

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

William J. Froehlich, Chairman
Dr. Mark O. Barnett
G. Paul Bollwerk, III

In the Matter of POWERTECH USA, INC. (Dewey-Burdock In Situ Uranium Recovery Facility)

Docket No. 40-9075-MLA

ASLBP No. 10-898-02-MLA-BD01

October 30, 2018

MEMORANDUM AND ORDER
(Denying Motions for Summary Disposition as to Contention 1A)

On August 17, 2018, the Nuclear Regulatory Commission Staff (NRC Staff) and Intervenor Oglala Sioux Tribe (Oglala Sioux Tribe or Tribe) filed separate motions for summary disposition of Contention 1A, the sole remaining contention in this proceeding.¹ Previously, the Board found in favor of the Oglala Sioux Tribe and the Consolidated Intervenor on Contention 1A in its 2015 Partial Initial Decision, holding that the NRC Staff's obligation to assess the impacts to Native American cultural, religious, and historical resources under the National Environmental Policy Act (NEPA) had not been satisfied.² Thereafter, in October 2017, the Board denied the NRC Staff's previous motion for summary disposition and reaffirmed its

¹ NRC Staff's Motion for Summary Disposition of Contention 1A (Aug. 17, 2018) [hereinafter NRC Staff Motion]; Oglala Sioux Tribe's Motion for Summary Disposition (Aug. 17, 2018) [hereinafter OST Motion].

² LBP-15-16, 81 NRC 618, 653 (2015), aff'd, CLI-16-20, 84 NRC 219 (2016).

conclusion that the NRC Staff had not yet satisfied its NEPA duty.³ The Board found that “the NRC Staff ha[d] failed to establish that there [we]re no material facts in dispute relative to the NRC Staff’s NEPA burden to adequately address the impact of the Dewey-Burdock project on tribal cultural resources,” particularly with regard to “the reasonableness of its method for assessing impacts from the Dewey-Burdock project on Sioux tribal cultural resources.”⁴

Now, one year later, in this Memorandum and Order the Board again finds that the NRC Staff has failed to show that there is no material factual dispute as to whether the NRC Staff has met its NEPA burden and fulfilled its duty to adequately address impacts to Sioux tribal cultural resources at the Dewey-Burdock project site. We therefore deny the NRC Staff’s current motion for summary disposition as to Contention 1A. While the NRC Staff’s proposal for resolving the environmental matters at issue here (the March 2018 Approach),⁵ was agreed to by all parties and could constitute a valid path for resolving Contention 1A, material factual disputes still remain regarding the reasonableness of the NRC Staff’s implementation of this approach, relating to (1) the survey methodology, and (2) the NRC Staff’s unilateral decision to discontinue efforts to implement the March 2018 Approach during the first week of Phase One of the site survey.

We likewise deny the Oglala Sioux Tribe’s motion for summary disposition and its request to stay or revoke the license of Powertech (USA), Inc. (Powertech). The Oglala Sioux Tribe has failed to show that there is no issue of material fact as to the reasonableness of the NRC Staff’s survey methodology or the NRC Staff’s overall implementation of the March 2018 Approach.

³ LBP-17-9, 86 NRC 167, 173–74 (2016), pet. for review denied, CLI-18-07, 88 NRC ___, ___ (slip op. at 1) (July 24, 2018).

⁴ Id.

⁵ See infra Section II.

I. Background Associated with the NRC Staff's March 2018 Approach

A. Procedural History Preceding the 2015 Partial Initial Decision

This proceeding⁶ began more than nine years ago when Powertech submitted a license application to construct and operate the proposed Dewey-Burdock in situ uranium recovery (ISR) facility in Custer and Fall River Counties, South Dakota.⁷ Thereafter, Consolidated Intervenorors (two individuals and six organizations) filed a Request for Hearing and Petition for Leave to Intervene on March 8, 2010,⁸ and the Oglala Sioux Tribe filed a separate Request for Hearing and Petition for Leave to Intervene on April 6, 2010.⁹ The Board held oral argument on the petitions on June 8 and 9, 2010,¹⁰ and on August 5, 2010, the Board admitted the Oglala Sioux Tribe and Consolidated Intervenorors as intervenorors to the proceeding.¹¹ The Board admitted four of the Oglala Sioux Tribe's contentions¹² and three of the Consolidated Intervenorors' contentions.¹³

After the Draft Supplemental Environmental Impact Statement (DSEIS) was issued on November 26, 2012, the Oglala Sioux Tribe and Consolidated Intervenorors filed new and

⁶ A detailed procedural history of this proceeding can be found in the Board's April 30, 2015 Partial Initial Decision. LBP-15-16, 81 NRC at 626–35.

⁷ Dewey-Burdock Project Supplement to Application for NRC Uranium Recovery License Dated February 2009 (Aug. 2009) (ADAMS Accession No. ML092870155).

⁸ Consolidated Request for Hearing and Petition for Leave to Intervene (Mar. 8, 2010).

⁹ Petition to Intervene and Request for Hearing of the Oglala Sioux Tribe (Apr. 6, 2010) at 22–23 [hereinafter Oglala Sioux Tribe Petition].

¹⁰ Tr. at 1–405 (June 8–9, 2010). Throughout this proceeding, beginning with oral argument in 2010, the transcripts have continued with sequential numbering. However, the transcript from November 7, 2016, was numbered with pages 1–61, and the transcript from November 16, 2017, began the transcript page numbering again from page 1171, which had been the starting number for the transcript from August 21, 2014. To avoid any confusion, we provide the date of the transcript with each citation.

¹¹ LBP-10-16, 72 NRC 361, 376 (2010).

¹² Id. at 444.

¹³ Id. at 443.

amended contentions.¹⁴ In a July 22, 2013 decision, the Board admitted nine contentions based on the new and original contentions.¹⁵ When the NRC Staff issued its Final Supplemental Environmental Impact Statement (FSEIS) on January 29, 2014, the previously admitted contentions migrated as challenges to the FSEIS.¹⁶ Subsequently, two of the admitted contentions were voluntarily withdrawn by the Oglala Sioux Tribe.¹⁷

On April 8, 2014, before a hearing was held on the admitted contentions, pursuant to 10 C.F.R. § 2.1202(a), the NRC Staff issued a 10 C.F.R. Part 40 source materials license to Powertech, authorizing Powertech to possess and use source and byproduct material in connection with the Dewey-Burdock project.¹⁸ On April 11, 2014, both the NRC Staff and the Oglala Sioux Tribe filed their first motions for summary disposition in this proceeding.¹⁹ The Board denied both parties' motions on June 2, 2014.²⁰ The Board then held an evidentiary hearing in Rapid City, South Dakota, from August 19–21, 2014, on the seven admitted

¹⁴ See List of Contentions of the Oglala Sioux Tribe Based on the Draft Supplemental Environmental Impact Statement (Jan. 25, 2013); Consolidated Intervenor's New Contentions Based on DSEIS (Jan. 25, 2013).

¹⁵ LBP-13-9, 78 NRC 37, 112–13 (2013). The seven original contentions contesting the adequacy of various aspects of Powertech's Environmental Report were migrated to challenges of the applicable portions of the DSEIS. Id. at 50. Several of the original seven contentions were reformulated by the Board for a total of five admitted contentions, and of the three new contentions that were admitted, one was split into two contentions for a total of four new contentions. Id. at 112–13.

¹⁶ LBP-15-16, 81 NRC at 631–32.

¹⁷ Id. at 633. Contentions 14A and 14B were withdrawn. Id.

¹⁸ Id. at 632. On April 30, 2014, the Board granted a temporary stay of the license in response to motions to stay from both Intervenor's. Id. However, after oral argument on those motions, the Board lifted the temporary stay and denied the motions on May 20, 2014. Id.

¹⁹ NRC Staff's Motion for Summary Disposition on Safety Contentions 2 and 3 (Apr. 11, 2014) (seeking summary disposition on the safety aspects of Contentions 2 and 3); Oglala Sioux Tribe's Motion for Summary Disposition National Environmental Policy Act Contentions 1A and 6 – Mitigation Measures (Apr. 11, 2014) (seeking summary disposition of NEPA issues in Contentions 1A and 6).

²⁰ Licensing Board Order (Denying Motions for Summary Disposition) (June 2, 2014) at 7 (unpublished).

contentions.²¹ On April 30, 2015, the Board issued a Partial Initial Decision on the merits of those contentions.²²

B. The 2015 Partial Initial Decision and the Commission's Review

The Board's April 30, 2015 Partial Initial Decision resolved all contentions in favor of the NRC Staff and Powertech except for Contentions 1A and 1B, on which the Oglala Sioux Tribe and Consolidated Intervenors prevailed.²³ Contention 1A pertained to the NRC Staff's NEPA obligation to assess the impacts to Native American cultural, religious, and historical resources.²⁴ The Board found that the NRC Staff failed to fulfill this NEPA obligation because the FSEIS did "not contain an analysis of the impacts of the project on the cultural, historical, and religious sites of the Oglala Sioux Tribe and the majority of the other consulting Native American tribes."²⁵ Accordingly, the Board concluded that "[w]ithout additional analysis as to how the Powertech project may affect the Sioux Tribes' cultural, historical, and religious connections with the area, NEPA's hard look requirement ha[d] not been satisfied, and potentially necessary mitigation measures ha[d] not been established."²⁶

Contention 1B involved the NRC Staff's National Historic Preservation Act (NHPA) obligation for government-to-government consultation with the Oglala Sioux Tribe.²⁷ Despite repeated concerns raised over five years by the Oglala Sioux Tribe about the consultation process, the NRC Staff held only large group meetings with members of multiple tribes, rather

²¹ LBP-15-16, 81 NRC at 633.

²² Id. at 708–11.

²³ Id. at 708–10.

²⁴ Id. at 653.

²⁵ Id. at 655.

²⁶ Id.

²⁷ Id.

than a government-to-government session solely with members of the Oglala Sioux Tribe.²⁸ Further, while the NRC Staff sent many letters directly to the Oglala Sioux Tribe, the Board noted that “quantity does not necessarily equate with meaningful or reasonable consultation.”²⁹ The Board found that the “NRC Staff [wa]s at least partly at fault for the failed consultation process,” but also acknowledged that the Oglala Sioux Tribe shared “some responsibility for the inadequacy of the FSEIS and the lack of meaningful consultation” because “some of its demands to engage with the NRC Staff were patently unreasonable.”³⁰ The Board concluded that in order to satisfy this NHPA consultation requirement, the NRC Staff was obligated to undertake additional consultation with the Oglala Sioux Tribe, which is the tribe with “the most direct historical, cultural, and religious ties to the area.”³¹

The Board retained jurisdiction over this proceeding pending further consultation between the Oglala Sioux Tribe and the NRC Staff.³² In the interim, however, all four parties to the proceeding filed petitions for review of the Partial Initial Decision.³³ On December 23, 2016, the Commission found no error with the Board decision that the NRC Staff’s NEPA and NHPA efforts were inadequate, and affirmed the Board’s decision on Contentions 1A and 1B.³⁴ The Commission acknowledged the proceeding remained within the Board’s jurisdiction to resolve the deficiencies identified in the Partial Initial Decision.³⁵ Addressing Contention 1A, the

²⁸ Id. at 656.

²⁹ Id.

³⁰ Id. at 656–57. Specifically, the Board found that the cost of the Oglala Sioux Tribe’s Makoche Wowapi survey proposal, estimated at close to \$1 million, Tr. at 807 (Aug. 19, 2014), was unreasonable. LBP-15-16, 81 NRC at 657 n.229.

³¹ Id. at 656–57.

³² Id. at 658. This included monthly status reports submitted by the NRC Staff describing its updated consultation efforts with the Oglala Sioux Tribe. Id.

³³ See CLI-16-20, 84 NRC at 224–27.

³⁴ Id. at 262.

³⁵ Id.

Commission concluded that the Board did not commit “clear error” in its factual determination that the NRC Staff’s consideration of the Oglala Sioux Tribe’s and other Native Americans’ cultural resources failed to satisfy NEPA’s hard look standard.³⁶ In addressing Contention 1B, the Commission determined that “[t]he Board, after a merits hearing, reasonably concluded that the Staff’s consultation with the Tribe was insufficient to meet these requirements.”³⁷ Finally, the Commission found that the Board had not improperly retained jurisdiction and, in carrying out the Board’s order, the NRC Staff was “free to select whatever course of action it deems appropriate to address the deficiencies . . . including, but not limited to further government-to-government consultation.”³⁸

C. The D.C. Circuit’s Review of 2015 Partial Initial Decision

After the Commission affirmed the Board’s April 2015 Partial Initial Decision, the Oglala Sioux Tribe appealed the Commission’s decision to the United States Court of Appeals for the District of Columbia Circuit.³⁹ The Oglala Sioux Tribe challenged the decision to “leave the license in effect pending the Staff’s effort to cure the NEPA deficiencies,” as well as the merits of several of the unfavorable Commission/Board rulings on its contentions.⁴⁰ The District of Columbia Circuit declined to rule on the merits of its contention-based challenges, finding that the Commission’s order “as a whole is not final,” and therefore the court did not have jurisdiction to review those rulings.⁴¹ The court did, however, take review of the Commission’s holding in CLI-16-20 that allowed the Powertech license to remain in effect while the proceeding and the

³⁶ Id. at 247–48.

³⁷ Id. at 249.

³⁸ Id. at 251.

³⁹ Oglala Sioux Tribe v. U.S. Nuclear Regulatory Comm’n, 896 F.3d 520 (D.C. Cir. 2018).

⁴⁰ Id. at 526.

⁴¹ Id. at 527.

NRC Staff's efforts to cure the NEPA-related deficiencies continued before the Board.⁴²

Although the court found that the standard the Commission applied to allow the Powertech license to become effective was contrary to NEPA, the court did not vacate the Agency's ruling. Instead, the court remanded the question of whether to allow the Powertech license to remain effective to the Commission.⁴³ On August 30, 2018, the Commission issued an order inviting the parties to this proceeding to provide their views on how the Agency should respond to the Court of Appeals' ruling and what legal standard the NRC should use in evaluating whether to vacate Powertech's license.⁴⁴

D. The 2017 Summary Disposition Decision and Commission's Review

While the Board's Partial Initial Decision was on appeal to the Commission, the NRC Staff reinitiated its government-to-government consultation efforts with the Oglala Sioux Tribe.⁴⁵ In June of 2015, letters were exchanged between the NRC Staff and the Oglala Sioux Tribe,⁴⁶ although nearly a year passed before a face-to-face consultation meeting actually took place. At that meeting, on May 19, 2016, in Pine Ridge, South Dakota, the Oglala Sioux Tribe voiced its objections to and concerns about the 2013 survey on the grounds that it "was incomplete and the survey methodology lacked scientific integrity."⁴⁷

⁴² Id. at 527–37.

⁴³ Id. at 538.

⁴⁴ Commission Order (Aug. 30, 2018) (unpublished).

⁴⁵ A more detailed history of the NRC Staff's efforts can be found in the Board's October 2017 summary disposition ruling. See generally LBP-17-9, 86 NRC at 174–83.

⁴⁶ Letter from Marissa G. Bailey, Director, Division of Fuel Cycle Safety, Safeguards, and Environmental Review, to John Yellow Bird Steele, President, Oglala Sioux Tribe (June 23, 2015) (ADAMS Accession No. ML15175A411); Letter from Denis Yellow Thunder, Tribal Historic Preservation Officer (THPO), Oglala Sioux Tribe, to Marissa G. Bailey, Director, Division of Fuel Cycle Safety, Safeguards, and Environmental Review (July 22, 2015) (ADAMS Accession No. ML15203A108).

⁴⁷ Summary of Meeting with the Oglala Sioux Tribe Regarding Dewey-Burdock In Situ Uranium Recovery Project (May 19, 2016) at 2 (ADAMS Accession No. ML16182A069) [hereinafter Pine Ridge Meeting Summary]. The 2013 survey methodology was an open-site survey, which

Noting that another eighteen months had passed with essentially no substantive progress toward agreement upon a method to collect the missing cultural, religious, and historical data, the Board convened a teleconference among the parties on November 7, 2016.⁴⁸ As a result of the teleconference, the Oglala Sioux Tribe and the NRC Staff then participated in another consultative conference call on January 31, 2017, during which the NRC Staff again proposed an open-site survey, and the Oglala Sioux Tribe again objected.⁴⁹ During the conference call, the Oglala Sioux Tribe reminded the NRC Staff of its preference for a more comprehensive approach, similar to the Makoche Wowapi approach proposed by the Oglala Sioux Tribe in 2012.⁵⁰ Following further email exchanges, in an April 14, 2017 letter to the Oglala Sioux Tribe's Tribal Historic Preservation Officer (THPO), the NRC Staff once again offered a two-week open-site survey proposal and requested the Oglala Sioux Tribe to either

allowed each tribe to send representatives to examine any area of the Dewey-Burdock site during a one-month period, and included per diem payments for three tribal representatives from each tribe, mileage reimbursement, and an unconditional grant from Powertech to each tribe of \$10,000. Letter from Kevin Hsueh, Chief, Environmental Review Branch, Division of Waste Management and Environmental Protection, to Tribal Historic Preservation Officer (THPO), Oglala Sioux Tribe at 1–2 (Feb. 8, 2013) (ADAMS Accession No. ML13039A336).

⁴⁸ LBP-17-9, 86 NRC at 180 (citing Licensing Board Memorandum and Order (Requesting Scheduling Information for Telephone Conference Call) (Oct. 13, 2016) (unpublished); NRC Staff's Consultation Status Update (June 1, 2016)).

⁴⁹ Summary of Teleconference with the Oglala Sioux Tribe Regarding the Dewey-Burdock In Situ Uranium Recovery Project (Jan. 31, 2017) (ADAMS Accession No. ML17060A260).

⁵⁰ *Id.* at 1. On September 27, 2012, the consulting tribes presented a cultural resources survey prepared by Makoche Wowapi/Mentz-Wilson Consultants to the NRC Staff as a means to identify resources in the area. LBP-15-16, 81 NRC at 646. The Makoche Wowapi proposal was estimated to cost approximately \$818,000. Makoche Wowapi/Mentz-Wilson Consultants, Proposal with Cost Estimate for Traditional Cultural Properties Survey for Proposed Dewey Burdock Project (Sept. 27, 2012) at 1 (ADAMS Accession No. ML15244B360).

accept or reject the offer.⁵¹ The Oglala Sioux Tribe's reply letter, dated May 31, 2017,⁵² contained "significant discussion as to the types of methodologies that the Tribe expected would be included" in a cultural resources survey.⁵³ Specifically, the Oglala Sioux Tribe expressed a desire for the NRC Staff to engage a qualified contractor, involve other Sioux Tribes, involve tribal elders, and allow for multiple site trips.⁵⁴ Following the Oglala Sioux Tribe's May 31 letter, the NRC Staff terminated its consultation efforts, concluding that after more than two years, "further consultation [was] unlikely to result in a mutually acceptable settlement of the dispute," and that the NRC Staff had satisfied its consultation responsibilities.⁵⁵

On August 3, 2017, the NRC Staff moved for summary disposition of Contentions 1A and 1B.⁵⁶ On October 19, 2017, the Board granted summary disposition of Contention 1B, finding that the NRC Staff's attempts at consultation had satisfied its NHPA requirements.⁵⁷ Nonetheless, concluding that material factual disputes remained, the Board denied summary disposition of Contention 1A, noting that because the NRC Staff had performed no additional survey, the deficiencies in the FSEIS remained.⁵⁸

Subsequently, Powertech filed an interlocutory appeal challenging the Board's denial of

⁵¹ Letter from Cinthya I. Román, Chief, Environmental Review Branch, Division of Fuel Cycle Safety, Safeguards, and Environmental Review, to Trina Lone Hill, THPO, Oglala Sioux Tribe at 1–3 (Apr. 14, 2017) (ADAMS Accession No. ML17103A500).

⁵² Letter from Trina Lone Hill, THPO, Oglala Sioux Tribe, to Cinthya I. Román, Chief, Environmental Review Branch, Division of Fuel Cycle Safety, Safeguards, and Environmental Review (May 31, 2017) (ADAMS Accession No. ML17152A109) [hereinafter May 31 Letter].

⁵³ Oglala Sioux Tribe's Response in Opposition to NRC Staff Motion for Summary Disposition of Contentions 1A and 1B (Sept. 1, 2017) at 16 [hereinafter Oglala Sioux Tribe Opposition to 2017 NRC Staff Motion for Summary Disposition].

⁵⁴ May 31 Letter at 4–8.

⁵⁵ NRC Staff's Motion for Summary Disposition of Contentions 1A and 1B (Aug. 3, 2017) at 27.

⁵⁶ Id.

⁵⁷ LBP-17-9, 86 NRC at 188–90.

⁵⁸ Id. at 194.

summary disposition of Contention 1A and requesting the Commission to reverse the decision and to “direct the Staff to supplement the [FSEIS], thereby ending this proceeding.”⁵⁹ On July 24, 2018, the Commission denied Powertech’s petition for review, and upheld the Board’s decision.⁶⁰ In concluding that Powertech had failed to meet the standard for sustaining an interlocutory appeal, the Commission noted its approval of the Board’s explanation that “consultation was necessary to achieve the end of meeting NEPA’s ‘hard look’ requirement” and agreed that “the mere act of consultation” would not “in and of itself be sufficient.”⁶¹ The Commission also emphasized that “NHPA and NEPA are separate statutes imposing different obligations on the Staff.”⁶² Furthermore, the Commission found that the Board correctly denied summary disposition on Contention 1A, because a material factual dispute remained over what would “constitute a reasonable method to assess cultural resources at the site.”⁶³

E. Efforts of the Parties Since LBP-17-9

Pursuant to the Board’s October 19, 2017 order denying summary disposition as to Contention 1A,⁶⁴ the Board held a number of teleconferences with the parties to monitor their progress on resolving Contention 1A. The first teleconference took place on November 16, 2017, during which the NRC Staff indicated that it was internally discussing next steps and intended to reach out to Powertech and the Oglala Sioux Tribe before the end of the year.⁶⁵

After the first conference, the NRC Staff quickly proposed a new approach for remedying

⁵⁹ CLI-18-07, 88 NRC at __ (slip op. at 1).

⁶⁰ Id.

⁶¹ Id. at __ (slip op. at 10).

⁶² Id.

⁶³ Id.

⁶⁴ LBP-17-9, 86 NRC at 173–74.

⁶⁵ Licensing Board Order (Requesting Information for Second Telephonic Conference Call) (Nov. 21, 2017) at 2 (unpublished).

the deficiencies identified in Contention 1A. On December 6, 2017, the NRC Staff sent out its proposed approach to identify Lakota Sioux Tribe historical, cultural, and religious resources.⁶⁶ This December proposal aimed to address the Oglala Sioux Tribe's previously-expressed concerns that the NRC Staff secure a contractor, meet with the Tribal Councils or Tribal Leaders of the Lakota Sioux Tribes to discuss the methodology, conduct oral history interviews with tribal elders, and coordinate a field survey at the site.⁶⁷ Although the NRC Staff's December proposal deferred selection of a specific survey methodology until a later date so that the participating tribes could provide input while working with the contractor, the NRC Staff proposed that tribal representatives would take approximately two two-week periods to examine areas of their choosing within the Dewey-Burdock site and help the contractor identify important areas to study in a survey report.⁶⁸ The NRC Staff's proposal acknowledged that confidential "information concerning the location of any identified sites of historic, cultural, or religious significance to the tribes may be reported separately and directly to the NRC as a confidential appendix to the survey report so that this information will not be disclosed to the public."⁶⁹

During a second teleconference on December 12, 2017, the parties discussed their initial reactions to the NRC Staff's December proposal.⁷⁰ At that time, the Oglala Sioux Tribe

⁶⁶ Letter from Cinthya I. Román, Chief, Environmental Review Branch, Division of Fuel Cycle Safety, Safeguards, and Environmental Review, to Trina Lone Hill, Director, Cultural Affairs & Historic Preservation Office, Oglala Sioux Tribe (Dec. 6, 2017) (ADAMS Accession No. ML17340B365) [hereinafter December Proposal]; Letter from Cinthya I. Román, Chief, Environmental Review Branch, Division of Fuel Cycle Safety, Safeguards, and Environmental Review, to John M. Mays, Chief Operating Officer, Azarga Uranium Corp. (Dec. 6, 2017) (ADAMS Accession No. ML17340B374); Letter from Cinthya I. Román, Chief, Environmental Review Branch, Division of Fuel Cycle Safety, Safeguards, and Environmental Review, to Consolidated Intervenors (Dec. 6, 2017) (ADAMS Accession No. ML17340B376).

⁶⁷ December Proposal at 1–2.

⁶⁸ *Id.* at 1.

⁶⁹ *Id.* at 3.

⁷⁰ Licensing Board Order (Scheduling Third Telephonic Conference Call) (Jan. 9, 2018) at 1–2 (unpublished).

and Consolidated Intervenors expressed tentative approval of the proposal.⁷¹ Powertech, however, expressed concern about the potential cost associated with this new approach.⁷² On January 19, 2018, the parties provided written responses to the NRC Staff's proposal.⁷³ The Oglala Sioux Tribe responded that the proposed approach "will provide a reasonable likelihood of satisfying NEPA and resolving the Oglala Sioux Tribe's long-standing NEPA contention with respect to the lack of an adequate cultural resources survey . . . [although] several important details remain to be established" such as "the specific field survey methodology, timing of the surveys, and length of time necessary for the surveys."⁷⁴ However, Powertech's response enumerated many concerns, including "exorbitant" costs, lack of well-defined specifics, and ineffective deadlines.⁷⁵ Powertech proposed an alternative plan of an ethnographic study, limited solely to a literature survey.⁷⁶

A third teleconference was held on January 24, 2018 to discuss the parties' respective positions on the NRC Staff's December proposal.⁷⁷ The Oglala Sioux Tribe continued to assert its general approval, noting that the physical site survey is a fundamental requirement.⁷⁸

⁷¹ Tr. at 1240–43 (Dec. 12, 2017).

⁷² Tr. at 1239 (Dec. 12, 2017).

⁷³ Letter from Trina Lone Hill, Cultural Affairs & Historic Preservation Office, Oglala Sioux Tribe, to Cinthya I. Román, Chief, Environmental Review Branch, Division of Fuel Cycle Safety, Safeguards, and Environmental Review (Jan. 19, 2018) (ADAMS Accession No. ML18019B267) [hereinafter OST Response to December Proposal]; Letter from John Mays, Chief Operating Officer, Powertech (USA) Inc., to Cinthya I. Román, Chief, Environmental Review Branch, Division of Fuel Cycle Safety, Safeguards, and Environmental Review (Jan. 19, 2018) (ADAMS Accession No. ML18019B268) [hereinafter Powertech Response to December Proposal]; Email from David Frankel, Consolidated Intervenors Counsel, to Emily Monteith, NRC Staff Counsel (Jan. 19, 2018, 8:13 PM) (ADAMS Accession No. ML18024A812).

⁷⁴ OST Response to December Proposal at 1–2.

⁷⁵ Powertech Response to December Proposal at 3–5.

⁷⁶ Id. at 7.

⁷⁷ Licensing Board Order (Requesting Information for Fourth Telephonic Conference Call) (Feb. 8, 2018) at 2–3 (unpublished) [hereinafter Fourth Teleconference Order].

⁷⁸ Tr. at 1273–74 (Jan. 24, 2018).

Powertech, on the other hand, stated its “unequivocal” rejection of the new proposed approach.⁷⁹ After hearing from the parties, the Board was concerned that, while the NRC Staff was moving quickly pursuant to the Board’s instructions, the other parties were not agreeable to proceeding in a similarly expeditious manner. The Board was particularly concerned that Powertech had “not yet provided the NRC Staff with answers on what components of the NRC Staff’s new proposal it would accept and what components it would not.”⁸⁰ Similarly, the Board was troubled that “the Oglala Sioux Tribe ha[d] yet to prepare a list of other Tribes it contemplates being a part of the survey – let alone reached out to those Tribes to determine if they are willing to participate.”⁸¹

During a fourth teleconference on February 23, 2018, the NRC Staff’s counsel suggested that the NRC Staff might be ready to provide the parties with its final decision on a potential method to resolve Contention 1A by the end of March.⁸²

II. The NRC Staff’s March 2018 Approach

A. Development of the Staff’s March 2018 Approach

On March 16, 2018, the NRC Staff notified the parties and the Board it had selected an approach to resolve Contention 1A.⁸³ The NRC Staff asserted it chose the March 2018

⁷⁹ Tr. at 1292 (Jan. 24, 2018).

⁸⁰ Fourth Teleconference Order at 4.

⁸¹ Id.

⁸² Tr. at 1320 (Feb. 23, 2018).

⁸³ Letter from Cinthya I. Román, Chief, Environmental Review Branch, Division of Fuel Cycle Safety, Safeguards, and Environmental Review, to Trina Lone Hill, Director, Cultural Affairs & Historic Preservation Office, Oglala Sioux Tribe (Mar. 16, 2018) (ADAMS Accession No. ML18075A499) [hereinafter March 2018 Approach]; Letter from Cinthya I. Román, Chief, Environmental Review Branch, Division of Fuel Cycle Safety, Safeguards, and Environmental Review, to John M. Mays, Chief Operating Officer, Azarga Uranium Corp. (Mar. 16, 2018) (ADAMS Accession No. ML18075A500); Letter from Cinthya I. Román, Chief, Environmental Review Branch, Division of Fuel Cycle Safety, Safeguards, and Environmental Review, to Consolidated Intervenors (Mar. 16, 2018) (ADAMS Accession No. ML18075A501); Letter from

Approach as a reasonable means to “remedy the deficiencies identified by the Board with respect to the Staff’s environmental review of tribal cultural resources that may be affected by the Dewey-Burdock project.”⁸⁴ The Board held its fifth conference call with the parties on March 27, 2018 to discuss the March 2018 Approach.⁸⁵ At that time, “neither Powertech nor the Oglala Sioux Tribe would commit then to participating in the NRC Staff’s March 2018 Approach, but indicated they would provide the NRC Staff with a definitive response” by March 30, 2018.⁸⁶ The Oglala Sioux Tribe raised concerns about “whether the Tribe would be reimbursed for expenses and compensated for time spent participating in the survey.”⁸⁷ Powertech did not specify any particular concerns, but would not commit to its previous offers of expense reimbursement.⁸⁸ The Board urged the parties to reach an agreement.⁸⁹

On March 30, 2018, the Oglala Sioux Tribe submitted a written response to the NRC Staff on its March 2018 Approach.⁹⁰ Overall, the Oglala Sioux Tribe expressed a commitment to participate in the March 2018 Approach, but warned that “the NRC Staff’s decisions on [two important] details could significantly affect the extent of the Tribe’s participation.”⁹¹ The two

Emily Monteith, NRC Staff Counsel, to Licensing Board (Mar. 16, 2018) (ADAMS Accession No. ML18075A498) [hereinafter NRC Staff Notification to Board].

⁸⁴ NRC Staff Notification to Board.

⁸⁵ Licensing Board Order (Requesting Information for Sixth Telephonic Conference Call) (Mar. 29, 2018) (unpublished) (recounting discussion at fifth conference call).

⁸⁶ Id. at 2.

⁸⁷ Id. at 2 (citing Tr. at 1357, 1362 (Mar. 27, 2018)).

⁸⁸ Id. at 2–3 (citing Tr. at 1358–60 (Mar. 27, 2018)).

⁸⁹ See id. (strongly encouraging each party to consider and discuss reimbursement options); Tr. at 1367–68 (Mar. 27, 2018) (“I don’t know if there’s anything else that the Board can do at this stage other than to remind the parties that . . . it looks like the last best approach to resolving the remaining contention and that the parties should take this opportunity to work with the staff to resolve this outstanding contention.”).

⁹⁰ Oglala Sioux Tribe’s Response to NRC Staff’s March 16, 2018 Cultural Resources Survey Proposal (Mar. 30, 2018) [hereinafter Oglala Sioux Tribe Response to March 2018 Approach].

⁹¹ Id. at 1–2.

details that the Oglala Sioux Tribe identified as lacking were (1) “involvement by any of the affected Tribes in the selection of a qualified contractor”; and (2) information about “reimbursement for costs and staff time of any of the Tribes.”⁹² Additionally, the Oglala Sioux Tribe reiterated that “the specific field survey methodology ha[d] yet to be established.”⁹³

On March 30, 2018, Powertech submitted a written response to the March 2018 Approach.⁹⁴ Powertech’s response catalogued the costs it had already incurred for previous unsuccessful survey efforts related to the Dewey-Burdock site.⁹⁵ Powertech argued it could only agree to the March 2018 Approach if the Board (1) established enforceable timelines with repercussions for missed timelines; (2) provided confirmation that Contention 1A would be satisfied through the process; and (3) provided confirmation that any lack of participation by other tribes would not prevent resolution of Contention 1A.⁹⁶ Additionally, Powertech argued that the NRC Staff should not pass through as licensing fees the NRC Staff’s costs to address Contention 1A.⁹⁷

During an April 6, 2018 teleconference, the Oglala Sioux Tribe explained to the Board that its concerns about involvement in selecting the contractor would not bar its participation, and the “Tribe is comfortable” with the March 2018 Approach timeline.⁹⁸ Powertech clarified that it was not refusing to pay reimbursements and honoraria, but that it needed assurances

⁹² Id. at 2–3.

⁹³ Id. at 4.

⁹⁴ Letter from John M. Mays, Chief Operating Officer, Azarga Uranium Corp., to Cinthya I. Román, Chief, Environmental Review Branch, Division of Fuel Cycle Safety, Safeguards, and Environmental Review at 1–2 (Mar. 30, 2018) (ADAMS Accession No. ML18089A656).

⁹⁵ Id. at 1–2.

⁹⁶ Id. at 3.

⁹⁷ Id.

⁹⁸ Tr. at 1386, 1395 (Apr. 6, 2018).

there was a “light at the end of the tunnel.”⁹⁹ By the end of the teleconference, the Intervenor parties had generally agreed to follow the March 2018 Approach, provided that Powertech would reimburse out-of-pocket costs.¹⁰⁰ At the conference, Powertech’s counsel was unable to say whether the company would make such payments, but on April 11, 2018, Powertech confirmed that it “would like the NRC Staff to urgently proceed with the approach and timeline” and that it would pay each participating Lakota Sioux Tribe for lodging and per diem, mileage, and an honorarium.¹⁰¹ Thus, all the parties accepted the March 2018 Approach as reasonable, and the NRC Staff began to move forward with its implementation, in accordance with the parties’ expressions of support for the March 2018 Approach and its included timeline.

B. Oglala Sioux Tribe Concerns Addressed by the March 2018 Approach

The March 2018 Approach included five elements as part of the effort to cure the NEPA deficiency in the FSEIS: (1) hiring a qualified contractor; (2) involving other Lakota Sioux Tribes; (3) providing iterative opportunities for the site survey; (4) involving tribal elders; and (5) conducting a site survey using a scientific methodology determined by the contractor in collaboration with the tribes. Each of these elements was repeatedly asked for by the Oglala Sioux Tribe, and once these Oglala Sioux Tribe-requested elements were finally included in NRC Staff’s plan to resolve Contention 1A, the parties agreed the March 2018 Approach was a reasonable method for the NRC Staff to satisfy its NEPA obligation.

1. Qualified Contractor

Since the Board first identified a NEPA deficiency in this proceeding, the Oglala Sioux Tribe has repeatedly indicated that hiring a contractor “with the necessary experience, training,

⁹⁹ Tr. at 1401 (Apr. 6, 2018).

¹⁰⁰ Tr. at 1379–80, 1435 (Apr. 6, 2018).

¹⁰¹ Letter from John M. Mays, Chief Operating Officer, Azarga Uranium Corp., to Cinthya I. Román, Chief, Environmental Review Branch, Division of Fuel Cycle Safety, Safeguards, and Environmental Review (Apr. 11, 2018) (ADAMS Accession No. ML18101A223).

and cultural knowledge to carry out and facilitate the survey” is necessary for an acceptable approach to satisfy the NRC Staff’s NEPA obligations.¹⁰² To support this request, the Oglala Sioux Tribe pointed out that Dr. Paul Nickens, the contractor hired by the NRC Staff to help carry out the March 2018 Approach, previously testified that use of a facilitator, “along the lines of a cultural anthropologist” who would “provide logistics support, documentation, recording support, report preparation . . . [has] usually been the best approach.”¹⁰³

In the March 2018 Approach, the NRC Staff granted the Oglala Sioux Tribe’s request and agreed to “onboard[] a contractor to facilitate implementation of the approach.”¹⁰⁴ The contractor was to “facilitate the survey, and document findings and supporting information,” and subsequently “prepare a survey report documenting the results and findings of the first and second phase of the field survey.”¹⁰⁵ Additionally, the contractor would conduct oral history interviews with tribal elders.¹⁰⁶ The NRC Staff awarded the contract for the March 2018 Approach to Dr. Paul Nickens of S. Cohen and Associates (SC&A).¹⁰⁷

Although the Oglala Sioux Tribe requested that it be involved in the selection of the contractor, NRC Staff counsel made clear that this would not be possible.¹⁰⁸ The Oglala Sioux

¹⁰² E.g., May 31 Letter at 4; see also Oglala Sioux Tribe Opposition to 2017 NRC Staff Motion for Summary Disposition, ex. 4, Emails Between Jeffery C. Parsons, Oglala Sioux Tribe Counsel, and David Cylkowski, NRC Staff Counsel, at unnumbered p. 68 (Apr. 28, 2017) (“[T]he Tribe’s stated position [is] that key features of a survey should include a qualified contractor to coordinate a survey.”).

¹⁰³ May 31 Letter at 4 (quoting Transcript of Proceedings, Crow Butte Res., Inc. (In Situ Leach Facility, Crawford, Neb.), Docket No. 40-8943-OLA, Tr. at 2023 (ADAMS Accession No. ML15244B278) [hereinafter Crow Butte Tr.]).

¹⁰⁴ March 2018 Approach at 1.

¹⁰⁵ Id. at 2–3.

¹⁰⁶ Id. at 4.

¹⁰⁷ NRC Staff Motion, attach. 1, NRC Staff’s Statement of Material Facts to Support Motion for Summary Disposition of Contention 1A (Aug. 17, 2018) at 16 [hereinafter NRC Staff Motion Statement of Facts].

¹⁰⁸ Tr. at 1380–81 (Apr. 6, 2018).

Tribe, while currently contesting the qualifications of the selected contractor,¹⁰⁹ nonetheless advised that its lack of input on the contractor selection would not prevent it from participating in the March 2018 Approach.¹¹⁰ Dr. Nickens and his team began working with the Oglala Sioux Tribe on June 1, 2018, to select a methodology for the survey.¹¹¹

2. Involvement of Other Lakota Sioux Tribes

The March 2018 Approach provided for Lakota Sioux Tribes other than the Oglala Sioux Tribe to participate in the site survey and the oral history interviews. While the Oglala Sioux Tribe has recognized that the “NRC Staff is under an obligation to conduct consultation meetings with the Oglala Sioux Tribe specifically,” it made clear that “in order to be competent in its analysis of Lakota Sioux cultural resources” and to satisfy its NEPA obligation, “a cultural resources survey must include the other Lakota Sioux tribal governments.”¹¹² The Oglala Sioux Tribe further maintains that being “engaged with and working with its other Sioux tribes” is a “central cultural tenet.”¹¹³ Therefore, under the March 2018 Approach the NRC Staff agreed to extend an invitation to Lakota Sioux Tribes that did not take part in the April 2013 survey to participate in the upcoming survey, as well as other elements of the March 2018 Approach, such as the oral history interviews.¹¹⁴ While these other tribes would not have the opportunity to comment on the selected Approach as a whole, they would be able to be involved in selection of the methodology and be able to participate and provide input in the supplementation of the

¹⁰⁹ Oglala Sioux Tribe’s Response in Opposition to NRC Staff Motion for Summary Disposition of Contention 1A (Sept. 21, 2018) at 8 [hereinafter Oglala Sioux Tribe Response to Staff Motion].

¹¹⁰ Oglala Sioux Tribe Response to March 2018 Approach at 2; Tr. at 1386, 1389 (Apr. 6, 2018).

¹¹¹ NRC Staff Motion Statement of Facts at 17.

¹¹² May 31 Letter at 4.

¹¹³ Tr. at 1291 (Jan. 24, 2018).

¹¹⁴ March 2018 Approach at 2. The NRC Staff ultimately invited one Dakota Sioux Tribe as well. See NRC Staff Motion at 20 n.89.

FSEIS.¹¹⁵

In response to questions posed by the NRC Staff, the Oglala Sioux Tribe indicated the Standing Rock Sioux and the Rosebud Sioux Tribe would likely be interested in participating in the March 2018 Approach, and confirmed that the NRC Staff should extend invitations to participate to the Standing Rock Sioux Tribe, Rosebud Sioux Tribe, Cheyenne River Sioux Tribe, Yankton Sioux Tribe, Crow Creek Sioux Tribe, and Flandreau Sioux Tribe.¹¹⁶ Only the Rosebud Sioux Tribe accepted the NRC Staff's invitation to join a webinar conference to discuss the survey methodology and participate in the March 2018 Approach.¹¹⁷

While the March 2018 Approach provided an opportunity for other tribes to become involved, the lack of willingness by other tribes to participate would not make this approach unreasonable.¹¹⁸ Thus, the Board previously made clear:

[I]f a Tribe doesn't participate, it would be pretty late in the game for them to come forward and try to come at this again. This is the opportunity that the staff has set forth to resolve this contention. And if any party or any entity out there doesn't take advantage of it, they will have missed their chance.¹¹⁹

Likewise, the Oglala Sioux Tribe recognized that each tribe is "allowed their own decision on whether or not to be involved in the survey, or the NEPA process more

¹¹⁵ See, e.g., Letter from Cinthya I. Román, Chief, Environmental Review Branch, Division of Fuel Cycle Safety, Safeguards, and Environmental Review, to Kip Spotted Eagle, THPO, Yankton Sioux Tribe (Apr. 12, 2018) (ADAMS Accession No. ML18102B247) (asking for input from other tribes only on their willingness to participate in implementing the chosen approach and establishing a survey methodology).

¹¹⁶ Notice of Oglala Sioux Tribe's Response to NRC Staff Questions (Feb. 15, 2018) at unnumbered p. 3–4 [hereinafter Oglala Sioux Tribe February Responses].

¹¹⁷ Summary of NRC Webinar and Teleconference Call Session to Discuss Survey Methodology for the Dewey-Burdock In Situ Uranium Recovery (ISR) Project at 7–9 (June 29, 2018) (ADAMS Accession No. ML18164A241) [hereinafter NRC Summary of Survey Methodology Sessions] (describing the participation of Ben Rhodd, THPO for the Rosebud Sioux Tribe, in the June 5, 2018 webinar).

¹¹⁸ See Tr. at 1408 (Apr. 6, 2018).

¹¹⁹ Id.

generally.”¹²⁰

3. Iterative Opportunities to Survey the Site

As part of a reasonable approach, the Oglala Sioux Tribe has requested the opportunity to make multiple trips to the survey location, declaring:

[T]he Tribe has always objected to one shot deals, to single visits that somehow bind them and has repeatedly suggested a process that includes a chance to go out into the field and have those boots on the ground, a chance to come back, talk amongst themselves, talk with their elders, go back again to address issues that come up during those talks, come back and iterate this a few times, not ad infinitum, but a few times.¹²¹

The March 2018 Approach, like the earlier December proposal, provided for “approximately four weeks for a field survey, which could be divided into two separate phases to accommodate the Tribe’s desire to conduct a few at a time.”¹²² Under the March 2018 Approach, Phase One of the survey was scheduled for June 11–22, 2018, and Phase Two was scheduled for September 3–14, 2018.¹²³ Citing problems settling on a methodology for the survey, Phase One of the field survey effort was terminated by the NRC Staff on June 15, halfway through the scheduled period, and was not completed.¹²⁴ Phase Two of the survey was never started. The record indicates, that during the nearly two-and-a-half months between the scheduled first and second phases, the NRC Staff did not work to reconcile the issues

¹²⁰ Oglala Sioux Tribe February Responses at unnumbered p. 4.

¹²¹ Tr. at 1202 (Nov. 16, 2017).

¹²² Tr. at 1236 (Dec. 12, 2017) (describing December Proposal, the precursor to the March 2018 Approach).

¹²³ March 2018 Approach, encl. 1 (hereinafter March 2018 Approach Timeline).

¹²⁴ Email from Emily Monteith, NRC Staff Counsel, to Travis Stills, Oglala Sioux Tribe Counsel (June 15, 2018, 2:39 PM) (ADAMS Accession No. ML18173A263); Letter from Cinthya I. Román, Chief, Environmental Review Branch, Division of Fuel Cycle Safety, Safeguards, and Environmental Review, to Kyle White, Interim Director, Oglala Sioux Tribe Natural Resources Regulatory Agency (July 2, 2018) (ADAMS Accession No. ML18183A304) [hereinafter NRC Staff Letter Discontinuing March 2018 Approach].

associated with the selection of a methodology for the site survey.¹²⁵

4. Involvement of the Tribal Elders

The Oglala Sioux Tribe's May 31st Letter asserts that the "ability to use tribal elders" was one of the "cultural needs of the Lakota Sioux" that should be accounted for in crafting a reasonable approach to satisfying the NRC Staff's NEPA obligation.¹²⁶ The Oglala Sioux Tribe also noted Dr. Paul Nickens' endorsement of the need to involve tribal elders in any approach, having previously testified that "probably the best [traditional cultural properties] survey approach is to involve Tribal Elders."¹²⁷

The March 2018 Approach incorporated tribal elder involvement in several ways. First, the contractor would conduct "oral history interviews with Tribal Elders of the Lakota Sioux Tribes."¹²⁸ These interviews were to focus "on gathering information about resources of significance to the Lakota Sioux Tribes that could be impacted by the Dewey-Burdock ISR project."¹²⁹ Additionally, as discussed supra, the March 2018 Approach provided for iterative opportunities to visit the survey location to allow for the Oglala Sioux Tribe to consult with its elders after Phase One.

In between Phase One and Phase Two of the field surveys, interviews with tribal elders were scheduled to occur from August 6 to August 17, 2018.¹³⁰ These two weeks were also intended to be an "opportunity for the Tribes and NRC staff to discuss preliminary findings and

¹²⁵ See, e.g., Letter from Emily Monteith, NRC Staff Counsel, to Licensing Board (Aug. 1, 2018) [hereinafter NRC Staff August 2018 Status Update] ("The Staff has undertaken no significant curative activities since the Staff's last update on July 2, 2018.").

¹²⁶ May 31 Letter at 8.

¹²⁷ Id. (citing Crow Butte Tr. at 2023).

¹²⁸ March 2018 Approach at 4.

¹²⁹ Id.

¹³⁰ March 2018 Approach Timeline.

results of the first phase of the field survey.”¹³¹ The NRC Staff, however, never reached this element of the March 2018 Approach. The NRC Staff decided to discontinue its efforts because of a breakdown of the survey methodology negotiations, and chose not to move forward with conducting oral history interviews. There is nothing in the record to show that the NRC Staff considered continuing with this element of the March 2018 Approach after terminating its efforts to resolve the site survey methodology issue.

Aside from the cost of renewed efforts, Powertech “appreciate[d] the inclusion of interviews with tribal councils, leaders and elders.”¹³² The Oglala Sioux Tribe also approved of the “commitment as set forth in its proposal to engage both the Tribal elders and the Tribal councils of multiple Tribes” as “appropriate and welcome.”¹³³

5. A Scientific Site Survey Methodology

The major impediment to resolving Contention 1A has been the NRC Staff’s repeated offering of an “open-site” survey approach as the methodology of completing the physical survey of the Dewey-Burdock site. An open-site survey, as the term has been used throughout the proceeding and described by counsel for the Oglala Sioux Tribe, is a survey “where there is no support from NRC staff or contractor . . . [a]nd it is essentially opening the site to the tribes to go out and do what they will do and be totally responsible for providing all the data and the analysis with no set protocol or methodology.”¹³⁴ The Oglala Sioux Tribe rejected this methodology at least twice before the March 2018 Approach was selected by the NRC Staff on the grounds that such a survey, “with no . . . protocols or approaches identified for making or

¹³¹ March 2018 Approach at 4.

¹³² Powertech Response to December Proposal at unnumbered p. 2.

¹³³ OST Response to December Proposal at 2.

¹³⁴ Tr. at 1431 (Apr. 6, 2018).

documenting observations,” would be unsuitable for satisfying NEPA.¹³⁵ The Oglala Sioux Tribe made clear its position that such a “survey methodology lacks scientific integrity,”¹³⁶ and in its May 31st Letter rejecting the “open-site” survey for the second time, the Tribe detailed what it considered appropriate aspects of a survey, including “the types of methodologies that the Tribe expected would be included in any NRC Staff courses of action to remedy the NEPA . . . violations.”¹³⁷

The NRC Staff agreed to hire a contractor to facilitate the March 2018 Approach, but chose to defer selection of a survey methodology until the contract was awarded.¹³⁸ The March 2018 Approach included five days (May 28 to June 1) for the new contractor, the Oglala Sioux Tribe, and any other participating tribes, to collaborate and agree to a scientifically-valid survey methodology for use at the Dewey-Burdock site.¹³⁹ Although the Oglala Sioux Tribe was concerned that “the specific field survey methodology had yet to be established,” the Oglala Sioux Tribe looked positively on the opportunity to work with the “NRC Staff and with the benefit of the expertise and experience of the selected contractor” to determine the appropriate methodology for the site survey.¹⁴⁰

The March 2018 Approach established specific deadlines by which the NRC Staff intended to retain a contractor (mid-April 2018), and hold meetings with any interested tribes (starting May 28, 2018), in preparation for Phase One of the site survey (scheduled for June 11

¹³⁵ See May 31 Letter at 2, 8 (recounting the numerous times that the Oglala Sioux Tribe has rejected the open-site approach in letters to the NRC Staff).

¹³⁶ Pine Ridge Meeting Summary at 2.

¹³⁷ Oglala Sioux Tribe Opposition to 2017 NRC Staff Motion for Summary Disposition at 16 (describing May 31 Letter).

¹³⁸ March 2018 Approach at 2.

¹³⁹ Id. at 4 (“Once the NRC staff brings its contractor on board, the NRC plans to hold a meeting with Lakota Sioux Tribes interested in participating in the field survey to discuss and establish the survey methodology and potential areas to be examined during the field survey.”).

¹⁴⁰ Oglala Sioux Tribe Response to March 2018 Approach at 4.

to June 22, 2018).¹⁴¹ As described in section II.1 supra, the NRC Staff fell behind schedule and notified the tribes of contractor selection on May 16. The NRC Staff then scheduled two webinars during the first week of June to establish a scientific methodology for the site survey. The NRC Staff indicated the purpose of the webinar and teleconference was to “discuss and establish the methodology to be implemented at the field survey and the areas to be examined at the Dewey-Burdock facility.”¹⁴² At the webinars, Dr. Nickens presented two potential survey methodologies, both of which involved re-locating previously identified places and documenting them with the tribes’ help.¹⁴³ After the webinars of June 1 and June 4, and a follow-up teleconference on June 5, Dr. Nickens provided a slightly more detailed survey methodology proposal, the “initial work plan,” which included a “windshield survey.”¹⁴⁴ This “windshield survey” methodology would involve driving to approximately 3 to 5 locations, prioritizing previously studied sites, and preparation of “daily packages” by the contractors containing any known information on the previously studied sites.¹⁴⁵ The summary of the webinars and teleconference indicates “[t]he NRC contractor discussed a proposed initial work plan for conducting the field survey for consideration by the invited Tribes, but emphasized that he welcomed further comments and modifications from the invited tribes on the proposed plan.”¹⁴⁶

On June 5, 2018, the NRC Staff’s contractor provided the invited tribes a proposed plan

¹⁴¹ March 2018 Approach Timeline.

¹⁴² NRC Summary of Survey Methodology Sessions at 2.

¹⁴³ Slideshow for Webinar, Dr. Paul Nickens (June 1 and 4, 2018) at 22–23 (ADAMS Accession No. ML18152A676).

¹⁴⁴ Proposed Initial Work Plan for Phase 1 Tribal Field Survey at the Dewey-Burdock ISR Project Area, June 11-22, 2018 (June 5, 2018) (ADAMS Accession No. ML18157A092) [hereinafter Proposed Initial Work Plan].

¹⁴⁵ Id. at 1.

¹⁴⁶ NRC Summary of Survey Methodology Sessions at 8.

of work consisting of an initial methodology for conducting the tribal field survey.¹⁴⁷ The NRC Staff's contractor requested comments from the tribes on the proposed plan.¹⁴⁸ The proposed plan of work would have been followed for the first three or four days of the field effort, with subsequent field activities determined in consultation with the participating tribes.¹⁴⁹

On June 8, 2018, the NRC Staff informed the invited tribes of a meeting location and time for the tribal field survey effort commencing on June 11, 2018.¹⁵⁰ Later that day, the Oglala Sioux Tribe responded to this email requesting the NRC Staff to plan not to go into the field on June 11 and informing the NRC Staff that the Oglala Sioux Tribe would be providing "a detailed response to the work plan today that sets out a proposed daily schedule with time, place, and tasks required to complete the necessary prerequisites."¹⁵¹ The Oglala Sioux Tribe informed the NRC Staff that "the field survey protocols and methods will be worked out with the benefit of face-to-face discussions between NRC contractors and the Tribe's professional staff, with the benefit of necessary protections for the Tribes' cultural and religious interests."¹⁵²

Subsequently, the Oglala Sioux Tribe sent the NRC Staff and other invited tribes a memorandum describing a proposed schedule for the June tribal field survey effort.¹⁵³ The Oglala Sioux Tribe's memorandum set forth several prerequisites to any field activities

¹⁴⁷ See generally Proposed Initial Work Plan.

¹⁴⁸ Email to Invited Tribes from Paul Nickens, SC&A and NRC Contractor (June 5, 2018, 11:24 PM) (ADAMS Accession No. ML18157A108).

¹⁴⁹ Proposed Initial Work Plan at 1.

¹⁵⁰ Emails to Sioux Tribes from Diana Diaz-Toro, NRC Project Manager (June 8, 2018) (ADAMS Accession Nos. ML18163A252, ML18163A241, ML18163A250, ML18163A243, ML18163A256, ML18163A255).

¹⁵¹ Email from Travis Stills, Oglala Sioux Tribe Counsel, to Diana Diaz-Toro, NRC Project Manager (June 8, 2018, 11:33 AM) (ADAMS Accession No. ML18159A585).

¹⁵² Id.

¹⁵³ Email from Travis Stills, Oglala Sioux Tribe Counsel, to NRC Staff and Sioux Tribes (June 8, 2018, 1:16 PM) (ADAMS Accession No. ML18159A620).

undertaken with the Oglala Sioux Tribe and a schedule and plan of work for the two weeks of the June tribal field survey effort, which called for the NRC Staff to meet with the Oglala Sioux Tribe in Pine Ridge, South Dakota, on June 11 and 12, 2018, to discuss and agree upon “survey methodologies and protocols.”¹⁵⁴ Additionally, the schedule and plan of work included obtaining the Tribe’s “THPO Advisory Council approvals for field survey methodology and protection of cultural resources” on June 13, 2018.¹⁵⁵

C. The Oglala Sioux Tribe’s Proposals

On June 11–12, 2018, the NRC Staff’s project manager Diana Diaz-Toro and the NRC Staff’s contractor, Dr. Paul Nickens, met with Acting THPO Kyle White, and other representatives of the Oglala Sioux Tribe at the Tribal Historic Preservation Offices in Pine Ridge, South Dakota, to continue discussions with the Oglala Sioux Tribe regarding a methodology for the June tribal field survey.¹⁵⁶

On June 12, 2018, the Tribe presented Ms. Diaz-Toro and Dr. Nickens with a memorandum entitled “Discussion Draft—Cultural Resources Survey Methodologies” that contained the following points:¹⁵⁷

1. The proposal, which was addressed only to Ms. Diaz-Toro and Dr. Nickens, instructed that it “shall not be disclosed or discussed with any federal employee

¹⁵⁴ Memorandum from Travis Stills, Oglala Sioux Tribe Counsel, to Diana Diaz-Toro, NRC Project Manager, Paul Nickens, SC&A and NRC Staff Contractor (June 8, 2018) (ADAMS Accession No. ML18159A621) [hereinafter Oglala Sioux Tribe Counsel Memo on Proposed Schedule].

¹⁵⁵ Id. at 3.

¹⁵⁶ NRC Staff Motion, attach. 2, Aff. of Diana Diaz-Toro Concerning the NRC Staff’s Motion for Summary Disposition of Contention 1A ¶ 9 (Aug. 17, 2018).

¹⁵⁷ NRC Staff Motion, attach. 3, Memorandum from Kyle White, Acting THPO, Oglala Sioux Tribe, to Diana Diaz-Toro, NRC Project Manager, Emily Monteith, NRC Staff Counsel, and Paul Nickens, SC&A and NRC Contractor (June 12, 2018) (ADAMS Accession No. ML18229A351) (non-public); see also NRC Staff Motion Statement of Facts at 20.

or contractor not specifically addressed in this memo.”¹⁵⁸

2. The proposal stated that “the prerequisites set out in the [June 8, 2018 memo circulated by Travis Stills] must be satisfied before any cultural resource survey activities may take place that involve Lakota peoples or Lakota cultural, historical, or spiritual knowledge.”¹⁵⁹
3. The proposal stated there would be other “preliminary work,” not included in the proposal that was to be done during Phase One, and that would be based on an “analysis of publicly available information, and Powertech’s proposed [siting] of it[s] facilities.”¹⁶⁰
4. The proposal would entail the involvement and remuneration of several dozen Oglala Sioux Tribe technical staff, spiritual leaders, elders, and warrior society leaders.¹⁶¹
5. The proposal would entail using the NRC Staff’s contractor for specific aspects of the proposal.¹⁶²
6. The proposal would entail visits and encampments by the Oglala Sioux Tribe elders at the Dewey-Burdock site over several days during the different seasons of the year.¹⁶³
7. The proposal would entail a 10-meter (m) transect-based tribal cultural field survey of the entire Dewey-Burdock site, reasoning that “10m intervals are required to obtain locations of [traditional cultural properties] which have been

¹⁵⁸ NRC Staff Motion Statement of Facts at 20.

¹⁵⁹ Id.

¹⁶⁰ Id.

¹⁶¹ Id.

¹⁶² Id.

¹⁶³ Id.

overlooked in past archaeological surveys.”¹⁶⁴

8. The proposal would require more than a year to complete the fieldwork associated with the tribal cultural field survey and the oral history research and interviews.¹⁶⁵
9. By the Oglala Sioux Tribe’s estimation, the “full budget to carry out the required survey” would exceed \$2 million.¹⁶⁶ The cost estimate for the proposal did not include (i.e., would be in addition to) the costs directly billable to Powertech for the NRC Staff’s time and contractor support.¹⁶⁷
10. The proposal does not take into account or make provision for the involvement of other tribes.¹⁶⁸

On June 15, 2018, the Oglala Sioux Tribe provided the NRC Staff with the updated version of its June 12, 2018 proposal.¹⁶⁹ The Tribe concluded in its proposal that:

[i]t is now NRC’s task to either accept the OST proposal or to propose an approach that limits the OST-proposed survey methodology to meet what NRC considers a reasonable budget. We also understand that NRC will make the final decision on the type of survey that NRC carries out, and the OST requests the opportunity to review and consult on NRC’s proposal before it is finalized.¹⁷⁰

Nevertheless, that same day the NRC Staff informed the Oglala Sioux Tribe of its decision to

¹⁶⁴ Id.

¹⁶⁵ Id. at 21.

¹⁶⁶ Id.

¹⁶⁷ Id.

¹⁶⁸ Id.

¹⁶⁹ NRC Staff Motion, attach. 4, Memorandum from Kyle White, Acting THPO, Oglala Sioux Tribe, to Diana Diaz-Toro, NRC Project Manager, Emily Monteith, NRC Staff Counsel, and Paul Nickens, SC&A and NRC Contractor (June 15, 2018) (ADAMS Accession No. ML18229A352) (non-public); see also NRC Staff Motion Statement of Facts at 21–23.

¹⁷⁰ NRC Staff Motion Statement of Facts at 23.

discontinue the remainder of the June 11–22 fieldwork effort.¹⁷¹

D. NRC Staff's Response to the Oglala Sioux Tribe's Proposals

On July 2, 2018, the NRC Staff responded to the Oglala Sioux Tribe's June 12 and June 15 proposals.¹⁷² The NRC Staff informed the Oglala Sioux Tribe that its proposal outlined an approach that is fundamentally incompatible with implementation of the March 2018 Approach, which was previously negotiated with the Oglala Sioux Tribe and parties and presented to the Board.¹⁷³ The NRC Staff stated that the Oglala Sioux Tribe's proposal included a wide range of activities and milestones that were not part of the negotiated approach; entailed a significantly larger scope, cost, and time to implement than the selected approach; and did not appear to contemplate the participation of other tribes or the costs associated with involving other tribes in such an approach.¹⁷⁴ And in response to the Oglala Sioux Tribe's June 15, 2018 request to accept its proposal or propose an alternative approach that tailored the Oglala Sioux Tribe's proposal to meet a reasonable budget, the NRC Staff informed the Oglala Sioux Tribe that it considered the selected March 2018 Approach to be a reasonable approach that is not cost-prohibitive, that reflected a reasoned assessment of both scope and cost, and that was premised upon extensive discussions with the Oglala Sioux Tribe and Powertech.¹⁷⁵ The NRC Staff stated that the Oglala Sioux Tribe's participation in the selected March 2018 Approach was

¹⁷¹ Email from Emily Monteith, NRC Staff Counsel, to Travis Stills Oglala Sioux Tribe Counsel (June 15, 2018, 2:39 PM) (ADAMS Accession No. ML18173A263) (explaining that the NRC Staff is "unable to move forward" given the "significantly different understanding about the progress that has been made this week toward final agreement on a survey methodology"); Email from Emily Monteith, NRC Staff Counsel, to Travis Stills, Oglala Sioux Tribe Counsel, (June 15, 2018, 5:40 PM) (ADAMS Accession No. ML18173A266) (reiterating the NRC Staff's decision as described in the previous email).

¹⁷² NRC Staff Letter Discontinuing March 2018 Approach.

¹⁷³ Id. at 1.

¹⁷⁴ Id.

¹⁷⁵ Id.

essential to that Approach and, given how far apart the Oglala Sioux Tribe's June proposals were from the March 2018 Approach, the NRC Staff and the Oglala Sioux Tribe's approaches could not be reconciled to resolve the outstanding contention in this proceeding.¹⁷⁶ The NRC Staff informed the Oglala Sioux Tribe that the only appropriate course of action was to discontinue its efforts to implement the March 2018 Approach.¹⁷⁷

Thereafter, in a July 5, 2018 filing the NRC Staff informed the Board that because the Oglala Sioux Tribe's June 12 and June 15 proposals were fundamentally incompatible with the March 2018 Approach, the NRC Staff was discontinuing its efforts to implement the Approach and was requesting that the Board establish a schedule for filing summary disposition motions relative to Contention 1A that would, at the request of the Oglala Sioux Tribe, commence no earlier than August 17, 2018.¹⁷⁸ In response, the Board established the filing schedule for the instant NRC Staff and Oglala Sioux Tribe dispositive motions.¹⁷⁹

III. Standards for Summary Disposition

The standards governing summary disposition in Subpart L proceedings are set out at 10 C.F.R. § 2.1205, and "are based upon those the federal courts apply to motions for summary judgment under Rule 56 of the Federal Rules of Civil Procedure."¹⁸⁰ Summary disposition may be granted

if the filings in the proceeding, depositions, answers to interrogatories, and admissions on file, together with the statements of the parties and the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to

¹⁷⁶ Id.

¹⁷⁷ Id. at 2.

¹⁷⁸ Motion to Set Filing Deadline for Summary Disposition Motions (July 5, 2018) at 1–2.

¹⁷⁹ Licensing Board Order (Establishing Procedures for Filing Motions for Summary Disposition) (July 19, 2018) at 4–5 (unpublished).

¹⁸⁰ Entergy Nuclear Generation Co. (Pilgrim Nuclear Power Station), CLI-10-11, 71 NRC 287, 297 (2010).

a decision as a matter of law.¹⁸¹

This standard establishes a two-part test: First, a board must determine if any material facts remain genuinely in dispute; second, if no such disputes remain, the board must determine if the movant's legal position is correct.¹⁸²

The moving party carries the burden of demonstrating that summary disposition is appropriate and must explain in writing the basis for the motion.¹⁸³ To support its motion, the moving party must also "attach . . . a short and concise statement of the material facts as to which the moving party contends that there is no genuine issue to be heard."¹⁸⁴ "The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor."¹⁸⁵

Alternatively, summary disposition should not be granted if it would require the board to engage in the making of "[c]redibility determinations, the weighing of the evidence, [or] the drawing of legitimate inferences from the facts."¹⁸⁶ Doing so would require the board to "conduct a trial on the written record by weighing the evidence and endeavoring to determine the truth of the matter."¹⁸⁷ Instead, the board's only role in deciding whether to grant a motion for summary disposition is to determine whether any genuine issue of material fact exists.¹⁸⁸

¹⁸¹ 10 C.F.R. § 2.710(d)(2). Although this proceeding is a simplified hearing governed by Subpart L of the regulations, 10 C.F.R. § 2.1205(c) states that "[i]n ruling on motions for summary disposition, the presiding officer shall apply the standards for summary disposition set forth in subpart G of this part." Id. § 2.1205(c).

¹⁸² See Progress Energy Fla., Inc. (Levy Cty. Nuclear Power Plant, Units 1 & 2), LBP-11-31, 74 NRC 643, 648 (2011).

¹⁸³ Advanced Med. Sys., Inc. (One Factory Row, Geneva, Ohio 44041), CLI-93-22, 38 NRC 98, 102 (1993); 10 C.F.R. § 2.1205(a).

¹⁸⁴ 10 C.F.R. § 2.710(a).

¹⁸⁵ Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986).

¹⁸⁶ Id.

¹⁸⁷ Fla. Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 6 & 7), LBP-16-3, 83 NRC 169, 176 (2016).

¹⁸⁸ Anderson, 477 U.S. at 249.

IV. Discussion

A. The NRC Staff's NEPA Hard-Look Responsibility

1. Legal Standards under the National Environmental Policy Act

Congress enacted NEPA to protect and promote environmental quality, as well as to “preserve important historic, cultural, and natural aspects of our national heritage.”¹⁸⁹ These goals are “realized through a set of ‘action-forcing’ procedures that require that agencies take a ‘hard look’ at environmental consequences,”¹⁹⁰ and disseminate that information to the public. Any proposed agency action “significantly affecting the quality of the human environment” requires a detailed environmental impact statement (EIS).¹⁹¹ Adverse effects include “ecological . . . aesthetic, historic, cultural, economic, social, or health” effects.¹⁹² The Supreme Court has recognized that “one important ingredient of an EIS is the discussion of steps that can be taken to mitigate adverse environmental consequences.”¹⁹³ Such a discussion is important to show that the agency has taken a “hard look.”¹⁹⁴ Accordingly, NEPA’s implementing regulations require the agency to discuss possible mitigation measures in defining the scope of the EIS,¹⁹⁵ in discussing alternatives to the proposed action,¹⁹⁶ and consequences of that action,¹⁹⁷ and in explaining its ultimate decision.¹⁹⁸ Additionally, the Commission’s regulations require the NRC

¹⁸⁹ 42 U.S.C. § 4331.

¹⁹⁰ Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350 (1989) (quoting Kleppe v. Sierra Club, 427 U.S. 390, 410 n.21 (1976)).

¹⁹¹ 42 U.S.C. § 4332(C).

¹⁹² 40 C.F.R. § 1508.8. The NRC is not bound by Council on Environmental Quality regulations; however, the regulations are entitled to considerable deference. LBP-15-16, 81 NRC at 636.

¹⁹³ Robertson, 490 U.S. at 351.

¹⁹⁴ Id. at 352.

¹⁹⁵ 40 C.F.R. § 1508.25(b).

¹⁹⁶ Id. § 1502.14(f).

¹⁹⁷ Id. § 1502.16(h).

¹⁹⁸ Id. § 1505.2(c).

Staff to include in an EIS “an analysis of significant problems and objections raised by . . . any affected Indian tribes and by other interested persons.”¹⁹⁹

However, NEPA does not “mandate particular results,”²⁰⁰ or require agencies to analyze every conceivable aspect of a proposed project.²⁰¹ Those risks that are “remote and speculative” or events that have a low probability of occurring are unnecessary to evaluate.²⁰² Rather, NEPA analysis must take into account “reasonably foreseeable” results.²⁰³ In assessing impacts, agencies are free to “select their own methodology so long as that methodology is reasonable.”²⁰⁴

2. The Hard-Look Requirement Has Not Been Met

In both April 2015²⁰⁵ and October 2017,²⁰⁶ this Board found that the NRC Staff failed to satisfy its NEPA obligation to address the impacts on tribal cultural, historical, and religious sites at the Dewey-Burdock project site. Specifically, the Board concluded that the NRC Staff “must conduct a study or survey of tribal cultural resources before granting a license.”²⁰⁷ Moreover, since “the cultural, historical, and religious sites of the Oglala Sioux Tribe have not been adequately catalogued, the [EIS] does not include mitigation measures sufficient to protect this Native American Tribe’s cultural, historical, and religious sites that may be affected by the

¹⁹⁹ Id. § 51.71(b).

²⁰⁰ Robertson, 490 U.S. at 350.

²⁰¹ Private Fuel Storage, L.L.C. (Indep. Spent Fuel Storage Installation), CLI-02-25, 56 NRC 340, 349 (2002).

²⁰² Limerick Ecology Action, Inc. v. Nuclear Regulatory Comm’n, 869 F.2d 719, 745 (3d Cir. 1989).

²⁰³ Private Fuel Storage, CLI-02-25, 56 NRC at 348.

²⁰⁴ Pilgrim, CLI-10-11, 71 NRC at 315 (citing Town of Winthrop v. FAA, 535 F.3d 1, 11–13 (1st Cir. 2008)).

²⁰⁵ LBP-15-16, 81 NRC 618.

²⁰⁶ LBP-17-9, 86 NRC 167.

²⁰⁷ LBP-15-16, 81 NRC at 653.

Powertech project.”²⁰⁸ Based on the record before us, these deficiencies have yet to be properly remedied. Once more, we conclude that the NRC Staff has failed to fulfill its obligation, and there is a material factual dispute as to the reasonableness of the NRC Staff’s implementation of the March 2018 Approach. Accordingly, summary disposition cannot be granted.

The NRC Staff’s March 2018 Approach, as agreed to by the parties, constituted a valid and reasonable approach for resolving Contention 1A. In developing the March 2018 Approach, the NRC Staff attempted to address the main concerns previously expressed by the Oglala Sioux Tribe. For example, as described in section II supra, after the Oglala Sioux Tribe challenged the lack of a trained surveyor or ethnographer to coordinate the site survey, the NRC Staff hired Dr. Paul Nickens to facilitate the survey.²⁰⁹ Likewise, after the Oglala Sioux Tribe challenged the number of tribes invited to participate in the survey, the NRC Staff not only extended invitations to participate to the Standing Rock Sioux Tribe, Rosebud Sioux Tribe, Cheyenne River Sioux Tribe, Yankton Sioux Tribe, Crow Creek Sioux Tribe, Flandreau Santee Sioux Tribe, and Lower Brule Sioux Tribe,²¹⁰ but also coordinated a webinar series and communicated the participation details via letter, email, and telephone call to these tribes.²¹¹ Moreover, after the Oglala Sioux Tribe challenged the length of time provided for the survey, the NRC Staff doubled the amount of time and provided iterative opportunities to survey the site.²¹² These efforts by the NRC Staff are commendable and demonstrate that the parties can

²⁰⁸ Id. at 655.

²⁰⁹ NRC Staff Motion at 23.

²¹⁰ NRC Staff Motion Statement of Facts at 15, 17.

²¹¹ NRC Staff Motion at 18–20. Only the Rosebud Sioux Tribe accepted the NRC Staff’s invitation to join a webinar conference to discuss the survey methodology and participate in the March 2018 Approach, but this does not diminish the NRC Staff’s efforts to implement this element. NRC Summary of Survey Methodology Sessions at 7–9 (describing the participation of Ben Rhodd, THPO for the Rosebud Sioux Tribe in the June 5th webinar).

²¹² NRC Staff Motion at 22.

negotiate with each other to develop and implement an acceptable plan of action to resolve Contention 1A. If the March 2018 Approach had been followed to completion, the NRC Staff's "hard look" into the cultural, historical, and religious sites of the Oglala Sioux Tribe might well have been satisfied.

However, as described supra in section II, the entire March 2018 Approach was terminated during the first week of Phase One, and the majority of the agreed upon elements were never fully implemented. The March 2018 Approach designated June 11–22, 2018 as the two weeks for Phase One of the survey, but before the survey could take place, the NRC Staff's contractor had to work with the tribes to find an appropriate survey methodology. A survey was never agreed upon, and, as a result, the first week of the field survey was instead spent discussing an appropriate survey methodology.²¹³ Further, although the Oglala Sioux Tribe stated its intent to continue with the scheduled "windshield tour" during the second week of Phase One (the week of June 18–22) so as to provide "important information to help prepare for oral interviews and the September field visits,"²¹⁴ the NRC Staff cancelled all further efforts related to the March 2018 Approach, having determined that discontinuation was the only appropriate course of action.²¹⁵ This meant that not only was selection of the methodology and the site survey never completed, but several other elements of the March 2018 Approach were not completed either. First, the promised iterative opportunities to visit the site did not occur

²¹³ See Email from Travis Stills, Oglala Sioux Tribe Counsel, to Diana Diaz-Toro, NRC Project Manager (June 8, 2018, 11:33 AM) (ADAMS Accession No. ML18159A585) (refusing to allow Phase One to start on June 11 until a methodology could be agreed upon); Oglala Sioux Tribe Advisory Council Meeting Agenda (June 13, 2018) (ADAMS Accession No. ML18173A206) (listing discussion between NRC, Dr. Nickens, and the Advisory Council regarding the Oglala Sioux Tribe's June 12 cultural resource survey proposal).

²¹⁴ Email from Travis Stills, Oglala Sioux Tribe Counsel, to Emily Monteith, NRC Staff Counsel (June 15, 2018, 3:14 PM) (ADAMS Accession No. ML18170A154).

²¹⁵ Email from Emily Monteith, NRC Staff Counsel, to Travis Stills, Oglala Sioux Tribe Counsel (June 15, 2018, 2:39 PM) (ADAMS Accession No. ML18173A263); NRC Staff Letter Discontinuing March 2018 Approach.

because, after Phase One was cancelled, Phase Two of the survey never occurred. The record indicates, that during the nearly two and a half months between the scheduled first and second phase, the NRC Staff did not work to reconcile the issues associated with the selection of a methodology for the site survey so that Phase Two might be conducted.²¹⁶ Likewise, there were no oral interviews of tribal elders. There is nothing in the record to show that the NRC Staff considered continuing with this element after terminating its efforts to resolve the site survey methodology issue.

The record indicates that while both parties made alienating decisions and caused schedule delays, the NRC Staff has not yet completed the task of taking the “hard look” required by NEPA. The NRC Staff has not implemented the mutually agreed-upon March 2018 Approach or any alternative approach to gather information about sites of cultural, historical, or religious significance to the tribes. Specifically, the NRC Staff did not (1) use its contractor to negotiate a detailed survey methodology that would be acceptable to the Oglala Sioux Tribe; (2) communicate with tribal elders, and identify specific cultural resources of significance to those elders; or (3) go onto the land with representatives of the Oglala Sioux Tribe to document significant tribal sites, and identify specific mitigation measures for impacts of the project on those sites. Instead, the NRC Staff has presented us with its original FEIS from January 2014, supplemented only by information that does not reflect additional survey work and analysis. This is essentially the same material we have previously reviewed and found to be insufficient to resolve Contention 1A.²¹⁷ Powertech admits that the only completed effort since the last summary disposition motion, amounting to a literature review report compiled and presented to the Oglala Sioux Tribe as background information for the proposed field survey effort, “is not

²¹⁶ See, e.g., NRC Staff August 2018 Status Update (“The Staff has undertaken no significant curative activities since the Staff’s last update on July 2, 2018.”).

²¹⁷ LBP-15-16, 81 NRC at 654–55; LBP-17-9, 86 NRC at 198.

materially different from information already assessed by NRC Staff in the FSEIS and [contains] no new information about sites of historic, cultural, or religious significance to these Tribes.”²¹⁸ The NRC Staff thus has not fulfilled its NEPA obligation to take a “hard look” at the Dewey-Burdock project’s potential adverse impacts to specific cultural, historical, or religious resources of importance to the Oglala Sioux Tribe. Whether the NRC Staff’s aborted implementation of the March 2018 Approach, including the survey methodology presented and the NRC Staff’s decision to discontinue its efforts, was reasonable remains a question of material fact, not law. At this summary disposition stage, we may not make credibility determinations or weigh the evidence.²¹⁹ As a matter of law, the NRC Staff has failed to implement the March 2018 Approach, or otherwise adequately explained why its failure was reasonable.

B. The Staff Likewise Has Failed to Establish the Reasonableness of its Actions Under CEQ Guidance on NEPA Responsibility When Required Information Is Lacking.

Notwithstanding the Staff’s failure to obtain additional information so as to establish that it has taken the requisite “hard look” under NEPA, Council of Environmental Quality (CEQ) guidelines provide an alternative approach for addressing such a deficiency. However, as we outline below, material factual disputes make it impossible at this point for the NRC Staff to invoke this guidance as a basis for a merits ruling in its favor on Contention 1A.

1. Legal Standard

Through 40 C.F.R. § 1502.22, the Council on Environmental Quality (CEQ) has provided a legal mechanism for instances when an agency is unable to obtain complete information to fully assess foreseeable significant adverse effects on the human environment. When the required information “is incomplete or unavailable . . . the agency shall always make clear that

²¹⁸ Powertech (USA), Inc.’s Response to Pleadings on Legal Standards (Oct. 19, 2018) at 4 (ADAMS Accession No. ML18293A000).

²¹⁹ Anderson, 477 U.S. at 255.

such information is lacking.”²²⁰ Furthermore, if the incomplete information is “essential to a reasoned choice among alternatives and the overall costs of obtaining it are not exorbitant,” the agency shall obtain the information and include it in the EIS.²²¹ If, on the other hand, the costs of obtaining the information are exorbitant, the agency must include in the FSEIS:

- (1) A statement that such information is incomplete or unavailable;
- (2) a statement of the relevance of the incomplete or unavailable information to evaluating reasonably foreseeable significant adverse impacts on the human environment;
- (3) a summary of existing credible scientific evidence which is relevant to evaluating the reasonably foreseeable significant adverse impacts on the human environment, and
- (4) the agency's evaluation of such impacts based upon theoretical approaches or research methods generally accepted in the scientific community.²²²

This standard provides a route for an agency to satisfy its NEPA obligation by disclosing and explaining its lack of information and providing a discussion of the potential impact to the best of its ability without the relevant information. As was noted supra, CEQ regulations are not binding on the agency when they “have a substantive impact on the way in which the Commission performs its regulatory functions.”²²³ The Commission made clear that it accepts the procedural requirements included in section 1502.22(b),²²⁴ so their applicability in these circumstances

²²⁰ 40 C.F.R. § 1502.22.

²²¹ Id. § 1502.22(a).

²²² Id. § 1502.22(b).

²²³ Pac. Gas & Elec. Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), CLI-11-11, 74 NRC 427 & nn.94–95 (quoting Environmental Protection Regulations for Domestic Licensing and Related Regulatory Functions and Related Conforming Amendments, 49 Fed. Reg. 9352, 9352 (Mar. 12, 1984) [hereinafter Final Rule on Environmental Protection Regulations]).

²²⁴ See Final Rule on Environmental Protection Regulations at 9356 (Commission has no problems with provisions of section 1502.22(b) under which agency must decide for itself whether the information that is not known is relevant to adverse impacts and, if relevant, whether the information is important to the decision and whether the agency wishes to proceed with the action in the absence of needed information).. This can be contrasted with the worst case analysis provision that previously was a part of this section that, while deemed a substantive requirement, see id., is no longer part of the regulatory text, compare National Environmental Policy Act Regulations, 50 Fed. Reg. 32,234, 32,236–37 (proposed Aug. 9,

continues to be appropriate.

2. The Requirements of 40 C.F.R § 1502.22 Have Not Been Met

In LBP-17-9, we noted that “if the NRC Staff chooses a methodology that does not include complete information about adverse effects on the Tribe’s cultural resources, the NRC Staff would need to include an explanation that satisfies the requirements of 40 C.F.R. § 1502.22.”²²⁵ We further stated that “if the NRC Staff concludes there is no affordable alternative to the open-site survey for assessing the missing Native American cultural resources, it must at a minimum provide an explanation of this type to satisfy NEPA that is specific to the cultural resources of the Oglala Sioux Tribe and the other Native American tribes currently missing from the FSEIS.”²²⁶

The NRC Staff now alleges that although it has not conducted a site survey or completed any other aspects of the March 2018 Approach (aside from hiring a contractor), it has satisfied section 1502.22 and thus its NEPA obligations. To justify its failure to implement the March 2018 Approach, the NRC Staff asserts that “the Tribe’s unforeseen, eleventh-hour proposal of a new approach [] was incompatible with the implementation of the selected approach and greatly exceeded [it], in cost, timeframe, and scope,” thereby rendering it “not reasonably feasible for the Staff to obtain the information from the Tribe.”²²⁷ As a substitute for the information that would have been obtained through the March 2018 Approach, the NRC Staff offers its original FSEIS from 2014, supplemented by the information in the adjudicatory record of this proceeding.²²⁸ Yet, as we outline below, several material factual disputes exist

1985), with National Environmental Policy Act Regulations; Incomplete or Unavailable Information, 51 Fed. Reg. 15,618 (Apr. 25, 1986).

²²⁵ LBP-17-9, 86 NRC at 200.

²²⁶ Id.

²²⁷ NRC Staff Motion at 32–33.

²²⁸ Id. at 38.

regarding this NRC Staff explanation that make summary disposition on this point wholly inappropriate.

Moreover, some of these same material factual disputes preclude us from granting the Oglala Sioux Tribe's dispositive motion as well.

3. Disputed Issues of Material Fact Remain

On the record before us, we are unable to conclude that no material factual dispute exists such that either the NRC Staff or the Oglala Sioux Tribe is entitled to judgment as a matter of law. Specifically, we see two key remaining material issues of fact.

i. The Reasonableness of the Survey Methodology

The Oglala Sioux Tribe contests whether the survey methodology, proposed by the NRC Staff and its contractor, as described in section II.5 supra, was reasonable. The Oglala Sioux Tribe argues that:

“Due to budget and timing constraints, NRC Staff never prepared a methodology . . . [i]nstead, in preparing for the conference calls and webinars for the purpose of going into the field on June 11, 2018, NRC Staff contractors provided only a basic outline of a work plan limited to a ‘windshield tour’ and [a] revisit [to] the poorly document[ed] sites identified by the 2013 survey – without providing for having any survey methodology in place.”²²⁹

As such, the Oglala Sioux Tribe contends, “[t]he initial work plan presented by NRC Staff contained no identifiable scientific methodology for a cultural resources survey” and “constituted nothing more than the equivalent to the ‘open-site’ survey that the Tribe had repeatedly rejected.”²³⁰

This is not the first time the Oglala Sioux Tribe has raised these objections regarding the methodology being offered by the NRC's contractor. The NRC Staff's memorandum summarizing the interactions between the contractor and the tribes to determine the survey

²²⁹ Oglala Sioux Tribe Response to Staff Motion at 6.

²³⁰ Id. at 7.

methodology noted that at the June 5th teleconference the Oglala Sioux Tribe objected to the proposed methodology, stating, “beginning the survey on June 11 would be tantamount to an open site survey, and that going out without a methodology in place is objectionable.”²³¹ The Oglala Sioux Tribe additionally restated its concerns with the methodology in an email from its counsel to Dr. Nickens (with the NRC Staff carbon-copied), in which the Oglala Sioux Tribe reiterated that “the work plan looks like NRC Staff’s previous use of an open site survey, which has been rejected by the Sioux Tribes and orders of the ASLB, and the Commission.”²³² The Oglala Sioux Tribe’s counsel stated that Dr. Nickens had acknowledged that “an open site approach is not an accepted methodology.”²³³ On June 8, the Oglala Sioux Tribe again stated its concerns regarding the “skeletal survey methodology proposal.”²³⁴

The Oglala Sioux Tribe accepted the March 2018 Approach as reasonable to resolve Contention 1A and does not challenge the reasonableness of the March 2018 Approach as written. Further, we agree with the Oglala Sioux Tribe that this should not prevent the Tribe from “maintain[ing] objection[s] to issues regarding a field survey methodology.”²³⁵ We also disagree with the NRC Staff that the Oglala Sioux Tribe has not provided support for its description of “the June tribal field survey effort as a mere offer of an open-site survey.”²³⁶ Instead, we find that the Oglala Sioux Tribe has raised a material factual dispute as to the reasonableness of the NRC Staff’s survey methodology, one important element of the March 2018 Approach.

²³¹ NRC Summary of Survey Methodology Sessions at 8.

²³² Email from Travis Stills, Oglala Sioux Tribe Counsel, to Paul Nickens, SC&A and NRC Staff Contractor (June 6, 2018, 2:30 PM) (ADAMS Accession No. ML18159A134).

²³³ Id.

²³⁴ Email from Travis Stills, Oglala Sioux Tribe Counsel, to Emily Monteith, NRC Staff Counsel (June 8, 2018, 7:50 PM) (ADAMS Accession No. ML18159A624).

²³⁵ Oglala Sioux Tribe Response to Staff Motion at 9.

²³⁶ NRC Staff Motion at 31.

ii. The Reasonableness of the NRC Staff's Decision to Discontinue Work

A material factual dispute also exists as to the reasonableness of the NRC Staff's decision to discontinue work completely on June 15, 2018. We reach this conclusion based on the objections raised by the Oglala Sioux Tribe on this issue.

First, the Oglala Sioux Tribe objects to the NRC Staff's depiction of the June 12 and 15 proposals as an ultimatum.²³⁷ In its pleadings, the Oglala Sioux Tribe claims it "expected NRC Staff to review the Tribe's input and continue working on the methodology."²³⁸ While the NRC Staff contends that the proposals were a constructive rejection, the Oglala Sioux Tribe argues it intended the proposals to "facilitate the discussions and provide NRC Staff and its contractors information on the type of methodologies the Tribe would like to incorporate to the degree possible into the field survey."²³⁹ Contrary to being an ultimatum, the record shows that the Oglala Sioux Tribe actually attempted to restart the negotiation immediately upon being informed that the NRC Staff would be discontinuing its implementation of the March 2018 Approach. In an email dated June 15, counsel for the Oglala Sioux Tribe stated that he believed there had been a "misunderstanding," and reiterating that the Oglala Sioux Tribe still planned to go ahead with the "windshield tour" that was scheduled for the week of June 18.²⁴⁰ The June 15 email further stated it was "appropriate for the THPO(s) and others to go into the field next week," and could provide "important information to help prepare for oral interviews and the September field visits."²⁴¹ The contradicting characterizations of the Oglala Sioux Tribe's June 12 and 15 proposals demonstrate there is a material factual dispute, i.e., whether the new

²³⁷ Oglala Sioux Tribe Response to Staff Motion at 13.

²³⁸ Id. at 7.

²³⁹ Id.

²⁴⁰ Email from Travis Stills, Oglala Sioux Tribe Counsel, to Emily Monteith, NRC Staff Counsel (June 15, 2018, 3:14 PM) (ADAMS Accession No. ML18170A154).

²⁴¹ Id.

proposals were a constructive rejection, as the NRC Staff seeks to characterize them, or simply were “necessitated by the NRC Staff’s continued reliance on an informal open site survey instead of a methodologically sound survey developed by qualified contractors, with the Tribe’s input.”²⁴² This dispute impacts the reasonableness of the NRC Staff’s decision to discontinue work.

At the same time, we acknowledge that while the Oglala Sioux Tribe characterized the June 12 and June 15 proposals as proposals for a “methodology,” those proposals may have been an attempt to renegotiate the entire approach, per the NRC Staff’s interpretation.²⁴³ During the April 6, 2018 teleconference, the NRC Staff explained that “notwithstanding the sort of open nature of what the survey might entail” it believed the Oglala Sioux Tribe, during survey methodology negotiations, would be “committed to working within the parameters set out in the [March 2018] approach.”²⁴⁴ As discussed supra, in section II.E and section IV.A, the Oglala Sioux Tribe’s June proposals went far beyond just suggesting a methodology for the site survey, i.e., a scientific method for how the site should be traversed, catalogued, etc., by expanding the budget, the time frame, and the geographic area involved. It may have been reasonable for the NRC Staff to view this as an attempt to establish a new approach, but we cannot make that determination based on the pleadings. The Oglala Sioux Tribe’s and NRC Staff’s different understandings of the Oglala Sioux Tribe’s proposed “survey methodology” demonstrates that a material factual dispute exists as to whether the new proposals were a rejection, or a starting point for further negotiation, and whether it was reasonable for the NRC Staff to discontinue its efforts to complete the site survey.

Second, the Oglala Sioux Tribe raises a material factual dispute as to the

²⁴² NRC Staff Motion at 31 (quoting Oglala Sioux Tribe’s Response to NRC Staff Motion to Set Filing for Summary Disposition Motions (July 16, 2018) at 2).

²⁴³ Id. at 30.

²⁴⁴ Tr. at 1433–34 (Apr. 6, 2018).

reasonableness of the NRC Staff's decision to forgo the remaining elements of the March 2018 Approach. The Oglala Sioux Tribe disputes the NRC Staff's view that negotiations had ended at an impasse: "With a full week left in the original schedule for field work, NRC Staff left Pine Ridge on June 15, 2018," thereby curtailing the "positive steps made by the in-person discussions."²⁴⁵ Regardless of the progress, or lack thereof, made during the first week, the timeline set forth in the NRC Staff's March 2018 Approach shows that the parties still had scheduled one more week in June, and two weeks in September to implement the field survey.²⁴⁶ The timeline set forth in the March 2018 Approach projected two weeks of oral history interviews with tribal elders in August.²⁴⁷ It is unclear from the record why the NRC Staff could not have moved forward and, at the very least, conducted the oral history interviews in August. The Oglala Sioux Tribe raises a valid material factual dispute about the reasonableness of the NRC Staff's decision to discontinue all aspects of the March 2018 Approach.

Accordingly, finding there remain material facts in dispute regarding Contention 1A, we deny both the NRC Staff's and Oglala Sioux Tribe's motions for summary disposition as to Contention 1A.²⁴⁸

V. Continuing Obligations and Further Procedures

A. Mandatory Disclosures

As we explained in LBP-17-9, 10 C.F.R. § 2.336 provides for "general discovery" in

²⁴⁵ Oglala Sioux Tribe Response to Staff Motion at 13.

²⁴⁶ March 2018 Approach Timeline.

²⁴⁷ Id.

²⁴⁸ The Board need not address the issue of license vacature raised in the Oglala Sioux Tribe's summary disposition motion, as that matter is before the Commission on remand from the District of Columbia Circuit. See section I.C supra.

Subpart L proceedings.²⁴⁹ The regulation requires that “all parties . . . shall . . . disclose and provide . . . all documents and data compilations in the possession, custody, or control of the party that are relevant to the contentions.”²⁵⁰ The regulation establishes that each party’s duty to submit these mandatory disclosures is ongoing, and that each party must make these mandatory disclosures once a month and without the filing of a discovery request by other parties.²⁵¹ Going forward, the parties must continue to disclose any documents relevant to the NRC Staff’s efforts to resolve Contention 1A.

B. Further Procedures

As part of its NEPA responsibilities, a federal agency must undertake reasonable efforts to acquire missing information.²⁵² The Board cannot direct the NRC Staff to pursue a single avenue to meet its statutory NEPA obligations. The Board can, however, establish procedures to ensure the NEPA-required “hard look” is taken or a legally sufficient explanation is placed on the record as to why the required information is missing and not “reasonably obtainable.” The Board, therefore, will establish procedures for the resolution of Contention 1A. The NRC Staff has two avenues available to it to conclude expeditiously the litigation of the issues in this case. The two alternative avenues are: (1) the NRC Staff can resume the implementation of its March 2018 Approach, with appropriate adjustments to the dates in the original timetable;²⁵³ or (2) the parties can prepare for a prompt evidentiary hearing, where testimony and evidence will be

²⁴⁹ Although 10 C.F.R. § 2.336 is contained in Subpart C to the agency’s Part 2 rules of procedure, Subpart C is generally applicable to all adjudications pursuant to the Atomic Energy Act, including Subpart L proceedings. 10 C.F.R. §§ 2.300, 2.1200.

²⁵⁰ Id. § 2.336(a)(2)(i).

²⁵¹ Id. § 2.336(a), (d).

²⁵² See 40 C.F.R. § 1502.22; Winthrop, 535 F.3d 1; Pilgrim, CLI-10-22, 72 NRC at 208.

²⁵³ Although the choice of an approach is one for the NRC Staff to make, see supra p.37, as a practical matter at this point, the March 2018 Approach is the only NRC Staff-generated alternative approach on the table.

taken on the questions raised by the motions for summary disposition filed August 17, 2018.

Alternative 1: Continue the Efforts Embodied in the March 2018 Approach

The Oglala Sioux Tribe first raised its concern with the protection of cultural and religious resources in a proposed contention filed in 2010.²⁵⁴ Almost nine years have passed and these concerns have not been resolved. As described supra, the parties reached an agreement on what appeared to be a reasonable approach to address the Oglala Sioux Tribe's concerns and satisfy the NRC Staff's NEPA obligations with the March 2018 Approach. What remains is implementation of the mutually agreed upon Approach. The NRC Staff may wish to reconsider its abandonment of the March 2018 Approach and move forward on the remaining elements of the March 2018 Approach.

Key progress has already been made towards implementing the March 2018 Approach. The NRC Staff has located and contracted with a qualified facilitator, experienced in conducting tribal surveys. The NRC Staff has made arrangements for the participation of other interested Lakota Sioux Tribes and has agreed to iterative trips to the sites to be studied. The NRC Staff and its contractor have provided for the involvement of tribal elders and the collection of oral histories. The March 2018 Approach has a budget that both the NRC Staff and Powertech supported. The Oglala Sioux Tribe has stated that it desires to move forward and cooperate with the NRC Staff to implement site survey and oral history portions of the March 2018 Approach. Now the NRC Staff must decide whether to continue with this progress.

If the NRC Staff chooses to move forward with the March 2018 Approach, and restart communication between its contractor and the participating tribes to develop a scientific methodology for the site survey, the only aspect of the Approach that is open for discussion is

²⁵⁴ Oglala Sioux Tribe Petition at 12–17.

the site survey methodology.²⁵⁵ That is, any tribal negotiating position or proposal should only encompass the specific scientific method that would fit into the two-week periods set out in the March 2018 Approach for visiting the physical site, i.e., how the contractor and Tribe members will walk the site and mark or record located tribal resources. While we understand the need to be sensitive to the cultural tenets and needs of the Oglala Sioux Tribe, given that the time period for the site survey phases was agreed to by the Oglala Sioux Tribe, and that it is the Oglala Sioux Tribe that has continually pushed for a scientific methodology, negotiations and proposals must remain within these constraints.

Finally, some of the documents in the record indicate that SUNSI and confidentiality issues may be a sticking point to further progress on the March 2018 Approach.²⁵⁶ If any party believes that the Protective Order already in place for this proceeding needs revision, it may file a request for such a revision with the Board.²⁵⁷

Alternative 2: Evidentiary Hearing to Receive Evidence and Explanation to Resolve Remaining Disputed Material Issues of Fact

There are three interrelated disputed material issues of fact that must be addressed

²⁵⁵ As previously suggested at a number of the telephone conferences with the Board and in LBP-17-9, the parties may submit a joint motion to request the appointment of a Settlement Judge to conduct settlement negotiations to assist in the resolution of this dispute pursuant to 10 C.F.R. § 2.338, and pursue that avenue in an attempt to reach a settlement and dismissal of the contention. Additionally, the parties might consider seeking assistance from the NRC Tribal Liaison to bring the NRC Staff and the Oglala Sioux Tribe closer to agreement.

²⁵⁶ Oglala Sioux Tribe Counsel Memo on Proposed Schedule at 1–2 (proposing a new schedule with “prerequisites for going into the field” including the need for updated confidentiality and SUNSI agreements); Emails between Emily Monteith, NRC Staff Counsel, and Travis Stills, Oglala Sioux Tribe Counsel (June 7, 8, and 11, 2018) (ADAMS Accession No. ML18173A166) (discussing the conflicting ideas about how sensitive information revealed from the March 2018 Approach would be protected).

²⁵⁷ At the outset of this proceeding, this Protective Order granting access to requested Sensitive Unclassified Non-Safeguards Information (SUNSI) was issued by the Chief Administrative Judge of the Atomic Safety and Licensing Board Panel to the Oglala Sioux Tribe. See Memorandum and Order of Chief Administrative Judge E. Roy Hawkens (Protective Order Governing the Disclosure of Sensitive Unclassified Non-Safeguards Information (SUNSI)) (Mar. 5, 2010) (unpublished).

before Contention 1A will be ripe for resolution by summary disposition. First, the NRC Staff must show that its March 2018 Approach contained a reasonable methodology for the conduct of the site survey. Second, the NRC Staff must show that its decision to discontinue work completely on June 15, 2018 was reasonable. Finally, consistent with 40 C.F.R. § 1502.22, the NRC Staff must show that proposed tribal alternatives to its March 2018 Approach would be cost prohibitive. With respect to the cost prohibitive factual dispute, the NRC Staff must provide information establishing the 40 C.F.R. § 1502.22(b)(3) and (4) requirements that set forth a “summary of existing credible scientific evidence which is relevant to evaluating the reasonably foreseeable significant adverse impacts [of the Dewey-Burdock project] on the human environment,”²⁵⁸ and “the agency’s evaluation of such impacts based upon theoretical approaches or research methods generally accepted in the scientific community.”²⁵⁹ In other words, in these circumstances, if the NRC Staff concludes there is no affordable alternative to the open-site survey for assessing the missing Native American cultural resources, to satisfy NEPA, the NRC Staff must at a minimum provide a sufficiently detailed explanation addressing the cultural resources analysis for the Oglala Sioux Tribe and the other Native American tribes that is currently missing from the FSEIS.²⁶⁰

Should the NRC Staff, after consultation with the parties,²⁶¹ choose not to continue with its progress on the March 2018 Approach, we will move forward with an expeditious evidentiary

²⁵⁸ 40 C.F.R. § 1502.22(b)(3).

²⁵⁹ Id. § 1502.22(b)(4).

²⁶⁰ See LBP-15-16, 81 NRC at 655; see also LBP-17-9, 86 NRC at 200.

²⁶¹ In providing the Staff with 30 days to advise the Board of its decision in this regard, we recognize that (1) any Staff decision to proceed is likely to be based on the expressed willingness of the Oglala Sioux Tribe and Powertech to continue under the March 2018 Approach; and (2) at least one meeting among the parties will be required to discuss going forward under the Approach. Given the parties’ past problems, it seems that a vital element of that meeting (and any follow-up meetings) will be to establish a common, concrete understanding of what elements are involved in each of the phases of the March 2018 Approach. Trying to “kick the can down the road” is no longer an option.

hearing to address the unresolved material issues of fact that arise from the August 17, 2018 motions for summary disposition. The NRC Staff shall inform the Board of its decision as to which alternative it wishes to pursue on or before November 30, 2018. The Board will convene an all-parties status conference December 5, 2018.

If the NRC Staff elects to proceed to an evidentiary hearing, the parties will file position statements and pre-filed direct testimony no later than January 4, 2019, in conjunction with a list of potential witnesses. Rebuttals to the position statements and pre-filed rebuttal testimony are to be filed no later than January 18, 2019. Motions in limine and party responses regarding both the initial and rebuttal pre-filed testimony will be allowed, as provided by the schedule in Appendix A. Any proposed cross-examination questions for the evidentiary hearing shall be submitted to the Board no later than February 15, 2019. The hearing itself will be scheduled for February 26–28, 2019, in South Dakota.

Following the conclusion of the evidentiary hearing, parties are to submit their proposed findings of fact and conclusions of law no later than March 30, 2019, and replies to the findings of fact and conclusions of law shall be filed no later than April 12, 2019.

Consistent with this schedule, as fully set forth in Appendix A to this Memorandum and Order, the Board anticipates issuing an initial decision on these matters by June 1, 2019. The

Board will contact the parties with the details of the all-parties status conference in the near term.

It is so ORDERED.

THE ATOMIC SAFETY
AND LICENSING BOARD

/RA/

William J. Froehlich, Chairman
ADMINISTRATIVE JUDGE

/RA/

Dr. Mark O. Barnett
ADMINISTRATIVE JUDGE

/RA/

G. Paul Bollwerk, III
ADMINISTRATIVE JUDGE

Rockville, Maryland
October 30, 2018

APPENDIX A: SCHEDULE – Powertech USA, Inc. (Dewey-Burdock In Situ Uranium Recovery Facility) Proceeding

Event:	Date:
Licensing Board Order Denying Staff Dispositive Motion on Contention 1A	October 30, 2018
NRC Staff Decision on Which Alternative to Pursue to Resolve Contention 1A	November 30, 2018
All Parties Status Conference	December 5, 2018
Evidentiary Hearing Schedule	
Positions Statements/Prefiled Direct Testimony from All Parties Due	January 4, 2019
Rebuttal Statements/Prefiled Rebuttal Testimony from All Parties Due	January 18, 2019
In Limine Motions on Prefiled Testimony Due	January 25, 2019
In Limine Motion Responses Due	February 1, 2019
Licensing Board Ruling on In Limine Motions	February 8, 2019
Proposed Cross-Examination Questions Due	February 15, 2019
Evidentiary Hearing	February 26-28, 2019
Proposed Findings of Fact/Conclusions of Law Due	March 30, 2019
Reply Findings of Fact/Conclusions of Law Due	April 12, 2019
Licensing Board Initial Decision	June 1, 2019

Additional Views of Bollwerk, A.J.,

Although I agree fully with the Licensing Board's disposition of the August 17, 2018 summary disposition motions of the NRC Staff and intervenor Oglala Sioux Tribe, I write separately to observe that given what has transpired, the parties may be inclined to "let the lawyers deal with it" in an evidentiary hearing rather than trying to move forward with collecting and recording additional tribal cultural resources information as was contemplated in the Staff's March 2018 Approach described in detail in the Board's opinion. Nonetheless, it is my hope they will use the thirty days provided by the Board's schedule to explore seriously whether that information-gathering process can be resumed and completed.

Certainly, if the time pressure associated with the delay in hiring a Staff cultural resources contractor and the need to conduct the site surveys before inclement weather intervened contributed to the events that resulted in the March 2018 Approach process being halted, those should no longer be factors. The Staff's contractor is onboard and the schedule can be "rebooted" to begin the onsite work in the early spring, perhaps after initiating an ethnographic outreach effort with tribal elders during the coming winter months to help inform the pedestrian surveys.

Though the Board is fully prepared to conduct an evidentiary hearing as outlined in its decision, it is hard to imagine that the goals of the National Environmental Policy Act, as well as the public interest generally, are best served by expending Board and party resources litigating the events of June 2018 that halted the cultural resources information-gathering process, as compared to devoting those resources to undertaking and completing that process so as to endeavor to fulfill the Staff's NEPA responsibilities. Moreover, the possibility exists that by June 2019 when the Board issues an initial decision after months of litigation, the parties could find themselves having to begin the same information-gathering process that, if resumed now, could be mostly finished by next June, with the Staff's environmental assessment supplement possibility completed by this time next year.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **MEMORANDUM AND ORDER (Denying Motions for Summary Disposition as to Contention 1A)** have been served upon the following persons by Electronic Information Exchange, and by electronic mail as indicated by an asterisk (*).

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POWERTECH (USA) INC., DEWEY-BURDOCK IN SITU RECOVERY FACILITY
DOCKET NO. 40-9075-MLA
**MEMORANDUM AND ORDER (Denying Motions for Summary Disposition as to
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[Original signed by Clara Sola _____]
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Dated at Rockville, Maryland,
this 30th day of October, 2018