

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	)	ASLBP No: 10-898-02-MLA-BD01
Facility)	)	

Hearing Exhibit

Exhibit Number: Exhibit OST-042-R

Exhibit Title: Declaration of Kyle White

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)	)	

**DECLARATION OF KYLE WHITE**

1. My name is Kyle White. I served as the Director of the Oglala Sioux Tribe Natural Resources Regulatory Agency at all times addressed in this declaration. The Oglala Lakota Cultural Affairs and Historic Preservation Office is a department within the Natural Resources Regulatory Agency.
  
2. The Oglala Sioux Tribe is a body politic comprised of approximately 41,000 citizens with territory of over 4,700 square miles on the Pine Ridge Reservation in the southwestern portion of South Dakota. The Oglala Sioux Tribe is the freely and democratically-elected government of the Oglala Sioux people, with a governing body duly recognized by the Secretary of Interior. The Oglala Sioux Tribe is the successor in interest to the Oglala Band of the Teton Division of the Sioux Nation, and is a protectorate nation of the United States of America. The Oglala Band reorganized in 1936 as the “Oglala Sioux Tribe of the Pine Ridge Indian Reservation” (“Oglala Sioux Tribe” or “Tribe”) under section 16 of the Indian Reorganization Act (“IRA”) of June 18, 1934, ch. 576, 48 Stat. 987, 25 U.S.C. § 476, and enjoys all of the rights and privileges guaranteed under its existing treaties with the United States in accordance with 25 U.S.C. § 478b. Its address is P.O. Box 2070, Pine Ridge, South Dakota 57770-2070.
  
3. I have reviewed the testimony of Jerry Spangler and his testimony oversimplifies and stereotypes all Lakota as “Tribal members.” (Exhibit NRC-176). The testimony, like NRC Staff’s assertions since 2014, mischaracterize the late Wilmer Mesteth’s testimony that “we, and we only we can assign meaning to our cultural resources.” A-20. In their September 1, 2017 opposition brief, the Consolidated Intervenors explained NRC Staff’s mischaracterization in opposing the NRC Staff’s unsuccessful Motion for Summary Disposition. Although Mr. Mesteth was a former THPO, his testimony was based also heavily on his cultural knowledge and role in traditional culture. *Id.* at 9 quoting Transcript at 765-67 (“I’m a medicine man. I use in my practice with these medicines on this country and I go into the Black Hills and I harvest these medicines yet today.”). (Exhibit OST-054).

4. Mr. Mesteth's testimony, taken in context, confirms for me that the Tribe is not alone among the entities that can assign meaning to the cultural resources impacted by the Dewey-Burdock project.

MR. MESTETH: Well, before I talk, I'd like to greet everybody in my Lakota language.

(Native language spoken [but not transcribed])

What I am saying is I'm from the Ogala Lakota Nation. And when I was growing up, you know, I grew up in my language. That's my first language is Lakota language. And I want that clearly understood here today in these proceedings here.

We are the ones that had rejection and we're the ones that are the experts, not the archaeologists. They make assumptions and hypotheses about our cultural ways and it's not accurate. Some of the information is not accurate. And that's why we object in certain situations. But I'm a Lakota spiritual leader all my life. I grew up in my traditional ways and the history of my people. I am well versed in the history of my people. [...]

We are one of the largest indigenous nations in this country on this continent, the Lakota, Dakota, and Nakota people. [...]

This Turtle Island, and we have respect among each other, our tribes and our cultural ways and our burial grounds, ar[e] well understood between tribes and we have effigies, stone features. We have sacred places here in this country and we are the only ones that can determine those things. And sometimes we are reluctant to share this information with archaeologists because the nature of the information, sacred places. Your understanding of a sacred place is different from mine. And I want those things clearly understood here today in these proceedings.

We are the ones, and the only ones, that are qualified. When we're talking about tribes in and around the Black Hills, the Lakota Nation, the Kiowa Nation, the Crow Nation, Arapaho, Northern Arapaho, Northern Cheyenne Nations, Hidatsa, Mandan and Arikara, the Ponca and Pawnee. These tribes are historical tribes. When we're looking at features and artifacts and you're talking about history of this Black Hills, then we are the experts. I want that clearly understood.

[...] And the cultural TCP surveys, cultural TCP surveys, that's where we are the ones that determine what is clearly Lakota, a stone feature, a plinth artifact, arrowpoint. Those things, because we still practice our culture and we can trace it back. And what kind of stones are used on this land?. What kind of medicines that we utilize? We still use -- I'm a medicine man. I use in my practice with these medicines on this country and I go into the Black Hills and I harvest these medicines yet today.

The knowledge of our people, you know, their existence here, you know, in the Black Hills area, some experts in the archeologist's field say that we're newcomers here. But no, in my ohunka, it states in there that we came forth upon creation here, not where

Adam and Eve came in the Garden of Eden, wherever that is, you know. But here in (native language spoken [but not transcribed] we call it, that's where our tradition states that we came forth upon this island here, the sacred Black Hills and we crossed over this land towards the east and then made our journey back here. That's our story and it's just as valid as this Holy Bible, you know. That's my understanding.

Transcript at 764 - 747. (Exhibit OST-054). It is my understanding that the English-language testimony is consistent with the greeting Mr. Mesteth provided in the Lakota language that the NRC failed to record (or translate) for the official transcript. Transcript at 764.

It is clear to me that Mr. Mesteth was using the word we to identify a wide range of persons and entities that may include, but is not limited to, the Oglala Sioux Tribe. I am aware of many other persons and entities that would fit into Mr. Mesteth's specific use of the word "we" in his testimony. However, the word "we" cannot be understood to exclude the Tribe from those persons necessary to carry out cultural resources identification, characterization, and protections

I agree with Mr. Mesteth's response to Chairman Froehlich's cross-examination question.

CHAIRMAN FROEHLICH: Among the various Lakota tribes would representation by one tribe suffice to protect the cultural interests of the other Lakota tribes?

MR. MESTETH: No, I don't believe so.

Transcript at 815. I disagree with NRC Staff's subsequent filings that mischaracterize Mr. Mesteth's testimony to assert that existing archeological surveys are sufficient to identify, characterize, and protect cultural resources of any Lakota Tribe.

5. Mr. Mesteth has since passed onto the Spirit World.  
<https://newsmaven.io/indiancountrytoday/archive/wilmer-mesteth-oglaala-lakota-spiritual-leader-walks-on-7M-D08eRMEqq7QQozyeatQ/>. I can confirm that Mr. Mesteth was not the OST THPO for the Tribe at the time of the 2014 hearing. Transcript at 80, 813 (Cross-examination by Chairman Forelich). I also agree with Mr. Micheal Catches Enemy's confirmation that the NRC Staff's approach was fatally flawed, in part, because with regard to Traditional Cultural Properties, "we won't be able to agree to a one-size-fits-all as tribes." Transcript at 862-863.
6. I also agree with Mr. Hannus's statement, referring to Powertech's consultants, that "we're not in any way qualified to be conducting TCP surveys." Transcript at 858. Mr. Hannus's testimony also explains why Mr. Spangler, an archeologist, is not a qualified contractor.

It's a complicated question for our discipline [archeology] in that the data sets that we work with can answer numerous questions about time, space, climates, types of sites as far as what was going on at the site, but we can't really attach historically identified tribal entities to those levels of evaluation. And again, that really should clearly, I think, show us that for us to then be able to make some kind of in roads ourselves, being not of Native

background, to identification of sites that are traditional cultural properties that have a tie to spirituality and so on, it is not in our purview to do that.

Transcript at 859. (Exhibit OST-054). It is my experience that various Western Sciences play a role in THPOs and other's efforts to identify, characterize, and protect cultural resources. However, a purely scientific methodology based on any single discipline or source of knowledge will not be adequate to the task. An interdisciplinary approach must include cultural sources of knowledge described by Mr. Mesteth, and must not be limited to the narrow approach taken by Mr. Hannus, Mr. Spangler, and other archeologists that lack the qualifications to conduct or design the interdisciplinary/intercultural approach required by cultural resources methodology.

7. There are important official and cultural distinctions between the Tribe that is participating in the formal hearing, which is established as described in paragraph 2, and the Lakota people(s), persons, and culturally based entities Mr. Mesteth was referring to. Some traditional Lakota people with deep cultural knowledge are members of the Oglala Sioux Tribe and some are members of other federally-recognized Indian Reorganization Act (IRA) Tribes. Many culturally traditional people have shunned membership in the IRA-based Tribe. Marriage and the normal course of human events has further complicated the question of membership to the point that it is false, and a misrepresentation of Mr. Mesteth's testimony, to say that all persons and entities with the required cultural knowledge are members of the Tribe.
8. The failure to note the important distinctions between IRA Tribal members, IRA Tribal staff, members of the Lakota culture, and the various traditional affiliations of the Lakota people prevent Mr. Spangler from providing an informed, let alone expert, opinion on the ways cultural knowledge is created, shared, and used within the IRA-based Tribe. Mr. Spangler has identified no basis for providing any opinion on the various persons and entities with relevant cultural knowledge who are not formal parties to the NRC proceeding. Similarly, Ms. D. Diaz-Toro's failure to understand the cultural distinctions is revealed by the use the terms "Tribe" and "Tribal Elders" as generic terms without regard to the specific persons and entities, such as "Oglala Sioux Tribe technical staff, spiritual leaders, elders, and warrior society leaders" the Tribe has identified in these formal proceedings as necessary for a cultural resource survey and analysis. A.23. See LBP-18-05 at 28.
9. A similar misunderstanding helps explain the dysfunction during NRC Staff meetings with the OST Cultural Resources Advisory Council. A.30 (bullet). These meetings were not designed, intended, nor planned to be sessions for the gathering of any cultural resources information. These meetings were required to discuss and give input on the design of methodologies and surveys in accordance with legal and cultural considerations, including OST Ordinances. This type of process allows for channeling of community input. Many researchers who are focused on intercultural collaborations, identify community involvement and decision making; from the beginning of research design and throughout the entirety of the research process is important to ensure the research is guided and formulated with the correct cultural context. The discussions and result of both the June 11, 2018 and February 22, 2019 meetings confirmed that NRC Staff had not, and would not, hire the qualified

persons necessary to design and implement a cultural resources survey methodology or analysis that complied with federal obligations or the Tribe's Ordinances and cultural considerations.

10. Mr. Spangler also states at A.10 of his testimony that "only Tribal members can assign significance to those sites." In my interactions with Mr. Spangler, it became immediately apparent that Mr. Spangler lacks training, background, and knowledge of the distinctions between a "Tribal member" and a "Lakota person." Mr. Spangler also states generically that, "Only a Tribal member with traditional knowledge can communicate with the ancestors, identify places where spirits dwell, or evaluate the spiritual power of an individual location." A.10. Mr. Spangler's statement confirms a lack of knowledge of the distinctions and complexities involved, and causes unnecessary confusion. Persons who are not members of the Tribe, including contractors with relevant cultural background and experience that I have regularly hired to carry out the Tribe's programs, play an important role in the Tribe's preservation, transmission, and use of traditional cultural knowledge in identifying, characterizing, and protecting our cultural resources. NRC Staff was offered, but refused, my input into the identification of qualified contractors on many occasions. I heard Mr. Spangler admit on multiple occasions that he does not have any meaningful experience with Lakota culture. His archeological work in the Desert Southwest is of little value to the cultural resources methodology.
11. The diversity of views within and among official government and traditional culture is often unseen and misunderstood by outsiders that lack the required cultural background, such as Mr. Spangler and Ms. Diaz-Toro. It is my understanding that neither speak any Lakota language, neither have familial ties with the Lakota, and neither have lived in the Lakota's historical territories.
12. The Tribe, and the staff I supervised, all have the required background. When the 2019 meetings were scheduled, I had looked forward to a wide range of culturally informed input into creating the survey methodology and analysis. I was looking forward to information contained in NEPA comments I anticipated to be submitted by other Tribes and culturally affiliated persons and entities. Much, but not all, of the required information is widely known and has been recorded in academic writings and is carried within oral traditions. My reliance on NEPA public comment outside the formal NRC hearing process is directly analogous to the NEPA requirements that force NRC Staff to seek input from all sorts of persons before taking action on a proposal. It is my understanding that NRC Staff cannot rely on the formal input of a single municipality, state, or federal agency to meet its public comment duties, and likewise, NRC Staff cannot rely on the formal input of a single Tribe as a substitute for the opportunity for public comment to inform the NEPA duties involving the cultural resources survey.
13. Instead, NRC Staff and Mr. Spangler insisted upon a narrow archeology approach that the Board and full Commission had repeatedly rejected.
14. The oversimplification of all persons with cultural resource information into "Tribal members" is one of the reasons I have repeatedly asked for a qualified Tribal Liaison with a

background in Tribal governance and Lakota culture to work with NRC Staff, and attend all meetings. Unfortunately, NRC Staff has not provided such a person. I have made this concern known in our meetings, in writing, and through statements of counsel. The problem is not that the information is unavailable. The problem is that NRC Staff is unwilling to take the steps necessary to understand cultural resource methodology based on an interdisciplinary approach to Western Science, informed by cultural ways of knowing.

15. In 1992 the U.S. Congress adopted amendments to the National Historic Preservation Act (P.L. 102-575) that allow federally recognized Indian tribes to take on more formal responsibility for the preservation of significant historic properties on tribal lands. Specifically, Section 101(d)(2) allows tribes to assume any or all of the functions of a State Historic Preservation Officer (“SHPO”) with respect to tribal land.
16. I am familiar with the license application submitted to the Nuclear Regulatory Commission (NRC) by Powertech (USA) Inc. (“Powertech” or “Applicant”) for the proposed Dewey-Burdock in-situ leach uranium mine in southwest South Dakota.
17. The lands encompassed by the Powertech proposal are within the Oglala Sioux Tribe’s aboriginal lands. As a result, the cultural resources, such as burials, items of cultural patrimony, artifacts, sites, and other material culture, etc., belong to and/or could be associated with the Tribe upon proper identification, documentation, evaluation, and recordation. By enacting NEPA (42 U.S.C. §§ 4231 *et seq.*), NAGPRA, (25 U.S.C. §§ 3001 *et seq.*), NHPA (16 U.S.C.S. §§ 470 *et seq.*) and other statutes, the United States Government has assured that the cultural resources of a tribe will be protected, even when they are not within reservation boundaries. Since there are cultural resources identified in the license application, and there may well be more that only the Tribe can identify and ensure that they are properly protected, the Tribe has a protected interest here. Any harm done to these cultural resources, especially to burials and artifacts, perhaps because the Applicant and NRC Staff did not properly judge the significance of certain artifacts or other resources, will be an irreparable injury to the very identity of the Tribe, caused by the actions of the Applicant, and condoned by the NRC Staff, the Tribe’s trustee.
18. In any case, the identification and discovery of significant cultural resources and prehistoric artifacts in the Tribe’s treaty and aboriginal territory implicates important tribal interests such that the Tribe’s rights are threatened by the Applicant’s proposed construction and mining activity in its aboriginal territory.
19. The characterization, analysis, and protection of the already identified features and artifacts also implicates important tribal interests.
20. The identification of potential cultural resources, characterization, analysis of their significance, and means of protecting these cultural resources from the proposed project requires an interdisciplinary approach that draws from both the Western scientific traditions and the culturally-embedded knowledge of persons and groups within the various cultures. The Oglala Sioux Tribe regularly relies on elected officials, specialized staff, qualified contractors, and the input of the relevant groups and individuals to inform its governmental

actions regarding the cultural resources of the Lakota Tribes, and others, with deep ties to this region.

21. The Oglala Sioux Tribe has taken, and continues to take, the necessary course of action to participate fully as a party in the NRC proceeding in part in order to safeguard its interests in the protection of cultural, historic, and natural resources, including ground water, at and in the vicinity of the mine site.
22. The adversarial nature of the NRC hearings, and NRC Staff's alignment with Powertech's interests, present a difficult context that discourages the Tribe, our contractors, and members to assert the specifics required to protect these interests. It is my experience that NRC Staff has unnecessarily treated myself, our contractors, and other THPOs as persistent adversaries. By acting as an adversary instead of carrying out the role of a federal trustee, the NRC Staff has effectively walled itself off from the information the NRC must use to meet its cultural resources duties.
23. It is difficult to find Tribal members and Lakota people willing to participate in formal hearings. There is a well-founded distrust for federal tribunals and outsiders trying to gain information about Lakota culture. In order to gain information about Lakota culture and cultural resources, the correct people must be identified and then must be addressed with the necessary respect and protocols.
24. The Nuclear Regulatory Commission ("NRC") has upheld this Atomic Safety and Licensing Board's ("ASLB") rulings that NRC Staff failed to comply with the National Environmental Policy Act (NEPA) with respect the Staff's failure to conduct an adequate survey for, and analysis of impacts to and mitigation for, cultural resources at the proposed mine site. Despite these acknowledged illegalities, the Commission nevertheless affirmatively confirmed the issuance of the disputed license. The NRC's action in doing so harms the Tribe's interests in ensuring the protection of its cultural, historic, and natural resources
25. The Tribe was granted standing in the hearing process before the Nuclear Regulatory Commission over the actively litigated objections of the applicant. NRC Staff did not object to the Tribe's standing. The ASLB found that the "Oglala Sioux Tribe has shown it has standing to participate in this proceeding..." *In the Matter of Powertech (USA), Inc.* (Dewey-Burdock In-Situ Uranium Recovery Facility), LPB-10-16, 72 NRC 361 (2010), at 3. Specifically, the ASLB found that the substantive injuries to the Tribe resulting from the proposed project as well as the procedural injuries resulting from the lack of compliance with NEPA and the NHPA confer standing on the Tribe. LPB-10-16, at 22-25.
26. During the evidentiary hearings held in August of 2014, Oglala Sioux Tribe witnesses Mr. Mesteth and Mr. CatchesEnemy testified in detail as to the ongoing harm to the Tribe's substantive and procedural interests as a result of the lack of analysis as to the cultural and water impacts associated with the proposed project. (Exhibit OST-054, pp. 763-767; 779-782; 794; 799-803;812-816; 825-827; 853-855; 861-864)
27. Included within the territory the Powertech proposal would impact are current or extinct water resources. Such resources are known to have been favored camping sites of



indigenous peoples, both historically and prehistorically, and the likelihood that cultural artifacts and evidence of burial grounds exist in these areas is strong.

28. While the Powertech application includes some evidence of a cultural resource study, no comprehensive study identifying all such resources has been adequately conducted by either the Applicant or NRC Staff, nor incorporated into the FSEIS. No such study has been conducted by the Tribe. While some other tribes have reviewed the site, these surveys are not sufficient to identify cultural and historic resources significant to the Oglala Sioux Tribe. The FSEIS does not describe any uniform or scientifically-verified methodology employed by these surveys, nor explain any methodology or scientific basis for the selection of certain cultural resources as significant or eligible for listed on the national register of historic places, while others are not granted such status or protections.
29. Powertech's Environmental Report accompanying the license application indicates that personnel from the Archaeology Laboratory at Augustana College ("Augustana"), Sioux Falls, South Dakota, conducted on-the-ground field investigations between April 17 and August 3, 2007. (Exhibit APP-040-B at 3-178). To my knowledge, the Tribe was not involved in this study, and no surveys have been made by any persons with relevant cultural experience. This study remains the primary basis for the NRC Staff's identification of identification and analysis of cultural resources in its FSEIS. NRC Staff has never engaged persons with relevant cultural knowledge to characterize and assign importance to the features identified by Augustana. NRC Staff committed in its Draft Supplemental Environmental Impact Statement to conduct additional scientifically-valid cultural resource surveys within the mine project area, and distribute such surveys for public comment as required by NEPA. (Exhibit OST-057). Despite these express commitments, NRC Staff failed to conduct any such surveys or solicit any additional public comment.
30. As stated in the Powertech Environmental Report, at 3-179 (Exhibit APP-040-B), the Augustana study found that "the sheer volume of sites documented in the area [was] noteworthy," and the area proposed for mining was found to have a "high density" of cultural resources. As also recognized in the environmental report, this indicates that use of the area by indigenous populations was, and has been, extensive.
31. The Powertech Environmental Report also states, at 3-178 (Exhibit APP-040-B), Augustana documented 161 previously unrecorded archaeological sites and revisited 29 previously recorded sites during the current investigation. Among these were some 200 hearths within 24 separate sites. Significantly, however, twenty-eight previously recorded sites were not relocated during a subsequent investigation.
32. Powertech asserts in its Environmental Report, at page 2-9, Table 2.11-1 (Exhibit APP-040-B), that impacts to cultural resources will be "none." However, the Memorandum of Agreement (with amendments) entered into between Powertech and the Archaeological Research Center (ARC), a program of the South Dakota State Historical Society, reproduced in the Environmental Report at Appendix 4.10-B (Exhibit APP-021-AA), specifically recognizes that "Powertech has

determined that the Project may have an affect on archaeological or historic sites that contain or are likely to contain information significant to the state or local history or prehistory....”

33. The NRC Staff’s Final Supplemental Environmental Impact Statement (FSEIS) relies heavily on the Augustana study ([Exhibit NRC-008-A at 3-76](#)) and a “Programmatic Agreement” (PA) developed outside of the NRC Staff’s National Environmental Policy Act (NEPA) review. ([Exhibit NRC-008-B-1 at 6-17](#)). As a result, the FSEIS defers its analysis of the impacts of the project construction, and development of mitigation plans and protocols to a later time.
34. Significantly, Powertech has not entered into any Memorandum of Agreement with the Tribe. Similarly, the “Programmatic Agreement” was finalized by NRC Staff without agreement, and over the official objections of, the Oglala Sioux Tribe. The NRC Staff has not obtained the Tribe’s participation in the development of any mitigation measures or other stipulations purported to result in the diminishment of impacts to the Tribe’s cultural and historic resources at the site. Nor has Powertech sought to include the Tribe in any of the “Dispute Resolution” procedures through which the Programmatic Agreement purports to remedy disagreements regarding the significance of cultural resources on the site, or the impact of any mining operations on these cultural resources. ([Exhibit NRC-018-A](#)). As a result, NRC Staff and Powertech have failed to adequately include the Tribe in this process, and leaves the Tribe’s cultural resources at significant risk.
35. In February of 2014, then Oglala Sioux President Brian V. Brewer submitted a letter to the NRC setting forth in some detail the significant problems with the NRC Staff’s approach to both compliance with NEPA and the National Historic Preservation Act (NHPA). ([Exhibit OST-012 at 132](#)). The issues identified in that letter have not been resolved, and the Tribe believes that significant historic and cultural resources remain at risk from the proposed mine project as a result.
36. The Oglala Sioux Tribe submitted declarations in the NRC administrative process in 2010 signed by then-THPO Wilmer Mesteth and Director of the Oglala Sioux Tribal Land Office Denise Mesteth, and in 2014 signed by then-THPO Michael CatchesEnemy. ([Exhibits OST-014, OST-015](#)). Because no scientifically-defensible site-wide cultural resources study or inventory has been conducted for the project area since the filing of those declarations, the criticisms and critiques of the cultural resources studies conducted with respect to the mine project area remain valid and current.
37. I am not aware of NRC Staff requesting public comment or employing a contractor with the relevant cultural knowledge to characterize the cultural resources that have already been identified. I am not aware of any NRC Staff effort to engage a contractor with relevant interdisciplinary scientific expertise and relevant cultural knowledge to characterize cultural resources information that remain protected by SUNSI designation.
38. I have received letters confirming that NRC Staff is still trying to identify cultural resources and still has not obtained the Tribe’s participation in the development of any mitigation measures or other plans purported to result in the diminishment of impacts to the Tribe’s cultural and historic resources at the site.

39. The Oglala Sioux Tribe has a concrete interest in a lawful and complete NEPA process. Using the NEPA process ensures Tribal members are able to engage the cultural resources decisions being made by NRC Staff and work to ensure that cultural and natural resources are protected from desecration and destruction.
40. The FSEIS, Record of Decision, and license were issued before Powertech or NRC Staff completed a Programmatic Agreement (“PA”) to establish the newly segregated cultural resources analysis. The Oglala Sioux Tribe is not a signatory to any PA concerning the Powertech proposal.
41. The NRC’s December 23, 2016 Order (CLI-16-20) upheld this Board’s ruling that NRC Staff had failed to comply with NEPA in its assessment and analysis of impacts to cultural resources at the proposed mine site. Nevertheless, the Commission approved the effectiveness of Powertech’s license without first properly surveying for or mitigating impacts on both identified and unidentified cultural resources.
42. On July 20, 2018, the United States Court of Appeals for the District of Columbia Circuit issued a decision in a case brought by the Oglala Sioux Tribe against the Nuclear Regulatory Commission alleging violations of federal law, including NEPA, for leaving the Powertech license in place despite the lack of a NEPA-compliant cultural resources impact and mitigation analysis.
43. Should the license remain active or construction go forward without first completing a proper survey and developing a lawful plan mitigating the impacts to sites and their setting, opportunities to implement mitigation options such as moving facility features and prohibiting disturbance of sensitive areas would be forever lost. By leaving the license in place, the NRC Staff has exacerbated the negative effect of the adversarial proceeding on the ability to carry out NRC’s cultural resource duties imposed by NEPA, NHPA, and the federal trust relationships.
44. As detailed in Mr. Mesteth’s and Mr. CatchesEnemy’s Declarations ([Exhibits OST-014, OST-015](#)), the numbers and density of cultural resources at the site proposed for mining demonstrate that any mining activity, including ground-disturbing construction activity, is likely to irreparably adversely impact the cultural resources of the Oglala Sioux Tribe. The failure to meaningfully involve the Tribe in the analysis of these sites, or to conduct any ethnographic studies in concert with a field study designed with credible interdisciplinary scientific methodology as part of the NEPA or NHPA processes, further exacerbate the impacts on the Tribe’s interests as a procedural matter causing irreparable harm by negatively affecting the Tribe’s ability to protect its cultural resources. If the project were not to go forward as planned, the interests of the Oglala Sioux Tribe would be protected as the potential for impact to the Tribe’s cultural resources would be diminished or outright eliminated.
45. In my capacity as Director of the Oglala Sioux Tribe Natural Resources Regulatory Agency, I participated in the NRC Staff’s efforts in 2018 and 2019 to design and undertake a competent cultural resources survey of the Dewey-Burdock property. In 2018, the schedule

for the proposed cultural resources survey effort was set forth in an enclosure to an April 13, 2018 letter from NRC Staff personnel to myself. The schedule contemplated meetings via webinars and teleconferences starting May 28, 2018 “to discuss and establish the survey methodology and the areas to be examined during the field survey.” (Exhibit OST-058).

46. I joined the conference call and webinar established for June 4, 2018, and the follow up teleconference on June 5, 2018, along with Mr. Lance Rom, principal at Quality Services, Inc., a professional cultural resources firm. Mr. Rom was participating as a professional paid consultant for the Oglala Sioux Tribe. The Oglala Sioux Tribe, and other THPOs, regularly hire cultural resources professionals with interdisciplinary training in the relevant Western sciences and relevant cultural backgrounds to assist staff meet our responsibilities. Quality Services, Inc. was paid approximately five thousand dollars for their professional services during June 2018.
47. During the June 4 and 5, 2018 teleconferences, topics of discussion included how the methodology for the cultural resources would be developed and what confidentiality protections would be in place to ensure protection of sensitive cultural information.
48. Confidentiality is critical to Oglala Sioux Tribe, and is the subject of tribal codes and ordinances. The Tribe provided NRC Staff with these provisions with the expectation that they would be applicable to all participants in the survey with access to sensitive cultural information, including NRC Staff and contractors.
49. Despite the Tribe’s explanation of the importance of additional confidentiality provisions, NRC Staff refused to provide for any expansion of existing SUNSI orders. NRC Staff did not provide any means to address the Tribe’s concerns over ownership of the information collected, both through the survey and the oral interviews.
50. During the teleconference discussions, 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.
51. On June 5, 2018, NRC Staff contractor Dr. Nickens provided a proposed “initial work plan” to the Tribe. (Exhibit OST-052). The June 5, 2018 initial work plan lacked any identifiable scientific methodology for a cultural resources survey. In fact, it constituted an open site survey proposal that 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;

52. Dr. Nickens' work plan contains no methodology. Dr. Nickens lacks the qualifications to design and implement a scientifically sound cultural resources survey methodology. Based on my experience and training, Dr. Nickens lacks the cultural knowledge necessary to design and implement an interdisciplinary cultural resources methodology or a method to properly characterize and assessment identified cultural resources.
53. Dr. Stoffle did not interact with the Tribe after the webinars and follow-up call were completed. Dr. Stoffle's participation ended abruptly after the University of Arizona was contacted to confirm whether Dr. Stoffle's assertions regarding confidentiality requirements based on his status - and the status of his graduate students - with the University were reliable. The University of Arizona disavowed any official sanction of Dr. Stoffle's involvement, or the involvement of his graduate students, with the NRC Staff's activities.
54. The Tribe raised objections to Dr. Nickens' June 5, 2018 open site survey immediately.
55. Dr. Nickens confirmed on the phone conference that the open site survey is not the type of approach he would recommend.
56. Dr. Nickens confirmed on the phone conference that his efforts were constrained by time pressure and NRC budget.
57. NRC Staff has never released the work plan and budget that constrained Dr. Nickens' work. Dr. Nickens offered to assist the Tribe to prepare a methodology.
58. On June 8, 2018, given the lack of a concrete plan from NRC Staff for development of a methodology or the site survey, the Tribe's presented, through counsel, a detailed work plan to NRC Staff. The plan included a summary of the discussions held to-date, a summary of the Tribe's concerns regarding issues that the Tribe had requested be addressed prior to field visits, including confidentiality concerns, as well as a detailed daily schedule for the Tribe and NRC Staff and contractors to finalize the survey methodology. The NRC Staff accepted the proposal and agreed to work to develop a methodology with face-to-face meetings during the wee week of June 11, 2018.
59. Given the lack of any scientific survey methodologies presented by NRC Staff or contractors, apart from the one-page summary work plan provided on June 5, 2018, and in order to facilitate the discussions and provide NRC Staff and its contractors information on the type of interdisciplinary and culturally-based methodologies the Tribe would like to incorporate, an initial proposal was hand delivered in Pine Ridge to NRC Staff and contractors on June 12, 2018. (Exhibit NRC-197). The proposal was not presented as any kind of ultimatum.
60. I had concluded that NRC Staff and Dr. Nickens lacked the scientific and cultural knowledge necessary to prepare the required methodology, carry out a survey, or to evaluate the results. The proposal was prepared by myself and Mr. Rom in coordination with other Tribal staff to educate NRC Staff and to provide a starting point for discussion of specific methodologies with NRC Staff and Dr. Nickens.

61. The Tribe's methodologies were discussed at the June 13, 2018 emergency meeting of the Oglala Sioux Tribe Cultural Affairs and Historic Preservation Advisory Council Meeting. Dr. Nickens and NRC Staff attended the meeting. During the meeting, the Advisory Council discussed the methodologies and gave input on Oglala Lakota cultural principles.
62. The Tribe believed that progress had been made toward at least a preliminary agreement on the methodology. Work on the methodology was deemed a priority because the "March 2018 approach" contemplated that a methodology would be established by qualified persons before Tribal members were brought in to help carrying out the survey. NRC Staff requested that the Tribe update its June 12 document based on the input of the Advisory Council before it would respond. NRC Staff notified the Tribe that no activities would occur until NRC Staff could respond to the Tribe's updated document.
63. The Tribe provided an update to the June 12 document on June 15, 2018 ([Exhibit NRC-198](#)), expecting to continue working on the methodology during the next week, while also beginning field work within the original schedule proposed by NRC Staff for the field survey. However, on June 15, counsel for NRC Staff informed the counsel for the Tribe that NRC Staff had rejected all aspects of the methodology developed by the Tribe and its contractors during face-to-face meetings. NRC Staff sent a similar email to myself on the same day. Neither email rejection provided any substantive explanation of why each and every methodological component was unacceptable, or why no portion of the Tribe's methodologies could be implemented in any manner. ([Exhibit OST-059](#)).
64. Without any attempt to negotiate, and despite the Tribe's request that the field work commence on June 18, 2018, 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. 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.
65. The June 2018 interactions confirmed for me that NRC Staff was not effectively working as a federal trustee seeking to carry out the cultural resources mandates of NEPA and NHPA. The June 2018 interactions confirmed for me that NRC Staff viewed themselves as a participant in an adversarial process with a goal of protecting its decision to issue a license without first meeting its NEPA and NHPA duties.
66. NRC Staff has repeatedly and erroneously stated, in person and in writing, that the Tribe agreed to be strictly bound March 2018 Approach. *See* March 12, 2019 OST letter to NRC Staff. ([Exhibit NRC-211](#)). Even the name of the document -approach - confirms my understanding that the purpose of the March 2018 Approach was to work toward an agreement that would allow the NRC Staff to meet the NRC duties set out in the orders issued by the Board and Commission.
67. NRC Staff used the March 2018 Approach to rebut information we provided on elements of a cultural resources methodology that could be used by NRC Staff to meet its duties. During late 2018 and into 2019, my efforts were re buffed by NRC Staff's assertions that the March

2018 Approach was some kind of contract that bound the Tribe to its terms. None of the procedures necessary to create a contract with the Tribe were followed by NRC Staff. The aggressive and litigious approach taken by NRC Staff precluded the give and take I normally have with contractors, other Tribes, and persons with cultural resources knowledge necessary to prepare a methodology to carry out the general outline identified in the March 2018 Approach.

68. The requirements I presented have been consistent with the requirements presented by the Tribe and the witnesses in the 2014 hearings. I am not authorized, and have never intended, to enter any agreement that could be construed as allowing NRC Staff to forego any aspect of the protections afforded the Tribe by federal laws invoked in these hearings.
69. Based on the NRC Staff's use of the March 2018 Approach, I refused to agree to any proposal the NRC Staff might later misconstrue or misrepresent as an agreement that could contractually bind the Tribe. For the same reasons, I never expressly nor constructively rejected any proposal presented by NRC Staff. Instead, on February 22, 2019, I brought together a diverse set of people who were willing to help NRC Staff carry out the duties that remained unfulfilled.
70. At the February 22, 2019 meeting, as is our custom and tradition, everyone was able to have their say on the topics they believed were important to address. It was apparent to me that the NRC Staff was not accustomed to this approach, and was unable to differentiate between official positions, demands, and suggestions made during the meeting. It was apparent to me that Mr. Spangler felt professionally threatened by the THPOs and others who expressed a distrust for archeologists who lacked the necessary cultural knowledge and background. Other participants confirmed my observation that NRC Staff was not interested in engaging, in part, because they did not have the benefit of a qualified Tribal Liaison to explain the context or the intent of many of the participants. NRC Staff did not bring (or request) an interpreter, and therefore NRC Staff and Mr. Spangler were unable to understand or engage matters presented by myself, THPOs, and others in Lakota language.
71. The Tribe did not reject the draft methodology outright. Some participants expressed strong reservations about the draft methodology. NRC Staff appeared to not have a full grasp as to what was happening and who was speaking in the meeting.
72. On behalf of the Tribe, and joined by others, I pushed for NRC Staff to attend additional meetings to follow up on the incomplete presentation of the draft methodology at the February 22, 2019 meeting at Pine Ridge. There was near-consensus, and apparent agreement by Mr. Spangler, that a cooperative approach to developing a sound methodology would require additional days of face-to-face discussions. (Exhibit NRC-218). Some attendees believed NRC Staff had no intention of working with us.
73. However, on behalf of the Tribe, I continued my requests that NRC Staff take the steps necessary to carry out the incomplete elements of the March 2018 Approach, particularly the preparation of a methodology prepared with the input of a qualified NRC contractor. At the February 21 meeting, many of the participants pleaded with NRC Staff to hire a competent

contractor – one with Lakota background and experience. (Exhibit NRC-218 at 2). It was apparent to me that NRC Staff did not have the experience or training required to know what constitutes a qualified contractor.

74. NRC Staff says they were not able to obtain any additional information to characterize and protect cultural resources, but they never sought to interview anyone or put any information out for public comment and review. NRC Staff took no affirmative steps to conduct any oral interviews. Conducting interviews would be an important source of information to characterize and protect the already-identified cultural resources, with or without the additional pedestrian survey.
75. The Tribe, as formal tribal government, is not the “holder” of all cultural resources information any more than the NRC is the “holder” of all information on nuclear waste disposal. Asking the Tribal government to provide information on cultural resources cannot substitute for asking the persons and entities to share that information, in accordance with federal law and the Tribe’s Ordinances.
76. The oral histories component of the March 2018 Approach did not depend on the pedestrian survey. Oral histories, conducted by the appropriate persons, are an important part of the cultural resources analysis from both a traditional knowledge and social sciences perspective. The social sciences often use an interdisciplinary approach to assemble this information, as data that informs an ethnographic study that is interpreted and included in a report prepared by trained social scientists. The traditional knowledge approach often assembles this knowledge in the forms interpreted by persons with the required cultural knowledge. These approaches can, and in my experience do, result in useful information on cultural resource protections.
77. Despite explicit requests for this information, NRC Staff has never provided me with any information on what a reasonable cost would be to carry out any element of the March 2018 Approach, such as the draft site survey methodology or oral histories component. NRC Staff never sought to discuss a reasonable dollar amount. Instead, NRC Staff offered honorariums in the amount Powertech agreed to pay.
78. NRC Staff did provide a literature report. As discussed at the February 22 meeting, the literature report is an amateurish background document that is riddled with false information and misstatements. The literature report appears to be taken entirely from an incomplete selection of publicly available sources and should have been put out for public review and comment. As was explained on February 22, public comment would have resulted in a very different document. For instance, I suggested to NRC Staff and Mr. Spangler specifically that the agency research and review existing publicly available literature regarding celestial knowledge that factors heavily into Lakota cultural history and provides information on how the Dewey-Burdock project may affect Lakota cultural resources. This information was never included in any NRC Staff or contractor document.
79. NRC Staff seems to maintain the vague position that cultural resources will be subject to “small to large” impacts as set out in the FSEIS. This conclusion provides such as broad



range as to render the assessment meaningless. I am accustomed to reviewing and relying on reports that contain detailed specificity as to the impacts and the means to avoid them. The FSEIS does not provide me with a hard look at the impacts of the proposal, and rejects known sources of information that must inform any cultural resources analysis.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on June 28, 2019 at Pine Ridge Indian Reservation.

*s/Kyle White*

---

Kyle White