

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of:	)	Docket No. 40-9075-LR
POWERTECH (USA) INC.	)	ASLBP No. 25-987-01-LR-BD01
(Dewey-Burdock In Situ Uranium Recovery Facility)	)	July 17, 2026
	)	

**NEW AND AMENDED CONTENTIONS OF THE OGLALA SIOUX TRIBE,
NDN COLLECTIVE, AND BLACK HILLS CLEAN WATER ALLIANCE
BASED ON THE NRC STAFF’S FINAL ENVIRONMENTAL ASSESSMENT,
FINDING OF NO SIGNIFICANT IMPACT, AND EXECUTED SECTION 106
PROGRAMMATIC AGREEMENT**

I. INTRODUCTION

Pursuant to 10 C.F.R. § 2.309(f), and together with the accompanying Motion for Leave to File (the “Motion”), the Oglala Sioux Tribe, NDN Collective, and Black Hills Clean Water Alliance (“Organizational Intervenors”) submit the following two amended contentions and six new contentions based on the NRC Staff’s Final Environmental Assessment and Finding of No Significant Impact (“EA” or “FONSI”) (ML26163A295) and the Section 106 Programmatic Agreement executed June 4, 2026 and filed with the Advisory Council on Historic Preservation on June 5, 2026 (“PA”) (ML26159A198; ML26159A199(Appendices)), which the EA incorporates by reference. EA at 1-5, 1-47. The Motion demonstrates that each contention satisfies 10 C.F.R. § 2.309(c)(1); this pleading demonstrates that each contention satisfies the admissibility factors of 10 C.F.R. § 2.309(f)(1). The factual record of the Section 106 process set out in Section IV of the Motion is incorporated here by reference.

II. AMENDED CONTENTION 1A

Amended Contention 1A: The NRC Staff's Environmental Assessment fails to comply with NEPA and 10 C.F.R. Part 51 because it contains an inadequate, inaccurate, or incomplete description of the cultural and historical resources of the Oglala Sioux Tribe in the Dewey-Burdock Project area, in that the EA (a) relies exclusively upon archaeological surveys conducted in 2007–2012 and a 2013 tribal survey in which the Oglala Sioux Tribe did not participate; (b) abandons, without reasoned explanation and solely in response to the applicant's cost-and-time objections, the tribal cultural resources survey the Staff itself proposed in the December 2025 draft Programmatic Agreement; and (c) defers all identification and evaluation of the Tribe's traditional cultural places until after licensing, if and when ground-disturbing activities occur.

A. Basis

The Board admitted Contention 1A because the TR/ER contained no adequate identification of the Oglala Sioux Tribe's cultural and historical resources, notwithstanding record evidence that such identification is now obtainable. LBP-25-3 at 19–43. The EA does not cure that omission; it solidifies it. The EA incorporates by reference the results of the prior surveys and asserts they “provide reliable data” and that the 2014 SEIS evaluations “continue to be valid.” EA at 1-48. But it remains an undisputed adjudicated fact that the Oglala Sioux Tribe participated in none of those surveys, Red Cloud Decl. ¶¶ 9–10, 15 (ML24282B073), and the record establishes that “only Tribal members can assign significance” to sites of tribal religious and cultural significance. LBP-19-10, 90 NRC 287, 334–35 (2019), quoted at LBP-25-3 at 40 n.132. An affected-environment description that omits an entire category of resources — the Tribe's traditional cultural places and resources — cannot satisfy 10 C.F.R. §§ 51.30 and 51.45 or NEPA's requirement of an accurate description of the environment the action will affect and the project's impacts.

The EA’s validity assertion is also contradicted by the Staff’s own record. The Staff’s own summary of the June 11, 2025 tribal site visit records that, “[c]onsidering the passage of time and events like erosion and heavy precipitation, Tribal representatives recommended additional opportunities to revisit tribal sites and re-evaluate eligibility determinations.” NRC Staff, Summary of Tribal Site Visit to Dewey Burdock (June 11, 2025 visit, August 1, 2025 summary) (ML25213A145) at 3. Those representatives included the Oglala Sioux Tribe. *Id.* The governing regulation provides that “[t]he passage of time, changing perceptions of significance, or incomplete prior evaluations may require the agency official to reevaluate properties previously determined eligible or ineligible.” 36 C.F.R. § 800.4(c)(1). The EA neither acknowledges the site-visit findings nor explains why data collected between 2007 and 2013 remains an adequate present-day baseline. That omission is not a technicality. The Dewey-Burdock landscape is erosion-prone, and the field data underlying the EA is nearly two decades old — the archaeological baseline dates to approximately 2007–2008. As Intervenor explained in their comments on the draft PA, “cultural sites are subject to erosion, new sites may have been exposed, and existing sites may have changed in ways that make their significance more apparent,” so that “[r]eliance on such stale data cannot meet the ‘reasonable and good faith’ identification standard.” Organizational Intervenor’s May 18, 2026 Comments (ML26139A278) § III.E. A survey conducted today would be reasonably likely to yield materially different data and results — including newly exposed sites and features not visible when the ground was last examined. The EA’s treatment of a nearly twenty-year-old, erosion-affected, and admittedly incomplete record as a fixed and “reliable” present-day inventory is precisely the reliance on stale data that 36 C.F.R. § 800.4(c)(1) forbids. Erosion-driven change in site conditions is further addressed in the Zephier Declaration. Ex. 1 (attached hereto) (Declaration of Russel Zephier, Jr., Oglala Sioux Tribe THPO), at ¶ 9.

Finally, the EA’s deferral of identification — evaluating tribal cultural resources only “if and when ground disturbing activities would occur,” EA at 1-48 — inverts NHPA’s and NEPA’s sequence. The purpose of an environmental review and of consultation is to inform the licensing decision before it is made; a description of the affected environment that will be assembled only after licensing, site by site, as the licensee elects to disturb ground, is no description at all. Cf. LBP-15-16, 81 NRC 618, 653–57 (2015) (Staff cannot assess impacts to the Tribe’s cultural resources without first identifying them). That the identification is obtainable is not open to serious dispute: the Staff and the Tribe agreed on a survey methodology for an in situ uranium site in September 2021 (the Crow Butte protocol), and the Staff proposed that very methodology for Dewey-Burdock in December 2025 before deleting it at the applicant’s request. *See* Survey Methodology to Identify Sites of Significance to the Oglala Sioux Tribe (ML21252A089; ML21252A074); Updated Draft PA (ML25346A149) (Stip. 2(c)); Updated Draft Appendix D to Draft PA (ML25346A150); Powertech comments on PA (ML262021A141) at 2, 6–7. Notably, as discussed *infra*, NRC Staff failed to meaningfully consult with the Tribe regarding its decision to abandon the survey or with respect to the accuracy of Powertech’s comments.

The stakes of this deferral are not abstract. The record accompanying the EA and PA identifies sites of the utmost cultural significance — possible graves and burial features — among those never evaluated with Oglala Sioux Tribe participation and consigned to post-licensing “avoidance.” *See, e.g.*, Site 39CU0271/TS130, a “Possible Gravesite” located approximately 61 meters (200 feet) from proposed wellfield areas, carries an “Adverse Effect” determination, yet “Tribes recorded the site but did not provide eligibility recommendations.” ML26159A199, App. B (Adverse Effects table). Tribal sites TS093, TS094, and TS144 — cairns located within the direct APE and likewise carrying “Adverse Effect” determinations — remain “Unevaluated,” their

status changed from “not eligible” to “unevaluated” based on input from the Standing Rock Sioux Tribe, with no eligibility recommendation from the Oglala Sioux Tribe. *Id.* The EA itself catalogs additional “unevaluated burial and cairn sites” and lists “possible gravesites” among the sites disposed of by avoidance. EA at 1-49 to 1-50. Because cairns and burial features may mark human interments of profound religious significance, and because “only Tribal members can assign significance” to such sites, LBP-19-10, 90 NRC at 334–35, an environmental review that defers their identification and evaluation — while conceding they may be adversely affected — cannot satisfy NEPA’s (or NHPA’s) requirement to describe and take a hard look at the affected environment before the decision is made.

B. Satisfaction of 10 C.F.R. § 2.309(f)(1)

(i) Specific statement: whether the EA’s description of the affected environment omits or misdescribes the Oglala Sioux Tribe’s cultural and historical resources, in violation of NEPA and 10 C.F.R. §§ 51.30, 51.45, and Part 51. (ii) Basis: Section II.A, *supra*; and exhibits cited; Petition to Intervene and Request for Hearing (October 8, 2024) (ML24282B056) and exhibits cited. (iii) Scope: the contention challenges the Staff’s environmental review document for this license renewal and is squarely within the scope of the proceeding; the Board admitted the same issue as pleaded against the TR/ER. LBP-25-3 at 41–43. (iv) Materiality: an adequate description of the affected environment is a prerequisite to the findings the NRC must make under NEPA and Part 51 before renewing the license; the FONSI itself rests on the completeness of the identification record. (v) Facts and expert support: the EA’s own text (EA at 1-46 to 1-51); the PA record; the site-visit summary; the Red Cloud Declaration; the Zephier Declaration. (vi) Genuine dispute: Intervenors dispute the EA’s conclusions that the prior surveys “provide reliable data,” that the

2014 evaluations “continue to be valid,” and that deferred, avoidance-based evaluation satisfies the agency’s obligation to describe and assess the affected environment. EA at 1-47 to 1-51.

C. 10 C.F.R. § 2.309(c)(1)

The good-cause showing for this contention appears in the Motion filed herewith at Sections IV and V.A, incorporated herein by reference.

III. AMENDED CONTENTION 1B

Amended Contention 1B: The Environmental Assessment fails to explain or support its conclusion that the impacts of the Dewey-Burdock Project on cultural and historic resources will not be significant, where the EA concedes the project “would result in adverse effects on historic and cultural resources”; where the Staff’s 2014 Supplemental Environmental Impact Statement assessed construction-phase impacts to those same resources as ranging from SMALL to LARGE; and where the no-significance conclusion rests entirely on avoidance buffers to be proposed and finalized by the licensee around sites, including burial sites, that have never been comprehensively identified or assessed with Oglala Sioux Tribe participation.

A. Basis

The Board admitted Contention 1B because the TR/ER declared cultural and historic impacts would be “none” without explanation. LBP-25-3 at 38–41. The EA replaces “none” with “not significant,” but the explanatory gap persists and has widened. The EA now concedes adverse effects. EA tbl. 3-8, at 1-73; EA at 1-74 (acknowledging that “there could be adverse effects to historic and cultural resources”). The Staff’s own 2014 SEIS — prepared for the identical, still-unbuilt project — characterized construction-phase impacts on cultural and historic resources as SMALL to LARGE. NUREG-1910, Supp. 4, Final SEIS for the Dewey-Burdock Project (Jan. 2014) (ML14024A477 (Vol. 1); ML14024A478 (Vol. 2)), Vol. 2 tbl. 9-1. The EA nowhere

explains the descent from a potentially LARGE impact, found after a full EIS, to no significant impact, found in an EA, for a twenty-year renewal of the same project.

The sole bridge the EA offers is the PA’s avoidance framework, and that bridge cannot bear the weight. First, avoidance presupposes identification, and the sites subject to avoidance were catalogued without the participation of the Tribe whose resources are at issue; as this Board asked, “[h]ow is Powertech to know . . . whether sites it selects . . . have spiritual importance for the Tribe?” LBP-25-3 at 41. That concern is heightened here, where the sites relegated to unevaluated status and post-licensing avoidance include possible graves and burial features that the EA itself concedes may be adversely affected — for example, the “Possible Gravesite” at 39CU0271/TS130 (Adverse Effect; ~61 m from proposed wellfields) and the unevaluated cairns TS093, TS094, and TS144 within the direct APE (Adverse Effect). Final PA Appendices (ML26159A199), App. B; EA at 1-49 to 1-50. A finding of no significant impact cannot rest on avoidance buffers, proposed by the licensee, around sites of potential burial that have never been evaluated for eligibility with the participation of the Tribe whose members alone can assign their significance. Second, under the PA the licensee itself “will propose” and “finaliz[e]” the avoidance buffers, with tribal participation limited to a 30-day advisory comment period and no tribal right to invoke dispute resolution as a concurring party. Final PA (ML26159A198), Stips. 5(a), 5(k), 13; Organizational Intervenors’ May 18, 2026 Comments (ML26139A278) §§ IV.A–E. Mitigation upon which a FONSI depends must be sufficiently definite and demonstrably effective to reduce impacts below significance; a self-administered avoidance scheme applied to an admittedly incomplete inventory is neither. Third, the predecessor mechanism — the 2014 PA — expired in April 2024 without ever being implemented, underscoring that paper commitments are not self-executing protection.

B. Satisfaction of 10 C.F.R. § 2.309(f)(1)

(i) Specific statement: whether the EA's conclusion that impacts to cultural and historic resources are not significant is unexplained, unsupported, and contrary to the record. (ii) Basis: Section III.A, *supra*. (iii) Scope: a direct challenge to the Staff's environmental review document in this renewal proceeding. (iv) Materiality: the significance conclusion is the FONSI — it is dispositive of whether an EIS must be prepared and whether the license may issue on this record. 10 C.F.R. §§ 51.31–51.32. (v) Facts and expert support: EA tbl. 3-8 and § 4; NUREG 1910 (SEIS impact conclusions); Final Programmatic Agreement; Draft Programmatic Agreement; Organizational Intervenor's May 18, 2026 Comments; Zephier Declaration; Declaration of Trina Lone Hill, attached as Exhibit B. (vi) Genuine dispute: Intervenor's directly controvert the EA's conclusion that the PA's avoidance framework renders conceded adverse effects insignificant. EA at 1-47 to 1-51, 1-73 to 1-74.

C. 10 C.F.R. § 2.309(c)(1)

The good-cause showing for this contention appears in the Motion at Sections IV and V.A, incorporated here by reference.

IV. CONTENTION 5 (NEW)

Contention 5: The NRC Staff's preparation of an Environmental Assessment and Finding of No Significant Impact, rather than an environmental impact statement or supplement to an EIS, violates NEPA and 10 C.F.R. §§ 51.20(a) and 51.20(b)(8), because (1) licensing of a Part 40 uranium milling facility is an action for which the Commission's regulations require an EIS or a supplement to an EIS; and (2) in the alternative, the proposed action may significantly affect the quality of the human environment — including conceded adverse effects on historic and cultural resources that the Staff's prior EIS for this same project assessed as ranging up to LARGE — such that the FONSI is arbitrary and unsupported.

A. Basis

First, 10 C.F.R. § 51.20(b)(8) requires an environmental impact statement or a supplement to an EIS for “[i]ssuance of a license to possess and use source material for uranium milling . . . pursuant to part 40.” The regulation’s trigger is the issuance of a license, and renewal is effected precisely by the issuance of a license: on June 18, 2026, the NRC issued Renewed License SUA-1600, a new twenty-year authorization to possess and use source material for uranium milling pursuant to Part 40. That is the agency’s own characterization of its action. A renewed license to possess and use source material for uranium milling is, in ordinary usage and in the Commission’s usage, “a license to possess and use source material for uranium milling” that has been issued. Nothing in § 51.20(b)(8) confines its terms to a first-in-time license, and the Staff may not narrow the regulation’s categorical command by administrative practice. The Staff’s preparation of an EA under §§ 51.21 and 51.31 — a procedural track reserved for actions *not* identified in § 51.20(b) — was therefore contrary to the Commission’s own regulations.

Second, the Staff’s own reading of § 51.20(b)(8) confirms its categorical character. In licensing the Moore Ranch ISR facility, the Staff acknowledged that it is “required by 10 CFR 51.20(b)(8) to prepare an Environmental Impact Statement (EIS) or a supplement to an EIS for the issuance of a license to possess and use source material for uranium milling,” and explained that the ISR GEIS together with a site-specific supplemental EIS “fulfills this regulatory requirement.” 74 Fed. Reg. 42,333, 42,333 (Aug. 21, 2009). An environmental assessment is neither of the two documents the Staff itself identified as satisfying the regulation. Nor can the Staff contend that the GEIS framework has no application at the renewal stage: the GEIS states that it provides the starting point for site-specific NEPA analyses “for new ISL facilities, as well as for applications to amend or renew existing ISL licenses.” ISL GEIS (ML15093A359) at xxxv, quoted at LBP-25-

3 at 29 n.111. If the Staff believed the impacts of renewal were adequately bounded by prior EIS-level analysis of this project, the vehicle that § 51.20(b)(8) and the GEIS framework supply for that circumstance is a supplement to an EIS — not a standalone EA culminating in a determination under § 51.31 that no EIS is required at all.

Third, the Staff's substitution of an EA is an unexplained departure from the agency's treatment of this very project. For the initial licensing of the Dewey-Burdock facility, the Staff prepared a full site-specific supplemental EIS, NUREG-1910, Supp. 4 (2014) (ML14024A477 (Vol. 1); ML14024A478 (Vol. 2)), which rated construction-phase impacts to historic and cultural resources as ranging up to LARGE. Because the facility has never been constructed, the renewed license is not a continuation of ongoing, previously analyzed operations; it is the operative federal authorization for the entire universe of construction, operational, aquifer-restoration, and decommissioning impacts that the Staff itself previously determined warranted EIS-level review. The Staff nowhere explains what changed between 2014 and 2026 such that the identical impacts of the identical project now merit only an EA and justify a Finding of No Significant Impact — on an environmental record more than a decade staler than the one the Staff found required a full EIS. An agency changing course must “display awareness that it is changing position” and show “good reasons for the new policy.” *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009); see *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 221–22 (2016); *Ctr. for Biological Diversity v. EPA*, 141 F.4th 153, 169 (D.C. Cir. 2025). The EA displays no such awareness and offers no such reasons.

To the extent the Staff relies on its use of environmental assessments for renewals of other ISR licenses, *e.g.*, License Renewal of Crow Butte ISR, 79 Fed. Reg. 64,629 (Oct. 30, 2014), those actions are inapposite. Each involved a facility that had been constructed and had operated for

decades, where renewal continued existing impacts under conditions of accumulated operational experience and monitoring data. Here, by contrast, no ground has been disturbed, no wellfield installed, and no impact of any kind has occurred; the renewal decision is functionally the initial licensing decision made a second time. In any event, an agency's past underenforcement of its own binding regulation cannot amend the regulation's categorical terms.

B. Satisfaction of 10 C.F.R. § 2.309(f)(1)

(i) Specific statement: whether an EIS or SEIS, rather than an EA and FONSI, is required for this license renewal. (ii) Basis: Section IV.A, *supra*. (iii) Scope: the adequacy and legal sufficiency of the Staff's NEPA review of the proposed action. (iv) Materiality: the choice of NEPA document determines the process, analysis, and findings prerequisite to license issuance. (v) Facts and expert support: EA § 4 and tbl. 3-8; Final Programmatic Agreement; Draft Programmatic Agreement; Organizational Intervenor's May 18, 2026 Comments; Zepher Declaration; 10 C.F.R. § 51.20(b)(8); ISL GEIS at xxxv. (vi) Genuine dispute: Intervenor's directly controvert the Staff's determination, EA at 1-74, that preparation of an EIS is not warranted and that a FONSI is appropriate.

C. 10 C.F.R. § 2.309(c)(1)

The good-cause showing for this contention appears in the Motion at Sections IV and V.B, incorporated here by reference.

V. CONTENTION 6 (NEW)

Contention 6: The Environmental Assessment violates NEPA's hard-look requirement and the APA's requirement of reasoned decisionmaking because the Staff declined to obtain reasonably available information essential to its analysis of impacts on the Oglala Sioux Tribe's traditional cultural places: having itself

proposed, in the December 2025 draft Programmatic Agreement, a tribal cultural resources survey based on the methodology NRC Staff and the Tribe jointly developed in September 2021, the Staff abandoned that survey solely in response to the applicant’s cost-and-time objections, contrary to the Staff’s own site-visit findings, and without reasoned explanation in the EA.

A. Basis

NEPA requires an agency to obtain information essential to a reasoned choice when the means of obtaining it are known and the costs are not exorbitant — and, at minimum, to explain a decision to forgo such information. Here, the information is concededly obtainable: the Staff proposed the survey, Updated Draft PA (ML25346A149); Updated Draft Appendix D to Draft PA (ML25346A150); a jointly developed methodology exists, Survey Methodology to Identify Sites of Significance to the Oglala Sioux Tribe (ML21252A089; ML21252A074); the Staff proposed employing that framework as recently as September 2025, Organizational Intervenors’ May 18, 2026 Comments (ML26139A278) § III.E; and the Tribe has formally sought to participate and remains willing to do so, March 12, 2025 Letter from Oglala Sioux Tribe to NRC Staff, attaching Ordinance 11-10 (ML25085A421); Zephier Declaration at ¶ 12; Lone Hill Declaration at ¶ 5. The Staff nonetheless deleted the survey after the applicant asserted the survey exceeded the NRC’s authority and cited its expense — including NRC staff hourly rates and tribal honoraria — and schedule pressure. Powertech comments on PA (ML262021A141) at 6–7. The EA’s entire explanation is that the Staff acted “[i]n response to comments on the draft PA regarding cost and time.” EA at 1-47 to 1-48.

That single sentence fails the requirements of reasoned decisionmaking in at least four respects. First, it does not acknowledge that the Staff was reversing its own recent, considered position, or supply the good reasons a change of course requires. Second, it does not engage the contrary record: the Staff’s own June 2025 site-visit summary recording that, “[c]onsidering the

passage of time and events like erosion and heavy precipitation,” tribal representatives recommended revisiting sites and re-evaluating eligibility, NRC Staff, Summary of Tribal Site Visit to Dewey Burdock (June 11, 2025 visit, August 1, 2025 summary) (ML25213A145) at 3, and the reevaluation duty of 36 C.F.R. § 800.4(c)(1). The baseline the EA treats as “reliable” is nearly two decades old and drawn from an erosion-prone landscape; on that record a current survey would be reasonably likely to produce materially different results, and the EA does not explain why the aged data suffices. Third, its cost rationale is unexamined: the NRC’s review costs are recoverable from the applicant under the agency’s fee-recovery statute, a point the Tribe raised in March 2025, March 12, 2025 Letter from Oglala Sioux Tribe to NRC Staff, attaching Ordinance 11-10 (ML25085A421). NRC Staff never consulted with the Tribe regarding the alleged costs and time necessary to conduct the survey, relying instead on unsubstantiated claims from the Applicant, and the EA nowhere weighs the asserted burden against the informational value of the survey. Fourth, deferral is not a substitute: shifting identification to “if and when ground disturbing activities would occur,” EA at 1-48, places the information on the far side of the decision it exists to inform.

The prior determinations that the Tribe’s cultural resources information was “unavailable” do not control, because the fact on which they rested no longer exists. The D.C. Circuit’s unavailability holding turned on a specific premise: after years of effort the Staff and the Tribe had failed to agree on a survey methodology, and there was “no reasonable assurance of a future accord.” *Oglala Sioux Tribe v. NRC*, 45 F.4th 291, 301 (D.C. Cir. 2022); *see* LBP-19-10, 90 NRC at 317–34. That premise is now false. In September 2021, the NRC Staff and the Oglala Sioux Tribe — the identical counterparties — developed and agreed to a survey methodology for identifying sites of historic, cultural, and religious significance to the Oglala Sioux Tribe at an in

situ uranium recovery site, the Crow Butte facility. Survey Methodology to Identify Sites of Significance to the Oglala Sioux Tribe (ML21252A089; ML21252A074); Organizational Intervenor’s May 18, 2026 Comments (ML26139A278) at § III.E. The accord the D.C. Circuit found lacking exists, between the same two parties, on the same subject.

The Staff itself confirmed that the agreed protocol fits this project. The tribal cultural resources survey in the December 2025 draft PA — Stipulation 2(c) and Appendix D — was built upon the 2021 Crow Butte protocol. Updated Draft PA (ML25346A149) (Stip. 2(c)); Updated Draft Appendix D to Draft PA (ML25346A150). The Staff thus did not treat the protocol as some abstract possibility; it selected that protocol as the template for identifying Oglala cultural resources at Dewey-Burdock and proposed it to the parties. When an agency has an agreed methodology in hand, has judged it suitable, and has proposed to use it, the information the methodology would produce is by definition available. The Staff’s subsequent deletion of the survey — for the applicant’s stated reasons of “cost and time,” EA at 1-47 — without consulting with the Tribe regarding the alleged cost and time, is not a finding of unavailability; it is the abandonment of available information at the regulated party’s request, which the APA and NEPA do not permit an agency to do without reasoned explanation, and which the EA does not explain.

The applicant’s contrary position confirms rather than defeats the point. Powertech has argued that the Crow Butte protocol “is not representative of a reasonable methodology in the current proceeding” because Crow Butte arose from an adjudicatory finding of a NEPA and NHPA violation. Powertech comments on PA (ML262021A141) at 3. But whatever the litigating merits of that distinction, it is the Staff’s professional judgment, not the applicant’s, that governs the adequacy of the environmental review — and the Staff judged the protocol suitable when it built Appendix D upon it in December 2025. An applicant’s view that an agency’s chosen methodology

is unnecessary cannot convert available information into unavailable information, nor supply the reasoned basis the agency itself failed to provide for reversing course. Intervenor need not establish that Crow Butte and Dewey-Burdock are legally identical; it is enough that the Staff itself selected the Crow Butte protocol for Dewey-Burdock and then abandoned it for the applicant's convenience. In any case, previous rulings from this Board have adjudicated the same NEPA and NHPA violation (LBP-15-16, 81 NRC 618, 708 (Apr. 30, 2015)), which was resolved only based on an "unavailability" finding that, as discussed, can no longer be substantiated. *See* Zephier Declaration at ¶¶ 11, 12; Organizational Intervenor's May 18, 2026 Comments (ML26139A278) at § III.E.

B. Satisfaction of 10 C.F.R. § 2.309(f)(1)

(i) Specific statement: whether the Staff's abandonment of the proposed tribal cultural resources survey, and the EA's failure to explain it, violate APA, NEPA, and reasoned-decisionmaking requirements. (ii) Basis: Section V.A, *supra*. (iii) Scope: the adequacy of the Staff's environmental review. (iv) Materiality: the abandoned survey supplies the identification record on which the affected-environment description, the impacts analysis, and the FONSI all depend. (v) Facts and expert support: EA at 1-47 to 1-48; Final Programmatic Agreement; Draft Programmatic Agreement; Organizational Intervenor's May 18, 2026 Comments; Powertech comments on PA; Survey Methodology to Identify Sites of Significance to the Oglala Sioux Tribe; Zephier Declaration; Lone Hill Declaration; (vi) Genuine dispute: Intervenor controverts the EA's determination that the avoidance-first alternative constitutes a reasonable identification effort and adequately supports the Staff's impact conclusions. EA at 1-47 to 1-51.

C. 10 C.F.R. § 2.309(c)(1)

The good-cause showing for this contention appears in the Motion at Sections IV and V.C, incorporated here by reference.

VI. CONTENTION 7 (NEW)

Contention 7: The NRC Staff has failed to comply with Section 106 of the National Historic Preservation Act, 54 U.S.C. § 306108, and its implementing regulations, in that (a) the Staff has not made a reasonable and good faith effort to identify historic properties and properties of religious and cultural significance to the Oglala Sioux Tribe, 36 C.F.R. § 800.4(b); (b) the Staff failed to conduct government-to-government consultation with the Oglala Sioux Tribe through its Tribal Council as the Tribe's designated representative, 54 U.S.C. § 302706(b); 36 C.F.R. § 800.2(c)(2)(ii), despite the Tribe's formal request and the Staff's written acknowledgment; (c) the circumstances of this undertaking do not authorize the use of a programmatic agreement under 36 C.F.R. § 800.14(b)(1); and (d) the executed Programmatic Agreement is structurally incapable of satisfying Section 106 because it excludes affected Tribes from signatory status, enforceable dispute resolution, and meaningful participation in the resolution of adverse effects.

A. Ripeness

This Board held that NHPA claims may be interposed only after the Staff issues its environmental review document. LBP-25-3 at 20 (collecting Commission authority). The Staff's environmental review document has now issued, and it expressly documents the Section 106 process and incorporates the PA by reference. EA at 1-5, 1-47. Any doubt that the Staff's Section 106 performance is complete and reviewable is resolved by the agency itself: by letters of July 8, 2026 to the President of the Oglala Sioux Tribe and to NDN Collective, the Staff announced that the filing of the executed PA "fulfills the requirements of Section 106 of the National Historic Preservation Act and its implementing regulations." ML26181A237; ML26181A222. Contention

7 is therefore raised at the first opportunity the Commission’s case law allows, and it challenges a Section 106 process the Staff has formally declared closed.

B. Basis (a): No Reasonable and Good Faith Identification Effort

Section 800.4(b)(1) requires a reasonable and good faith effort to identify historic properties, informed by, among other things, the magnitude of the undertaking and the nature and extent of potentially affected properties — and § 800.4(c)(1) requires reevaluation where the passage of time or incomplete prior evaluations so warrant, in consultation with tribes that possess special expertise in assessing properties of significance to them. No identification effort with Oglala Sioux Tribe participation has ever been conducted; the Staff proposed one and withdrew it at the applicant’s request also without consulting with the Tribe or NDN Collective on that decision; 31 percent of the more than 300 identified sites remain unevaluated, Final PA (ML26159A198) Stip. 2(b), and eligibility disputes under National Register Criterion C remain unresolved, Organizational Intervenors’ May 18, 2026 Comments (ML26139A278) §§ III.A, IV.F, H; and identification is deferred to post-licensing ground disturbance.

A deferral adopted to spare the applicant cost, over the objection of the affected Tribe, on a record the agency’s own site visit showed to be aging, is not a reasonable and good faith effort. Section 800.4(c)(1) makes the point regulatory: the passage of time and “incomplete prior evaluations” may require the agency to reevaluate properties previously determined eligible or ineligible. The field data here is nearly twenty years old and the site is erosion-prone; the Staff’s own June 2025 site visit recorded that erosion and heavy precipitation warrant revisiting sites, NRC Staff, Summary of Tribal Site Visit to Dewey Burdock (June 11, 2025 visit, August 1, 2025 summary) (ML25213A145) at 3, and a current survey would be reasonably likely to identify newly exposed sites and features. Zephier Declaration at ¶¶ 9-10. An identification effort that freezes a

nearly two-decade-old, erosion-affected, and admittedly incomplete inventory in place — and defers any reevaluation until ground disturbance is already imminent — is not the reasonable and good faith effort § 800.4(b) and (c) require.

The inadequacy is most acute for the possible graves and burial features in the record. Section 800.4(b) requires the identification effort to be calibrated to “the likely nature and location of historic properties within the area of potential effects,” and cairns, burials, and possible gravesites within the direct APE demand a heightened, not a deferred, effort. Yet the record disposes of these by avoidance while leaving them unevaluated: 39CU0271/TS130 is flagged “[a]void as possible gravesite” though “Tribes . . . did not provide eligibility recommendations,” and unevaluated cairns TS093, TS094, and TS144 within the direct APE carry Adverse Effect determinations. Final PA Appendices (ML26159A199), App. B. Where the agency itself acknowledges possible human interments that its undertaking may adversely affect, a phased approach under 36 C.F.R. § 800.4(b)(2) that postpones their evaluation until ground disturbance is imminent — without the participation of the Oglala Sioux Tribe — is not the “reasonable and good faith” identification the regulation requires. That conclusion is reinforced by the availability of an agreed means of identification: the Staff proposed a survey built on the 2021 Crow Butte protocol it had developed with the Tribe, then withdrew it for cost and time. Survey Methodology to Identify Sites of Significance to the Oglala Sioux Tribe (ML21252A089; ML21252A074); Updated Draft PA (ML25346A149) (Stip. 2(c)); Updated Draft Appendix D to Draft PA (ML25346A150). An identification effort is not “reasonable and good faith” where the agency declines an agreed, available survey method — as to possible graves, no less — at the licensee’s request.

C. Basis (b): Failure of Government-to-Government Consultation

The NHPA vests the duty to consult in the agency, and it is an affirmative and continuing duty. The agency official “is responsible for ensuring that consultation... is initiated” and for providing tribes and other consulting parties “a reasonable opportunity” to participate, 36 C.F.R. § 800.2(c)(2)(ii)(A), and “remains legally responsible for” Section 106 compliance regardless of any reliance on others, *id.* § 800.2(a)(3). The Tribe bears no reciprocal obligation to solicit the agency’s attention. Here, the Staff itself set the next step and then abandoned it: by letter of April 23, 2025 titled “Proposed Government-to-Government Meeting with the Oglala Sioux Tribe Tribal Council” (ML25101A288), the Staff stated it was “honored by the opportunity to engage with and receive feedback from the Oglala Sioux Tribal Council and provide a presentation,” offered to meet in person or virtually, and asked the Council for its “preferred dates and times” (ML25101A288). Having committed to consulting with Tribal Council, the Staff sent no further letter, placed no follow-up call to the Council, and made no attempt to calendar the meeting it had proposed; it then executed the PA on June 4, 2026 — more than thirteen months later — without the meeting having occurred. July 8, 2026 letter to Oglala Sioux Tribe (ML26181A237), identifying Trina Lone Hill as THPO; Organizational Intervenor’s May 18, 2026 Comments (ML26139A278) § III.B. The Staff’s response to comments recasts this inaction as the Tribe’s, asserting that after April 23 “no dates were shared with the NRC staff.” Final PA Appendices (ML26159A199), App. B at B-15 to B-16. But an offer to schedule is the opening of a reasonable opportunity to consult, not its discharge, and the Staff cannot manufacture a record of tribal non-cooperation by doing the minimum, failing to follow up, and then invoking the Tribe’s silence. *See Lone Hill Declaration*, at ¶¶ 4–6.

The Staff's substitution argument fails for an independent reason. Consultation must be conducted "with the representatives designated or identified by the tribal government," 36 C.F.R. § 800.2(c)(2)(ii)(C), and the ACHP's guidance frames honoring a tribe's chosen consultation process as a matter of respect for tribal sovereignty. The Oglala Sioux Tribe designated its representative by ordinance and in writing: under Ordinance 11-10, government-to-government consultation "must [o]ccur through a formal meeting with the Oglala Sioux Tribal Council," and "[n]either the Executive Committee nor any... staff member... shall be authorized to engage in government-to-government consultations." OST Ordinance 11-10 § 7.a (ML25070A215); *see* March 12, 2025 Letter from Oglala Sioux Tribe to NRC Staff, attaching Ordinance 11-10 (ML25085A421). The Staff nonetheless offers, as "meaningful consultation," that it invited the Tribe to comment by letter and email, to join multi-tribe government-to-government meetings, and to attend a site visit. Final PA Appendices (ML26159A199), App. B at B-15. Section 800.2(c)(2)(ii)(C) does not permit the agency to substitute engagement of its own choosing for consultation with the representative the Tribe designated; consultation with a designated representative means consultation with the one designated. The general engagement the Staff catalogs, whatever its value, is not the Tribal Council meeting the Tribe's law requires and the Staff itself proposed.

The Staff's failure to reach the Tribe's designated representatives is confirmed by its failure even to ascertain who they are. The office of Tribal Historic Preservation Officer changed hands at least twice after early 2025, and Trina Lone Hill — to whom the Staff addressed its April 23, 2025 letter — has not held that office since May of 2025; the current THPO is Russel Zephier, Jr.. Lone Hill Declaration at ¶¶ 7–8. Yet as late as July 8, 2026 — after execution of the PA, issuance of the EA, and issuance of the renewed license — the very letter by which the Staff announced to

the Tribe's President that the agency's Section 106 obligations were fulfilled identified Ms. Lone Hill, on its face, as the Tribe's Tribal Historic Preservation Officer. July 8, 2026 letter to Oglala Sioux Tribe (ML26181A237), at 2 (cc line). An agency that has not troubled to learn the identity of the tribal official responsible for historic preservation has not carried its affirmative duty to consult with "the representatives designated or identified by the tribal government," 36 C.F.R. § 800.2(c)(2)(ii)(C); the burden to ascertain that representative is the agency's, not the Tribe's.

This is not the sustained, exhausted effort that excused the agency in the initial-licensing proceeding. There, the finding of "unavailability" rested on years of documented agency effort and repeated methodology proposals "with no reasonable assurance of a future accord." *Oglala Sioux Tribe v. NRC*, 45 F.4th 291, 301 (D.C. Cir. 2022). Here the Staff made a single overture, received a cooperative response invoking the Tribe's lawful process, and let it lapse. Read side by side, the prior record cuts against the Staff. And the omission is precisely the one that rendered the initial-licensing consultation unlawful, LBP-15-16, 81 NRC at 653–57 — as the applicant's own comments concede, the prior process "failed with respect to the Oglala Sioux because it did not have a one-on-one government-to-government meeting." Powertech comments on PA (ML262021A141) at 3. The EA's certification that consultation was conducted "in accordance with 36 CFR 800," EA at 1-47, is contradicted by the agency's own correspondence.

D. Basis (c): A Programmatic Agreement Is Not Authorized Here

Program alternatives are confined to the circumstances enumerated in 36 C.F.R. § 800.14(b)(1). This undertaking is a single mine site with a defined boundary, defined facilities, and pre-determined ground-disturbing activities; effects can be determined before approval if the identification effort is performed. Any present indeterminacy is self-created by the refusal to conduct the survey and cannot supply the predicate for deferral under § 800.14(b)(1)(ii).

Intervenors preserved this objection in the Section 106 record. Organizational Intervenors' May 18, 2026 Comments (ML26139A278) at § III.D.

E. Basis (d): The Executed PA Is Structurally Deficient

Even were a PA authorized, this one cannot carry the agency's Section 106 obligations. Under its terms: the licensee "will propose" and "finaliz[e]" the avoidance buffers that define the protection afforded each site, with tribal participation limited to a 30-day comment period, Stip. 5(a) (Final PA (ML26159A198)) — vesting the party with the greatest economic interest in minimizing protection with the authority to set it. Tribes are invited to sign only as concurring parties, Final PA Appendices (ML26159A199), App. B at B-16; the NRC identifies the only "required signatories" as itself and the SD SHPO, *id.*, so under 36 C.F.R. § 800.6(c) the affected Tribes hold no signatory right to invoke dispute resolution or to object to amendments with effect.

The Staff's own July 8, 2026 completion letters confirm the structure: the signatories to the PA are the NRC, which signed on May 29, 2026, and the SD SHPO, which signed on June 4, 2026 — while Powertech, the licensee, "was also invited to sign the PA as an invited signatory due to their responsibilities detailed within the PA." July 8, 2026 letters to Oglala Sioux Tribe and NDN Collective, ML26181A237; ML26181A222. The party whose economic interest the agreement regulates was offered a signatory's seat; the Tribes whose ancestral and religious resources it governs were not. The Staff's reliance on 36 C.F.R. § 800.6(c)(3) does not answer the deficiency: that provision permits an agency to invite additional parties to be concurring parties, but it does not authorize relegating to advisory status the very Tribes to whom the affected properties hold religious and cultural significance and whose "special expertise" 36 C.F.R. § 800.4(c)(1) commands the agency to credit. After an unanticipated discovery, Tribes receive a 10-business-day review, after which "ground disturbance activities shall not resume in the area of

discovery until the NRC, BLM, and EPA have issued a written notice to proceed” — with no tribal concurrence required, Final PA (ML26159A198) Stip. 8(c), (i), a shorter and weaker role than the thirty days NAGPRA affords for inadvertent discoveries, 43 C.F.R. § 10.4; and 31 percent of identified sites remain unevaluated while unresolved Criterion C eligibility disputes are carried forward with no mechanism for resolution before buffers are set, Final PA (ML26159A198), Stip. 2(b); Organizational Intervenor’s May 18, 2026 Comments (ML26139A278) at § IV.F. The agreement locks this framework in place for twenty years, Stip. 16. A framework in which the affected Tribes cannot enforce, cannot invoke dispute resolution as of right, and are relegated to advisory comment on licensee-set protections does not afford the reasonable opportunity to participate in the resolution of adverse effects that § 800.2(c)(2)(ii) requires.

F. Satisfaction of 10 C.F.R. § 2.309(f)(1)

(i) Specific statement: whether the Staff’s Section 106 process, as documented in the EA and the executed PA, complies with the NHPA and 36 C.F.R. Part 800. (ii) Basis: Sections VI.B–E, *supra*. (iii) Scope: NHPA compliance is the NRC’s obligation in this licensing action, and the Board has held such claims are properly raised upon issuance of the Staff’s environmental review document. LBP-25-3 at 20. (iv) Materiality: the NRC may not complete this undertaking without satisfying Section 106; the PA is also tied to the license through condition 9.8. EA at 1-48. (v) Facts and expert support: EA’s own words (1-5, 1-47, 48); Organizational Intervenor’s May 18, 2026 Comments (ML26139A278); Updated Draft PA (ML25346A149) (Stip. 2(c)); Updated Draft Appendix D to Draft PA (ML25346A150); Survey Methodology to Identify Sites of Significance to the Oglala Sioux Tribe (ML21252A089; ML21252A074); March 12, 2025 Letter from Oglala Sioux Tribe to NRC Staff, attaching Ordinance 11-10 (ML25085A421); NRC Staff, Summary of Tribal Site Visit to Dewey Burdock (June 11, 2025 visit, August 1, 2025 summary)

(ML25213A145); Powertech comments on PA (ML262021A141); Final PA (ML26159A198); Final PA Appendices (ML26159A199); April 23, 2025 titled “Proposed Government-to-Government Meeting with the Oglala Sioux Tribe Tribal Council” (ML25101A288); July 8, 2026 letters to Oglala Sioux Tribe and NDN Collective, ML26181A237; ML26181A222; OST Ordinance 11-10 (ML25070A215); Zephier Declaration; Lone Hill Declaration. (vi) Genuine dispute: Intervenor controveert the EA’s determinations that consultation was conducted in accordance with 36 C.F.R. Part 800 and that the PA documents compliance with Section 106. EA at 1-5, 1-47-48.

G. 10 C.F.R. § 2.309(c)(1)

The good-cause showing for this contention appears in the Motion at Sections IV and V.D, incorporated here by reference.

VII. CONTENTION 8 (NEW)

Contention 8: The Environmental Assessment fails to take a hard look at the direct and indirect on-site environmental impacts of the proposed action’s authorization of extended central processing plant operations to process uranium-loaded resin from offsite sources for several years after decommissioning of the Dewey-Burdock wellfields, including (a) the volume, on-site storage, and disposal of additional 11e.(2) byproduct material and liquid waste generated at the site; (b) transportation of loaded resin to the site; (c) prolonged deferral of site decommissioning and completion of aquifer restoration; and (d) radiological and non-radiological exposures during the extended operational period.

A. Basis

This contention concerns the proposed action itself, not other projects. The renewed license authorizes operation of the Dewey-Burdock CPP, and the EA acknowledges the CPP “would continue to operate for several years, following the decommissioning of the wellfields,” processing

resin from offsite projects and tolling arrangements. EA at 1-69. The environmental consequences of that authorized, on-site activity — additional byproduct waste generated and disposed at Dewey-Burdock, resin shipments into the site, extension of the operational period, and postponement of final decommissioning and restoration — occur at the project at hand. They are not effects of “other future or geographically separate projects,” *Seven Cty. Infrastructure Coal. v. Eagle Cty.*, 605 U.S. 168, 186–87 (2025), and nothing in CLI-26-6, which addressed the environmental effects of potential future wellfield projects elsewhere, removes the on-site consequences of this facility’s own licensed operations from the scope of the Staff’s review.

The EA’s treatment is conclusory. It asserts that impacts “would be similar to those impacts discussed in this EA” and that resin transport is bounded by the yellowcake transportation analysis, EA at 1-69 to 1-70, without quantifying the additional throughput, the added volumes of liquid and solid byproduct waste, the adequacy of disposal capacity (the EA’s disposal figures are keyed to Dewey-Burdock production, e.g., EA at 1-68), the duration of extended operations, or the consequences of deferring decommissioning and restoration completion. An unquantified assertion of similarity is not a hard look at an acknowledged, multi-year extension of on-site operations.

B. Satisfaction of 10 C.F.R. § 2.309(f)(1)

(i) Specific statement: whether the EA adequately analyzes the on-site impacts of extended CPP operations processing offsite-derived resin. (ii) Basis: Section VII.A, *supra*. (iii) Scope: the impacts of the proposed action — operation of the licensed facility — are within this proceeding. (iv) Materiality: these impacts bear directly on the FONSI and on waste-disposal, decommissioning, and financial-assurance findings attendant to renewal. (v) Facts and expert support: EA §§ 3.12–3.13. (vi) Genuine dispute: Intervenors controvert the EA’s conclusion that

extended CPP operations require no additional analysis because their impacts would be similar to those already assessed. EA at 1-69 to 1-70.

C. 10 C.F.R. § 2.309(c)(1)

The good-cause showing for this contention appears in the Motion at Sections IV and V.E, incorporated here by reference.

VIII. CONTENTION 9 (NEW)

Contention 9: NRC Staff have been provided actual knowledge identifying discovered burials, human remains, and cultural items on federal public lands portion of the project area that are likely to be impacted and/or excavated, but has taken no steps to comply with the Native American Graves Protection and Repatriation Act (“NAGPRA”), 25 U.S.C. § 3001 et seq. Burials and covered items were identified in Appendix B to the Final PA, confirming that actual knowledge imposed a number of duties on federal agencies, such as NRC, who is taking a lead role in managing Powertech’s private activities on federal public lands. These duties include preparation of a plan of action for each burial and consultation with the Oglala Sioux Tribe and potential individual descendants. NRC Staff, knowingly and in concert with the BLM and other PA signatories, has unlawfully delayed compliance with NAGPRA duties involving existing discoveries until after license renewal. The PA unlawfully limits NAGPRA duties during constructions and shifts all NAGPRA duties into the inadvertent discovery provision.

A. Basis

Appendix B of the PA, confirms that graves, human remains, funerary objects, and other items of cultural significance have been discovered and identified in and near the project area that may be affected by the project. Final PA Appendices (ML26159A199), App. B. However, NRC Staff have made no attempt to address these already-discovered NAGPRA duties on federal lands that are managed subject to NRC licensing. Despite this knowledge, NRC Staff has again refused to conduct a survey that would inform the NAGPRA-mandated plan of action for human remains and cultural items discovered during earlier surveys, and has refused to engage in statutorily-mandated consultation with the Oglala Sioux Tribe and the other Intervenor before licensing.

To put an end to the centuries-long scourge of “looting and plundering of Native American burial grounds,” [NAGPRA] protected those burial grounds — along with the remains and items buried there pursuant to tribal tradition — from excavation. *Thorpe v. Borough of Thorpe*, 770 F.3d 255, 260 (3d Cir. 2014). [NAGPRA] also sought to remedy a history of federal exploitation of Native American remains and artifacts. *See id.* (describing “cultural plundering” of “breathtaking” scope).

Winnebago Tribe of Neb. v. United States Dep’t of the Army, 175 F.4th 529, 532 (4th Cir. 2026).

NAGPRA duties are mandatory for all federal agencies when NAGPRA-covered matters are discovered on federal lands¹. 43 C.F.R. § 10.2-10.4. These duties are broader than NHPA², and must be carried out before the agency takes action, or on a specified schedule if inadvertently discovered during implementation of the planned activity, which here is implementation of the license on public lands. 43 C.F.R. § 10.4 (b)(1) (“Before a planned activity or after a discovery, the Federal agency or DHHL must identify consulting parties and invite the parties to consult.”). NAGPRA regulations define “discovery” to mean “exposing, finding, or removing human remains or cultural items whether intentionally or inadvertently on Federal or Tribal lands without a written authorization for an excavation under § 10.6 of this part.” 43 C.F.R. § 10.2. NRC Staff, through the surveys it approved, has discovered human remains and cultural items on federal lands. *See e.g.* Final PA Appendices (ML26159A199) at Appendix B at B-1, B-20-B43. “As the discoverer of the remains, [NRC Staff] has a statutory duty to make ‘a reasonable effort to protect them’; as

¹Licensing federal lands for in situ leach production imbues NRC Staff with control sufficient to trigger NAGPRA duties. 88 FR 86452, 86471 (“Whether a Federal agency’s control of the lands on which it conducts its programs or activities is sufficient to apply these regulations depends on the circumstances and scope of that Federal agency’s authority, and on the nature of State and local jurisdiction. Because of the wide array of agency-specific authorities that can establish federally controlled lands, the Federal agency officials must make such determinations on a case-by-case basis. In some circumstances, the definition may include lands leased by the Federal agency, depending on the nature of that lease, the Federal agency’s statutory authority, and other case-by-case circumstances.”).

² 88 FR 86452, 86487 (“the scope of [NAGPRA] and these regulations can be greater than the NHPA requirements”).

the federal agency responsible for managing the site, it must ‘further secure and protect inadvertently discovered human remains . . . including, where necessary, stabilization and covering.’” *Yankton Sioux Tribe v. United States Army Corps of Eng’rs*, 83 F. Supp. 2d 1047, 1057 (D.S.D. 2000) quoting 43 C.F.R. § 10.4(d)(ii) (now at 43 C.F.R. § 10.5). Similar to the NEPA and NHPA contentions above, instead of carrying out the NAGPRA duty to plan, protect, and consult with the Oglala Sioux Tribe and potential lineal descendants regarding already-discovered remains or items, NRC Staff crafted the new Final PA to treat the burials and other NAGPRA-protected items that have already been found on federal lands based on the “inadvertent discovery” provisions in the PA. Final PA Appendices (ML26159A199), Appendix C at C-2 Despite actual knowledge and discovery before licensing, NRC Staff have made no pre-license efforts to satisfy the duties to protect NAGPRA-covered graves and cultural resources on federal lands.

The PA confirms that most of the identified burials and sites with cultural items on federal lands have not undergone initial assessments, detailed assessment, and no assessments were informed by necessary consultation with the Oglala Sioux Tribe or linear descendants. Final PA Appendices (ML26159A199), Appendix B at B-1, B-20-B43. It is arbitrary and capricious to ignore the burials and covered objects intentionally found during the surveys in the license proceeding, leaving them for the construction phase as “inadvertent discoveries.” 43 C.F.R. § 10.2. Indeed, nothing in the renewed license, NEPA analysis, NHPA process, or the PA identifies any consultation with the Oglala Sioux Tribe or linear descendants on any matter involving NRC Staff’s actual knowledge about graves, remains, or other culture items identified in the PA, Appendix B. NRC’s license now/plan later approach to NAGPRA unlawfully delays compliance with NAGPRA duties. 43 C.F.R. § 10.4 (b)(1) (“Before a planned activity or after a discovery, the Federal agency or DHHL must identify consulting parties and invite the parties to consult.”).

Further, once discovered on federal lands subject to NRC licensing of a planned activity, often during the NEPA and NHPA cultural resource surveys and tribal consultation that has not yet been completed due to the lack of surveys, NAGPRA requires federal agencies to approve and sign a NAGPRA “plan of action” when identification of human remains or cultural items are identified on federal lands being targeted for resource development, such as the Dewey-Burdock project. 10 C.F.R. § 10.4 (d). NRC has taken the lead role in the NHPA compliance and has elected to go forward with a PA that foregoes pre-licensing surveys and protections, and that also purports to unlawfully delay NAGPRA compliance by issuing a license without preparing a plan of action or consultation with the Oglala Sioux Tribe. These duties cannot be shifted to BLM, despite the agency’s agreement in the NHPA-based PA, which arbitrarily and unlawfully delays preparation of a NAGPRA plan of action and avoids consultation with individual lineal descendants and the Oglala Sioux Tribe, even though existing discoveries have triggered NAGPRA duties. 43 C.F.R. § 10.2-10.4. The preamble confirms that the “draft regulations require the Federal agency or DHHL prepare and approve a plan of action, which includes consultation, for any discovery” bolstered by a stronger requirement to initiate consultation. 88 FR 86452, 86490 citing § 10.4 (c)(1)(iii).

NRC Staff’s disregard for already-discovered burials and items unlawfully subjects the already-discovered burials and items to tight post-licensing timelines that are designed for inadvertent discoveries made after the planned activity has been approved. *Id.* Final PA Appendices (ML26159A199), Appendix C, at C-2. Critically, NAGPRA does not contain any reference to a PA or other device that allows NRC Staff to delay compliance where discoveries exist for a planned activity.

The reliance on the “inadvertent discovery” on federal lands provision in the PA Appendix D also violates NAGPRA by limiting its provision to “human remains.” Final PA Appendices (ML26159A1990, Appendix C at C-2. By contrast, NAGPRA requires:

that all persons conducting construction activities at [the covered project] must comply with NAGPRA as to each inadvertent discovery of Native American human remains, funerary objects, sacred objects, or objects of cultural patrimony. In addition, each inadvertent discovery of Native American cultural items will require compliance with the protection, notification, certification and consultation duties imposed by NAGPRA and its implementing regulations.

Yankton Sioux Tribe v. United States Army Corps of Eng’rs, 209 F. Supp. 2d 1008, 1025-26 (D.S.D. 2002). Even when the expanded scope of “inadvertent discovery” is addressed in the PA, the post-licensing “discoveries” are limited to “human remains” (Final PA Appendices (ML26159A199), Appendix C at C2) and exclude NAGPRA’s “protection, notification, certification and consultation duties” for “funerary objects, sacred objects, or objects of cultural patrimony” and other Native American cultural items. *Yankton Sioux Tribe v. United States Army Corps of Eng’rs*, 209 F. Supp. 2d 1008, 1025-26 (D.S.D. 2002).

In short, NAGPRA sets out two sets of closely related agency duties; one for already-discovered burials and related cultural items, and one for inadvertent discoveries. *Id.* Both turn on timely preparation of an action plan and consultation with Tribes and lineal descendants. *Id.* NRC Staff, in seeking to carry out its licensing duties involving federal lands, has complied with neither NAGPRA duty. NAGPRA does not contain a PA provision, and there is no provision in NAGPRA that allows NRC Staff to delay NAGPRA compliance where there is an existing discovery. The refusal to comply with NAGPRA duties that require consultation with the Oglala Sioux Tribe involves a common set of facts across the other contentions and also confirms further violations of NHPA and NEPA. These overlapping violations can be cured by directing NRC Staff to carry

out its statutory duties in accordance with the overlapping duties imposed by federal laws. 43 C.F.R. § 10.4 (d) (encouraging NAGRPA compliance in coordination with NHPA).

NRC Staff has not yet taken action to identify or require effective mitigation, despite the plans set forth in the 2014 PA. *See, e.g.*, ML26118A050 (April 2026 NRC Staff and Powertech email confirming ongoing consideration of NHPA and NAGPRA issues). These NRC Staff duties cannot be resolved in private negotiations with Powertech, as these matters remain subject to the overlapping disclosure, analysis, public comment, and consultation duties imposed by NAGPRA, NEPA, and NHPA, including preparation of an EIS. An EA and entirely prospective PA is not appropriate for the still-unresolved significant impacts to graves and cultural resources identified in the 2026 PA and Appendix B thereto.

B. Satisfaction of 10 C.F.R. § 2.309(f)(1)

(i) Specific Statement: whether the identification of NAGPRA-covered remains and cultural items on federal lands within the Oglala Sioux Tribe’s ancestral territory requires a plan of action before the License may issue. (ii) Basis: Section VIII.A *supra*. (iii) Scope: the impacts to identified and unidentified burials and cultural objects caused by the proposed action – operation of the licensed facility – are within this proceeding. (iv) Materiality: A Plan of Action and NAGPRA consultation with Intervenors is required before NRC Staff can assess whether NAGPRA requires relocation of portions of the project infrastructure, or other protective measures, to address direct and contextual impacts to these NAGPRA-covered remains and items. (v) Facts and expert support: Final PA (ML26159A198); Final PA Appendices (ML26159A199); EA’s own words at § 3.7.2 (1-47 – 1-51), (vi) Genuine Dispute: The use of an NHPA-derived PA to address already-discovered and unassessed burial sites and items on federal lands triggered NRC Staff’s NAGPRA duties and further contradicts NRC Staff’s findings and conclusion that the

NHPA/NAGPRA/NEPA consultation with the Oglala Sioux Tribe and others can take place after the license is issued. 43 C.F.R. § 10.4 (b)(1) (“Before a planned activity or after a discovery, the Federal agency or DHHL must identify consulting parties and invite the parties to consult.”).

IX. CONTENTION 10 (NEW)

Contention 10: The EA’s analysis of impacts to the northern long-eared bat (endangered), the tricolored bat (proposed endangered), the monarch butterfly (proposed threatened), and the western regal fritillary (proposed threatened) does not satisfy NEPA’s hard-look requirement, the ESA’s best available science requirement, or the APA’s demand for reasoned decisionmaking, because the effects determinations for all four species rest on habitat suitability, conservative assumptions of presence, and ecological baseline data now seventeen years old, without any species-specific field survey conducted during a window in which the species could be detected or their habitat use characterized.

A. Basis

NEPA requires the Staff to take a hard look at the environmental impacts of the proposed action, and that look must rest on accurate, reasonably current information sufficient to permit a reasoned evaluation of impacts to protected species. Here the record establishes that no such information was gathered for any of the four species.

The only ecological field surveys of the site are the vegetation and wildlife baseline studies Powertech conducted from July 2007 through August 2008. EA § 3.8 (ML26163A295). The Staff’s sole basis for treating that seventeen-year-old baseline as current is Powertech’s own assertion, offered in response to the Staff’s RAIs, that “there have been no significant changes in landform or use” since 2008. *Id.* (ML26163A295). The only new fieldwork is a single “cursory level wildlife survey” conducted on March 17, 2025. EA § 3.8 (ML26163A295); Biological Assessment at 20 (ML25262A029). That one-day survey was directed at black-tailed prairie dog

towns, bald eagle nests, and raptor nests; it was neither designed nor represented as a presence, absence, or habitat-use survey for any of the four species at issue here. EA § 3.8 (ML26163A295) (documenting prairie dog town, absence of prior eagle and raptor nests).

For the two bat species, the Staff does not merely fail to survey — it affirmatively concedes the omission. The Biological Assessment states that “[b]ecause no surveys have been conducted to determine the species’ presence, the NRC staff conservatively concludes that the northern long-eared bat could occur within the action area year-round,” and applies the identical reasoning to the tricolored bat. BA at 16 (ML25262A029). The Staff thus premised its effects determination on an admitted absence of any survey data. A March 17 survey could not have supplied that data in any event: the Biological Assessment itself recognizes that the northern long-eared bat “hibernates during winter months, typically October through mid-March to April,” BA at 17 (ML25262A029), and established survey methodology for these species requires acoustic or mist-net detection during a summer season (May 15–August 15 in the hibernating range), not a single daytime walkover in mid-March. No such protocol survey was performed at any time.

For the western regal fritillary, the record is not merely silent but internally contradictory. The Staff acknowledges that during the baseline ecological surveys “Powertech did not identify any violet spp.” — the obligate larval host plant on which the species depends — yet nonetheless “conservatively concludes that violet spp. plants may be present in the action area.” BA at 22 (ML25262A029). The Staff assumed the presence of the one habitat feature its own survey data affirmatively failed to find and did so without conducting any growing-season survey that could have resolved the question. For the monarch butterfly, the Staff likewise relied on habitat suitability and 2013 observations of nectar and host plants, with no flight-period survey to establish occupancy or habitat use. EA § 3.8 (ML26163A295); BA at 15 (ML25262A029).

The consequence is that the Staff cannot, on this record, characterize the extent or intensity of any of the four species' use of the action area — the locations of roost trees, maternity colonies, or hibernacula for the bats, or of larval host plants and occupied habitat for the butterflies. Without that information, the EA cannot support a reasoned conclusion regarding the significance of impacts, and cannot assess whether the species-specific mitigation on which the Staff relies — seasonal tree-clearing restrictions, a monitoring buffer at the Triangle Mine, and groundwater monitoring to protect potential hibernacula — is adequate to the occupancy that actually exists, and cannot meet the ESA's requirement that agency's use the best available science. 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(d). An agency may not satisfy NEPA or the ESA by assuming a conclusion the underlying record does not support, nor may it substitute an applicant's unsupported assertion of "no significant changes" for the current, site-specific data a hard look requires.

The FWS concurrence does not cure the defect. The Staff will point to the Fish and Wildlife Service's September 29, 2025 concurrence in the Staff's "may affect, not likely to adversely affect" determinations for all four species. EA §§ 3.8, 4.x (ML26163A295); Letter, FWS to NRC (ML25273A244). That concurrence does not answer this contention. The Section 7 consultation and the NLAA determinations were themselves built on the same survey-free record; a concurrence that inherits the Staff's evidentiary gap cannot fill it. NEPA's hard-look obligation is independent of the ESA consultation standard, and an NLAA concurrence resting on assumed presence and stale baseline data does not meet the ESA requirement for best science or establish that the EA took the requisite hard look at the significance of impacts or at the adequacy of mitigation. Nor does the Staff's conservative posture of assuming presence excuse the omission: assuming that a species is present says nothing about how and where it uses the site, which is precisely the information required to evaluate impact significance and mitigation adequacy.

Distinction from Contention 4. This contention does not, as the previously rejected Contention 4 did, rest on a generalized assertion that the baseline is old. It identifies specific, species-by-species survey-protocol deficiencies tied to established detection methodologies and windows: the absence of any acoustic or mist-net bat survey during the summer detection season, confirmed by the Staff's own admission that "no surveys have been conducted"; the absence of any growing-season survey for the regal fritillary's obligate violet host, coupled with the Staff's assumption of a habitat feature its baseline failed to find; and the absence of any flight-period survey for the two butterfly species. These are concrete, record-based deficiencies in the methodology of the Staff's environmental review, not a mere quarrel with the age of the data.

B. Satisfaction of 10 C.F.R. § 2.309(f)(1)

(i) Specific statement: whether the EA's terrestrial-ecology analysis and species effect determinations rest on an adequate evidentiary baseline. (ii) Basis: Section IX.A, *supra*. (iii) Scope: the adequacy of the Staff's environmental review. (iv) Materiality: the effect determinations underpin the FONSI and the Staff's conclusion that its ESA obligations are satisfied. EA at 1-53, 1-74. (v) Facts and expert support: EA § 3.8 and tbl. 3-4; Biological Assessment (ML25262A029); Letter, FWS to NRC (ML25273A244); Powertech Response to RAI (March 31, 2025) (ML25090A317). (vi) Genuine dispute: Intervenors controvert the EA's conclusions that the 2007–2008 surveys, as supplemented, provide a sufficient basis for its ecological impact and effect determinations. EA at 1-52 to 1-57.

C. 10 C.F.R. § 2.309(c)(1)

The good-cause showing for this contention appears in the Motion at Sections IV and V.F, incorporated here by reference.

X. CONCLUSION

For the foregoing reasons and those stated in the accompanying Motion for Leave to File, Amended Contentions 1A and 1B and Contentions 5 through 10 satisfy 10 C.F.R. §§ 2.309(c)(1) and 2.309(f)(1) and should be admitted.

Respectfully submitted,

/s/signed electronically by
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July 17, 2026

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-LR
	)	
(Dewey-Burdock In Situ Uranium Recovery	)	
Facility)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing New and Amended Contentions in the captioned proceeding were served via the Electronic Information Exchange (“EIE”) on the 17th day of July, 2026, and via email to those parties for which the Board has approved service via email, 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
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