

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)	
)	
POWERTECH (USA) INC.,)	Docket No. 40-9075-MLA
)	
(Dewey-Burdock In Situ Uranium Recovery)	October 18, 2019
Facility))	

OGLALA SIOUX TRIBE’S REPLY
FINDINGS OF FACT AND CONCLUSIONS OF LAW

Pursuant to this Board’s September 6, 2019 Order, the Oglala Sioux Tribe (“Tribe”) hereby submits this Reply Findings of Fact and Conclusions of Law.

INTRODUCTION AND SUMMARY

The questions presented in this hearing can be resolved on conclusions of law, without addressing who said what during negotiations in an adversarial adjudication. However, the underlying factual questions, most of which involve NRC Staff’s assertions regarding discussions during these adversarial adjudicatory proceedings, do not support the finding that would excuse NRC Staff’s National Environmental Policy Act (“NEPA”) violations. Despite NRC Staff’s narrow focus on its discussions with the Tribe and the Board’s hearing, the Tribe has been denied the benefit of the informed participation of other Tribes, other agencies, and the public in the NEPA process. As a result, NRC Staff has not met its burden to demonstrate compliance with the applicable federal law in this proceeding.

The single most important conclusions of law were originally made by the Board in LBP-15-16 – finding that the Final Supplemental Environmental Impact Statement (FSEIS) failed to comply with the National Environmental Policy Act (NEPA) requirement that the agency take a

“hard look” at impacts from the Dewey-Burdock uranium mine proposal. This ruling was upheld by the Commission and is not open for re-adjudication. *See Va. Elec. & Power Co.* (North Anna Nuclear Power Station, Units 1 and 2), ALAB-584, 11 NRC 451, 463-465 (1980). NRC Staff’s continued attempts to simply point to the original FSEIS as the basis for a Board ruling in its favor on Contention 1A may not, as a matter of law, suffice. Secondly, NRC Staff’s admitted disregard for the statutory procedural requirements of NEPA, including the public notice and comment procedures embodied in 40 C.F.R. § 1502.22, fatally doom NRC Staff’s attempts to demonstrate NEPA compliance. Third, NRC Staff misapplies NEPA so-called “rule of reason” in an unpersuasive attempt to escape the “hard look” mandate.

As to findings of fact, NRC Staff’s continued mischaracterizations of the record regarding the Tribe’s position regarding the March 2018 Approach also do not suffice to meet NRC Staff’s burden. The facts in the record demonstrate that while the Tribe has expressed concern about the timelines and funding for the approach, the Tribe has repeatedly demonstrated a commitment to resolving the differences and conducting the work. In contrast, NRC Staff provided no evidence of qualified persons on NRC Staff, failed to obtain a culturally qualified contractor, and unreasonably refused to work with the Tribe to consummate the cultural resources survey. NRC Staff’s emphasis on litigation is consistent with the decision to forego qualified persons, and predictably resulted in the failure to develop a reasonable mechanism for conducting a cultural resource survey. The return to litigation was guaranteed by NRC Staff’s decision to provide no resources for the qualified persons employed by the Tribe who NRC Staff claim are necessary to conduct the survey.

Instead, NRC Staff unreasonably attempted to force the Tribe to bear the majority of the costs necessary to design the methodology and conduct the on-the-ground survey work. The

NRC Staff's negotiating tactics placed unfunded burdens on the Tribe that predictably and unreasonably precluded any chance at compromise. The \$10,000 honorarium for the Tribe pledged by Powertech would fall short of covering the costs of Tribal member participation and was never intended to cover the Tribe's costs to implement the March 2018 Approach. Even absent an on-the-ground cultural resources survey, NRC Staff irrationally abandoned all efforts to collect any of the other readily available information on the impacts from the project on cultural resources. Indeed, NRC Staff foreclosed productive discussions with multiple Tribes a mere week after presenting a draft methodology for the Tribes' review, before any meaningful attempts were made to incorporate the Tribes' input into the draft. The result was an unreasonable and incomplete draft methodology that lacked any Tribal input.

In short, there was no final methodology for the parties or the Board to assess at the hearing, and NRC Staff has admittedly not used any NEPA procedures to remedy the NEPA violations identified by the Board and Commission. There is simply nothing for the Board to approve that could avoid the already-adjudicated NEPA violations.

As a matter of law, NRC Staff has not yet complied with NEPA's procedural mandate by preparing an EIS that remedies the duly adjudicated NEPA violations. Such an EIS must be subjected to public review and comment and must either provide the required cultural resources analysis or meet the four-part test required to avoid the NEPA mandate. 40 C.F.R. § 1502.22 (b).

As remedy, because Powertech has expressed an unwillingness and inability to pay for the necessary NEPA analysis, the license must now be set aside. A better course, and the reasonable course that could satisfy NEPA, is to deny the application and direct NRC Staff to consider the Powertech proposal, along with any new information on the scope of the project,

pursuant to a new application that addresses the procedural shortcomings and lack of information provided by Powertech's original application.

ARGUMENT

I. NRC Staff's Reliance on the Existing Record for NEPA Compliance is Unsupportable

NRC Staff's principal argument in this proceeding hinges on an assertion that the FSEIS contains all the information necessary for the Board to find compliance with NEPA's "hard look" mandate. NRC Staff Proposed Findings of Fact and Conclusions of Law at 3-4. However, the agency admits that "the environmental record of decision in this matter does not include any new information on the presence of sites of historic, cultural, and religious significance to the Lakota Sioux Tribes at the Dewey-Burdock site; any changes to the discussion of potential adverse effects from the Dewey-Burdock project on sites of historic, cultural, and religious significance to the Lakota Sioux Tribes; or any changes to the discussion of potential mitigation measures for such sites." NRC Staff Proposed Findings of Fact and Conclusions of Law at 50.

This is despite the Board's ruling, affirmed by the Commission, that the existing record does not satisfy NEPA's "hard look" requirement. LBP-15-16, 81 NRC 618, 653-655 (2015); LBP-18-5, 88 NRC 95, 125 (2018). The Board held that NRC Staff "must conduct a study or survey of tribal cultural resources before granting a license" and that because "the cultural, historical, and religious sites of the Oglala Sioux Tribe have not been adequately catalogued, the [FSEIS] does not include mitigation measures sufficient to protect this Native American Tribe's cultural, historical, and religious sites that may be affected by the Powertech project." 88 NRC at 125. As admitted by NRC Staff, no such study or survey has occurred.

II. NRC Staff Unlawfully Disregards the Procedural Requirements of 40 C.F.R. § 1502.22

NRC Staff attempts to evade the procedural requirements of 40 C.F.R. § 1502.22 by simply labeling them as “substantive.” NRC Staff Proposed Findings of Fact and Conclusions of Law at 49. This mischaracterization ignores that ““NEPA imposes only procedural requirements.”” *Oglala Sioux Tribe v. NRC*, 896 F.3d 520, 534 (D.C. Cir. 2018)(*quoting Winter v. NRDC*, 555 U.S. 7, 23 (2008)). In any case, NRC Staff’s “substantive” argument merely confirms its failure to demonstrate that it has complied with the procedural requirements of 40 C.F.R. § 1502.22. The Tribe provided a detailed response to NRC Staff’s arguments on this issue, which remain virtually unchanged from NRC Staff’s Opening Statement submitted on May 17, 2019. As such, the Tribe incorporates herein the argument on these issues, rebutting NRC Staff’s legal arguments and authorities, contained in the Oglala Sioux Tribe’s Response Statement of Position at pp. 30-50.

40 C.F.R. § 1502.22 requires that:

The agency shall include within the environmental impact statement:

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

40 C.F.R. § 1502.22(b). In this case, NRC Staff has not included any of the relevant information in an environmental impact statement and has not made a draft EIS available for public comment or review. This procedural requirement is central to NEPA’s process, as “the purpose of the ‘hard look’ requirement is to ‘foster both informed agency decision-making and informed public participation.’” NRC Staff Proposed Findings of Fact and Conclusions of Law at 11 (citing

Louisiana Energy Servs., L.P. (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77, 87-88 (1998)(quoting *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 371 (1989)).

Without public participation in the form of public review and comments, NEPA's statutory purposes are not met.

As discussed in the Oglala Sioux Tribe's Proposed Findings of Fact and Conclusions of Law, NRC Staff and Powertech cited NRC and federal court authority provide only a narrow exception to the public comment and review requirements for instances where the NEPA document in fact includes the relevant analysis and the adjudicatory record merely confirms that analysis. *See* Oglala Sioux Tribe Proposed Findings of Fact and Conclusions of Law at 38-46. This narrow exception is not applicable here, as the FSEIS here (as confirmed by the Board and Commission) lacks an analysis of Lakota cultural resources.

Powertech's legal arguments regarding the standard for supplementation of an existing EIS are inapplicable. *See* Powertech Reply at 6. The cases cited by Powertech pertain to situations where a final, complete, and lawful NEPA document is issued and new information arises potentially bringing the analysis contained in that final NEPA document into question. Here, the NEPA document was never lawfully completed – as this Board has repeatedly found – and thus Powertech's argument in this respect is simply inapplicable.

NRC Staff has also failed to provide the necessary "summary of existing credible scientific evidence which is relevant to evaluating the reasonably foreseeable significant adverse impacts on the human environment." 40 C.F.R. § 1502.22(b)(3). With respect to this procedural requirement, NRC Staff points solely to its prefiled testimony at A.54. NRC Staff Proposed Findings of Fact and Conclusions of Law at 50, n. 241. However, that section of the Staff's testimony merely references the Dr. Nickens literature review (Exhibit NRC-224) and a

“Summary of Tribal Cultural Heritage Resources Data Acquired in June 2018” (Exhibit NRC-196). NRC Staff now overtly disavows the literature review as “irrelevant.” NRC Staff Proposed Findings of Fact and Conclusions of Law at 35. Further, the Tribe’s prefiled testimony and the live testimony at the August 2019 hearing thoroughly discredited the literature review in terms of both its content and its failure to account for significant available literature sources. For example, Dr. Howe’s uncontradicted testimony was that the Nickens literature review contained serious “factual errors on historical dates and then there’s just omissions of core document or core references dealing with Lakota history and culture.” August 28, 2019 Transcript at 1842, lines 19-21. (“these are core documents. I mean, these are the books by the first anthropologists and ethnologists and people that know Lakota history and culture. These are there. These are the ones that are -- everyone knows and they are absent from the lit review.”). *Id.* at 1843, lines 2-7. *See also* Exhibit OST-045-R (Declaration of Dr. Craig Howe) at ¶¶ 10-23.

Similarly, the June 2018 Summary document (Exhibit NRC-196) is nothing more than an effort by students hired by an NRC Staff contractor to attempt to recreate GIS location data that was not gathered during previous, inadequate efforts to identify and document cultural resources at the proposed mine site. August 29, 2019 Transcript at 2069-70. Indeed, NRC Staff witness Ms. Diaz-Toro specifically disavowed the document as not providing any information “relevant to evaluating the reasonably foreseeable significant adverse impacts on the human environment” (40 C.F.R. § 1502.22(b)). Specifically, Ms. Diaz-Toro testified that “[i]t doesn’t provide any information that, about the significance of known tribal sites to the Oglala Sioux Tribe. It’s not a methodology. It’s, it doesn’t, it doesn’t provide the information that the NRC staff would need in order to assess impacts.” August 29, 2019 Transcript at 2069 line 23 to 2070 line 2.

NRC Staff's Proposed Findings of Fact and Conclusions of Law neglected to address the evidence in the record demonstrating NRC Staff has refused to collect and review any of the other available information on impacts to cultural resources. These sources include additional literature sources, existing available studies and cultural resources reviews, oral interviews, and other sources. *See* Oglala Sioux Tribe Proposed Findings of Fact and Conclusions of Law at 52-61. Instead of remedying the previous analysis or providing any additional available information as required, NRC Staff relies entirely on the original FSEIS.

Lastly, NRC Staff has failed to conduct the procedural step of "evaluation of such impacts based upon theoretical approaches or research methods generally accepted in the scientific community." 40 C.F.R. § 1502.22(b)(4). NRC Staff asserts that its prefiled testimony at A.55 – A.57 addresses this requirement. NRC Staff Proposed Findings of Fact and Conclusions of Law at 50 n. 241. However, nothing in that section of Staff's testimony purports to contain such an evaluation. Indeed, those portions of Staff testimony merely point to the FSEIS. There is no discussion or reference to theoretical approaches or research methods, nor how or whether these methods are accepted in the scientific community.

Overall, NRC Staff simply disparages and discounts the procedural requirements of NEPA embodied in section 1502.22. This approach ignores the express terms of the statute that require NEPA compliance "to the fullest extent possible" 42 U.S.C. § 4332(2)(C). Instead, NRC Staff adopt a novel, unsupported, and highly generalized "reasonableness" approach. The Commission's Order in CLI-19-09 does not authorize complete abandonment of the section 1502.22 requirements or the statutory standard. The Commission's official policy is embodied in 49 Fed.Reg. 9352, 9353–54 (1984), which professes that the Commission will follow these procedural requirements. That Commission rulemaking exercise is binding, and NRC Staff is

not free to challenge the statutory standard or the rulemaking in this adjudicatory proceeding. 10 C.F.R. § 2.335.

III. NRC Staff Continues to Misapply the NEPA Rule of Reason

As discussed thoroughly in the Oglala Sioux Tribe's Proposed Findings of Fact and Conclusions of Law, NEPA's so-called "rule of reason" applies where a litigant is requesting an agency to review types of impacts that are entirely speculative and remote. Oglala Sioux Tribe Proposed Findings of Fact and Conclusions of Law at 61-66. NRC Staff's and Powertech's continued reliance on this theory should be rejected by the Board as inapplicable where, as here, there is no debate that the project may (indeed will) have significant impacts on confirmed cultural resources.

IV. NRC Staff's Proposed Factual Findings Mischaracterize the Tribe's Positions on the March 2018 Approach

As detailed in the Tribes Response Statement of Position (at 8-16) and Proposed Findings of Fact and Conclusions of Law (at 9-19), NRC Staff's assertion that the Tribe rejected the March 2018 Approach, constructively or otherwise, is false. It is equally true that the Tribe never fully endorsed the March 2018 Approach, which was prepared before any NRC contractors were on boarded and which left principal and difficult questions such as methodology and actual costs, unanswered.

Indeed, the record demonstrates that it was the Tribe that continued to engage and sought to continue to pursue development of the methodology contemplated by the March 2018 Approach, and it was NRC Staff that repeatedly shut down and refused to participate in discussions. *See* Oglala Sioux Tribe Proposed Findings of Fact and Conclusions of Law at 10-12 (detailing the Tribe's efforts in 2018 and 2019 to ensure discussions continued and on-the-ground field work commenced). It is unreasonable for NRC Staff to blame the Tribe for NRC

Staff's failure to develop a methodology, failure to continue discussions, and rejection of the Tribe's efforts to begin field work at the site.

As early as June of 2018, when NRC Staff arrived in South Dakota with Dr. Nickens, but without any credible methodology, it was the Tribe that expended its own resources to provide some basis for discussions on methodology to occur. August 29, 2019 Transcript at 1977, lines 24-25. As repeatedly demonstrated, the Tribe's methodology discussion draft was just that, a draft for discussion. *See* Oglala Sioux Tribe Proposed Findings of Fact and Conclusions of Law at 49. The testimony also demonstrates that even though Mr. White, as the new Tribal Historic Preservation Officer, was not comfortable with the two, two-week period timeframe, the Tribe expressly agreed both in 2018 and 2019 to begin field work despite these concerns. *See* August 29, 2019 Transcript at 1986 lines 2-7 (2018); *id.* at 2004 lines 12-25 (2019). Thus, the record simply does not support NRC Staff's narrative that the Tribe "rejected" the March 2018 Approach such that there was no possibility of coming to an agreement on the methodology.

Rather, it was NRC Staff that failed to obtain qualified staff, unreasonably refused to provide the Tribe sufficient resources to conduct the survey work that requires trained professionals, and that unreasonably abandoned all aspects of the March 2018 Approach and February 2019 Draft Methodology. In both 2018 and 2019, NRC Staff unilaterally shut down discussions nearly immediately after the Tribe, (through qualified staff, qualified professionals, and persons with traditional ecological knowledge), expressed their concerns in face-to-face meetings with NRC Staff and NRC contractors, despite the Tribe's good faith efforts to help NRC Staff comply with NEPA procedures. Instead of engaging difficult questions by faithfully following the NEPA procedures set out in the March 2018 Approach, NRC Staff retreated to

litigation and reliance on letters and motions practice. The Board cannot rescue NRC Staff's unreasonable decisions to forego NEPA.

As discussed in the Oglala Sioux Tribe's Proposed Findings of Fact and Conclusions of Law, NRC Staff choked off the March 2018 Approach by refusing to even discuss options for allowing the Tribe more than \$10,000 to implement all aspects of the March 2018 Approach, including accomplishing the on-the-ground cultural resources survey, conducting the oral interviews, and drafting and reviewing the report. *See* Oglala Sioux Tribe's Proposed Findings of Fact and Conclusions of Law at 51-52. Other viable options rejected out of hand by NRC Staff included the reasonable possibilities of combining some or all of the seven offered \$10,000 honoraria, of seeking grants or other government funding sources, and of allowing NRC Staff's contractor (SC&A) to bring on other qualified subcontractors to complete the work. *Id.*

NRC Staff's repeat references to "months" of negotiations with the Tribe over the draft methodology is contradicted by record evidence that confirms the discussions involving NRC contractors only spanned a few days in June 2018 and February 2019. NRC Staff Proposed Findings of Fact and Conclusions of Law at 10, 18, 28, 29, 49. The record demonstrates that NRC Staff did not hire any sort of contractor to aid with the development of any methodologies (including the March 2018 Approach) until May of 2018. August 29, 2019 Transcript at 2052, line 23 to 2053, line 3. This originally was Dr. Nickens, who arrived in South Dakota in June of 2018 purportedly to commence field work, but with a document that "very much lacked a scientific methodology. I mean, it was just - - it wasn't structured correctly. It didn't have definitions and it didn't have protocols that we expect in a scientific methodology." August 29, 2019 Transcript at 1958, lines 16-22 (Mr. Spangler).

Similarly, the subsequent effort at a draft methodology was presented to the Tribe on February 15, 2019 – just one week before the February 22, 2019 meeting in Pine Ridge. Exhibit NRC-211 at 5. On January 11, 2019, the Tribe objected to the NRC Staff announcement that Mr. Spangler, an archaeologist specializing in what he terms “‘prehistoric’ people of the Desert Southwest” had been assigned to this matter. Exhibit NRC-203 at 2.¹ At the February 22, 2019 meeting, despite Mr. Spangler’s unfamiliarity, and lack of any experience, with Lakota culture, the Tribes and Mr. Spangler nevertheless all expressed optimism at the prospect of continuing discussions to develop the draft survey and include input from the Tribes. Exhibit NRC-218 at 2.

A mere one week later, with no additional contact, NRC Staff provided the Tribe its March 1, 2019 letter where NRC Staff effectively killed all discussions. Exhibit NRC-215. Thus, NRC Staff abandoned the field survey methodology discussions after one week, never provided a contractor or subcontractor with any experience in Lakota cultural issues, and never allowing for any input from any of the Tribes to be incorporated into the draft methodology. NRC Staff’s unreasonable conduct should be rejected by the Board.

CONCLUSION

The Tribe maintains and incorporates by reference its Response Statement of Position and Proposed Findings of Fact and Conclusions of Law to rebut NRC Staff and Powertech arguments not specifically addressed herein. The result of the hearing cannot provide NEPA compliance, as no public comment and review has been provided. NRC Staff has not prepared a

¹Unlike the qualifications proffered in his pre-filed testimony, Mr. Spangler’s online qualifications identify no experience or expertise with Lakota culture, or any living modern indigenous culture for that matter. Exhibit NRC-203 at 2 *citing* <http://www.cparch.org/Uinta%20Research/web/26.html>

NEPA document that includes either a competent review of the impacts of the Dewey-Burdock Project to Lakota cultural resources nor the required procedural elements of 40 C.F.R. § 1502.22. Therefore, as a matter of law, NRC Staff cannot prevail at this juncture.

The record demonstrates that NRC Staff unreasonably implemented the March 2018 Approach by refusing necessary funding and refusing to discuss development of a methodology with any flexibility. NRC Staff then unreasonably abandoned all negotiations with the Tribe and implementation of any of the elements of the March 2018 Approach. NRC Staff has not met its burden to demonstrate that all relevant information was unavailable or that it has satisfied NEPA's requirements for leaving relevant information out of an EIS. On the evidence provided, the Board has the necessary information to enter an order setting aside the FSEIS, ROD, and license. In this way, the Board can create a clean slate on which NRC Staff can carry out the required NEPA analyses.

Respectfully Submitted this 18th Day of October 2019,

/s/ Jeffrey C. Parsons

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing OGLALA SIOUX TRIBE’S REPLY FINDINGS OF FACT AND CONCLUSIONS OF LAW in the above-captioned proceeding were served via the Electronic Information Exchange (“EIE”) on the 18th day of October 2019, which to the best of my knowledge resulted in transmittal of same to those on the EIE Service List for the captioned proceeding.

/s/ signed electronically by_____

Jeffrey C. Parsons
Western Mining Action Project