

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) )

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NRC STAFF'S PROPOSED FINDINGS OF FACT  
AND CONCLUSIONS OF LAW

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I. INTRODUCTION

1.1. The Atomic Safety and Licensing Board (ASLB) issues this Decision on Contention 1A, the sole remaining contention in this 10 C.F.R. Part 2, Subpart L proceeding. In this contention, the Oglala Sioux Tribe (Tribe) and the Consolidated Intervenors challenge the adequacy of the Staff's National Environmental Policy Act (NEPA) review with respect to cultural resources of significance to the Tribe in support of issuance of a license application for the Dewey-Burdock in situ recovery facility (Dewey-Burdock).

1.2 Although this proceeding has a lengthy history, the remaining legal and factual issues necessary to resolve Contention 1A have been significantly focused by the Board's subsequent rulings. In particular, our decision in LBP-18-5 described in detail how the parties' negotiations over the immediately preceding months had resulted in an approach (the "March 2018 Approach") for identifying Oglala Sioux cultural resources that may be impacted by the Dewey-Burdock project, thereby facilitating the identification of appropriate NEPA mitigation measures. Most crucially, we found there that although the precise survey methodology remained to be finalized, all parties had agreed to the fundamental parameters and that the approach was reasonable.

1.3 In denying the parties' motions for summary disposition, we therefore indicated that should the Staff resume negotiations to implement the March 2018 approach, it was not necessary for the Staff to renegotiate the already agreed-upon structure and terms.<sup>1</sup> Accordingly, after the Staff resumed negotiations in late 2018 and those negotiations failed to reach an agreement in February 2019, we granted the Staff's motion to proceed to an evidentiary hearing to resolve two focused issues: 1) whether the Staff's proposed draft methodology for the conduct of a site survey was reasonable, and 2) the reasonableness of the Staff's determination that the information sought from the Tribe is unavailable.<sup>2</sup>

1.4 After considering all relevant evidence in the record, we resolve Contention 1A in favor of the Staff. In doing so, we conclude that the Staff, through its reasonable efforts with respect to the issues raised in Contention 1A, has met its burden of demonstrating that the FSEIS, as modified by the record of this proceeding, complies with the dictates of NEPA and applicable NRC regulations in 10 C.F.R. Part 51.

## II. BACKGROUND

2.1 In 2009, Powertech applied for an NRC license to be used in connection with the proposed Dewey-Burdock in-situ uranium recovery (ISR) facility in Fall River and Custer Counties, South Dakota.<sup>3</sup>

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<sup>1</sup> *Powertech (USA), Inc.* (Dewey-Burdock In Situ Uranium Recovery Facility), LBP-18-5, 88 NRC 95, 135 (2018); *Powertech (USA), Inc.* (Dewey-Burdock In Situ Uranium Recovery Facility), CLI-19-09, 90 NRC \_\_, \_\_ (Sep. 26, 2019) (slip op. at 15). The Commission noted that the Board found that "the Tribe was bound by the terms it had agreed to in accepting the March 2018 Approach, including the two two-week periods allotted to accomplish the survey."

<sup>2</sup> Order (Granting NRC Staff Motion and Scheduling Evidentiary Hearing), at 4 (Apr. 29, 2019) (unpublished) (ML19119A322) [hereinafter April 29, 2019 Order].

<sup>3</sup> On April 8, 2014, the NRC Staff issued Powertech Source Material License No. SUA-1600. See Ex. NRC-012, Powertech Source Material License No. SUA-1600 [hereinafter "Powertech License"] (ML14043A392).

2.2 In accordance with 10 C.F.R. Part 51, the Staff prepared a FSEIS for the Dewey-Burdock project.<sup>4</sup> In the FSEIS, the Staff evaluated information about Indian Tribes' cultural resources that it was able to obtain from surveys conducted by seven Tribes, but which lacked specific input of the Lakota Sioux Tribes. The Staff included and described the information gathered from the site surveys that were conducted in 2013 in the Staff's evaluation of the potential impacts of the Dewey-Burdock project in the FSEIS.

2.3 In Chapter 3 of the FSEIS, the Staff described various types of sites that could have been identified as sites of significance to Lakota Sioux Tribes if the Tribes had provided information to the Staff regarding site survey results.<sup>5</sup> The Staff described the cultural history of the Black Hills with reference to the Lakota Sioux connection to the area, including the religious and cultural significance of the Black Hills to the Lakota Sioux.<sup>6</sup> In addition, in the FSEIS, the Staff evaluated how the Dewey-Burdock project might affect *all* identified sites within the area of potential effects, not merely those sites that were eligible for listing on the National Register of Historic Places.<sup>7</sup> The Staff presented its impact determinations in the FSEIS, along with its recommended measures to mitigate these impacts.<sup>8</sup> After the Staff completed its evaluations, it provided the impact assessments and mitigation recommendations to all consulting Tribes for comment—including the Oglala Sioux Tribe—as it had committed to doing when it released the Draft SEIS.<sup>9</sup>

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<sup>4</sup> Exs. NRC-008-A-1 through NRC-008-B-2 [hereinafter FSEIS].

<sup>5</sup> Ex. NRC-008-A-1, FSEIS, at 257–63; Ex. NRC-176-R at A.17

<sup>6</sup> Ex. NRC-008-A-1, FSEIS, at 247, 257–59.

<sup>7</sup> Ex. NRC-008-A-2, FSEIS, at 466–86; Ex. NRC-176-R at A.18.

<sup>8</sup> Ex. NRC-008-A-2, FSEIS, at 474–86. In particular, in Tables 4.9-1 through 4.9-6, the Staff provided its determinations regarding both environmental impacts and National Register of Historic Places eligibility. In these tables the Staff also included a column titled “Management Recommendation/Comments,” which lists its mitigation recommendations under both the NHPA and NEPA. *Id.*

<sup>9</sup> Exs. NRC-059 and NRC-061 through NRC-063. These exhibits include the following documents: Letter to Oglala Sioux Tribe Transmitting TCP Survey Report for Dewey-Burdock Project (ML13357A234) (Dec. 23, 2013); NRC's Overall Determinations of Eligibility and Assessments of Effects (ML13343A155) (Dec.

2.4 The Staff concluded that the overall potential impacts to historic and cultural resources from the Dewey-Burdock project would range from SMALL to LARGE.<sup>10</sup> Further, in accordance with 36 C.F.R. §§ 800.4(b)(2) and 800.14(b), the Staff finalized a programmatic agreement for the Dewey-Burdock project.<sup>11</sup> The Staff thereafter issued a Record of Decision for its NEPA review and the materials license for the Dewey-Burdock project.<sup>12</sup> The issuance of the Record of Decision and license reflected the Staff's determination that additional information

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16, 2013); NRC NRHP Determinations (ML13343A155) (Dec. 23, 2013); Table 1.0 for Draft PA (ML13354B948) (Nov. 22, 2013). The Staff sent copies of these documents to all consulting Tribes.

<sup>10</sup> Ex. NRC-008-A-1, FSEIS, at 43-44; Ex. NRC-008-A-2, FSEIS, at 462-95, 586. The Staff determined that the overall impacts from other phases of the project, such as operation and aquifer restoration, would range from "SMALL" or "SMALL to MODERATE" impacts on cultural resources because mitigation measures would be imposed before facility construction for both known and any newly discovered cultural resources in accordance with Condition 9.8 of Powertech's license. Ex. NRC-008-A-1, FSEIS, at 43-44; Ex. NRC-008-A-2, FSEIS, at 462-95, 495; Ex. NRC-012, Powertech License, at 5-6. Pursuant to License Condition 9.8, Powertech is required to cease "any work resulting in the discovery of previously unknown cultural artifacts[.]" Ex. NRC-012, Powertech License, at 5-6. All newly discovered artifacts would be inventoried and evaluated in accordance with 36 C.F.R. Part 800, and work could not restart without authorization to proceed from the NRC, the South Dakota State Historic Preservation Officer (SHPO), and the Bureau of Land Management. Ex. NRC-008-A-2, FSEIS, at 43-44; Ex. NRC-012, Powertech License, at 5-6. Ex. NRC-176-R at A.18.

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

<sup>12</sup> Exs. NRC-011, NRC Record of Decision for the Dewey-Burdock Uranium In-Situ Recovery Project (ML14066A466) (Apr. 8, 2014) and NRC-012, Powertech License, respectively.

on Lakota Sioux cultural resources was not essential to a reasoned choice among alternatives.<sup>13</sup>

### III. PROCEDURAL HISTORY

3.1. The procedural history of this case is lengthy, and the Board does not repeat it in full.<sup>14</sup> This Section summarizes the relevant developments since the parties reinitiated negotiations in approximately October of 2017, after we issued LBP-17-9, to provide context for the issues of fact and law remaining to be addressed in this hearing.

#### A. The Reinitiation of Negotiations Following LBP-17-9

3.2. After the Board's ruling in LBP-17-9, the parties resumed efforts to resolve Contention 1A. In consultation with the parties, including the Oglala Sioux Tribe, the Staff developed the March 2018 Approach for obtaining additional information on cultural resources of significance to Lakota Sioux Tribes that took into account the material concerns of the Oglala Sioux Tribe that we identified in LBP-17-9.<sup>15</sup>

3.3. Acknowledging the Tribe's position that a "physical site survey is a fundamental requirement,"<sup>16</sup> the March 2018 Approach provided the Tribe a third opportunity to participate in a site survey of the Dewey-Burdock site.<sup>17</sup> The March 2018 Approach included the following

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<sup>13</sup> See Ex. NRC-176-R at A.56.

<sup>14</sup> For additional background on Contention 1A and the Staff's NEPA review of impacts to historic and cultural resources, see NRC Staff's Petition for Review of LBP-15-16 at 2–11 (May 26, 2015) (ML15146A499); Exhibit (Ex.) NRC-001, Initial Testimony and Affidavits from Haimanot Yilma, Kellee L. Jamerson, Thomas Lancaster, James Prikryl, and Amy Hester at A1.1–A.1.19 (June 20, 2014); Exs. NRC-008-A-1, NUREG-1910, Supplement 4, "Environmental Impact Statement for the Dewey-Burdock Project in Custer and Fall River Counties, South Dakota: Supplement to the Generic Environmental Impact Statement for In-Situ Leach Uranium Milling Facilities" (Vol. 1) (ML14024A477) at 76–84 and NRC-008-A-2, FSEIS, Vol. 2 (ML14024A478), at 474–87; Ex. NRC-015, Dewey-Burdock ISR Project Summary of Tribal Outreach (ML14099A010) (summarizing the Staff's consultations with Indian Tribes during the development of the FSEIS).

<sup>15</sup> See Ex. NRC-176-R at A.20.

<sup>16</sup> *Powertech*, LBP-18-5, 88 NRC at 109; see also Ex. NRC-176-R at A.20.

<sup>17</sup> Ex. NRC-176-R at A.20. The Tribe's first opportunity to participate in a Tribal site survey occurred in April-May of 2013. The Staff attempted to reach agreement with the Tribe on a site survey methodology,



elements: (1) hiring a qualified contractor to help facilitate implementation of the approach; (2) involving other Lakota Sioux Tribes; (3) providing iterative opportunities for the tribal site survey; (4) involving tribal elders; and (5) conducting a site survey using a scientific methodology determined by the contractor in collaboration with the tribes.<sup>18</sup> As we subsequently held, “[e]ach of these elements was repeatedly asked for by the Oglala Sioux Tribe, and once these Oglala Sioux Tribe-requested elements were finally included in NRC Staff’s plan to resolve Contention 1A, the parties agreed the March 2018 Approach was a reasonable method for the NRC Staff to satisfy its NEPA obligation.”<sup>19</sup> In accordance with the parties’ expressions of support for the March 2018 Approach and its included timeline, and in reliance on the Tribe’s representations of reasonableness and intent to participate, the Staff moved forward with implementing the March 2018 Approach.<sup>20</sup>

3.4 The March 2018 Approach explicitly did not include a specific methodology for conducting the Tribal cultural resources site survey component of the Approach, because the Tribe had informed the Staff that such a methodology would need to be developed with the Tribe’s input in coordination with the services of the Staff’s expert contractor.<sup>21</sup> However, when the Staff’s contractor offered the Tribe different approaches and a work plan upon which to base

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but after eight months of negotiations, the Tribe presented the Makoche Wowapi approach, and the Staff determined that Powertech and the Tribe were not going to agree on terms of a statement of work to perform the surveys. Therefore, the Staff proceeded with an alternative methodology whereby seven Tribes (including one Sioux Tribe) conducted site surveys. Ex. NRC-008-A-1 at 259–263 (ML14024A477); Ex. NRC-176 at A.15. The second site survey opportunity occurred in 2017, after the Tribe stated to the Staff during a January 31, 2017 teleconference that it would provide specific information on parameters it would find acceptable for the proposed survey. However, in April 2017, having never received that information from the Tribe, the Staff proposed an open site survey of the license area in April or May, per diem and mileage reimbursement, and an honorarium of \$10,000 to the Tribe. The Tribe also rejected this approach. See Ex. NRC-176-R at A.19.

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

<sup>19</sup> *Powertech*, LBP-18-5, 88 NRC at 112; see also Ex. NRC-176-R at A.20; *Powertech*, CLI-19-09, 90 NRC at \_\_ (slip op. at 10).

<sup>20</sup> See *Powertech*, LBP-18-5, 88 NRC at 111–112; Ex. NRC-176-R at A.21.

<sup>21</sup> See Ex. NRC-190, Oglala Sioux Tribe May 31, 2017 Letter Responding to NRC’s April 14, 2017 Letter, at 4 (May 31, 2017) (ML17152A109); Ex. NRC-176-R at A.33–34.

discussions for a site survey methodology, the Tribe rejected these options as providing for only an “open-site survey” of the site, and proposed its own approach for providing the information sought by the Staff, which the Staff concluded was incompatible with the effectuation of the March 2018 Approach.<sup>22</sup> In June 2018, the Staff informed the Tribe that it considered the Tribe’s proposal to be a constructive rejection of the March 2018 Approach, and that based on the Tribe’s position concerning the essential elements of a Tribal cultural resources site survey effort, it did not anticipate reaching an agreement on a site survey methodology.<sup>23</sup>

B. The Staff and Tribe’s Motions for Summary Disposition

3.5 The Staff and the Tribe then each moved to resolve Contention 1A by summary disposition.<sup>24</sup> In October 2018, we denied both motions.<sup>25</sup> In denying the Staff’s motion for summary disposition, we found that the NEPA “hard look” requirement had not been met.<sup>26</sup> We stated that in our previous rulings (LBP-15-16 and LBP-17-9), we “found that the NRC Staff failed to satisfy its NEPA obligation to address the impacts on tribal cultural, historical, and religious sites at the Dewey-Burdock project site.”<sup>27</sup> Specifically, we concluded that the NRC Staff “must conduct a study or survey of tribal cultural resources before granting a license,”<sup>28</sup> and since “the cultural, historical, and religious sites of the Oglala Sioux Tribe have not been adequately catalogued, the [EIS] does not include mitigation measures sufficient to protect this Native American Tribe’s cultural, historical, and religious sites that may be affected by the

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<sup>22</sup> Ex. NRC-176-R at A.22–23; *see also* Ex. NRC-198, Oglala Sioux Tribe’s June 15, 2018 Updated Cultural Resources Survey Methodologies Proposal (ML18170A155) (June 15, 2018) (non-public).

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

<sup>24</sup> *See Powertech*, LBP-18-5, 88 NRC at 99–100; Ex. NRC-176-R at A.22.

<sup>25</sup> *See Powertech*, LBP-18-5, 88 NRC at 100.

<sup>26</sup> *Id.* at 125.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* (citing LBP-15-16, 81 NRC at 653).

Powertech project.”<sup>29</sup> Because these deficiencies had yet to be properly remedied, we found that “the Staff had failed to fulfill its obligation, and there is a material factual dispute as to the reasonableness of the NRC Staff’s implementation of the March 2018 Approach.”<sup>30</sup>

3.6 We found that the “Staff’s March 2018 Approach, as agreed to by the parties, constituted a valid and reasonable approach for resolving Contention 1A.”<sup>31</sup> But because the Staff did not fully carry out the March 2018 Approach and obtain the information it sought via this approach from the Tribe, we concluded that the Staff thus had not demonstrated as a matter of law that it had “fulfilled its NEPA obligation to take a ‘hard look’ at the Dewey-Burdock project’s potential adverse impacts to specific cultural, historical, or religious resources of importance to the Oglala Sioux Tribe.”<sup>32</sup> We also found that the existence of material factual disputes prevented the Staff from invoking 40 C.F.R. § 1502.22 as a basis for the Board to grant summary disposition in its favor.<sup>33</sup>

3.7 Having found that the Staff’s March 2018 Approach was reasonable, and that Tribe had likewise accepted it as reasonable,<sup>34</sup> we concluded that there nevertheless remained issues of material fact with respect to (1) the reasonableness of the methodology proposed by the Staff and its contractor for the site survey component of the March 2018 Approach and (2) the Staff’s decision to discontinue work on the March 2018 Approach on June 15, 2018—specifically, whether the Tribe’s June 15, 2018 proposal in fact constituted a constructive rejection of the March 2018 Approach, and whether it was reasonable for the Staff to forgo the

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<sup>29</sup> *Id.* (citing LBP-15-16, 81 NRC at 655).

<sup>30</sup> *Id.* at 125.

<sup>31</sup> *Id.*; *Powertech*, CLI-19-09, 90 NRC at \_\_ (slip op. at 10).

<sup>32</sup> LBP-18-5, 88 NRC at 127–128.

<sup>33</sup> *Id.* at 130–134.

<sup>34</sup> *Id.* at 131 (“The Oglala Sioux Tribe accepted the March 2018 Approach as reasonable to resolve Contention 1A and does not challenge the reasonableness of the March 2018 Approach as written.”); see also CLI-19-09, 90 NRC at \_\_ (slip op. at 10).

remaining elements of the March 2018 Approach.<sup>35</sup> We “establish[ed] procedures for the resolution of Contention 1A”<sup>36</sup> by identifying two alternate avenues “to conclude expeditiously the litigation of the issues in this case”: “(1) the NRC Staff can resume the implementation of its March 2018 Approach, with appropriate adjustments to the dates in the original timetable; or (2) the parties can prepare for a prompt evidentiary hearing, where testimony and evidence will be taken on the questions raised by the motions for summary disposition filed August 17, 2018.”<sup>37</sup>

3.8 We emphasized that under the first alternative—resuming implementation of the March 2018 Approach—“the only aspect of the Approach that is open for discussion is the site survey methodology[;] [t]hat is, any tribal negotiating position or proposal should only encompass the specific scientific method that would fit into the two-week periods set out in the March 2018 Approach for visiting the physical site, i.e., how the contractor and Tribe members will walk the site and mark or record located tribal resources.”<sup>38</sup> We further emphasized that while we “[understood] the need to be sensitive to the cultural tenets and needs of the Oglala Sioux Tribe, given that the time period for the site survey phases was agreed to by the Oglala Sioux Tribe, and that it is the Oglala Sioux Tribe that has continually pushed for a scientific methodology, negotiations and proposals must remain within these constraints.”<sup>39</sup>

C. The Reinitiation of Negotiations after LBP-18-5 and Hearing Request

3.9 In November 2018, the Staff sent a letter to the Tribe and parties, informing them that it intended to proceed under the Board’s first alternative, with appropriate adjustments to

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<sup>35</sup> *Powertech*, LBP-18-5, 88 NRC at 130–134. While finding that a material factual dispute existed on this question, the Board noted that it “acknowledge[d] that while the Oglala Sioux Tribe characterized the June 12 and June 15 proposals as proposals for a ‘methodology,’ those proposals may have been an attempt to renegotiate the entire approach, per the NRC Staff’s interpretation.” *Id.* at 132–133.

<sup>36</sup> *Id.* at 134.

<sup>37</sup> *Id.* at 134–135.

<sup>38</sup> *Id.* at 135–136 (internal citations omitted) (emphasis in original); CLI-19-09, 90 NRC at \_\_ (slip op. at 11); see also Ex. NRC-176-R at A.22, A.26.

<sup>39</sup> *Powertech*, LBP-18-5, 88 NRC at 136.

the dates in the original timetable for the March 2018 Approach.<sup>40</sup> The Staff stated that it intended to resume negotiations with the Tribe on a site survey methodology that fit within the constraints of the March 2018 Approach, including the two two-week periods set out in that approach.<sup>41</sup> The Staff sought the input of the Tribe on what it considered the appropriate aspects for a site survey methodology and, with the Tribe's input in mind – in particular, its concerns regarding the need for a survey methodology with “scientific integrity” – developed and provided the Tribe a draft methodology on which to continue these discussions and obtain the Tribe's approval.<sup>42</sup> As detailed in the Staff's testimony (and discussed further in our findings below), after many additional months of effort, these discussions did not result in an agreement on a methodology that would be acceptable to the Tribe for conducting a tribal site survey.<sup>43</sup> Accordingly, the Staff filed a motion requesting that the Board set a schedule for an evidentiary hearing in this proceeding, which we granted on April 29, 2018.<sup>44</sup>

3.10 As specified in the April 29, 2019 Order, the hearing was granted to resolve the disputed issues of fact regarding the reasonableness of the NRC Staff's proposed draft methodology for the conduct of a site survey to identify sites of historic, cultural, and religious significance to the Oglala Sioux Tribe, and the reasonableness of the NRC Staff's determination that the information it seeks to obtain from the site survey is unavailable.<sup>45</sup>

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<sup>40</sup> See Ex. NRC-195, NRC November 21, 2018 Letter to Oglala Sioux Tribe Resuming Implementation of the NRC Staff March 16, 2018 Approach at 2, 4 (ML18325A029) (Nov. 21, 2018); Ex. NRC-176-R A.24–25.

<sup>41</sup> Ex. NRC-176-R at A.24.

<sup>42</sup> *Id.* at A.24–26.

<sup>43</sup> *Id.* at A.42–44.

<sup>44</sup> See April 29, 2019 Order; NRC Staff's Motion to Set Schedule for Evidentiary Hearing (Apr. 3, 2019) (ML19093B813).

<sup>45</sup> April 29, 2019 Order at 5.

#### IV. LEGAL STANDARDS

##### A. NEPA Requirements

4.1. Contention 1A raises challenges to the Staff's compliance with NEPA<sup>46</sup> and the NRC regulations implementing the agency's responsibilities pursuant to NEPA.<sup>47</sup> NEPA requires federal agencies to take a "hard look" at the environmental impacts of a proposed action, as well as reasonable alternatives to that action.<sup>48</sup> The purpose of the "hard look" requirement is to "foster both informed agency decision-making and informed public participation."<sup>49</sup> This "hard look" requirement is tempered by a "rule of reason"<sup>50</sup> that requires agencies to address only those impacts that are reasonably foreseeable. Thus, under NEPA's rule of reason, the Staff need not address every environmental effect that could potentially result from the proposed action.<sup>51</sup> Rather, the Staff need only provide "[a] reasonably thorough discussion of the significant aspects of the probable environmental consequences[.]"<sup>52</sup>

4.2. Furthermore, "NEPA gives agencies broad discretion to keep their inquiries within appropriate and manageable boundaries."<sup>53</sup> To this end, "NEPA does not call for certainty or precision, but an *estimate* of anticipated (not unduly speculative) impacts."<sup>54</sup> The

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<sup>46</sup> 42 U.S.C. § 4321 *et seq.*

<sup>47</sup> 10 C.F.R. Part 51.

<sup>48</sup> See *Louisiana Energy Servs., L.P.* (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77, 87-88 (1998).

<sup>49</sup> *Id.* at 88 (quoting *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 371 (1989)).

<sup>50</sup> See, e.g., *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), ALAB-156, 6 AEC 831, 836 (1973).

<sup>51</sup> *Ground Zero Ctr. For Non-Violent Action v. U.S. Dept. of the Navy*, 383 F.3d 1082, 1089-90 (9th Cir. 2004) (citing *NoGWEN Alliance of Lane County, Inc. v. Aldridge*, 855 F.2d 1380, 1385 (9th Cir. 1988)).

<sup>52</sup> *Trout Unlimited v. Morton*, 509 F.2d 1276, 1283 (9th Cir. 1974); *Warm Springs Dam Task Force v. Gribble*, 621 F.2d 1017, 1026-27 (9th Cir. 1980).

<sup>53</sup> *Ground Zero Ctr. For Non-Violent Action*, 383 F.3d at 1089-90 (citing *NoGWEN Alliance of Lane County*, 855 F.2d at 1385); see also *Southern Nuclear Operating Co.* (Early Site Permit for Vogtle ESP Site), LBP-09-07, 69 NRC 613, 631 (2009) (stating that the Staff "need not address every impact that could possibly result, but rather only those that are reasonably foreseeable or have some likelihood of occurring.").

<sup>54</sup> *Louisiana Energy Servs., L.P.* (National Enrichment Facility), CLI-05-20, 62 NRC 523, 536 (2005).

proper inquiry is not whether an effect is “theoretically possible,” but whether it is “reasonably probable that the situation will obtain.”<sup>55</sup>

4.3. An environmental review document “is not intended to be ‘a research document.’”<sup>56</sup> NEPA does not require the Staff to analyze “every conceivable aspect” of a proposed project.<sup>57</sup> “There is no NEPA requirement to use the best scientific methodology, and NEPA should be construed in the light of reason if it is not to demand virtually infinite study and resources.”<sup>58</sup> Although the Staff can always gather more data in a particular area, it “must have some discretion to draw the line and move forward with decisionmaking.”<sup>59</sup>

4.5. When reviewing an EIS for compliance with NEPA, a court must “take a holistic view of what the agency has done to assess environmental impact[s],” and must not “‘flyspeck’ the agency’s environmental analysis.”<sup>60</sup> In the context of NRC proceedings, the Commission has specifically stated that NRC hearings are not intended to fine-tune, add details or nuances, or edit Staff NEPA documents to meet an intervenor’s preferred language or emphasis.<sup>61</sup>

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<sup>55</sup> *Northern States Power Co.* (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-455, 7 NRC 41, 49 (1978).

<sup>56</sup> *Entergy Nuclear Generation Co.* (Pilgrim Nuclear Power Station), CLI-10-22, 72 NRC 202, 208 (2010) (citing *Town of Winthrop v. FAA*, 533 F.3d 1, 13 (1st Cir. 2008)).

<sup>57</sup> *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-02-25, 56 NRC 340 (2002).

<sup>58</sup> *Entergy Nuclear Generation Co.* (Pilgrim Nuclear Power Station), CLI-10-11, 71 NRC 287, 315 (2010) (citing *Hells Canyon Alliance v. United States Forest Serv.*, 227 F.3d 1170, 1185 (9th Cir. 2000); *Natural Resources Defense Council v. Hodel*, 865 F.2d 288, 294 (D.C. Cir. 1988)) (internal quotation omitted).

<sup>59</sup> *Pilgrim*, CLI-10-11, 71 NRC at 315.

<sup>60</sup> See, e.g., *Fuel Safe Washington v. FERC*, 389 F.3d 1313, 1323 (10th Cir. 2004) (describing the inquiry as “deciding whether claimed deficiencies in a FEIS are merely flyspecks, or are significant enough to defeat the goals of informed decision making and informed public comment”) (quotation marks omitted); *Half Moon Bay Fishermans’ Mktg. Ass’n v. Carlucci*, 857 F.2d 505, 508 (9th Cir. 1988) (“The reviewing court may not ‘flyspeck’ an EIS.”).

<sup>61</sup> *Exelon Generation Co., LLC* (Early Site Permit for Clinton ESP Site), CLI-05-29, 62 NRC 801, 811 (2005) (boards “do not sit to ‘flyspeck’ environmental documents or to add details or nuances.”); see also *System Energy Resources, Inc.* (Early Site Permit for Grand Gulf ESP Site), CLI-05-4, 61 NRC 10, 19 (2005) (internal citations omitted) (editing Staff NEPA documents to meet an intervenor’s preferred language or emphasis “is not a function of [the NRC] hearing process,” and “boards do not sit to parse and fine-tune” the staff’s NEPA documents).

Furthermore, “in an NRC adjudication, it is Intervenor’s burden to show [the] significance and materiality” of a mistake in the Staff’s environmental review document.<sup>62</sup>

4.6. A licensing board may look beyond the face of the Staff’s NEPA document and examine the entire administrative record to determine whether “the Staff’s underlying review was sufficiently detailed to qualify as ‘reasonable’ and a ‘hard look’ under NEPA — even if the Staff’s description of that review in the [NEPA document] was not.”<sup>63</sup> Thus, “even if an [EIS] prepared by the Staff is found to be inadequate in certain respects, the Board’s findings, as well as the adjudicatory record, ‘become, in effect, part of the [EIS].’”<sup>64</sup>

B. Incomplete and Unavailable Information Under NEPA

4.7. While a federal agency must analyze environmental consequences in its environmental review where it is reasonably possible to do so, NEPA’s rule of reason acknowledges that in certain cases an agency may be unable to obtain information to support a complete analysis.<sup>65</sup> CEQ regulations require that when an agency is evaluating reasonably foreseeable significant adverse effects on the human environment in an EIS “and there is incomplete or unavailable information, the agency shall always make clear that such information is lacking.”<sup>66</sup> If the incomplete or unavailable information is “essential to a reasoned choice among alternatives and the overall costs of obtaining it are not exorbitant,” the agency shall

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<sup>62</sup> *Clinton ESP*, CLI-05-29, 62 NRC at 811.

<sup>63</sup> *Dominion Nuclear North Anna, LLC* (Early Site Permit for North Anna ESP Site), CLI-07-27, 66 NRC 215, 230 (2007).

<sup>64</sup> *Strata Energy, Inc.* (Ross In Situ Recovery Project), LBP-15-3, 81 NRC 65, 82 (2015), *aff’d*, CLI-16-13, 83 NRC 566 (2016) (citations omitted); *see also Pacific Gas and Electric Co.* (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), CLI-08-26, 68 NRC 509, 526 (2008) (“Consistent with longstanding NRC practice,” an NRC adjudicatory decision “becomes part of the environmental record of decision along with the environmental assessment itself.”).

<sup>65</sup> National Environmental Policy Act Regulations; Incomplete or Unavailable Information, 51 Fed. Reg. 15,618, 15,621 (Apr. 25, 1986).

<sup>66</sup> 40 C.F.R. § 1502.22.



include the information in the EIS.<sup>67</sup> If the overall costs of obtaining the information are exorbitant or the means to obtain it are not known, the agency must include in the EIS:

(1) A statement that such information is incomplete or unavailable; (2) a statement of the relevance of the incomplete or unavailable information to evaluating reasonably foreseeable significant adverse impacts on the human environment; (3) a summary of existing credible scientific evidence which is relevant to evaluating the reasonably foreseeable significant adverse impacts on the human environment, and (4) the agency's evaluation of such impacts based upon theoretical approaches or research methods generally accepted in the scientific community.<sup>68</sup>

4.8. CEQ has explained that the term “overall costs” is intended to encompass “financial costs and other costs such as costs in terms of time (delay) and personnel” and that “overall costs” should be interpreted “in light of overall program needs.”<sup>69</sup> CEQ has also stated that “theoretical approaches or research methods generally accepted in the scientific community” includes “commonly accepted professional practices such as literature searches[.]”<sup>70</sup> Federal courts have been “unwilling to give a hyper-technical reading” of 40 C.F.R. § 1502.22 to require the inclusion of a separate, formal statement in the EIS to the effect that information is incomplete or unavailable where the record in the proceeding supplies the relevant information.<sup>71</sup> Further, to demonstrate a violation of NEPA on the basis of 40 C.F.R. § 1502.22, a petitioner “must show (1) the missing information is essential to a reasoned decision

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<sup>67</sup> *Id.* § 1502.22(a).

<sup>68</sup> *Id.* § 1502.22(b).

<sup>69</sup> 51 Fed. Reg. at 15,622.

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

<sup>71</sup> *Colo. Env'tl. Coal. v. Dombeck*, 185 F.3d 1162, 1172–73 (10th Cir. 1999); see also *WildEarth Guardians v. U.S. Forest Serv.*, 828 F. Supp. 2d 1223, 1240 (D. Colo. 2011) (agency satisfied 40 C.F.R. § 1502.22 where it stated that additional information on climate impacts was unavailable but that available information indicates impacts would not be significant); *High Country Conservation Advocates v. U.S. Forest Serv.*, 52 F. Supp. 3d 1174, 1194 (D. Colo. 2014) (record supplied sufficient information on significance of missing data to satisfy 40 C.F.R. § 1502.22).

between the alternatives, and (2) that the public was unaware of the limitations of the data the [federal agency] relied on.”<sup>72</sup>

4.9. The Commission’s longstanding policy, as recently reiterated in CLI-19-09, is that the NRC, “as an independent regulatory agency, ‘is not bound by those portions of CEQ’s NEPA regulations’ that, like [40 C.F.R. §] 1502.22, ‘have a substantive impact on the way in which the Commission performs its regulatory functions.’”<sup>73</sup> But the Commission does look to CEQ’s regulations as guidance.<sup>74</sup> With respect to the applicability of 40 C.F.R. § 1502.22, the Commission has noted that it may look to 40 C.F.R. § 1502.22 for guidance, but it is not controlling.<sup>75</sup> In particular, in reiterating that the NRC is not bound by 1502.22, the Commission emphasized that, rather, it has “consistently directed the Staff to undertake reasonable efforts to obtain unavailable information.”<sup>76</sup>

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<sup>72</sup> *Trout Unlimited v. U.S. Dep’t of Agric.*, 320 F. Supp. 2d 1090, 1110–11 (D. Colo. 2004) (citing *Dombeck*, 185 F.3d at 1172–73). The Commission has cautioned, in the context of severe accident mitigation alternatives (SAMA) analyses, that “[t]here is questionable benefit to spending considerable agency resources in an attempt to fine-tune a NEPA mitigation analysis,” noting that unless a deficiency “could credibly render the SAMA analysis altogether unreasonable under NEPA standards,” “a SAMA-related dispute will not be material to the licensing decision[.]” *Entergy Nuclear Gen. Co. and Entergy Nuclear Operations Inc.* (Pilgrim Nuclear Power Station), CLI-12-1, 75 NRC 39, 57–58 (2012). Although the contention at issue in this proceeding is not a SAMA contention, the principle is fundamental to NEPA’s “rule of reason” in the context of 40 C.F.R. § 1502.22: unless an alleged deficiency in the FSEIS would have a material impact on the agency’s licensing decision, *i.e.*, the decision between alternatives, the dispute over the deficiency is not a material one.

<sup>73</sup> *Pac. Gas & Elec. Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-11-11, 74 NRC 427, 444 (2011) (quoting Environmental Protection Regulations for Domestic Licensing and Related Regulatory Functions and Related Conforming Amendments, 49 Fed. Reg. 9352, 9352 (1984)); *see also Powertech*, CLI-19-09, 90 NRC at \_\_\_ (slip op. at 18-19).

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

<sup>75</sup> *See Powertech*, CLI-19-09, 90 NRC at \_\_\_ (slip op. at 18); *Diablo Canyon*, CLI-11-11, 74 NRC at 443–44; *North Anna ESP*, CLI-07-27, 66 NRC at 235–36 & n.115; *Pac. Gas & Elec. Co.* (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), CLI-08-1, 67 NRC 1, 12 (2008).

<sup>76</sup> *Powertech*, CLI-19-09, 90 NRC at \_\_\_ (slip op. at 18).

C. Burden of Proof

4.12. Generally, an applicant has the burden of proof in a licensing proceeding.<sup>77</sup> For contentions asserting failures to comply with NEPA, however, the burden of proof is on the Staff.<sup>78</sup> Because Contention 1A challenges the Staff's FSEIS, the Staff bears the burden of proof for demonstrating that it has satisfied its responsibilities under NEPA.<sup>79</sup>

4.13. The standard of proof in this proceeding is preponderance of the evidence.<sup>80</sup> Because NEPA does not require certainty or precision or the use of best methodology, the Staff need not prove, and this Board need not find, that its results are the most accurate or were performed with the best methodology.<sup>81</sup> The Staff's NEPA analysis is deemed adequate unless the Staff "has failed to take a 'hard look' at significant environmental questions – i.e., the Staff has unduly ignored or minimized pertinent environmental effects."<sup>82</sup>

4.14. Finally, in NRC adjudications, it is the Intervenors' burden to show the significance and materiality of mistakes in the Staff's environmental review document.<sup>83</sup> "Boards do not sit to 'flyspeck' environmental documents or to add details or nuances. If the ER (or EIS) on its face comes to grips with all important considerations, nothing more need be done."<sup>84</sup>

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<sup>77</sup> 10 C.F.R. § 2.325.

<sup>78</sup> *Progress Energy Florida, Inc.* (Levy County Nuclear Power Plant, Units 1 and 2), CLI-10-2, 71 NRC 27, 34 (2010).

<sup>79</sup> *See, e.g., id.*

<sup>80</sup> *See Pacific Gas and Electric Co.* (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), CLI-08-26, 68 NRC 509, 521 (2008) (applying a preponderance of the evidence standard to resolution of an environmental contention).

<sup>81</sup> *See Louisiana Energy Services*, CLI-05-20, 62 NRC at 536 (stating that NEPA does not require certainty or precision); *Pilgrim*, CLI-10-11, 71 NRC at 315 (stating that NEPA does not require use of the best methodology).

<sup>82</sup> *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 & 2; Catawba Nuclear Station, Units 1 & 2), CLI-03-17, 58 NRC 419, 431 (2003).

<sup>83</sup> *Clinton ESP*, CLI-05-29, 62 NRC at 811.

<sup>84</sup> *Id.* (quoting *System Energy Resources, Inc.* (early Site Permit for Grand Gulf Site), CLI-05-4, 61 NRC 10, 13 (2005)).

V. RULINGS ON LEGAL ISSUES

A. Admission of Exhibits

5.1 As stated in the September 18, 2019 Order, all exhibits in the final exhibit list, appended to the transcript of the hearing, constitute the official compilation of exhibits admitted during this portion of the proceeding.<sup>85</sup>

5.2 Additionally, we noted that exhibits identified and admitted in the August 2014 evidentiary hearing in this proceeding were considered as admitted exhibits for this portion of the proceeding.<sup>86</sup>

B. Expert Witness Qualifications

5.3. An expert opinion is only admissible if the witness is competent to give an expert opinion and adequately states and explains the factual basis for the expert opinion.<sup>87</sup> An admissible expert opinion must be “based upon sufficient facts or data to be the product of reliable principles and methods that the witness applied to the facts of the case.”<sup>88</sup>

5.4. In addition, a party bears the burden of demonstrating that its witness is qualified to serve as an expert.<sup>89</sup> “A witness may qualify as an expert by knowledge, skill, experience, training, or education to testify [i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue.”<sup>90</sup>

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<sup>85</sup> Memorandum and Order (Adopting Transcript Corrections and Redacted Version of Transcript for Closed Hearing Session and Closing the Evidentiary Record), at 2 (Sept. 18, 2019) (unpublished) (ML19261B330).

<sup>86</sup> *Id.* at 2-3 n.8.

<sup>87</sup> *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), LBP-05-4, 61 NRC 71, 81 (2005).

<sup>88</sup> *Id.* at 80.

<sup>89</sup> *Duke Energy Corp.* (Catawba Nuclear Station, Units 1 and 2), CLI-04-21, 60 NRC 21, 27 (2004).

<sup>90</sup> *Id.* at 27–28.

5.5. We find that in this proceeding, the Staff and the Oglala Sioux Tribe have demonstrated that each of their witnesses is qualified to serve as an expert on relevant aspects of Contention 1A. Powertech and the Consolidated Intervenors did not propose witnesses.

VI. FINDINGS OF FACT

6.1 After weighing the evidence and arguments submitted by the parties, we find that the Staff proposed an objectively reasonable methodology. We further find that the staff reasonably determined that the information it seeks is unavailable and has provided the information necessary to satisfy 40 C.F.R. § 1502.22 on the record of this proceeding.

A. The Staff's 2019 Proposed Draft Methodology Was Reasonable

6.2 In our April 29, 2019 Order granting the NRC Staff's request for hearing, we identified the first issue for hearing as follows:

[T]he hearing should resolve the disputed issues of fact as to the reasonableness of the NRC Staff's proposed draft methodology for the conduct of a site survey to identify sites of historic, cultural, and religious significance to the Oglala Sioux Tribe[.]<sup>91</sup>

For the reasons described below, we find that the Staff proposed an objectively reasonable draft methodology in February of 2019.

1. The March 2018 Approach Was a Reasonable Approach for Obtaining Additional Information on Lakota Sioux Cultural Resources and Was Agreed Upon by All Parties

6.3 As we found in LBP-18-5, the parties previously reached agreement on a reasonable approach to address the Tribe's concerns and resolve the NEPA deficiency.<sup>92</sup> After months of negotiating with the Tribe and other parties to this proceeding, the Staff developed an integrated approach to resolve Contention 1A, which has come to be known as the March 2018

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<sup>91</sup> April 29, 2019 Order at 4.

<sup>92</sup> See *Powertech*, LBP-18-5, 88 NRC at 125; *Powertech*, CLI-19-09, 90 NRC at \_\_\_ (slip op. at 10).

Approach.<sup>93</sup> The Approach responded to concerns that the Tribe previously raised, including the hiring of a qualified contractor, involving other Lakota Sioux Tribes, providing iterative opportunities for a site survey, engagement of tribal elders, and, most critically, the conduct of a site survey using a scientific methodology in collaboration with the Tribes.<sup>94</sup>

6.4 The Tribe agreed that it was “comfortable with...the approach” proposed by the Staff.<sup>95</sup> Specifically, the Tribe indicated that the proposed two noncontiguous two-week periods were “achievable,” and that the Tribe was “comfortable with those.”<sup>96</sup> The Tribe further stated that the proposed \$10,000 honorarium per participating tribe, as well as per diem and reimbursement for other associated expenses was “appropriate for its valuable staff time and resources.”<sup>97</sup> Based on these representations, we found in LBP-18-5 that the “Staff’s March 2018 Approach, as agreed to by the parties, constituted a valid and reasonable approach for

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<sup>93</sup> See Ex. NRC-192, NRC March 16, 2018 Letter to Oglala Sioux Tribe Transmitting NRC’s Approach to Identify Historic, Cultural, and Religious Sites (Mar. 16, 2018) (ML18074A396); see also Ex. NRC-176-R at A.19; Transcript of Proceedings (Tr.) at 1691 (Aug. 28, 2019) (ML19248C650).

<sup>94</sup> See Ex. NRC-176-R at A.20–21; Tr. at 1690–1691; see also Ex. NRC-192.

<sup>95</sup> Tr. (Apr. 6, 2018) (ML18100A912) at 1389 (counsel for the Tribe stating that the Tribe is “...comfortable with, as we stated multiple times, the approach that the NRC staff has laid out. So we are hopeful that won’t be a problem”), 1432 (“[W]e maintain the position that that March 2018 approach is a reasonable one and would not like to see backsliding to the proposals that have led to this litigation from the start”); see also Ex. NRC-219 Oglala Sioux Tribe’s March 30, 2018 Response to NRC Staff’s March 16, 2018 Approach, at 1 (ML18089A655) (“Based on the approach described, the Tribe continues to believe these efforts may provide a reasonable path toward NRC satisfying NEPA and resolving the Oglala Sioux Tribe’s long-standing NEPA contention.”); *Powertech*, CLI-19-09, 90 NRC at \_\_ (slip op. at 15) (“The Board stated that the Tribe was bound by the terms it had agreed to in accepting the March 2018 Approach, including the two two-week periods allotted to accomplish the survey.” (citing LBP-18-5, 88 NRC at 130-34.))

<sup>96</sup> Ex. NRC-219 at 4 (describing the proposed timeline as “appearing achievable”); Tr. at 1395 (“The Tribe has, I think, been consistent with these dates. Although somewhat tight, I think are achievable. And so the Tribe is, at this point, comfortable with those. We do note that there are some significant components that have not been fully vetted or fully described in terms of the methodology. But at this point, based on what we have in hand, the Tribe is comfortable with that time line.”).

<sup>97</sup> Ex. NRC-194, Oglala Sioux Tribe’s February 15, 2018 Responses to NRC Counsel Questions at 5 (ML18046A171) (“The Tribe believes that reimbursement is appropriate for its valuable staff time and resources. As communicated on the February 1, 2018 counsel conference call, it is difficult to respond precisely without knowing what Powertech is prepared to offer and without input on methodology from a qualified contractor. The Tribe would anticipate that an amount on the order of what was proposed previously would be appropriate.”).

resolving Contention 1A,”<sup>98</sup> but that material questions of fact remained, one of which was the reasonableness of the Staff’s proposed methodology for the site survey, one element of the March 2018 Approach.<sup>99</sup>

2. The Staff’s February 2019 Draft Proposal Was an Objectively Reasonable Methodology to Carry Out the Site Survey Element of the March 2018 Approach

6.5 The Staff’s proposed draft methodology to implement the site survey element of the Approach was proposed to the Tribe in February 2019.<sup>100</sup> We find that it too was objectively reasonable.

6.6 In LBP-18-5, we established procedures for the resolution of Contention 1A by identifying two alternative avenues. We emphasized that should the Staff choose the first of these two avenues – resuming the implementation of the March 2018 Approach, with appropriate adjustments to the dates in the original timetable – that “the only aspect of the Approach that is open for discussion is the site survey methodology[;] [t]hat is, any tribal negotiating position or proposal should only encompass the specific scientific method that would fit into the two-week periods set out in the March 2018 Approach for visiting the physical site, i.e., how the contractor and Tribe members will walk the site and mark or record located tribal resources.”<sup>101</sup> Accordingly, in February 2019, the Staff provided to the Tribe a proposed draft site survey methodology that worked within the agreed-upon parameters of the March 2018 Approach and accounted for the Tribe’s previously raised concerns.<sup>102</sup>

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<sup>98</sup> *Powertech*, LBP-18-5, 88 NRC at 125.

<sup>99</sup> *Id.* at 130–34.

<sup>100</sup> See *generally* Ex. NRC-214, Proposed Draft Cultural Resources Site Survey Methodology (Feb. 15, 2019) (ML19058A153); see *also* Ex. NRC-176-R at A.26.

<sup>101</sup> *Powertech*, LBP-18-5, 88 NRC at 135–36 (internal citations omitted) (emphasis in original); see *also* *Powertech*, CLI-19-09, 90 NRC at \_\_\_ (slip op. at 11).

<sup>102</sup> See Ex. NRC-176-R at A.26; Ex. NRC-214.

6.7 For the reasons discussed below in Sections VI.A.2.a–d, we find that the Staff’s proposed draft methodology is reasonable. First, based on the input Staff received from the Tribe during previous negotiations, it blends the scientific method with tribal cultural knowledge: it accounts for the Tribe’s previously raised concerns, includes the Tribe’s participation in the field survey, and is appropriately flexible to include the Tribe’s additional input, had negotiations continued. Second, we further find that under these circumstances, the timeline and reimbursement amounts specified in the proposed draft methodology are reasonable, because the parties agreed that two two-week periods to conduct the survey and the reimbursement amounts were reasonable aspects of the March 2018 Approach. Finally, although the Board asked additional questions at the evidentiary hearing about other potential approaches to the Staff’s proposed draft methodology, we find that because the parties agreed upon an acceptable Approach to resolving this contention, NEPA’s rule of reason makes it ultimately unnecessary to evaluate what other approaches might hypothetically have been pursued.

a. *The Proposed Draft Methodology Appropriately Blends the Scientific Method with Tribal Considerations and Expertise*

6.8 Prior to the Staff’s February 2019 proposed draft methodology, the Tribe had rejected methodologies it considered “open-site” surveys that lacked “scientific integrity.”<sup>103</sup> As a result, in LBP-18-5, we acknowledged the importance of selecting a scientific methodology.<sup>104</sup> Given the Tribe’s repeated requests for a “scientific” methodology, we find that the Staff appropriately balanced the incorporation of Tribal input with the scientific method. The Staff’s proposed draft methodology builds upon the framework of other scientific methodologies that

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<sup>103</sup> *E.g.*, Ex. NRC-186, Summary of May 19, 2016 Pine Ridge Meeting with the Oglala Sioux Tribe at 2 (ML16182A069); Tr. at 1431; Ex. NRC-190 at 1.

<sup>104</sup> *See Powertech*, LBP-18-5, 88 NRC at 135 (holding that “any tribal negotiating position or proposal should only encompass the specific *scientific method* that would fit into the two two-week periods set out in the March 2018 Approach” (italics emphasis added)); *see also Powertech*, CLI-19-09, 90 NRC at \_\_\_ (slip op. at 11).



have been used successfully by other governmental agencies.<sup>105</sup> In particular, the Staff's methodology builds upon the definitions and field identifications of Dr. LeBeau, whose Lakota-specific<sup>106</sup> work the Tribe specifically requested the Staff to consider.<sup>107</sup> Mr. Spangler also incorporated the framework of Ball, et al., which emphasizes that a survey methodology should be driven by Tribal goals and objectives and that Tribal members themselves describe the sites and their significance according to their own standards and definitions.<sup>108</sup> In blending these previously successful methodologies, the Staff's draft methodology proposes specific categories of information to be collected and analyzed, utilizes site formats for recording observations, and suggests ways to describe the observations.<sup>109</sup> It also proposes using geographic information system (GIS) software to document the location of sites of significance, oral interviews to supplement field observations, a set of prescriptive steps to accomplish the site survey within the parameters of the March 2018 Approach,<sup>110</sup> and culminates in a synthesized report.<sup>111</sup> These aspects of the Staff's February 2019 methodology demonstrate that the Staff developed a methodology that would describe the observable characteristics of sites of significance to the

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<sup>105</sup> See Tr. at 1960 (Aug. 29, 2019) (ML19248C650) (Mr. Spangler explaining that the LeBeau methodology has been used by the Army Corps of Engineers, and Ball et al. has been used by the Department of Interior).

<sup>106</sup> See Ex. NRC-206, LeBeau, Sebastian, "Reconstructing Lakota Ritual in the Landscape: The Identification and Typing System for Traditional Cultural Property Sites" at 1 (2009) ("This work is about Lakota traditional cultural property sites (TCPs) and the development of a Lakota survey methodology and site taxonomy system[.]"); see also Ex. NRC-176-R at A.30 (explaining that Mr. Spangler blended "the definitions and field identifications found in a Lakota-specific methodology from Dr. LeBeau, who is a member of the Cheyenne River Sioux Tribe").

<sup>107</sup> Ex. NRC-203, Oglala Sioux Tribe's January 11, 2019 Response to NRC's November 21, 2018 Letter Proposing to Resume Negotiations at 3 (ML19011A459).

<sup>108</sup> See Tr. at 1960; Ex. NRC-176-R at A.11, A.41.

<sup>109</sup> Ex. NRC-214 at 10; Ex. NRC-176-R at A.35–36.

<sup>110</sup> Ex. NRC-214 at 12–14; Ex. NRC-176-R at A.35–36.

<sup>111</sup> Ex. NRC-214 at 13–14; Ex. NRC-176-R at A.35–36.

Lakota and that responded to the Tribe's previous criticisms of site surveys as lacking "scientific integrity."<sup>112</sup>

6.9 Throughout this proceeding, the Tribe has often stated – and the Staff has not disputed – that Tribal members are the only ones with the unique expertise to identify and ascribe significance<sup>113</sup> to sites of historic, cultural, and religious significance to the Lakota Sioux Tribes.<sup>114</sup> The Staff testified that "[t]here are fundamental differences in how Tribes and non-Tribal individuals view the world around them,"<sup>115</sup> and that intangible values or significance of sites are known only to the Tribes. The Staff's draft methodology accordingly proposed that observable traits of the sites would be recorded using scientific methods, and the Tribal members themselves would supplement those observations with unobservable characteristics of the sites.<sup>116</sup> The significance of observable and unobservable characteristics would be assigned by the Tribes themselves.<sup>117</sup> The Staff also testified about the ways in which the methodology is flexible to incorporate input from the Tribe: it repeatedly encouraged Tribal input;<sup>118</sup> it incorporated the Tribe's own objectives, goals, and methods;<sup>119</sup> and it relied on Tribal

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<sup>112</sup> Ex. NRC-176-R at A.40; *see also* Ex. NRC-206 at 90–91.

<sup>113</sup> We note that the "significance" that the Tribe ascribes to the sites is a separate concept from the "significance" determinations that the Staff makes as part of its NEPA document. Whereas the Staff determines whether the identified sites will be significantly (i.e., SMALL, MEDIUM, or LARGE) impacted by the federal action and includes that determination as part of its NEPA document, the Tribe is uniquely positioned to determine whether a site is culturally significant to them. The significance of the resource to the Tribe would not be captured in the evaluation of impacts, but rather in the mitigation measures taken with respect to a given resource. *See* Tr. at 1930-33.

<sup>114</sup> *See* Ex. NRC-176-R at A.30, A.38; Tr. at 764–66 (Aug. 19, 2014) (ML14234A449).

<sup>115</sup> Ex. NRC-176-R at A.38.

<sup>116</sup> *Id.* at A.40.

<sup>117</sup> *Id.*

<sup>118</sup> *See id.* at A.31, A.34, A.42; *see also, e.g.,* Ex. NRC-214 at 6 ("This is a working document to be developed in collaboration with the Tribes and based on the Tribes self-determination. Accordingly, additional input regarding concepts and terms are welcomed and encouraged.").

<sup>119</sup> *See* Ex. NRC-176-R at A.31. *Compare* Ex. NRC-214 at 9 *with* Ex. NRC-198 (non-public) at 2.

knowledge to facilitate the site survey.<sup>120</sup> Therefore, we agree that the Staff developed a proposed draft methodology that balances the scientific method with the need for tribal participation, and we find that the methodology was reasonable.<sup>121</sup>

6.10 Although the Tribe offered general (and at times contradictory) criticisms about the Staff's proposed draft methodology, we find that none undercuts the methodology's reasonableness. For instance, the Tribe asserted in its Response Statement of Position that the Staff's proposed draft methodology is narrowly "scientific" and not "interdisciplinary."<sup>122</sup> Yet the Staff's proposed draft methodology provides numerous mechanisms for Tribal input, and the Tribe does not clarify how its criticism affects the reasonableness of the proposed draft methodology.<sup>123</sup> And as discussed in paragraph 6.8 above, the Staff also explained how its methodology drew on other methodologies that are not only based on scientific principles but have been successfully implemented by other governmental entities in cooperation with a variety of tribes. Therefore, we find that the Tribe's vague criticism that the methodology is not "interdisciplinary" does not reveal any deficiency in the content and structure of the Staff's proposed draft methodology. As another example, at hearing, Dr. Morgan testified that the Tribe hasn't "been given that opportunity to play a role in the definition or creating the

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<sup>120</sup> See Ex. NRC-176-R at A.26, A.30; Ex. NRC-214 at 8–9.

<sup>121</sup> Ex. NRC-176-R at A.12, A.38.

<sup>122</sup> See, e.g., Oglala Sioux Tribe's Response Statement of Position at 16 (June 28, 2019) (ML19179A337) [hereinafter "Tribe's RSOP"] ("NRC Staff is wrong in its narrow interpretation of 'scientific'"), 18 ("The Tribe has insisted on a scientifically defensible interdisciplinary approach required by NEPA that fully accounts for traditional cultural knowledge."), 19 ("The Draft Methodology relies on stilted and outmoded 'scientific method' and 'empirical evidence' in a way that violates NEPA's mandate that all federal agencies use a 'systematic interdisciplinary approach' that involves 'unquantified' considerations and 'ecological information.'").

<sup>123</sup> We further note that while NEPA requires the use of a "systematic, interdisciplinary approach" in planning and decision-making, the interdisciplinary aspect of the statute and accompanying regulations contemplates experts in various fields weighing in on their respective areas of analysis. 42 U.S.C. § 4332(A). NEPA does not require, as the Tribe suggests, that the Staff's contractor be an expert in all related disciplines in order to develop or implement a reasonable methodology. Furthermore, the Staff's methodology does, in fact merge several disciplines, including archeology, ethnography, and traditional tribal knowledge. See Ex. NRC-225, NRC Staff's Prefiled Reply Testimony (ML19198A338) at A.6.

terminology” with respect to a site survey methodology.<sup>124</sup> However, the Staff’s proposed draft methodology specifically incorporated definitions created by a Lakota individual that had been used successfully in a previous site survey, and invited the Tribe’s input with respect to definitions.<sup>125</sup> Moreover, the Staff created flexibility for input from the Tribe regarding definitions, such as by including the clause “additional input regarding concepts and terms are welcomed and encouraged.”<sup>126</sup>

6.11 Additionally, during negotiation meetings, in its Response Statement of Position, and during the evidentiary hearing, the Tribe criticized the Staff’s consideration of Dr. LeBeau’s methodology.<sup>127</sup> Yet the Tribe itself first recommended the Staff consider using LeBeau.<sup>128</sup> And indeed, Dr. Morgan stated at the evidentiary hearing that the LeBeau methodology, “in terms of the terminology and the Lakota language, it’s very valuable...on several levels.”<sup>129</sup> As the Staff explained, the 2019 proposed draft methodology utilized LeBeau’s definitions to characterize the information in such a way that a non-Lakota decision maker could understand its significance, which appears consistent with Dr. Morgan’s acknowledgement that LeBeau’s terminology is “valuable.”<sup>130</sup> The Tribe generally stated in its Response Statement of Position

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<sup>124</sup> Tr. at 1856.

<sup>125</sup> See Ex. 176-R at A.37, A.40-41; Ex. NRC-214 at 6.

<sup>126</sup> Ex. NRC-214 at 6. At the evidentiary hearing, after criticizing the Staff for not allowing sufficient Tribal input on definitions, Dr. Morgan attacked these very clauses as indicating that the methodology was not “fully fleshed out.” Tr. at 1945–46. We find that this contradictory testimony does not specify any material deficiency in the Staff’s methodology.

<sup>127</sup> See Ex. NRC-218, Oglala Sioux Tribe’s Summary of the Meeting with NRC Staff on February 22, 2019 in Pine Ridge, SD at 2 (ML19074A247); Tribe’s RSOP at 19–20, 43; Tr. at 1855–56, 1859–64.

<sup>128</sup> Ex. NRC-203 at 3 (“Dr. Nickens identifies two methodologies associated with the work of Dr. Richard Stoffle and Dr. Sebastian LeBeau. While both methods have shortcomings, and there are other scientific and traditional methods of gathering and interpreting the necessary information, *these methodologies should be considered in the upcoming discussions.*”) (emphasis added).

<sup>129</sup> Tr. at 1863.

<sup>130</sup> See Ex. NRC-176-R at A.40; Tr. at 1866.

that LeBeau's methodology contained "controversial methods and conclusions,"<sup>131</sup> but explained at hearing that the controversy largely pertained to Dr. LeBeau disclosing too much information, not that the information was incorrect.<sup>132</sup> Additionally, at the evidentiary hearing Dr. Morgan criticized the LeBeau methodology because it was completed in 2009, but she did not explain how its age had any bearing on its suitability under the circumstances of this survey effort.<sup>133</sup> In sum, the Tribe did not explain why the Staff's reliance on LeBeau was misplaced, and we find that the Staff reasonably incorporated a previously successful, Lakota-specific methodology into its proposal, and utilized it specifically for the purposes that the Tribe indicated would be valuable. We find that neither this nor the Tribe's other arguments constitute a persuasive challenge to the rational structure and research underpinning the Staff's reasonable methodology.

b. *Under These Circumstances, the Proposed Draft Methodology's Timeline and Tribal Compensation Amounts are Reasonable*

6.12 After the Staff reinitiated negotiations with the Tribe following our denials of summary disposition, the Tribe voiced its disagreement with both the timeframe in which to complete the site survey and the Staff's proposed honorarium and reimbursement amounts.<sup>134</sup> However, in both respects we find that the Staff reasonably relied on previous representations of the Tribe and on our findings in LBP-18-5 when developing the proposed draft methodology. Under these circumstances, where extensive negotiations preceded the Staff's proposal of the draft methodology, we find that the timeline and Tribal compensation are reasonable.

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<sup>131</sup> Tribe's RSOP at 20.

<sup>132</sup> Tr. at 1859 (Dr. Morgan explaining that "The issue with Dr. LeBeau's dissertation is that there were many that felt that he should not have put that information out there and there were several that felt that he actually gave out too much information.").

<sup>133</sup> *Id.*

<sup>134</sup> See, e.g., Ex. NRC-203 at 4–5; Ex. NRC-218 at 2; Tribe's RSOP at 13.

6.13 First, in response to the Tribe's previous criticism about the length of time provided for the survey, the Staff doubled the amount of time and provided iterative opportunities to survey the site.<sup>135</sup> The Tribe initially agreed to this, stating that the "proposed time line presented by the NRC Staff appears achievable."<sup>136</sup> However, the Tribe's position regarding the two two-week periods appears to have shifted after its agreement to the March 2018 Approach timelines. Once the Staff reinitiated negotiations regarding the site survey, the Tribe asserted that the two two-week periods for the site survey are insufficient.<sup>137</sup> When we asked the Tribe's witness Mr. White for an explanation regarding this change in position, he stated that he "did not feel comfortable with what was agreed to by the previous THPO," but did not offer specific or persuasive reasoning.<sup>138</sup> He implied that he wanted to "be able to go out to the site and look at the entire site," but the Staff in fact offered to open the entire site to the Tribes.<sup>139</sup> Mr. White also expressed reservations with an "open site survey," but as the Staff testified, the Staff's proposed methodology is demonstrably not an open site survey; instead it prescribed specific scientific steps and methods with which to complete the site survey.<sup>140</sup> Particularly in the absence of a reasoned explanation for the Tribe's change in position regarding the sufficiency of the two two-week periods, we agree with the Staff that it was reasonable to rely on the Tribe's previous representations that the timelines were achievable.<sup>141</sup>

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<sup>135</sup> See Ex. NRC-176-R at A.20, A.30; see also Ex. NRC-192 at 2.

<sup>136</sup> Ex. NRC-193 at 2.

<sup>137</sup> See, e.g., Ex. NRC-218 at 2 (Tribe's summary of the February 22 meeting asserting that "a credible methodology [should] be developed...then a time frame and budget determined"); Ex. NRC-211, Oglala Sioux Tribe March 12, 2019 Response to NRC's March 1, 2019 Letter at 3 (ML19074A235) (stating that "it would be arbitrary and capricious to limit the methodology to timelines created without benefit of a qualified contractor"); Tribe's RSOP at 14 (reiterating the same).

<sup>138</sup> See Tr. 1974–76.

<sup>139</sup> *Id.* at 1975. *But see* Ex. NRC-214 at 15 ("Access to the entire project area will be provided.").

<sup>140</sup> See Ex. NRC-176-R at A.32–A.36.

<sup>141</sup> To gather additional context regarding the timelines, we asked questions at the evidentiary hearing about transects, ground coverage, and the number of people needed to carry out a survey of the entire site boundary. See Tr. at 1986–2001. The testimony at hearing supports that the project site could in

6.14 Similarly, after the months of negotiations that led to the March 2018 Approach, the Tribe agreed that the reimbursement for its participation in the site survey was “appropriate.”<sup>142</sup> The initially agreed-upon terms were: \$136 per day for lodging and \$59 per day for meals and incidental expenses for each Tribal representative; \$0.535 per mile for one round trip for each phase of the site survey for each Tribe; and a \$10,000 honorarium to each participating Tribe.<sup>143</sup>

6.15 But the Tribe has also changed its position regarding compensation since negotiations restarted in late 2018, now claiming that it did not “unconditionally agree to any specific dollar amount.”<sup>144</sup> We asked several questions at the evidentiary hearing regarding rates of reimbursement used by cultural resource management (CRM) firms to gather context about compensation in the field.<sup>145</sup> However, we ultimately determine that under the circumstances of this proceeding, where the parties negotiated and agreed to the terms, the \$10,000 honorarium per participating Tribe, together with per diem and reimbursement for other

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fact be surveyed in the two two-week periods allocated, although this would require participation by at least nine individuals. Redacted Tr. (Aug. 29, 2019) (ML19261C250) at 33. In any event, the parties negotiated the timeframe and reached an agreement that we therefore need not second guess to determine that it was reasonable.

<sup>142</sup> Ex. NRC-194 at 5 (“The Tribe believes that reimbursement is appropriate for its valuable staff time and resources. As communicated on the February 1, 2018 counsel conference call, it is difficult to respond precisely without knowing what Powertech is prepared to offer and without input on methodology from a qualified contractor. The Tribe would anticipate that an amount on the order of what was proposed previously would be appropriate.”); Ex. NRC-176-R at A.20–21.

<sup>143</sup> See Ex. NRC-176-R at A.20. Seven Tribes were invited to participate. *Id.*

<sup>144</sup> Tribe’s RSOP at 12; see also Ex. NRC-217, February 19, 2019 Teleconference Call Summary with Oglala Sioux Tribe Comments (Draft) at 3 (Feb. 19, 2019) (ML19079A400); Ex. NRC-218 at 2; Ex. NRC-211 at 2.

<sup>145</sup> CRM firms specialize in archaeological surveys for government or private entities. Tr. at 1742. We note, however, that in this proceeding the Tribe has previously been critical of such a firm’s services. See Ex. NRC-064, Letter from John Yellow Bird Steele, President of the Oglala Sioux Tribe Re: Refusal to Accept Dewey-Burdock In Situ Project Proposal (Nov. 5, 2012) (ML14172A071) (rejecting the services of KLJ). It is therefore unclear how consideration of compensation for such firms ultimately has practical value in assessing the reasonableness of compensation to Tribes for their participation in a site survey in this case, even if it might be in other situations.

associated expenses, was reasonable.<sup>146</sup> The Staff's proposed draft methodology was based on the input and participation by the Tribe's experts (as well as other Tribes that the Oglala Sioux Tribe insisted must participate). Because the Tribe has repeatedly stated that only it can identify cultural resources of significance to the Lakota, and in light of the Tribe's previous rejection of hiring a CRM firm, the methodology did not contemplate hiring a CRM firm or other paid field workers. Therefore, any further "budget" beyond the agreed-upon honorarium, per diem, other expenses paid to the Tribe, and the NRC's contract with SC&A is not necessary.<sup>147</sup> And more importantly, given the months of negotiations that preceded the Tribe's change in position, the Staff acted reasonably when it proposed the same amounts that the Tribe had previously found appropriate.<sup>148</sup> In short, where the Tribe previously agreed to the timeline and compensation parameters in the Staff's proposed draft methodology, and absent more persuasive reasoning from the Tribe regarding its changed position, NEPA's rule of reason does not demand that the Staff go back to the drawing board to renegotiate those parameters.<sup>149</sup>

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<sup>146</sup> We also note that, while an honorarium is not necessarily intended as direct compensation, with at least three participating Tribes (Powertech agreed to compensate up to seven), the honorarium would cover the cost that we estimated at the hearing to survey the entire 2600 acres, even at the market rates postulated. See Redacted Tr. at 33.

<sup>147</sup> See *generally*, Ex. NRC-214. We also note that the Tribe appears to misconstrue its own previous statements during all-parties teleconferences. Contrary to the Tribe's position in its RSOP that the Tribe "specifically stated that the costs necessary to compensate for staff time to carry out the project would need to be separate from the proposed honorarium," the lines that the Tribe cites – when read in context – actually explain that the honorarium is separate from *the per diem and other costs associated with travel and lodging*. See Tr. at 1393. Powertech agreed to pay not only the \$10,000 honorarium, but also the per diem and other associated costs. See Ex. NRC-210, Powertech Response to NRC Staff's March 16, 2018 Letter Confirming Reimbursement and Honoraria at 2 (Apr. 11, 2018) (ML18101A223).

<sup>148</sup> Ex. NRC-194 at 5 (the Tribe stating that "an amount on the order of what was proposed previously would be appropriate").

<sup>149</sup> At the evidentiary hearing, the Board observed that a \$10,000 honorarium seems to be the standard for agencies to provide to tribes and raised the issue of the generic reasonableness of agencies employing what might be interpreted as a one-size-fits-all approach. See Redacted Tr. at 37–38. Under the circumstances here, we find that \$10,000 per tribe for up to seven tribes, plus per diem and additional expenses, is reasonable because it provides sufficient funding to cover the area in question, and because the parties directly negotiated and agreed to that amount.



c. *Speculation Regarding Approaches Other than the Staff's Proposed Draft Methodology Does Not Alter Our Determination*

6.16 During the evidentiary hearing, we probed into potential approaches, discussed briefly below, other than the Staff's proposed draft methodology, to better understand the context of the Staff's decisions. Because the ultimate determination for the hearing was whether the Staff's proposed draft methodology was reasonable – and because, as described above, we have found that it was – speculation regarding hypothetical approaches other than the Staff's proposed methodology does not alter our determination. NEPA does not demand that the Staff use “the best scientific methodology,”<sup>150</sup> or dictate that the Staff must implement an approach of the Tribe's particular choosing. Rather, the Staff is free to “select [its] own methodology as long as that methodology is reasonable.”<sup>151</sup> We will nonetheless briefly describe why some of the other paths raised by the Tribe in its pleadings or discussed at the hearing do not ultimately change our determinations.

i. *Mr. Spangler Is Qualified to Design a Tribal Cultural Resources Site Survey Methodology*

6.17 For purposes of NEPA, we do not need to determine whether selection of a different contractor (including hiring the Tribe or a CRM firm) might also have been reasonable, but only whether the contractor and methodology the Staff selected was reasonable. As outlined above, we ultimately find that the Staff's methodology was reasonable, and further, we conclude that the Staff's chosen contractor, Mr. Spangler, is qualified to design such a methodology.

6.18 We find that Mr. Spangler's breadth of experience is appropriate for crafting a reasonable methodology that accounts for traditional cultural knowledge.<sup>152</sup> His testimony

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<sup>150</sup> *Pilgrim*, CLI-10-11, 71 NRC at 315 (citing *Hells Canyon All. v. U.S. Forest Serv.*, 227 F.3d 1170, 1185 (9th Cir. 2000)).

<sup>151</sup> *Pilgrim*, CLI-10-11, 71 NRC at 316 (quoting *Winthrop*, 535 F.3d at 13).

<sup>152</sup> See Ex. NRC-176-R at A.3b; Ex. NRC-225 at A.3.

thoroughly explains his background, and we find that his thirty years of experience developing cultural resource methodologies and extensive experience working with Tribes to facilitate protection of Tribal interests demonstrate that he is qualified to both design and implement the Staff's methodology.<sup>153</sup> He does not dispute that only the Lakota can ascribe meaning to identified sites of significance or identify sacred locations or significance that are intangible, and he explained why the Staff's proposed draft methodology therefore explicitly utilized a structured approach to balance scientific principles with Tribal expertise and input.<sup>154</sup> Mr. Spangler never asserted that he was authorized to speak on behalf or to substitute his expertise for that of the Tribe;<sup>155</sup> rather, the methodology provided that he would engage with the Tribes in order to elicit information from them – tasks for which his background and experience show he is capable and qualified.

6.19 While recognizing that NEPA does not require the Staff to undertake activities beyond what is reasonable, at the evidentiary hearing, we asked questions regarding the Staff's contracting process<sup>156</sup> and the role of CRM firms in the field of cultural resources<sup>157</sup> to better understand the Staff's decision to hire SC&A. Though the Tribe's witnesses seemed to suggest that the Staff could only fulfill its NEPA obligation by hiring the Tribe directly,<sup>158</sup> the Staff has repeatedly explained that it was statutorily precluded from hiring the Tribe, as an active litigant

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<sup>153</sup> See *id.*

<sup>154</sup> Ex. NRC-176-R at A.6, A.12, A.26 (explaining that the Tribes themselves would provide their own research objectives, describe the cultural resources within the context of their own world views and indigenous nomenclature, and ascribe cultural significance to the sites).

<sup>155</sup> See *United Keetoowah Band of Cherokee Indians v. Fed. Comm. Com'n.*, No. 18-1129, slip op. at 35-36 (D.C. Cir. 2019) (explaining that Advisory Council on Historic Preservation guidance states that "unless an archeologist has been specifically authorized by a tribe to speak on its behalf on the subject, it should not be assumed that the archeologist possesses the appropriate expertise to determine what properties are or are not of significance to an Indian tribe").

<sup>156</sup> Tr. at 1718–67.

<sup>157</sup> See, e.g., *id.* at 1791–93; 1797–98.

<sup>158</sup> See *id.* at 1869 ("...where is the consultant contract with the experts in the field of traditional cultural properties that are native, that have the ability to inform all sides?").

in this proceeding.<sup>159</sup> Instead, the Staff explained that it properly followed the Federal Acquisition Regulations and agency contracting procedures when it selected SC&A to fulfill this contract.<sup>160</sup> Further, any implication that the Staff should have used a CRM firm contradicts the Tribe's own previously stated positions in this proceeding, as the Tribe has previously rejected the services of KLJ, a CRM firm.<sup>161</sup> In any event, we find that the Staff acted reasonably when it hired a contractor with the necessary experience at crafting a methodology with scientific integrity for a tribal cultural resources survey.<sup>162</sup>

*ii. Conducting Oral Interviews Without a Site Survey Is Contrary to the Tribe's Own Demands*

6.20 Both the Tribe and Consolidated Intervenors argued that the Staff has not met its NEPA burden because it has not attempted to conduct oral interviews even in the absence of a site survey.<sup>163</sup> At hearing we probed the utility of conducting oral interviews without a site survey,<sup>164</sup> and we ultimately conclude that, under these circumstances and according to NEPA's rule of reason, the Staff reasonably decided not to pursue oral interviews because doing so would be inconsistent with the Tribe's years-long position that the conduct of a site survey is the

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<sup>159</sup> See, e.g., *id.* at 1381, 1889; see also Atomic Energy Act § 170A, 42 U.S.C. § 2210a.

<sup>160</sup> See Tr. 1716–64.

<sup>161</sup> See Ex. NRC-064.

<sup>162</sup> At the evidentiary hearing, the Tribe's witnesses implied that a better option would be for the Staff to hire a "TCP firm." See, e.g., Tr. at 1943–44; Redacted Tr. at 28. We find no evidence in the record to distinguish between hiring a TCP firm from a CRM firm. As such, there is no need for us to separately consider whether the Staff's decision not to hire a "TCP firm" (as opposed to a CRM firm) impacts the reasonableness of its approach.

<sup>163</sup> See, e.g., Tribe's RSOP at 37–38; Consolidated Intervenors' Response Statement of Position at 2 (June 28, 2019) (ML19179A334) [hereinafter "CI SOP"]; Tr. at 2015 ("MR. PARSONS: [...] the point the tribe was making, was that there is, regardless – even if the Board were to accept the premise that the cultural survey, on-the-ground survey, was unavailable, there is additional available information that exists that could have been obtained[.]")

<sup>164</sup> See, e.g., Tr. at 1794–99.

only way to resolve the NEPA deficiency.<sup>165</sup> The Tribe's conflicting testimony regarding the utility of oral interviews underscores the reasonableness of the Staff's determination.<sup>166</sup>

6.21 Furthermore, the Tribe itself appears to have acknowledged other practical impediments to conducting oral interviews. At hearing, Mr. White testified that the Staff apparently would have needed to follow an additional process to "obtain[ ] permission to seek that information" from the Tribe's research and review board<sup>167</sup> and receive approval from the Tribe's advisory council.<sup>168</sup> Dr. Morgan additionally spoke at length about Tribes' preference to not share information related to sacred places.<sup>169</sup> Although we have determined that NEPA's rule of reason does not require the Staff to implement anything more than an objectively reasonable approach, we find that given the Tribe's conflicting testimony and the practical impediments acknowledged by the Tribe itself, the Tribe's refusal to participate in the field survey does not now make it reasonable for the Staff to proceed with piecemeal implementation of the proposed draft methodology, especially given that doing so would still not produce the complete site survey information the Tribe believes is necessary to comply with NEPA.

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<sup>165</sup> See, e.g., Tr. at 814–15 (Aug. 19, 2014) (ML14234A449) (Tribe's assertion that the "only level of effort sufficient for identifying historic properties would be an on-the-ground 100-percent survey of the entire licensed boundary by tribal personnel from participating tribes"); Tr. at 2011 (Ms. Diaz-Toro testifying that the Staff has remained open to alternative approaches, but that the Tribe has consistently asserted that only a pedestrian survey would facilitate locating sites of significance to the Lakota); see also Ex. NRC-225 at A.7.

<sup>166</sup> For instance, in his testimony, Mr. White underscored that site surveys are needed and implied that interviews alone would not suffice, but he later denied a linkage between interviews and the survey. Compare Ex. OST-042-R ¶ 24 (stating that the NRC has failed to comply with NEPA because the Staff failed "to conduct an adequate survey for, and analysis of impacts to and mitigation for, cultural resources" at the site) and *id.* ¶ 28 (stating that previously conducted surveys "are not sufficient to identify cultural and historic resources significant to the Oglala Sioux Tribe") with *id.* ¶ 76 ("The oral histories component of the March 2018 Approach did not depend on the pedestrian survey.").

<sup>167</sup> Tr. at 1806.

<sup>168</sup> *Id.* at 1812.

<sup>169</sup> See *id.* at 1855, 1909–10.

iii. *Other Approaches Raised by the Tribe Likewise Do Not Alter the Reasonableness of the Staff's Approach*

6.22 At hearing, the Tribe's witnesses suggested other methodologies that they asserted the Staff should have pursued or incorporated, such as the North Dakota Department of Transportation (NDDOT) "Design Manual."<sup>170</sup> Dr. Morgan at one point even implied that the Staff should start over completely.<sup>171</sup> We note that the hearing appears to be the first time that the Tribe suggested reliance on the NDDOT Design Manual, despite the Staff's repeated attempts to elicit specific feedback from the Tribe regarding what such a site survey methodology should entail.<sup>172</sup> We reiterate that NEPA only requires the Staff to select a reasonable methodology; it is not required to choose the best scientific methodology, or the Tribe's preferred approach.<sup>173</sup> And given that years of negotiations went into the March 2018 Approach, we find that obligating the Staff to start anew as the Tribe suggests is certainly beyond what NEPA's rule of reason requires, and would not permit the Staff to have "some discretion to draw the line and move forward with decisionmaking."<sup>174</sup>

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<sup>170</sup> See Ex. NRC-183, North Dakota Department of Transportation, "Design Manual," Chapter II, "Environmental and Public Involvement," Section 5, "Cultural Resources," revised Mar. 6, 2017 (ML19137A398).

<sup>171</sup> See Tr. at 1953.

<sup>172</sup> See, e.g., Ex. NRC-191, NRC Staff Dec. 6, 2017 Letter to Trina Lone Hill, Oglala Sioux Tribe, Regarding US Nuclear Regulatory Commission Proposal to Identify Historic, Cultural, and Religious Sites (Dec. 6, 2017) (ML19137A407); NRC-192; NRC-195; NRC-204, NRC January 25, 2019 Letter in Response to Oglala Sioux Tribe Letter dated January 11, 2019 (Jan. 25, 2019) (ML19137A422). Additionally, Mr. Spangler testified that he did in fact review and consider the NDDOT Design Manual when developing the Staff's proposed draft methodology. Tr. at 1950; see also Ex. NRC-214 at A-1.

<sup>173</sup> See, e.g., *Entergy Nuclear Generation Co. (Pilgrim Nuclear Power Station)*, CLI-10-11, 71 NRC 287, 315 (2010) (quoting *Nat. Res. Def. Council v. Hodel*, 865 F.2d 288, 294 (D.C. Cir. 1988) (footnotes omitted); see also *Nat. Res. Def. Council v. Morton*, 458 F.2d 827, 837 (D.C. Cir. 1972) (NEPA "must be construed in the light of reason if it is not to demand what is, fairly speaking, not meaningfully possible, given the obvious, that the resources of energy and research—and time—available to meet the Nation's needs are not infinite").

<sup>174</sup> *Pilgrim*, CLI-10-11, 71 NRC at 315 (citing *Winthrop*, 535 F.3d at 11–13).

6.23 To conclude, these other approaches raised in pleadings or discussed at the hearing do not ultimately change our determination that the Staff proposed an objectively reasonable methodology. NEPA does not require more.

d. *The Tribe's Criticism of the Nickens Report Is Irrelevant Because the Methodology Does Not Rely on the Substance of That Report*

6.24 In testimony and at hearing, the Tribe criticized various aspects of the literature review report prepared by Dr. Paul Nickens.<sup>175</sup> However, it is unnecessary for us to examine or resolve those criticisms because the report ultimately has no effect on our conclusions. The Staff acknowledged that it did not rely on the substance of the report in developing its draft methodology and also determined that the report provided no new and significant information that would alter the FSEIS conclusions.<sup>176</sup> Further, as the Staff explained in its testimony, the literature review report, otherwise known as a Class I overview, synthesizes relevant cultural materials already in the existing literature.<sup>177</sup> In sum, while this information could have helped the Tribe inform its input to the survey, the Staff did not rely on the report to formulate the methodology and the report did not contain any new material information regarding cultural resources at the site.<sup>178</sup>

6.25 Further, because the report only contains a summary of existing literature, the substance of the Tribe's objections appear directed to what the Tribe perceives as errors in the underlying literature, not with Dr. Nickens' summary of it.<sup>179</sup> Therefore, the Tribe's criticisms of

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<sup>175</sup> See, e.g., Ex. OST-042-R ¶ 78; Ex. OST-045-R at 2-4; Tr. at 1842-45.

<sup>176</sup> See, e.g., Ex. NRC-176-R at A.54.

<sup>177</sup> See Tr. at 2061 (Mr. Spangler testifying that "in the profession, what we call a Class I overview, which is basically a synthesis of all of the cultural materials known about a certain area that are reasonably available.")

<sup>178</sup> See, e.g., Ex. NRC-176-R at A.54; Tr. at 2061.

<sup>179</sup> See Tr. at 2061 (Mr. Spangler testifying that a literature review report or Class I overview may be based on books, journal articles, site forms at the SHPO, oral histories filed with a university, or other reasonably available sources about "the cultural history of a particular area...synthesized into one coherent narrative").

the Nickens literature review report do not ultimately change our conclusion that the Staff's proposed draft methodology was reasonable.

B. Unavailability of Information

6.26. Having considered the reasonableness of the Staff's methodology, we now turn to the second issue identified for hearing. In our April 29, 2019 Order granting the NRC Staff's request for hearing, we identified the second issue for hearing as follows:

[T]he hearing should resolve the disputed issues of fact as to the...reasonableness of the NRC Staff's determination that the information it seeks to obtain from the site survey is unavailable.<sup>180</sup>

For the reasons described below, we find that the Staff reasonably determined that the information needed to cure the NEPA deficiency is unavailable.

1. Information Needed to Cure NEPA Deficiency

6.27 In LBP-15-16 and LBP-17-09, we stated that “[t]o fulfill the agency's NEPA . . . responsibilities to protect and preserve cultural, religious, and historical sites important to the Native American tribal cultures in the Powertech project area, the NRC Staff must conduct a study or survey of tribal cultural resources before granting a license.” In LBP-17-09, the Board found that because the Staff had yet to conduct “any such study or survey,” the “FSEIS deficiencies remain[.]”<sup>181</sup> In affirming the reasonableness of the Staff's determination that the information sought is unavailable, we address three interrelated issues. We first observe that the information the Staff sought from a site survey would have been useful only to the extent that it would have informed mitigation measures, but would not have impacted the Staff's overall NEPA impact determination.<sup>182</sup> Second, we find that the Staff has made reasonable efforts to

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<sup>180</sup> April 29, 2019 Order at 4.

<sup>181</sup> *Powertech (USA), Inc.* (Dewey-Burdock In Situ Uranium Recovery Facility), LBP-17-9, 86 NRC 167, 194 (2016).

<sup>182</sup> See Ex. NRC-176-R at A.56.

obtain the information from the Tribe, but the Tribe has constructively rejected the Staff's efforts. And finally, we find that according to the Tribe itself, implementing other aspects of the March 2018 Approach would not have revealed any new information that would have contributed to the resolution of the NEPA deficiency.

a. *The Information the Staff Seeks Is Relevant to Mitigation Measures But Would Not Have Altered the Overall NEPA Impact Determination*

6.28 The Staff testified that the information it sought from a cultural resources study would have been useful in describing potential impacts to individual resources that may have been located on the Dewey-Burdock site and would have allowed consideration of mitigation measures to protect any resources that were located as a result of the survey.<sup>183</sup> The Staff further testified that the ultimate determination of impacts to cultural resources under NEPA would not have changed based on any new information.<sup>184</sup> This is because the Staff already determined that the impact to cultural resources located within the affected area of the Dewey-Burdock site will be significant (i.e., SMALL to LARGE).<sup>185</sup> Thus, any information the Staff may have gathered from the site survey would not have altered the FSEIS conclusion regarding the impact significance levels, only its consideration of mitigation measures.

b. *The Staff Made Reasonable Efforts to Obtain the Information, But the Tribe Has Rejected the Staff's Efforts*

6.29 The Tribe has stated repeatedly that a survey was necessary to obtain the information needed to cure the NEPA deficiency. Specifically, the Tribe stated that the "only

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<sup>183</sup> *Id.* at A.53, A.55; Tr. at 1800–01, 1930.

<sup>184</sup> Ex. NRC-176-R at A.50, Tr. at 1801, 1930.

<sup>185</sup> Ex. NRC-176-R at A.56, Tr. at 1930–1932. As we noted in n.113 above, the overarching significance level determination under NEPA is a concept distinct from the relative significance or importance of a cultural resource to a particular group of people. The significance of the resource to the Tribe would be captured in the mitigation measures taken with respect to a given resource, not the evaluation of impacts.



level of effort sufficient for identifying historic properties would be an on-the-ground 100-percent survey of the entire licensed boundary by tribal personnel from participating tribes.”<sup>186</sup>

6.30 With respect to how the needed information could be obtained, the Tribe stated that “of great importance is the fact that the expertise of the Lakota Sioux is *essential* to a meaningful and comprehensive survey.”<sup>187</sup> The Tribe further stated that it had “...sacred places here in this country and we are the only ones that can determine those things...We are the ones, and the only ones, that are qualified[.]”<sup>188</sup> Based on the Tribe’s statements, the Staff concluded that the information it sought to cure the Board-identified NEPA deficiency could only be obtained from the Tribe itself.<sup>189</sup>

6.31 The Staff testified that it focused its efforts on the March 2018 Approach and developed its survey methodology to heavily involve the Tribe based on the Tribe’s repeated representations that only a pedestrian survey would be sufficient to identify the resources of significance to the Lakota people, and that only the Tribe itself was capable of identifying the resources.<sup>190</sup> The Staff also testified that the March 2018 Approach resulted from negotiations with the Tribe and that all elements of that approach, especially the need for an on-the-ground survey, derive from statements or requests made by the Tribe.<sup>191</sup>

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<sup>186</sup> Tr. at 814–15.

<sup>187</sup> Ex. NRC-190 at 3 (emphasis added).

<sup>188</sup> See Ex. NRC-176-R at A.20.

<sup>189</sup> *Id.*

<sup>190</sup> See *id.* at A.20, A.48.

<sup>191</sup> *Id.* at A.20; NRC Staff’s Initial Statement of Position (May 17, 2019) (ML19137A446) [hereinafter “ISOP”] at 48–50. As already discussed in Section VI.A.1 *supra*, other elements of the March 2018 Approach that directly incorporated the Tribe’s feedback include hiring a qualified contractor, developing a survey methodology with a structure that would both solicit and fully incorporate the Tribe’s cultural knowledge and values, while fitting within the framework of the March 2018 Approach.

6.32 The Staff testified that in an effort to finalize a methodology to conduct the site survey element of the Approach, between the initial agreement of the parties in March 2018 and the Staff's request for an evidentiary hearing, the Staff exchanged letters with the Tribe, conducted teleconferences and webinars, and traveled to Pine Ridge for two face-to-face meetings.<sup>192</sup> However, when the Staff traveled to Pine Ridge in June 2018, the Tribe proposed its own methodology.<sup>193</sup> The Tribe's June 2018 Proposal included a wide range of activities and milestones that were not part of the negotiated approach; entailed a significantly larger scope, cost, and time to implement than the selected approach; and did not account for the participation of other tribes or the costs associated with involving other tribes, an element that the Tribe insisted be included.<sup>194</sup> Based on the fact that the Tribe's proposal disregarded the previously agreed upon parameters, the Staff concluded that the Tribe was no longer committed to the March 2018 Approach.<sup>195</sup>

6.33 Then, after our ruling in LBP-18-5, the Staff offered the Tribe another opportunity to participate in the March 2018 Approach. The Staff testified that it developed the 2019 proposed draft methodology to implement the pedestrian survey element of the March 2018 Approach, and that it specifically incorporated feedback from the Tribe into the proposed draft methodology.<sup>196</sup> However, during negotiation meetings in February 2019, and again during Board and parties teleconference in March 2019, the Tribe stated that the methodology for the

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<sup>192</sup> See Ex. NRC-176-R at A.22, A.25, A.42–43.

<sup>193</sup> *Id.* at A.22-23; *Powertech*, LBP-18-5, 88 NRC at 119–122.

<sup>194</sup> *Id.*

<sup>195</sup> Ex. NRC-176-R at A.23.

<sup>196</sup> Ex. NRC-176-R at A.24–A.26, A.40–A.41; Ex. NRC-214 at 6. Additionally, at hearing, Dr. Morgan testified that the Tribe has not “been given that opportunity to play a role in the definition or creating the terminology and we really have had to fit inside the box of the disciplines or they've shoved us into those boxes.” Tr. at 1856. However, Dr. Morgan later criticized the Staff's proposed draft methodology as “a working document to be developed in collaboration with the tribes” and “not a fully fleshed out methodology” specifically because it provided opportunities for the Tribe to provide input to the definitions and terminology. *Id.* at 1945.

site survey should be developed without regard to the parameters of the March 2018 Approach, and that the other elements of the approach—i.e. timeframe, cost, duration, and scope—should be renegotiated after the site survey methodology was finalized.<sup>197</sup> The Tribe reiterated this position at hearing, as Mr. White explained that when he took over as THPO, he declined to support the agreement made by the Tribe under the previous THPO.<sup>198</sup> Therefore, based on the Tribe’s stated positions, it is reasonable to conclude that the Tribe rejected not just the February 2019 methodology, but the previously-negotiated parameters of the March 2018 Approach.

6.34 We find that the Staff reasonably interpreted the Tribe’s position in negotiations with the Staff on a site survey methodology for implementing the March 2018 Approach, including what the Tribe communicated in the March 21, 2019 teleconference and in its March 12, 2019 letter, as indicating that the Tribe no longer intended to participate in that Approach. Because the Tribe’s position would render meaningless the parties’ extensive negotiations to define and reach agreement on the parameters of the March 2018 Approach, as well as the Board’s rulings that acknowledged the parties’ agreement to that Approach and accordingly focused the scope of negotiations on the site survey methodology, we find that the Staff reasonably concluded the information was unavailable.

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<sup>197</sup> See, e.g., Tr. at 1576–77, 1590, 1598, 1602–03, 1605, 1612–13; Ex. NRC-217 at 2 (“Mr. Parsons indicated he was not the expert and, thus, the experts should determine the site survey methodology and then develop the timeline, rather than establishing strict time frames and then fit a methodology into those strict time frames.”); Ex. NRC-218 at 2 (“The time frames and budget need to be flexible to allow for a credible methodology to be developed that includes traditional cultural knowledge and protocols, then a time frame and budget determined”); see also Ex. NRC-211 at 3 (“Once a methodology is determined, the parties should then turn their attention to what a reasonable cost may be and what mechanisms may exist for securing the necessary funding to carry out that methodology.”), *id.* (“...the timeline must remain flexible and be informed by the specifics of the methodology as it is developed.”)

<sup>198</sup> Tr. at 1975.

c. *The Staff Reasonably Determined that the Information to Cure the Deficiency Cannot Be Obtained by Implementing Other Elements of the March 2018 Approach*

6.35 The Tribe and Consolidated Intervenors have implied that the Staff cannot conclude that the information it seeks is unavailable without having first exhausted myriad other methods of obtaining the information.<sup>199</sup> However, the Commission recently reiterated the appropriate NEPA standard for determining when information is unavailable: the Staff need only undertake “reasonable efforts.”<sup>200</sup> As explained below, in light of the Tribe’s longstanding position regarding the need for a site survey to resolve the NEPA deficiency, together with the Tribe’s constructive rejection of the March 2018 Approach, the Staff undertook reasonable efforts to obtain the information in question, and there was no NEPA requirement for the Staff to separately seek to implement other elements of that Approach.

6.36 As discussed above, both the Tribe and the Consolidated Intervenors claimed for the first time in prefiled testimony that by not attempting to obtain information from the Lakota communities through oral interviews, the Staff has not met its NEPA burden.<sup>201</sup> In particular, in an apparent reversal of the Tribe’s repeated and longstanding position that the only way to cure the Board-identified NEPA deficiency is to conduct a Tribal pedestrian site survey of the Dewey-Burdock site, the Tribe now asserts that the Staff should nevertheless have conducted oral interviews absent an additional survey.<sup>202</sup> In contrast, the Staff testified that “[t]he March 2018

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<sup>199</sup> See, e.g., *id.* at 2015 (Tribe’s counsel stating that “even if the Board were to accept the premise that the cultural survey, on-the-ground survey, was unavailable, there is additional available information that exists that could have been obtained, not to intimate that a change in the tribe’s longstanding position that a cultural resources survey on the ground is necessary to satisfy NEPA”).

<sup>200</sup> *Powertech*, CLI-19-09, 90 NRC at \_\_ (slip op. at 18).

<sup>201</sup> Tribe’s RSOP at 42–50; Consolidated Intervenors’ Response Statement of Position (June 28, 2019) (ML19179A334) [hereinafter “CI SOP”] at 2. As described *supra* in Section VI.A.2.c.ii, the relevant issue for this hearing is not whether the Staff has implemented its methodology and obtained the information it sought from the site survey, but rather, whether its proposed draft methodology is a reasonable one to resolve Contention 1A.

<sup>202</sup> Compare Tr. at 814–15 and Ex. NRC-176-R at A.48 with Tribe’s RSOP at 42 n.2. See also Tr. at 2010, 2015.

Approach was constructed such that all elements of a cultural resource survey would work in harmony rather than in a compartmentalized manner. The success of each aspect of the March 2018 Approach was dependent on the success of the preceding milestones,<sup>203</sup> an interdependence which the Staff communicated to the Tribe in a November, 2018 letter.<sup>204</sup> The Staff further testified that because of the Tribe's continued insistence that a site survey was the only way to obtain the information necessary to cure the NEPA defect, the Tribal cultural resources site survey is, and has been, the key element of the March 2018 Approach.<sup>205</sup>

6.37 The Staff testified that while interviews independent of a survey may have provided contextual information about the importance of the region, they would not have provided the specific information about the significance of previously or newly identified cultural resource sites, because no pedestrian site survey would have preceded them.<sup>206</sup> The Staff further testified that while it is possible that the other elements of the March 2018 Approach may have provided *some* information, it could not have substituted for the Tribal cultural resources site survey. And the Staff accordingly explained that without the Tribe's cooperation and participation, pursuing other aspects of the March 2018 Approach – namely, the oral history interviews, survey report, FSEIS supplement – would neither be feasible nor would it accomplish the NEPA objective.<sup>207</sup>

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<sup>203</sup> Ex. NRC-176-R at A.45.

<sup>204</sup> See Ex. NRC-195 at 1.

<sup>205</sup> See Ex. NRC-176-R at A.45.

<sup>206</sup> See Ex. NRC-225 at A.7.

<sup>207</sup> Ex. NRC-176-R at A.45. The Tribe also asserted, despite its position that the previously conducted tribal cultural resource surveys were "inadequate," that the Staff should have built on those by conducting oral interviews specifically based on the previous survey. Tribe's RSOP at 42. The Staff testified that it requested information that the Tribe had regarding the presence of any known sites at Dewey-Burdock, but that the Tribe failed to provide that information and continued to assert that only a new site survey would provide the needed information. Ex. NRC-176-R at A.46.

6.38 Further, the Tribe’s witnesses indicated at the evidentiary hearing that the Tribes prefer *not* to share the information the Staff is seeking. Dr. Morgan explained that “Our people are very sensitive and very wary of those who are outsiders who come in and try to take information from us and then disappear,”<sup>208</sup> and that “the Native peoples have this closed way of we don’t want to give out that information. It’s not something that we are supposed to give out[.]”<sup>209</sup> These statements, combined with the additional practical impediments to collecting oral history information about which Mr. White testified,<sup>210</sup> further reinforce the Staff’s determination that under the circumstances of this proceeding, undertaking piecemeal efforts to implement other elements of the Approach would have been neither practical nor reasonable, and they accordingly support its determination that the information is unavailable. Because these facts demonstrate that the Staff made “reasonable efforts” to obtain the unavailable information, no more is required to satisfy NEPA.

2. The Staff Reasonably Determined that for Purposes of 40 C.F.R. § 1502.22 the Information Required to Remedy the NEPA Deficiency Is Incomplete or Unavailable and the Costs of Obtaining It Are Exorbitant

6.39 The CEQ regulations at 40 C.F.R. § 1502.22 specify that an agency preparing an EIS should make clear where information essential to a reasoned choice among alternatives is incomplete or unavailable. If “the overall costs of obtaining the information are not exorbitant,”<sup>211</sup> the agency shall include it in the EIS; if the information “cannot be obtained because the overall costs of obtaining it are exorbitant or the means to obtain it are not known,” the agency must make clear that the information is incomplete or unavailable and address its

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<sup>208</sup> Tr. at 1909–10.

<sup>209</sup> *Id.* at 1855.

<sup>210</sup> See *id.* at 1806, 1812; see also Section VI.A.2.c.ii *supra*.

<sup>211</sup> 40 C.F.R. § 1502.22(a).

relevance to the Staff's evaluation of impacts and the agency's evaluation of such impacts based on theoretical methods or approaches generally accepted in the scientific community.<sup>212</sup>

6.40 As we explained above, CEQ regulations are not binding on the NRC and the Staff is only required to use reasonable efforts to obtain unavailable information.<sup>213</sup>

Nevertheless, we find that even were we to apply the criteria as defined in the regulation, the Staff has provided the requisite justification for its determination. Under these circumstances, where the Tribe has changed its position on an Approach to which it had previously agreed, we find that the Staff has reasonably determined that the information it seeks is unavailable and that the costs of obtaining it are exorbitant. The only alternative methodologies that the Tribe has specifically proposed are exorbitant in terms of both time and expense, and renegotiating an Approach that the Tribe previously agreed upon would certainly entail large expenditures of time and money. Further, we find that the Staff has satisfied the intent of 40 CFR 1502.22 by including the information required by the regulation in the record of this proceeding.

a. *The Staff Reasonably Concluded That the Information It Sought Was Incomplete or Unavailable*

6.41 The Staff testified that it "recognized that there were fundamental differences between the parties regarding the previously negotiated and agreed-upon parameters, and that a mutually agreeable arrangement was not feasible in order to carry out a tribal cultural resource survey in 2019."<sup>214</sup>

6.42 The Staff testified that it consistently incorporated feedback from the Tribe, in both the March 2018 Approach and the 2019 proposed draft methodology for the site survey.<sup>215</sup> However, as we have outlined above, the Tribe appears to have reversed its position on several

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<sup>212</sup> 40 C.F.R. § 1502.22(b).

<sup>213</sup> *Powertech*, CLI-19-09, 90 NRC at \_\_\_ (slip op. at 18).

<sup>214</sup> Ex. NRC-176-R at A.44.

<sup>215</sup> See Section VI.A.1 *supra*; see also Ex. NRC-176-R at A.20–21; Tr. at 1690; Ex. NRC-192.

key issues. For example, after asserting throughout the course of the proceeding that only a site survey will cure the NEPA deficiency, and specifically stating that “a simple literature review, background check, or some similar effort is not sufficient,”<sup>216</sup> the Tribe subsequently criticized the Staff for not engaging in other means of collecting information short of such a survey, such as conducting oral interviews alone. At hearing however, the Tribe was unwilling to opine that such interviews would ultimately be able to provide the requisite information.<sup>217</sup> The Tribe also appears to have changed its position with respect to the appropriateness of enlisting archeologists to assist in obtaining cultural resource information. The Tribe criticized the adequacy of an archeologist’s perspective 16 times in its Response Statement of Position,<sup>218</sup> previously rejected the Staff’s attempt to hire a CRM firm,<sup>219</sup> and stated on numerous occasions that only the Tribe was qualified to identify its own cultural resources. In contrast, at hearing the Tribe seemed amenable to the idea of the Staff hiring a CRM firm.<sup>220</sup> The Tribe also advocated an approach seemingly at odds with its repeated demand for a “scientifically defensible” methodology: having criticized previous Staff proposals as lacking “scientific integrity,”<sup>221</sup> the Tribe, with support from the Consolidated Intervenors, suggested that the Staff should have interviewed Lakota people, seemingly at random, to assess whether they had relevant

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<sup>216</sup> Ex. NRC-190 at 3.

<sup>217</sup> See Tr. at 2014. When the Board asked Mr. White directly whether the Staff would be able to obtain the necessary information through interviews absent a site survey, he replied, “I have no comment on that. I’m not an expert in that.” *Id.* This comment is puzzling considering Mr. White’s testimony and basis of his admission as an expert witness.

<sup>218</sup> See e.g., Tribe’s RSOP at 2, 3, 17, 18, 21, 30, 40, 44, 50.

<sup>219</sup> Ex. NRC-064 (rejecting KLJ proposal (Ex. BRD-011, Kadrmass, Lee & Jackson, Inc., Scope and Fee for the U.S. Nuclear Regulatory Commission and Powertech (USA) (Oct. 2012) (non-public) (ML19242C260))); Tr. at 1947.

<sup>220</sup> Tr. at 1857. Dr. Morgan stated that “there’s been an opening up and more participation based upon those individual CRM firms that are respectful of our ways and have built relationships with us as Native nations. And so there’s potential there.” She further asked with respect to the Staff’s proposed draft methodology, “how would you not have a piece in there where you are paying either a CRM company and/or a TCP company to do that work?” *Id.* at 1939.

<sup>221</sup> See Ex. NRC-176-R at A.19, A.26, A.30.



knowledge.<sup>222</sup> We agree that the Tribe's changing position with respect to these key issues further supports the reasonableness of the Staff's determination that reaching an agreement would not be possible, and that the information it seeks is unavailable.

b. *The Staff Reasonably Concluded that the Cost of Obtaining the Required Information from the Tribe was Exorbitant*

6.43 The Staff testified that the costs of the Tribe's proposed alternatives to the March 2018 Approach were exorbitant on their face. Specifically, the Staff testified that the cost of the Makoche Wowapi proposal was approximately \$818,000 and the cost of the Tribe's June 2018 proposal, prepared by Quality Services, was approximately \$2 million.<sup>223</sup> In LBP-15-16, we already determined that the cost of the Makoche Wowapi proposal was patently unreasonable.<sup>224</sup> Additionally, when we further inquired into the Tribe's June 2018 proposal at the hearing, even the Tribe's witness, Dr. Morgan, testified that the \$2 million cost of the proposal "seems high."<sup>225</sup> Accordingly, we find that even considering solely the dollar amounts, the cost of the Tribe's proposed alternatives is unreasonable.

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<sup>222</sup> Tribe's RSOP at 42; CI SOP at 2; Ex. OST-42-R ¶ 74.

<sup>223</sup> Ex. NRC-176-R at A.49–51; Tr. at 1883.

<sup>224</sup> *Powertech*, LBP-15-16, 81 NRC at 656–57 & n.229 (citing Tr. at 807, 810) (referring in part to "the funds requested to collect tribal cultural information" associated with the Makoche Wowapi proposal and comparable survey efforts); see also *Powertech*, LBP-17-9, 86 NRC at 177 & n.33 (stating "the Board [in LBP-15-16] found that the cost of the survey proposal, estimated at close to \$1 million . . . was unreasonable.").

<sup>225</sup> Redacted Tr. at 8. Furthermore, the Tribe has asserted that the Staff has not demonstrated exorbitant cost because it has not provided "actual cost data." See Tribe's RSOP at 40–41. Our determination, however, derives from the fact that the information from the Tribe needed to satisfy the deficiency in the FSEIS – expressed in dollars, time, and resources – is exorbitant as evidenced by the Tribe's own proposals and the change in its negotiating positions. See Ex. NRC-176-R at A. 49–51. The NRC stated that without the realistic prospect of an agreement with the Tribe to conduct a Tribal site survey, the missing information is not otherwise obtainable. *Id.* When compared to the figures that all parties agreed were reasonable under the March 2018 Approach, we find that it is reasonable for the Staff to conclude, based on the only specific proposals the Tribe has provided, that the cost to obtain the information is exorbitant and that further efforts to implement the March 2018 Approach would not be fruitful.

6.44 The Staff also maintains that the cost of the Tribe's June 2018 proposal is exorbitant in terms of time.<sup>226</sup> The Staff testified, and the Tribe's witness confirmed at hearing, that the time required to complete the work under the Tribe's June 2018 proposal would be "a year to a year and a half,"<sup>227</sup> despite the parties all having agreed under the March 2018 Approach that two noncontiguous two-week periods was a reasonable amount of time to conduct the survey. The Board inquired as to how much time would be required to cover the affected 2600-acre site at the hearing. Based on the Staff's and Tribe's witness testimony, we determined that working eight hour days, the work could be done by nine people in approximately 19 days – which is consistent with the March 2018 Approach and the Staff's 2019 proposed draft methodology.<sup>228</sup> Additionally, Mr. Spangler testified that two two-week periods was sufficient to survey the affected area of the project site.<sup>229</sup> Nonetheless, the Tribe now appears to take the position that the parties should abandon the March 2018 Approach and implied that methodology negotiations should "start all over."<sup>230</sup> In light of the exorbitant dollar costs of the Tribe's alternative proposals and the Tribe's change of position with respect to the previously agreed upon Approach, we find that the Staff reasonably determined that the overall cost of obtaining the information from the Tribe is exorbitant, particularly where the information is not essential to a reasoned choice among alternatives.

3. The Staff Has Satisfied 40 C.F.R. § 1502.22

6.45 As discussed above, the Commission recently clarified that the Staff is not bound by 40 C.F.R. § 1502.22. Rather the Staff must make "reasonable efforts" to obtain unavailable

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<sup>226</sup> Ex. NRC-176-R at A.49.

<sup>227</sup> Tr. at 1969.

<sup>228</sup> Redacted Tr. at 32–33.

<sup>229</sup> Tr. at 2007. Specifically, Mr. Spangler stated that "it would take 173 person days. . . to do 2600 acres, and that's definitely doable in a four-week period."

<sup>230</sup> *Id.* at 1953.

information.<sup>231</sup> Nonetheless, the Staff has demonstrated that the standards considered by that regulation are met here. First, the NRC looks to CEQ regulations for guidance, but the regulations cannot impose a substantive requirement on the Staff. Second, even if they could, the information specified by 1502.22 is on the record. Finally, the record of this proceeding modifies the NEPA document and no formal supplement is required.

a. *The NRC Looks to CEQ's Regulations as Guidance, and Those Regulations Cannot Impose a Substantive Requirement on the Staff*

6.46 The Commission has concluded that the NRC looks to CEQ regulations as guidance, but is not bound by them.<sup>232</sup> Further, the Commission recently reiterated that “as an independent regulatory agency we are not bound by section 1502.22” and that the Staff is must only “undertake reasonable efforts to obtain unavailable information.”<sup>233</sup> This is especially true where a CEQ regulation purports to impose a substantive rather than procedural requirement on the Staff.<sup>234</sup>

6.47 At hearing, the Tribe suggested that the Staff had failed to comply with additional substantive requirements of 1502.22. Specifically, the Tribe’s counsel stated that:

Part of the legal test under 1502.22 is to gather available information...[T]he point the tribe was making, was that there is, regardless – even if the Board were to accept the premise that the cultural survey, on-the-ground survey, was unavailable, there is additional available information that exists that could have been obtained, not to intimate that a change in the tribe's longstanding position that a cultural resources survey on the ground is necessary to satisfy NEPA.<sup>235</sup>

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<sup>231</sup> *Powertech*, CLI-19-09, 90 NRC at \_\_\_ (slip op. at 15).

<sup>232</sup> *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-02-25, 56 NRC 340, 348 n.22 (2002) (citing *Limerick Ecology Action, Inc. v. NRC*, 869 F.2d 719, 743 (3d Cir. 1989)); *Dominion Nuclear North Anna, LLC* (Early Site Permit for North Anna ESP Site), CLI-07-27, 66 NRC 215, 222 n.21 (2007).

<sup>233</sup> *Powertech*, CLI-19-09, 90 NRC at \_\_\_ (slip op. at 18).

<sup>234</sup> *Diablo Canyon*, 74 NRC at 444 (quoting Final Rule, Environmental Protection Regulations for Domestic Licensing and Related Regulatory Functions and Related Conforming Amendments, 49 Fed. Reg. 9352, 9352 (Mar. 12, 1984)).

<sup>235</sup> Tr. at 2015.

This position amounts to an assertion that the Staff must pursue additional methods for obtaining information regardless of whether, as we have found above, it has undertaken extensive efforts to negotiate and implement an approach that the parties agreed was reasonable but which the Tribe then constructively rejected. This claim is demonstrably inconsistent with the Commission's recent reiteration that the relevant legal inquiry is simply whether the Staff made reasonable efforts to obtain the unavailable information. Further, the Tribe's position also demonstrates the futility of finding that NEPA requires the Staff to separately pursue oral interviews: the Tribe itself states that such action absent the on-the-ground survey the Tribe has consistently demanded would not be sufficient to resolve the NEPA deficiency. We agree with the Staff that under these circumstances, to interpret 1502.22 to require additional efforts to obtain the incomplete or unavailable information – including any other attempt to gather additional information that would not even resolve the NEPA deficiency, according to the Tribe – would have the effect of imposing substantive requirements on the agency.

6.48 Furthermore, 40 C.F.R. § 1502.22 does not alter or diminish NEPA's rule of reason and in fact, only serves as a "useful guide in determining what is reasonable."<sup>236</sup> As discussed at length above, in this case the Staff has relied on statements by the Tribe in selecting a reasonable means to secure the information required to cure the NEPA deficiency. After lengthy negotiations resulting in agreement by all parties, the Tribe withdrew its support for the agreed upon approach, nullifying months of negotiation, and even implied at hearing that the Staff should simply start over. As the Staff has testified, NEPA does not require the Staff to use "virtually infinite study and resources."<sup>237</sup> We find that the Staff selected a reasonable approach and took reasonable steps to implement that approach, and that the effort that the Tribe's

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<sup>236</sup> See *Powertech*, CLI-19-09, 90 NRC at \_\_\_ (slip op. at 18).

<sup>237</sup> *Entergy Nuclear Generation Co. (Pilgrim Nuclear Power Station)*, CLI-10-11, 71 NRC 287, 315 (2010) (quoting *Nat. Res. Def. Council v. Hodel*, 865 F.2d 288, 294 (D.C. Cir. 1988) (footnotes omitted).

position would necessitate to obtain the information is not required by NEPA's overriding "practical rule of reason." NEPA does not require the Staff to accede to the Tribe's desired methodology, but merely to take reasonable steps to evaluate the potential impacts to cultural resources.<sup>238</sup> In this case, the record as a whole demonstrates that the Staff has fulfilled its obligations under NEPA and, despite its reasonable efforts, has been unable to obtain information to mitigate impacts to Lakota-specific cultural resources. We agree with the Staff that, having made these reasonable efforts, it is not obliged to reset the clock and explore other options, especially those that the Tribe previously deemed insufficient.

b. *The Information on the Record Meets the Standards of 40 C.F.R. § 1502.22*

6.49 The parties agree 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;<sup>239</sup> any changes to the discussion of potential adverse effects from the Dewey-Burdock project on sites of historic, cultural, and religious significance to the Lakota Sioux Tribes; or any changes to the discussion of potential mitigation measures for such sites.<sup>240</sup> In Section VII of its initial testimony, the staff detailed the basis for its conclusion that the information it sought from the Tribe is unavailable under 40 C.F.R. § 1502.22 and further demonstrates that each of the factors is present in the record.<sup>241</sup> As such, the Staff has demonstrated that the record of this proceeding satisfies the standards of 40 C.F.R. § 1502.22.<sup>242</sup>

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<sup>238</sup> *Id.* at 208 (NEPA requirements are "tempered by a practical rule of reason" (internal citations omitted)).

<sup>239</sup> Ex. NRC 176-R at A.55

<sup>240</sup> *Id.* at A.56.

<sup>241</sup> *See id.* The Staff's initial testimony at A.47–A.51 provides the Staff's statement that the information it seeks is unavailable and provides the Staff's justification for this conclusion: A.53 provides a statement of the relevance of the missing information; A.54 summarizes the existing credible scientific evidence relevant to evaluating the significant impacts of the project on the human environment; and A.55–A57 provide the Staff's evaluation of these impacts.

<sup>242</sup> *See* ISOP at 60–61.

c. *The Staff's FSEIS, As Supplemented by the Information in the Record of This Proceeding, Satisfies the Criteria of 40 C.F.R. § 1502.22 and NEPA*

6.50 We have discussed throughout this proceeding whether the Staff is required to provide a formal supplement to the FSEIS. The Staff testified that longstanding Commission caselaw, recently affirmed by the D.C. Circuit, specifies that where the Staff has provided information that cures a NEPA defect on the adjudicatory record, it is not required to draft a formal supplement to the NEPA document.<sup>243</sup>

6.51 As the Staff's testimony demonstrates, the information that the Staff obtained in the course of seeking to implement the survey did not materially affect the FSEIS's analysis and conclusions.<sup>244</sup> Likewise, and as discussed above, the information the Staff sought to obtain via the site survey would not have altered either the Staff's ultimate impact conclusions in the FSEIS or the ultimate decision to issue the license.<sup>245</sup> Accordingly, to require a formal supplement to the FSEIS to present information that ultimately does not alter the Staff's impact conclusions, but solely confirms what has already been scrutinized in the public forum of this evidentiary hearing—that additional information regarding cultural resources could not be obtained—would “serve no important NEPA goal.”<sup>246</sup>

6.52 In sum, we find that through the record of this proceeding, the Staff has provided information that meets the criteria listed in 40 C.F.R. § 1502.22 and thus has satisfied NEPA.

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<sup>243</sup> See *La. Energy Servs., L.P.* (Claiborne Enrichment Center), CLI-98-3, 47 NRC at 89; *Strata Energy, Inc.* (Ross In Situ Uranium Recovery Project), CLI-16-13, 83 NRC 566, 595 (2016), *aff'd*, *Nat. Res. Def. Council v. NRC*, 879 F.3d 1202, 1210 (D.C. Cir. 2018) (the “hearing record, and subsequent decision on a contested environmental matter augment the environmental record of decision”).

<sup>244</sup> Ex. NRC-176-R at A.55.

<sup>245</sup> *Id.* at A.56.

<sup>246</sup> *Crow Butte Resources, Inc.* (Crawford, Nebraska Facility), CLI-18-8, 88 NRC 141, 170 (2018); *cf. Nat. Res. Def. Council v. NRC*, 879 F.3d at 1210–12 (where Board augmented environmental record of decision with additional information but the information did not alter Board's conclusion, no “harmful consequence of the supplementation” was identified and there was therefore “nothing to be gained by ... consider[ing] the same information again”); *Friends of the River v. FERC*, 720 F.2d 93, 106 (D.C. Cir. 1983) (declining to remand for new environmental impact statement where agency, in response to public comments, already had investigated and addressed issues in publicly accessible opinion).

## VII. CONCLUSIONS OF LAW

7.1 The Board has considered all of the evidence presented by the parties on Contention 1A. Based upon a review of the entire record in this proceeding, and based upon the findings of fact set forth above, which are supported by reliable, probative, and substantial evidence in the record, the Board has decided all matters in controversy concerning Contention 1A, and reaches the following conclusions.

7.2 The Board concludes that the Staff's proposed draft methodology was objectively reasonable and was developed to blend the scientific method with tribal cultural knowledge in response to the Tribe's request.

7.3 The Board concludes that under the circumstances of this case, the Staff's specified timeline and reimbursement amounts for the implementation of the proposed draft methodology are reasonable, not only because all parties agreed to the March 2018 Approach, but also because the record demonstrates that the work can reasonably be accomplished within these parameters.

7.4 The Board concludes that the Staff reasonably determined that the information it sought from the Tribe is unavailable. The Staff offered the Tribe numerous opportunities for a survey and developed a reasonable approach to which all parties agreed. The Tribe's subsequent repudiation of that agreement and changing positions with respect to key issues reinforce the Staff's determination that reasonable efforts will not elicit the information.

7.5 The Board concludes that the Staff has demonstrated compliance with 40 C.F.R. § 1502.22 and, as a result, has demonstrated that it took the reasonable efforts required by NEPA to obtain the unavailable information.

7.6 The Board concludes that this decision and the record of this proceeding is deemed to supplement the Staff's NEPA document and constitutes the complete NEPA record.

7.7 We therefore affirm that the Staff has taken the requisite "hard look" at the impacts to cultural resources at the Dewey-Burdock project site and that its FSEIS, as

supplemented by the record of this proceeding, complies with the requirements of NEPA.

Accordingly, we resolve Contention 1A in favor of the Staff.

Respectfully submitted,

**/Signed (electronically) by/**

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

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Dated at Rockville, Maryland  
this 4th day of October, 2019.



October 4, 2019

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "NRC Staff's Proposed Findings of Fact and Conclusions of Law" in the above captioned proceeding have been served via the NRC's Electronic Information Exchange ("EIE"), the NRC's E-Filing System, this 4<sup>th</sup> day of October, 2019, which to the best of my knowledge resulted in transmittal of the foregoing to those on the EIE Service List for the above-captioned proceeding. Counsel for the Staff served those representatives exempted from filing through the EIE with copies by electronic mail, also on October 4, 2019.

**Signed (electronically) by**

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