

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of:	}	Docket No.: 40-9075-MLA
POWERTECH (USA) INC.	}	Date: May 22, 2019
(Dewey-Burdock In Situ Uranium Recovery Facility)	}	

**LICENSEE POWERTECH (USA) INC. INITIAL STATEMENT OF
POSITION REGARDING CONTENTION 1A**

I. INTRODUCTION

Licensee Powertech (USA) Inc. (Powertech) hereby submits its Statement of Position regarding the grant of United States Nuclear Regulatory Commission (NRC) No. SUA-1600 permitting the construction and operation of the Dewey-Burdock *in situ* uranium recovery (ISR) project in the State of South Dakota. The issued license permits Powertech to construct ISR facilities at the Dewey-Burdock Project in accordance with NRC regulations at 10 CFR Part 40 and Appendix A Criteria and other applicable regulations, guidance, and policy. More specifically, this Statement of Position is directed at the sole remaining contention in this proceeding and is intended to support the position taken by the United States Nuclear Regulatory Commission (NRC) Staff that the Atomic Safety and Licensing Board (hereinafter the “Board”) close the evidentiary record on this contention and terminate the proceeding in its entirety.

As set forth in this Statement of Position, Powertech asserts that: (1) NRC Staff’s proposed March 2018 approach to resolve the sole remaining contention in this proceeding

(Contention 1A) was “reasonable” under applicable regulations and deemed acceptable by all parties to this proceeding, including the Oglala Sioux Tribe (hereinafter the “Tribe”) and a group of individual members of the public (hereinafter “CI”) and accepted by this Board; (2) implementation of this proposed and accepted approach was not possible due to a lack of finalization of an agreed upon methodology within the parameters of this approach; (3) NRC Staff’s decision to abandon further discussions of such approach with the Tribe due to an inability to reach an agreement of a methodology within the parameters of the March 2018 approach was “reasonable;” (4) any additional information associated with historic and cultural resources of the Tribe at the Project site is “unavailable”; and (5) NRC Staff’s position that the Final Environmental Impact Statement (hereinafter the “FSEIS”) can be adequately supplemented using the existing record of decision (ROD) and the administrative hearing record is acceptable under existing case law. For these reasons and for the reasons discussed below, Powertech concurs with the determinations of NRC Staff for resolution of Contention 1A and respectfully requests that the Board find that this Contention should be resolved in the favor of NRC Staff and Powertech and that this administrative proceeding be terminated. Further, Powertech respectfully requests that the Board find that no further action needs to be taken on Powertech’s existing NRC license and that the administrative record for this proceeding be closed.

II. BACKGROUND AND PROCEDURAL HISTORY

The history of this case is lengthy and Powertech does not repeat it in full. This Section summarizes the relevant procedural history and events, to provide context for the issues of fact and law remaining to be addressed in this hearing. As a preliminary matter, Powertech hereby incorporates NRC Staff’s recitation of the facts and procedural background into this Statement of Position in its entirety and offers the summary of said facts and procedural background below.

After the Dewey-Burdock license application was made publicly available, on January 5, 2010, NRC Staff issued a Federal Register notice providing interested stakeholders and other members of the public with an opportunity to request a hearing on the application and to request access to sensitive unclassified non-safeguards information (SUNSI) associated with such application.¹ On January 15, 2010, counsel for the Tribe and CI submitted a request for access to SUNSI documentation. After reviewing this request, NRC Staff determined that these parties were not entitled to access to the SUNSI documentation. On February 26, 2010, the Tribe and CI submitted a motion for a ninety (90) day extension of time to file their Request based on a number of factors including a lack of time to review the Dewey-Burdock license application. On March 3, 2010, both Powertech and NRC Staff filed responses in opposition to the Tribe's and CI's motion and, on March 5, 2010, it was determined that the Tribe and CI were not entitled to an extension of time.

On March 12, 2010, the Commission established an Atomic Safety and Licensing Board Panel (Board). On March 8th and 9th, 2010, and April 6, 2010, CI and the Tribe respectively submitted requests for a hearing to propose contentions for admission to such a hearing. On April 12 and May 3, 2010, Powertech and NRC Staff respectively submitted responses to CI's and the Tribe's requests and argued that the proffered contentions were not admissible under NRC regulations at 10 CFR Part 2.309. On June 8 and 9, 2010, the Licensing Board conducted oral argument in Custer County, South Dakota, where all parties' arguments on standing and admissible contentions were heard.

In this proceeding, CI's and the Tribe's hearing requests proffered approximately twenty-one (21) contentions that raised a variety of safety and environmental issues of concern regarding

¹ See 75 Fed. Reg. 467 (January 5, 2010).

Powertech's license application. On August 5, 2010, the Licensing Board issued LBP-10-16 in which CI and the Tribe each were granted standing to intervene and several contentions for both parties were admitted. More specifically, the Licensing Board admitted a total of seven (7) contentions related to historic and cultural resources, adequacy of baseline groundwater quality data, hydrogeological confinement in aquifers within which the proposed Dewey-Burdock project is to occur, and groundwater consumption. After an October, 2012, teleconference, the Licensing Board consolidated the seven admitted contentions into the following: (1) Contention 1 A/B regarding historic and cultural resources, including the failure to adequately consult with the Tribe, (2) Contention 2 regarding adequacy of baseline groundwater data, (3) Contention 3 regarding hydrogeological confinement of the aquifers in which the proposed Dewey-Burdock project is to occur, and (4) Contention 4 regarding potential impacts to groundwater quantity and/or consumption.

Then, NRC issued a Federal Register notice and indicated its Notice of Intent to prepare a supplemental environmental impact statement (SEIS) for the proposed Dewey-Burdock process. As part of the SEIS preparation process, NRC Staff contacted the United States Bureau of Land Management (BLM) and, per agreement, BLM agreed to serve as a cooperating agency for preparation of what would eventually become the Powertech Dewey-Burdock Final Environmental Impact Statement (FSEIS). By joining as a cooperating agency, BLM contributed expertise on a variety of resource areas including historic and cultural resources, land use, soils, and endangered species.

On November 26, 2012, NRC Staff issued its Draft Supplemental Environmental Impact Statement (DSEIS) for the proposed Dewey-Burdock project for public comment. By rule, the Tribe and CI were entitled to thirty (30) days to file new or amended contentions. In compliance

with this opportunity and after receiving an extension from December 31, 2012 to January 25, 2013, both CI and the Tribe filed requests to admit several new or amended contentions. On March 11, 2013, both Powertech and NRC Staff submitted responses to these requests opposing the admission, amendment or migration of any new/amended contentions. CI and the Tribe submitted replies to such responses.

On July 22, 2013, the Licensing Board issued an Order granting the admission of three (3) new contentions to the proceeding regarding mitigation measures (Contention 6), connected actions (Contention 9), and Endangered Species Act analysis and the sufficiency of such analysis (Contentions 14A/B). The Licensing Board also rejected several contentions, many of which were brought forward from previous contentions on Powertech's license application.

On January 29 and February 3, 2014, NRC Staff issued the FSEIS which stated that, absent a safety-related concern to the contrary, it recommended that NRC Staff issue Powertech's requested license. The FSEIS included an assessment of the environmental aspects of groundwater and historic and cultural resources at the Dewey-Burdock site, as well as mitigation measures.² Based on the FSEIS, on March 17, 2014, both CI and the Tribe submitted a request to admit new/amended contentions, including migration of existing admitted contentions, to the FSEIS. On April 4, 2014, both Powertech and NRC Staff submitted responses to these requests and, on April 11, 2014, both CI and the Tribe submitted replies to these responses.

On April 28, 2014, the Licensing Board issued an Order allowing the previously admitted contentions to migrate from the DSEIS to the FSEIS with no changes in the substance of such

² United States Nuclear Regulatory Commission, NUREG-1910, Volume 4, *Environmental Impact Statement for the Dewey-Burdock Project in Custer and Fall River Counties, South Dakota: Supplement to the Generic Environmental Impact Statement for In-Situ Leach Uranium Milling Facilities — Final Report* (January 29, 2014).

contentions. As a result, the complete list of contentions in this proceeding are detailed in the *Table of Admitted Contentions* in LBP-14-5.

On April 8, 2014, NRC Staff issued notice to the Licensing Board that it had issued Powertech NRC License No. SUA-1600 stating that “the Staff finds that the application complies with the Atomic Energy Act and the NRC’s regulations....The Staff has considered the safety-related arguments raised by the CI and the Tribe in the hearing, but those arguments do not affect the conclusions in the Safety Evaluation Report.”

On April 11, 2014, both NRC Staff and the Tribe submitted Motions for Summary Disposition of certain contentions or portions thereof. NRC Staff’s summary disposition motion sought disposition of the safety-related components of Contentions 2 and 3 dealing with the adequacy of Powertech’s groundwater data and site hydrology, and the Tribe’s summary disposition motion sought disposition of Contention 1A related to historic and cultural resources and Contention 6 on mitigation measures. On April 25, 2014, all parties submitted responses to these summary disposition motions with Powertech supporting NRC Staff’s motion and opposing the Tribe’s, NRC Staff opposing the Tribe’s motion, the Tribe opposing NRC Staff’s motion, and CI supporting the Tribe’s motion and opposing NRC Staff’s. The Licensing Board denied both NRC Staff’s and the Tribe’s motions.

On April 14, 2014, both the Tribe and CI submitted Motions for a Stay of the Effectiveness of Powertech’s NRC license citing to various claims associated with Powertech’s and NRC Staff’s review and assessment of historic and cultural resources at the Dewey-Burdock site and other claims. On April 24, 2014, both Powertech and NRC Staff submitted responses to these Motions opposing the grant of a stay of SUA-1600. In April of 2014, the Licensing Board issued a temporary stay of SUA-1600 pending oral argument, which was held via teleconference

in May of 2014. In May of 2014, the Licensing Board issued an Order lifting the temporary stay and denying a full stay of SUA-1600.

After receiving filings from all parties on the admitted contentions, the Board held an evidentiary hearing in August of 2014, at which testimony was heard from all parties on each admitted contention, including but not limited to Contention 1A. Upon completion of the evidentiary hearing and filing of all findings of fact and conclusions of law from all parties, on March 30, 2015, the Board issued an Initial Decision in which it determined that all admitted contentions, with two (2) exceptions, should be resolved in favor of NRC Staff and Powertech and that the evidentiary record on such admitted contentions should be closed. *See In the Matter of Powertech (USA) Inc., (Dewey-Burdock ISR Project), LBP-15-16, 81 NRC 618 (April 30, 2015).*

In the same Initial Decision, the Board determined that Contention 1A dealing with National Environmental Policy Act (NEPA) compliance in the ROD for historic and cultural resources and Contention 1B dealing with National Historic Preservation Act (NHPA) compliance under the Section 106 consultation process should remain open for further deliberation with an attempt to achieve compliance through cooperative efforts between all parties. Upon receipt of this Initial Decision, on May 22, 2015, both Powertech and NRC Staff appealed this Initial Decision to the Commission and argued that, for purposes of this Position Statement, that Contention 1A and 1B had been satisfied.

On December 23, 2016, while NRC Staff was pursuing negotiations with the Tribe and CI to resolve Contentions 1A and 1B, the Commission issued an Order (CLI-16-20) denying the Petition for Review of NRC Staff and Powertech. The Commission determined that the Board's

decision should not be disturbed and that the NHPA Section 106 procs and associated NEPA compliance was not complete.

After CLI-16-20 was issued and NRC Staff re-commenced discussions with the Tribe and CI, the Tribe appealed the Commission's subsequent endorsement of the closure of other admitted contentions and the viability of Powertech's NRC license pending full NEPA compliance to the United States Court of Appeals for the District of Columbia Circuit (DC Circuit) requesting that the Court invalidate Powertech's license. After the submission of written briefs and subsequent oral argument, the DC Circuit issued an opinion remanding the case to the Commission for further deliberations, including the issuance of an Order setting parameters for maintenance of Powertech's NRC license and the extent to which it may be used during the existing administrative litigation. In CLI-19-01 issued on January 31, 2019 the Commission stated that Powertech's NRC license should remain active and that it must inform NRC Staff with adequate notice prior to any site development activities.

During the course of the appeal to the DC Circuit, NRC Staff re-commenced discussions with CI and the Tribe regarding resolution of Contentions 1A and 1B consistent with the Board's 2015 Order stating that the agency must make one more attempt to invite the Tribe to survey the Project site and to provide site-specific information on its historic and cultural resources associated with the site. Over 23 months, NRC Staff made attempts to contact and negotiate with the parties regarding the formulation of an appropriate approach to identifying Tribal historic and cultural resources at the Project site and to supplement the FSEIS as appropriate. After numerous attempts, no agreement between the parties could be reached other than the assent by Powertech to fully fund the site survey effort and to make the Project site accessible for the relevant parties. After the failure to achieve an agreement on a proposed approach, on July

24, 2017, NRC Staff terminated its consultation efforts under NHPA Section 106 and filed a motion for summary disposition of both remaining contentions under 10 CFR Part 2.1205 regulations. In its motion and supported by Powertech, NRC Staff argued that further efforts to comply with the Board 2015 Order were unlikely to yield positive results and the further gathering of additional historic and cultural resources information. Thus, Contention 1B was satisfied based on the ROD and the administrative record at that time and that Contention 1A was, by definition, moot due to the inability to gather such information. The Tribe and CI opposed this motion.

On October 19, 2017, the Board issued LBP-17-09, in which it found that NRC Staff indeed had satisfied Contention 1B regarding NHPA Section 106 compliance and that the evidentiary record on this contention should be closed. However, the Board also determined that that Contention 1A had not been resolved. As such, as of the date of that Order, the evidentiary record for Contention 1A remained open.

Powertech immediately appealed the Board's decision to the Commission and requested interlocutory review of LBP-17-09 arguing that the Board erred in keeping the evidentiary record open with respect to Contention 1A. However, this appeal was denied.

After the issuance of LBP-17-09, NRC Staff revisited negotiations with all parties regarding an acceptable approach to resolving Contention 1A. In December of 2017, NRC Staff issued a proposed draft approach to complete the NEPA process. While it argued at the time that the proposal was cost prohibitive, Powertech agreed the proposed parameters and further agreed to fund all associated activities. After further discussions with all parties, in March of 2018, the final proposed approach was agreed upon, including site assessment parameters and compensation options, and the process of implementing said approach commenced. After

continued discussions with the Tribe and CI on this matter and determining that future efforts would not result in a satisfactory conclusion, on August 17, 2018, NRC Staff filed a motion for summary disposition of Contention 1A and, on October 30, 2018, the Board rendered their decision denying the motion. Negotiations, including meetings and the exchange of proposals regarding methodologies were exchanged between the Tribe and NRC Staff and proceeded throughout 2018 and into 2019. Upon the beginning of 2019, it was determined by NRC Staff that further discussions with the Tribe over implementation of the March, 2018 approach were futile and the NRC Staff subsequently terminated further negotiations. Citing an impasse in these discussions, including the Tribe's reluctance to agree to an approach within the March, 2018 approach's parameters, NRC Staff informed the Board that it believed the only way to effectively close the record on Contention 1A was to proceed to an evidentiary hearing. Powertech concurred with this conclusion while the Tribe and CI claimed that further discussions would yield a positive result. NRC Staff argued that the Tribe continuously proposed changes to NRC Staff's proposed methodologies that went far beyond the parameters of the March, 2018 agreed-upon approach and that there was no chance for resolution of these differences. As such, NRC Staff filed a motion with the Board requesting that an evidentiary hearing be granted and that a briefing schedule be established.

On May 10, 2019, the Board finalized a briefing schedule for an evidentiary hearing. On May 17, 2019, NRC Staff submitted its Statement of Position and pre-filed testimony arguing its position that further discussions with the Tribe will not yield a result in which additional historic and cultural resource information could be obtained. For the reasons discussed below, Powertech concurs with NRC Staff's position and respectfully requests that the Board find that further information from the Tribe is "unavailable," that NEPA compliance has been achieved

and that Contention 1A be resolved in favor of NRC Staff and Powertech and the full evidentiary record on this proceeding be closed.

III. ARGUMENT

While it did not have a substantive role in the implementation of the March, 2018 agreed-upon approach except for agreeing to fully fund the implementation efforts and to make the Project site accessible, Powertech does have additional argument to offer in tandem with its support of NRC Staff's position. As stated above, Powertech's position on Contention 1A at this time is as follows: (1) NRC Staff's proposed March 2018 approach to resolve the sole remaining contention in this proceeding (Contention 1A) was "reasonable" under applicable regulations and deemed acceptable by all parties to this proceeding, including the Tribe and CI, and accepted by this Licensing Board; (2) implementation of this proposed and accepted approach was not possible due to a lack of finalization of an agreed upon survey methodology within the parameters of this approach; (3) NRC Staff's decision to abandon further discussions of such an approach with the Tribe due to an inability to reach an agreement on a survey methodology within the parameters of the March, 2018 approach was "reasonable;" (4) any additional information associated with historic and cultural resources of the Tribe at the Project site is "unavailable" and (5) NRC Staff's position that the Final Environmental Impact Statement (hereinafter the "FSEIS") can be adequately supplemented using the existing record of decision (ROD) and the administrative hearing record is acceptable under existing Commission case law.

A. NRC STAFF'S PROPOSED AND ACCEPTED MARCH 2018 APPROACH WAS "REASONABLE"

1. National Environmental Policy Act Standards

Given that this evidentiary hearing and the arguments offered should be taken in their entirety over the full scope of the ROD and administrative hearing record, a brief recitation of the

applicable NEPA based law and the Commission's implementing regulations is appropriate. To date, NRC Staff has prepared, issued for public comment, and finalized a programmatic environmental impact statement (EIS) or Generic Environmental Impact Statement (GEIS or NUREG-1910) for ISR facilities that is intended to have SEISs tiered off of its programmatic findings. *See United States Nuclear Regulatory Commission, NUREG-1910, Generic Environmental Impact Statement for In-Situ Leach Uranium Milling Facilities*, (May 2009). It is this GEIS that serves as the primary, programmatic basis for the Dewey-Burdock ISR Project SEIS. To date, five (5) SEISs have been prepared and finalized for ISR projects since the development of the GEIS, including the Dewey-Burdock ISR Project. 10 CFR Part 51 regulations represent the Commission's interpretation of Council on Environmental Quality (CEQ) regulations under NEPA. As an independent regulatory agency, the Commission is not required to comply with portions of CEQ regulations that have some substantive impact on the manner in which the Commission performs its primary regulatory responsibilities. 10 CFR § 51.20(b)(8) specifically requires that source material milling operating licenses be subject to EIS-level environmental reviews, requiring either an EIS or SEIS.

Under NRC regulations, an applicant generally has the burden of proof in a licensing proceeding. *See* 10 CFR § 2.325. However, in cases involving environmental contentions, NRC Staff bears the burden because it is the entity with the ultimate responsibility for NEPA compliance. *See e.g., Duke Power Co. (Catawba Nuclear Station, Units 1 & 2)*, CLI-83-19, 17 NRC 1041, 1049 (1983). The applicant also may serve as a proponent of a particular position set forth in an EIS and, as a proponent, also has the burden on that matter. *Louisiana Energy Servs., L.P. (Claiborne Enrichment Center)*, LBP-96-25, 44 NRC 331, 338-39 (1996) (citing *Pub. Serv.*

Co. of N.H. (Seabrook Station, Units 1 & 2), ALAB-471, 7 NRC 477, 489 n.8 (1978)), *rev'd on other grounds*, CLI-97-15, 46 NRC 294 (1997).

For environmental reviews, NRC Staff is required to take a “hard look” at the potential environmental impacts of a proposed action under NEPA. This “hard look” requirement is tempered by a “rule of reason” that requires agencies to address only impacts that are reasonably foreseeable—not remote or speculative. If an admitted contention alleges that an environmental review document such as an SEIS is inadequate, “the ‘rule of reason’ by which NEPA is to be interpreted provides that agencies need not consider ‘remote and speculative’ risks or ‘events whose probabilities they believe to be inconsequentially small.’”³

NEPA analyses often must rely upon imprecise and uncertain data, particularly when forecasting future technological developments, which should be judged on their reasonableness. When faced with uncertainty, NEPA only requires “reasonable forecasting.” In short, NEPA allows agencies “to select their own methodology as long as that methodology is reasonable.”⁴

NRC Staff’s environmental review is deemed to be adequate unless NRC Staff “has failed to take a ‘hard look’ at significant environmental questions –i.e., the Staff has unduly ignored or minimized pertinent environmental effects.”⁵ NEPA provides no guarantee that federally approved projects will not *have* adverse environmental impacts, nor does NEPA require agencies to select the most environmentally advantageous or benign option available.⁶

³ *Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station, ALAB-919, 30 NRC 29, 44 (1989) (citation omitted).

⁴ *See The Lands Council v. McNair*, 537 F.3d 981, 1003 (9th Cir. 2008) (finding that an EIS need not be based on the “best scientific methodology available”).

⁵ *See Duke Energy Corp.* (McGuire Nuclear Station, Units 1 & 2; Catawba Nuclear Station, Units 1 & 2), CLI-03-17, 58 NRC 419, 431 (2003) (discussing what an intervenor must allege, with adequate support, to litigate a NEPA claim).

⁶ *See Hydro Resources, Inc.* (Crownpoint Uranium Project), CLI-06-29, 64 NRC 417, 429 (2006).

“NEPA does not require ‘a fully developed plan that will mitigate environmental harm before an agency can act,’ rather, NEPA requires only that ‘mitigation be discussed in sufficient detail to ensure that environmental consequences have been evaluated.’” *Holy Cross Wilderness Fund v. Madigan*, 960 F.2d 1515, 1522 (10th Cir. 1992), *quoting Methow Valley*, 490 U.S. at 352-53; *see also Hydro Resources, Inc.* (Crownpoint Uranium Project), CLI-06-29, 64 NRC 417, 427 (2006) (discussing that an EIS need not contain “a complete mitigation plan” or even “a detailed explanation of specific [mitigation] measures which will be employed” and stating that mitigation measures “need not be legally enforceable, funded or even in final form to comply with NEPA’s procedural requirements.”). A agency need only provide “[a] reasonably thorough discussion of the significant aspects of the probable environmental consequences[.]” *Trout Unlimited v. Morton*, 509 F.2d 1276, 1283 (9th Cir. 1974); *Warm Springs Dam Task Force v. Gribble*, 621 F.2d 1017, 1026–27 (9th Cir. 1980). *See also Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-05-20, 62 NRC 523, 536 (2005) (“NEPA does not call for certainty or precision, but an *estimate* of anticipated (not unduly speculative) impacts.”) (emphasis in original).

As a preliminary matter, the primary focus of this evidentiary hearing is the mutually agreed upon approach for facilitating final NEPA compliance with respect to Contention 1A on historic and cultural resources in NRC Staff’s 10 CFR Part 51 environmental review of the Project and the reasonableness of a methodology to implement its provisions. Throughout the entirety of the license application review process, NRC Staff developed a full ROD, including an FSEIS that was issued in draft form for public comment and license conditions directed specifically at addressing historic and cultural resources. *See e.g.*, Powertech License SUA-1600, License Condition 9.8. This ROD was developed pursuant to NRC Staff activities under

the NHPA Section 106 process and the environmental review without active participation by the Tribe or CI despite numerous opportunities to participate, which will be detailed below. The FSEIS for this Project site spans a total of 1310 pages, including 61 pages and Appendix D devoted specifically to historic and cultural resource assessment. To the extent that Native American Tribe's actively participated in the process of providing site-specific information, whether through open site surveys and/or submission of literature, these items were assessed and included in the FSEIS.

After repeated attempts to engage the Tribe and CI in NEPA activities, NRC Staff developed a proposed approach to resolve Contention 1A. This approach mirrored the approaches taken by NRC Staff previously as documented in the administrative litigation record through the testimony of several expert witnesses:

“Regarding the allegation that the tribal field survey methodology was not “scientific,” Powertech witness Dr. Sebastian testified that Tribal places of religious and cultural significance to Native American Tribes are “outside of the realm of western scientific methods” and information about such places is maintained within the traditional knowledge of the Tribes. *See* Powertech Ex. APP-063 at 6, ¶ A.7. Dr. Sebastian testified that identification of places of religious and cultural significance “depends on the knowledge of traditional cultural practitioners, not on the exercise of some scientific discipline or method.” *See id.* at 7, ¶ A.9. Dr. Sebastian testified that NRHP and ACHP guidance makes it clear that each Tribe or other traditional community will have its own views on appropriate methods of identification and NRC Staff did not try to impose a uniform set of methods on identification of places of religious and cultural significance:

NRC did not try to impose a uniform set of methods on the identification of properties of religious and cultural significance. Instead, the agency made the assumption that each Tribe would know best how to identify the properties of significance to their people and offered all of the Tribes the opportunity to come to the project area, with financial and logistical support from the applicant, and carry out whatever identification activities were deemed culturally appropriate by that Tribe.

See Powertech (USA) Inc., Findings of Fact and Conclusions of Law, 10.26, pp. 46-47 (January 9, 2015).

However, Dr Sebastian was testifying to only one component of NRC Staff's two-pronged approach to the methodology wherein the Tribe can ascribe the intangible significance to what it determines is a TCP. As NRC Staff elaborates in documents and references completed during recent efforts, there also exists a clear basis in scientific literature of established procedures for identifying site features typical of a TCP that do not need to fully rely on input from the Tribe. As Mr. Spangler testifies, and as Dr. LeBeau described, certain attributes of the Lakota Tribe's TCPs can be observable and measurable, such as constructed rock alignments, cairns, and depressions.¹⁷⁷ As part of this step, a TCP would be "empirically described according to their physical characteristics, their location, and their relationship to other TCPs. This is the scientific component of the proposed draft site survey methodology."¹⁷⁸

Based on this, NRC Staff offered the Tribe and CI, with the assent of Powertech, an opportunity to engage in yet another attempt to obtain site-specific historic and cultural resource information. Both the Tribe and CI agreed to set a process within the parameters of the March 2018 approach and, based on information offered in NRC Staff's recent pleading, a proposed process in accord with the March, 2018 approach was offered but not agreed upon and does not appear likely to be resolved in the future.

B. NRC STAFF'S DECISION TO ABANDON FURTHER IMPLEMENTATION EFFORTS IS "REASONABLE"

As a general matter, Powertech concurs with NRC Staff's presentation of the arguments associated with the "reasonable" nature of its decision to abandon further efforts to come to a satisfactory conclusion regarding establishment of a process to identify Tribal historic and cultural resources at the Project site. However, Powertech also offers the following additional information and argument.

It is apparent that, by definition and considering that a lead agency such as NRC cannot force a given Native American Tribe to consult with the agency, cooperate in any way on site surveys or other information gathering techniques or provide information through literature or personal historical assessments, a proper evaluation of the “reasonableness” of a proposed approach to gathering such information and the subsequent assessment of such information through the NEPA process should include an analysis of the efforts made to engage such Tribe(s) in these efforts and their responses thereto. As can be seen from the synopsis below, the Tribe and CI have had ample opportunities to provide substantive input to NRC Staff on Tribal historic and cultural resources and have, consistently resisted such efforts and have failed to actively participate.

First, the Tribe was initially informally consulted with the offer of a meeting in November 17, 2009⁷ and later officially with initial letters offering consultation that were sent in March 19, 2010⁸. There was no initial response from any Tribes expressing interest.⁹ NRC Staff continued to consult with Tribes for period of the several years up to completion of licensing in 2013 and this remained active even following licensing. This included:

- 1) holding an initial face-to-face meeting in June 2011 for the purpose of information gathering¹⁰
- 2) sending letters and holding a face-to-face meeting to gather input on how to conduct a TCP survey in January and February of 2012.¹¹
- 3) providing a proposed statement of work (SOW) for conducting a site survey and requesting comment in March 2012 including a follow-up teleconference in April 2012¹²
- 4) circulating a revised SOW in August 2012 requesting comment and followed by two teleconferences with the Tribes to discuss the SOW.¹³

⁷ NRC-015 at 1.

⁸ *Id.* at 1.

⁹ *Id.* at 2.

¹⁰ *Id.* at 3.

¹¹ NRC-015 at 4-5.

¹² *Id.* at 5.

¹³ *Id.* at 7.

In September 2012, NRC staff received the Makoche-Wawopi/Mentz-Wilson proposal on behalf of several Tribes¹⁴, which was followed by a second proposal by Kadrmas Lee Jackson (KLJ) in October.¹⁵ In October, NRC Staff sent a letter requesting input on alternative methods of identification and later that month an abridged proposal for the site survey.¹⁶ The KLJ proposal was formally withdrawn by the contractor in December of that year.¹⁷ NRC Staff re-scheduled the site survey with a letter to all concerned Native American Tribes on Dec 14, 2012 and followed this up with letters on February 8 scheduling the survey in April 2013.¹⁸ On March 22, 2013 NRC Staff received a letter formally objecting to the site survey.¹⁹ NRC Staff conducted the site survey in April and May of 2013, with the participation of seven Tribes including one Sioux Tribe, the Crow Creek Sioux.²⁰ During this time, the Tribe and other Native American Tribes had more than three years to provide input on the Project and more than two years to comment on scope of work, approach, and methodology for a site survey.

Second, on April 30th, 2015 the Board ruled in favor of the Tribe on Contention 1A and 1B and, on June 23, 2015, NRC Staff issued a letter to the Tribe “the NRC staff renews its request for your views regarding any Sioux cultural, historical, or religious sites that may be impacted by the Dewey-Burdock Project.”²¹ On August 26, 2015 the NRC Staff sent a letter following the Tribe’s Sun Dance ceremonies that NRC Staff “intends to use any additional information it obtains from the Oglala Sioux Tribe to supplement both our NHPA and NEPA

¹⁴ *Id.* at 9.

¹⁵ NRC-015 at 10.

¹⁶ *Id.* at 11.

¹⁷ *Id.* at 12.

¹⁸ *Id.* at 12,13.

¹⁹ NRC-148.

²⁰ NRC-008-B at F-2.

²¹ See *In the Matter of Powertech (USA) Inc.*, NRC Staff’s Statement of Material Facts to Support Motion for Summary Disposition of Contentions 1A and 1B, at 40(3) (ML17215B356)

reviews.”²² The NRC Staff also requested a government-to-government meeting. The Tribe initially responded it would be interested in such a meeting however NRC Staff when following up with proposed meeting dates was unable to receive any further communication from the Tribe until December 2018 after reaching out to the Tribe’s counsel.²³ Communication resumed in December and continued through April before a successful meeting could be agreed upon by the Tribe.²⁴ This meeting was held in Pine Ridge, SD on May 19, 2016 that was 11 months after NRC Staff’s first request.²⁵ The meeting included discussion on the possibility of another survey opportunity. There were no further developments until the Licensing Board held a conference Nov 7, 2016.²⁶ Following this meeting, on November 23, 2016, NRC Staff sent a letter to the Tribe’s Tribal Historic Preservation Officer (“THPO”) inviting the Tribe to participate in further consultation on the parameters of an additional survey of the Dewey-Burdock site proposing these meetings should be held in December 2016, January 2017, or a time suitable to the Tribe.²⁷ No response was received to this letter despite attempts by NRC Staff to reach the Tribe.²⁸ Finally, on January 13, 2017, the Tribe’s counsel provided response from the Tribe eventually resulting in a teleconference held January 31, 2017.²⁹ During this meeting NRC Staff conveyed their proposal for a site survey and the Tribe expressed their disappointment in this proposal but committed to provide the NRC Staff information about a

²² *Id.* at 41 (4).

²³ *Id.* at 41-42 (4-5).

²⁴ *Id.* at 42-44 (5-7).

²⁵ *In the Matter of Powertech (USA) Inc.*, NRC Staff’s Statement of Material Facts to Support Motion for Summary Disposition of Contentions 1A and 1B, at 44 (7).

²⁶ *Id.* at 44-45 (7-8).

²⁷ *Id.* at 46 (9).

²⁸ *Id.* at 46-47 (9-10).

²⁹ *In the Matter of Powertech (USA) Inc.*, NRC Staff’s Statement of Material Facts to Support Motion for Summary Disposition of Contentions 1A and 1B, at 47 (10).

tribal survey approach by mid-March 2017 as to aid the discussion and establishment of a survey. The Tribe re-iterated this commitment in February and March.³⁰

On March 17, 2017 NRC Staff inquired about the status and received an email from Tribe that they were “working on getting you all information on the Tribe’s concepts for a survey approach - as well as a date in early April that works for another call.”³¹ A month later on April 14, 2017 and a month after the Tribe’s commitment in January, NRC Staff having not received information from the Tribe regarding survey parameters or its availability for another teleconference, issued a letter to the Tribe’s THPO offering specific arrangements for a survey and requesting the Tribe’s acceptance or rejection by May 5, 2017.³² The Tribe responded that they would not be able to respond by that time which was extended by NRC Staff to May 31.³³ The Tribe rejected the proposal on May 31, 2017³⁴ and NRC Staff provided a response to the Tribe on July 24, 2017 that the Staff “reluctantly recognizes that further consultation is unlikely to result in mutually acceptable settlement of the dispute regarding the outstanding contentions.”³⁵

During this opportunity, the Tribe was provided over two years to provide its input on Sioux cultural, historical, and religious sites, which could be impacted by the Dewey-Burdock Project. In addition, the Tribe was given over six months to provide comment on the parameters of a site survey, which ultimately were never prescribed in detail by the Tribe. The opportunity

³⁰ *Id.* at 47-49 (10-12).

³¹ *Id.* at 49 (12).

³² *Id.* at 49 (12).

³³ *In the Matter of Powertech (USA) Inc.*, NRC Staff’s Statement of Material Facts to Support Motion for Summary Disposition of Contentions 1A and 1B, at 50 (13)

³⁴ *Id.* at 51 (14)

³⁵ *Id.* at 52 (15)

is marked by a repeated lack of communication by the Tribe despite NRC Staff providing letters clearly requesting information on such matters.

Third, on August 3, 2017 the NRC Staff submitted a motion for summary disposition of Contentions 1A and 1B which carried a split decision from the ASLB on October 19, 2017, granting summary disposition of Contention 1B in favor of the NRC Staff and Powertech but denying summary disposition on Contention 1A. On December 6, 2017 the NRC Staff proposed a new Approach³⁶, which incorporated elements that had been requested by the Tribe and included a schedule with a site survey to begin in June 2018. The letter also requested input on the survey methodology. On January 19, 2018, the Tribe and CI provided input on the proposed approach, calling the proposed approach as “generally acceptable” and “appears achievable” further stating during a teleconference “we think the components that have been put forth align with the issues we have raised and have been raising for some time. So should the NRC Staff propose to move forward as proposed, we would participate.”³⁷ Discussions continued during February and on March 16, 2018, the NRC Staff sent a letter to OST and other Lakota Tribes describing their final approach (March 2018 Approach) that incorporated the Tribe’s comments to the December proposal and setting a schedule including further discussions on survey methodology.³⁸ In response, the Tribe stated “based on the approach described, the Tribe continues to believe these efforts may provide a reasonable path toward NRC satisfying NEPA and resolving Contention 1A stating that it looked forward to discussing the field survey methodology.”³⁹ On April 11, 2018 Powertech stated it agreed to fund the site survey as proposed

³⁶ See *In the Matter of Powertech (USA) Inc.*, NRC Staff Statement of Material Facts to Support Motion for Summary Disposition of Contentions 1A and 1B, at 42(3) (ML17215B356)

³⁷ *Id.* at 45 (6).

³⁸ *Id.* at 45-49 (6-10).

³⁹ *Id.* at 51-52 (12-13).

by NRC Staff.⁴⁰ On April 13, 2018, NRC Staff sent letters to the Tribe and other Lakota Tribes confirming the plan to move forward with the March 2018 Approach and requesting input on survey methodology and suggesting a webinar to discuss this the week of May 28, 2018.⁴¹ Based on input from several Tribes the webinar was rescheduled and held on June 1 and 4, 2018.⁴² On June 5 and 7, 2018, NRC Staff provided the Native American Tribes a proposed plan of work and initial survey methodology as well as a literature review report requesting further comment from the Tribes.⁴³ On June 8, 2018, the Tribe requested that NRC Staff plan on not going into the field and that the Tribe would be providing “a detailed response to the work plan”.⁴⁴ On June 12, 2018, the Tribe provided a new proposal significantly changing the overall scope and including a number of comments on methodology.⁴⁵ Such comments were incompatible with the March 2018 approach, more specifically, with the schedule laid out and agreed to in the March, 2018 Approach. NRC Staff subsequently canceled the site survey later that week due to the incompatibility of the survey with the agreed upon March 2018 Approach.⁴⁶ During this time the Tribe and other Lakota Tribes had approximately seven months to provide further input on the survey methodology. Despite several concessions made by NRC Staff on behalf of the Tribe in its March 2018 Approach, it appears that the Tribe has not acted in good faith with respect to these previous agreements by reversing its stance on these parameters.

⁴⁰ *In the Matter of Powertech (USA) Inc.*, NRC Staff Statement of Material Facts to Support Motion for Summary Disposition of Contentions 1A and 1B, at 53-54 (14-15).

⁴¹ *Id.* at 54-55 (15-16).

⁴² *Id.* at 56 (17).

⁴³ *Id.* at 57 (18).

⁴⁴ *In the Matter of Powertech (USA) Inc.*, NRC Staff Statement of Material Facts to Support Motion for Summary Disposition of Contentions 1A and 1B, at 57 (18).

⁴⁵ *Id.* at 59 (20).

⁴⁶ *Id.* at 59 (20), 62 (23).

Lastly, on August 17, 2018, NRC Staff filed its motion for summary disposition of Contention 1A and, on October 30, 2018, the Board rendered their decision denying the motion. On November 21, 2018, NRC Staff sent a letter to the Tribe and other Lakota Tribes stating, “staff remains committed to an open dialogue to finalize the methodology to be used for conducting a physical site survey to identify sites of historic, cultural, and religious significance to the Oglala Sioux Tribes and Lakota Sioux Tribes.” The letter confirmed that such a methodology, and not the previously agreed upon March 2018 Approach was to be the only subject of negotiation, consistent with the Board’s ruling of October, 2018.⁴⁷ The letter laid out a schedule for the activities including negotiation of the methodology during a period from December 2018 to February 2019, with the completion of a methodology planned for early March prior to proposed site survey fieldwork to start April 1, 2019. The letter also requested response from the Tribe of their interest by December 5, 2018, consistent with the included schedule. The Tribe could not respond by this date, which was ultimately extended to January 11, 2019 when they did indeed provide a formal response.⁴⁸ NRC Staff responded to the Tribe’s comments on January 25, 2019 and invited the Tribe to discuss the proposed process on a weekly basis.⁴⁹ On February 8, 2019 the parties held a teleconference⁵⁰ and subsequent to this the NRC Staff provided a draft methodology document to the Tribe and other Lakota tribes for comment on February 15, 2019⁵¹. Further communications between the parties occurred on February 19, 2019 via teleconferences⁵² and a February 22 face-to-face meeting with the Oglala Sioux Tribal

⁴⁷ NRC-195 at 1,2.

⁴⁸ NRC-203.

⁴⁹ NRC-204.

⁵⁰ NRC-205.

⁵¹ NRC-176 at 33.

⁵² NRC-217.

Historic Preservation Council⁵³. On March 1, 2019, NRC Staff provided a letter to the Tribe and other Lakota Tribes, affirming again the Board's directive that the March 2018 Approach was not subject to negotiation and that comments received were in direct conflict with this, though further stating that they wished to receive comments on the methodology in an upcoming March 5 teleconference and would want to confirm that the Tribe wishes to continue discussions by March 8.⁵⁴ The teleconference was held without attendance by the Tribe⁵⁵ and NRC Staff received a response from the Tribe on March 12, 2019, with the Tribe once again stating that they did not agree with the March 2018 Approach.⁵⁶ In the March 21, 2019 teleconference with all parties and the Licensing Board, NRC Staff announced that the differences on the methodology were so fundamental that they did not see further negotiations to be productive or feasible.⁵⁷ The Tribe and other Lakota Tribes had in excess of 3 months to provide input via a number of opportunities, yet such specifics did not come forth and the Tribe contradicted the framework of the March 2018 Approach with their comments.

Overall, there have been four (4) separate time periods within which the Tribe and other Lakota Tribes have had extensive opportunities to provide input on sites of cultural, historic, and/or religious significance that potentially could be impacted by the Project, as well as any parameters and methodologies pertaining to the conduct of a Project site survey to identify such sites. This has occurred over a period of more than nine (9) years, including efforts over a period of at least seven (7) years where NRC Staff has specifically requested input on aspects of such a survey. Thus, based on the abject failure of the Tribe and CI to develop and approve a site-

⁵³ NRC-220.

⁵⁴ NRC-215 at 2,3,5.

⁵⁵ NRC-216.

⁵⁶ NRC-211.

⁵⁷ ML19084A260 at 1565.

specific process for obtaining historic and cultural resource information over several years, it serves as nothing more than a waste of time and financial resources to engage in further efforts to satisfy Contention 1A other than to declare the information “unavailable.”

C. ADDITIONAL TRIBAL SITE-SPECIFIC HISTORIC AND CULTURAL RESOURCE INFORMATION IS “UNAVAILABLE”

Based on the items discussed above and the abject failure of the Tribe and CI to willingly participate in the most basic negotiations for development of a process to identify Tribal historic and cultural resources after more than seven (7) years of discussion, further additional Tribal site-specific information should be deemed “unavailable” in the light of CEQ regulations at 40 CFR 1502.22. As a general matter, NRC Staff effectively has argued that it is unable to further quantify the time and/or expense associated with further efforts to identify Tribal site-specific historic and cultural resource information based the obvious lack of cooperation the part of the Tribe and CI. *See generally In the Matter of Powertech (USA) Inc.*, NRC Staff’s Initial Statement of Position. While Powertech’s role in these discussions has recently been strictly limited to funding additional efforts and making the Project site accessible, Powertech is in a position to further support NRC Staff’s argument that the circumstances here render further information “unavailable.”

As properly stated by NRC Staff, CEQ regulations at 40 CFR Part 1502.22(b) set forth guidance that must be satisfied within the confines of an EIS (or in the instant case the FSEIS) to render a NEPA analysis complete based on otherwise “unavailable” information:

“When an agency is evaluating reasonably foreseeable significant adverse effects on the human environment in an environmental impact statement and there is incomplete or unavailable information, the agency shall always make clear that such information is lacking.

(a) If the incomplete information relevant to reasonably foreseeable significant adverse impacts is essential to a reasoned choice among alternatives and the overall costs of

obtaining it are not exorbitant, the agency shall include the information in the environmental impact statement.

(b) If the information relevant to reasonably foreseeable significant adverse impacts cannot be obtained because the overall costs of obtaining it are exorbitant or the means to obtain it are not known, the agency shall include within the environmental impact statement:

(1) A statement that such information is incomplete or unavailable; (2) a statement of the relevance of the incomplete or unavailable information to evaluating reasonably foreseeable significant adverse impacts on the human environment; (3) a summary of existing credible scientific evidence which is relevant to evaluating the reasonably foreseeable significant adverse impacts on the human environment, and (4) the agency's evaluation of such impacts based upon theoretical approaches or research methods generally accepted in the scientific community. For the purposes of this section, "reasonably foreseeable" includes impacts which have catastrophic consequences, even if their probability of occurrence is low, provided that the analysis of the impacts is supported by credible scientific evidence, is not based on pure conjecture, and is within the rule of reason."

40 CFR € 1502.22 (a-b) (2019).

With respect to its role in the resolution of Contention 1A, Powertech is in a position to support NRC Staff's statements regarding "overall costs" otherwise defined as "financial costs and other costs such as costs in terms of time (delay) and personnel" and that "overall costs" should be interpreted "in light of overall program need." *See* 51 Fed. Reg. 15618, 15,622 (April 25, 1986)); NRC-176 at A.50.

This proceeding regarding Contention 1A has spanned a period of over nine years, ranging from pre-licensing activities during the 10 CFR Part 51 environmental review process through post evidentiary hearing discussions between all parties and post-summary disposition discussions between the Tribe/CI and NRC Staff with Powertech agreeing to fully fund these efforts and make the Project site accessible. As discussed in Section III(C) above, the Tribe and CI have had ample opportunities to engage NRC Staff in discussions regarding satisfaction of the NEPA process. The unwillingness here to actively engage NRC Staff in these processes include

the Tribe's failure to appear at the initial open site survey, the Board's site visit prior to the initial evidentiary hearing, and the apparent unwillingness to accept proposed reasonable detailed methodologies from NRC Staff despite agreeing to the March 2018 proposed approach.

Looking backwards, Powertech already has presented enough cost-associated evidence throughout the course of this proceeding and will not repeat it here. However, one additional argument that has not been actively discussed is the expenditure of time which is part of the "overall cost" analysis under 40 CFR Part 1502.22(b). Since the issuance and approval of NUREG-1910, which supplied programmatic assessments of historic and cultural resources through the regions of the United States where the Project site is located, at least five (5) ISR licenses have been issued where multiple identified Native American Tribes either participated or declined to offer any additional information. These projects were approved with little or no controversy, including with respect to the associated historic and cultural resource evaluation processes under 10 CFR Part 51. But, in the instant case, Powertech has proceeded in good faith along with NRC Staff in attempting to actively engage the Tribe and CI in order to obtain site-specific information. But, at some point, there must be a clear point in the process timeline which a licensee, as well as the lead agency, can quantify the time and cost associated with this process. As of the date of this filing, there is no evidence in the record that the Tribe and CI seek any positive conclusion to discussion regarding Contention 1A other than to further delay the Project's development. Despite repeated statements to the contrary, the Tribe and CI have done little if anything to further these efforts and, as such, NRC Staff's determination that discussions should be terminated, and that site-specific information is "unavailable" is correct. Therefore, it is inconceivable that any positive results can be reached over time and that either NRC Staff or Powertech can accurately quantify the time and expenditures associated with further efforts.

Additionally, on June 12, 2018, the Tribe presented Ms. Diaz-Toro and Dr. Nickens with a memorandum entitled “Discussion Draft—Cultural Resources Survey Methodologies” (ref. LBP-18-05). With respect to the site survey aspect of the March 2018 approach, the Tribe’s proposal requires more than one year to complete the fieldwork associated with the tribal cultural field survey and the oral history research and interviews. Further, by the Tribe’s estimation, the “full budget to carry out the required survey” would exceed \$2 million. In addition, 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, as well costs that would be directly incurred by Powertech for staffing, rental of equipment, etc. Also, the proposal did not take into account or make provision for the involvement of other Lakota Tribes. This proposal was significantly outside the scope of the agreed upon March 2018 Approach. Further, the estimated costs of this proposal significantly exceeded the Makoche-Wawopi proposal of 2012⁵⁸, which the Licensing Board termed “patently unreasonable” due to its cost.⁵⁹ Lastly, the Tribe’s estimate does not consider overall costs (as previously defined) and fails to consider the time and expenditures incurred over the past nine years pertaining to this process.

Further, Powertech expressly concurs with NRC Staff’s legal assessment of the Commission’s role in the implementation of CEQ regulations into its 10 CFR Part 51 environmental review processes. The Commission is not required to follow the express mandate of CEQ or its implementing regulations; but rather, it has agreed to use such regulations as guidance. In that vein, NRC Staff has been empowered by the Commission to interpret and enforce its regulations, including those at 10 CFR Part 51. *See* 10 CFR € 1.42. As such, NRC Staff has determined on at least two (2) occasions that site-specific historic and cultural resource

⁵⁸ NRC-199-R at 1.

⁵⁹ LBP-15-16 at 42.

information from the Tribe and CI cannot be reasonably obtained and the full administrative record speaks to that conclusion. Further, an accurate assessment of “overall costs” other than the obvious expenditure of time and financial resources to date is impossible to quantify as NRC Staff has noted that the differences between its previously offered methodology within the parameters of the March, 2018 Approach and the perspectives of the Tribe are far too great to achieve a satisfactory solution. Based on these determinations and the sheer length of time associated with these efforts, further site-specific information should be deemed “unavailable.”

D. NRC STAFF DOES NOT NEED TO SUPPLEMENT THE FINAL ENVIRONMENTAL IMPACT STATEMENT

Finally, NRC Staff has stated that its full ROD, including appropriate 10 CFR Part 51 assessment documentation, license conditions, and other historic and cultural resource information and plans going forward, and the administrative litigation record is sufficient to satisfy NEPA and, therefore, a supplement to the FSEIS is not necessary under Commission case law. Powertech concurs with this determination.

Assuming the Board concludes that NRC Staff cannot reasonably obtain site-specific historic and cultural resource information from the Tribe and CI and, therefore, cannot assesses such information in the FSEIS or the full administrative record, NRC Staff’s documented efforts in the ROD and administrative effort with what the Board has called a “an explanation that satisfies the requirements of 40 CFR € 1502.22” should be sufficient to close Contention 1A. As stated by NRC Staff, the administrative record contains a sufficient summary of available, relevant information related to historic and cultural resources, discusses the relevance of unavailable or incomplete information and the lack of potential material effects on its evaluation, an FSEIS that adequately addresses potential impacts on historic and cultural resources based on relevant, available information (including programmatic assessments in NUREG-1910), and

exhibits a “reasonable” effort over a considerable period of time to obtain and assess previously unavailable information. Further, the administrative record has been supplemented by major components such as an additional literature study completed in 2018 and additional methodology documents all of which have been submitted to the Tribe and other Lakota Tribes for comment. Also, the record includes documentation of the multiple opportunities for input provided to the Tribes. Lastly, NRC Staff and its contractors have concluded the FSEIS’ assessment of small to large would not materially change based on the additional information included in these documents. Based on this and the fact that Commission case law cited by NRC Staff strongly supports at both the Board and Commission levels that an FSEIS supplement is not warranted in this case, Powertech concurs with NRC Staff’s position that the Project FSEIS does not require further supplementation and the ROD and administrative litigation record satisfy appropriate NEPA requirements.

IV. CONCLUSION

For the reasons discussed above, Powertech concurs with the determinations of NRC Staff for resolution of Contention 1A and respectfully requests that the Board find that this Contention should be resolved in the favor of NRC Staff and Powertech and that this administrative proceeding be terminated. Further, Powertech respectfully requests that the Board find that no further action needs to be taken on Powertech's existing NRC license and that the administrative record for this proceeding be closed.

Respectfully Submitted,

**/Executed (electronically) by and in
accord with 10 C.F.R. § 2.304(d)/
Christopher S. Pugsley, Esq.**

Dated: May 22, 2019

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**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of:)	
)	Docket No.: 40-9075-MLA
POWERTECH (USA) INC.)	Date: May 22, 2019
)	
(Dewey-Burdock In Situ Uranium)	
Recovery Facility))	
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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing “**LICENSEE POWERTECH (USA) INC. INITIAL STATEMENT OF POSITION REGARDING CONTENTION 1A**” in the above captioned proceeding have been served via the Electronic Information Exchange (EIE) this 22nd day of May 2019, which to the best of my knowledge resulted in transmittal of the foregoing to those on the EIE Service List for the above captioned proceeding.

Respectfully Submitted,

**/Executed (electronically) by and in
accord with 10 C.F.R. § 2.304(d)/
Christopher S. Pugsley, Esq.**

Dated: May 22, 2019

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