UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of	)	
	)	
POWERTECH (USA) INC.,	)	Docket No. 40-9075-MLA
	)	ASLBP No. 10-898-02-MLA-BD01
(Dewey-Burdock In Situ Uranium Recovery	)	
Facility)	)	June 22, 2015

Oglala Sioux Tribe's Consolidated Response to Petitions for Review of LBP-15-16

In accordance with 10 C.F.R. § 2.341, Intervenor Oglala Sioux Tribe ("OST" or "Tribe") hereby submits this Consolidated Response to the Petitions for Review of LBP-15-16 filed by NRC Staff and the applicant Powertech (USA) Inc. ("Powertech" or "applicant").

INTRODUCTION AND SUMMARY

The Petitions for Review filed by NRC Staff and Powertech fail to set forth sufficient basis for the Commission to undertake review of the Atomic Safety Licensing Board's ("ASLB" or "Board") rulings on Contention 1A and Contention 1B contained in LBP-15-16, or the additional license condition imposed by the Board with respect to identifying and plugging historic abandoned boreholes in the proposed mining area.

With respect to Contention 1A, NRC Staff attempts to persuade the Commission to adopt an unsupportable interpretation of the National Environmental Policy Act ("NEPA") that would contravene established law and allow the agency to ignore the statutory mandate that all agencies comply with NEPA "to the fullest extent possible" in favor of a "made reasonable effort" standard not found in regulation or statute. Further, both petitioners misread and misconstrue the Board's ruling as to Contention 1A, asserting that it is internally inconsistent with regard to the holding that NRC Staff failed to conduct the requisite "hard look" at cultural resource impacts.

The Board was not inconsistent, but rather simply made a reasonable distinction between NRC Staff's review of impacts to "historic" resources versus "cultural" resources. This distinction finds ample support in the law.

With respect to Contention 1B, the vast majority of each Petition selectively cites the record in order to re-cast the facts in a more favorable light to the petitioners. Both petitions attempt to reargue their losing case to the Commission and both ask the Commission to overturn the express factual findings of the Board. The record, as understood by a Board that cross-examined and assessed credibility of live witnesses in this case, contradicts and undermines these efforts to reargue and skew the facts. In any case, neither petitioner has met its burden of demonstrating that the Board's factual findings were "clearly erroneous" as the record amply supports the Board's findings. As a result, the Commission should not disturb the Board's factual findings.

The applicant's Petition fails to meet its burden to show a sufficient basis for the Commission to disturb the Board's decision to adopt a license condition requiring the applicant to identify and plug abandoned boreholes at the proposed mining site. The applicant misinterprets applicable NRC precedent and fails to demonstrate any clearly erroneous findings of any material facts, thus rendering its petition deficient on this issue.

Lastly, NRC Staff contends that the Board lacked authority to retain jurisdiction over compliance with the NEPA and the National Historic Preservation Act ("NHPA"). The Tribe raised a similar concern in its Petition for Review and maintains that given the Board's ruling of law that NRC Staff has failed to comply with wither NEPA or NHPA, the license should be vacated and remanded to the agency pending full compliance with these laws.

STANDARD OF REVIEW

NRC Staff and Powertech assert that the Board's legal analyses departed from established precedent and that the Board's factual findings were clearly erroneous.

The Commission's "standard of 'clear error' for overturning a Board factual finding is quite high." *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-03-8, 58 NRC 11 (2003). It is not enough that NRC Staff and Powertech "demonstrate[] only that the record evidence in this case may be understood to support a view sharply different from that of the Board." *Kenneth G. Pierce* (Shorewood, Illinois), CLI-95-6, 41 N.R.C. 381, 381 (1995). "A 'clearly erroneous' finding is one that is not even plausible in light of the record viewed in its entirety." *Tennessee Valley Authority* (Watts Bar Nuclear Plant, Unit 1; Sequoyah Nuclear Plant, Units 1 and 2; Browns Ferry Nuclear Plant, Units 1, 2, and 3), CLI-04-24, 60 NRC 160, 189 (2004) (internal citations and quotation marks omitted).

For conclusions of law, the Commission's "standard of review is more searching. We review legal questions *de novo*. We will reverse a licensing board's legal rulings if they are 'a departure from or contrary to established law."' *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-09-7, 69 NRC 235, 259 (2009) (citing *Tennessee Valley Authority* (Watts Bar Nuclear Plant, Unit 1; Sequoyah Nuclear Plant, Units 1 and 2; Brown's Ferry Nuclear Plant, Units 1, 2, and 3), CLI-04-24, 60 NRC 160, 190 (2004)).

THE BOARD'S FACTUAL FINDINGS ARE SUPPORTED BY THE RECORD

Both NRC Staff and Powertech spend a considerable number of pages attempting to recast the factual background of this case as one where NRC Staff did everything possible to adequately consult with the Tribe and to obtain information and review impacts associated with the cultural resources at the site in coordination and good faith consultation with the Tribe.

However, these factual recitations amount to nothing more than an attempt to repackage the facts in a light more favorable to the petitioners. Contrary to the portrayal advanced by NRC Staff and Powertech, the facts reflected in the record support the Board's rulings in the Tribe's favor on Contentions 1A and 1B. Despite the frequent diatribes and unwarranted attacks on the Tribe, both parties' discussions reflect only a disagreement with the Board's factual findings, and do not indicate any "clearly erroneous" finding of any material fact so as to justify Commission review.

Findings of Fact: NRC Staff's Inadequate Cultural Resource Analysis

Perhaps recognizing the shortcomings of NRC Staff efforts regarding cultural resources, neither Petition asserts satisfaction of NEPA's "to the fullest extent possible" standard. 42 U.S.C. § 4332. Instead, both Petitions seek reversal based on the proposition that the record establishes NRC Staff "made a reasonable effort" at compliance. On this basis alone, the Commission need not review of the Board's ruling where neither petition claims the record demonstrates NRC Staff satisfied the applicable standard. The record demonstrates that NRC Staff did not conduct a competent review of impacts to cultural resources at the site sufficient to meet the NEPA "hard look" standard "to the fullest extent possible." The record is therefore consistent with the Board's findings. The Board rightly concluded that "compliance with the NHPA 'does not relieve a federal agency of the duty of complying with the [environmental] impact statement requirement 'to the fullest extent possible.'" LBP-15-16 at 39 (citations omitted).

For example, the only Class III level archaeological survey conducted in this case was the original survey by applicant witness Dr. Hannus and the students at Augustana College. The Augustana College survey was presented by the applicant in the Environmental Report, at

Appendix 4.10-A. Exhibit APP-009. This submittal demonstrates that the Augustana College survey left a significant number of archaeological, historical, and traditional cultural resources on site unevaluated; therefore, the potential impacts to these resources have not been addressed. Among these are 87 known sites. ER, Appendix 4.10-A at ii. Importantly, the Environmental Report fails to provide any identifiable survey protocol or methodology developed with any involvement by the Tribe or any other qualified cultural resource specialist. As a result, this number is undoubtedly higher.

Further, there are discrepancies between the number of sites identified in the report included in the Application at ER, Appendix 4.10-A and sworn testimony given by the state historic preservation officer in a State of South Dakota proceeding related to this matter, showing that significant sites are not included or discussed in the Application. *See* Declaration of Wilmer Mesteth at ¶¶ 15-19; Exhibit OST-15. The result is that no NEPA environmental document contains a scientifically-defensible protocol and methodology for analysis of cultural resources, as required by NEPA. The FSEIS admits this deficiency by discussing the NRC Staff's unsuccessful attempt to secure a scientifically-valid independent cultural survey of the project area, and further confirms that instead of having such a survey completed, NRC Staff abandoned that approach. FSEIS at 1-23 to 24; Exhibit NRC-008-A.

The Board properly found that the primary reliance by NRC Staff and the applicant on the Augustana study is not supportable – particularly where the Board's heard and cross-examined live witnesses at the hearing. Dr. Hannus, who lead the Augustana study at the behest of the applicant admitted that his team was not "in any way qualified to be conducting [cultural resource] surveys" and further conceded that given the heightened cultural issues of the Sioux Tribes that "there will be sites that will need to be addressed archaeologically and there will be

probably sites that need to be addressed as traditional cultural properties." August 19, 2014 Transcript at p. 858, lines 4-8; 12-20. *See also* August 19, 2014 Transcript at p. 859, lines 18-24 (Dr. Hannus)("And again, that really should clearly, I think, show us that for us to then be able to make some kind of in roads ourselves, being not of Native background, to identification of sites that are traditional cultural properties that have a tie to spirituality and so on, it is not in our purview to do that.").

Applicant witness Dr. Luhman reiterated this point, confirming that "a traditional Level 3 survey may, in fact, encounter some resources that would be associated with Native American groups or which they would identify. But, they wouldn't necessarily identify all of the resources primarily because some of the knowledge is not available to those conducting the Level 3 survey." August 19, 2014 Transcript at p. 762, line 24 to p. 763, line 6.

Importantly, despite NRC Staff's heavy reliance on Augustana's initial work included in the application material and on Augustana to conduct all the additional field work, Dr. Hannus testified that his office has never worked on any projects that considered the cultural resources at a site. August 19, 2014 Transcript at p. 843, lines 4-7. Despite this fact, NRC Staff witness Dr. Luhman testified that NRC Staff relied on Augustana to conduct all of the initial and follow up field survey work at the site, with the exception of the three non-Sioux tribes that submitted reports. August 19, 2014 Transcript at p. 818, lines19-22.[1]

Upon the Sioux Tribes' request as early as 2011 that cultural resource surveys be conducted at the site, NRC Staff prompted the applicant to bring in Dr. Sabastian and her firm to

[1] Powertech, at 19 n.41, contends that the Board erred in finding that only four tribes participated in the field survey process, of which none were Sioux. However, the record clearly reflects that the FSEIS incorporated only information obtained from four tribes (with only three of those actually submitting reports) that conducted surveys and that none of these tribes were Sioux. August 19, 2014 Transcript at p. 821, lines 3-7; *id*. at p. 875, lines 6-11 (NRC Staff witness Ms. Yilma).

coordinate this review. August 19, 2014 Transcript at p. 784, lines 20-25 (Dr. Sabastian). However, Dr. Sabastian also testified that she also has never been involved in any kind of "actual physical on-the-ground [cultural resources] survey-kind of thing that we're talking about." August 19, 2014 Transcript at p. 846, lines 9-21.

Lastly, Mr. Fosha, with the State of South Dakota, testified that he worked with the applicant and Augustana "from the very start of the project, so the bulk of this material is a result of myself reviewing what Augustana College had been doing in the field." August 19, 2014 Transcript at p. 865, lines 3-6. Mr. Fosha testified that he met with the applicant and between them discussed methods for identification of sites and the methods and steps to take "throughout the process," but only related to the State of South Dakota permit, and having "nothing to do with the NRC permit or anything like that" – even remarking that "up until the point where Augustana was nearly finished I was the only review agency on this project." August 19, 2014 Transcript at p. 865, line 23 to p. 866, line 5. Despite Mr. Fosha being the only person giving any direction to Dr. Hannus' Augustana team, Mr. Fosha testified that his experience and focus was solely "the field of archaeology" and that he also did not possess the experience to conduct a cultural resource survey. August 19, 2014 Transcript at p. 867, lines 14-20.

The only NRC Staff or applicant witness that testified to having any experience in conducting cultural resource field surveys was NRC Staff witness Dr. Luhman. However, as stated, Dr. Luhman admitted to relying exclusively on Augustana for both the initial field work and the follow up field studies, even though Dr. Hannus' testimony had confirmed that Augustana had no cultural resource survey or impact review experience. August 19, 2014 Transcript at p. 818, lines19-22 (Dr. Luhman). Dr. Luhman did testify that "in those projects in which I have been involved [a cultural survey] it is typically that [cultural resource experts] are

working alongside with the archaeological survey team as they are going about doing the survey. It could be in the preliminary stages of doing the generalized recognizance (sic) of the project area. Oftentimes the federal agency and other parties will be along that process so that there can be discussions while out in the field, and these are for sometimes very large projects. But in my experience it typically is at the same time when there is an ongoing consultative and survey process." August 19, 2014 Transcript at p. 836, line 18 to p. 837, line 2.

Consistent with the admitted lack of any relevant cultural resource experience or focus by any of the prior analysts in reviewing sites for cultural resource impacts, at the live hearing NRC Staff witness Ms. Yilma admitted that no written cultural resources analysis prepared during any part of the NEPA analysis included any comments or reports from any Sioux Tribes or other persons with expertise on cultural resource impacts. August 19, 2014 Transcript at p. 821, lines 3-7; *id*. at p. 875, lines 6-11. This is despite testimony from NRC Staff witness Ms. Yilma as to the Staff's recognition of the importance of the area to the Sioux from a cultural perspective from the earliest stages of the application review stage. August 19, 2014 Transcript at p. 774, line 21 to p. 775, line 1. *See also*, August 19, 2014 Transcript at p. 771, lines 1-7 (Ms. Yilma).

NRC Staff witness Ms. Yilma also testified as to the importance and focus at least as early as 2011 by both the Sioux Tribes and within NRC Staff on the need for culturally-based field surveys in order to fulfill the NEPA and NHPA requirements. August 19, 2014 Transcript at p. 776, line 22 to p. 777, line 3; p. 790, lines 1-17. Indeed, NRC Staff witness Ms. Yilma testified that after meeting in 2011 with the Oglala Sioux, Standing Rock Sioux, Flandreau Santee Sioux, Sisseton Wahpeton (Sioux), Cheyenne River Sioux, and Rosebud Sioux (*see* August 19, 2014 Transcript at p. 810, lines 16-22), NRC Staff specifically deliberated about conducting an ethnographic study of the site to ensure incorporation of Sioux cultural and

historic perspectives, but "the ultimate decision was instead of an ethnographic study a field survey was necessary, so we focused our attention on the field survey approach." August 19, 2014 Transcript at p. 846 line 22 to 847, lines 8. Despite admitting that it was "necessary" to the analysis, no cultural resources review or field study incorporating any Sioux cultural expertise was ever conducted at the site or incorporated into any NEPA document. August 19, 2014 Transcript at p. 821, lines 3-7 (Ms. Yilma); *id*. at p. 875, lines 6-11 (Ms. Yilma).

Ultimately, rather than preparing an environmental document based on a competent survey that included proper scientific expertise and methodology, NRC Staff instead simply invited Tribes to visit the site for themselves, making no provision for any methodologies or scope. August 19, 2014 Transcript at p. 847, lines 12-20 (Ms. Yilma); August 19, 2014 Transcript at p. 821, lines 3-7 (Ms. Yilma). Several Tribes, including the Oglala Sioux Tribe, rejected the terms of the NRC Staff directed survey as improper and insufficient. FSEIS at 1-25; Exhibit NRC-008-A-1. Instead of resolving these issues in an appropriate and satisfactory manner, NRC Staff simply charged forward, collecting reports from only three (3) Tribes that did participate in the exercise (none of them Sioux) and NRC Staff unilaterally deemed the analysis sufficient. August 19, 2014 Transcript at p. 820, lines 18-25 (Ms. Yilma).

Taken together, this testimony and evidence establishes that the Board's factual findings as to the lack of a NEPA-compliant review of cultural resources is soundly supported by the Record, and does not approach the "clearly erroneous" standard. Moreover, the Board's findings are informed by credibility assessments based on observing live testimony and witness responses that do not show up in the transcript. The Board's factual findings are confirmed by admissions in the record that no one with any Sioux cultural resource expertise, tribal-affiliated or otherwise, prepared any comments or reports that were incorporated into the cultural resource reviews. The

record further supports the finding that none of the parties that conducted the cultural reviews of the site, including field surveys, were trained, experienced, or competent to review or survey the area for, let alone determine impacts from the project to, the relevant cultural resources.

Findings of Fact: Government to Government Consultation

The record in this case also supports the Board's factual findings that NRC Staff neglected to engage in the required "reasonable and good faith" government-to-government consultation with the Tribe as required by the NHPA. As such, neither NRC Staff nor Powertech have raised substantial questions demonstrating any "clearly erroneous" findings of material facts in this regard. Here, contrary to NRC Staff and Powertech's one-sided presentation of the record, the timeline and actions of NRC Staff and the applicant's consultants, as these parties testified at the hearing, support the Board's finding that NRC Staff's consultation was not NHPA-compliant.

At the hearing, NRC Staff witness Ms. Yilma testified that NRC Staff "did not conduct an ethnographic study, but we did have a discussion about them during our face-to-face interactions with the tribes. And the ultimate conclusion was instead of an ethnographic study a field survey was necessary, so we focused our attention on the field survey approach." *Id*. at p. 847, lines 3-8.

In order to move forward with the "necessary" field study, instead of the agency taking it upon itself, NRC Staff witness Ms. Yilma testified that NRC Staff requested that the applicant provide the additional information, which resulted in the hiring by the applicant of Dr. Sabastian and her firm (SRI) "to be [the applicant's] consulting party and assist [the applicant] in identifying and satisfying the tribes' request." August 19, 2014 Transcript at p. 791, lines 12-18. *See also*, *Id*. at p. 792, lines 13-16 (Dr. Sabastian)("Once we came on board in the fall of 2011,

we began with the NRC introducing us to the tribes and asking the tribes to work with us. We began contacting all the tribes."). NRC Staff apparently was not concerned with the fact (or perhaps never inquired) that Dr. Sabastian, as she testified at the hearing, had never been involved in any kind of "actual physical on-the-ground [cultural resources] survey-kind of thing that we're talking about." August 19, 2014 Transcript at p. 846, lines 9-21. Federal courts have specifically rejected reliance on contracted investigators as satisfying the required "government-to-government" consultation requirements. See *Quechan Tribe*, 755 F.Supp.2d at 1119(holding that "while public informational meeting, consultations with individual tribal members, meetings with government staff or contracted investigators, and written updates are obviously a helpful and necessary part of the process, they don't amount to the type of 'government-to-government' consultation contemplated by the regulations.").

This field survey effort continued with a determination "that a statement of work was necessary to document the requirements and by which the tribes would go out and do the tribal survey." August 19, 2014 Transcript at p. 791, lines 19-24. Dr. Sabastian testified that in an attempt to come to agreement over the scope of work, SRI held a two-day meeting in February of 2012. *Id*. at p. 793, lines 1-7. After that meeting, SRI prepared a scope of work for a field survey, as "NRC [Staff] was anxious to sort of move the process along." *Id*. at p. 793, lines 7-8. Problematically, the NRC Staff tasked SRI to develop a scope of work, despite the fact that Dr. Sabastian had never conducted this kind of "actual physical on-the-ground TCP survey-kind of thing that we're talking about." August 19, 2014 Transcript at p. 846, lines 9-21.

Despite this lack of experience and knowledge, Dr. Sabastian testified that she and her firm "did the best that we could and said okay, here's the draft document. Clearly we're not the experts on how to do this. But here it is for the tribes to have something to work against or have

a structure to begin saying we don't like this, we do like that." *Id*. at p. 793, lines 9-15. Not surprisingly, the Tribes "said it was completely inadequate" and again, instead of acting reasonably and consulting on a government-to-government basis by presenting a scope of work prepared by someone with experience, NRC Staff instead had SRI try "with a second draft which [the Tribes] also said was completely not acceptable…." *Id*. at 793, lines 19-23. NRC Staff witness Ms. Yilma testified that the SRI proposal "didn't actually specify a methodology. It was more general guidance that Powertech provided…." *Id*. at 797, lines 21-23. OST witness Mr. CatchesEnemy testified that the Tribes were reasonably concerned about SRI's drafts because it lacked the "cultural relevance" necessary for such a project. *Id*. at p. 794, lines 5-8; 18-21.

Unsatisfied with SRI's repeated attempts, the Tribes submitted their own draft statement of work as a counter to the draft from the applicant's inexperienced consultants. *Id*. at p. 792, lines 1-6 (Ms. Yilma); p. 803, lines 21-22 (Ms. Yilma). The Tribes' proposal contained specifics related to timeframes, cost, and reporting requirements that the Tribe believed would adequately address the cultural and historical issues in the area. *Id*. at p. 803, line 22 to p. 804, line 21 (Ms. Yilma). However, NRC Staff witness Ms. Yilma testified that NRC Staff unilaterally rejected the proposal that was submitted by the Tribes because it "was significantly larger in dollar amount and also duration" and "significantly varied from what Powertech provided." *Id*. at p. 805, lines 15-19. Specifically, the proposal "was about six months" and "by the end of six months, we would have gotten a report, whereas, we were looking at magnitude of a month that we would identify historic properties and do our assessment." *Id*. at p. 806, lines 20-24. Lastly, "the tribes' proposal was close to $1 million. And Powertech's proposal was close to $110,000 or $120,000." *Id*. at p. 807, lines 14-16.

Instead of engaging in any back and forth or compromise on the Tribes' proposal, NRC Staff simply rejected it and unilaterally ended all negotiation and discussion over that scope of work and the Tribes' proposed field survey process. The Tribes responded with disbelief and severe disappointment as evidenced in email and letter correspondence between affected Tribes and the NRC Staff (*see* communications regarding NEPA and NHPA compliance)(Exhibit OST-11, pages 272-325). These letters to NRC Staff came from the Standing Rock Sioux Tribe (pages 272-277), the Sisseton Wahpeton Oyate (pages 280-281), the Rosebud Sioux Tribe (pages 288-293), and the Yankton Sioux Tribe (page 294).

During the process, the Tribes detailed their legitimate objections of the Tribal historic preservation officers to the proposed NRC Staff scientific methodology in conducting the required cultural resource impact survey of the proposed mine site. The Standing Rock Sioux Tribe's highly detailed letter specifically identifies objections targeting the geographic scope of the NRC Staff proposed surveys (only a small portion of the project area), as well as the scope of the impacts to be considered (direct impacts vs. indirect impacts), the timing of the survey, the resources available for Tribal participation, the selection process for the NRC Staff's survey contractor, and the protocols for identifying sites and gauging their significance. Exhibit OST-11, pages 272-277. Despite these objections, the Tribes committed to working with NRC Staff and the applicant in good faith, with the understanding that NRC Staff and the applicant must assure a meaningful process and credible methodology. Unfortunately, NRC Staff had abandoned this effort, without any substantive response to the Tribes, let alone a meaningful explanation or other discussion of the decision to reject the Tribes' survey proposal. Instead, NRC Staff went forward with an "open-site" survey method that lacked any organized or

scientifically determined methodology. FSEIS at 1-23 to 24; Exhibit NRC-008-A; August 19, 2014 Transcript at p. 797 lines 21-24 (Ms. Yilma).

Rather than explaining the reason for rejecting the Tribes' proposal, NRC Staff sent a one page letter dated October 12, 2012 that contained no detail or other explanation of NRC's decision to reject the Tribes' survey proposal. ML12286A310 (referenced and relied upon in Exhibit NRC-015). This October 12, 2012 letter also contained as an attachment a Powertech letter dated October 9, 2012 where the applicant, also without detail or explanation, simply informs NRC Staff that it will refuse to contribute more than $100,000 to the cultural resources identification effort. ML12285A425 (referenced and relied upon in Exhibit NRC-015 at 10). Consistent and supportive of the Board's findings on this matter, NRC Staff's discussion and negotiation with the Oglala Sioux Tribe was not reasonable and was not in good faith.

NRC Staff's complaint about the six month time frame for the Tribes' review was also not reasonable. This is demonstrated by the fact that Dr. Hannus testified that it took his Augustana team, apart from the initial survey conducted prior to and presented as part of the application, "an additional two seasons of work" to conduct the follow up surveys. August 19, 2014 Transcript at p. 818, line 23 to p. 819, line 3. To have expected the Tribes to conduct the entirety of their survey within a month, and to unilaterally reject the Tribes' proposal on that basis, is not reasonable. The applicant-led field work conducted by Dr. Hannus contrasts with testimony from NRC Staff witness Dr. Luhman that cultural resource surveys are to be conducted alongside any archaeological surveys. August 19, 2014 Transcript at p. 836, line 18 to p. 837, line 2.

In sum, the Record supports the Board's findings of fact with respect to the lack of reasonable and good faith, government-to-government consultation with the Oglala Sioux Tribe.

Despite NRC Staff and Powertech's self-serving version of the facts presented in the Petitions, neither party has demonstrated that the Board's findings in this regard may be "clearly erroneous" and "not even plausible in light of the record viewed in its entirety." *See Tennessee Valley Authority*, 60 NRC at 189.

THE BOARD'S LEGAL INTERPRETATIONS ARE NOT CONTRARY TO ESTABLISHED LAW

Contention 1A

NRC Staff argues that instead of requiring a "hard look" at the cultural resource impacts of the proposed mine project "to the fullest extent possible," NEPA requires only that the agency demonstrate that it made a "reasonable effort" to obtain information on such impacts, regardless of the actual extent of those impacts. NRC Staff Petition at 18. NRC Staff ignores precedent to assert that compliance with NEPA is premised on "the level of effort expended by Staff in its NEPA review" rather than whether the relevant NEPA documents actually contained any of the required impact analysis. NRC Staff Petition at 19, 20. Powertech similarly argues that NEPA requires only that a "rule of reason" should be applied to NEPA analyses to excuse NRC Staff's failure to incorporate any surveys of Sioux cultural resources at the site. Powertech Petition at 17. Applying these novel legal standards to avoid disclosure and analysis of identified impacts and mitigation measures finds no support in NEPA or judicial precedent, and thus neither NRC Staff nor Powertech raise any substantial questions as to the NEPA "fullest extent possible" standard applied by the Board. LBP-15-16 at 39. It is well established that:

> NEPA's instruction that all federal agencies comply with the impact statement requirement - and with all the other requirements of § 102 – "to the fullest extent possible," 42 U.S.C. § 4332, is neither accidental nor hyperbolic. Rather, the phrase is a deliberate command that the duty NEPA imposes upon the agencies to consider environmental factors not be shunted aside in the bureaucratic shuffle.

Flint Ridge Dev. Co. v. Scenic Rivers Ass'n, 426 U.S. 776, 787 (U.S. 1976).

In making its argument that the Board mis-applied NEPA precedent, NRC Staff relies on *Ground Zero Ctr. For Non-Violent Action*, 383 F.3d 1082 (9th Cir. 2004), *Warm Springs Dam Task Force v. Gribble*, 621 F.2d 1017 (9th Cir. 1980), and *Entergy Nuclear Generation Co.* (Pilgrim Nuclear Power Station), CLI-10-11, 71 NRC 287 (2010). NRC Staff Petition at 18. However, each of these cases is wholly inapposite, as they deal with circumstances where a court upheld an agency's limited NEPA analysis of extremely unlikely, even catastrophic, and highly speculative impacts that could result from its actions. Indeed, in the passage cited by NRC Staff, the *Ground Zero* court simply held that "[a]n EIS need not discuss remote and highly speculative consequences." *Ground Zero*, 383 F.3d at 1089-90 (*citing Warm Springs*, 621 F.2d at 1026-27).

Similarly, the *Warm Springs* holding cited by NRC Staff dealt with the court's rejection of an argument that NEPA requires a detailed analysis of a highly speculative and catastrophic seismic event on a dam construction. 621 F.2d at 1026-27. Lastly, the *Pilgrim* case dealt with the Commission simply confirming that "an environmental impact statement is not intended to be a "'research document,' reflecting the frontiers of scientific methodology, studies, and data. NEPA does not require agencies to use technologies and methodologies that are still 'emerging' and under development, or to study phenomena 'for which there are not yet standard methods of measurement or analysis.'" 71 NRC at 315.

To the contrary, in this case there is no dispute that NRC Staff was aware that the mine project area contains abundant resources of cultural significance to the Oglala Sioux Tribe. Exhibit APP-009 at 27 (remarking that "the sheer volume of sites documented in the area is noteworthy"). There is also no dispute that the mining project will have an impact on these resources and that NRC Staff failed to incorporate any competent cultural review into its NEPA analysis. August 19, 2014 Transcript at p. 875, lines 7-11 (Ms. Yilma). This is not a case where

the "rule of reason" referred to by NRC Staff and Powertech operates to excuse NRC Staff from analyzing some highly speculative impact. As such, the legal precedent cited by NRC Staff is inapposite and NRC Staff and Powertech have failed to demonstrate that the Board's application of NEPA's "hard look" requirement was contrary to any established law or precedent.

Nowhere does NRC Staff or Powertech cite to any statutory language, or a single case holding that an agency's level of effort alone suffices for compliance with NEPA, without regard to whether the relevant NEPA document actually contains the required environmental impact analyses. As a result, neither party has demonstrated any substantial questions as to the Board's interpretation of NEPA.

Next, NRC Staff contends that the Board departed from established law by making "divergent findings under NEPA and NHPA." NRC Petition at 21. The centerpiece of this argument is an assertion that the Board failed to "identify any NEPA-specific requirement that the Staff failed to meet with identifying cultural resources." NRC Petition at 22. However, the Board did exactly that – ruling that NRC Staff had failed to conduct the required "hard look" at cultural resource impacts and mitigation as required by NEPA. LBP-15-16 at 40 ("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.").

Lastly, both NRC Staff and Powertech continue to rely heavily on the Programmatic Agreement ("PA") as a basis to demonstrate a mistake of law by the Board and solve the lack of compliance with NEPA. NRC Staff Petition at 19 n. 83; Powertech Petition at 21. However, the PA cannot remedy the concessions by NRC Staff that no cultural resource surveys of Sioux

cultural resources were incorporated into any analysis of cultural impacts. August 19, 2014 Transcript at p. 821, lines 3-7 (Ms. Yilma); at p. 875, lines 6-11 (Ms. Yilma). As determined by the Board, the NRC Staff's decision to simply invite Tribes to visit the site for themselves cannot serve to satisfy NRC's NEPA duties, particularly as here where NRC Staff made no provision for any assurance of proper cultural expertise, proper methodology, scope, or the participation of the relevant Tribal representatives. August 19, 2014 Transcript at p. 847, lines 12-20 (Ms. Yilma); August 19, 2014 Transcript at p. 821, lines 3-7 (Ms. Yilma). Several Tribes, including the Oglala Sioux Tribe, properly rejected these terms as improper and insufficient. FSEIS at 1-25; Exhibit NRC-008-A-1. In the end, these surveys resulted in the submission of reports from only three (3) Tribes (none of them Sioux) after which NRC Staff terminated its NEPA review of cultural resources and unilaterally deemed its NEPA review as sufficient. August 19, 2014 Transcript at p. 820, lines 18-25 (Ms. Yilma).

The PA does not include any actual analysis or reasonably developed mitigation plans for cultural resources, but rather only sets forth a proposed plan for attempting to gather additional information at a later date and to negotiate as-yet unidentified mitigation measures into a mitigation plan at some point in the future. Exhibit NRC-018-A, at 5-10. Even for these plans, the PA specifically excludes from the effect of its terms all cultural resources that do not rise to the level, in NRC Staff's view, of eligibility for the NRHP. *Id*. at 6 ¶ 3(k); 9, ¶ 6(l); 11 ¶ 9(g).[2] As a result, the Board's ruling that neither reliance on the PA nor other tribal surveys represents the "hard look" required by NEPA is well-supported by established law.

[2] Notably, the authority for the use of a PA in the first instance derives from ACHP regulations at 36 C.F.R. § 800.14(b)(1)(ii). However, this section specifically requires that the use of a PA is allowable only where "effects on historic properties cannot be fully determined prior to approval of an undertaking." 36 C.F.R. § 800.14(b)(1)(ii). In this case, no such demonstration has been made, rendering the use of a PA unwarranted.

Contention 1B

Federal case law confirms the reasonableness of the Board's NHPA ruling in favor of the Tribe on Contention 1B. NRC Staff and Powertech repeatedly blame the Tribe for the problems with NRC Staff's NHPA compliance, asserting that the Tribe made unreasonable demands as to the scope and scale of a cultural resources study. However, the facts from the record recited *supra* dispel that notion.

Further, federal case law supports the Tribe's estimated six (6) month length of time and $1million cost necessary to perform an adequate cultural resources study. *See* August 19, 2014 Transcript, p.807 lines14-16 ("The tribes' proposal was close $1 million. And Powertech's proposal was close to $110,000 or $120,000.") (Ms. Yilma). For instance, in *Quechan Indian Tribe of the Fort Yuma Indian Reservation v. U.S. Dept. of the Interior*, 547 F.Supp.2d 1033 (D. Ariz. 2008), the Court upheld a Bureau of Reclamation NHPA consultation process, but only after specifically noting that physical on-the-ground traditional cultural property surveys were conducted with members of local tribes and "[i]n total, the process lasted over five years and cost more than two million dollars." *Quechan Indian Tribe*, 547 F.Supp.2d at 1046. There, the agency's compliance with NHPA was upheld because the agency took steps to ensure that cultural resource experts participated in on-the-ground cultural resource reviews.

Federal case law also supports the Board's determination that NRC Staff failed to meet federal duties to the Tribe where arbitrary NRC Staff cost and time components foreclosed any additional substantive negotiation or compromise on the Tribes' proposal. Federal courts have specifically rejected such agency justifications of "the size, complexity, and expense of [a] project, as well as time limits" in order to "impose deadlines of their own choosing" on NHPA consultation. *Quechan Indian Tribe*, 755 F.Supp.2d at 1119. Rather, while the courts recognize

that "Section 106's consulting requirements can be onerous … [b]ecause of the large number of consulting parties (including several tribes), the logistics and expense of consulting," "government agencies are not free to glide over requirements imposed by Congressionally-approved statutes and duly adopted regulations." *Id.*

Testimony confirmed that NRC Staff did not attempt to refute or refine the Tribes' approach or even have a discussion with the Tribes in an effort to resolve this difference of opinion, revealing both a lack of reasonableness and good faith, and a breach of the duties owned the Tribe under the federal trust responsibility. *See e.g. California Valley Miwok Tribe v. United States*, 515 F.3d 1262 (D.C. Cir. 2008)(discussing source of federal obligations to Tribes). The record, particularly when read in context of the four day hearing, established that NRC Staff aligned with the applicant, relied on the applicant's inexperienced contractor to do the hard work of consultation, and ultimately carried forward the wishes of the applicant over federal duty to the Tribe when rejecting without meaningful discussion the Tribes' reasonable proposal as too expensive and too time consuming.

NRC Staff's tactics during the NHPA process, and particularly in response to the Tribes' proposal for a legitimate cultural resources survey, to engage the Tribe in conversation yet never actually consider, or in some cases respond to, the substantive concerns and alternatives presented by the Tribes, supports the Board's finding that NRC Staff contravened the requirements of the NHPA. *See Quechan Indian Tribe*, 755 F.Supp.2d at 1118 (agency communications "replete with recitals of law (including Section 106), professions of good intent, and solicitations to consult … do not, by themselves, show [the agency] actually complied with the law."). The approach taken by NRC Staff harmed the Tribe's ability to participate in the identification of historic/cultural properties, and hampered its ability to effectively participate at

the later stage when the specific impacts from a particular project are analyzed. *See, e.g.*, 36 C.F.R. §§ 800.4 ("Identification of historic properties") and 800.5 ("Assessment of adverse effects").

The Board's decision is consistent with federal courts that have held that at least in part, reasonable and good faith efforts "depend on consultation with appropriate persons to gather information concerning historic properties to facilitate the identification and adequate consideration of historic preservation in the fact of new undertakings." *Attakai v. U.S.*, 746 F.Supp. 1395, 1408 (D. Ariz. 1990). Although *Attakai* dealt with an agency refusing to give an affected Tribe any opportunity to participate, the principle applies to this case, where the agency unilaterally rejected the Tribe's survey proposals based on unreasonable timing and cost restrictions and neglected to meet with the Tribe to resolve the differences.

Similarly, the Court in *Slockish v. U.S. FHWA*, 682 F.Supp.2d 1178 (D. Or. 2010) ruled that the NHPA requires the federal agencies to "assure that the agency has all the information needed to make an informed decision about the project's impacts prior to undertaking the project." *Slockish*, 682 F.Supp.2d at 1198. The Court further held that the requirement for complete information is a "key requirement in any federal project or undertaking which cannot casually be set aside." *Id*. Finally, the Court ruled that "by failing to include key stakeholders in the process, [the agency] may have acted without information necessary for them to comply with their obligations under [the NHPA]." *Id*. at 1198-99.

In *Pueblo of Sandia v. U.S.*, 50 F.3d 856 (10th Cir. 1995), the Circuit Court held that despite the fact the local affected Tribes declined to respond to repeated U.S. Forest Service requests for information on cultural resources, the fact that the agency was aware that such resources existed in the area "was sufficient to require the Forest Service to engage in further

investigations, especially in light of regulations warning that tribes might be hesitant to divulge the type of information sought." *Pueblo of Sandia*, 50 F.3d at 860. While in that case, the Forest Service appears to have wholly ignored evidence of cultural resources in making a determination that none existed in the affected area, the principle applies here. Despite the Tribes' hesitancy to engage in the survey scope of work proposed by the admittedly inexperienced consultant hired by the applicant, this caselaw supports a finding that NRC Staff did not comply with NHPA requirements.

Lastly, NRC Staff makes a pair of related arguments that the Board's interpretation of NHPA Contention 1B is inconsistent with a portion of its ruling under Contention 1A with respect to NEPA. NRC Staff Petition at 21, 23. Even if the conclusions diverge, which they do not, caselaw supports the independent review of NEPA and NHPA compliance where "compliance with the NHPA 'does not relieve a federal agency of the duty of complying with the impact statement requirement 'to the fullest extent possible.'" *Lemon v. McHugh*, 668 F. Supp. 2d 133, 144 (D.D.C. 2009) *quoting Preservation Coalition, Inc. v. Pierce*, 667 F.2d 851 (9th Cir. Idaho 1982) *quoting* 42 U.S.C. § 4332.

NRC Staff argues that because the Board found NRC Staff had conducted adequate review under NEPA and adequate consultation under NHPA with regard to "historic resources" it cannot find that NRC Staff failed to comply with NEPA and NHPA with regard to "cultural resources." *Id*. at 23-24. NRC Staff ignores the clear distinction between "historic" and "cultural" resources. NRC Staff wrongly asserts that "historic" resources include "cultural" resources, and thus the Board's ruling is inconsistent with established law.

NEPA regulations specifically distinguish between the "historic" and "cultural", requiring that the "effects" that must be reviewed in a NEPA document include "ecological (such

as the effects on natural resources and on the components, structures, and functioning of affected ecosystems), aesthetic, historic, cultural, economic, social, or health, whether direct, indirect, or cumulative." 40 C.F.R. § 1508.8. NRC Staff witness Ms. Yilma specifically acknowledged the distinction in the hearing and directly contradicts NRC Staff's argument.

> Under NEPA, we're supposed to be looking at cultural resources. Historical property is a subset of cultural resources and so therefore any information that are provided under the NHPA historical properties are a subset of NEPA review. So we have to consider them under the NEPA review.

August 19, 2014 Transcript at p. 785, lines 14-19. The joint Advisory Council on Historic Preservation ("ACHP") and Council on Environmental Quality ("CEQ") NEPA Handbook relied upon by the applicant and NRC Staff includes provisions specifically echoing this point:

> WHAT IS A "CULTURAL RESOURCE?"
>
> Effects considered under NEPA include cultural and historic. [40 C.F.R. § 1508.8]. The term "cultural resources" covers a wider range of resources than "historic properties," such as sacred sites, archaeological sites not eligible for the National Register of Historic Places, and archaeological collections.

Exhibit NRC-048 at 4. Thus, contrary to NRC Staff's misguided argument, the Board's conclusions of law are entirely consistent with the fact that NEPA's "hard look" standard applies to historic properties and cultural resources.

NRC Staff relies heavily on a letter from the ACHP to demonstrate compliance with the NHPA. NRC Staff Petition at 24. However, that letter merely indicated that from the limited information available to it at the time, the ACHP could not conclude that NRC Staff had violated the NHPA. While the ACHP has its role in advising agencies and establishing regulations, it is not the final arbiter of NRC Staff's compliance with the Act. That responsibility falls to the hearing officer and this Commission, which has the benefit of a fully-developed factual record. In the record, the applicant concedes this point, as its witness Dr. Sabastian testified that NRC

has the authority to determine its compliance with NHPA. Exhibit APP-063 at 12, ¶ A.23. As demonstrated herein, based on the full and complete factual record, the Board had substantial basis in the record in support of its finding of a lack of NHPA compliance, and no demonstration has been made that the Board's findings were "clearly erroneous."

POWERTECH'S SUA SPONTE ARGUMENT IS WITHOUT MERIT

Powertech argues that the Board's imposition of a license condition regarding locating and properly abandoning all historic drill holes in the proposed mine wellfields was a "clear error of fact" and was not properly before the Board. Powertech Petition at 22. However, the Board's ruling and the Record demonstrate that this issue was squarely before the Board. *See* LBP-15-16 at 56 (reciting Tribe and NRC Staff arguments regarding boreholes); 66-68 (Board recounting extensive evidence and testimony directly pertaining to Powertech responsibility to identify and plug historic boreholes); 72-73 (reciting NRC Staff argument that boreholes will be identified and plugged). *See also* Statement of Position of the Oglala Sioux Tribe at 33 *citing* Exhibit NRC-008-B, FSEIS at E-135 to 136; OST Post-Hearing Brief at 48-52 (discussing borehole plugging). As such, the Board did not run afoul of any *sua sponte* restrictions and the Record supports the new license condition.

RETAINED JURISDICTION NOT NECESSARY

NRC Staff argues that the Board exceeded its jurisdiction in retaining jurisdiction over the issues related to Contentions 1A and 1B. NRC Staff Petition at 14-16. In support, NRC Staff cites to precedent where various ASLB's or the Commission confirmed that a Board's authority to retain jurisdiction "does not extend to superintending the Staff's discharge of its review functions. *See Duke Energy Corp.* (Catawba Nuclear Station, Units 1 and 2), CLI-04-6, 59 NRC 62, 74 (2004)." *U.S. Army* (Jefferson Proving Ground), LBP-05-9, 61 NRC 218, 222

(2005). "The licensing boards' sole, but very important, job is to consider safety, environmental, or legal issues raised by license applications. Licensing boards simply have no jurisdiction over nonadjudicatory activities of the Staff that the Commission has clearly assigned to other offices unless the Commission itself grants that jurisdiction to the Board." *Duke Energy*, 59 NRC at 74.

In this case, the Board has not requested that the Commission provide further guidance or authority with respect to its decision (*see* 10 C.F.R. §§ 2.319(l), 2.323(f)), and the Board has made concrete legal rulings with respect to both Contention 1A and 1B. *See* LBP-15-16 at 42 ("The FSEIS has not adequately addressed the environmental effects of the Dewey-Burdock project on Native American cultural, religious and historic resources, and the required meaningful government-to-government consultation between the Oglala Sioux Tribe and the NRC Staff has not taken place."). As such, the Board has fulfilled its responsibilities and the only appropriate result is vacatur of the license and remand to NRC Staff to remedy the legal errors. *See* 16 U.S.C. § 470f (requiring NHPA compliance "prior to the issuance of any license"); 10 C.F.R. §§ 51.100, 51.101 (requiring completion of EIS prior to licensing); 76 FR 56951, 56957-58 (Sept. 15, 2011)(confirming NRC policy that all NEPA requirements "must be satisfied by the NRC before it can approve the subject application….").

CONCLUSION

Based on the forgoing, the Tribe asserts that neither NRC Staff nor Powertech have demonstrated a sufficient basis for the Commission to review the Board's rulings on Contention 1A or 1B, nor the inclusion of the additional license condition pertaining to boreholes. Lastly, the Commission should vacate the license until full compliance with NEPA and the NHPA has been achieved.

Respectfully Submitted,

/s/ Jeffrey C. Parsons

Jeffrey C. Parsons
Western Mining Action Project
P.O. Box 349
Lyons, CO 80540
303-823-5732
Fax 303-823-5732
wmap@igc.org

Travis E. Stills
Energy and Conservation Law
Managing Attorney
Energy Minerals Law Center
1911 Main Avenue, Suite 238
Durango, Colorado 81301
stills@frontier.net
phone:(970)375-9231
fax: (970)382-0316

Attorneys for Oglala Sioux Tribe

Dated at Lyons, Colorado
this 22nd day of June, 2015

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Consolidated Response to Petitions for Review of LBP-15-16 in the captioned proceeding were served via the Electronic Information Exchange ("EIE") on the 22nd day of June, 2015, 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_____
Jeffrey C. Parsons
Western Mining Action Project
P.O. Box 349
Lyons, CO 80540
303-823-5732
Fax 303-823-5732
wmap@igc.org