

July 17, 2019

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))

NRC STAFF'S REPLY STATEMENT OF POSITION

Pursuant to the Atomic Safety and Licensing Board's April 29, 2019 Order (Granting NRC Staff Motion and Scheduling Evidentiary Hearing) and May 10, 2019 Order (Granting NRC Staff's Motion for Extension of Time), the Staff of the U.S. Nuclear Regulatory Commission (Staff) replies to the Oglala Sioux Tribe's (Tribe's) and Consolidated Intervenors' Response Statements of Position. This Reply and accompanying Staff testimony confirm why the Board should resolve Contention 1A in the Staff's favor, as the Tribe's and Consolidated Intervenors' claims fail to show any legal or factual deficiency in the Staff's objectively reasonable approach for demonstrating its compliance with NEPA.

The Tribe asserts that the NRC Staff has not resolved the Board-identified NEPA deficiency because the proposed draft methodology was not designed by qualified individuals and is not adequately "interdisciplinary."¹ The Tribe also suggests that, regardless of whether the Staff was able to implement the March 2018 Approach for conducting a site survey, the Staff should have attempted to collect cultural resources information by conducting oral interviews.²

¹ See *generally* Oglala Sioux Tribe's Response Statement of Position (June 28, 2019) (ADAMS Accession No. ML19179A337) ("RSOP").

² See, e.g., RSOP at 42–46.

The Consolidated Intervenors express support for the Tribe's position and offer declarations of 22 Lakota individuals who they claim have "personal knowledge concerning Oglala Lakota cultural resources that may be at the Dewey Burdock site."³ Finally, the Tribe asserts that it never agreed "unconditionally" to the March 2018 Approach,⁴ that the Staff has not complied with 40 C.F.R. § 1502.22, and that the Staff has misapplied NEPA's "rule of reason."⁵

In response to these claims, the Staff demonstrates that the proposed draft methodology was objectively reasonable, that the Staff is entirely qualified to design such a methodology, and that the information the Staff seeks is incomplete or unavailable. As the Staff explains, none of the Tribe's varied criticisms demonstrates that the Staff's approach was objectively unreasonable. Further, the Tribe's claims regarding the Staff's compliance with 40 C.F.R. § 1502.22 do not refute the Staff's determination; rather, the Tribe has misapprehended applicable legal standards and material issues remaining to be resolved at this hearing. Because the Tribe has now constructively declined to proceed consistent with the basic parameters of the objectively reasonable March 2018 Approach, Contention 1A should be resolved in favor of the Staff.

I. The Staff Provided an Objectively Reasonable Methodology

As demonstrated in the Staff's Initial Statement of Position (ISOP) and Testimony, the Staff's proposed draft methodology reasonably balances a scientific methodology for conducting a Tribal cultural resources site survey with the unique considerations of Tribal autonomy and expertise.⁶ Aside from the complaint that Section 8 of the proposed draft methodology is still

³ Ex. INT-023.

⁴ RSOP at 8.

⁵ See RSOP at 30–50, 50–55.

⁶ See NRC Staff's Initial Statement of Position (May 17, 2019) (Agencywide Documents Access and Management System (ADAMS) Accession No. ML19137A446) ("ISOP") at 30–47.

just an “open-site survey”⁷ – a claim that the Staff’s Initial Statement of Position and Testimony already refutes⁸ – the Tribe articulates no specific dispute with the Staff’s proposed draft methodology.⁹ Instead, the Tribe challenges the qualifications of the Staff and its contractors, critiques the methodology on the vague basis that it is not “interdisciplinary,” and appears to reverse its longstanding position that a Tribal cultural resources pedestrian site survey is necessary by criticizing the NRC Staff for not completing oral interviews. When analyzing the Staff’s proposed draft methodology by the correct legal standard – NEPA’s objective rule of reason rather than the subjective standard of what the Tribe will ultimately agree to – the Staff has met its burden.

A. The Staff’s Proposed Draft Methodology Was Designed by Qualified Individuals

Throughout its response statement of position and witness declarations, the Tribe criticizes the Staff’s and contractor’s qualifications, based on what the Tribe portrays as an unduly archaeology-focused approach and a lack of Lakota-specific experience.¹⁰ Contrary to the Tribe’s assertion that the Staff “keeps hiring archeologists that lack the necessary cultural resources expertise, training, and background to go beyond what was confirmed as inadequate and outside the purview of non-Native archeologists at the 2014 hearings,”¹¹ Mr. Spangler’s approach and breadth of experience is entirely appropriate for crafting a reasonable

⁷ RSOP at 21.

⁸ See ISOP at 38–42.

⁹ RSOP at 16–23.

¹⁰ See, e.g., RSOP at 11, 14, 18, 44–45, 50; Ex. OST-042-R ¶¶ 6, 8–10, 52, 73; Ex. OST-043-R ¶¶ 46, 52. However, in designing the proposed draft methodology, the Staff considered several different methodologies, including one developed by Dr. LeBeau, an enrolled member of the Cheyenne River Sioux Tribe. See Ex. NRC-214 at 4; Ex. NRC-225 at A.3–A.4. Despite Dr. LeBeau’s qualifications and the fact that that methodology was developed by a Lakota individual, in consultation with Lakota elders, and specifically for Lakota TCPs, the Tribe nonetheless criticized LeBeau as “controversial.” See, e.g., RSOP at 19–20.

¹¹ RSOP at 50.

methodology that accounts for traditional cultural knowledge.¹² Although only Tribal members steeped in traditional cultural knowledge have the ability to ascribe meaning to sites of significance or identify sacred locations that are intangible, the proposed draft methodology's structured approach explicitly accounts for the need to balance scientific principles with Tribal expertise and input, and "emphasize[s] the importance of Tribal participation because the intangible values are known only to the Tribes."¹³

To the extent that the Tribe's position is that the only "qualified persons" to design a cultural resources methodology are Lakota individuals, this position disregards the established role in this field of thousands of non-Native and extremely qualified archaeologists, ethnographers, and historians.¹⁴ Moreover, accepting this premise would in practice appear to require agencies to acquire staff or contractors with extensive and direct experience with each Tribe potentially affected by a project, and conceivably necessitating as many different survey methodologies as there are affected Tribes.¹⁵ Mr. White's perspective that the governing body of a Tribe cannot necessarily speak to the cultural knowledge and experience of the broader Tribal community seems to contemplate an even higher bar for determining the completeness of a survey methodology: "Asking the Tribal government to provide information on cultural resources cannot substitute for asking the persons and entities to share that information."¹⁶ Taken to its logical

¹² See Ex. NRC-176-R at A.3b; Ex. NRC-225 at A.3.

¹³ Ex. NRC-176-R at A.12; see also *id.* at A.6, A.26 (explaining that the Tribes themselves would provide their own research objectives, describe the cultural resources within the context of their own world views and indigenous nomenclature, and assign their own significance to the sites).

¹⁴ See Ex. NRC-225 at A.3.

¹⁵ *Id.*

¹⁶ Ex. OST-042-R ¶ 75; see also *id.* ¶¶ 3, 4, 7–9, 12. To the extent that these statements imply that it was insufficient for the NRC to have been engaging with the designated representatives of the Tribe, the Tribe never expressed such a concern throughout the development of the March 2018 Approach, and the Staff reasonably relied on the Oglala Sioux Tribe representatives during negotiations. Further, the Tribe emphasized the importance of engaging the governments of other participating Tribes. For example, the Staff sought the Oglala Sioux Tribe's input on which other Tribes to invite to the site surveys as part of the March 2018 Approach and followed their guidance in doing so. See Ex. NRC-225 at A.8; Ex. NRC-194 at unnumbered pages 3–4.

conclusion, this premise could imply that agencies could not consider the statements of Tribal governments as a reasonably complete foundation for designing cultural resources surveys.¹⁷ In any event, the Staff has explained why solicitation and consideration of the Tribe's unique perspective and expertise is specifically incorporated into the Staff's proposed draft methodology, making it an eminently reasonable method for gathering the information the Tribe insists is crucial for a Tribal cultural resources survey.¹⁸

B. The Tribe's Vague Claim That the Staff's Approach Was Not "Interdisciplinary" Does Not Identify Any Deficiency in the Proposed Draft Methodology

The Tribe also asserts in its response that the Staff's proposed draft methodology is insufficient because it is narrowly "scientific" and not "interdisciplinary."¹⁹ In addition to being vague,²⁰ this criticism – which has evolved from the Tribe insisting on a "scientifically defensible" methodology to one that incorporates "methodologies used within the social sciences"²¹ to "interdisciplinary" – ignores the content and structure of the Staff's proposed draft methodology (and the March 2018 Approach as a whole), which already provides numerous mechanisms for considering the Tribal input and perspectives that the Tribe seems to be demanding.²² Instead, it appears that the Tribe has simply invoked a word from NEPA directives to federal agencies

¹⁷ Ex. OST-042-R ¶ 75.

¹⁸ See, e.g., Ex. NRC-176-R at A.26, A.30, A.34, A.37–40; Ex. NRC-225 at A.3, A.6.

¹⁹ See, e.g., RSOP at 16 ("NRC Staff is wrong in its narrow interpretation of 'scientific'"), 18 ("The Tribe has insisted on a scientifically defensible interdisciplinary approach required by NEPA that fully accounts for traditional cultural knowledge."), 19 ("The Draft Methodology relies on stilted and outmoded 'scientific method' and 'empirical evidence' in a way that violates NEPA's mandate that all federal agencies use a 'systematic interdisciplinary approach' that involves 'unquantified' considerations and 'ecological information.'").

²⁰ Although the word "interdisciplinary" appears 15 times in the Tribe's response and 40 times in witness declarations and exhibits, the Tribe never defines the term. See Ex. OST-042-R through Ex. OST-046. Accordingly, the Tribe never specifies in what way invoking that concept reveals a relevant deficiency in the Staff's methodology.

²¹ Ex. NRC-217 at 3.

²² See Ex. NRC-225 at A.6.

out of context, without explaining in any way how it alters the reasonableness of the proposed draft methodology.

It is true that NEPA requires the use of a “systematic, interdisciplinary approach” in planning and decision-making, but that term directs federal agencies to consider impacts to all aspects of the environment: air quality, land use, geology and soil, water, ecological resources, historic and cultural resources.²³ Likewise, although CEQ regulations require that environmental impact statements “be prepared using an inter-disciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts,” the regulation goes on to explain that “disciplines of the preparers shall be appropriate to the scope and issues identified in the scoping process.”²⁴ In other words, the interdisciplinary aspect of the statute and accompanying regulations contemplates experts in various fields weighing in on their respective areas of analysis; as the NRC Staff testifies, “[t]his is not a mandate that biologists and botanists and archaeologists each use interdisciplinary approaches. It is a mandate that the environmental analysis (EIS) as a whole be interdisciplinary.”²⁵ Even accepting the premise that the methodology itself must be interdisciplinary (i.e., two or more disciplines), the Staff’s proposed draft methodology still meets this definition, because it uses multiple disciplines in the course of a particular study, including: (1) history/ethnography, (2) oral interviews to be conducted at the time of the pedestrian survey, and (3) a Tribal Cultural Survey using traditional ecological knowledge.²⁶

²³ 42 U.S.C. § 4332(A); *see also* Ex. NRC-225 at A.5.

²⁴ 40 C.F.R. § 1502.6; *see also* Ex. NRC-225 at A.5.

²⁵ *See* Ex. NRC-225 at A.5. The Tribe cites *In the Matter of Hydro Resources, Inc.* (2929 Coors Road Suite 101 Albuquerque, New Mexico 87120), 62 N.R.C. 442 (2005) for the proposition that “the consultant must be qualified to develop and conduct interdisciplinary cultural resources inquiries.” RSOP at 22. However, the case does not support the Tribe’s characterization. The words “discipline” and “interdisciplinary” do not appear in the decision, and the Presiding Officer’s conclusion that the Staff satisfied NEPA hinged not on contractor qualifications but instead on the substantive discussion of impacts in the FEIS. *See generally Hydro Resources*, 62 N.R.C. 442 (2005).

²⁶ *See* Ex. NRC-225 at A.6.

The Tribe makes the additional claim that the Staff failed to incorporate “social sciences.” As with its assertion that the methodology is not “interdisciplinary” the Tribe does not define what it means by “social sciences,” but as the Staff has testified, the principles of the scientific method are the same regardless of the specific scientific discipline.²⁷ In response to the Tribe’s criticism that the Staff employed a “stilted and outmoded” application of the scientific method, the Staff underscores that the basic components of the scientific method have remained the same for more than 200 years, so they do not become “outmoded.”²⁸ Regardless, the Staff has explained how its approach intentionally and appropriately balanced scientific principles with traditional cultural knowledge. Ultimately, this nebulous critique of the Staff’s use of scientific principles – like the criticism that the Staff failed to use an “interdisciplinary” methodology – identifies no concrete dispute with the reasonableness of the Staff’s approach.

C. The Tribe and the Consolidated Intervenors’ Inconsistent Position Regarding an Acceptable Method to Gather Cultural Resources Information Does Not Refute the Reasonableness of the Staff’s Proposed Draft Methodology

In their response Statements of Position, the Tribe and Consolidated Intervenors both claim that by not attempting to obtain information from the Lakota communities through oral interviews, the Staff has not met its NEPA burden.²⁹ In an apparent reversal of the Tribe’s previous position that the only way to cure the Board-identified NEPA deficiency is to conduct a Tribal pedestrian site survey of the Dewey-Burdock site, the Tribe now claims that despite its view that the previously conducted site surveys are inadequate, the Staff should nevertheless

²⁷ See Ex. NRC-176-R at A.37 (“These principles are the same regardless of the specific scientific field (i.e., social, physical).”).

²⁸ See Ex. NRC-225 at A.6.

²⁹ RSOP at 42–50; Consolidated Intervenors’ Response Statement of Position (June 28, 2019) (ADAMS Accession No. ML19179A334) (“CI SOP”) at 2. As described in Section III, the relevant issue for this hearing is not whether the Staff has implemented its methodology and obtained the information it sought from the site survey, but rather, whether its proposed draft methodology is a reasonable one to resolve Contention 1A.

have built upon that information by conducting oral interviews absent an additional survey.³⁰

The Tribe's witness appears to contradict himself on this point; in his declaration, Mr. White underscores that site surveys are needed and implies that interviews alone would not suffice, but later denies a linkage between interviews and the survey.³¹ The Consolidated Intervenors additionally appear to support the Tribe's position on this point by implying that the Staff should have reached out – apparently at random – to various Lakota individuals like those whose declarations they attach.³²

However, the purpose of the oral interviews in the March 2018 Approach was simply to gather a Tribal perspective on the significance of known sites as well as those that would have been identified during the first phase of the survey efforts, and to in turn better inform the second phase of the survey.³³ The interrelatedness of the survey and oral interviews make the Staff's proposed draft methodology an integrated whole, and thus oral interviews were not (and still are not) viable as a stand-alone initiative.³⁴ Further, the Tribe's June 15, 2018 proposal – the only written alternative the Tribe has provided, aside from the “patently unreasonable”

³⁰ Compare Tr. at 814–15 and Ex. NRC-176-R at A.48 with RSOP at 42 n.2.

³¹ Compare Ex. OST-042-R ¶ 24 (stating that the NRC has failed to comply with NEPA because the Staff failed “to conduct an adequate survey for, and analysis of impacts and to and mitigation for, cultural resources” at the site) and *id.* ¶ 28 (stating that previously conducted surveys “are not sufficient to identify cultural and historic resources significant to the Oglala Sioux Tribe”) with *id.* ¶ 76 (“The oral histories component of the March 2018 Approach did not depend on the pedestrian survey.”).

³² See CI SOP at 2; Ex. CI-023.

³³ See Ex. NRC-176-R at A.45; Ex. NRC-225 at A.7.

³⁴ Ex. NRC-225 at A.7. The Tribe again seeks to challenge the Staff's explanation regarding the purpose of oral interviews by attacking the staff's qualifications (claiming that the position “is not supported by any person with the required qualifications”). See RSOP at 48. First, the Tribe continues to misapprehend the Staff's explanation; the Staff's position has never been that oral interviews have no value to a cultural impact analysis (indeed, that is why they were an integrated component of the March 2018 Approach). Rather, the Staff has explained why under the circumstances of this proceeding, it determined that only pursuing oral interviews independent of the site survey would not be reasonable, because doing so would be inconsistent with the agreed-upon parameters of the March 2018 Approach, would present significant practical challenges as well as further delays, and still would not resolve the deficiency as asserted by the Tribe. Ex. NRC-225 at A.7. And as explained in Section I.A above, the Staff and contractor are entirely qualified to make such a determination.

Makoche Wowapi proposal – called for the NRC Staff contractor to train certain members of the Tribe, who would in turn conduct the oral interviews themselves.³⁵ In other words, the Tribe’s proposed approach to interviews would have necessitated a significantly more expensive and time-consuming process than contemplated by the March 2018 Approach.³⁶ Ultimately, the Tribe’s repudiation or modification of its previous positions reinforces why the Staff’s approach is objectively reasonable.

In their response, the Consolidated Intervenor appear to support the Tribe’s stance on the oral interviews by stating that “that NRC Staff has chosen to make the process fail by intentionally choosing to not seek input from knowledgeable Lakota people and by the NRC Staff’s intentional disregard for repeated Tribal request [*sic*] for an iterative process that involved Lakota people including tribal members and tribal officials.”³⁷ In support, they offer the signed declarations of 22 Lakota individuals who the Consolidated Intervenor imply could have provided personal knowledge regarding Oglala Lakota cultural resources that may be at the Dewey Burdock site.³⁸ However, as the Staff explained in its Initial Statement of Position and Testimony, oral interviews were planned after the site visits to elicit site-specific information.³⁹ While interviews independent of a survey may have provided contextual information about the importance of the region, they would not have provided the specific information about the

³⁵ See Ex. NRC-198 at 3.

³⁶ See Ex. NRC-225 at A.7. The Tribe asserts that the NRC should have pursued oral interviews, despite implicitly acknowledging that it has repudiated the previously-negotiated parameters that the March 2018 Approach included for that purpose: “Although the Tribe asserts, and the 2014 testimony confirms, that NRC Staff cannot conduct cultural resource analysis without aid of persons with the necessary interdisciplinary skills and cultural background, *the refusal of the Tribe to provide those services voluntarily and without commensurate compensation* does not relieve NRC of its NEPA duties.” RSOP at 48 (emphasis added).

³⁷ CI SOP at 2.

³⁸ See Ex. INT-023. However, none of the declarants indicated that they had knowledge related to specific, previously-identified cultural resources; they merely made general statements about their connection to the area.

³⁹ Ex. NRC-176-R at A.45.

significance of previously or newly identified sites, because no pedestrian site survey would have preceded them.⁴⁰ Ultimately, the Staff's proposed draft methodology incorporated oral interviews as a complement to the field survey, and the Tribe's repudiation of the March 2018 Approach led the Staff to determine that the site survey could not take place. The Tribe's refusal to participate does not now make it reasonable to proceed with piecemeal implementation of the proposed draft methodology, especially given that doing so would still not produce the complete site survey information the Tribe believes is necessary to comply with NEPA.

The Consolidated Intervenors also imply that the Staff should have attempted to contact Lakota individuals for interviews, providing signed declarations from 22 individuals who have "personal knowledge concerning Oglala Lakota cultural resources that may be at the Dewey Burdock site."⁴¹ Setting aside that the Consolidated Intervenors have waited until now to share this information despite multiple years of negotiations, what they seem to be asserting is far from the systematic approach to cultural resource information that the Oglala Sioux Tribe have insisted is required: it ignores the emphasis on a "scientifically defensible" site survey that the Oglala Sioux Tribe and other intervenors have been demanding throughout this process.⁴²

Further, the Consolidated Intervenors' suggestion does not ultimately reveal any unreasonableness in the structured process that the Staff has appropriately pursued in negotiating the March 2018 Approach and the proposed draft methodology. At this stage in the process, and especially considering the Board's direction in LBP-18-5 that the focus of negotiations should have been "how the contractor and Tribe members will walk the site and mark or record located tribal resources," the reasonableness of the Staff's approach does not

⁴⁰ See Ex. NRC-225 at A.7.

⁴¹ See *generally* Ex. INT-023; see *also* CI SOP at 2.

⁴² See Ex. NRC-225 at A.7.

hinge on whether some individuals can be located who have some insights about cultural resources the Staff could consider (at low cost or otherwise).⁴³ Such a suggestion neither acknowledges what has occurred in the course of this proceeding and years of negotiations, nor would it provide the scientific integrity the Oglala Sioux Tribe has contended is missing.⁴⁴

In sum, the Staff constructed oral interviews as one supplemental aspect of the proposed draft methodology, but the Oglala Sioux Tribe rejected that reasonable, integrated approach.⁴⁵ For the reasons explained in the Staff's Initial Statement of Position and this Reply, NEPA principles do not require the Staff to start back at square one as if these years of negotiations had never occurred.

D. The Tribe's Criticisms of the Literature Review Report by Dr. Nickens Are Not Material to Confirming the Reasonableness of the Proposed Draft Methodology

The Tribe devotes considerable time in its Response Statement of Position and testimony criticizing various aspects of the literature review report prepared by Dr. Paul Nickens.⁴⁶ However, in its Initial Statement of Position and Testimony, the Staff acknowledged that the report did not alter the Staff's FSEIS conclusions; rather, the Staff included it in its summary of existing information relevant to the evaluation of significant adverse impacts at the site,

⁴³ *Powertech*, LBP-18-5, 88 NRC at 135–36.

⁴⁴ See, e.g., Tr. at 1431 (Tribe criticizing a previous NRC Staff-proposed approach because it had “no set protocol or methodology”).

⁴⁵ See Ex. NRC-176-R at A.44; see also Ex. NRC-220 at 1.

⁴⁶ See, e.g., Ex. OST-042-R ¶ 78 (“[T]he literature report is an amateurish background document that is riddled with false information and misstatements”); Ex. OST-043-R ¶ 49, attachment; Ex. OST-045-R ¶¶ 10–23.

In the Board's order dated July 8, 2019, the Board reiterated its direction that citations in witness testimony to documentary material other than citations to legal authorities must be accompanied by a PDF evidentiary exhibit, with its own exhibit number, that includes the relevant portions of the referenced supporting material. Order (Providing Case Management Information Regarding Exhibits) (July 8, 2019) (ML19189A149) at 1. In response, the Tribe resubmitted its declarations with citations, but identified as exhibits only three of the referenced documents to which the Board had alluded. See Ex. OST-057 through OST-059. Therefore, the Staff's understanding is that, consistent with the Board's direction, the other documents referenced in the Tribe's Statement of Position and declarations, as well as in the report by Dr. Morgan, are not part of the evidentiary record.

consistent with the criteria of 40 CFR § 1502.22.⁴⁷ If the Staff had been able to implement the site survey and thereby gather new information to be evaluated in a supplement to the FSEIS as intended, the Staff previously explained that it would also take the Tribe's feedback on the report into account in such a supplement as appropriate.⁴⁸ Ultimately, the Tribe's concerns regarding the literature review report have no bearing on the reasonableness of the proposed draft methodology, because the Staff did not rely on the report to formulate the methodology and it did not contain any new material information regarding cultural resources at the site.

II. The Information Sought by the Staff is Unavailable

Through its testimony and initial statement of position, the Staff has demonstrated that information on Lakota-specific historic and cultural resources necessary to cure the Board-identified NEPA deficiency is incomplete or unavailable. First, the Staff demonstrated in its testimony and initial statement of position that it satisfied the procedural requirements of 40 C.F.R. § 1502.22.⁴⁹ Second, longstanding Commission caselaw, recently affirmed by the D.C. Circuit, specifies that where the Staff has provided information that cures a NEPA defect on the adjudicatory record, it is not required to draft a formal supplement to the NEPA document.⁵⁰ Finally, the Staff has adequately demonstrated that the cost to obtain the information on Lakota-specific cultural resources is exorbitant, and it would have been unreasonable for the Staff to

⁴⁷ ISOP at 66; Ex. NRC-176-R at A.54.

⁴⁸ When the Tribe mentioned similar concerns about the report in early 2019, the Staff explicitly stated that it would take the Tribe's feedback into consideration in the course of preparing the anticipated supplemental NEPA analysis. See, e.g., Ex. NRC-203 at 3 ("The Tribe asks NRC Staff to formally disavow the Literature Review Report and direct a qualified NRC Tribal Liaison to work with NRC Staff, contractor and Tribes' representatives to prepare a Literature Review Report that accurately provides a culturally supported interdisciplinary account of the Lakota Tribe's physical, cultural, and spiritual history."); Ex. NRC-204 at 4–5 ("The NRC staff welcomes the Tribe's input to this literature review report, and, consistent with agency practice, will reference the Tribe's input in its NEPA supplemental analysis.").

⁴⁹ See ISOP at 60–71; Ex. NRC-176-R at A.47–A.55.

⁵⁰ See *LES*, CLI-98-3, 47 NRC at 89. *Strata*, CLI-16-13, 83 NRC at 595, *aff'd*, *Nat. Res. Def. Council v. NRC*, 879 F.3d 1202, 1210 (D.C. Cir. 2018) (the "hearing record, and subsequent decision on a contested environmental matter augment the environmental record of decision").

evaluate costs of alternatives when the Board directed the parties to negotiate within the parameters of the March 2018 Approach and the Tribe has repeatedly insisted that only a pedestrian site survey would provide the missing information.⁵¹

A. The Staff Has Complied with 40 C.F.R. § 1502.22

The Tribe asserts in its Response Statement of Position that the NRC Staff “admitted that it failed to provide the information required by 40 C.F.R. § 1502.22.”⁵² The Tribe provides no support in its Response Statement of Position for this inaccurate characterization of the Staff’s stated position.⁵³ Contrary to the Tribe’s assertion, the Staff thoroughly explained how it has addressed the factors of 40 C.F.R. § 1502.22 to demonstrate that information on Lakota cultural resources is unavailable.⁵⁴ As the Staff stated in its initial testimony, the Tribe has long maintained that only its members can provide the information needed to cure the Board-identified NEPA defect.⁵⁵ The Tribe rejected several previous opportunities to perform a survey of the site.⁵⁶ After months of negotiations, the Tribe agreed that the March 2018 Approach was reasonable, prompting the Staff to proceed with its implementation.⁵⁷ However, once the Tribe repudiated its agreement to work within the bounds of the March 2018 Approach, as the Staff

⁵¹ See ISOP at § IV.C; *Powertech*, LBP-18-5, 88 NRC at 135–36.

⁵² RSOP at 50. While the Tribe does not provide support for this assertion, it seems to be a mistaken inference based on the fact that the Staff acknowledges that the record contains no new information regarding impacts to cultural resources. See ISOP at 62. This, however, in no way precludes the Staff from complying with 40 C.F.R. § 1502.22, which specifically deals with information that is incomplete or unavailable. In that respect, the Staff is relying on the considerable new evidence in the record regarding the Staff’s reasonable efforts (over multiple years) to obtain the information following the Board’s merits ruling. It is those developments that demonstrate why the Staff has satisfied 40 C.F.R. § 1502.22.

⁵³ RSOP at 50. The Tribe asserts that the Staff has failed to meet the factors required by 40 C.F.R. § 1502.22, but does not identify where the Staff allegedly admitted to having failed to do so.

⁵⁴ See Ex. NRC-176-R at A.47–A.56; ISOP at 60–71.

⁵⁵ Ex. NRC-176-R at A.48.

⁵⁶ *Id.* at A.19, ISOP at 3–5, 9–12.

⁵⁷ Ex. NRC-176-R at A.48.

testified, it could no longer reasonably expect that the information it sought from the Tribe can be obtained.⁵⁸

The Staff's initial testimony and Statement of Position, along with the FSEIS, contain all of the information that 10 C.F.R. § 1502.22 requires to be in the NEPA record.⁵⁹ The Staff's initial testimony at A.47—A.51 provides the Staff's statement that the information it seeks is unavailable and provides the Staff's justification for this conclusion: A.53 provides a statement of the relevance of the missing information; A.54 summarizes the existing credible scientific evidence relevant to evaluating the significant impacts of the project on the human environment;⁶⁰ and A.55—A.57 provide the Staff's evaluation of these impacts. The Tribe did not challenge any of the information in the Staff's testimony regarding the § 1502.22 factors, with the limited exception (discussed further below in Section II.B) of the Staff's determination that the cost of obtaining the information is exorbitant.

Instead, the Tribe focuses primarily on its claim that the § 1502.22 factors must be discussed specifically in an EIS.⁶¹ In making this assertion, the Tribe ignores longstanding Commission precedent and invokes several DC Circuit cases that do not in fact support the Tribe's position.⁶² For example, the Tribe cites the recent DC Circuit decision in *Oglala Sioux Tribe v. NRC* as its support for numerous legal conclusions on the merits of this case.⁶³ However, that decision addresses only a narrow collateral issue (and one that is entirely distinct

⁵⁸ *Id.*

⁵⁹ *Id.* at A.47—A.56; ISOP at 54—67.

⁶⁰ The Tribe asserts that the Staff failed to provide the required summary of existing evidence. RSOP at 42. However, at bottom, this argument is nothing more than a restatement that the Staff was not ultimately able to carry out the March 2018 Approach.

⁶¹ See RSOP at 31—38.

⁶² See RSOP at 31—33. The few cases the Tribe cites merely state that the missing information must be addressed, but do not refute Commission precedent that such information may be supplied by the administrative record.

⁶³ RSOP at 31, 33.

from the merits issues presently before the Board): whether the NRC may apply an irreparable harm standard in evaluating whether a license may remain in place despite what the agency characterizes as a significant NEPA deficiency.⁶⁴ As the court stated, its ruling in that case “has no bearing on [the] ultimate resolution of the merits of the Tribe’s . . . contention[], including whether NEPA actually has been (or subsequently will be) satisfied.”⁶⁵ Thus, the case provides no support for the Tribe’s assertion that an adjudicatory record may not supplement the NEPA record, as that decision did not remotely address the longstanding and well-settled practice of supplementing the NEPA record with the adjudicatory record.⁶⁶ Furthermore, the D.C. Circuit ultimately declined to vacate Powertech’s license, finding that “the Tribe will not suffer harm—irreparable or otherwise” from leaving the license intact at this point.⁶⁷

Similarly, the Tribe quotes *National Parks Conservation Association v. Semonite* to support its assertion that “[t]he D.C. Circuit has recently confirmed that NEPA violations are not remedied in adjudication but are properly remedied by setting aside the agency action and remanding for the agency to conduct a new NEPA analysis.”⁶⁸ Contrary to the Tribe’s characterization of the holding in this case, in *Semonite*, the court held that the Army Corps of Engineers misapplied specific factors enumerated in 40 C.F.R. § 1508.27 to determine that a project would have no significant impact on the human environment after the agency had

⁶⁴ 896 F.3d 520, 528 (D.C. Cir. 2018). The court acknowledged as a threshold matter that it had no jurisdiction to speak to any issue on the merits because it lacks jurisdiction under the Hobbs Act. *Id.* at 527. Contrary to the inferences created by the Tribe’s quotes from this case, the court clearly stated that it addressed only the narrow issue of the NRC’s application of the irreparable harm standard for vacating a license.

⁶⁵ *Id.* at 528.

⁶⁶ The court held “only that, once the NRC determines there is a significant deficiency in its NEPA compliance, it may not permit a project to continue in a manner that puts at risk the values NEPA protects simply because no intervenor can show irreparable harm.” *Id.* at 538.

⁶⁷ *Id.*

⁶⁸ RSOP at 34 (citing *Nat’l Parks Conservation Ass’n v. Semonite*, 916 F.3d 1075, 1089 (D.C. Cir. 2019)).

proceeded with implementing a project without preparing an EIS at all.⁶⁹ The court, having determined that the Corps failed to properly apply these enumerated factors in arriving at the finding of no significant impact (FONSI), remanded the decision to the agency to prepare an EIS.⁷⁰ The court did not in any way address whether, having determined the potential for significant impact and having already prepared an EIS, an agency may supplement the EIS on the adjudicatory record. However, as the Staff demonstrated in its ISOP, it is well-settled under Commission jurisprudence that the NRC may thus cure a NEPA defect.⁷¹ In sum, the caselaw on which the Tribe relies provides no support for its assertions that the Staff failed to comply with 40 C.F.R. § 1502.22.

B. The Tribe's Cost-Related Arguments Do Not Refute the Staff's Determination That the Costs of Obtaining the Information Are Exorbitant

The only component of the Staff's 40 C.F.R. § 1502.22 determination that the Tribe challenges is the determination that the costs of obtaining the information are exorbitant. The Tribe asserts that the Staff has not quantified the costs it has expended and so cannot

⁶⁹ *Semonite* at 1082.

⁷⁰ *Id.* at 1087–88.

⁷¹ See *Crow Butte Res., Inc.* (Crawford, Nebraska Facility), CLI-19-5, 89 NRC ___, ___ (May 30, 2019) (slip op. at 1–2); *Strata*, CLI-16-13, 83 NRC at 595, *aff'd sub nom, Nat. Res. Def. Council v. NRC*, 879 F.3d 1202, 1209–1212 (D.C. Cir. 2018) (finding that “the Commission had adequately augmented its decision before being challenged in this court”). The Tribe offers numerous case cites out of context to attempt to rebut this assertion. For example, the Tribe cites *Sierra Club v. Hodel*, 848 F.2d 1068, 1094 (10th Cir. 1988) for the assertion that “[t]he preparation of an EIS also entails similar public and interagency participation. . . This cross-pollination of views could not occur within the enclosed environs of a courtroom.” In that case, however, no NEPA document was prepared at all and the district court simply made its own finding of no significant impact. Similarly, the Tribe cites *Sierra Club v. US DOT*, 962 F.Supp. 1037, 1045 (N.D. Ill. 1997) and *Sierra Club v. Marsh*, 976 F.2d 763 (1st Cir. 1992) for the proposition that the court found a “lack of NEPA compliance [where] the analysis ‘was not incorporated into the final impact statement[.]’” RSOP at 32. However, the Tribe omits the context of the *Marsh* decision that “[B]ecause public disclosure is a central purpose of NEPA, an EIS that does not include all that is required by NEPA may not be cured by memoranda or reports that are included in the administrative record *but are not incorporated into the EIS itself.*” *Marsh*, 976 F.2d at 770. These cases do not challenge the Commission’s position that information on the adjudicatory record of an NRC proceeding does in fact modify and become part of the FEIS. *Hydro Res., Inc.* (Rio Rancho, NM), CLI-01-4, 53 NRC 31, 53 (2001) (quoting *Phila. Elec. Co.* (Limerick Generating Station, Units 1 and 2), ALAB-819, 22 NRC 681, 706–07 (1985)).

demonstrate exorbitant cost.⁷² The Tribe also asserts that the NRC is required to provide actual cost data for proposed alternatives and asserts that the Staff mischaracterized the scope and cost of the Tribe's proposed Makoche Wowapi alternative.⁷³

The Staff's determination, however, does not derive from quantification of what the licensee has been billed as the Tribe implies, but rather that the cost of obtaining the information from the Tribe needed to satisfy the Board-identified deficiency in the FSEIS – expressed in dollars, time, and resources – is exorbitant as evidenced by the Tribe's own proposals and its repudiation of its own previous negotiating positions.⁷⁴ As the Staff testified, the Tribe has advanced two proposals, the Makoche Wowapi proposal in 2012 and the June 15, 2018 proposal.⁷⁵ This Board determined that the Makoche Wowapi proposal was “patently unreasonable” in calling for \$818,000 to survey approximately 2,500 acres.⁷⁶ The Tribe's RSOP insists, without any support from the ruling or transcript, that the Board's conclusion regarding the unreasonableness of the Makoche Wowapi proposal was confined to the cost if it were extrapolated to survey an area the size of the entire Dewey-Burdock site (approximately \$3.3 million).⁷⁷ The Tribe then appears to abandon its own premise by comparing that same \$818,000 to the NRC Staff's estimate of its then current proposal of \$792,300, stating that the NRC “was already prepared to spend close to the \$800,000 that it nonsensically argues was

⁷² RSOP at 38.

⁷³ *Id.* at 40–41.

⁷⁴ See ISOP at 55–60. The NRC's determination of exorbitant cost under 40 C.F.R. § 1502.22 also considered the fact that without the realistic prospect of an agreement with the Tribe to conduct a Tribal site survey, the missing information is not otherwise obtainable. *Id.* at 49, Ex. NRC-176-R at A.49–51.

⁷⁵ Ex. NRC-176-R at A.43.

⁷⁶ ISOP at 4, Ex. NRC-176-R at A.23.

⁷⁷ RSOP at 41.

unreasonable and exorbitant.”⁷⁸ The Tribe’s comparison here is likewise logically unsupportable. The Tribe disregards that the \$792,300 NRC estimate it references included all costs associated with the methodology, including NRC FTE, NRC travel, contractor costs, reimbursement to up to five Tribes (mileage, per diem, and lodging), and honoraria and stipend to up to five Tribes.⁷⁹ The Makoche Wowapi proposal, on the other hand, contemplated surveying only a quarter of the site, and the proposed \$818,000 cost covered only the fee for the contractor.⁸⁰ Similarly, the Tribe asserts that its roughly \$2 million proposal of June 15, 2018 was merely a “good faith” effort to provide a “discussion starter.”⁸¹ However, the \$2 million cost of that proposal only reflects costs directly payable to the Tribe and does not include any allowance for the contractor, the NRC Staff, participation by other Tribes, or any other aspect of the survey.⁸²

In any event, whether the Board relied on \$818,000 or an extrapolated cost in finding the Makoche Wowapi proposal “patently unreasonable” (and again, the Board’s analysis contains nothing that would support the Tribe’s inference), the Tribe’s \$2 million June 15, 2018 proposal is fundamentally incompatible with the Board’s direction in LBP-18-5.⁸³ When compared to the figures that all parties agreed were reasonable under the March 2018 Approach, it is reasonable for the Staff to conclude, based on the only specific proposals the Tribe has provided, that the cost to obtain the information is exorbitant and that further efforts to implement the March 2018 Approach would not be fruitful.

⁷⁸ RSOP at 41. By comparing the \$818,000 directly to the Staff’s proposed cost of \$792,300, the Tribe ignores the very theory it just articulated—that the overall cost of the Makoche Wowapi proposal if applied to the Dewey Burdock site would actually cost a total of \$3.3 million.

⁷⁹ OST-056 at Attachment 1.

⁸⁰ *Id.*

⁸¹ RSOP at 40.

⁸² Ex. NRC-176-R at A.23.

⁸³ Ex. NRC-176-R at A.22–A.23.

In its RSOP the Tribe argues that the NRC must provide cost data on alternatives to the draft proposed methodology. The Tribe provides no basis for this assertion, but more fundamentally, the argument disregards the extent to which the Tribe's views determined the path of negotiations and the approach the Staff sought to implement. Further, the Board's direction in LBP-18-5 to continue focused negotiations within the March 2018 Approach is based on the Tribe's own negotiating positions. As the Staff has testified, virtually every aspect of the March 2018 Approach and the Staff's draft proposed methodology was crafted in direct response to the Tribe's requests.⁸⁴ Most importantly, the Staff has focused on conducting a pedestrian survey of the Dewey Burdock site because of the Tribe's longstanding position that only an on-the-ground survey would suffice.⁸⁵ The Staff has responded directly to the Tribe's requests regarding how to appropriately obtain information about TCPs, and with the understanding that the parties were conducting focused negotiations based on a mutually agreed upon approach consistent with the direction in the Board's orders, which have continued to narrow the focus of negotiations in an effort to reach resolution.⁸⁶

C. The Tribe Has Effectively Repudiated the March 2018 Approach

Despite stating on the record that the Tribe was amenable to the parameters of the March 2018 Approach⁸⁷ – and despite the Board's finding that the parties agreed to the March 2018 Approach as a “valid and reasonable approach for resolving Contention 1A”⁸⁸ – the Tribe now claims that it never agreed to the fundamental timelines or terms of reimbursement associated with the March 2018 Approach.⁸⁹ The Tribe relies heavily on these statements as

⁸⁴ Ex. NRC-176-R at A.30.

⁸⁵ Ex. NRC-176-R at A.30, A.48; *see also* Tr. at 814; Ex. NRC-190 at 2; Ex. NRC-225 at A.7.

⁸⁶ *See* Ex. NRC-225 at A.10.

⁸⁷ *See* ISOP at 29, n.138.

⁸⁸ LBP-18-5, 88 NRC at 125.

⁸⁹ *See, e.g.*, RSOP at 10 (stating that the Tribe had “never accepted a rigid application of the March 2018 Approach,”), 12 (stating that the Tribe “did not unconditionally agree to any specific dollar amount”), 14

the basis for claiming that the Staff's actions (particularly in late 2018–2019) were “legalistic,” and in turn, that the Tribe was surprised that the Staff “unilaterally” ceased negotiations.⁹⁰ However, neither the Tribe's response nor testimony acknowledge the Board's direction in LBP-18-5 that “any tribal negotiating position or proposal should only encompass the specific scientific method that would fit into the two-week periods set out in the March 2018 Approach for visiting the physical site, i.e., how the contractor and Tribe members will walk the site and mark or record located tribal resources.”⁹¹ As explained in the Staff's initial testimony, the record supports both the Staff's understanding that the basic parameters of the March 2018 Approach had been agreed upon, and that the Staff had appropriately shaped its negotiations in the 2018–2019 timeframe around that agreement.⁹²

The Tribe further claims that the “NRC Staff was on notice and undertook additional efforts to complete negotiations with the Oglala Sioux Tribe with full knowledge that both the timelines and costs were contested issues.”⁹³ The Tribe points to its January 11, 2019 letter and the February 19, 2019 teleconference transcript as support for the claim that the Tribe raised concerns about the amount of reimbursement, and it references the December 6, 2018 teleconference transcript as an example of the Tribe's concern about the timeline.⁹⁴ However, these teleconference calls occurred *after* the Staff made the decision to resume negotiations consistent with the Board's directions in LBP-18-5, which refutes the Tribe's claim that the Staff attempted to negotiate with knowledge that timeline and cost were “contested issues.” In fact,

(“[I]t would be arbitrary and capricious to limit the methodology timelines created without the benefit of a qualified contractor.”).

⁹⁰ RSOP at 9, 11.

⁹¹ LBP-18-5, 88 NRC at 135–36.

⁹² See, e.g., ISOP at 30–31, 44–47.

⁹³ RSOP at 16.

⁹⁴ See RSOP at 12–14.

these types of statements highlighted by the Tribe are precisely why the Staff sought to confirm the Tribe's fundamental willingness to abide by the parameters of the March 2018 Approach in its March 1, 2019 letter, given how crucial those basic parameters were to the ability to finalize a methodology by the spring of 2019 as called for in the updated schedule.⁹⁵ Ultimately, the Tribe's assertions regarding its misgivings about the timeline and costs do not refute the reasonableness of the Staff's expectation of the Tribe's commitment to the basic parameters of the March 2018 Approach.

III. The Applicable NEPA Standards Fully Support the Staff's Position

In its Response Statement of Position, the Tribe misunderstands the legal and factual issues to be resolved at this hearing.⁹⁶ The Tribe further asserts that the Staff has misapplied NEPA's "rule of reason."⁹⁷ Because the Tribe's assertions rest on a fundamental misunderstanding of NEPA standards, the Tribe's claims do not refute how the Staff has met its burden and complied with NEPA.

A. The Tribe Misapprehends the Legal and Factual Issues That Remain to be Resolved

Throughout its Response Statement of Position, the Tribe misapprehends the legal and factual issues that are relevant to resolution of Contention 1A. First, the Tribe appears to assert that the relevant issues and adjudicatory record are unchanged from the original merits hearing

⁹⁵ See, e.g., Ex. NRC-215. As an additional example of the challenges to the Staff's reasonable efforts to implement the agreed-upon March 2018 Approach, the Tribe's response again expresses concerns about confidentiality. See, e.g., Ex. OST-042-R ¶¶ 47–49; Ex. OST-043-R ¶ 47. While this is not the first time the Tribe has raised concerns about confidentiality, Mr. White's statement that "Despite the Tribe's explanation of the importance of additional confidentiality provisions, NRC Staff refused to provide for any expansion of existing SUNSI orders" is contradicted by the record. Ex. OST-042-R ¶ 49. On June 7, 2019, counsel for the NRC Staff provided a proposed amendment to the protective order governing this proceeding to counsel for all parties. During the December 6, 2018 teleconference call with the Board and parties, Counsel for the Tribe acknowledged the proposed amendment, and stated that "The Tribe is happy to review that again and provide a response with respect to adequacy of the protective order and what changes might need to be incorporated." Tr. at 1484. The NRC Staff never received any further communication from the Tribe on whether the proposed amendment would resolve the Tribe's concerns.

⁹⁶ See RSOP at 3–8, 23–30.

⁹⁷ See RSOP at 50–55.

in 2014; that is, that the Staff seeks to demonstrate compliance with NEPA based solely on the information in the FSEIS and the understanding that the information in the FSEIS constitutes the full and complete NEPA record.⁹⁸ The Tribe further asserts that until the Staff demonstrates compliance with 40 C.F.R. § 1502.22 and provides additional information in a supplement to the NEPA document, the “matter is not ripe for Board hearing or adjudication.”⁹⁹ However, the Tribe disregards how the focus of the issues for hearing has narrowed over the course of the proceeding consistent with the Board’s rulings. Having demonstrated the reasonableness of the draft proposed methodology and the Staff’s satisfaction of 10 C.F.R. § 1502.22 as summarized above, the Staff now turns to the Tribe’s assertions regarding the remaining material legal and factual issues to resolve Contention 1A.

In LBP-18-5, the Board stated explicitly that “[s]hould the NRC Staff, after consultation with the parties, choose not to continue with its progress on the March 2018 Approach, we will move forward with an expeditious evidentiary hearing to address unresolved material issues of fact that arise from the August 17, 2018 motions for summary disposition.”¹⁰⁰ Because all of the progress made to that point relied on all parties agreeing that the March 2018 Approach was reasonable, the options that the Board presented to the Staff were accordingly structured in direct relation to the March 2018 Approach: the Staff could continue negotiating within its bounds or elect to go to hearing to resolve the particular material issues enumerated by the Board. Although at that point the Staff elected to continue negotiations, it requested this hearing after the Tribe’s statements during those negotiations indicated that the Tribe had repudiated

⁹⁸ The Tribe states that the “question is whether NRC Staff has subsequently remedied the NEPA violations.” RSOP at 4.

⁹⁹ RSOP at 6. The Staff notes that it has already demonstrated compliance with 40 C.F.R. § 1502.22, as discussed above in Section II.A.

¹⁰⁰ LBP-18-5, 88 NRC 95, 137 (2018).

the March 2018 Approach, a position the Tribe has reinforced in its RSOP.¹⁰¹ The issues of material fact to be determined by this hearing, as stated in the Board's April 29, 2019 Order, are "the reasonableness of the NRC Staff's proposed draft methodology for the conduct of a site survey to identify sites of historic, cultural, and religious significance to the Oglala Sioux Tribe and the reasonableness of the NRC Staff's determination that the information it seeks to obtain from the site survey is unavailable."¹⁰² Furthermore, as the Staff stated in its ISOP and as discussed above, longstanding Commission law provides that the adjudicatory record supplements the NEPA document to constitute the complete NEPA record.¹⁰³ Therefore, the Tribe's position that the Staff is "relying entirely on the analysis provided in the 2014-FEIS [*sic*]" is demonstrably incorrect.¹⁰⁴

The Tribe also asserts that this "hearing is futile and unripe, because there is no NEPA document to adjudicate, a Draft Methodology that NRC chose to abandon when it scuttled the negotiations, therefore no cost estimate."¹⁰⁵ At root, the Tribe's position appears to be that without a formal supplement to the NEPA document, the Staff cannot meet its burden, and thus the Board has insufficient information to resolve the contention at hearing.¹⁰⁶ However, as the Staff has explained, Commission caselaw confirms that asserted NEPA deficiencies can be resolved on the adjudicatory record, and the Staff has fully addressed both why its draft methodology was reasonable and why (in light of its ultimately unsuccessful negotiations with

¹⁰¹ See Motion to Set Schedule for Evidentiary Hearing (Apr. 3, 2019) (ML19093B813). The Tribe does not deny that it will not work within the confines of the March 2018 Approach. In fact, the RSOP further distances the Tribe from the statements it made in support of the March 2018 Approach. RSOP at 8–16.

¹⁰² Licensing Board Order (Granting NRC Staff Motion and Scheduling Evidentiary Hearing) (Apr. 29, 2019) (ML19119A322) at 3.

¹⁰³ ISOP at 23.

¹⁰⁴ RSOP at 7. Rather, the Staff relies on the 2014 FSEIS, as supplemented by the adjudicatory record of this proceeding, to demonstrate that 40 C.F.R. § 1502.22(b)(2) has been satisfied.

¹⁰⁵ RSOP at 27.

¹⁰⁶ *Id.* at 31.

the Tribe to implement the March 2018 Approach) the information it sought to obtain is incomplete or unavailable.¹⁰⁷ As the Staff stated in its ISOP, based on the record in this proceeding, including the FSEIS and the Staff's testimony, the Board should conclude that the Staff has met its NEPA burden to take a "hard look" and resolve Contention 1A in the Staff's favor.

B. The Tribe Inaccurately Portrays NEPA's Rule of Reason

The Tribe asserts that the NRC Staff has misapplied NEPA's "rule of reason." However, the Tribe's efforts to narrow the applicability of the rule of reason reflect a misunderstanding of the relevant caselaw.¹⁰⁸ The Tribe claims that NEPA's rule of reason applies only where impacts from a federal action are "remote or speculative",¹⁰⁹ and in doing so the Tribe relies on a mistaken presumption that the Staff has not performed an analysis of impacts to cultural resources at the Dewey Burdock site.¹¹⁰ As explained below, these arguments fail for a number of reasons.

First, the fundamental assertion underpinning the Tribe's NEPA argument disregards a crucial (and undisputed) aspect of the record. Namely, the Tribe's argument centers around the assertion that the Staff has attempted to apply "NEPA's 'rule of reason' as to unlawfully evade analysis of reasonably foreseeable impacts" to cultural resources at the Dewey Burdock site.¹¹¹ However, this argument ignores the documented analysis of impacts in the FSEIS.¹¹² The Staff

¹⁰⁷ The Tribe asserts that this matter can be resolved summarily now, without the need for further expenditure of resources. Because the testimony and exhibits demonstrate why the Staff has met its burden, the Staff agrees that the Board could resolve the matter on the pleadings.

¹⁰⁸ RSOP at 51.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* The Tribe states that "the consequences of the NRC license are not remote or speculative, and the 'rule of reason' does not excuse the NRC's failure to prepare any NEPA analysis...." *Id.*

¹¹¹ RSOP at 53.

¹¹² See Ex. NRC-225 at A.5.

testified that Chapter 4 of the FSEIS contains an evaluation of impacts to historic and cultural resources from construction, operation, aquifer restoration, and decommissioning at the Dewey Burdock site.¹¹³ The Staff also testified that the range of impacts to historic and cultural resources on the Dewey Burdock site range from SMALL to LARGE.¹¹⁴ The Staff's analysis thus already considers and discloses that impacts of the project on cultural resources are reasonably foreseeable and potentially significant. Therefore, the Tribe's assertion that the Staff has attempted to "evade analysis of reasonably foreseeable impacts" is simply incorrect.

Second, the Tribe correspondingly fails to show any error in the Staff's reliance on the Commission's holding in the *Pilgrim* decision. The Staff cited *Pilgrim* for the proposition that the agency may select its own methodology to satisfy NEPA as long as that methodology is reasonable.¹¹⁵ The Tribe, in an attempt to narrow the application of NEPA's rule of reason, cites *Pilgrim* "to distinguish the SAMA analysis at issue there as a mitigation analysis" rather than an evaluation of impacts.¹¹⁶ The Tribe attempts to distinguish this case by stating "under applicable NEPA law. . . site-specific mitigation analyses do not require a fully developed mitigation plan, but rather one that is reasonably complete."¹¹⁷ However, the Tribe's own description of the missing information (and the Board's interpretation of it in this proceeding) in fact reinforces that the information that the Staff has determined is incomplete or unavailable is to inform a site-specific mitigation analysis rather than a threshold determination of impacts on cultural resources:

Here the Board's order in LBP-15-16 confirmed that impacts are non-speculative by emphasizing the fact that the FSEIS's [*sic*] lacked analysis of "potentially necessary

¹¹³ Ex. NRC-176-R at A.18. See also NRC-008-A-2 at 466–486.

¹¹⁴ Ex. NRC-176-R at A 18.

¹¹⁵ ISOP at 19.

¹¹⁶ RSOP at 54 (emphasis in original).

¹¹⁷ *Id.*

mitigation measures” for “environmental effects of the Dewey-Burdock project on Native American cultural, religious and historic resources.”¹¹⁸

In short, because the Tribe concedes that the unobtainable information is to inform mitigation analysis, the Tribe’s own interpretation of *Pilgrim* confirms that the NRC Staff’s efforts to obtain it are subject to the rule of reason.

Furthermore, in *Pilgrim*, the Commission determined that a bounding analysis of impacts, even on a generic basis, satisfied NEPA; the accompanying site-specific mitigation analysis needed only be reasonably complete.¹¹⁹ The Tribe suggests that the NRC simply has chosen not to evaluate impacts for cultural resources at the Dewey-Burdock site. However, just as with the Generic EIS for reactor license renewal relied on in *Pilgrim*, the FSEIS in this case bounds the analysis of impacts to cultural resources at the Dewey-Burdock site, including resources located by Level III cultural resource investigations and cultural resource surveys in which seven Indian Tribes participated.¹²⁰ As the Staff testified, the FSEIS explains why impacts for all cultural resources located on the site would range from SMALL to LARGE, which bounds all cultural resources that could be present on the Dewey-Burdock site, including any new resources that may be discovered during surveys by additional tribes. The analysis reflects the Staff’s understanding that the Dewey-Burdock project may impact historic and cultural resources and acknowledges that these impacts may be significant, and that it must take reasonable steps to determine appropriate mitigation measures for these resources.¹²¹

However, as the Staff stated in its Initial Statement of Position, NEPA imposes procedural rather

¹¹⁸ RSOP at 53 (quoting LBP-15-16, 81 NRC 618, 655, 657 (2015)).

¹¹⁹ Entergy Nuclear Generation Co. (Pilgrim Nuclear Power Station), CLI-10-11, 71 NRC 287, 316 (2010) (“Because the GEIS provides a severe accident impact analysis that envelopes the potential impacts at *all* existing plants, the environmental impacts of severe accidents during the license renewal term already have been addressed generically in bounding fashion.”)

¹²⁰ Ex. NRC-008-A-1 at 83; see *a/so* NRC-019 at 1.

¹²¹ Ex. NRC-176-R at 43–45.

than substantive requirements on the NRC.¹²² Having offered the Tribe multiple opportunities to participate in a survey to provide its perspective on cultural resources at the Dewey-Burdock site and ultimately inform the identification of mitigation measures, including most recently in furtherance of an approach whose parameters the Tribe agreed was reasonable, the Staff has acted reasonably. The Staff has also explained why the consideration of mitigation measures, even if they were to reduce the range of impacts evaluated, would not have the potential to change the Staff's determination that the proposed action was the environmentally preferable alternative. Under these circumstances, demanding the expenditure of exorbitant resources to obtain additional information would constitute imposition of a substantive requirement significantly outside the bounds of NEPA's rule of reason and goal of facilitating an informed agency decision.

Finally, the cases that the Tribe cites do not support its strained efforts to find NEPA's rule of reason inapplicable to the facts of this proceeding. First, although the Tribe asserts that the court's logic in *Ground Zero* hinged on the remote and speculative nature of the potential harm, the Tribe has incorrectly reversed the logic of the case's holding. In that case – which never mentions the phrase “rule of reason” – the court ruled that because a new type of harm was remote and speculative, it need not be analyzed.¹²³ The Tribe erroneously extrapolates that holding to state that in order for the rule of reason to apply, an agency must show that the harm is remote and speculative.¹²⁴ Further, the court in *Ground Zero* also made clear that where, as in this case, the harm caused by an action is already well-understood and documented in an EIS, no supplement is required. Unlike petitioners in *Ground Zero*, the Tribe here does not claim there is a new or different cause of harm. Rather, the Tribe asserts that a

¹²² ISOP at 69.

¹²³ *Ground Zero Ctr. for Non-Violent Action v. U.S. Dep't of Navy*, 383 F.3d 1082, 1090–91 (9th Cir. 2004).

¹²⁴ RSOP at 52.

supplement to the EIS is required to provide a more complete analysis of mitigation for the impacts of the action already analyzed in the Staff's FSEIS – the impacts to TCPs that could occur from the ISR mining project at the Dewey-Burdock site. Consistent with the *Ground Zero* court's reasoning regarding when a supplement is unnecessary, the basic nature and potential significance of impacts from this project are not new and have already been determined to range from SMALL to LARGE for cultural resources located within an APE on the site.

Similarly, the Commission's decision in *Private Fuel Storage, L.L.C.*, did not rest solely on the remote and speculative nature of terrorist attacks, as the Tribe asserts.¹²⁵ Rather, the Commission determined based on a number of factors, including protecting sensitive information from public dissemination in the NEPA process, that NEPA is simply not the appropriate framework for evaluating the threat of a terrorist attack against a facility.¹²⁶ At any rate, the Tribe's proposed distinction is off the mark, as the Staff's FSEIS thoroughly describes impacts from the Dewey-Burdock project and, far from trying to minimize the characterization of impacts to cultural resources or portray those impacts as remote and speculative, determines that such impacts may be as high as LARGE.¹²⁷

Rather, as the Staff has explained, given those understood impacts, developing additional site-specific mitigation measures that specifically account for the Lakota perspective is ultimately dependent on the Oglala Sioux Tribe and other Lakota Tribes' participation and input. Accordingly, those efforts to inform the mitigation analysis are, as the Tribe has recognized in its discussion of *Pilgrim*, subject to NEPA's rule of reason.

¹²⁵ RSOP at 52–53.

¹²⁶ *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-02-25, 56 NRC 340, 347–48 (2002).

¹²⁷ Ex. NRC-008-A-1 at 43–44; Ex. NRC-008-A-2 at 462–95, 586.

IV. Conclusion

In their respective RSOPs, the Tribe and Consolidated Intervenors have not presented any factual or legal arguments that ultimately refute the Staff's determinations that its proposed draft methodology is reasonable or that the information the Staff seeks to obtain is incomplete or unavailable. Therefore, based on the record in this proceeding, the Board should conclude that the Staff has met its NEPA obligations, and it should resolve Contention 1A in the Staff's favor.

Respectfully submitted,

/Signed (electronically) by/

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

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