

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) October 4, 2019
Facility))

OGLALA SIOUX TRIBE'S
PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

Pursuant to this Board's September 6, 2019 Order, the Oglala Sioux Tribe ("Tribe") hereby submits this Proposed Findings of Fact and Conclusions of Law.

INTRODUCTION AND SUMMARY

At the adjudicatory hearing held in this matter on August 28-29, 2019, the Board established a schedule for the submission of Proposed Findings of Fact and Conclusions of Law and Replies thereto. August 29, 2019 Transcript at 2104. The Board memorialized the schedule in its Order dated September 6, 2019. This Proposed Findings of Fact and Conclusions of Law is timely submitted in accordance with the Board's schedule.

The legal briefing, and exhibits submitted prior to the August 2019 hearing, along with the live testimony presented at the hearing, demonstrates that NRC Staff has not met its burden to demonstrate Contention 1A should be resolved in its favor. To the contrary, the record demonstrates that NRC Staff has failed to take the "hard look" at impacts to cultural resources as required by NEPA and failed to demonstrate that the information related to evaluating the impacts to cultural resources is unavailable. As a factual matter, NRC Staff has also failed to demonstrate that its March 2018 Approach was reasonable as that Approach was implemented

by NRC Staff or that NRC Staff's decision to abandon all efforts to negotiate a survey methodology was reasonable. Lastly, NRC Staff has failed to comply with NEPA's procedural requirements embodied in 40 C.F.R. § 1502.22. As a result, the Board should resolve Contention 1A in favor of the Tribe and vacate the Final Supplemental Environmental Impact Statement (FSEIS), Record of Decision (ROD), and License.

The testimony confirmed that existing information, including information collected by Augustana College and other information readily available through other means, has not been characterized and analyzed by qualified persons. The testimony confirmed that the expertise required to carry out the necessary cultural resources analysis is available and can be reasonably acquired through contract and traditional means, but was not sought by NRC Staff, in part due to pressure by Powertech to unreasonably limit the expenditures required to hire qualified persons to create and implement that cultural resources surveys. The testimony confirmed that NRC Staff was offered, but summarily rejected, assistance from the Tribe in identifying qualified persons and contractors.

The testimony also confirmed that public input into a draft NEPA document would have provided NRC Staff with valuable and important information, and corrections to fundamental errors made by NRC Staff contractors. The testimony confirmed that NRC Staff's failure to follow NEPA's procedures fails to provide the necessary "hard look" at impacts to cultural resources and therefore fails to meet NRC's various duties under federal law. NRC Staff has not provided the basis for any analysis or conclusions in a NEPA document, as required by NEPA procedures, whether carried out as prescribed by 40 C.F.R. § 1502.22 or an alternate public notice and comment procedure that would accomplish the same ends. A Draft SEIS would have enabled the public to correct many fundamental errors in the draft documents NRC Staff have

relied upon. Instead, NRC Staff seeks to convert the action-forcing public disclosure and participation requirements of NEPA into a closed procedure limited to those parties who engage the extraordinarily burdensome hearing process adopted by NRC - in contradiction of NEPA and the CEQ regulations.

The testimony confirmed that NRC Staff's inability to gain access to the necessary information and persons is directly related to its failure to engage a qualified Tribal Liaison and decision to employ a series of contract archeologists that lacked the necessary interdisciplinary training and cultural experience to carry out a competent cultural resources survey that is meaningful to the Lakota people, Tribes, and the Tribal members.

Even though both the Board and Commission have already ruled that Powertech's application and the surveys conducted in advance of the FSEIS failed to provide the information necessary to conduct a NEPA analysis, Powertech provided no evidence whatsoever to defend a license that NRC Staff issued without NEPA compliance.

The Board can resolve this entire matter by finding the NRC Staff and Powertech have demonstrated, repeatedly, an unwillingness to take reasonable steps to comply with federal law as set out in Board and Commission orders. By setting aside the FSEIS, ROD, and license the Board can conserve resources of the federal and Tribal governments by creating a clean slate upon which any future agency decisions can be made in an interdisciplinary manner, informed by traditional ecological knowledge, in accordance with NEPA procedures.

ARGUMENT

A. NRC Staff Has Not Proffered Evidence Capable of Meeting its Burden

The previous rulings from this Board, the Nuclear Regulatory Commission, and the U.S. Circuit Court for the D.C. Circuit provide important background as to the as-yet incomplete

National Environmental Policy Act (“NEPA”) process relating to NRC Staff’s analysis of direct, indirect, and cumulative impacts to cultural resources from the Dewey-Burdock project and mitigation measures that may eliminate or minimize those impacts. The remaining Contentions have not yet been subjected to judicial review by the D.C. Circuit, many of which overlap with the legal issues and NEPA-specific relief requested pursuant to Contention 1A.

For purposes of the hearing, the touchstone for the legal and factual analysis is the initial ruling on the merits of Contention 1A from the Board finding “that the FSEIS [had] not adequately addressed the environmental effects of the Dewey-Burdock project on Native American cultural, religious, and historic, resources ...” LBP-15-16, 81 NRC 618, 655 (2015). This ruling was affirmed by the Commission in CLI-16-20. The Board later reaffirmed NEPA’s requirements in LBP-18-05 (2018) at 33, confirming that NEPA’s “goals are “realized through a set of ‘action-forcing’ procedures that require that agencies take a ‘hard look’ at environmental consequences,” and disseminate that information to the public.” *quoting Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989) (*quoting Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976)). These findings of fact and law are established in this case. Thus, NRC Staff’s attempts to rely on the analysis in the FSEIS is without basis, and veiled attempts to re-litigate these issues in the present hearing stage must be rejected. The questions presented must be considered within the context of whether NRC Staff has subsequently remedied duly adjudicated NEPA violations. At this stage of the adjudication, the burden falls entirely on NRC Staff to demonstrate compliance with NEPA’s “‘action forcing’ procedures.” *Id.*

There is no dispute that NRC Staff has not supplemented or otherwise updated the FSEIS and has conducted no further cultural resource surveys or other substantive effort to identify, analyze impacts to, or develop mitigation for cultural resources at the proposed mine site. The

NRC Staff's briefing, exhibits, and testimony proffered no new NEPA-compliant environmental document, survey, analysis, or any other evidence that could rehabilitate the established NEPA violations. In its most recent Motion for Summary Disposition, NRC Staff conceded that "the environmental record of decision in this matter does not include any new information." NRC Staff Motion for Summary Disposition (filed August 17, 2018)(ML18229A343) at 33. There has been no change to the status of the NEPA compliance. NRC Staff's Initial Statement of Position also confirmed:

the environmental record of decision in this matter does not include any new information on the presence of sites of historic, cultural, and religious significance to the Lakota Sioux Tribes at the Dewey-Burdock site; any changes to the discussion of potential adverse effects from the Dewey-Burdock project on sites of historic, cultural, and religious significance to the Lakota Sioux Tribes; or any changes to the discussion of potential mitigation measures for such sites.

NRC Staff Initial Statement of Position at 62. There has been no update or changes made to the NEPA documents the Board and Commission held were inadequate to meet NRC's NEPA duties. NRC Staff did not use NEPA procedures to remedy the duly adjudicated NEPA violations.

Instead of NEPA compliance, NRC Staff purports to excuse its NEPA violations based on assertions that all relevant information is "unavailable" to NRC Staff. In doing so, NRC Staff relies on a Counsel of Environmental Quality ("CEQ") regulation that excuses NEPA violations only in narrow circumstances and upon the satisfaction of specific elements. 40 C.F.R. § 1502.22. Paradoxically, however, while relying upon and citing to this regulation to avoid further NEPA analysis, NRC Staff also argues that the procedural aspects of the regulation do not apply to NRC Staff.

NRC Staff's position is contrary to NEPA and the holdings entered in this proceeding. In its most recent ruling denying summary disposition, the Board held that NRC Staff had not

satisfied the requirements of the CEQ regulation. LBP-18-05 at 40. As remedy, NRC Staff was required to choose between “two avenues available to it.” *Id.* at 47. NRC Staff chose to attempt compliance with NEPA’s disclosure and analysis requirements by “mov[ing] forward on the remaining elements of the March 2018 Approach.” Exhibit NRC-195 (November 21, 2018 Letter) (ML18325A029). NRC Staff subsequently abandoned that choice and asserted the intention to go down the second avenue provided by the CEQ regulations. 40 C.F.R. § 1502.22. However, NRC Staff has not fulfilled those requirements either – nor engaged any other NEPA procedures that would remedy violations found by the Commission and Board rulings.

While NRC Staff freely admits that it has not provided any additional analysis or data that could remedy the existing NEPA violations, it now argues that it is not bound by 40 C.F.R. § 1502.22 and should not be required to meet the regulatory steps to satisfy that NEPA “escape clause” – even if the relevant information is legitimately unavailable. NRC Staff Initial Statement of Position at 67-70 (arguing that no additional analysis under § 1502.22(b)(3) and (4) should be required and no Supplemental Environmental Impact Statement need be prepared). Taken as a whole, the record confirms that the NRC Staff acted contrary to law, contrary to Board orders, and without compliance with procedures required to meet NEPA’s statutory mandate, and instead seeks to rely solely on hearing testimony provided by its own ill-equipped staff and contractors as the basis to forego the cultural resource analysis.

The D.C. Circuit has confirmed that “‘preserv[ing] important historic, cultural, and natural aspects of our national heritage’ constitutes an important goal of the statute.” *Nat’l Parks Conservation Ass’n v. Semonite*, 916 F.3d 1075, 1082 (D.C. Cir. 2019) (*quoting* 42 U.S.C. § 4331(b)(4)) *citing* *Oglala Sioux Tribe v. United States NRC*, 896 F.3d 520, 529 (D.C. Cir. 2018). NRC Staff’s choice to ignore NEPA procedures effectively asks the Board to disparage an

unresolved NEPA violation as “merely ‘procedural’” even though the D.C. Circuit has emphasized that “NEPA imposes only procedural requirements.” *Oglala Sioux Tribe*, 896 F.3d at 534 (D.C. Cir. 2018) quoting *Winter v. NRDC, Inc.*, 555 U.S. 7, 23. The Board should decline to accept the NRC Staff’s invitation to disregard the D.C. Circuit opinion that confirmed serious flaws with NRC Staff’s approach to NEPA compliance in the present matter.

Even more recently, the D.C. Circuit has ruled that independent agencies, such as NRC, are entitled to no deference in interpreting NEPA, as that duty is assigned exclusively to the Council on Environmental Quality (CEQ). *United Keetoowah Band of Cherokee Indians in Okla., et al. v. FCC*, 2019 U.S. App. LEXIS 23762 at *7 (D.C. Cir., August 9, 2019). NRC authority to the contrary is not good law, and does not bind this Board.¹ Thus, in arguing that it may dispense with the fundamental aspects of the 1502.22 requirements to avoid any competent survey of cultural resources at the Dewey-Burdock site, NRC Staff contravenes NEPA and the express and controlling rulings of the D.C. Circuit.

Importantly, NRC Staff has the burden of proof and persuasion in this hearing process. “As the movant, the staff had the burden of pointing out exactly what allegedly new information or analysis [is contained in a NEPA document], and how exactly that new information or analysis provides a reasonable basis for concluding the information adequately addresses” the

¹ The Board is not bound by the Commission’s recent denial of Powertech’s request for interlocutory review. The observations purporting to construe CEQ NEPA regulations in the recent CLI-19-09, as pointed out by Commissioner Baran are, at best, “unnecessary dicta.” CLI-19-09 at 22. Further, the observations made while denying interlocutory review could be considered an improper attempt to prejudice and influence the Board’s ongoing proceeding despite previous rulings, in violations of due process and fairness. *Cinderella Career & Finishing Sch., Inc. v. FTC*, 425 F.2d 583, 589 (1970) (administrative tribunals “may not turn away in haughty administrative aloofness from the entire body of law governing their procedures.”) cited by *Nuclear Info. & Res. Serv. v. NRC*, 509 F.3d 562, 571 (2007).

previous rulings. *In re Crow Butte Res., Inc.*, 2018 NRC LEXIS 3 (N.R.C. March 16, 2018) citing *Fansteel Inc.* (Muskogee, Okla. Site), CLI-03-13, 58 NRC 195, 204 (2003). In short, the Board should not do NRC Staff's work for them. *Id.*

Here, NRC Staff has failed to address the issues identified by the Board, Commission, and United States Court of Appeals for the D.C. Circuit, as it has failed to proffer competent evidence of either NEPA or § 1502.22 compliance. Without a final NEPA document that either contains a competent cultural resources impact analysis or uses the standards and procedural requirements of 40 C.F.R. § 1502.22 to disclose and invite public comment on NRC's decision to abandon its NEPA analysis of cultural resources impacts, NEPA's statutory requirements cannot be satisfied.

As a practical matter, NRC Staff has been granted an "indefinite amount of time to resolve this deficiency" in the FSEIS that emerged from Powertech's inadequate application, and allowing indefinite opportunities where NRC Staff concedes it has failed to proffer admissible evidence that meets the § 1502.22 standards and that has been subjected to NEPA documentation and formal comment, "would be counter to the Commission's policies and regulations." *In re Calvert Cliffs 3 Nuclear Project, LLC*, 76 N.R.C. 184, 2012 NRC LEXIS 38, 2012 NRC LEXIS 38 (N.R.C. August 30, 2012).

Based on the passage of time, NRC Staff's inability to remedy the NEPA violation, and the fact that the deficient FSEIS did not consider reasonable alternative protections for cultural resources, "NEPA's goals of deliberative, non-arbitrary decision-making would seem best served by the [NRC Staff] approaching these actions with a clean slate." *High Country Conservation Advocates v. U.S. Forest Serv.*, 67 F. Supp. 3d 1262, 1265 (D. Colo. 2014) accord *Bob Marshall Alliance v. Lujan*, 804 F. Supp. 1292, 1297-98 (D. Mont. 1992) (NEPA mandate of "full and

meaningful consideration of the no-action alternative can be achieved only if all alternatives available [...] are developed and studied on a clean slate.”). NRC Staff and Powertech have failed to proffer any probative evidence on the 40 C.F.R. § 1502.22 provision (Powertech offered no testimony or evidence at all) that could excuse NRC Staff’s admitted failure to prepare an FEIS that meets the NEPA requirements and procedures must be met before the issuance of a license.

In short, the Board should enter an order that confirms the duly adjudicated NEPA violation, enters findings of fact confirming the violation could have been, but was not remedied in accordance with NEPA procedures, invalidates and sets aside the ROD, license, and FSEIS, and thereby ensure NRC Staff complies with NEPA mandates and Commission’s policies and regulations before issuing any future license.

B. The Record Demonstrates that the Oglala Sioux Tribe Never Agreed Unconditionally to the March 2018 Approach, which Contained no Methodology

Throughout the hearing process, NRC Staff has mischaracterized the record, including the Tribe’s “positions” related to the March 2018 Approach. Importantly, the March 2018 Approach was not prepared with the benefit of a qualified NRC contractor and contained no methodology. The March 2018 Approach was a negotiating document, promoted by the Board in a series of conference calls over the period of a year and a half, that was designed to move past litigating positions and to “get people talking to each other.” Exhibit NRC-211 at 3 *quoting* January 29, 2019 conference call transcript at 1537-1538. Six weeks after Judge Bollwerk’s admonition, and what the Tribe believed were productive talks on February 22, 2019 in Pine Ridge, on March 15, 2019, NRC Staff unilaterally reverted to litigation and abandoned the March 2018 Approach. Exhibit NRC-216.

NRC staff has asserted that the Tribe rejected NRC Staff's attempts to conduct any component of its March 2018 Approach – or any cultural resources impact review at all. NRC Staff Initial Statement of Position at 50-52, 69. To the contrary, the Tribe remained committed to working with NRC staff and its contractor to develop a suitable cultural resources survey methodology that the March 2018 Approach explicitly stated had not been prepared, in part, because NRC Staff did not onboard its archeological contractors until May 2018. August 29, 2019 Transcript at 2052, line 23 to 2053, line 3. Much of the relevant facts related to the events that occurred in 2018 were set forth in full detail in the Oglala Sioux Tribe's September 21, 2018 Response in Opposition to NRC Staff's Motion For Summary Disposition of Contention 1A (Exhibit OST-053) (ML18264A346) at 5-19 and Exhibit OST-042-R (Declaration of Kyle White).

Further, the written testimony from Kyle White, as confirmed at the August 2019 hearing, exemplified the repeated efforts the Tribe has made to continue to work on a survey methodology and to reach an agreement with NRC Staff. This testimony demonstrates that the Tribe never "rejected" the March 2018 approach, but rather insisted on a thoughtful, well-planned, and culturally-relevant methodology. Exhibit OST-42-R at ¶¶ 66-69. Specifically, Mr. White testified that during the June 2018 negotiations with NRC Staff regarding a cultural resources survey, the Tribe had arranged its own consulting firm to help design and carry out a cultural resources survey and was prepared to go out into the field to begin the on-the-ground work. August 29, 2019 Transcript at 1976, line 17 to 1978, line 24. Dr. Morgan testified to a number of approaches taken by various contractors that NRC Staff could have, but did not, secure to design and implement and reasonable, cost-effective cultural resource methodologies. OST-43-R at ¶¶39-41, 46-52. Dr. Morgan's expert testimony is undisputed.

The record in this proceeding also demonstrates the Tribe's commitment to continue working on a cultural resources impact analysis. Exhibit OST-42-R at ¶¶71 -73 The meeting notes from the February 22, 2019 meeting on the Pine Ridge Reservation demonstrate that the multiple Tribes involved remained committed to working with NRC staff and its contractor to develop a suitable cultural resources survey methodology. Exhibit NRC-218. Contrary to NRC Staff's arguments that the Tribe rejected negotiations, the unilateral decision to terminate all discussions was made by exclusively by NRC Staff. As of the conclusion of the February 22, 2019 meeting, the discussions between the Tribes and NRC Staff has only reached through Section 7 of the NRC staff contractor's Draft Methodology document. *Id.* The Tribes expressly stated their desire to work with Mr. Spangler's to continue to review of the draft methodology and to continue discussions involving Mr. Spangler and the Tribes' representatives to develop a workable methodology. *Id.*

Instead of pursuing meaningful negotiations, NRC Staff sent a legalistic and exacting letter on March 1, 2019, causing unnecessary delay by forcing the Oglala Sioux Tribe staff and counsel to put aside other work related to communicating about the survey methodology among its members and the other Tribes involved in the process. Exhibit NRC-215. Instead, as NRC staff requested, the Oglala Sioux Tribe and its counsel spent their time sorting through the multitude of assertions and characterizations made in the letter in order to provide a comprehensive and timely response. Exhibit NRC-211.

NRC Staff's formal litigation approach was fatal to negotiations that appeared to have taken quite a positive and productive turn during the February 22, 2019 in-person meeting on the Pine Ridge Reservation. Exhibit OST-042-R (Declaration of Kyle White) at ¶ 72. Further, NRC Staff's approach in forcing the Tribe to divert its efforts to such a detailed response was contrary

to the instruction from the Board as to how the parties ought to conduct themselves toward pursuing an agreement on the survey methodology and related issues. *See* Exhibit OST-051 (January 29, 2019 conference call transcript) (ML19030A497) at 1537-1538 (“This is Judge Bollwerk. It strikes me that the time to exchange letters has ended now and it’s time to engage. And I think you both understand that, all the parties understand that. But I think it's time to move forward and get people talking to each other.”). The Oglala Sioux Tribe stated its explicit desire to switch focus back to discussions and negotiations aimed at determining a suitable methodology for the survey of cultural resources. Exhibit NRC-211. However, the Oglala Sioux Tribe was required to respond in kind to NRC staff in order to correct the record and reiterate its consistent positions. The NRC Staff, whether purposefully or inadvertently, thereby derailed the progress that was made on February 22, 2019.

NRC Staff mischaracterizes the Oglala Sioux Tribe’s long-standing position regarding the March 2018 survey proposal. Specifically, the arguments in NRC Staff’s Initial Statement of Position are premised on an assertion that the Tribe had unconditionally agreed to all of the confines of the March 2018 Approach. NRC Staff Initial Statement of Position at 29. Contrary to NRC Staff’s assertions, the Oglala Sioux Tribe had never accepted a rigid application of the March 2018 Approach, which was nothing more than a proposed means to cooperatively develop the studies and analysis required to meet NRC Staff’s NEPA obligations. Although the Oglala Sioux Tribe has acknowledged that while the approach has strong potential to develop into an agreement on an actual survey methodology, ethnographic surveys, and subsequent analysis for inclusion in a NEPA document, significant details were left to be worked out between the parties with the input of a qualified NRC contractor, as well as other affected Tribes.

Specifically, as noted in the March 2018 Approach proposed by NRC Staff, the methodology for the survey had yet to be identified or formulated. In March 2018, NRC staff had not secured the input of any contractor with any qualifications. Indeed, NRC Staff testified that the agency had not brought on any expertise to advise on any methodology until May of 2018. August 29, 2019 Transcript at 2052, line 23 to 2053, line 3. The Approach merely sought to create some negotiating space between the parties to allow the cooperative development of a survey methodology in a manner that integrated ecological, social, and natural scientific principles involved in conducting surveys and documenting information, while maintaining relevance to the Lakota culture. *See* Exhibit NRC-192 (March 16, 2018 Letter to Oglala Sioux Tribe from NRC staff)(ML18074A396) at 2 (“2. The field survey will be conducted using a survey methodology that will be established in coordination with the NRC, with the support of the contractor, and the Lakota Sioux Tribes in advance of the field survey.”). No cultural resources methodology existed in March 2018 for the Tribe to agree upon and none was proposed by NRC Staff in 2018. The first time the beginnings of a draft methodology were presented by NRC Staff occurred in February 2019 (Exhibit NRC-214), but that draft methodology was quickly and unilaterally pulled off the table by NRC Staff after the February 22, 2019 meeting in Pine Ridge. Exhibit NRC-216.

With respect to the financial resources necessary to carry out the survey, NRC staff ignores the April 6, 2018 transcript in making the erroneous assertion that the Tribe had fully agreed regarding the level of the reimbursement for the survey work. NRC Staff Initial Statement of Position at 44. In that April 6, 2018 teleconference, counsel for the Tribe specifically stated that the costs necessary to compensate for staff time to carry out the project would need to be established and provided to secure services of persons qualified to design and

implement cultural resource survey methodologies, separate from the proposed honorarium provided to the on-site survey and oral interview participants. Exhibit OST-047 (April 6, 2018 conference call transcript)(ML18100A912) at 1394, lines 2-7.

Further, NRC Staff inappropriately relies on selective quotes from the Tribe's February 15, 2018 response to the Board. NRC Staff Initial Statement of Position at 29 n. 136. Contrary to NRC Staff's characterization, the Tribe did not unconditionally agree to any specific dollar amount. Rather, the Tribe maintained its neutral position on what constituted reasonable costs by unambiguously stating that the methodology required to meet NRC duties must be determined first, and only then could the costs be determined and agreed upon. Specifically, the Tribe stated with regard to costs that "it is difficult to respond precisely without knowing what Powertech is prepared to offer and without input on methodology from a qualified contractor." Exhibit OST-048 (February 15, 2018 Notice of Oglala Sioux Tribe's Responses to NRC Staff Questions) (ML18046A171) at 5. The reasonableness of the Tribe's approach was confirmed by Dr. Morgan's undisputed testimony. Exhibit Ost-043 at ¶39 ("Specific methodologies and an implementation plan are required to provide an estimated cost of such an analysis."). Even though the NRC Staff presented a hard cap of \$10,000, the Tribe sought to find a way forward that might convince NRC Staff that requiring the Tribe to conduct NRC Staff duties, without compensation normally paid for such services, was untenable. Those efforts proved unsuccessful, and NRC Staff is exploiting and mischaracterizing those efforts by improperly attempting to bind the Tribe to negotiating positions taken during attempts at compromise.

The testimony at the hearing confirms NRC Staff's unreasonable positions regarding compensation for conducting the cultural resources survey. The testimony confirmed that NRC Staff potentially had some \$70,000 available to facilitate the cultural resources survey, but

repeatedly denied the Tribe access to any more than \$10,000. August 29, 2019 Redacted Closed Session Transcript (public version) at 33, lines 20-23 (NRC Staff confirming that it potentially had available to it \$70,000; \$10,000 for each of the potentially-involved Tribes); *id.* at 34, lines 6-11 (Mr. White confirming the Tribe's requests to use the potentially available funds, but NRC Staff denied those requests). This arbitrary \$10,000 cap on the Tribe's efforts was imposed regardless of, and without regard to, any actual costs calculated to perform the necessary work. The Board recounted during the hearing the fact that even the most basic standard cultural resources survey of the site would, at minimum (without accounting for oral interview expenses), cost approximately three times this amount. *Id.* at 33 lines 5-11. Despite this, NRC Staff unreasonably refused to entertain any of the Tribe's proposals for exploring options for securing the necessary funding for qualified persons to design and implement a competent site survey. *See* Exhibit NRC-204 at 5 (NRC Staff letter dated January 25, 2019 rejecting any further discussion of any of the proposals put forward by the Tribe for additional funding opportunities).

Additionally, the testimony at the hearing demonstrated that NRC Staff chose to ignore the option of having the NRC Staff contractor secure additional expertise as part of its contract with NRC Staff to bring on qualified paid staff to conduct the field work. August 29, 2019 Redacted Closed Session Transcript (public version) at 39 lines 14-25 to 40 lines 1-7. (Mr. Spangler explaining that his contract allowed him to bring on additional staff). Despite this potentially viable option of having SC&A hire qualified persons, NRC Staff never communicated this option to the Tribe for discussion. *Id.* Instead, NRC Staff again opted to pursue further litigation. Exhibit NRC-216.

NRC Staff unreasonably ignored Oglala Sioux Tribe statements expressing the need for a flexible approach to the financial resources necessary to carry out the cultural resources survey.

For instance, in the January 11, 2019 Oglala Sioux Tribe's Response to NRC Staff's November 21, 2018 Letter proposing to resume negotiations, the Tribe specifically raised the issue of costs for carrying out the cultural resources survey, stating unambiguously that "the Tribe is not willing to voluntarily provide NRC staff with services normally obtained through federal contract." Exhibit NRC-203 at 5.

Similarly, during the February 19, 2019 conference call discussion between NRC Staff and the Oglala Sioux Tribe, the Tribe specifically requested that the NRC staff's contractor provide any examples of any cultural resources survey projects where a budget on the order of \$10,000 was considered sufficient for a pedestrian survey, including identification and evaluation of cultural resources on an area approximating that at issue with the Dewey-Burdock site. Exhibit OST-042-R (Declaration of Kyle White) at ¶ 77. NRC Staff's contractor was unable to provide any examples and NRC Staff has never provided the Tribe any information with respect to the reasonableness of such a budget. *Id.* NRC Staff acted unreasonably in ignoring the question of compensation for services regularly provided to federal agencies, states, and Tribes by paid contractors, and by unreasonably insisting that NRC Staff's duties be met by the Tribe, without compensation. *Id.*

NRC Staff has failed to provide any evidence or information as to a reasonable cost for carrying out a cultural resources impact analysis pursuant to a methodology developed pursuant to the March 2018 Approach. In retrospect, NRC Staff instead has constantly hardened its position based on the March 2018 budget estimates that were contested by the Tribe because the rough estimates were made prior to any efforts to develop a methodology, in "coordination with the NRC with the support of the contractor, and the Lakota Sioux Tribes." Exhibit NRC-192 (ML18074A396) at 2. The Tribe specifically identified other opportunities to explore to garner

the necessary resources on January 11, 2019 (*see* Exhibit NRC-203 at 5) but NRC Staff never responded and unilaterally, and unreasonably, terminated all negotiations before these options could even be discussed or explored. Exhibit NRC-216.

As demonstrated in the record and through testimony at the hearing, NRC Staff effectively used capricious tactics and the March 2018 Approach to set an arbitrary budget cap and limited timeframe for the Tribe's involvement, despite the lack of any developed methodology and before even engaging a qualified contractor or the Tribes to prepare the cultural resource methodology. NRC Staff provided no cost evidence and cannot meet its burden on the question of reasonable costs based on negotiating positions or the March 2018 Approach. The only cost evidence in the record was that presented during testimony at the August 2019 hearing, which showed NRC Staff had options available to it – in the form of six additional \$10,000 payments for other participating Tribes and options for the NRC Staff contractor to hire additional qualified personnel under the existing contract – but NRC Staff explicitly, and unreasonably, refused to consider or in the case of hiring additional staff under the existing contract, even inform the Tribe, of these options.

With respect to the timeline, the NRC Staff's March 1, 2019 letter quotes the Oglala Sioux Tribe's counsel in recognizing the Oglala Sioux Tribe's consistent statements that the timeline would have to be flexible based on the completion of "significant components that have not been fully vetted or described in terms of the methodology." Exhibit NRC-215 at 2. The Tribe repeatedly reiterated its position that the timelines must be based on the methodology, and that it would be arbitrary and capricious to limit the methodology to timelines created without benefit of a qualified contractor.

In the course of the proceedings at least as far back as beginning in December of 2018 – and in particular on the December 6, 2018 teleconference – the Tribe specifically asserted that in light of the failures of the June 2018 efforts, the timeline must remain flexible and be informed by the specifics of the methodology as it is developed. *See* Exhibit OST-050 (December 6, 2018 conference call transcript)(ML18346A090) at 1478-1479 (“And so I would just note that our experience now is that the better practice is to have the generalities laid out in terms of the time line but in order to have the process work, the methodology, the designed methodology should inform the specific dates and have an opportunity to inform the specific dates that are laid out.”); at 1480 (“As I had just explained, the Tribe believes that the creation of the methodology ought to be able to inform, at least on some level, the schedule as well. So we would hope that there would be some flexibility to developing a methodology that could incorporate different time components.”). Additionally, during the January 29, 2019 teleconference, the Tribe again specifically communicated its position that the timeline proposed in the March 2018 Approach was preliminary, and that flexibility must be maintained to ensure the actual timing of the survey is informed by the methodology:

And then as far as timing, certainly we understand that NRC Staff has put forth a proposed timeline and the Tribe is certainly willing to engage in the coming weeks in discussions, but as the Tribe noted, on the December 6th conference call amongst the parties coordinated by the Board, the Tribe believed that the precise timing of the culture resources survey components, needs to be informed by the methodology that is determined and not go through an exercise of trying to fit the methodology in the predetermined, the Tribe might contend somewhat arbitrary timelines, without regard to the specific methodology. So, the Tribe would note, sort of reiterate its discussion or its comments from the December 6th conference call, that this timing issue should be flexible to accommodate the methodology that’s determined.

Exhibit OST-051 (January 29, 2019 conference call transcript) at 1531-1532. The same issue was identified in the Oglala Sioux Tribe’s Response to NRC Staff’s November 21, 2018 Letter. Exhibit NRC-203 at 5 (“Once the necessary confidentiality agreements are in place, the survey

schedule should be reconfigured to ensure the survey methodology integrates the necessary celestial, and other, conditions required to conduct the survey.”). Lastly, during the conference call among the parties on February 19, 2019, the Tribe stated the same position, to which NRC Staff responded that NRC Staff understood and agreed to be “flexible” in their approach to timing. Exhibit NRC-217 (Summary of February 19, 2019 meeting). Thus, there is no basis for any assertion that the Tribes’ discussion of the need for flexibility in the timeline was somehow a new topic that arose during the February 22, 2019 meeting. Rather, the reference to the need for flexibility in that context was the continuation of the Tribes’ efforts to find a mutually agreeable solution, consistent with long-held position that a methodology prepared by a qualified cultural resources contractor with input from the persons with the required cultural knowledge must drive the timing. As such, NRC Staff’s assertions that the Tribe’s position constituted a “constructive rejection” of NRC Staff’s approach is unsupported by the record, and merely confirms NRC’s take-it-or-leave-it approach that appears designed more to protect the license issued by NRC Staff than protecting significant cultural resources.

Notably, these statements of position by the Tribe were directly communicated to NRC Staff prior to the final decision to move forward in 2019 with another attempt to implement the March 2018 Approach via negotiations designed to create a cultural resources methodology with the benefit of qualified NRC contractor and various Tribes. As such, NRC Staff was on notice and undertook additional efforts in negotiations with the Oglala Sioux Tribe with full knowledge that both the timelines and costs would need to be addressed. In sum, the failure to reach a compromise informed by qualified contractors and the March 2018 Approach resulted from NRC Staff’s refusal to reasonably engage the Tribes – and occurred despite rather than as a result of the Tribe’s conduct and actions.

C. **NRC Staff's Draft Methodology Was Not A Reasonable, Nor Complete, Methodology**

The record in the matter, including the testimony at the August 2019 hearing, demonstrates that NRC Staff failed to provide a reasonably complete and competent draft methodology either in June of 2018 or in February of 2019. NRC Staff's witness Mr. Spangler testified that the document prepared by Dr. Nickens as a proposed methodology in June of 2018 was not competent. August 29, 2019 Transcript at 1958, lines 16-22. Indeed, Mr. Spangler readily admitted that his review of the one-page document prepared by Dr. Nickens readily identified serious deficiencies. *Id.* ("It very much lacked a scientific methodology. I mean, it was just - - it wasn't structured correctly. It didn't have definitions and it didn't have protocols that we expect in a scientific methodology."). Mr. White explained that it was because of this lack of any competent methodology from NRC Staff that forced the Tribe to bring on its own contractor, at substantial cost, to help the Tribe begin to develop a proposal that could form the basis for discussion with NRC Staff. *Id.* at 1969 lines 12-20. This effort was necessarily subject to serious time-constraints, as NRC Staff had arrived in South Dakota insufficiently prepared – forcing the Tribe to compensate for NRC Staff's failure. The resulting discussion draft prepared by the Tribe – meant solely for the purpose of facilitating conversation – was then used as a straw man by NRC Staff to unilaterally abandon negotiations. Exhibit OST-059; Exhibit NRC-200. Such tactics were not reasonable and cannot excuse away NRC's NEPA duties.

As to the February 2019 Draft Methodology, that document was shared with the Tribe for the first time on February 15, 2019 – one week prior to the February 22, 2019 meeting held on the Pine Ridge Reservation. For most of the participants, the February 22, 2019 meeting was the first time they had been able to review the document in detail or discuss the document with NRC Staff and NRC Staff contractors. Exhibit NRC-218. The participants noted that the Tribes and

NRC Staff should continue to discuss the scientific principles used in the document to ensure incorporation of Lakota traditional knowledge. *Id.*

NEPA requires that federal agencies incorporate broad scientific principles in NEPA impact analyses, requiring a “systematic interdisciplinary approach” that involves “unquantified” considerations and “ecological information.” 42 U.S.C. §4332(2)(A, B, H). NEPA requires that “[A]ll agencies of the Federal Government shall – (A) Utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man’s environment.” 42 U.S.C. § 4332(2)(A).

There was nothing at the February 22, 2019 meeting that should have caused NRC Staff to abandon discussions over the proposed cultural resources survey methodology. NRC Staff’s choice to do so was unreasonable. Exhibit NRC-216. The discussion at the February 22, 2019 meeting regarding use of the term “scientific” to narrow the analysis was to highlight for NRC staff’s contractor that the Tribes have in the past experienced problems where federal agencies discount traditional cultural and ecological knowledge in the analysis of impacts to cultural resources, development of mitigation measures, and in the evaluation of cultural resources for inclusion in the National Register of Historic Places based on a perceived need to adhere to an overly rigid definition of “scientific”. Exhibit NRC-218. Unfortunately, and without the benefit of the NRC Tribal Liaison in attendance, NRC Staff and the archeologist it hired to carry out a cultural resources study, hardened their position around the term “scientific.” The Tribe’s testimony, including that of an expert in the interdisciplinary analysis of Lakota cultural resources, explains and confirms the interdisciplinary approach required to meet NEPA’s

mandate in context of cultural resources analysis. Exhibit OST-043-R (Declaration of Dr. Kelly Morgan) at ¶¶ 17, 20. August 28, 2019 Transcript at 1868 line 25 to 1872 line 24.

There is no reason to believe, or evidence to establish, that this case involves insurmountable challenges to integrating physical and social science and the Lakota's "Traditional Ecological Knowledge" into NRC Staff's NEPA interdisciplinary analysis. Yet, the February 22, 2019 discussion confirmed that NRC staff directed Mr. Spangler to construct the draft cultural resource survey methodology based solely on his cramped view of the so-called "scientific method" based on his narrow experience as an archeologist working in the Desert Southwest. Exhibit NRC-218. As Dr. Morgan's testimony establishes, the skills of an archeologist lack the interdisciplinary and traditional ecological knowledge required to carry out a cultural resources survey. Exhibit OST-043-R (Declaration of Dr. Morgan) at ¶¶15-17.

The inability of non-Native archeologists such as Dr. Nickens and Mr. Spangler to prepare methodologies or carry out cultural resources studies, without the assistance of culturally knowledgeable persons, was confirmed by Dr. Hannus' testimony in 2014 confirming the difficulty for archeologists, "not of Native background, to identif[y] sites that are traditional cultural properties that have a tie to spirituality and so on, it is not in our purview to do that." Exhibit OST-054 at 859. Mr. Spangler's lack of familiarity with Lakota culture was clearly evidenced during the August 2019 hearing. During the hearing, despite leading off the listing of his experience on his curriculum vitae as having "[w]orked with the Lakota Oglala Sioux Tribes in the late 1990s and early 2000s" (Exhibit NRC-178 at 1) the testimony demonstrated that this entire experience consisted of making one single phone call in the 1990's to an unidentified Lakota person from whom Mr. Spangler received no information. August 28, 2019 Transcript at 1769 line 19 to 1770 line 3. No other experience working with any Lakota tribes is contained in

Mr. Spangler's Statement of Professional Qualifications. Exhibit NRC-178. The record is thus uncontested that Mr. Spangler may have experience documenting what he considers "the prehistoric of the Intermountain West," Mr. Spangler lacked the necessary experience or qualifications to design a Lakota culturally-relevant methodology. August 28, 2019 Transcript at 1772 lines 3-4. To paraphrase, Mr. Spangler "can't protect what [he] doesn't know is there." *Id* at 1744 at line 18.

The inability of non-Native archeologists to integrate the various sources of knowledge and information are a familiar component of the Tribes' staff and contractors' day-to-day work with other federal agencies. The lack of cultural resource understanding on behalf of NRC Staff's chosen archeological contractors is a direct result of NRC Staff's failure to accept the Oglala Sioux Tribe's offers to ensure the participation of a Tribal Liaison and contractor(s) that are familiar with Lakota Culture and the integration of social and natural sciences with Traditional Ecological Knowledge. Exhibit OST-042-R (Declaration of Kyle White).

The Tribe has insisted on a scientifically defensible interdisciplinary approach required by NEPA that fully accounts for traditional cultural knowledge. The February 15, 2019 Draft Methodology appears to explicitly discount these aspects. For instance, the document prepared by Mr. Spangler pursuant to NRC Staff limitations states:

The scientific process requires the use of defined and articulated instruments to test a hypothesis or series of hypotheses by gathering observable, empirical evidence, and it calls for rigorous adherence to standards and practices accepted by scientific disciplines, such that results are measurable and replicable. But Tribal surveys might run counter to traditional scientific practices because, as discussed in Section 2.0 above, there are fundamental differences in how Indian Tribes and non-Tribal individuals view the world around them. Tribal surveys are intended to document what Tribal members believe to be significant, but these observations might not be measurable, replicable, or even observable to non-Tribal individuals.

Exhibit NRC-214 (February 15, 2019 Draft Methodology) at 3. This passage states that somehow Tribal members' culturally based knowledge and observations are not compatible with a "scientific" approach to information gathering, as that term is used in NEPA. Thus, the Tribal Historic Preservation Officers in attendance at the February 22, 2019 meeting made it explicitly clear that any definition of "scientific" in the development of the methodology that attempts to discount traditional cultural knowledge is unacceptable. Exhibit OST-042-R (Declaration of Kyle White); *see also* Exhibit NRC-218 (February 22, 2019 meeting notes). 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." 42 U.S.C. § 4332(2)(A, B, H). The statutory mandates were imposed by Congress on all agencies in 1970.

With respect to Draft Methodology's heavy reliance on Dr. Sebastian LeBeau's methodology, the Oglala Sioux Tribe's position has never been that the LeBeau method was sufficient in and of itself for development of a cultural resources survey methodology. Exhibit OST-042-R (Declaration of Kyle White). Similarly, the Oglala Sioux Tribe has never stated that the LeBeau methodology is completely irrelevant. NRC Staff's narrow either "for or against" approach, ignores the careful, nuanced views the Tribe provided on the LeBeau methodology.

In its January 11, 2019 Response, the Oglala Sioux Tribe merely pointed out that NRC Staff's previous consultant, Dr. Paul Nickens, had identified the LeBeau methodology as an example of a methodology – to counter the assertions made by Powertech and NRC Staff in the past that there is no way to develop *any methodologies* for using traditional cultural knowledge in the context of a "scientific" cultural resources survey. *See* Exhibit NRC-203 (January 11, 2019 Oglala Sioux Tribe's Response to NRC Staff's November 21, 2018 Letter)

(ML19011A459) at 3. NRC Staff seeks to turn its reluctant acceptance of the Tribe's position - that there are methodologies - on its head. However, it is perfectly consistent to say the LeBeau methodology should be *considered* as an example confirming methodologies exist and later state that the LeBeau model is seriously flawed and should not be uniformly adopted. Notably, that January 11, 2019 Response specifically identified the LeBeau methodology as having “shortcomings” in its approach. *Id.* at 3.

At the February 22, 2019 meeting, persons steeped in Lakota culture and with experience implementing cultural resources surveys involving Lakota culture communicated that heavy reliance in the February 15, 2019 Draft Methodology document on LeBeau's model is not appropriate and ignores criticisms of LeBeau's 2009 dissertation. Exhibit NRC-218. The testimony at the August 2019 hearing confirmed the Tribe's positions regarding the LeBeau model paralleled the criticisms discussed on February 22, 2019 and identified other methodologies that should play a larger role in the creation of a methodology. August 29, 2019 Transcript at 1859 line 21 to 1862 line 9.

NRC Staff's Initial Statement of Position asserts that the February 15, 2019 Draft Methodology document was drafted with sufficient depth and substance to provide a reasonable methodology. NRC Staff Initial Statement of Position at 31. However, as discussed at the February 22, 2019 meeting on the Pine Ridge Reservation, the Draft Methodology document actually contains no discussion of an actual on-the-ground methodology, such as the development of items such as appropriate transect parameters and staffing levels – among other essential components of a well-developed methodology. NRC Staff asserts that the Draft Methodology does contain these details (NRC Staff Initial Statement of Position at 40-41), but the document merely lists components that would need to be determined at a later time. Exhibit

NRC-214 at 14-17. Indeed, that draft document contains only an outline of a schedule and makes multiple references to the need to make additional decisions on methodology that NRC Staff never took the time to incorporate the input of the February 22 participants or the Tribe. Importantly, NRC Staff made no further effort to complete the Draft Methodology.

The evidence admitted and testimony presented at the August 2019 hearing confirms the inadequacies of the Draft Methodology. For instance, the Board presented multiple examples of methodologies used and proposed for use in conducting cultural resources surveys, and each example contains specifics that are lacking in the February 2019 Draft Methodology. See Exhibit BRD-003 (detailing specific elements used for the assessment of properties of religious and cultural significance for the Strata Energy, Inc., Ross ISR Project); Exhibit BRD-011 (Non-public); Exhibit BRD-012 (Non-public).

Importantly, at the close of the February 22, 2019 meeting, as with previous meetings that were held between the parties, the non-party participants, Tribe, and the NRC Staff contractor had yet to progress past Section 7 of the Draft Methodology document. Exhibit NRC-217. The first seven sections mainly provided background information and provided context for the development of the cultural resources methodology itself. Section 8 of the Draft Methodology document – which the Tribes did not have the opportunity to discuss in detail during either meeting – purports to be a survey methodology, but, as discussed only contained a schedule and references to methodological issues that would need to be resolved. Exhibit NRC-217 at 14-17. Thus, it essentially restates an “open site survey” that was rejected on several occasions during these proceedings. *See e.g.* LBP-128-05 at 8 FN47 (“2013 survey methodology was an open site survey...”); *id.* at 24-27. The February 15, 2019 Draft Methodology proposed to conduct a “windshield tour” on the first day, followed by survey of as-yet unidentified

transects of “potential areas to be examined,” and remains remarkably similar to the June 5, 2018 open site survey “methodology” forwarded by Dr. Nickens. Exhibit OST-052.

Based on the February 22, 2019 meeting, and informed by NRC Staff’s previous abandonment of the untenable position that no methodologies existed, the Oglala Sioux Tribe perceived an opportunity was opening up, remained willing to negotiate, and continued to pursue time with NRC Staff and its contractor to work out the cultural resources methods and details that the “open site survey” proposals created by the non-Lakota experienced archeologists hired by NRC Staff did not contain. Exhibit OST-042-R (Declaration of Kyle White). The Oglala Sioux Tribe did not believe that there are such fundamental differences between NRC staff’s contractors and the Tribes that the efforts should be abandoned. *Id.* Instead, the meetings appeared to provide an opening for the Tribes to convince NRC Staff that additional discussions related to interdisciplinary and traditional ecological knowledge were required to supplement Mr. Spangler’s limited archeological approach. *Id.*; August 29, 2019 Transcript at 2021 line 19 to 2022 line 18.

Indeed, at the February 22, 2019 meeting on the Pine Ridge Reservation all of the Tribal Historic Preservation Officers, and the NRC staff’s contractor, Mr. Spangler, expressed a strong desire to continue to work to develop a methodology that will result in a competent, culturally-relevant, and NEPA compliant cultural resources survey. *Id.*; Exhibit NRC-218 at 2. The Tribe proposed multi-day meetings of the qualified personnel to delve deep into the survey methodology required to reach agreement on the proper methodology. *Id.*; Exhibit NRC-218 at 2. However, NRC Staff immediately abandoned the effort before additional progress toward developing a reasonable methodology could be developed. Exhibit NRC-216.

An underlying predicate to NRC Staff's argument, and litigating position, is that full and rigid implementation of the March 2018 Approach is the only reasonable method that could be used to fulfill NEPA's mandate. However, Commission precedent confirms that the NRC Staff (and the applicant) can meet this duty by hiring independent, qualified cultural resources consultants to coordinate and/or conduct the required survey in order to sufficiently inform the NEPA analysis with credible information. Such was the case in *In the Matter of Hydro Resources, Inc.* (2929 Coors Road Suite 101 Albuquerque, New Mexico 87120), 62 N.R.C. 442 (2005), where the required NEPA cultural resources impact analysis was upheld based specifically on the cultural resources studies and analyses prepared by the applicant's consultants. 62 N.R.C. at 451-452. Importantly, the consultant must be qualified to develop and conduct interdisciplinary cultural resources inquiries and must appropriately coordinate and interact with the relevant tribal governments and communities. *Id.*

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

At the August 2019 hearing, Mr. Spangler testified that his understanding was that he was authorized under his contract with NRC Staff to hire additional qualified sub-contractors to help design and perform the necessary work. August 29, 2019 Redacted Closed Session Transcript (public version) at 39 lines 14-25 to 40 lines 1-7. However, this information was never shared

with the Tribe. *Id.* Also at the August 2019 hearing, NRC Staff argued that federal contract regulations precluded NRC Staff from relying on or hiring the Oglala Sioux Tribe, or a contractor of the Tribe’s suggestion, to conduct the survey because of a perceived “conflict of interest.” August 29, 2019 Transcript at 1881 line 24 to 1882 line 7. NRC Staff (through counsel) admitted that they were not familiar with any of the specific contracting limitations, but foreclosed the Tribe’s direct involvement anyway. *Id.* at 1890 line 18 to 1894 line 2. NRC Staff counsel’s lack of expertise is evident from the fact that NRC regulations specifically address this situation and provide for an express exception to the perceived “conflict of interest” problem where that party (here, the Tribe) is the only party with the necessary relevant experience to conduct the work. *See* 48 C.F.R. § 2009.570-9 Waiver (NRC Contracting Regulations)(emphasis added):

- (a) The contracting officer determines the need to seek a waiver for specific contract awards with the advice and concurrence of the program office director and legal counsel. Upon the recommendation of the Senior Procurement Executive, and after consultation with legal counsel, the Executive Director for Operations may waive the policy in specific cases if he determines that it is in the best interest of the United States to do so.
- (b) Waiver action is strictly limited to those situations in which:
 - (1) The work to be performed under contract is vital to the NRC program;
 - (2) **The work cannot be satisfactorily performed except by a contractor whose interests give rise to a question of conflict of interest.**
 - (3) Contractual and/or technical review and surveillance methods can be employed by the NRC to neutralize the conflict.
- (c) The justification and approval documents for any waivers must be placed in the NRC Public Document Room.

Despite this unambiguous exception to NRC Staff’s “conflict of interest” contracting rules, NRC Staff never explored this option – or informed the Tribe that such an exception existed that would have allowed the Tribe to perform the cultural resources survey work. Abandoning all discussions without exploring this potential option was not reasonable.

Far from carrying NRC Staff's burdens, the statements exchanged in what the Tribe believed were good faith negotiations confirm that NRC Staff was internally relying on hardened litigating positions, apparently promoted by uninformed legal counsel, that prevented NRC Staff from procuring the necessary expertise (from the Oglala Sioux Tribe directly through consultation, through qualified contractors, or otherwise) to fulfill its NEPA cultural resource impact review obligations. Each NRC Staff position appears calculated to undermine and simply abandoned the cultural survey efforts. Overall, the forgoing discussion demonstrates that NRC Staff was not reasonable either in allowing only a preliminary draft of the methodology to be developed nor in its complete abandonment of all cultural resources impact analysis efforts.

D. NRC Staff Has Provided No Demonstration of Compliance with NEPA

The relevant NEPA procedures and requirements have been articulated throughout this case by the Board, Commission, and the United States Court of Appeals for the D.C. Circuit. As currently postured, the burden of proof rests on NRC Staff and NRC Staff has not met the burdens imposed by NRC's motion regulations or by NEPA.

NEPA is an action-forcing statute applicable to all federal agencies. Its sweeping commitment is to "prevent or eliminate damage to the environment and biosphere by focusing government and public attention on the environmental effects of proposed agency action." *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 371 (1989). The statute requires "that the agency will inform the public that it has indeed considered environmental concerns in its decision-making process." *Baltimore Gas and Electric Company v. NRDC*, 462 U.S. 87, 97 (1983). In a NEPA document, the government must disclose and take a "hard look" at the foreseeable environmental consequences of its decision. *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976).

Closely related to NEPA’s “hard look” mandate, NEPA prohibits reliance upon conclusions or assumptions that are not supported by scientific or objective data.

“Unsubstantiated determinations or claims lacking in specificity can be fatal for an [environmental study] Such documents must not only reflect the agency’s thoughtful and probing reflection of the possible impacts associated with the proposed project, but also provide the reviewing court with the necessary factual specificity to conduct its review.” *Committee to Preserve Boomer Lake Park v. Dept. of Transportation*, 4 F.3d 1543, 1553 (10th Cir. 1993).

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

The CEQ regulations require that: “NEPA procedures must ensure that environmental information is available to public officials and citizens **before** decisions are made and **before** actions are taken.” 40 C.F.R. § 1500.1(b)(emphasis added). The statutory prohibition against taking agency action before NEPA compliance applies to NRC decisionmaking. 42 U.S.C. § 4332(2)(C) *cited by New York v. NRC*, 681 F.3d 471, 476 (D.C. Cir. 2012); *Oglala Sioux Tribe v. NRC*, 896 F.3d 520, 529 (2018).

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

A federal agency may not simply claim that it lacks sufficient information to assess the impacts of its actions. Rather, “[a] conclusory statement unsupported by empirical or

experimental data, scientific authorities, or explanatory information of any kind not only fails to crystallize the issues, but affords no basis for a comparison of the problems involved with the proposed project and the difficulties involved in the alternatives.” *Seattle Audubon Society v. Moseley*, 798 F. Supp. 1473, 1479 (W.D. Wash. 1992), *aff’d* 998 F.2d (9th Cir. 1993).

NEPA requires that mitigation measures be reviewed in the NEPA process. “[O]mission of a reasonably complete discussion of possible mitigation measures would undermine the ‘action forcing’ function of NEPA. Without such a discussion, neither the agency nor other interested groups and individuals can properly evaluate the severity of the adverse effects.” *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 353 (1989), *accord New York v. NRC*, 681 F.3d 471, 476 (D.C. Cir. 2012).

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

Importantly, the D.C. Circuit Court of Appeals has very recently confirmed that the Court “owe[s] no deference to [an independent agency’s] interpretations of the NHPA or NEPA, which are primarily administered by the Advisory Council, *see McMillan Park Comm. v. Nat’l Capital Planning Comm’n*, 968 F.2d 1283, 1287-88, 297 U.S. App. D.C. 1 (D.C. Cir. 1992), and the Council on Environmental Quality, *see Grand Canyon Tr. v. FAA*, 290 F.3d 339, 341, 351 U.S. App. D.C. 253 (D.C. Cir. 2002) (as amended Aug. 27, 2002), respectively.” *United Keetoowah Band of Cherokee Indians in Okla., et al. v. FCC*, 2019 U.S. App. LEXIS 23762 at *7 (D.C. Cir., August 9, 2019). Thus, despite any attempts by the Nuclear Regulatory Commission to assert its own interpretations of NEPA over those expressed in the CEQ regulations, the Commission, and

by extension NRC Staff and this Board, may not ignore or disclaim the applicability of CEQ's NEPA procedural regulations.

NEPA requires that all relevant information necessary for an agency to demonstrate compliance with NEPA be included in an environmental impact statement, and not in additional documents outside of the public comment and review procedures applicable to that environmental impact statement. *See, Massachusetts v. Watt*, 716 F.2d 946, 951 (1st Cir. 1983) (“[U]nless a document has been publicly circulated and available for public comment, it does not satisfy NEPA’s EIS requirements.”); *Village of False Pass v. Watt*, 565 F. Supp. 1123, 1141 (D. Alaska 1983), *aff’d sub nom Village of False Pass v. Clark*, 735 F.2d 605 (9th Cir. 1984) (“The adequacy of the environmental impact statement itself is to be judged solely by the information contained in that document. Documents not incorporated in the environmental impact statement by reference or contained in a supplemental environmental impact statement cannot be used to bolster an inadequate discussion in the environmental impact statement.”); *Dubois v. U.S. Dept. of Agriculture*, 102 F.3d 1273, 1287 (1st Cir. 1996), *cert. denied sub nom. Loon Mountain Recreation Corp. v. Dubois*, 117 S. Ct. 2510 (1997) (“Even the existence of supportive studies and memoranda contained in the administrative record but not incorporated in the EIS cannot ‘bring into compliance with NEPA an EIS that by itself is inadequate.’ . . . Because of the importance of NEPA’s procedural and informational aspects, if the agency fails to properly circulate the required issues for review by interested parties, then the EIS is insufficient even if the agency’s actual decision was informed and well-reasoned.”); *Grazing Fields Farm v. Goldschmidt*, 626 F.2d 1068, 1072 (1st Cir. 1980) (same).

Specifically, the Board's October 26, 2018 Order specified three elements NRC Staff would have to satisfy in order to provide the Board a sufficient basis to resolve Contention 1A in NRC Staff's favor.² Specifically, the Board ruled:

There are three interrelated disputed material issues of fact that must be addressed before Contention 1A will be ripe for resolution by summary disposition. First, the NRC Staff must show that its March 2018 Approach contained a reasonable methodology for the conduct of the site survey. Second, the NRC Staff must show that its decision to discontinue work completely on June 15, 2018 was reasonable. Finally, consistent with 40 C.F.R. § 1502.22, the NRC Staff must show that proposed tribal alternatives to its March 2018 Approach would be cost prohibitive. With respect to the cost prohibitive factual dispute, the NRC Staff must provide information establishing the 40 C.F.R. § 1502.22(b)(3) and (4) requirements that set forth a "summary of existing credible scientific evidence which is relevant to evaluating the reasonably foreseeable significant adverse impacts [of the Dewey-Burdock project] on the human environment," and "the agency's evaluation of such impacts based upon theoretical approaches or research methods generally accepted in the scientific community." In other words, in these circumstances, if the NRC Staff concludes there is no affordable alternative to the open-site survey for assessing the missing Native American cultural resources, to satisfy NEPA, the NRC Staff must at a minimum provide a sufficiently detailed explanation addressing the cultural resources analysis for the Oglala Sioux Tribe and the other Native American tribes that is currently missing from the FSEIS.

LBP-18-05 at 48-49 (footnotes omitted) (emphasis supplied).

As argued herein and confirmed in the NRC Staff's November 2018 letter choosing to resume the March 2018 Approach, these three binding NEPA requirements must, if at all, be addressed in the context of a Supplement to the FSEIS. Exhibit NRC-195 at 6 ("Mid-December 2019: NRC staff publishes draft supplemental analysis to the FSEIS for 45-day public review and comment period.; January 2020: NRC staff considers public comments and revises supplemental analysis to the FSEIS, as appropriate.; February 2020: NRC staff publishes final supplemental analysis to the FSEIS.").

² These elements are not an exhaustive list of elements necessary to satisfy NEPA, but does present three threshold elements the Board ruled NRC Staff must meet before the Board could reach the question of whether that NRC Staff has remedied the NEPA violations established in these proceedings.

It is not the role of the Tribe or the Board to “‘plumb the record’ for arguments that there is a reasonable basis to conclude that the new information adequately addresses the deficits, or generally ‘do counsels’ work for them.’” *In re Crow Butte Res., Inc.*, 2018 NRC LEXIS 3 (N.R.C. March 16, 2018) quoting *Nat. Res. Def. Council*, 879 F.3d at 1209. The 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. Simply put, there can be no evidences as to the reasonableness or unavailability of a methodology that NRC Staff never completed.

Previously in this case, the Commission ruled that the Board correctly concluded that NEPA imposes obligations on NRC that NRC Staff’s FSEIS failed to satisfy. *In re Powertech (USA), Inc.*, CLI-16-20 (N.R.C. Dec. 23, 2016) (upholding Board finding that “analysis of the environmental effects on cultural resources in the FSEIS was insufficient”); *see also, Oglala Sioux Tribe v. NRC*, 896 F.3d 520 (D.C. Cir. 2018). While “the ultimate burden with respect to NEPA lies with the NRC Staff,” NRC Staff has not presented any further NEPA analysis or documentation that could meet its NEPA obligations. CLI-16-20 at 15. As recently acknowledged by the Board, “[i]n both April 2015 and October 2017, this Board found that the NRC Staff failed to satisfy its NEPA obligation to address the impacts on tribal cultural, historical, and religious sites at the Dewey-Burdock project site.” LBP-18-05 at 34. In LBP-18-05, the Board ruled “[o]nce more, we conclude that the NRC Staff has failed to fulfill its obligation....” LBP-18-05 at 35. Once again, NRC Staff’s Initial Opening Statement confirms that “the environmental record of decision in this matter does not include any new information on the presence of sites of historic, cultural, and religious significance to the Lakota Sioux Tribes at the Dewey-Burdock site; any changes to the discussion of potential adverse effects from the

Dewey-Burdock project on sites of historic, cultural, and religious significance to the Lakota Sioux Tribes; or any changes to the discussion of potential mitigation measures for such sites.” NRC Staff Initial Statement of Position at 62.

The Board confirmed that NRC Staff has the burden in this proceeding and must support its NEPA compliance, if at all, “by a preponderance of the evidence.” *In re Powertech USA, Inc.*, 81 N.R.C. 618, 642 (LBP-15-16, Apr. 30, 2015). However, as admitted by NRC Staff in its most recent Motion for Summary Disposition “the environmental record of decision in this matter does not include any new information on the presence of sites of historic, cultural, and religious significance to the Lakota Sioux Tribes at the Dewey-Burdock site; any changes to the discussion of potential adverse effects from the Dewey-Burdock project on sites of historic, cultural, and religious significance to the Lakota Sioux Tribes; or any changes to the discussion of potential mitigation measures for such sites.” NRC Staff Motion for Summary Disposition at 33-34 (filed August 17, 2018)(ML18229A343). This position is reiterated verbatim in the NRC Staff’s Initial Statement of Position at 62.

NRC Staff’s only evidence is its *draft*, and admittedly incomplete, proposed methodology and its assertion that its unilateral abandonment of the attempts to conduct a survey were “reasonable.” However, this documentary and testimonial evidence cannot suffice for a demonstration of compliance with NEPA. There is no support in NEPA or relevant caselaw for a “reasonable effort” standard that would allow NRC Staff to escape the requirements of NEPA. At most, in cases such as *Entergy Nuclear Generation Company and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-10-22, 72 NRC 202 (2010), the Commission held that “NEPA requires the NRC to provide a ‘reasonable’ mitigation alternatives analysis, containing ‘reasonable’ estimates, including, where appropriate, full disclosures of any

known shortcomings in available methodology, disclosure of incomplete or unavailable information and significant uncertainties, and a reasoned evaluation of whether and to what extent these or other considerations credibly could or would alter the Pilgrim SAMA analysis conclusions on which SAMAs are cost-beneficial to implement.” *Id.* at 208. At base, this case merely re-states the 40 C.F.R. § 1502.22 standard.

Of course, there is no completed survey methodology, only the beginnings of a draft cultural resource survey prepared by an archeologist with the same disciplinary and cultural limitations that were fatal to the Augustana archeological survey. OST-042-R (Declaration of Kyle White); OST-043-R (Declaration of Dr. Kelly Morgan). Further, as set forth in detail in the Tribe’s testimony, the Tribe disputes as a matter of fact that NRC Staff made a “reasonable effort” to negotiate a survey methodology, even though whether or not NRC Staff made such a “reasonable effort” during negotiations is not a determining factor.

NEPA’s procedural and “hard look” requirements control the outcome of Contention 1A, and neither can be accomplished in an evidentiary hearing without the benefit of a supplemental FSEIS. As this Board has recognized, NEPA’s “hard look is intended to foster both informed agency decision-making and informed public participation so as to ensure that the agency does not act upon incomplete information.” LBP-15-16, 81 N.R.C. 618 at 637. “The NEPA hard look must emerge from an engagement in informed and reasoned decision making, as the agency ‘obtains opinions from its own experts, obtains opinions from experts outside the agency, gives careful scientific scrutiny and responds to all legitimate concerns that are raised.’” *Id.* at n. 98 quoting *Hughes River Watershed Conservancy v. Johnson*, 165 F.3d 283, 288 (4th Cir. 1999) (citing *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 378–85 (1989)).

NRC Staff has not complied with NEPA, and there is no basis for the Board to excuse non-compliance with NEPA’s “duty of complying with the [environmental] impact statement requirement ‘to the *fullest extent possible.*’” *In re Powertech USA, Inc.*, 81 N.R.C. 618 at 655-657 (N.R.C. Apr. 30, 2015) *quoting Pres. Coal., Inc. v. Pierce*, 667 F.2d 851, 859 (9th Cir. 1982) (quoting 42 U.S.C. § 4332) (emphasis supplied).

E. NRC Staff Has Not Complied With 40 C.F.R. § 1502.22

NRC Staff has not identified any competent new cultural resource information or analysis. NRC Staff Opening Statement of Position at 62. NRC Staff has not provided the information necessary to meet its burden under 40 C.F.R. § 1502.22. *Native Village of Point Hope v. Salazar* (D. Alaska 2010) 730 F.Supp.2d 1009, 1018 (confirming that the agency has the burden of demonstrating all of the necessary elements under § 1502.22). In the absence of an SEIS, NRC Staff cannot meet its burden of NEPA compliance. *Id.*

1. 40 C.F.R. § 1502.22 Requires the Relevant Information to be Included in an Environmental Impact Statement

NRC Staff has failed comply with 40 C.F.R. § 1502.22 because the agency has not followed the necessary NEPA procedure of publishing the required information in an Environmental Impact Statement. This failure has unlawfully eliminated the ability of any member of the public or any other tribal government to provide any input whatsoever to NRC Staff’s purported demonstration of compliance with that regulation. *See Oglala Sioux Tribe v. NRC*, 896 F.3d 520, 529 (D.C. Cir. 2018)(“If even ‘significant’ deficiencies in NEPA reviews are forgiven because they are merely procedural, there will be nothing left to the protections that Congress intended [NEPA] to provide.”).

The plain language of 40 C.F.R. § 1502.22 requires all of the necessary information to be “included within the environmental impact statement” and federal courts require such evidence-

supported decision-making – contained in a Supplemental EIS – to show compliance with 40 C.F.R. § 1502.22. *See Sierra Club v. US DOT*, 962 F.Supp. 1037, 1043 (N.D. Ill.

1997)(requiring “that the final impact statement was at least required to explain in some meaningful way why such a study was not possible. 40 C.F.R. § 1502.22; cf. *Laguna Greenbelt, Inc. v. U.S. Dept. of Transp.*, 42 F.3d 517, 526–27 (9th Cir.1994) (suggesting that a final impact statement cannot rely on a single socioeconomic forecast unless the statement relies on existing needs or explains why an alternative study is not possible); *Seattle Audubon Society v. Espy*, 998 F.2d 699, 704 (9th Cir.1993) (an impact statement, which did not address in any meaningful way the uncertainties of the evidence it relied on, must undertake further study or explain why such study is not necessary or feasible).

Here, NRC Staff has not provided the information required to comply with 40 C.F.R. § 1502.22. Notably, 40 C.F.R. § 1502.22 expressly mandates that where necessary information is unavailable, in order to satisfy NEPA’s procedural mandate:

The agency **shall include within the environmental impact statement:**

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

40 C.F.R. § 1502.22(b). *See also Sierra Club v. US DOT*, 962 F.Supp. 1037, 1045 (N.D. Ill.

1997)(finding lack of NEPA compliance where the analysis “was not incorporated into the final impact statement.) “By itself, this flaw makes defendants’ analysis inadequate.” *Id* citing *Sierra Club v. Marsh*, 976 F.2d 763, 770 (1st Cir.1992) (citations omitted). “Failing to incorporate the study into the final impact statement deprives the public and other participants in the process of the opportunity to comment on it.” *Id*.

The Commission itself has made clear that “[t]he Commission intends to follow the standard in 40 CFR 1502.22(a)” despite any potential rare substantive issues with its implementation. 49 Fed.Reg. 9352, 9353–54 (1984). *See also* LBP-18-05 at 39-40 (“The Commission made clear that it accepts the procedural requirements included in section 1502.22(b), so their applicability in these circumstances continues to be appropriate.”). NRC regulations contain no alternative to the 40 C.F.R. § 1502.22(b) procedure that relies on public disclosure, involvement, and comment to inform the agency decisionmaker and ensure compliance with NEPA’s action-forcing mandate.

The D.C. Circuit has very recently rejected NRC’s unique, *ad hoc* approach to NEPA, confirming that NRC Staff must comply with NEPA’s procedural requirements before taking action. *Oglala Sioux Tribe v. NRC*, 896 F.3d 520, 529 (D.C. Cir. 2018)(“If even ‘significant’ deficiencies in NEPA reviews are forgiven because they are merely procedural, there will be nothing left to the protections that Congress intended [NEPA] to provide.”); *see also NRDC, et al. v. NRC*, 879 F.3d 1202 (2016)(discussing the lack of NEPA compliance in attempts to supplement an EIS in the context of an administrative hearing). Repairing NEPA violations within the confines of NRC’s contention-based administrative litigation similarly eviscerates NEPA’s twin purposes. “[I]t is not an adequate alternative . . . to merely include scientific information in the administrative record. NEPA requires that the EIS itself ‘make explicit reference . . . to the scientific and other sources relied upon for conclusions in the statement.’” *Sierra Club v. Bosworth*, 199 F. Supp. 2d 971, 980 (N.D. Cal. 2002). *See also* 40 C.F.R. § 1502.24; *Save the Yaak Committee v. Block*, 840 F.2d 714, 718-19 (9th Cir. 1988) (biological assessment was not functional equivalent of NEPA analysis and also came too late).

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

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

184 F. Supp. 2d 1058, 1069 (D. Or. 2002). *See also, League of Wilderness Defenders v. Zielinski*, 187 F. Supp. 2d 1263, 1271 (D. Or. 2002) (study relied upon by BLM was not in AR at the time of final NEPA document; "A federal agency's defense of its positions must be found in its EA"); *Grazing Fields Farm v. Goldschmidt*, 626 F.2d 1068, 1072 (1st Cir. 1980)(NEPA does not contemplate that documents "contained in the administrative record, but not incorporated in any way into an EIS, can bring into compliance with NEPA an EIS that by itself is inadequate"); *Great Basin Resource Watch v. Bureau of Land Management*, 844 F.3d 1095, 1104 (9th Cir. 2016) ("[A] post-EIS analysis – conducted without any input from the public – cannot cure deficiencies in an EIS. *Center for Biological Diversity v. U.S. Forest Service*, 349 F.3d 1157, 1169 (9th Cir. 2003). The public never had an opportunity to comment on the 'double-check' analysis, frustrating NEPA's goal of allowing the public the opportunity to "play a role in ... the decisionmaking process." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349, 109 S.Ct. 1835, 104 L.Ed.2d 351.").

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

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

Sierra Club v. Hodel, 848 F.2d 1068, 1094 (10th Cir. 1988) *citing* 40 C.F.R. §§ 1503.1(a)(4), 1506.6, *overruled in part on other grounds, Los Ranchos de Albuquerque v. Marsh*, 956 F.2d 970 (10th Cir. 1992). The 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. *Nat'l Parks Conservation Ass'n v. Semonite*, 916 F.3d 1075, 1089 (D.C. Cir. 2019). Further, the D.C. Circuit has sharply criticized the NRC attempts to use its confined adjudicatory process to supplement a NEPA document that requires public comment and review. In *NRDC, et al. v. NRC*, 879 F.3d 1202 (D.C. Cir. 2018), the D.C. Circuit confirmed that the Commission's practice of attempting to supplement a NEPA document through the adjudicatory process "are not idle concerns" (879 F.3d at 1210) and the Commission's practice in this regard is neither "ideal or even desirable." *Id.* at 1212. The Court went on to allow the post-hoc supplementation in that case only because a remand to conduct any further study would be "utterly pointless" because the required analyses were already completed and already part of the evidentiary record. 879 F.3d at 1212. This is the critical distinguishing factor here – the cultural resources impact and mitigation analysis has not been conducted and is not in the record.

Indeed, NRC Staff has determined that it will not conduct any additional cultural resources survey efforts including any oral history interviews or additional literature reviews. As argued herein, this refusal is without basis under NEPA or 40 C.F.R. § 1502.22. Even if NRC Staff's failure to collect any additional information or perform any additional reviews were justifiable under this regulation, NRC Staff must still follow NEPA statutory procedures in preparing a supplement to its NEPA document, and must include the information required by 40 C.F.R. § 1505.22 and provide the public and Tribes the opportunity to assess and comment on that analysis – as NEPA requires. In coordination with this public NEPA process, the Tribe and any other parties (including other Tribes, tribal members, and others not party to this adjudicatory proceeding) would have the opportunity to submit comment to inform NRC Staff's analysis, as well as submit new or amended contentions to the extent the supplemental NEPA

analysis is found wanting. This is the same process NRC Staff employed when preparing its Draft and Final Supplemental Environmental Impact Statements. This is the same process NRC Staff committed to in its Draft Final Supplemental Environmental Impact Statement. NRC Staff's Answer to Contentions on Draft Supplemental Environmental Impact Statement at 13 ("As the Staff explained when it issued the DSEIS, however, it is working to facilitate a field survey of the Dewey-Burdock site in order to obtain additional information on historic properties. When the survey is complete, the Staff will supplement its analysis in the DSEIS and circulate the new analysis for public comment.").

Following NEPA procedures to satisfy NEPA duties is also the process NRC Staff proposed as part of its March 2018 Approach, which it carried through to its most recently abandoned attempt to conduct a cultural resources survey. *See* Exhibit NRC-195 at 6 ("Mid-December 2019: NRC staff publishes draft supplemental analysis to the FSEIS for 45-day public review and comment period.; January 2020: NRC staff considers public comments and revises supplemental analysis to the FSEIS, as appropriate.; February 2020: NRC staff publishes final supplemental analysis to the FSEIS.").

NRC Staff relies on *S. Nuclear Operating Co. (Vogle ESP Site)*, LBP-09-7, 69 NRC 613 (2009) to argue that Commission precedent excuses them from compliance with § 1502.22 in this case. NRC Staff Initial Statement of Position at 61-62. However, that case presented a fundamentally distinct situation – in fact, there the Commission specifically recognized that, in the face of assertions that the impacts of dredging were not considered, NRC Staff "responded to comments on the DEIS by including this information. *See* 10 C.F.R. § 51.91(a)(1). The Staff also properly noted in the FEIS the areas in which it did not have enough information to make a more thorough analysis. *See* 40 C.F.R. § 1502.22 (providing that any agency should make clear

when information is incomplete or lacking).” 69 NRC at 731. Here, the adjudicated record demonstrates that the FSEIS lacks a compliant Lakota cultural resources analysis – and NRC Staff has refused to include any of the relevant information required by § 1502.22 in a NEPA document – as was done in the Vogtle ESP Site case.

NRC Staff also cites *North Anna ESP*, CLI-07-27, 66 NRC 215 at 235–36 as support for its position that it need not comply with § 1502.22. NRC Staff Initial Statement of Position at 61. However, that case also presented a fundamentally distinct situation from that at issue here. There, the Commission made expressly clear its ruling was premised on the fact it was dealing with an Early Site Permit – just the first stage of a multi-stage project – where future additional NEPA studies would be forthcoming on the same project before any impacts occurred. The Commission recognized:

We took much the same tack in the recent Grand Gulf ESP proceeding as we do here. In Grand Gulf, we concluded that, because certain environmental effects simply could not “be meaningfully assessed at the ESP stage,” the Staff’s decision to defer consideration of those effects until “a time when they can be accurately assessed [was] consistent with NEPA’s requirements.

66 NRC at 236. Thus, the Commission’s somewhat forgiving treatment of “unresolved issues” in an Early Site Permit setting (*see* 66 NRC at 235) is not comparable to the case at bar, which is not a multi-stage analysis.

NRC Staff also provides some federal court decisions it asserts support its position on § 1502.22. NRC Staff Initial Statement of Position at 61. NRC Staff cites *Colorado Environmental Coalition v. Dombeck*, 185 F.3d 1162, 1172–73 (10th Cir. 1999) to argue that this Board should not require compliance with the requirements of § 1502.22. However, in that case, the Court made clear that all of the relevant factors of § 1502.22(b) were included in the EIS and subject to formal public comment, and the Plaintiffs were requesting the Court “to impose data

gathering requirements under circumstances where no such data exists.” 185 F.3d at 1172. As to strict compliance with the regulation, the Court did not excuse the agency from meeting the requirements of the regulation, rather the Court merely held that, given all of the information required was included in the EIS and put out for formal public comment, “an additional, formal statement citing and specifically parroting the regulatory language at 40 C.F.R. § 1502.22(b) would serve no useful purpose, and the omission of such a statement in this case does not violate the National Environmental Policy Act. See 40 C.F.R. § 1500.3 (trivial violations not actionable).” *Id.* at 1173. The case before the Board is hardly based on so trivial an argument. Here, NRC Staff has made no argument that the relevant data does not exist, and no argument that the requirements of § 1502.22 have been including in an EIS available for formal public comment but merely lacking a regulation-parroting statement.

Similarly, NRC Staff’s reliance on *WildEarth Guardians v. U.S. Forest Service*, 828 F. Supp. 2d 1223 (D.Colo. 2011) is misplaced. There, the Court found the agency had provided in its formal NEPA document all of the relevant information necessary to satisfy each element of § 1502.22(b). 828 F.Supp.2d at 1240. Further, the Court made central to its holding the fact that Plaintiffs had not been able to provide any examples of any methodologies available to science to provide the analysis requested (e.g., project’s impact on global climate change). Here, the methods to collect the cultural resources information are well-known – whether via a pedestrian survey, oral history interviews, or otherwise. As such, this case does not support NRC Staff’s argument that it need not comply with either NEPA’s ‘hard look’ mandate or the requirements of § 1502.22(b).

Lastly, NRC Staff cites *High Country Conservation Advocates*, 52 F. Supp. 3d 1174 (D.Colo. 2014). However, that case is immediately distinguishable as it involved an issue of air

impacts that was addressed in the EIS and the data requested was not needed. The Court merely ruled that “technical compliance with Section 1502.22 has never been required as long as other information in the agency documents reveals that the missing information is not essential.” 52 F.Supp.3d at 1194. Here, the Board, the Commission and the D.C. Circuit Court of Appeals have all already found that information on impacts to the Tribe’s cultural resources is essential to comply with NEPA.

There is no legal or factual basis to excuse NRC Staff’s compliance with the requirements of § 1502.22 – including that the relevant information be provided in a NEPA document available for formal public comment and review.

2. NRC Staff Has Not Provided Relevant Cost Data or Demonstrate Exorbitant Costs to Show the Information is Unavailable

40 C.F.R. § 1502.22 applies only where the agency makes a conclusive showing that the “overall costs of obtaining it are exorbitant or the means to obtain it are not known...” 40 C.F.R. § 1502.22(b). NRC Staff has not provided evidence or any other factual demonstration to support a finding regarding estimated costs of implementing the *draft* methodology, let alone a finding of “exorbitant” cost based on any cultural resources methodology developed by an NRC contractor with the necessary qualifications. In fact, the testimony at the hearing directly contradicted this argument, demonstrating that additional funding for a cultural resources survey was available – NRC Staff and Powertech simply chose not to pay a qualified NRC contractor, the Tribe, or a qualified commercial firm to carry out the work.

NRC Staff failed to provide any specific cost information of implementing any type of data collection or cultural resources impact analysis. The undisputed expert testimony of Dr. Morgan confirms that cost estimates are impossible on this record. Dr. Morgan testified, “[s]pecific methodologies and an implementation plan are required to provide an estimated cost

of such an analysis. I am not aware of any NRC-proposed methodology that would support a reliable cost estimate.” OST-043-R at ¶39. Dr. Morgan’s testimony demonstrates that neither the March 2018 Approach nor the February 2019 Draft Methodology contained sufficient information to provide the basis for a cost estimate. Consistent with the Tribe’s intention of merely providing a document to spur discussions in June 2018, Dr. Morgan also testified that the Tribe’s discussion document did not provide a basis to make a reasonable cost estimate. August 29 Closed Session Transcript redacted (public version) at 8. Dr. Morgan opined that qualified persons might be able to carry out the work for between \$800,000 and \$1,000,000, if provided the opportunity to prepare an informed bid on a defined cultural resources project. *Id.* at 8 - 10. Notably, this is a similar cost NRC Staff anticipated that it would need to spend on the project. Exhibit OST-056 (January 17, 2018 NRC Staff’ Response to January 9, 2018 Order)(calculating spending \$792,300). It is NRC’s burden to demonstrate that the costs are exorbitant, but NRC Staff did not provide any documentary or testimonial evidence to contradict Dr. Morgan’s testimony.

Instead, the only information in the record as to costs of an on the ground survey was the cost information inserted by the Board’s post-briefing exhibits and the testimony solicited by the Board’s examination of witnesses. *See* August 29, 2019 Redacted Closed Session Transcript (public version) at 33 lines 5-11. However, those cost numbers demonstrate that the cultural resources survey costs have not been shown to be exorbitant. Further, NRC Staff has not provided nor disclosed any suitable data or information on either what it has spent to date, nor any information on what it or other agencies may spend on such studies in other circumstances – despite specific requests from the Tribe. *See* Exhibit NRC-217 (February 19, 2019 meeting notes) at 3.

Despite the mandatory disclosure requirements, NRC Staff and Powertech have disclosed almost no evidence of actual costs incurred or estimates of what compliance may cost. LBP-17-9, 10 C.F.R. § 2.336. Further, the most recent information in the Record pertaining to cost is NRC Staff's February 15, 2018 filing with the Board, in which NRC Staff concedes that despite this Board's mandate since April 30, 2015 (LBP-15-16) to resolve Contentions 1A and 1B, "since April 30, 2015, the NRC has billed Powertech \$20,073.75 under 10 CFR Part 170 in connection with the NRC Staff's efforts to resolve Contentions 1A and 1B." Exhibit OST-055 (NRC Staff February 15, 2018 billing summary data) at 1. Not surprisingly, NRC Staff has never attempted to argue that \$20,073.75 in costs over almost four years is exorbitant. Tellingly, instead of verifiable evidence of costs, NRC Staff refers only to "hypothetical costs" of gathering cultural resources information. Exhibit NRC-176 (NRC Staff Written Testimony) at 42 (A.51). NEPA is an action-forcing statute applicable to all federal agencies, and NRC Staff cannot avoid NEPA duties by refusing to provide data on which to review NRC Staff's determine whether the costs of the methodology are reasonable.

NRC Staff has also failed to address the costs of any alternative method of gathering data related to cultural resources. This is despite the fact that each of the example cultural resource analysis methodologies NRC Staff provides as exhibits show that making use of oral history interviews is a principle method in order to collect relevant cultural information. *See* Exhibits NRC-180 through NRC-185, and Exhibit NRC-206. No cost estimates, let alone evidence of actual exorbitant costs, were provided by NRC Staff, thereby NRC Staff has failed to meet its evidentiary burdens.

NRC Staff attempts to meet its burden by argument that cost figures included by the Oglala Sioux Tribe are exorbitant. NRC Staff Initial Statement of Position at 46. However,

NRC Staff takes those figures out of context and otherwise misrepresents the record in this case. In any case, the exhibits admitted and the testimony presented at the hearing demonstrated that the cultural resources survey costs would be well-within the range of other efforts conducted by NRC Staff in other venues. NRC Staff attacks the Oglala Sioux Tribe's June 2018 document as formally proposing a \$2 million dollar budget for the pedestrian cultural resources survey. NRC Staff Initial Statement of Position at 46, 56. However, as explained repeatedly, the Tribe put this document forward over the course of a few days only as an example because NRC Staff and its archeologist lacking any culturally-relevant experience had not brought any cultural resource methodologies whatsoever (draft or otherwise) to the discussion and had provided no cost information that could serve to begin any discussions of a reasonable cultural resource survey and analysis. Exhibit OST-042-R (Declaration of Kyle White); *see also* Oglala Sioux Tribe's Response to Motion for Summary Disposition (September 21, 2018) (ML18264A346) at 39. NRC Staff witness testimony from Mr. Spangler conceded that the document produced by Dr. Nickens and presented to the Tribe in June of 2018 was inadequate as it "very much lacked a scientific methodology." August 29, 2019 Transcript at 1958, lines 16-22.

Thus, as detailed by the Tribe, simply in a good faith effort to promote compromise and provide some basis for an informed discussion of the matter, the Tribe put forward the June 15, 2018 document. For more than a year, NRC Staff has punished the Tribe's good faith efforts by mischaracterizing the context, content, and intent of the document. As that document makes clear on its face, it was intended merely as a discussion starter to inform NRC Staff and its contractors of the deficiencies in a limited archeology-based approach to cultural resources analysis, which was necessary to fill the gap caused by NRC Staff's failure to provide any draft

proposals of any kind. *Id.* The testimony at the hearing from Mr. White confirmed this fact. August 29, 2019 Transcript at 1969 lines 14-20.

NRC Staff's gamesmanship of using the Tribe's June 15, 2018 document as a straw man is not sufficient to satisfy the agency's burden to demonstrate that the cost to engage in any cultural resources survey or other further investigation or data gathering and analysis is exorbitant. Allowing the NRC Staff to use the Tribe's good faith attempts to infuse information into the negotiations as evidence to support NRC Staff's evidentiary burdens would not only violate the Commission's evidentiary rules, it would telegraph to all other parties that the Board condones NRC Staff's manipulation of statements made in negotiations. *In re Chaisson*, 80 N.R.C. 125, 2014 NRC LEXIS 28, (N.R.C. September 8, 2014) (declining "to rehash who said what to whom during the "attempts to reach compromise.") *citing* F.R.E. 408.

Further, NRC Staff misinterprets the Board's ruling in LBP-15-16, in which the Board found some early cost figures presented by the Tribes for a survey "patently unreasonable." NRC Staff Initial Statement of Position at 56. A careful read of the 2014 hearing transcript reveals that the \$818,000 cost figure cited by NRC Staff was for a survey that covered only one-quarter of survey area. Exhibit OST-054 (Transcript of August 19, 2014 hearing at 807-808)(September 4, 2014 NRC Staff transcript corrections)(confirming that the \$818,000 was only for 2,500 acres of the approximately 10,000-acre project area). Thus, the number the Board found to be patently unreasonable if applied to the entire survey area was on the order of \$3.3 million – not \$818,000. Indeed, NRC Staff's own estimate provided to the Board and parties on January 17, 2018 of what it anticipated to spend on a cultural resources survey, prepared before the March 2018 Approach was adopted and without the benefit of qualified input or assistance,

was \$792,300. Exhibit OST-056 (January 17, 2018 NRC Staff' Response to January 9, 2018 Order).

NRC Staff has failed to provide any evidence of the cost and made its decision to forego cultural resources analysis without any evidence to support its assertion that the still-hypothetical cultural resource survey and analysis is exorbitant. It was already prepared to spend close to the \$800,000 that it nonsensically argues was unreasonable and exorbitant – apparently only because the Tribe proposed it. NRC Initial Statement of Position at 56. In sum, NRC Staff's refusal to provide a reliable cost estimate in a NEPA document, as required by 40 C.F.R. § 1502.22, precludes it from meeting its burdens in this hearing.

The hearing testimony confirmed that NRC Staff had invited seven tribes to participate in the cultural resources survey and had anticipated providing each Tribe a \$10,000 honorarium – potentially totaling at least \$70,000. August 29, 2019 Redacted Closed Session Transcript (public version) at 33, lines 20-23 (NRC Staff confirming that it potentially had available to it \$70,000; \$10,000 for each of the potentially-involved Tribes). However, despite requests from the Tribe for the opportunity to incorporate that total number into the discussion for how to pay for the professional staff to conduct the on-the-ground survey, NRC Staff explicitly refused. *Id.* at 34, lines 6-11 (Mr. White confirming the Tribe's requests to use the potentially available funds, but NRC Staff denied those requests). The testimony at the hearing also demonstrated that while contracting out the survey to a third-party survey firm would likely be much more expensive than hiring the Tribe, the Tribe had staff and contractors that could have been considered as subcontractors to inform the SC&A's otherwise unqualified staff. August 29, 2019 Transcript at 1987 lines 1-11. NRC Staff rejected this suggestion out of hand – claiming a

prohibition on any “conflict of interest” in contracting – but NRC Staff never investigated the possibility of an exception from any such prohibition. *See* 48 C.F.R. § 2009.570-9 (Waiver).

NRC Staff asserts that the cultural resources information is “unavailable” because only the Tribe can identify the culturally important sites – but also that the Tribe is specifically forbidden from acting in any part as a contractor for the survey because of its role as a party to this proceeding. However, NRC Staff never even considered the allowances in its own regulations for waiver from the conflict of interest rules. Further, NRC Staff admitted in testimony that the previous efforts to bring on a qualified contractor (at Dewey-Burdock, other uranium sites, and even other nuclear sites such as the Prairie Island nuclear plant) were not subject to the conflict of interest provisions because those efforts had the direct involvement of the licensee. August 28, 2019 Transcript at 1758 line 9 to 1760 line 6. However, despite this potentially viable option, NRC Staff refused to consider it – based on a clearly erroneous reading of the contracting regulations. As such, the resources to conduct the survey could have been available, but NRC Staff unreasonably refused to discuss these options with the Tribe. After sabotaging the Tribe’s efforts to reach a compromise in this manner, NRC Staff cannot now credibly claim that its “hypothetical” costs are exorbitant.

3. NRC Staff Has Failed to Provide the Necessary Summary of Existing Credible Scientific Evidence or Evaluate the Impacts Based on Other Methods

Even if NRC Staff could somehow meet its burden of demonstrating “exorbitant” costs – without any cost evidence and contrary to the hearing testimony – NRC Staff has failed to meet its burden on the other elements of 40 C.F.R. § 1502.22. Specifically, this regulation requires the agency to provide, in a NEPA document subject to formal public comment:

(3) a summary of existing credible scientific evidence which is relevant to evaluating the reasonably foreseeable significant adverse impacts on the human environment, and (4)

the agency's evaluation of such impacts based upon theoretical approaches or research methods generally accepted in the scientific community.

NRC Staff took demonstrably inadequate steps to identify existing credible scientific evidence relevant to reasonably foreseeable impacts to cultural resources at the site. As detailed in the written and oral testimony, extensive³ credible evidence exists - including within the Lakota communities that could be obtained by NRC Staff through means other than the pedestrian survey upon which most of the parties' efforts have been spent. For instance, NRC Staff took no steps to attempt to gather any evidence through oral interviews, despite making these efforts a central component of the proposed methodology and March 2018 Approach. *See* Exhibit NRC-192 (March 2018 Approach at 4); NRC-214 (2019 Draft Methodology at 14). These oral interviews would provide some context and meaning to the information gathered by the archeologists. Exhibit OST-043-R (Declaration of Dr. Kelly Morgan) at ¶¶ 31-34. They would also provide a first step toward an iterative process used by persons qualified to design and conduct cultural resource surveys.

Each of the sources NRC Staff cites to as providing credible examples of cultural resources methodologies relies heavily – even principally – on oral interviews as a necessary component to inform any cultural resources impact analysis. For instance, the LeBeau dissertation, upon which NRC Staff purports to have relied upon so heavily, specifically states that “ My primary source of cultural information identifying significant cultural activities was obtained from the wóyake ‘to tell’ Lakota oral tradition.” NRC-206 at 99. The LeBeau document emphasizes the seminal importance of the oral tradition in conducting any Lakota

³ The inadequacy of the existing site surveys has been established. The Tribe's position on the adequacy of the existing surveys is consistent with the Tribe's position that significant additional cultural resource analysis can be conducted based on the existing (albeit inadequate) site surveys.

cultural resources analysis. *See, i.e., Id.* at 11, 27 (recounting the author “Conduct[ing] exhaustive comprehensive reviews of the Lakota oral tradition” and “interviewed numerous traditional spiritual leaders, traditional tribal elders, tribal oral historians, and tribal educators, gathering information from them documenting significant kinds of cultural activities, and recording the kinds of physical locations they are commonly performed in.”), 30 (“The primary source of information I used to identify important ceremonies was and still is oral tradition. This is a body of narrations referred to as wóyake —to tell (Theisz 1975:6) that record the cultural and historic past of the Lakota as we ourselves interpret that past. It contains numerous wicówoyakepi —true stories that describe and explain significant traditional activities. They give details of their origins, their intentions, and of course of how and where they are generally performed.”). These are but a few examples, but the document is replete with references to oral interviews forming a fundamental basis for any meaningful cultural resources analysis.

Similarly, the NRC Staff testimony provides other examples that also emphasize the need for oral interviews. For instance, NRC Staff’s Exhibit NRC-180, Branum, Kelly M. et. al., Survey to Identify and Evaluate Indian Sacred Sites and Traditional Cultural Properties in the Twin Cities Metropolitan Area (2010) identifies oral interviews as the first primary method used in that investigation. NRC-180 at 7 (“The primary methods used in this investigation include:

- Interviews. During the course of this investigation, the team carried out 42 interviews with 21 people.”). Similarly, as described in NRC Staff’s prefiled direct testimony, each of the other studies, Exhibits NRC-181 through NRC-185 all rely significantly on oral interviews in order to carry out the cultural resources analysis. *See* NRC Staff Prefiled Direct Testimony at 7.

Despite this repeated and primary emphasis on the need for oral interviews in the methodological examples forwarded by NRC Staff, NRC Staff conducted no oral interviews.

The only basis articulated for foregoing this critical component is testimony from NRC Staff witnesses that:

Because the purpose of the oral history interviews was to supplement the pedestrian site survey, conducting oral history interviews alone without a site survey would not have served their intended purpose. Further, oral interviews can only be conducted with the cooperation of the Tribes, but access to the interviewees is currently limited by the Tribes themselves.

In short, given the Tribe's constructive rejection of the March 2018 Approach, pursuing other aspects of the March 2018 Approach was not feasible. And even if it were, such a compartmentalized approach would not have produced meaningful information for NEPA purposes.

NRC Staff Prefiled Direct Testimony at 39 (A.45). The 2014 hearings conclusively established that NRC Staff, and the archeologist contractors it keeps hiring, lack the cultural resources training and experience required to opine on matters, because, "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 [archeologist's] purview to do that." Exhibit OST-054 (August 19, 2014 hearing transcript) at 859.

The NRC Staff's explanation does not confront previous testimony, fails to provide any supportable basis, and makes little sense in the context of this case. Importantly NRC Staff's testimony is directly contradicted by the testimony of Oglala Sioux Tribe witnesses Kyle White, Dr. Kelly Morgan, and Dr. Howe each of whom have the qualifications, background, and experience that NRC Staff and its contractors admittedly lack. Exhibit OST-043-R (Declaration of Dr. Kelly Morgan); Exhibit OST-042-R (Declaration of Kyle White); Exhibit OST-045-R (Declaration of Dr. Craig Howe).

NRC Staff provides no basis for its assertion that other aspects of the March 2018 Approach it failed to implement were "not feasible." NRC Staff provides no information as to the costs of pursuing these other components or explain how, given all of the literature framing

oral interviews as principally important to a cultural resources impact analysis, these efforts would not have “produced meaningful information.” Such bare assertions, unsupported by any proof or evidence, cannot provide a basis for NRC Staff to ignore its obligations under 40 C.F.R. § 1502.22.

NRC Staff attempts to blame the Tribe for the NRC contractors’ lack of qualified persons and ability to conduct oral interviews – referencing the Tribe’s arguments that the only way to gather sufficient evidence to conduct a NEPA-compliant cultural resources impact analysis is to conduct a pedestrian survey. NRC Staff Initial Statement of Position at 53-54. This position is flawed because it fails to recognize that the issue here is whether NRC Staff has demonstrated the unavailability and exorbitant cost of obtaining relevant information – not what is required to fully satisfy the “hard look” mandate.

NRC Staff provides no evidence or proof whatsoever that conducting the remaining components of the March 2018 Approach would result in exorbitant costs. During the February 22, 2019 meeting, various persons with the required training and background described how they gather and characterize the necessary information. Mr. Spangler expressed interest in learning more about the examples described by the THPOs in attendance. Days later, NRC Staff curtailed these efforts. Exhibit NRC-216.

NRC Staff also attempts another argument blaming the Tribe – asserting that because the Tribe is a party to this case, it would refuse to help NRC Staff collect any information and that only the Oglala Sioux Tribal government can provide the required information. NRC Staff Initial Statement of Position at 60. This argument fails for at least two reasons. The first is that the Tribe has repeatedly expressed its willingness to work with NRC Staff – including along with several other Tribes at the February 22, 2019 meeting. Exhibit NRC-218. Secondly, NRC Staff

is (unsurprisingly) confused as to how Lakota culture functions. As emphasized in one of NRC Staff's own exhibit demonstrating a cultural resources survey methodology, the agency must:

Understand tribal authority and representation. In any situation, understanding both formal and informal authority is profoundly important. Representation and authority can be nested in many layers: Who speaks for "culture?"; Who speaks with the legitimate authority of government?; Who possesses culturally-appropriate credentials, whether from the culture of academe or the culture of an oral tradition?; Who speaks for the past or the future?

Exhibit NRC-184 at 13. This passage means that NRC Staff's assumptions that only the formal Indian Reorganization Act (IRA)-sanctioned Oglala Sioux Tribal government can provide cultural information as opposed to others in the Lakota community or other Tribes is grossly uninformed. Most importantly, the Tribe has engaged this proceeding to forward its interest in ensuring that NRC Staff "carry out cultural resources identification, characterization, and protections" should Powertech muster the resources to implement the project. Exhibit OST-042 (Declaration of Kyle White) at ¶¶4, 17-22.

Indeed, the pursuit of this information does not depend on the Oglala Sioux Tribe government. As described by Kyle White, the Oglala Sioux Tribal government is not the "holder" of all Lakota cultural resources information – despite NRC Staff's mischaracterization of Mr. Mesteth's testimony given to this Board in 2014. Exhibit OST-042 (Declaration of Kyle White) at ¶ 75. As such, tribal members, elders, and community members possess relevant information that can and should have been solicited through oral interviews conducted in accordance with federal law and the Tribes' ordinances, and an opportunity for public comment on a Supplemental Environmental Impact Statement. *Id.* at ¶ 76. Dr. Morgan provides these types of services to the governmental entities a regular basis. Exhibit OST-043 (Declaration of Dr. Kelly Morgan). Indeed, the Tribe itself has relied on qualified contractors during these proceedings. Exhibit OST-042 (Declaration of Kyle White) at ¶ 46.

Further, as discussed *supra*, other examples demonstrate the ability of NRC Staff and other agencies to conduct the necessary cultural resources analysis so long as competent consultants or staff are retained and the NEPA processes are followed. *See In the Matter of Hydro Resources, Inc.* (2929 Coors Road Suite 101 Albuquerque, New Mexico 87120), 62 N.R.C. 442, 451-452 (2005)(upholding NEPA cultural resources impact analysis conducted by objectively qualified personnel and interaction with tribal communities); *Ctr. for Biological Diversity v. United States BLM*, 2017 U.S. Dist. LEXIS 137089, at *54-55 (D. Nev. Aug. 23, 2017) (holding that BLM “engaged in a good-faith attempt to identify relevant cultural sites and consult with the tribes about how best to protect them” including preparation of significant cultural and ethnographic reports and studies).

Unfortunately, NRC Staff blamed the Tribe for the NRC Staff’s refusal to implement any part of its proposed March 2018 Approach and refusal to allow the public any opportunity to provide any comment or critique of any of any information added to the record since the last NEPA public comment period – including the Literature Review, 2018 site inspection, or any of the testimony provided by NRC Staff purporting to satisfy the requirements of 40 C.F.R. § 1502.22.

NRC Staff conveniently ignores that in this case, there was some survey work done at the site without the involvement of the Oglala Sioux Tribe. Paradoxically, NRC Staff attempts to rely on this past work as a basis to uphold its position that it has conducted the necessary cultural resource surveys. NRC Staff Initial Statement of Position at 63. While the Tribe certainly maintains the inadequacy of those surveys on their own to satisfy NEPA’s requirements, they nevertheless contradict NRC Staff’s assertion that there was nothing upon which to base any pursuit of additional information through oral interviews of community and Lakota tribal

members. 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.

Lastly, NRC Staff's effort to discount the value of oral interviews is not supported by any person with the required qualifications. The importance of oral interviews is specifically confirmed the Tribe's testimony from Kyle White, Dr. Kelly Morgan, and Dr. Howe. All of the Tribe's witnesses are qualified, by training, background, and experience, to provide expert testimony on the value of oral interviews in conducting a cultural resources impact analysis, even in the absence of a fully-vetted pedestrian cultural resources survey. Exhibit OST-042 (Declaration of Kyle White) at ¶ 74; Exhibit OST-043 (Declaration of Dr. Kelly Morgan) at ¶¶ 31-34 ; Exhibit OST-045 (Declaration of Dr. Craig Howe) at ¶ 20.

In attempting to comply with 40 C.F.R. § 1502.22 in the evidentiary hearing instead of a NEPA document subjected to public comment, NRC Staff asserts that it “has appropriately evaluated and documented the existing information in the record concerning cultural and historic resources.” NRC Staff Initial Statement of Position at 61-62 (emphasis added); *see also id.* at 63 (section describing existing FEIS discussion). Thus, instead of complying with the requirements of 40 C.F.R. § 1502.22, which require the agency to develop a “summary of existing credible scientific evidence which is relevant to evaluating the reasonably foreseeable significant adverse impacts on the human environment” NRC Staff unreasonably constrained its review only to information that was already in the record. In this way, NRC Staff effectively ignores any and all information it had not already obtained and placed in the record. Limiting the summary to only already-obtained information defeats the purposes of the regulation – and the action-forcing

purposes of NEPA. There is ample material outside of the record that ought to have informed NRC Staff's efforts – including oral histories and literature not already incorporated into the existing record and offered to be provided during the June 2018 discussions and the February 22, 2018 meeting attendees. *See* Exhibit OST-042-R (Declaration of Kyle White) at ¶¶ 74-76; Exhibit OST-043-R (Declaration of Dr. Kelly Morgan) at ¶¶ 31-34.

The testimony at the August 2019 hearing also demonstrated the existence of relevant and available information that NRC Staff and its contractor either simply ignored, failed to collect, or lacked the necessary experience to know it existed. For instance, Dr. Morgan testified that significant information on the cultural resources and significance of the site exists in various locations in South Dakota, North Dakota, and Oklahoma. August 28, 2019 Transcript at 1870 line 20 to 1872 line 24. NRC Staff failed to identify or collect or review any of the available information.

As the final requirement of 40 C.F.R. § 1502.22 – requiring the agency to present an “evaluation of such impacts based upon theoretical approaches or research methods generally accepted in the scientific community” – NRC Staff admits that it has produced nothing to meet this requirement.

[T]he environmental record of decision in this matter does not include any new information on the presence of sites of historic, cultural, and religious significance to the Lakota Sioux Tribes at the Dewey-Burdock site; any changes to the discussion of potential adverse effects from the Dewey-Burdock project on sites of historic, cultural, and religious significance to the Lakota Sioux Tribes; or any changes to the discussion of potential mitigation measures for such sites.

NRC Staff Initial Statement of Position at 62. NRC Staff further concedes that with respect to the new documents added to the record since the FEIS was published, no additional analysis of any kind was produced because

[T]he information in these reports is not materially different from the information already assessed by the Staff in the FSEIS, and because the reports do not provide any additional information about the presence of sites of historic, cultural, and religious significance to the Lakota Sioux Tribes at the Dewey-Burdock project site, or additional information about the significance of known tribal sites to the Lakota Sioux Tribes.

NRC Staff Initial Statement of Position at 66-67.

Importantly, NRC has never hired a contractor with the qualifications to address the theoretical approaches or research methods. 40 C.F.R. § 1502.22. Instead, NRC Staff keeps hiring archeologists that lack the necessary cultural resources expertise, training, and background to go beyond what was confirmed as in adequate and outside the purview of non-Native archeologists at the 2014 hearings. Exhibit OST-054 (August 19, 2014 hearing transcript) at 859. Exhibit OST-043-R (Declaration of Dr. Kelly Morgan); Exhibit OST-042-R (Declaration of Kyle White).

Because NRC Staff has admitted that it failed to provide the information required by 40 C.F.R. § 1502.22, has never hired persons with the necessary expertise and background to conduct a cultural resource survey, and asserted it will not prepare a Supplemental EIS, a position Powertech has supported, Contention 1A is properly resolved in the Tribe's favor, and the license is properly set aside.

F. NRC STAFF MISAPPLIES NEPA'S LIMITED "RULE OF REASON"

NRC Staff attempts to justify its failure to prepare any further NEPA analysis on cultural resources by relying on NEPA caselaw from the 9th Circuit and the Commission that applies a "rule of reason" to NEPA analyses. NRC Staff Initial Statement of Position at 18-19. However, NRC Staff again misapplies this caselaw. The cases cited by NRC Staff do not stand for the proposition that an agency may neglect to analyze a foreseeable impact from its actions, such as impacts to cultural resources at issue here. Rather, the "rule of reason" discussed in the cases

cited by NRC Staff relate to the fact that an agency is not obligated to analyze wholly speculative or remote consequences from agency actions.

Here, in holding the FSEIS inadequate to meet NEPA's "hard look" mandate, the Commission confirmed that the "Board found insufficient the Staff's analysis of the environmental effects of the Dewey-Burdock project on Native American cultural, historic, and religious resources." *In re Powertech (USA), Inc.*, 2016 NRC LEXIS 36 at *53 (N.R.C. Dec. 23, 2016) (emphasis supplied). There has never been a dispute that the Powertech proposal will have certain impacts on "Native American cultural, historic, and religious resources." *Id.* The only dispute is whether NRC Staff carried out a NEPA analysis of these impacts sufficient to support license approval. It has not. Simply put, the consequences of the NRC license are not remote or speculative, and the "rule of reason" does not excuse NRC's failure to prepare any NEPA analysis to address the deficient FSEIS analysis of these impacts.

For instance, in *Ground Zero Ctr. For Non-Violent Action v. U.S. Dept. of the Navy*, 383 F.3d 1082 (9th Cir. 2004), the Court described the contours of the so-called "rule of reason" under NEPA. There, the Court rejected a claim that the Navy, in siting a nuclear weapons facility, must conduct a detailed NEPA analysis of the potential for an accidental nuclear explosion. The evidence in *Ground Zero* case showed that the chances of a significant impact from such an event was one in 100 million and one in one trillion. *Id.* at 1090. As held by the Court, "[t]he risk of accidental explosion is estimated by multiplying the risk of any accident by the risk that an accident will yield explosion. The product of the probabilities cited in the Navy's report is infinitesimal, and such remote possibilities do not in law require environmental evaluation." *Id.*

This factual situation is a far cry from that presented here. Here, there is no dispute that “the proposed action has the potential to affect certain sites of religious and cultural significance to Native American tribes.” *In re Powertech USA, Inc.*, 81 N.R.C. 618 at 644 (N.R.C. Apr. 30, 2015).

In addition to the factual disparities, the legal analysis by the Court in *Ground Zero Ctr. For Non-Violent Action* demonstrates the case is limited to situations where “[a]n EIS need not discuss remote and highly speculative consequences.” 383 F.3d. at 1283; *see also Warm Springs Dam Task Force v. Gribble*, 621 F.2d 1017, 1026-27 (9th Cir.1980).” *See also, id.* at n.6 (“For example, we have held that agencies performing NEPA review are not required to consider the environmental consequences of the increased risk of nuclear war resulting from construction of military communications towers, *No GWEN*, 855 F.2d at 1381, 1386, the environmental effects from the failure of a dam from a catastrophic, but highly unlikely, earthquake, *Warm Springs*, 621 F.2d at 1026-27, or how remotely possible land-use changes might bear on the environmental effects of a new dam, *Trout Unlimited*, 509 F.2d at 1283-84.”).

The “rule of reason” simply does not justify NRC Staff’s claims that it is unable to obtain information to support a complete NEPA analysis.

NRC Staff’s “rule of reason” argument also finds no support in Commission precedent. For example, in *Private Fuel Storage L.L.C.* (Independent Spent Fuel Storage Installation), CLI-02-25, 56 NRC 340 (2002), the Commission ruled that an NRC Staff NEPA analysis need not consider the highly remote potential for a terrorism attack on a nuclear fuel facility. In so ruling, the Commission held:

It is well established that NEPA requires only a discussion of “reasonably foreseeable” impacts. Grappling with this concept, various courts have described it as a “rule of reason,” or “rule of reasonableness,” which excludes “remote and speculative” impacts or “worst-case” scenarios. Courts have excluded impacts with either a low probability of

occurrence, or where the link between the agency action and the claimed impact is too attenuated to find the proposed federal action to be the “proximate cause” of that impact. NEPA does not call for “examination of every conceivable aspect of federally licensed projects.” Here, the possibility of a terrorist attack on the PFS facility is speculative and simply too far removed from the natural or expected consequences of agency action to require a study under NEPA.

Private Fuel Storage L.L.C. (Independent Spent Fuel Storage Installation), CLI-02-25, 56 NRC 340, 348-49 (2002)(footnotes and citations omitted).

Thus, NRC Staff confuses the application of NEPA’s “rule of reason” as to unlawfully evade analysis of reasonably foreseeable impacts that must be considered in a NEPA document. The cited “rule” does not allow NRC Staff to abandon its NEPA analysis of impacts, such as those to cultural resources at issue here, that are an expected, foreseeable, and natural consequence of its actions. NRC Staff has not, and cannot, make the necessary showing that impacts to cultural resources are somehow highly remote or speculative. Here, the Board’s Order in LBP-15-16 confirmed that impacts are non-speculative by emphasizing the fact that the FSEIS’s lacked analysis of “potentially necessary mitigation measures” for “environmental effects of the Dewey-Burdock project on Native American cultural, religious and historic resources.” *In re Powertech USA, Inc.*, 81 N.R.C. 618 at 655 (N.R.C. Apr. 30, 2015).

Similarly, in *Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-10-11, 71 NRC 297 (2010), relied upon by NRC Staff, the Commission dealt with a situation entirely distinct from that presented here. In that case, the intervenor argued that NRC Staff had used improper models and inputs to an existing analysis in the NEPA document of Severe Accident Mitigation Alternatives (SAMA) such that the analysis resulted in erroneous conclusions. The Board clarified that “the issue here is whether the Pilgrim SAMA analysis resulted in erroneous conclusions on the SAMAs found cost-beneficial to implement. The question is not whether there are “plainly better” atmospheric dispersion models

or whether the SAMA analysis can be refined further.” 71 NRC at 315. Based on the Commission’s finding that NRC Staff did conduct a detailed SAMA analysis, the Commission recited some general legal points, in dicta, without applying or analyzing those legal points with respect to any particular aspect of the case:

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

71 NRC at 315 (footnotes and citations omitted). Fatal to NRC Staff’s reliance on this argument is that nowhere has NRC Staff provided any evidence that the Tribe is requesting that NRC Staff must use “emerging” technologies or conduct an analysis that reflects “the frontiers of scientific methodology, studies and data.”

Additionally, and importantly, the Commission in *Pilgrim* went on to distinguish the SAMA analysis at issue there as a mitigation analysis, and “not a substitute for, and do[es] not represent, the NRC NEPA analysis of potential impacts” from the licensing activity. 71 NRC at 316. The Commission pointed this out as important because under applicable NEPA law, unlike site-specific impact analyses, site-specific mitigation analyses do not require a fully-developed mitigation plan, but rather one that is reasonably complete. *Id.* Thus, the *Pilgrim* case is distinct on the facts and the law from the case at issue here and does not support NRC Staff’s proposal to dispense with the cultural resources impact review altogether.

Here, the impacts are knowable, and NRC Staff has conceded that it has not conducted a NEPA-compliant impacts analysis and has conducted no NEPA mitigation analysis. NRC Staff Initial Statement of Position at 62.

CONCLUSION

NRC Staff has not prepared a supplemental EIS, and therefore, as a matter of law, cannot prevail at the hearing. The record demonstrates that NRC Staff unreasonably implemented the March 2018 Approach by refusing necessary funding and refusing to discuss any flexibility on timing – and ultimately unreasonably abandoning all negotiations with the Tribe. Further, NRC Staff has not met its burden to demonstrate that all relevant information was unavailable or that it has satisfied NEPA’s requirements for leaving relevant information out of an EIS. On the evidence provided, the Board has the necessary information to enter an order setting aside the FSEIS, ROD, and license and thereby create a clean slate on which NRC Staff can carry out the required NEPA analyses.

Respectfully Submitted this 4th Day of October 2019,

/s/ Jeffrey C. Parsons

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing OGLALA SIOUX TRIBE'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW in the above-captioned proceeding were served via the Electronic Information Exchange ("EIE") on the 4th day of October 2019, which to the best of my knowledge resulted in transmittal of same to those on the EIE Service List for the captioned proceeding.

/s/ signed electronically by _____

Jeffrey C. Parsons
Western Mining Action Project