UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

NRC STAFF'S REPLY FINDINGS OF FACT AND CONCLUSIONS OF LAW

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October 18, 2019

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INTRODUCTION

In accordance with 10 C.F.R. § 2.1209, the Atomic Safety and Licensing Board's scheduling order in this proceeding, and the revisions to the schedule made at the evidentiary hearing, the NRC Staff hereby submits its reply findings of fact and conclusions of law ("Reply Findings") regarding Contention 1A.[1] These Reply Findings respond to the proposed findings of fact and conclusions of law submitted by the Oglala Sioux Tribe ("Tribe") concerning whether the Staff's proposed draft methodology for the conduct of a site survey was reasonable, and the reasonableness of the Staff's determination that the information sought from the Tribe is unavailable.

For the reasons set forth in the Staff's Proposed Findings[2] and in the Reply Findings below, the Board should conclude that the Staff, through its reasonable efforts with respect to the issues raised in Contention 1A, has met its burden of demonstrating that the FSEIS, as modified by the record of this proceeding, complies with the dictates of NEPA and applicable

[1] Order (Granting NRC Staff Motion and Scheduling Evidentiary Hearing), at 4 (Apr. 29, 2019) (unpublished) (ML19119A322); Transcript of Proceedings (Tr.) at 2104 (Aug. 29, 2019) (ML19261C250).

[2] NRC Staff's Proposed Findings of Fact and Conclusions of Law (Oct. 4, 2019) (ML19277J459) [hereinafter "Staff's Proposed Findings"].

NRC regulations in 10 C.F.R. Part 51. Accordingly, the Board should resolve Contention 1A in favor of the Staff.

V. RULINGS ON LEGAL ISSUES[3]

C. NRC Contract Regulations

5.6 The Tribe has repeatedly intimated that the only acceptable means of curing the NEPA deficiency would be for the Staff to directly hire the Tribe to develop the site survey methodology and implement the site survey.[4] At hearing, the Staff testified that hiring the Tribe for that purpose was not possible under the circumstances of this case because the Atomic Energy Act and NRC's contracting regulations precluded hiring an entity with a conflict of interest.[5] In its Proposed Findings, the Tribe suggests for the first time that NRC contracting regulations provide for a waiver of organizational conflict of interest that would allow the Staff to hire the Tribe.[6] Specifically, the Tribe points to 48 C.F.R. § 2009.570-9, "Waiver," which, under particular circumstances, allows for waiving a conflict of interest in awarding a contract. The

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[3] For clarity, these Reply Findings are organized with headings corresponding to the structure of the Staff's Proposed Findings. The paragraph numbering in each section accordingly extends from that in the Staff's Proposed Findings.

[4] *See, e.g.*, Tr. (Aug. 28, 2019) (ML19248C650) at 1869 (Dr. Morgan testifying that the way to "go forward" is to bring "individuals and companies [who are the experts on traditional cultural properties] into the fold and talk with them and contract with them"); Oglala Sioux Tribe's Response Statement of Position at 2 (June 28, 2019) (ML19179A337) [hereinafter "Tribe's RSOP"] ("The testimony [of the Tribe's witnesses] confirms that the expertise required to carry out the necessary cultural resources analysis…can be reasonably acquired through contract and traditional means"), 23 (stating that the Staff must procure "the necessary expertise (from the Oglala Sioux Tribe directly through consultation, through qualified contractors, or otherwise) to fulfill its NEPA cultural resource impact review obligations"); Oglala Sioux Tribe's Proposed Findings of Fact and Conclusions of Law (Oct. 4, 2019) (ML19277J128) [hereinafter "OST FOF"] at 2, 30 (same quotes as Tribe's RSOP); Ex. NRC-219 Oglala Sioux Tribe's March 30, 2018 Response to NRC Staff's March 16, 2018 Approach, at 2 (ML18089A655) (Tribe's counsel stating that the Tribe requested input into the contractor selection, and that the March 2018 Approach "does not include any specifics related to reimbursement for costs and staff time of any of the Tribes in conducting necessary duties contemplated in the proposal").

[5] Tr. at 1889.

[6] *See* OST FOF at 29 ("NRC regulations specifically address this situation and provide for an express exception to the perceived 'conflict of interest' problem…").

Tribe states that "[d]espite this unambiguous exception to NRC Staff's "conflict of interest" contracting rules, NRC Staff never explored this option – or informed the Tribe that such an exception existed that would have allowed the Tribe to perform the cultural resources survey work."[7] The Tribe failed to note, however, that 48 C.F.R. § 2009.570-1(c) specifically excludes "parties to a licensing proceeding" from the applicability of subpart 2009. Therefore, we agree with the Staff's understanding that in this case it was precluded from hiring the Tribe.

5.7 Further, we observe that even if the waiver regulation were available to parties in a licensing proceeding, the factors for waiver are not present in this case. 48 C.F.R. § 2009.570-9 specifies that:

> (b) Waiver action is strictly limited to those situations in which:
>
> > (1) The work to be performed under contract is vital to the NRC program;
> > (2) The work cannot be satisfactorily performed except by a contractor whose interests give rise to a question of conflict of interest.
> > (3) Contractual and/or technical review and surveillance methods can be employed by the NRC to neutralize the conflict.

The Tribe relies primarily on factor (b)(2) to argue that the Staff should have explored this option, stating that "the Tribe is the only party with the necessary relevant experience to conduct the work."[8] As we explain in further detail *infra*, under the circumstances here, we find that a reasonable site survey methodology can be designed by an entity other than the Tribe (particularly where it explicitly provides for the Tribe's input and participation), that Mr. Spangler is qualified to design a tribal cultural resources survey, and that he in fact did develop a reasonable survey methodology in the form of the Staff's 2019 proposed draft methodology.[9]

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[7] OST FOF at 29.

[8] *Id.* The Tribe repeatedly makes the conclusory statement that the Staff's contractor lacks the requisite experience to develop a cultural resources survey without identifying actual deficiencies in the Staff's methodology. In its proposed Findings of Fact and Conclusions of Law, rather than refute the Staff's demonstration of the adequacy of its methodology, the Tribe simply repeated the identical arguments from its RSOP that the Staff already demonstrated were without merit.

[9] Staff's Proposed Findings ¶ 6.17–6.19. We also note that factor (b)(1) is also likely not met. The Staff testified that while the information gained from a new survey would allow for mitigating harm to Lakota-

The record demonstrates that Mr. Spangler has over thirty years of experience developing cultural resource methodologies, and extensive experience working with Tribes to facilitate protection of Tribal interests.[10] Additionally, he has served as a principal investigator, worked with CRM firms, and has extensive experience assisting Federal agencies.[11] The Tribe's generalized criticism of Mr. Spangler offers no support for the notion that the only way to satisfy the NEPA deficiencies is to hire the Tribe directly.[12] Therefore, we conclude that the Staff acted reasonably in hiring SC&A to perform the activities in question.

5.8 Furthermore, as the Staff has testified, it hired a contractor that was qualified to perform the necessary work.[13] NEPA does not require the Staff to hire the Tribe, the Tribe's preferred contractor, or any other person affiliated with the Tribe; it only requires the Staff to act reasonably.[14] In this case, we find that by selecting an objectively qualified contractor, the Staff has satisfied its NEPA obligation.

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specific resources, it would not change the overall NEPA determination that the project involves significant impacts to tribal cultural resources that may be as high as LARGE. Tr. at 1930–1933. Accordingly, in this situation we do not see how the work to be done under the contract would require the staff to deem it "vital" to an NRC program.

[10] Staff's Proposed Findings ¶ 6.18; Tr. at 1764–1792.

[11] Tr. at 1782, 1784, 1785–1786.

[12] OST FOF at 22–23. The Tribe's criticism of Mr. Spangler is largely that he is a "non-native archeologist" and that he does not have specific "Lakota experience." Given our findings regarding his experience and the ways in which the Staff's proposed methodology solicits and considers the Tribe's cultural knowledge, neither of these lines of criticism contradicts Mr. Spangler's ability to design and facilitate a cultural resources survey or, in turn, the reasonableness of the Staff's efforts. Staff's Proposed Findings ¶ 6.17-6.19.

[13] Ex. NRC-176-R, Prefiled Direct Testimony of Diana Diaz-Toro and Jerry Spangler, at A.3b, A.20, A.28; Ex. NRC-225, NRC Staff's Prefiled Reply Testimony (ML19198A338) at A.3.

[14] *See, e.g.*, *Powertech (USA), Inc.* (Dewey-Burdock In Situ Uranium Recovery Facility), CLI-19-09, 90 NRC __, __ (Sep. 26, 2019) (slip op. at 18) (reiterating that the standard for the Staff is "reasonable effort").

VI. Findings of Fact

EIS Supplementation (Adding to Staff Proposed Findings VI.B.3)

6.53 The Tribe makes several claims about the interpretation of NEPA and CEQ regulations, which we have largely already addressed *supra* and found in each respect that the Staff has met the applicable NEPA requirements.[15] We here briefly address an additional related argument the Tribe raises in its FOF. The Tribe invokes *United Keetoowah Band of Cherokee Indians v. Fed. Comm. Com'n* as authority for its claim that the adjudicatory record of an NRC proceeding cannot supplement the agency's NEPA document.[16] In *Keetoowah*, the D.C. Circuit declined to defer to the Federal Communication Commission's (FCC's) interpretation of NEPA, which the Tribe cites for the proposition that "despite any attempts by the Nuclear Regulatory Commission to assert its own interpretations of NEPA over those expressed in the CEQ regulations, the Commission, and by extension NRC Staff and this Board, may not ignore or disclaim the applicability of CEQ's NEPA procedural regulations."[17] The Tribe also quotes a number cases out of context as support for the assertion that all information supporting an agency's NEPA determination must be in an EIS or supplement.[18] But much of the Tribe's argument relies on caselaw holding that an EIS cannot be

[15] Staff's Proposed findings §VI.B.

[16] OST FOF at 32–33; *see also United Keetoowah Band of Cherokee Indians v. Fed. Comm. Com'n.*, No. 18-1129, slip op. at 14 (D.C. Cir. 2019). As a preliminary matter, the Tribe cites *Keetoowah* for the proposition that Commission caselaw interpreting NEPA "is not good law, and does not bind this Board." *Id.* at 7, 32. The only support the Tribe offers for this assertion is an out of context quote in which the D.C. Circuit acknowledges that the Court does not owe the FCC deference when it interprets CEQ regulations. However, in *Keetoowah*, the Court determined that the FCC acted arbitrarily and capriciously when it deregulated, with no justification, construction of an entire class of cell towers – a decision that has no bearing on the issues in this case (specifically, the need to formally supplement a NEPA document and the applicability of 40 C.F.R. § 1502.22). *Id.* Contrary to the Tribe's unsupported proclamation, Commission holdings, absent specific contrary ruling by the federal courts, bind our decisions.

[17] OST FOF at 32–33.

[18] *Id.* at 40–42.

supplemented after a challenge has been raised in *federal* court (as opposed to while the proceeding is still before the agency, as it is here).[19] Therefore, consistent with binding Commission caselaw, we conclude that while the licensing action is still in administrative litigation before the agency, our adjudicatory decision modifies the NEPA document and becomes part of the NEPA record.

Scope of 40 C.F.R. § 1502.22 (Adding to Staff Proposed Findings VI.B.3)

6.54 In its Proposed Findings of Fact, the Tribe appears to assert that the Staff is required to exhaust other potential avenues (i.e., take additional substantive steps) to satisfy 40 C.F.R. § 1502.22 even if those additional steps will not ultimately satisfy NEPA.[20] The Tribe specifically acknowledged in its Response Statement of Position, Proposed Findings, and at hearing that additional efforts, such as conducting oral interviews absent a site survey, will not ultimately resolve the NEPA deficiency because a pedestrian survey is still necessary.[21] Therefore, the Tribe argues that the Staff must make such efforts solely to satisfy 40 C.F.R. § 1502.22, despite concluding that doing so would not satisfy NEPA's "hard look" and thus would serve no logical NEPA purpose.[22] Given the Commission's recent reiteration that the NRC is not bound by section 1502.22, and that the Staff must only make "reasonable effort to obtain

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[19] *See, e.g., id.* at 42. The Tribe cites *NRDC v. NRC* for the proposition that "the D.C. Circuit has sharply criticized the NRC attempts to use its confined adjudicatory process to supplement a NEPA document that requires public comment and review." However, the D.C. Circuit in *NRDC v. NRC* specifically held that where the Commission addresses a NEPA deficiency in a "publicly accessible opinion" "before being challenged in [federal] court," no remand for supplementation is necessary. 879 F.3d 1202, 1211 (D.C. Cir. 2016). And in the instant proceeding, the D.C. Circuit specifically declined to review the merits of Contention 1A because the Court did not have jurisdiction to review an agency action that was not final. *See Oglala Sioux Tribe v. Nuclear Reg. Com'n.*, 896 F.3d 520, 527–528 (D.C. Cir. 2018).

[20] *See* OST FOF at 56 (stating that the Staff's position regarding oral interviews is "flawed because it fails to recognize that the issue here is whether NRC Staff has demonstrated the unavailability and exorbitant cost of obtaining relevant information – not what is required to fully satisfy the 'hard look' mandate").

[21] *See, e.g.*, OST FOF at 53 n.3, 56; RSOP at 42 n.2; Tr. at 2015 (Tribe's counsel stating that "even if the Board were to accept the premise that the cultural survey, on-the-ground survey, was unavailable, there is additional available information that exists that could have been obtained, *not to intimate that a change in the tribe's longstanding position that a cultural resources survey on the ground is necessary to satisfy NEPA*" (emphasis added)).

[22] *See* OST FOF at 56.

unavailable information," we find that requiring the Staff to take additional substantive steps to obtain the information would be contrary to NEPA and Commission caselaw.[23]

Reasonableness of Reimbursement (Adding to Staff Proposed Findings VI.A.2.b)

6.55 In its proposed findings of fact, the Tribe argued that the Staff has not met its NEPA burden because it did not propose a sufficient budget for its draft methodology.[24] We find, however, that the issues raised by the Tribe do not reveal any material deficiency in the Staff's methodology.

6.56 The Tribe testified that the reimbursement aspect of the March 2018 Approach included Powertech supplying a $10,000 honorarium per participating Tribe.[25] The Staff confirmed that, because the Oglala Sioux Tribe specifically requested the involvement of other Lakota Tribes, the Staff invited a total of seven Tribes to participate in a site survey.[26] Therefore, if all seven tribes chose to participate, Powertech would pay a total of $70,000 in honoraria.[27] The Tribe implies that because the Staff "potentially had available to it $70,000," the Staff acted unreasonably by refusing to discuss the possibility of giving this entire this sum to the Tribe for its work on the site survey.[28] However, under the circumstances, because the Tribe previously agreed that the honorarium and reimbursement amounts in the March 2018 Approach were "appropriate for its valuable staff time and resources,"[29] we do not find

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[23] *Powertech*, CLI-19-09, 90 NRC at __ (slip op. at 18).

[24] *See* OST FOF at 14–15; 50-51; *see also* Ex. NRC-210 at 2.

[25] OST FOF at 51; Redacted Tr. (Aug. 29, 2019) (ML19261C250) at 33.

[26] *See* Ex. NRC-176-R at A.24–A.26, A.40–A.41; Ex. NRC-214 at 6-7.

[27] *See* Redacted Tr. at 33; OST FOF at 14-15; 50-51; *see also* Ex. NRC-210, Powertech Response to NRC Staff's March 16, 2018 Letter Confirming Reimbursement and Honoraria at 2 (Apr. 11, 2018) (ML18101A223).

[28] OST FOF at 51.

[29] Ex. NRC-194, Oglala Sioux Tribe's February 15, 2018 Responses to NRC Counsel Questions at 5 (ML18046A171) ("The Tribe believes that reimbursement is appropriate for its valuable staff time and resources. As communicated on the February 1, 2018 counsel conference call, it is difficult to respond

persuasive the Tribe's change in its position regarding the reasonableness of that honorarium.[30] Instead, we find that the Staff reasonably relied on the Tribe's previous statements of agreement.

6.57 The Tribe additionally claimed that the Staff did not demonstrate that the cost to obtain the missing information was exorbitant for purposes of satisfying 40 C.F.R. § 1502.22.[31] In making this argument, the Tribe compared the cost of the Makoche Wowapi proposal (approximately $800,000, an amount that we previously found was "patently unreasonable"[32]) with a Staff cost estimate provided at the Tribe's request in January 2018.[33] The Tribe fails to acknowledge, however, that the Staff's estimated $792,300 was inclusive of *all* costs associated with the site survey, including Staff FTE, contractor payment, Staff travel expenses, and tribal reimbursement and honoraria.[34] The Makoche Wowapi proposal, on the other hand, only included funds paid directly to the Tribe's contractor.[35] We find, therefore, that the Tribe's comparison is misplaced, as the two figures cover a different range of expenses.

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precisely without knowing what Powertech is prepared to offer and without input on methodology from a qualified contractor. The Tribe would anticipate that an amount on the order of what was proposed previously would be appropriate.").

[30] We additionally note that the reimbursement and honoraria would be supplied by Powertech, not the Staff, and Powertech's agreement was for participating tribes. *See* Ex. NRC-210 (Powertech confirming it would supply reimbursement and honoraria as part of the March 2018 Approach); Ex. NRC-202, Powertech's December 5, 2018 Response to NRC Staff's November 21, 2018 Letter Confirming Reimbursement and Honoraria (ML19137A420) (Powertech re-confirming that it would provide reimbursement and honoraria when Staff reinitiated negotiations in November 2018).

[31] *See* OST FOF at 51.

[32] *Powertech*, LBP-15-16, 81 NRC at 656–57 & n.229 (citing Tr. at 807, 810) (referring in part to "the funds requested to collect tribal cultural information" associated with the Makoche Wowapi proposal and comparable survey efforts); *see also Powertech (USA), Inc.* (Dewey-Burdock In Situ Uranium Recovery Facility), LBP-17-9, 86 NRC 167, 177 & n.33 (2016) (stating "the Board [in LBP-15-16] found that the cost of the survey proposal, estimated at close to $1 million . . . was unreasonable.").

[33] *See* OST FOF at 47; Ex. OST-056, January 17, 2018 NRC Staff Response to January 9, 2018 Order (ML19180A009).

[34] *See* Ex. OST-056 at 3.

[35] *See* Ex. BRD-012, Makoche Wowapi / Mentz-Wilson Consultants, Proposal with Cost Estimate for Traditional Cultural Properties Survey for Proposed Dewey-Burdock Project (2012) (nonpublic) at

6.58 In sum, having found that the Staff's methodology was reasonable to implement the field survey element of the March 2018 Approach and that the Staff's selected contractor was qualified to design and implement the methodology (with the Tribe's participation), we conclude that the only remaining cost is the reimbursement and honorarium to the Tribe. We further find that all parties agreed to the honorarium and reimbursement as part of negotiating the March 2018 Approach. Accordingly, the Tribe's criticisms have not identified a material deficiency in the reasonableness of the Staff's methodology.

IV. CONCLUSION

For the reasons stated above, and in the Staff's Proposed Findings of Fact and Conclusions of Law, the Board affirms that the Staff proposed a reasonable methodology and that it reasonably determined the information it seeks is unavailable. Therefore, we find that the Staff's reasonable efforts comply with the requirements of applicable law and accordingly resolve Contention 1A in favor of the Staff.

Respectfully submitted,

/Signed (electronically) by/
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/Executed in Accord with 10 C.F.R. 2.304(d)/
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Dated at Rockville, Maryland
this 18th day of October, 2019.

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unnumbered 3–4 (ML19232A423). We also note that Mr. Spangler testified at hearing that the Makoche Wowapi proposal included rates for field techs that were "between 100-150% over market value." Redacted Tr. at 21.

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "NRC Staff's Reply Findings of Fact and Conclusions of Law" in the above captioned proceeding have been served via the NRC's Electronic Information Exchange ("EIE"), the NRC's E-Filing System, this 18th day of October, 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. Counsel for the Staff served those representatives exempted from filing through the EIE with copies by electronic mail, also on October 18, 2019.

Signed (electronically) by

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