

July 1, 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))	

NRC STAFF’S REPLY TO OGLALA SIOUX TRIBE’S RESPONSE BRIEF

The Staff replies to the Oglala Sioux Tribe’s June 22, 2015 brief, in which the Tribe argues that the Commission should deny the Staff’s petition for review. The Tribe makes two broad claims, one of which is that the Staff is simply challenging the Board’s factual findings, rather than pointing to any error of law.¹ The Tribe also claims the Staff argues merely that it “made a reasonable effort” at identifying cultural resources in the Dewey-Burdock area, whereas NEPA required the Staff to take a “hard look” at such resources.²

Both claims are incorrect. The Staff did, in fact, argue that the Board erred as a matter of law by incorrectly applying NEPA’s “hard look” standard.³ The Staff also argued that the Board’s finding that the Staff failed to consult with the Tribe as required under the NHPA (Contention 1B) is legally inconsistent with its finding that, when attempting to identify tribal resources, the Staff complied with the NHPA (Contention 1A).⁴ In addition, the Staff explained that it took a hard look at cultural resources, as required by NEPA, and that it made a reasonable and good faith effort to identify historic properties, as required by the NHPA.⁵

¹ Tribe’s Response at 4.

² Response at 1, 4, 15.

³ Staff’s Petition for Review at 17–20.

⁴ *Id.* at 21–23.

⁵ *Id.* at 19–20, 23–25.

In its response, the Tribe makes numerous other unfounded claims. For example, the Tribe argues that, when evaluating cultural resources, the Staff relied primarily on an archeological survey conducted by Powertech's contractor that did not address American Indian cultural resources.⁶ In fact, the Staff expended considerable effort arranging for tribal surveys designed to identify American Indian resources. Through these surveys, the Staff obtained information on the cultural resources of four American Indian tribes. The Staff also reviewed an ethnohistoric study of information on American Indian cultural resources that included information on Sioux resources.⁷ In addition, the Staff repeatedly sought information on cultural resources from the tribes through other means.⁸

The Tribe also claims that the Staff did not use an appropriate methodology for identifying cultural resources of American Indian tribes.⁹ The Tribe fails to mention that several tribes, including the Oglala Sioux, told the Staff that only their own representatives could identify tribal resources that may be present at the Dewey-Burdock site.¹⁰ Accordingly, the Staff arranged for field surveys that allowed each tribe to send its own representatives to identify such resources. In other words, the Staff's methodology for identifying tribal resources was not only appropriate—it was the very methodology upon which the Tribe insisted. Consistent with NEPA's "rule of reason," the Staff cannot be faulted where the Tribe declined to participate in the very type of survey for which it advocated.

On pages 7–11 of its response the Tribe argues that, with one exception, none of the Staff's or Powertech's personnel had experience conducting field surveys for American Indian cultural resources. The Tribe overlooks that the Staff invited the personnel most experienced in this area—representatives from each of the 23 tribes with whom it was consulting under the NHPA—to survey the Dewey-Burdock site.

⁶ Response at 5–6.

⁷ Exs. NRC-008-A at 257–59, NRC-018-B at 10–13, NRC-144.

⁸ Exs. NRC-015, NRC-018-B at 13–24.

⁹ Response at 5.

¹⁰ Exs. NRC-064 at 2, NRC-065 at 1, Ex. NRC-066 at 2.

According to the Tribe, the Staff relied on Powertech's contractor to consult with the tribes, in violation of the NHPA's requirements.¹¹ The hearing record, however, shows that the Staff consulted on its own, working with all parties to resolve issues under the NHPA.¹² Furthermore, although the Tribe refers to Powertech's consultant as "inexperienced," the contractor has significant experience investigating cultural resources.¹³ The contractor simply had not previously conducted the particular type of field survey called for by the Tribe here, a survey that according to the Tribe could only be performed by its own members.

The Tribe next claims that, when differences arose between Powertech and the consulting tribes about a statement of work, the Staff did not seek to resolve these differences and simply moved to an approach involving individual site surveys.¹⁴ In fact, the Staff worked diligently to resolve these differences, as reflected in the evidence of record.¹⁵ The Staff moved forward with an alternate survey approach only because it determined, after consulting on the issue for approximately nine months, that the parties could not agree on a statement of work. As the Staff explained to the Board, the Tribe's proposed statement of work involved surveying only 25% of the Dewey-Burdock site at a cost of approximately \$1,000,000, with a six-month wait for the survey report.¹⁶

The Tribe further claims that the Staff relied on the Programmatic Agreement for the Dewey-Burdock Project to show that it analyzed cultural resources and developed relevant mitigation

¹¹ Response at 11, 20.

¹² Ex. NRC-015, NRC-018-B at 13–24.

¹³ Ex. APP-002. Powertech's contractor, SRI Foundation, was also a contractor for the agency's review that the court upheld in *Quechan*, a case the Tribe cites as an example of adequate consultation under the NHPA. *Quechan Indian Tribe v. United States DOI*, 547 F. Supp. 2d 1033, 1046 (D. Ariz. 2008).

¹⁴ Response at 12–14, 20.

¹⁵ See Ex. NRC-015 at 6–12 (showing certain actions the Staff took to reconcile the statements of work); see also Exs. NRC-018-D, NRC-031 (ACHP letters explaining that the Staff complied with the NHPA).

¹⁶ Hearing Transcript at 803–08.

measures.¹⁷ In fact, the Staff addressed both issues primarily in the Dewey-Burdock FSEIS.¹⁸ The Programmatic Agreement does, however, further discuss impacts to cultural resources that are eligible or potentially eligible for listing on the National Register, along with mitigation measures.¹⁹

On pages 19–20 of its response, the Tribe argues that the *Quechan* decision supports its claim that the Staff did not make a good faith and reasonable effort at consulting with tribes. According to the Tribe, the agency’s consultation process that the court upheld in *Quechan* lasted over five years, cost more than two million dollars, and involved on-the-ground surveys for cultural resources. In this case, however, the Staff consulted with tribes for approximately four years, and tribes likewise conducted on-the-ground surveys for cultural resources. Furthermore, while the court in *Quechan* refers to the amount the agency spent during its consultation process, it does not identify any minimum funding requirement under the NHPA, nor does it state the amount the agency spent on surveys specifically.²⁰

On pages 19–22, the Tribe cites several other federal court decisions to support its arguments. The first case, *California Valley Miwok Tribe*, discusses the federal trust responsibility to tribes. This responsibility imposed no particular obligations on the Staff here, however, other than to comply with applicable law.²¹ The quoted portions of three other cases the Tribe cites—*Attakai*, *Slockish*, and *Lemon*—simply restate general principles of NHPA law and do not show any deficiency in the Staff’s review. The last case, *Pueblo of Sandia*, involved an agency that “wholly ignored evidence of cultural resources,” whereas in the present case the Staff attempted for almost four years to obtain information on Sioux cultural resources.

¹⁷ Response at 17–18.

¹⁸ Ex. NRC-008-A-2 at 462–95.

¹⁹ In particular, Attachment B to the Agreement discusses impacts to these sites (Ex. NRC-018-B at 25–46), while the Agreement itself lists certain mitigation measures (e.g., Ex. NRC-018-A at 5, 10).

²⁰ In any event, the costs involved in *Quechan* appear to have been borne solely by the agency itself, unlike in NRC licensing actions, where the applicant typically pays for surveys and certain other costs related to NHPA consultation.

²¹ See *Gros Ventre Tribe v. United States*, 469 F.3d 801 (9th Cir. 2006) (federal trust responsibility to tribes “does not impose a duty . . . beyond complying with generally applicable statutes and regulations”).

On pages 22–24 the Tribe argues the Board reasonably found that, while the Staff identified “historic resources” as required under the NHPA, it failed to identify the broader category of “cultural resources” as required under NEPA. The Tribe overlooks, however, that in order to comply with the NHPA the Staff had to attempt to identify *both types* of resources.²² The difference between the Staff’s NHPA and NEPA reviews lies not in the Staff’s identification efforts, but with how the Staff evaluated the resources once it found them eligible or potentially eligible for listing on the National Register (thus requiring further review under both the NHPA and NEPA) or ineligible (requiring further review under NEPA alone). The Board, however, found that while the Staff identified resources as required by the NHPA, it did not meet NEPA’s identification requirements. Because the Board did not point to any difference between NHPA and NEPA requirements to support its divergent findings, the Board committed an error of law.

Finally, the Tribe argues that the ACHP did not find the Staff complied with the NHPA, but “merely indicated that from the limited information available to it . . . the ACHP could not conclude that NRC Staff had violated the NHPA.”²³ The Staff, however, fully informed the ACHP of its consultation efforts under the NHPA, and the ACHP was in fact a consulting party in the Staff’s review.²⁴ Furthermore, the ACHP affirmatively found that the Staff met the “content and spirit” of the NHPA—it did not merely find a lack of evidence on this issue.²⁵

Respectfully submitted,
/Signed (electronically) by/
Michael J. Clark
Counsel for the NRC Staff

/Signed (electronically) by/
Patricia A. Jehle
Counsel for the NRC Staff

Dated at Rockville, Maryland
This 1st day of July 2015

²² 36 C.F.R. § 800.2(c)(2)(ii)(A), (D); 36 C.F.R. § 800.4(c)(1).

²³ Response at 23.

²⁴ Exs. NRC-015 at 13–14, NRC-018-B at 21.

²⁵ Ex. NRC-031. The Tribe also argues that the Commission, rather than the ACHP, is the final arbiter of the NRC’s compliance with the NHPA. Response at 23. While true, in making its findings the Commission gives considerable weight to the relevant findings of other expert agencies. *Public Serv. Co. of New Hampshire, et al.* (Seabrook Station, Units 1 and 2), CLI-77-8, 5 NRC 503, 527 (1977); *see also Quechan Indian Tribe*, 547 F. Supp. 2d at 1047 (citing the ACHP’s finding to support its own finding that the agency complied with the NHPA).

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CERTIFICATE OF SERVICE

Pursuant to 10 C.F.R. § 2.305, I certify that counsel for the NRC Staff served copies of the "NRC Staff's Reply to the Oglala Sioux Tribe's Response Brief" via the NRC's Electronic Information Exchange (EIE) on July 1, 2015. Counsel for the Staff served those representatives exempted from filing through the EIE with copies of its motion by electronic mail, also on July 1, 2015.

***/Signed (electronically) by/
Patricia A. Jehle***

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