPA, NEPA, and government-to-government consultation requirements. ML17205A063.

c. The NRC Staff letter did not address the methodology or substantive aspects of the Tribe's letter. The sole basis contained in the letter for the NRC Staff's decision to unilaterally abandon any effort at reaching a compromise was a one-sentence explanation that "[t]he positions you raised in your response, including but not limited to the length of the site survey, the survey methodology, and the requirement that the staff coordinate with the governments of all Lakota Sioux Tribes before designing a cultural resources survey, appear to be far apart from the discussions in the May 19, 2016, government-to-government meeting, the January 31, 2017, teleconference, and the reasonable opportunity to identify cultural resources described in the NRC staff's letters dated April 14, 2017, and May 8, 2017." *Id*. at 2. Nowhere does the NRC Staff letter address any of the substantive points, or what aspects of these categories are "far apart" from previous discussions. The letter fails to recognize the Tribe's express acknowledgments in its May 31, 2017 letter that all these aspects identified were open to discussion, including length of survey and survey methodology. Remarkably, the letter cites the Tribe's desire to coordinate with other Sioux Tribe's as an aspect "far apart" from the discussions in May of 2016 and January of 2017 – despite the specific references in the summary reports from those meetings reflecting the Tribe's express statements that coordination with other tribes was an important component to the Tribe.

d. The NRC Staff's July 24, 2017 letter does not represent a good faith or reasonable attempt to comply with the NHPA or NEPA, nor to remedy the substantive deficiencies identified by the Board or Commission Decision.

e. On July 31, NRC Staff counsel emailed the Tribe's counsel stating that NRC Staff believed the July 24, 2017 letter unilaterally rejecting any further discussion or consultation with the Tribe represented a trigger pursuant to 10 C.F.R. § 2.323(a)(2) to file a Motion for Summary Disposition within 10 days and that it would be doing so on August 3, 2017. The Tribe's counsel responded on August 2, 2017 explaining the Tribe's position that the July 24, 2017 letter should not be interpreted as a self-imposed trigger under 10 C.F.R. § 2.323(a)(2), and that the Tribe continued to believe there was significant opportunity for discussion and agreement on a survey approach. *Id.* The Tribe's Counsel explained that the text of the Tribe's May 31, 2017 letter clearly communicated that it contained no completely non-negotiable terms and expected NRC Staff to at least respond with specific bases for rejecting any approach other than Powertech's preferred open site approach. *Id*. On August 3, 2017, NRC Staff Counsel emailed, without elaboration, that NRC Staff "believe that filing the Staff's motion today remains the most appropriate step…" and that instead of responding to the Tribe in a consultation setting, the motion would provide the Staff's position regarding the additional factual matters you raise related to the Tribe's May 31, 2017 letter." *Id*. NRC Staff filed the Motion on the same day.

D. Background on NEPA Requirements

The NEPA requirements were resolved by the Board, Commission, and United States Court of Appeals for the D.C. Circuit, and are not properly revisited in a motion for summary disposition. But, because NRC Staff seeks new determinations on settled legal issues as a means to establish compliance with the previous holdings, NEPA will be summarized and addressed again.

NEPA is an action-forcing statute applicable to all federal agencies. Its sweeping commitment is to "prevent or eliminate damage to the environment and biosphere by focusing government and public attention on the environmental effects of proposed agency action." *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 371 (1989). The statute requires "that the agency will inform the public that it has indeed considered environmental concerns in its decision-making process." *Baltimore Gas and Electric Company v. NRDC*, 462 U.S. 87, 97 (1983).

In a NEPA document, the government must disclose and take a "hard look" at the foreseeable environmental consequences of its decision. *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976).

Closely related to NEPA's "hard look" mandate, NEPA prohibits reliance upon conclusions or assumptions that are not supported by scientific or objective data. "Unsubstantiated determinations or claims lacking in specificity can be fatal for an [environmental study] …. Such documents must not only reflect the agency's thoughtful and probing reflection of the possible impacts associated with the proposed project, but also provide the reviewing court with the necessary factual specificity to conduct its review." *Committee to Preserve Boomer Lake Park v. Dept. of Transportation*, 4 F.3d 1543, 1553 (10th Cir. 1993).

NEPA's implementing regulations require agencies to "insure the professional integrity, including scientific integrity of the discussions and analysis…." 40 C.F.R. § 1502.24 (Methodology and Scientific Accuracy). Further, where data is not presented in the NEPA document, the agency must justify not requiring that data to be obtained. 40 C.F.R. § 1502.22.

The CEQ regulations require that: "NEPA procedures must ensure that environmental information is available to public officials and citizens **before** decisions are made and **before** actions are taken." 40 C.F.R. § 1500.1(b)(emphasis added). The statutory prohibition against taking agency action before NEPA compliance applies to NRC decisionmaking. 42 U.S.C. § 4332(2)(C) *cited by New York v. NRC*, 681 F.3d 471, 476 (D.C. Cir. 2012); *Oglala Sioux Tribe v. NRC*, *CITE* (2018).

To meet these requirements "an agency must set forth a reasoned explanation for its decision and cannot simply assert that its decision will have an insignificant effect on the environment." *Marble Mountain Audubon Society v. Rice*, 914 F.2d 179, 182 (9th Cir. 1990), *citing Jones v. Gordon*, 792 F.2d 821 (9th Cir. 1986).

A federal agency may not simply claim that it lacks sufficient information to assess the impacts of its actions. Rather, "[a] conclusory statement unsupported by empirical or experimental data, scientific authorities, or explanatory information of any kind not only fails to crystallize the issues, but affords no basis for a comparison of the problems involved with the proposed project and the difficulties involved in the alternatives." *Seattle Audubon Society v. Moseley*, 798 F. Supp. 1473, 1479 (W.D. Wash. 1992), *aff'd* 998 F.2d (9th Cir. 1993).

NEPA requires that mitigation measures be reviewed in the NEPA process. "[O]mission of a reasonably complete discussion of possible mitigation measures would undermine the 'action forcing' function of NEPA. Without such a discussion, neither the agency nor other

interested groups and individuals can properly evaluate the severity of the adverse effects." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 353 (1989), *accord New York v. NRC*, 681 F.3d 471, 476 (D.C. Cir. 2012).

NEPA regulations require that an EIS: (1) "include appropriate mitigation measures not already included in the proposed action or alternatives," 40 C.F.R. § 1502.14(f); and (2) "include discussions of: . . . Means to mitigate adverse environmental impacts (if not already covered under 1502.14(f))." 40 C.F.R. § 1502.16(h).

NEPA requires that all relevant information necessary for an agency to demonstrate compliance with NEPA be included in an environmental impact statement, and not in additional documents outside of the public comment and review procedures applicable to that environmental impact statement. *See*, *Massachusetts v. Watt*, 716 F.2d 946, 951 (1st Cir. 1983) ("[U]nless a document has been publicly circulated and available for public comment, it does not satisfy NEPA's EIS requirements."); *Village of False Pass v. Watt*, 565 F. Supp. 1123, 1141 (D. Alaska 1983), *aff'd sub nom Village of False Pass v. Clark*, 735 F.2d 605 (9th Cir. 1984) ("The adequacy of the environmental impact statement itself is to be judged solely by the information contained in that document. Documents not incorporated in the environmental impact statement by reference or contained in a supplemental environmental impact statement cannot be used to bolster an inadequate discussion in the environmental impact statement."); *Dubois v. U.S. Dept. of Agriculture*, 102 F.3d 1273, 1287 (1st Cir. 1996), *cert. denied sub nom. Loon Mountain Recreation Corp. v. Dubois*, 117 S. Ct. 2510 (1997)("Even the existence of supportive studies and memoranda contained in the administrative record but not incorporated in the EIS cannot 'bring into compliance with NEPA an EIS that by itself is inadequate.' . . . Because of the importance of NEPA's procedural and informational aspects, if the agency fails to properly

circulate the required issues for review by interested parties, then the EIS is insufficient even if the agency's actual decision was informed and well-reasoned."); *Grazing Fields Farm v. Goldschmidt*, 626 F.2d 1068, 1072 (1st Cir. 1980) (same).

E. NRC Staff Has Not Demonstrated Compliance with NEPA

The Commission's majority ruled that the Board correctly concluded that NEPA imposes obligations on NRC that NRC Staff's FSEIS failed to satisfy. *In re Powertech (USA), Inc*., CLI-16-20 (N.R.C. Dec. 23, 2016)(upholding Board finding that "analysis of the environmental effects on cultural resources in the FSEIS was insufficient"); *see also, Oglala Sioux Tribe v. NRC*, ___ F.3d ___ (D.C. Cir. July 20, 2018). While "the ultimate burden with respect to NEPA lies with the NRC Staff," NRC Staff has not presented any further NEPA analysis or documentation that could meet its NEPA obligations. CLI-16-20 at 15. Read fairly, the Motion simply urges the Board to revisit its holding in LPB-15-16 finding the FEIS lacking necessary information on cultural resources impacts and mitigation and adopt Commissioner Svinicki's dissenting view of NRC Staff's narrow application of NEPA requirements. *See* Motion at 20, N.95. However, there is no basis to revisit the Commission's legal determinations and instruction that this Board only address the "narrow issue of resolving the deficiencies identified by the Board." CLI-16-20 at 30. Further, as recently held by the Commission in response to Powertech's appeal of this Board's denial of Summary Disposition in LBP-17-09, there is also no room for the NRC Staff's effective out of time request for reconsideration of this Board's decision in LBP-15-16 holding the FSEIS inadequate. *See* CLI-18-07 at 11 (July 24, 2018).

The NEPA issue is therefore limited to whether NRC Staff conducted a NEPA analysis or public participation opportunity to cure the "deficiencies in the FSEIS" that lacks the necessary "hard look" identification, analysis, and disclosure of impacts to cultural resources. *Id*. at 57.

The NEPA issue is easily resolved because NRC Staff has not identified any NEPA analysis, NEPA process, or NEPA document addressing impacts to cultural resources that could cure the FSEIS deficiencies. *Id.* at 38 ("NEPA requires an analysis of the effects on all of the cultural resources present at the site, not only those properties eligible for listing on the National Register of Historic Places."). NRC Staff's legal arguments that attempt to avoid the NEPA requirements set out by the Board, Commission, and United States Court of Appeals for the D.C. Circuit similarly fall short.

1. NRC Staff has Prepared no NEPA Document or NEPA Analysis Since the FSEIS

The Board confirmed that NRC Staff must support its NEPA compliance, if at all, "by a preponderance of the evidence." *In re Powertech USA, Inc*., 81 N.R.C. 618 at 642 (N.R.C. Apr. 30, 2015). NRC Staff ignores its burden and provides no evidence of any NEPA analysis or NEPA documentation, arguing instead that unsuccessful attempts to create a survey methodology excuses NEPA compliance. Motion at 2. NRC Staff asserts that "the Staff's FSEIS, as supplemented by the information in the adjudicatory record of this proceeding, provides a sufficient basis for the agency's 'fully informed and well-considered decision' on Powertech's application for the Dewey-Burdock project." Motion at 15-16.

However, NRC Staff never provides any reference to any additional analysis of the impacts to cultural resources at the site. Indeed, NRC Staff expressly admits that "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; 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." Motion at 33-34.

As the Board held, "[w]ithout additional analysis as to how the Powertech project may affect the Sioux Tribes' cultural, historical, and religious connections with the area, NEPA's hard look requirement has not been satisfied, and potentially necessary mitigation measures have not been established." *Id.* at 655. The Board need go no further with respect to determining whether NRC Staff has taken a "hard look" than to accept NRC Staff's admissions and hold that NRC Staff has provided no evidence of any NEPA analysis that could cure the FSEIS deficiencies and establish the "hard look" required by NEPA.

2. Coordination with the Tribe is not the Only Means to Satisfy NRC's NEPA Duties

The Commission did not limit NRC Staff's use of various means to satisfy NEPA's "hard look" mandate and confirmed that NRC "Staff is free to select whatever course of action it deems appropriate to address the deficiencies identified in the Board's order, including, but not limited to further government-to-government consultation." *In re Powertech (USA), Inc.*, CLI-16-20 at 41 (N.R.C. Dec. 23, 2016) (emphasis supplied). Despite the explicit command that consultation and coordination with the Tribe is one among many means to satisfy NEPA, the only course of action NRC Staff took was an unsuccessful and truncated attempt to establish a survey methodology limited to only conceptual offerings from NRC's contractor of a proper methodology for cultural resource surveys. When the Tribe came forward with ideas of what types of components of a survey methodology should be on the table for discussion, NRC Staff balked and abruptly ended the effort – despite the Tribe's repeated willingness to begin field efforts while a final methodology was determined. This is far from the "constructive rejection" of the survey approach with which that NRC Staff attempts to characterize the discussions.

NEPA compliance cannot have been achieved based on the undisputed fact that NRC Staff has conducted no additional efforts to identify cultural resources – no original research, no interviews, no ethnographic analysis, no circulation of draft analyses, no additional field investigation with any qualified personnel, and no other professional tools. The literature review provided by NRC Staff in the record itself demonstrates that it is not a substitute for a physical survey in coordination with individuals with sufficient cultural experience and knowledge. *See* i.e., June 2018 literature review (ML18159A192) at 9 (confirming that the literature review was intended to help provide baseline information in support of field survey efforts); *id*. at 16 (recognizing that any credible approach must "take[] into account the Lakota views for the individual places and the larger landscape setting. Inherent in this approach is the involvement of Lakota people, including, at various points in the process, Tribal cultural authorities, such as the respective Tribal Historic Preservation Officers (THPOs), other traditional Tribal historians, traditional spiritual leaders, and traditional Tribal Elders."); *id*. at 28 ("In the past few decades, it has become apparent that while archaeologists may or may not be adept at identifying all Tribal places on the landscape, they seldom, if ever, have an adequate cultural background to be able ascribe Native American context to the resource site or place as a potential place of traditional cultural or religious significance."); *id*. at 42 (Summary noting the need for follow up site investigations and oral interviews).

NRC Staff assertions that its failure to reach agreement with the Tribe on a methodology excuses it from NEPA compliance fundamentally misunderstands that the Commission confirmed the agency's duties under NEPA fall on NRC Staff, not the Tribe, Tribal members, or the general public. *In re Powertech (USA), Inc.*, CLI-16-20 at 15 (N.R.C. Dec. 23, 2016) ("the ultimate burden with respect to NEPA lies with the NRC Staff"). While certainly some

involvement of the Tribe is an important and highly valuable component, and information from some knowledgeable source is essential – the NRC Staff has an independent duty to conduct NRC's cultural resources impacts analysis in accordance with NEPA's "hard look" mandate.

NEPA makes clear that impacts of the license applicant's proposal on cultural resources are one of many categories of effects an agency must analyze, disclose, and compare in "a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences" in agency decisionmaking. 42 U.S.C. § 4332(2)(A). The regulations define direct and indirect impacts to include "effects on natural resources and on the components, structures, and functioning of affected ecosystems," as well as "aesthetic, historic, cultural, economic, social or health [effects]." 40 C.F.R. § 1508.8(b). *See also* 40 C.F.R. § 1502.16(g) (NEPA analysis "shall include discussions of … historic and cultural resources….").

Thus, even where a tribal government is not involved – or is unreasonably excluded from an analysis – the Commission recognized that NRC Staff may use other means to provide a NEPA-compliant analysis of impacts to cultural impacts. *In re Powertech (USA), Inc.*, CLI-16-20 at 41 (N.R.C. Dec. 23, 2016)(identifying consultation as one means, among others, to address FEIS deficiencies). The fact that NRC Staff lacks the requisite expertise in the relevant disciplines necessary to carry out NRC's NEPA cultural resources duties does not excuse lack of compliance with federal law. Otherwise, the untenable result, and precedent, would be that NRC Staff need only fail to reach agreement with a tribal government to effectively evade conducting its statutorily-mandated cultural resources impact analysis. NRC Staff offers no authority for such a proposition.

The Tribe, like the Board and Commission, would prefer to reach an agreement with NRC Staff on the methodology of cultural resources survey. The Tribe remained willing

throughout (and remains willing) to meaningfully participate in the type of methodologically-sound survey and NEPA analysis that NRC Staff has rejected without articulating its basis. The Tribe prepared to urge its members and the general public to submit their comments on a draft NEPA document that identified (consistent with federal law) and analyzed impacts to cultural resources at the site. As the Board found, "Tribal officials stated that historic and cultural resource studies of the sites should be conducted with tribal *involvement*." *In re Powertech USA, Inc*., 81 N.R.C. 618 at 645 (N.R.C. Apr. 30, 2015) (emphasis supplied). Although the Tribe set forth detailed suggestions to further the discussion of methodology to counter NRC Staff's lack of any specifics on any type of survey methodology, at no time has the Tribe offered to assume NRC Staff's duty to conduct the necessary NEPA analysis. Further, at no time did the Tribe present any "ultimatum" with respect to its proposed concepts for the survey methodology. Declaration of Kyle White at ¶ 41. Rather, the Tribe repeatedly engaged, at its own expense, its cultural resources staff and expert in order to 'fill the gap' created by NRC Staff's inability to provide specifics. When the Tribe did provide its concepts, NRC Staff failed to respond in any substantive way – contending in conclusory fashion that the Tribe's concepts were fundamentally inconsistent with the NRC Staff approach, but not providing any detail to back up that assertion.

Other cases and governmental documents demonstrate that NEPA duties to identify, analyze, and disclose impacts to cultural resources impose a broader mandate that cannot be avoided. For example, even if an agreement with NRC Staff remains elusive, other non-Indian agencies, such as the South Dakota SHPO and even the North Dakota Department of Transportation, regularly conduct such research, including putting out Requests for Proposals for cultural resources surveys from professional cultural resource contractors. See

https://history.sd.gov/preservation/rfp.aspx; https://duckduckgo.com/l/?kh=-1&uddg=https%3A%2F%2Fwww.dot.nd.gov%2Fdivisions%2Fets%2FRFPs%2Fdocs%2F56%2FRFP%2520Complete%2520Cultural%2520Resource%25202016-2017%2520State%2520Work.docx. Further, Commission precedent confirms that the NRC Staff (and the applicant) can meet this duty by hiring independent, qualified cultural resources consultants to coordinate and/or conduct the required survey in order to sufficiently inform the NEPA analysis with credible information. Such was the case in *In the Matter of Hydro Resources, Inc.* (2929 Coors Road Suite 101 Albuquerque, New Mexico 87120), 62 N.R.C. 442 (2005), where the required NEPA cultural resources impact analysis was upheld based specifically on the cultural resources studies and analyses prepared by the applicant's consultants. 62 N.R.C. at 451-452. Importantly, the consultant must appropriately coordinate and interact with the relevant tribal governments and communities. *Id*.

Similarly, other agencies routinely rely on qualified agency social scientists such as trained ethnographers to carry out the necessary surveys and analysis, with significant input, participation, and consultation from the relevant tribes, short of a mandate that a certain tribe conduct the survey. See e.g. *Ctr. for Biological Diversity v. United States BLM*, 2017 U.S. Dist. LEXIS 137089, at *54-55 (D. Nev. Aug. 23, 2017)(holding that BLM "engaged in a good-faith attempt to identify relevant cultural sites and consult with the tribes about how best to protect them" including preparation of significant cultural and ethnographic reports and studies).

Contrary to the examples cited above, NRC Staff in this case failed to fulfill its NEPA cultural resource impact review obligations and instead simply unilaterally abandoned the cultural survey efforts and filed the instant Motion. Notably, the NRC Staff abandoned its approach without explaining the reasons it felt the Tribe's concepts were "fundamentally"

inconsistent with the NRC Staff approach or giving the Tribe a meaningful opportunity to respond to its decision. This occurred despite the Tribe's repeated requests to continue the dialogue and to begin field work based on perceived progress made to that point, but despite the lack of a fully-settled methodology. *See, i.e.*, June 8, 2018 letter from Travis Stills to NRC Staff (ML18159A621); June 15, 2018 email string (ML18170A154)(proposing to begin field visits on Monday June 18 despite lack of settled methodology).

The Commission's recognition of other means to satisfy NRC Staff's NEPA duties, in combination with examples of other means that NRC and federal courts have condoned on the circumstances of those cases, confirm the fallacy of NRC Staff's argument that it may forsake its cultural resources impact analysis obligations under NEPA when coordination with the Tribe appears as an inconvenience to the agency.

As it has repeatedly done in the past, NRC Staff attempts to blame the Tribe for its failure to reasonably negotiate a methodology for the cultural resources survey. NRC Staff claims that "the Tribe could not have reasonably expected that the negotiation and selection of yet another approach could take place within the timeframe for implementing the selected approach, given the extensive consultation undertaken to arrive at an agreement among the parties to support and participate in the selected approach." Motion at 30. Similarly, NRC Staff makes much of the Tribe's agreement that the selected approach held potential for resolving Contention 1A, citing "the parties' negotiations over many months to develop the selected approach. The Staff provided potential options for methodologies for discussion with the invited Tribes, followed by a proposed plan of work consisting of an initial methodology for conducting the June tribal field survey, and repeatedly sought the Tribe's input on the methodology for the field survey." Motion at 31. In fact, NRC Staff asserts that it was "precluded from fully implementing [its

March 2018 approach by the Tribe's constructive rejection of the approach." *Id*. at 33. As detailed in the Material Facts section *supra*, these arguments are not based in facts – and certainly not uncontroverted facts.

This concept of "constructive rejection" is a material issue of fact that the Tribe affirmatively disputes. Simply put, the Tribe never rejected the approach, but rather sought to further the planned and fully-anticipated discussions as to the proper methodology to be used in the field. Kyle White Declaration at ¶¶ 41-43. Rather, it was NRC Staff that abandoned the discussions without providing any substantive response to the Tribe. In fact, the March 2018 approach specifically deferred development of the field methodology to the May-June timeframe in the approach schedule. *See* Enclosure 1 to March 16, 2018 letter (ML18075A502)(listing May 28-June 1 as time period "to discuss and establish the survey methodology and the areas to be examined during the field survey."). NRC Staff attempts to blame the Tribe for not having negotiated the methodology earlier, but NRC Staff cannot escape the fact their own proposal contemplates this negotiation to occur at the May-June meetings.

Indeed, NRC Staff's original proposal from December 2017 also expressly deferred development of the field survey methodology. ML18002A529 at 2 (¶4(d)). The Tribe's January 19, 2018 letter in response also specifically references the need to conduct that negotiation – stating:

> With respect to the field survey protocols set forth in the letter, the Office believes they are generally acceptable. However, as noted in the letter, the specific field survey methodology, timing of the surveys, and length of time necessary for the surveys need to be established. These are key issues the Office wishes to discuss further, in partnership with both NRC Staff and with the benefit of the expertise and experience of the selected contractor. Once the contractor is on board, the Office believes these discussions can begin promptly and the detailed survey can be designed based on the contactor's input.

ML18019B267 at 2. Indeed, even as late as the April 6, 2018 conference call, in discussing the Tribe's position on the March 2018 proposal, counsel for the Tribe specifically referenced the negotiation and development of the field survey methodology as a "significant component[] that had not been fully vetted or fully described" in the proposal and would therefore need to be addressed:

> [JEFF PARSONS]17 We do note that there are
> 18 some significant components that have not been fully
> 19 vetted or fully described in terms of the methodology.
> 20 But at this point, based on what we have in hand, the
> 21 Tribe is comfortable with that time line.
> 22 JUDGE FROEHLICH: Okay. So for example,
> 23 on the methodology in which you just mentioned, there
> 24 is a period of time or a milestone for input and
> 25 discussions among the staff and the Tribe.

April 6, 2018 conference call transcript (ML18100A912) at page 1395. Thus, the lack of efforts to negotiate and finalize a field survey methodology before the May-June 2018 timeframe was not the Tribe's "fault" – rather, it was the result of NRC Staff's failure to bring on any personnel with competence to discuss the matter with the Tribe (or even to refer the matter to the established expertise within the agency at the Federal, State and Tribal Liaison Branch), and the NRC Staff's own March 2018 approach proposal that expressly deferred that discussion and negotiation until May-June 2018.

3. NRC Staff Misapply NEPA Caselaw Regarding the "Rule of Reason"

NRC Staff and Powertech cite to *Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-10-11, 71 NRC 297 (2010) for the proposition that NEPA is bounded by a "rule of reason" that does not require the agency conduct research and thus excuses analysis of cultural resources impacts in this case. NRC Staff Motion at 12 N. 51; Powertech at 9. However, in that case, the Commission dealt with a situation

entirely distinct from that presented here. In that case, the intervenor argued that NRC Staff had used improper models and inputs to an existing analysis in the NEPA document of Severe Accident Mitigation Alternatives (SAMA) such that the analysis resulted in erroneous conclusions. The Board clarified that "the issue here is whether the Pilgrim SAMA analysis resulted in erroneous conclusions on the SAMAs found cost-beneficial to implement. The question is not whether there are "plainly better" atmospheric dispersion models or whether the SAMA analysis can be refined further." 71 NRC at 315. Based on the Commission's finding that NRC Staff did conduct a detailed SAMA analysis, the Commission recited some general legal points, in dicta, without applying or analyzing those legal points with respect to any particular aspect of the case:

> NEPA "should be construed in the light of reason if it is not to demand" virtually infinite study and resources. Nor is an environmental impact statement intended to be a "research document," reflecting the frontiers of scientific methodology, studies and data. NEPA does not require agencies to use technologies and methodologies that are still "emerging" and under development, or to study phenomena "for which there are not yet standard methods of measurement or analysis." And while there "will always be more data that could be gathered," agencies "must have some discretion to draw the line and move forward with decisionmaking." In short, NEPA allows agencies "to select their own methodology as long as that methodology is reasonable."

71 NRC at 315 (footnotes and citations omitted). This is the passage relied upon by NRC Staff in its Motion. However, fatal to NRC Staff's argument, nowhere has NRC Staff provided any evidence that the Tribe is requesting that NRC Staff must use "emerging" technologies or conduct analysis that reflects "the frontiers of scientific methodology, studies and data."

Additionally, and importantly, the Commission in *Pilgrim* went on to distinguish the SAMA analysis at issue there as a mitigation analysis, and "not a substitute for, and do[es] not represent, the NRC NEPA analysis of potential impacts" from the licensing activity. 71 NRC at 316. The Commission pointed this out as important because under applicable NEPA law, unlike

site-specific impact analyses, site-specific mitigation analyses do not require a fully-developed mitigation plan, but rather one that is reasonably complete. *Id.* Thus, the *Pilgrim* case is distinct on the facts and the law from the case at issue here and does not support NRC Staff's proposal to dispense with the cultural resources impact review altogether.

Here, the impacts are well known and/or knowable, and NRC Staff has not provided any evidence that it conducted a NEPA-compliant impacts analysis and has conducted no NEPA mitigation analysis. *In re Powertech USA,* Inc., 81 N.R.C. 618 at 644 (N.R.C. Apr. 30, 2015). In fact, NRC Staff has provided no evidence that it conducted any NEPA analysis after the Board's April 2015 Order established the FSEIS lacked the "hard look" required by NEPA. *Id.*

The paragraph quoted above from the *Pilgrim* case also demonstrates the fallacy of NRC Staff's argument that agencies are not required under NEPA to conduct any independent research. While agencies need not develop documents that reflect the "frontiers" of science, federal courts routinely find that NEPA does require agencies to conduct original research. *See Save Our Ecosystems v. Clark,* 747 F.2d 1240, 1248 (9th Cir.1984) (confirming "that an agency may be required to do independent research on the health effects of a herbicide. This is not a new requirement."); *Northwest Coal. for Altern. to Pesticides v. Lyng* (9th Cir.1988) 844 F.2d 588, 596 (ruling that "an agency must conduct independent research on the safety of herbicides it proposes to use."); *League of Wilderness Defenders/Blue Mountains Biodiversity Project v. Forsgren*, 163 F.Supp.2d 1222 (D.OR. 2001), *reversed on other grounds* 309 F.3d 1181 (9th Cir. 2002)(holding that if the information relevant to adverse impacts is essential but not known, the agency must fill that gap by independent research in environmental impact statement completed under NEPA).

Lastly, NRC Staff asserts that the existing FEIS contains an adequate analysis of Lakota Sioux cultural resources, despite the lack of any supplemental analysis since this Board's Order finding that same analysis inadequate. Indeed, NRC Staff itself, in response to the Tribe's contentions on the Draft SEIS, conceded that its analysis was incomplete, promising to formally supplement the analysis. In the present Motion, however, NRC Staff attempts to disavow that commitment, characterizing it instead as a commitment to simply provide some impact assessment and mitigation recommendations to all Tribes. Motion at 4. However, as stated in the NRC Staff Answer to Contentions on the Draft Supplemental Environmental Impact Statement with respect to the cultural resources survey issue:

> As the Staff explained when it issued the DSEIS, however, it is working to facilitate a field survey of the Dewey-Burdock site in order to obtain additional information on historic properties. When the survey is complete, the Staff will supplement its analysis in the DSEIS and circulate the new analysis for public comment.

NRC Staff's Answer to Contentions on Draft Supplemental Environmental Impact Statement at 13 (ML13066B030). The promised field survey and information were not provided in the FSEIS or any other NEPA environmental document. Likewise, the Final SEIS proceeded without any supplemental analysis despite NRC Staff's admission that the document failed to adequately analyze cultural resources, and the promise to issue a supplemental NEPA document in the future – which even to date NRC Staff has never done. Now, the NRC Staff seeks to avoid the Board and Commission Orders, and its own prior commitments, without carrying out any new survey, new analysis, and required public comment.

In any case, the lack of compliance with NEPA in the FSEIS was established by this Board in its merits ruling, as upheld by the Commission. NRC Staff cannot now be heard to re-argue NEPA "hard look" compliance based on the same rejected arguments, particularly absent any additional analysis.

NRC Staff erroneously asserts that NEPA's "hard look" standard is satisfied regardless of whether the agency gathered the available and necessary information and actual conducts any of the relevant analysis, so long as Staff made reasonable efforts to do so. Motion at 20; *see also* Powertech at 8. This is wrong. As the Board's Opinion rightly stated, NEPA imposes on NRC Staff "the duty of complying with the [environmental] impact statement requirement 'to the fullest extent possible.'" *In re Powertech USA, Inc.*, 81 N.R.C. 618 at 655-657 (N.R.C. Apr. 30, 2015) *quoting Pres. Coal., Inc. v. Pierce*, 667 F.2d 851, 859 (9th Cir. 1982) (*quoting* 42 U.S.C. § 4332). NRC Staff does not allege, let alone show evidence, that it attempted to meet the "fullest extent possible" standard confirmed by the Board. Instead, NRC Staff continues to rely on the FSIES that NRC Staff prepared in reliance on the "reasonable efforts" theory.

The caselaw relied upon by NRC Staff and Powertech to support the "reasonable effort" standard is not applicable. For instance, both parties cite *Town of Winthrop v. FAA*, 535 F.3d 1 (1st Cir. 2008). However, that case dealt not with an agency attempting to escape NEPA's "hard look" requirement because of incomplete or unavailable information, but rather a court deferring to an agency's determination that it need not supplement an already completed and lawful EIS with supplemental information and studies. Similarly, in *Entergy Nuclear Generation Company and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-10-22, 72 NRC 202 (2010) cited by NRC Staff does not rule that NRC Staff may exclude information from its NEPA analysis if it has made a "reasonable effort" to obtain the information. To the contrary, the case holds that "NEPA requires the NRC to provide a 'reasonable' mitigation alternatives analysis, containing 'reasonable' estimates, including, where appropriate, full disclosures of any known shortcomings in available methodology, disclosure of incomplete or unavailable information and significant uncertainties, and a reasoned evaluation of whether and to what

extent these or other considerations credibly could or would alter the Pilgrim SAMA analysis conclusions on which SAMAs are cost-beneficial to implement." *Id*. at 208. At most, this case merely re-states the 40 C.F.R. § 1502.22 standard.

In any case, the Tribe disputes as a matter of fact that NRC Staff made a "reasonable effort" to negotiate a survey methodology. The facts demonstrate that NRC Staff and its contractor arranged the June 1, 4, and 5 meetings with the Tribe to discuss methodologies, but came prepared with no specific proposals and relied entirely on the Tribe to develop and present possible methodologies. When the Tribe did so, NRC Staff refused to engage in any discussion of which methodologies could be incorporated and to what extent and simply abruptly ended its involvement with the Tribe in summary fashion – despite the Tribe's willingness and express desire to continue the negotiation and the field surveys. At minimum, these are material controverted facts that preclude the granting of summary disposition.

4. 40 C.F.R. § 1502.22 Does Not Excuse NRC Staff's Failure to Comply With NEPA's Hard Look Requirement

As the Board stated, NEPA's "hard look is intended to foster both informed agency decision-making and informed public participation so as to ensure that the agency does not act upon incomplete information." LBP-15-16, 81 N.R.C. 618 at 637. "The NEPA hard look must emerge from an engagement in informed and reasoned decision making, as the agency 'obtains opinions from its own experts, obtains opinions from experts outside the agency, gives careful scientific scrutiny and responds to all legitimate concerns that are raised.'" *Id*. at n. 98 *quoting Hughes River Watershed Conservancy v. Johnson*, 165 F.3d 283, 288 (4th Cir. 1999) (*citing Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 378–85 (1989)). NRC Staff does not identify competent new cultural resource information or analysis and continues to blame the Tribe for the unresolved deficiencies in the FSEIS.

NRC Staff cites 40 C.F.R. § 1502.22 as a defense for its failure to provide any evidence that any NRC Staff with relevant expertise conducted any hard look review of cultural resources in any NEPA document. Motion at 33-38.

At the outset, the Tribe contests NRC Staff's improper attempts to shift the burden to the Tribe to demonstrate that NRC Staff failed to comply with 40 C.F.R. § 1502.22. NRC Motion at 13-14, *see also* N.62 (*citing* ***Trout Unlimited v. U.S. Dep't of Agric.***, 320 F. Supp. 2d 1090, 1110–11 (D. Colo. 2004)). However, the Tribe does not bear the burden. Rather, it is NRC Staff that bears the burden as NRC Staff is asserting 40 C.F.R. § 1502.22 as a defense to the lack of information in any NEPA document. Such improper attempts to shift the burden have been squarely rejected by the federal courts. *Native Village of Point Hope v. Salazar* (D. Alaska 2010) 730 F.Supp.2d 1009, 1018 ("Defendants argue that *Plaintiffs* have the burden to demonstrate that the information they claim is missing meets both the 'relevant' and 'essential' prongs of § 1502.22, and that Plaintiffs have failed to meet this burden. The Court finds, however, that this conflicts with the plain language of § 1502.22, which requires the agency to make the findings."). Further, NRC Staff's argument ignores that this Board, affirmed by the Commission, has already found the violations of NEPA, and re-litigation of those rulings is not proper. *See* CLI-18-07 at 11 (finding no compelling reason to re-visit this Board's findings of violations of NEPA).

Regarding compliance with the regulation, while this regulation does deal with situations where there is incomplete or unavailable information, it applies as a threshold matter only where the agency makes a conclusive showing that the "overall costs of obtaining it are exorbitant or the means to obtain it are not known…." 40 C.F.R. § 1502.22(b). Nowhere in the Statement of Facts or in the one affidavit filed in support of the Motion does NRC Staff present any such

"exorbitant" cost evidence, let alone such evidence to overcome its burden to make the required showing here. Indeed, NRC Staff provided no evidence that the concepts identified in the Tribe's June discussion proposals are prohibitively expensive, nor did NRC Staff create any cost estimate based on the Tribe's proposed methodologies. Further, NRC Staff has provided no suitable data or information on either what it has spent to date, nor any information on what it or other agencies may spend on such studies in other circumstances. NRC Staff has also not provided any analysis of what it would cost to pursue a cultural resources impact and mitigation analysis in any other manner. The most recent information in the Record pertaining to cost is NRC Staff's February 15, 2018 filing with the Board, in which NRC Staff concedes that despite this Board's mandate since April 30, 2015 (LBP-15-16) to resolve Contentions 1A and 1B, "since April 30, 2015, the NRC has billed Powertech $20,073.75 under 10 CFR Part 170 in connection with the NRC Staff's efforts to resolve Contentions 1A and 1B." ML18046B427 at 1. Not surprisingly, NRC Staff does not attempt to argue that $20,073.75 in costs over almost three years is exorbitant.

Without any of this necessary and relevant information, NRC Staff has not made any fact-based demonstration that the costs of procuring information sufficient to satisfy NEPA is "exorbitant". Instead, NRC Staff looked only at the illustrative example included by the Tribe in its June 15 discussion document of what a survey would entail with all the methodologies included and used to their fullest extent. NRC Staff ignored the Tribe's express invitation (and expectation) for NRC Staff and the Tribe to use that information as a starting point to work to determine which of the methodologies could be implemented, and to what extent. NRC Staff then made the conclusory determination that the Tribe's proposals were "fundamentally inconsistent" with NRC Staff's approach and then determined, without any apparent analysis or

reasoned explanation, that the costs would be "exorbitant". Federal courts reject this type of unsupported decision-making under 40 C.F.R. § 1502.22. *See Sierra Club v. US DOT*, 962 F.Supp. 1037, 1043 (N.D. Ill. 1997)(requiring "that the final impact statement was at least required to explain in some meaningful way why such a study was not possible. 40 C.F.R. § 1502.22; cf. *Laguna Greenbelt, Inc. v. U.S. Dept. of Transp.*, 42 F.3d 517, 526–27 (9th Cir.1994) (suggesting that a final impact statement cannot rely on a single socioeconomic forecast unless the statement relies on existing needs or explains why an alternative study is not possible); *Seattle Audubon Society v. Espy*, 998 F.2d 699, 704 (9th Cir.1993) (an impact statement, which did not address in any meaningful way the uncertainties of the evidence it relied on, must undertake further study or explain why such study is not necessary or feasible).

Further, NRC Staff has failed to make the threshold demonstration under 40 C.F.R. § 1502.22 because the uncontroverted evidence demonstrates that none of the information required to comply with 40 C.F.R. § 1502.22 was included in any NEPA document. 40 C.F.R. § 1502.22 expressly mandates that where necessary information is unavailable:

> The agency **shall include within the environmental impact statement**:
> (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.

40 C.F.R. § 1502.22(b). None of this information was included in the FSEIS. Indeed, NRC Staff spent years arguing that its FSEIS analysis contained everything necessary to comply with NEPA. Federal courts reject agencies' attempts to skirt these important requirements. *See Sierra Club v. US DOT*, 962 F.Supp. 1037, 1045 (N.D. Ill. 1997)(finding lack of NEPA compliance were the analysis "was not incorporated into the final impact statement. By itself,

this flaw makes defendants' analysis inadequate. *See, e.g., Sierra Club v. Marsh*, 976 F.2d 763, 770 (1st Cir.1992) (citations omitted). Failing to incorporate the study into the final impact statement deprives the public and other participants in the process of the opportunity to comment on it. *Id*. In this case, the only statement of any of these matters from NRC Staff is in an Affidavit and a legal brief filed in a limited adjudicatory hearing, after the agency has fully committed to its course of action and with no meaningful opportunity for the Tribe or any member of the public to provide any comment or pre-decisional review of the information. This scenario is not compliant with the letter or spirit of NEPA's procedural requirements. The Commission itself has made clear that "[t]he Commission intends to follow the standard in 40 CFR 1502.22(a)" despite any potential rare substantive issues with its implementation. 49 Fed.Reg. 9352, 9353–54 (1984).

The D.C. Circuit has very recently rejected NRC's unique approach to NEPA, confirming that NRC Staff must comply with NEPA's procedural requirements before taking action. *Oglala Sioux Tribe v. NRC*, ___ F.3d___, slip op. at 26 ("If even 'significant' deficiencies in NEPA reviews are forgiven because they are merely procedural, there will be nothing left to the protections that Congress intended [NEPA] to provide."). Repairing NEPA violations within the confines of NRC's contention-based administrative litigation similarly eviscerates NEPA's twin purposes. "[I]t is not an adequate alternative . . . to merely include scientific information in the administrative record. NEPA requires that the EIS itself 'make explicit reference . . . to the scientific and other sources relied upon for conclusions in the statement.'" *Sierra Club v. Bosworth*, 199 F. Supp. 2d 971, 980 (N.D. Cal. 2002). *See also* 40 C.F.R. § 1502.24; *Save the Yaak Committee v. Block*, 840 F.2d 714, 718-19 (9th Cir. 1988) (biological assessment was not functional equivalent of NEPA analysis and also came too late).

In *League of Wilderness Defenders v. Forsgren*, the Ninth Circuit noted:

> the Forest Service relies upon post-EA submissions and declarations to the court, as well as assurances that its experts were aware of plaintiffs' concerns and considered them, in arguing that there are no uncertainties or unknown risks surrounding the Hash Rock proposal. This is insufficient under NEPA.

184 F. Supp. 2d 1058, 1069 (D. Or. 2002). *See also, League of Wilderness Defenders v. Zielinski*, 187 F. Supp. 2d 1263, 1271 (D. Or. 2002) (study relied upon by BLM was not in AR at the time of final NEPA document; "A federal agency's defense of its positions must be found in its EA"); *Grazing Fields Farm v. Goldschmidt*, 626 F.2d 1068, 1072 (1st Cir. 1980)(NEPA does not contemplate that documents "contained in the administrative record, but not incorporated in any way into an EIS, can bring into compliance with NEPA an EIS that by itself is inadequate").

The NRC Staff's approach here is strikingly similar to other situations where the federal courts have invalidated attempts by a federal agency to use post-EIS analyses to confirm or otherwise ratify previously identified gaps in a NEPA analysis. For instance, in *Great Basin Resource Watch v. Bureau of Land Management*, 844 F.3d 1095 (9th Cir. 2016), the Court rejected the Bureau of Land Management's attempt to fix gaps in an air quality NEPA analysis by conducting a "double-check" post-EIS review of air quality. The Court ruled that:

> [A] post-EIS analysis – conducted without any input from the public – cannot cure deficiencies in an EIS. *Center for Biological Diversity v. U.S. Forest Service*, 349 F.3d 1157, 1169 (9th Cir. 2003). The public never had an opportunity to comment on the 'double-check' analysis, frustrating NEPA's goal of allowing the public the opportunity to "play a role in … the decisionmaking process." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349, 109 S.Ct. 1835, 104 L.Ed.2d 351.

Great Basin Resource Watch v. Bureau of Land Management, 844 F.3d 1095, 1104 (9th Cir. 2016).

Further, the federal courts have specifically held that analyses submitted during an adjudicatory hearing process also cannot remedy a NEPA violation:

> The preparation of an EIS also entails similar public and interagency participation. [. . .] This cross-pollinization of views could not occur within the enclosed environs of a courtroom.

Sierra Club v. Hodel, 848 F.2d 1068, 1094 (10th Cir. 1988) *citing* 40 C.F.R. §§ 1503.1(a)(4), 1506.6, *overruled in part on other grounds, Los Ranchos de Albuquerque v. Marsh*, 956 F.2d 970 (10th Cir. 1992).

Setting aside the express 40 C.F.R. § 1502.22 requirement that the necessary information be included "within the environmental impact statement," NRC Staff nevertheless appears to argue that it complied with the four prongs of 40 C.F.R. § 1502.22(b). Motion at 33-38. However, the arguments presented by NRC Staff fall short – in no small part because the majority of NRC Staff's discussion focuses on assertions that the FSEIS, as originally presented, contain all the necessary information to comply with NEPA's "hard look" requirement. Motion at 34. This is despite the uncontroverted fact that there has been no supplement to the FSEIS and "the environmental record of decision in this matter does not include any new information…." Motion at 33.

Regarding the applicable standard for demonstrating compliance with 40 C.F.R. § 1502.22, NRC Staff inappropriately relies on *Dominion Nuclear North Anna, LLC* (Early Site Permit for North Anna ESP Site), CLI-07-27, 66 NRC 215, 235–36 (2007) to set forth the applicable test. Motion at 33 N.159. The *Dominion Nuclear* case was an Early Site Permit (ESP) case in a posture that differs substantially from the case at bar. Specifically, in the *Dominion Nuclear* case, as an ESP case, the Commission was necessarily dealing with a preliminary decision related to site suitability and not a permit for construction and operation of a new facility. The Commission pinned its decision allowing the ESP to move forward despite lack of full information on the fact that full-scale NEPA review would occur on the site proposal

in the future, holding that "because certain environmental effects simply could not 'be meaningfully assessed at the ESP stage,' the Staff's decision to defer consideration of those effects until 'a time when they can be accurately assessed [was] consistent with NEPA's requirements.'" 66 NRC at 236. *Dominion Nuclear* is thus distinct from the case at issue here, as NRC Staff has made it abundantly clear that it will not engage in any additional NEPA analysis – and indeed, has refused to pursue any supplement to the FSEIS in this case. Contrary to NRC Staff's argument, the only properly applicable standards are NEPA's "hard look" standard and the specific provisions of 40 C.F.R. § 1502.22.

Under the first prong of 40 C.F.R. § 1502.22(b) NRC Staff asserts that the relevant cultural impacts information is incomplete and unavailable. Motion at 33. This information certainly was not disclosed in the FSEIS as required, but the information is not unavailable. As discussed herein, there are numerous ways to obtain the relevant information. These require the agency to continue its negotiations with the Tribe or find a suitably knowledgeable contractor to conduct a competent analysis. The fact that NRC Staff refuses to engage with the Tribe in the necessary meaningful dialogue to establish a field survey methodology does not render the information unavailable. At minimum, whether the information is "unavailable" is a disputed issue of material fact.

NRC Staff seeks to address the second prong by arguing that the information <u>is</u> relevant to evaluating the foreseeable significant impacts of the project, but "would not have materially affected the Staff's determination regarding the adverse impacts to cultural resources." Motion at 34. According to NRC Staff, because of the lack of any detailed information in the FSEIS, the agency labeled the potential impacts to cultural resources as ranging from "small to large." Motion at 35. Thus, argues NRC Staff, even if the agency

gathered accurate information and found highly significant impacts, it would still be within the "large" range of impacts, and thus the FSEIS analysis would not have changed. *Id*.

This argument fails to address the requirement in 40 C.F.R. § 1502.22(b). NRC Staff fails to describe the relevance of the missing information – except to admit that it is relevant. Further, accepting this argument rewards the very lack of detailed information NEPA is designed to prevent – so long as the agency casts a wide enough range of impacts, it can say the required information would have no effect on its analysis. Lastly, this argument fails to account for mitigation, which are certainly a relevant consideration regarding evaluating the impacts of the proposed project but go unaddressed in NRC Staff's cursory presentation on relevance.

Third, NRC Staff asserts that the FSEIS, along with the 2018 literature review and minimal re-survey without relevant expertise, presents all the relevant existing evidence. This argument ignores the fact that even without a survey, there are other forms of relevant evidence that are not accounted for. For instance, as Dr. Nickens testified in the Crow Butte proceedings, as detailed in the Tribe's May 31, 2017 letter, interviews and discussions with elders is a critical component of a cultural resources survey. May 31, 2017 letter (ML17152A109) at 3. NRC Staff does not present any evidence that such discussions and interviews are unavailable. This is similar to the approaches identified in Dr. Nickens' literature review, where he recounts various methods of obtaining information that include components that do not necessarily involve full physical surveys of the site. June 2018 NRC Staff literature review (ML18159A192) at 30 (discussing Sprague site-specific ethnographic review); at 11-16 (discussing Stoffle and LeBeau site-specific approaches). Of course, whether such a site-specific approach absent a physical survey would suffice as a reasonable approach would still be an issue for determination – but the

point is that there is relevant available information that NRC Staff has declined and/or refused to collect and describe.

Lastly, NRC Staff fails to demonstrate that it has satisfied the requirement that it conduct an "evaluation of such impacts based upon theoretical approaches or research methods generally accepted in the scientific community." Instead, NRC Staff concedes that because it has no new information, it cannot conduct any additional analysis. Motion at 37-38. This failure to make any attempt to identify or employ any "theoretical approaches or research methods generally accepted in the scientific community" cannot suffice under 40 C.F.R. § 1502.22(b). Indeed, this requirement is present precisely because there is a purported unavailability of information.

As such, for all the above reasons, NRC Staff has not met its burden of demonstrating compliance with 40 C.F.R. § 1502.22.

F. Remedy

NRC has interpreted its procedural rules as providing the Board with power to set aside the license where legal violations persist. NRC Merits Br. before the U.S. Court of Appeals for the D.C. Circuit at 8 (ML17227A161)("the ongoing adjudication could potentially result in modification or revocation of the already-issued license.") *citing In Re Powertech*, LBP-15-16, 81 N.R.C. 618 at 638 n.104, 679. This Board's power to revoke the license finds further support in prior NRC decisions. *See e.g. In the Matter of Public Service Company of New Hampshire, et al.* (Seabrook Station, Units 1 and 2) ALAB-416, 5 N.R.C. 1438 (N.R.C. June 29, 1977)(in light of procedural uncertainty, the Board assumed it retained power to lift license suspension the Board had issued). As stated in NRC's unsuccessful motion to dismiss briefing in the U.S. Court of Appeals for the D.C. Circuit, "ongoing efforts at the NRC could potentially prompt

modification or revocation of the license [g]iven that the NRC has already found noncompliance with NEPA and has yet to fix the noncompliance." NRC Motion to Dismiss Reply Br. at 11.

It is now apparent that the convictions and beliefs that "the NRC Staff will act with dispatch to cure this NEPA deficiency" were not fulfilled by NRC Staff. *In re Crow Butte Res., Inc*., 2016 NRC LEXIS 32 at 356 (N.R.C. Dec. 6, 2016). Because it has become unreasonable to believe NRC Staff will take any action inconsistent from the position advocated in the adjudicatory hearing and Court of Appeals, despite rejection by the Board and Commission orders, it is now "appropriate under the circumstances" for this Board to either revoke the license as represented in the briefing or issue a revised initial decision that orders denial of Powertech's license. *Id*. at 356-357 *citing* 10 C.F.R. § 2.340(e)(2).

G. Conclusion

Despite Commissioner Baran's strong dissent on the proper relief, the Commission confirmed NEPA violations and approved this Board's decision to allow NRC Staff to correct the NEPA violations after the license issued. NRC Staff's Motion has not identified any substantive cultural resources evidence gathered by NRC Staff since the Board issued its Order on April 2015, nor has it demonstrated compliance with 40 C.F.R. § 1502.22. The Board should deny NRC Staff's Motion, vacate the already-issued license based on unresolved NEPA violations, and if necessary, set the matter for an evidentiary hearing.

Respectfully Submitted this 21st Day of September 2018,

/s/ Jeffrey C. Parsons

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing RESPONSE TO MOTION FOR SUMMARY DISPOSITION in the above-captioned proceeding were served via the Electronic Information Exchange ("EIE") on the 21st day of September 2018, which to the best of my knowledge resulted in transmittal of same to those on the EIE Service List for the captioned proceeding.

/s/ signed electronically by_____

Jeffrey C. Parsons
Western Mining Action Project