UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of	)	
	)	
POWERTECH (USA) INC.,	)	Docket No. 40-9075-MLA
	)	ASLBP No. 10-898-02-MLA-BD01
(Dewey-Burdock In Situ Uranium Recovery Facility)	)	
	)	January 21, 2020

OGLALA SIOUX TRIBE'S PETITION FOR REVIEW OF LBP-19-10, LBP-17-09, AND BOARD RULING ON MOTION TO STRIKE

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Pursuant to 10 C.F.R. §§ 2.1212 and 2.341, Intervenor Oglala Sioux Tribe ("OST" or "Tribe") hereby submits this Petition for Review.

I. INTRODUCTION

This Petition for Review seeks Commission review of orders issued by the Atomic Safety Licensing Board ("ASLB" or "Board") that resolved two of the Tribe's contentions in favor of NRC Staff and the licensee. As detailed herein, the Tribe seeks review of 1) ASLB's ruling in LBP-17-09, 86 NRC 167 (2017) issued October 19, 2017, granting NRC Staff's motion for summary disposition of Contention 1B; 2) ASLB's ruling on August 12, 2019 denying the Tribe's motion to strike, and 3) ASLB's ruling in LBP-19-10 (Final Initial Decision) issued December 12, 2019, resolving Contention 1A in favor of NRC Staff. In accordance with NRC regulations, this Petition contains the requisite discussion for each "substantial question" presented for review. 10 C.F.R. § 2.341(b)(2), (4).

The rulings in LBP-17-09 and the Order denying the Motion to Strike were interlocutory in nature and not immediately appealable to the Commission absent extenuating circumstances. See 10 C.F.R. § 2.341(f)(2). The issuance of the Final Partial Decision in LBP-19-10 renders evidentiary rulings and resolution of Contention 1A and Contention 1B ripe for Commission review at this time. See CLI-18-07, 88 NRC 1 (2018), at 7 n. 28-29.

.II. LEGAL BACKGROUND

The contentions subject to this Petition involve allegations of violations of the National Environmental Policy Act (NEPA) and the National Historic Preservation Act (NHPA).

A. National Environmental Policy Act

NEPA is an action-forcing statute applicable to all federal agencies. Its sweeping commitment is to "prevent or eliminate damage to the environment and biosphere by focusing government and public attention on the environmental effects of proposed agency action." *Marsh*

v. Oregon Natural Resources Council, 490 U.S. 360, 371 (1989). The statute requires "that the agency will inform the public that it has indeed considered environmental concerns in its decision-making process." *Baltimore Gas and Electric Company v. NRDC*, 462 U.S. 87, 97 (1983). NEPA documents must disclose and take a "hard look" at the foreseeable environmental consequences of its decision. *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976).

The CEQ regulations ensure all agencies comply with NEPA's purposes by requiring that: "NEPA procedures must ensure that environmental information is available to public officials and citizens **before** decisions are made and **before** actions are taken." 40 C.F.R. § 1500.1(b)(emphasis added). These statutory provisions apply to NRC decisionmaking. 42 U.S.C. § 4332(2)(C) *cited by New York v. NRC*, 681 F.3d 471, 476 (D.C. Cir. 2012); *Oglala Sioux Tribe v. NRC*, 896 F.3d 520, 529 (2018).

NEPA requires that mitigation measures be reviewed in the NEPA process. "[O]mission of a reasonably complete discussion of possible mitigation measures would undermine the 'action forcing' function of NEPA. Without such a discussion, neither the agency nor other interested groups and individuals can properly evaluate the severity of the adverse effects." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 353 (1989), *accord New York v. NRC*, 681 F.3d 471, 476 (D.C. Cir. 2012). NEPA regulations require that an EIS: (1) "include appropriate mitigation measures not already included in the proposed action or alternatives," 40 C.F.R. § 1502.14(f); and (2) "include discussions of: . . . Means to mitigate adverse environmental impacts (if not already covered under 1502.14(f))." 40 C.F.R. § 1502.16(h).

NEPA's implementing regulations require agencies to "insure the professional integrity, including scientific integrity of the discussions and analysis…." 40 C.F.R. § 1502.24. Further, where data is not presented in the NEPA document, the agency must justify the decision not to obtain the data. 40 C.F.R. § 1502.22. A federal agency may not simply claim that it lacks

sufficient information to assess the impacts of its actions. Rather, "[a] conclusory statement unsupported by empirical or experimental data, scientific authorities, or explanatory information of any kind not only fails to crystallize the issues, but affords no basis for a comparison of the problems involved with the proposed project and the difficulties involved in the alternatives." *Seattle Audubon Society v. Moseley*, 798 F. Supp. 1473, 1479 (W.D. Wash. 1992).

When an agency action involves "significant impacts," NEPA requires that all relevant information necessary for NEPA compliance be included in an environmental impact statement that has been prepared pursuant to the NEPA procedures, including the public comment and review requirements. See *Massachusetts v. Watt*, 716 F.2d 946, 951 (1st Cir. 1983) ("[U]nless a document has been publicly circulated and available for public comment, it does not satisfy NEPA's EIS requirements.").[1]

The plain language of 40 C.F.R. § 1502.22 requires all of the necessary information to be "included within the environmental impact statement." Federal courts require agencies to conduct evidence-supported decision-making – contained in a Supplemental EIS – to show compliance with 40 C.F.R. § 1502.22. See *Sierra Club v. US DOT*, 962 F.Supp. 1037, 1043 (N.D. Ill. 1997)(requiring "that the final impact statement was at least required to explain in some meaningful way why such a study was not possible.") *citing* 40 C.F.R. § 1502.22.

When an agency claims the necessary information is unavailable, the mandatory terms in

[1]See also *Village of False Pass v. Watt*, 565 F. Supp. 1123, 1141 (D. Alaska 1983), *aff'd sub nom Village of False Pass v. Clark*, 735 F.2d 605 (9th Cir. 1984) ("The adequacy of the environmental impact statement itself is to be judged solely by the information contained in that document. Documents not incorporated in the environmental impact statement by reference or contained in a supplemental environmental impact statement cannot be used to bolster an inadequate discussion in the environmental impact statement."); *Dubois v. U.S. Dept. of Agriculture*, 102 F.3d 1273, 1287 (1st Cir. 1996), *cert. denied sub nom. Loon Mountain Recreation Corp. v. Dubois*, 117 S. Ct. 2510 (1997)("Even the existence of supportive studies and memoranda contained in the administrative record but not incorporated in the EIS cannot 'bring into compliance with NEPA an EIS that by itself is inadequate.'"); *Grazing Fields Farm v. Goldschmidt*, 626 F.2d 1068, 1072 (1st Cir. 1980) (same).

40 C.F.R. § 1502.22 confirm agencies must prepare an EIS with specified information:

> 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.

40 C.F.R. § 1502.22(b). See also *Sierra Club v. US DOT*, 962 F.Supp. at 1045(finding lack of NEPA compliance were the analysis "was not incorporated into the final impact statement.) "Failing to incorporate the study into the final impact statement deprives the public and other participants in the process of the opportunity to comment on it." "Id. *citing Sierra Club v. Marsh*, 976 F.2d 763, 770 (1st Cir. 1992) (citations omitted).

B. National Historic Preservation Act

The federal courts have addressed the strict mandates of the NHPA:

> Under the NHPA, a federal agency must make a reasonable and good faith effort to identify historic properties, 36 C.F.R. § 800.4(b); determine whether identified properties are eligible for listing on the National Register based on criteria in 36 C.F.R. § 60.4; assess the effects of the undertaking on any eligible historic properties found, 36 C.F.R. §§ 800.4(c), 800.5, 800.9(a); determine whether the effect will be adverse, 36 C.F.R. §§ 800.5(c), 800.9(b); and avoid or mitigate any adverse effects, 36 C.F.R. §§ 800.8[c], 800.9(c)**.** The [federal agency] must confer with the State Historic Preservation Officer ("SHPO") and seek the approval of the Advisory Council on Historic Preservation ("Council").

Muckleshoot Indian Tribe v. U.S. Forest Service, 177 F.3d 800, 805 (9th Cir. 1999). See also 36 C.F.R. § 800.8(c)(1)(v)(agency must "[d]evelop in consultation with identified consulting parties alternatives and proposed measures that might avoid, minimize or mitigate any adverse effects of the undertaking on historic properties and describe them in the EA.")

The substantive and procedural mandates of NHPA § 106 ("Section 106") require federal agencies, prior to approving any "undertaking," such as this Project, to "take into account the effect of the undertaking on any district, site, building, structure or object that is included in or

eligible for inclusion in the National Register." 16 U.S.C. § 470(f). Section 106 applies to properties already listed in the National Register, as well as those properties that may be eligible for listing. See *Pueblo of Sandia v. United States*, 50 F.3d 856, 859 (10th Cir. 1995).

Section 106 imposes procedural duties that ensure federal agencies play an important role in "preserving, restoring, and maintaining the historic and cultural foundations of the nation." 16 U.S.C. § 470. If an undertaking "may affect" an eligible site, the agency must make a reasonable and good faith effort to seek information from consulting parties, other members of the public, and Native American tribes to identify historic properties in the area of potential effect. 36 C.F.R. § 800.4(d)(2). See also *Pueblo of Sandia*, 50 F.3d at 859-863 (agency failed to make reasonable and good faith effort to identify historic properties).

The NHPA also requires that federal agencies consult with any "Indian tribe ... that attaches religious and cultural significance" to the sites. 16 U.S.C. § 470(a)(d)(6)(B). Consultation must provide tribes "a reasonable opportunity to identify its concerns about historic properties, advise on the identification and evaluation of historic properties, including those of traditional religious and cultural importance, articulate its views on the undertaking's effects on such properties, and participate in the resolution of adverse effects." 36 C.F.R. § 800.2(c)(2)(ii).

To ensure affected Tribes and others are involved in the identification and evaluation of historic properties, the NHPA requires that "[t]he agency official shall ensure that the section 106 process is initiated early in the undertaking's planning, so that a broad range of alternatives may be considered during the planning process for the undertaking." 36 C.F.R. § 800.1(c) (emphasis added). The ACHP has published guidance specifically reiterating that consultation must begin at the earliest possible time in an agency's consideration of an undertaking. ACHP, Consultation with Indian Tribes in the Section 106 Review Process: A Handbook (November 2008), at 3, 7, 12, and 29. The Handbook confirms that early federal agency engagement with the

Tribe is an issue of respect for tribal sovereignty. Id.

To ensure federal agencies respect tribal sovereignty, the NHPA requires that consultation with Indian tribes "recognize the government-to-government relationship between the Federal Government and Indian tribes." 36 C.F.R. § 800.2(c)(2)(ii)(C).[2] All federal agencies must fully implement the federal government's trust responsibility. See *Nance v. EPA*, 645 F.2d 701, 711 (9th Cir. 1981)("any Federal Government action is subject to the United States' fiduciary responsibilities toward the Indian tribes").

III. BOARD RULING MADE IN ERROR ON CONTENTION 1A (NEPA)

The ASLB ruled in 2015 that the FSEIS "has not adequately addressed the environmental effects of the Dewey-Burdock project on Native American cultural, religious, and historic resources, and the required meaningful consultation between the Oglala Sioux Tribe and the NRC Staff has not taken place." LPB-15-16 at 42. This ruling was affirmed by the Commission in CLI-16-20. During the most recent proceedings, the Board conceded that NRC Staff has not produced any information to remedy this legal failure. LBP-19-10 at 56. Indeed, NRC Staff readily admits that "the environmental record of decision in this matter does not include any new information." NRC Staff Motion for Summary Disposition (8/17/2018) (ML18229A343) at 33; NRC Staff Initial Statement of Position (5/17/2019)(ML19137A446) at 62.

Despite the admitted NEPA violations, the Board excused NRC Staff's NEPA failures based on a flawed interpretation of NEPA and by improperly blaming the Oglala Sioux Tribe.

A. NRC Staff failed to allocate sufficient time and financial resources to complete a survey

The Board's findings never define the estimated time and cost requirements to conduct a

[2] See also Presidential Executive Memorandum entitled "Government-to-Government Relations with Native American Tribal Governments" (April 29, 1994), 59 Fed. Reg. 22951, and Presidential Executive Order 13007, "Indian Sacred Sites" (May 24, 1996), 61 Fed. Reg. 26771.

cultural resources survey, but claims that the Oglala Sioux Tribe unconditionally agreed to a two (2) week time frame and only $10,000 to conduct the entirety of the cultural resources survey. LBP-19-10 at 44-45. The findings are incorrect.

In the absence of a time and cost estimate for NEPA compliance, the Board relies on the so-called March 2018 Approach (Ex. NRC-192) which constituted only a broad outline of a survey approach and failed to include the methodology for conducting the survey. Id. at 2, ¶ 2. The Board ruled that it was reasonable for NRC Staff to adopt specific times and specific compensation levels in March 2018, before any portion of the methodology had even been prepared or reviewed by a qualified NRC Contractor.[3] See NRC-193 -194 (raising objections). Contrary to the Board's ruling, the Tribe had never accepted a rigid application of the March 2018 Approach, which was nothing more than a proposed framework to negotiate and cooperatively develop the studies and analysis required to meet NRC Staff's NEPA obligations. Ex. NRC-192 at 4 (NRC anticipated "publishing a draft of the supplemental analysis for a 45-day public comment period by mid-February 2019.").

At most, the Tribe sought to continue negotiations by acknowledging that the Approach had potential to develop into an agreement on an actual survey methodology, ethnographic surveys, and subsequent analysis for inclusion in the NEPA document NRC Staff had agreed to prepare. Id. However, the methodology for information gathering and analysis – including the creation of the entire on-the-ground survey methodology – was explicitly omitted from the Approach. Ex. NRC-192 at 2 ("the field survey will be conducted using a survey methodology that will be established in coordination with the NRC, with the support of a contractor, and the Lakota Sioux Tribes in advance of the field survey."). This methodology was never established.

[3] NRC secured the assistance of two archeologists from the Desert Southwest in May 2018 and then halted work in June 2018.

The Board faults the Tribe for maintaining objections to the undefined and uncompensated costs of the Tribe's involvement in preparing and implementing the survey methodology. LBP-19-10 at 47. However, costs and compensation continued to be an issue because NRC Staff and Powertech refused to provide compensation necessary for the Tribe to prepare and implement the survey, particularly in light of the $645,000 NRC Staff expected to incur, and charge to Powertech. Ex. NRC-192 at 4. The agency attempted to force the Tribe to subsidize the NRC Staff's survey efforts despite the scarce resources of the Tribe – a patently unreasonable request. The Board concedes that the amount of compensation offered was objectively insufficient to conduct the requisite survey. LBP-19-10 at 46, n. 231.

The Board's ruling mischaracterized the parties' negotiations. LBP-19-10 at 45. The Tribe never agreed to a specific dollar amount and NRC never specified aspects of the survey development and implementation the Tribe would carry out. Rather, the Tribe unambiguously stated that the methodology and tasks must be determined first, and only then could the costs be determined and agreed upon. See Ex. OST-048 (2/15/2018 Notice of Oglala Sioux Tribe's Responses to NRC Staff Questions) at 5 ("it is difficult to respond precisely without knowing what Powertech is prepared to offer and without input on methodology from a qualified contractor.").[4] The reasonableness of the Tribe's approach during these negotiations was confirmed by Dr. Morgan's undisputed testimony. Ex. OST-043 at ¶39 ("Specific methodologies and an implementation plan are required to provide an estimated cost of such an analysis.").

[4] See also Ex. OST-047 (April 6, 2018 conference call transcript) at 1394, lines 2-7 (Tribe stating that the costs necessary to compensate for staff time to carry out the project would need to be established and provided to secure services of persons qualified to design and implement cultural resource survey methodologies, separate from the proposed honorarium provided to the on-site survey and oral interview participants); Ex. NRC-203 at 5 ("the Tribe is not willing to voluntarily provide NRC staff with services normally obtained through federal contract.").

NRC Staff's unreasonable position – imposing a hard cap of $10,000[5] for the Tribe to carry out undefined tasks – effectively required the Tribe to conduct NRC Staff duties, without compensation. Id. The Board deemed the arbitrary $10,000 cap on the Tribe's participation reasonable, even though it was imposed without a methodology or cost estimate for developing and implementing the nonexistent methodology. Id.

At the hearing, the Board addressed exhibits it had offered and concluded that even the most basic implementation of a cultural resources survey of the site would, at minimum (without accounting for oral interview expenses), cost the Tribe approximately three times the amount offered. Id. at 33 lines 5-11. The Board entered no finding, and the record does not support, a cost estimate.[6] Despite the obvious but undefined expense involved with NEPA compliance, NRC Staff unreasonably refused any efforts to secure the necessary funding for qualified persons to design **and** implement a competent site survey. See Ex. NRC-204 at 5 (NRC Staff letter dated 1/25/2019 rejecting discussion of the proposals forwarded by the Tribe for additional funding).

NRC Staff could have, but did not, direct its contractor to secure the required expertise to design and conduct the survey and analyses. 8/29/2019 Redacted Closed Session Transcript (public version) at 39 lines 14-25 to 40 lines 1-7. (Mr. Spangler explaining that his contract allowed him to bring on additional staff). Despite the option of directing SC&A to hire qualified

[5] The testimony confirmed that Powertech pledged it would not object to NRC Staff's distribution of $70,000 in "honorariums" to facilitate the cultural resources survey, but NRC Staff repeatedly asserted that no Tribe would be provided any more than $10,000. August 29, 2019 Redacted Closed Session Transcript (public version) at 33, lines 20-23; id. at 34, lines 6-11 (Mr. White confirming the Tribe's requests to use the potentially available funds, but NRC Staff denied those requests).

[6] The NRC Staff did not submit any evidence or information into the hearing record to establish a reasonable cost for carrying out a cultural resources impact analysis on this Project, pursuant to a methodology developed pursuant to the March 2018 Approach. Instead, the Board filed and then relied on its own exhibits to resolve contested issues of fact. See *e.g*. LBP-19-10 at 10 n. 48 *citing* Ex. BRD-006; n. 53 *citing* BRD-010; n. 162 *citing* BRD-004; n. 176 *citing* BRD-002, BRD-002; BRD-011-BRD-013; n. 231 *citing* BRD-003.

persons, NRC Staff never even communicated this option to the Tribe for discussion. Id.

The Board's central findings - that the Oglala Sioux Tribe was unwilling to participate in negotiations over the cultural resources survey (LBP-19-10 at 48-49) and rejected any attempt to conduct the survey (LBP-19-10 at 51-54) - are false and contradicted by the record. The record demonstrates that the Tribe went to great lengths to facilitate a survey. The March 2018 Approach was a negotiating document, promoted by the Board in a series of conference calls over the period of a year and a half, that was designed to move past litigating positions and to "get people talking to each other." Ex. NRC-211 at 3 *quoting* 1/29/2019 conference call transcript at 1537-1538. NRC Staff, not the Tribe, unilaterally abandoned the March 2018 Approach. See Ex. NRC-216.

NRC Staff forced the Tribe to develop a proposed cultural resources survey methodology, in part, because NRC Staff did not onboard the archeological contractors until May 2018. 8/29/2019 Transcript at 2052, line 23 to 2053, line 3. Due to NRC Staff's lack of preparation, the Tribe produced a methodology – purely for discussion purposes – in June 2018. See Ex. OST-053 (Tribe's 9/21/2018 Summary Disposition Response) at 5-19; Ex. OST-042-R (Declaration of Kyle White). The Board relied almost entirely on the June 2018 "discussion draft" to measure the reasonableness of the Tribe's participation in negotiations, and to support its ultimate NEPA ruling. LBP-19-10 at 45-48.

The written and live testimony from Kyle White provides record evidence of the Tribe's repeated efforts develop a survey methodology and to reach an agreement with NRC Staff. The Board's errors flow from the attempts to further characterize the negotiations. The Tribe never "rejected" the March 2018 approach, but rather engaged negotiations to obtain a thoughtful, well-planned, and culturally-relevant methodology. Ex. OST-42-R at ¶¶ 66-69. The Tribe even arranged its own consulting firm to help design and carry out a cultural resources survey, and

was prepared to go out into the field to begin the on-the-ground work in June 2018. 8/29/2019 Transcript at 1976, line 17 to 1978, line 24. Dr. Morgan's expert testimony identifies a number of approaches taken by various contractors that NRC Staff could have, but did not, secure to design and implement and reasonable, cost-effective cultural resource methodologies. OST-43-R at ¶¶39-41, 46-52. Dr. Morgan's expert testimony is undisputed, and largely ignored.

The record confirms the Tribe continued good-faith negotiation of a cultural resources impact analysis until the NRC Staff unilaterally shut down negotiations in March 2019. Ex. OST-42-R at ¶¶71-73. The meeting notes from the February 22, 2019 meeting on the Pine Ridge Reservation confirm participation of multiple Tribes and commitments to work with NRC Staff and its contractor to develop a suitable cultural resources survey methodology. Ex. NRC-218. The record contradicts the Board's assertions that the Tribe rejected negotiations; the unilateral decision to terminate all discussions was made by exclusively by NRC Staff. Id. At the conclusion of the February 22, 2019 meeting, the discussions between the Tribes and NRC Staff had only reached through Section 7 of the NRC staff contractor's Draft Methodology document. Id. Instead of scheduling the follow-up that the Tribes sought, NRC Staff rejected the Tribes' offer to work with Mr. Spangler on the draft methodology and closed down negotiations. Id.

The Tribe's negotiating position was consistent throughout the course of the proceedings overseen by the Board, and is summarized by the December 6, 2018 teleconference transcript where the Tribe specifically asserted that the timeline must remain flexible and be informed by the specifics of the methodology that had not yet been developed. See Ex. OST-050 (12/6/2018 conference call transcript) at 1478-1479 ("the methodology, the designed methodology should inform the specific dates and have an opportunity to inform the specific dates that are laid out."); at 1480 ("the creation of the methodology ought to be able to inform, at least on some level, the schedule as well."). Additionally, during the January 29, 2019 teleconference, the Tribe again

specifically communicated its position that the timeline proposed in the March 2018 Approach was preliminary, and flexibility must be maintained to ensure the survey timing is informed by the methodology. Ex. OST-051 (1/29/2019 conference call transcript) at 1531-1532.[7] During the February 19, 2019 conference call, the Tribe stated the same position, and NRC Staff confirmed its that NRC Staff understood and agreed to be "flexible" in their approach to timing. Ex. NRC-217 (Summary of February 19, 2019 meeting).

Thus, the record contradicts the Board's finding that the Tribe's position regarding timeline flexibility was a new topic that arose during the February 22, 2019 meeting. Notably, the Tribe's consistent positions were directly communicated to NRC Staff prior to the final decision to move forward in 2019 with another attempt to implement the March 2018 Approach. As such, NRC Staff was on notice and undertook additional efforts in negotiations with full knowledge that both the timelines and costs would need to be addressed.

In sum, the record confirms that the failure to negotiate a cultural resource survey methodology resulted from NRC Staff's refusal to timely engage qualified contractors to inform NRC Staff – and occurred despite rather than because of the Tribe's conduct and actions.

B. NRC Staff failed to provide a competent survey methodology or allow sufficient negotiations

NRC Staff failed to provide a reasonably complete and competent draft methodology in June of 2018 or in February of 2019. Mr. Spangler testified that June 2018 open site survey forwarded by Dr. Nickens was not a competent survey methodology. 8/29/2019 Transcript at 1958, lines 16-22. ("It very much lacked a scientific methodology. I mean, it was just - - it wasn't structured correctly. It didn't have definitions and it didn't have protocols that we expect

[7] See also Ex. NRC-203 (11/21/2018 Letter) at 5 ("Once the necessary confidentiality agreements are in place, the survey schedule should be reconfigured to ensure the survey methodology integrates the necessary celestial, and other, conditions required to conduct the survey.").

in a scientific methodology."). NRC Staff had arrived in South Dakota in June 2018 insufficiently prepared and without a survey methodology. Id. Mr. White explained that NRC Staff's failure to provide a competent methodology forced the Tribe to bring on its own contractor, at substantial cost, to quickly draft a document that could inform negotiations with NRC Staff. Id. at 1969 lines 12-20. The resulting discussion draft prepared by the Tribe – meant solely for the purpose of facilitating discussion – was then used as a straw man by NRC Staff to unilaterally abandon negotiations. Ex. OST-059; Ex. NRC-200. The Board commits the same error. LBP-19-10 at 45-46.

Similarly, NRC Staff provided the February 2019 Draft Methodology to the Tribe for the first time on February 15, 2019 – one week prior to the February 22, 2019 meeting held on the Pine Ridge Reservation. For most of the Tribal participants, the February 22, 2019 meeting was the first time they had been able to review the document in detail or discuss the document with NRC Staff and NRC Staff contractors. Ex. NRC-218. The participants noted that the Tribes and NRC Staff should continue to discuss the scientific principles used in the document and discuss ways to ensure incorporation of Lakota traditional knowledge. Id.

All of the participants in the February 22, 2019 meeting at Pine Ridge, including the Tribal Historic Preservation Officers from four separate Lakota Sioux Tribes, identified shortcomings and offered to engage in detailed further discussions to help Mr. Spangler develop a competent methodology. Similar to March 2018, the February 2019 NRC Staff Draft Methodology document contained no discussion of an actual on-the-ground methodology, such as the development of appropriate transect parameters and staffing levels – among other essential components of a well-developed methodology. Ex. NRC-214 at 14-17. The Draft merely listed components that would need to be determined at a later time. Id. Indeed, the Draft contained only an outline of a schedule and made multiple references to the need to make additional decisions

on methodology. Yet, NRC Staff never incorporated the input of the February 22 participants or the Tribe. Importantly, NRC Staff made no further effort to complete the Draft.

The record confirms the Draft Methodology was inadequate and NRC Staff's rejection of the Tribe(s) efforts to negotiate a methodology.[8] Most important, the record does not contain a cultural resources methodology for the Board to assess as to cost or effectiveness, only a Draft.

C. NRC Staff failed to comply with 40 C.F.R. § 1502.22

The Board ruled that the 40 C.F.R. § 1502.22 procedures requiring agency staff to justify its decision forego NEPA analysis in a supplemental EIS are not binding on NRC Staff, due to NRC's status as an independent agency. LBP-19-10 at 72. However, the D.C. Circuit Court of Appeals has expressly ruled that independent agencies, such as NRC, are entitled to no deference in interpreting NEPA, as that duty is assigned exclusively to the Council on Environmental Quality (CEQ). *United Keetoowah Band of Cherokee Indians in Okla. v. FCC*, 933 F.3d 728, 738 (D.C. Cir. 2019). Here, NRC Staff freely admits that it has not satisfied the procedural requirements of 40 C.F.R. § 1502.22. NRC Staff Initial Statement of Position at 67-70. The Board ruled that CEQ regulations do not apply to NRC's NEPA procedures. LBP-19-10 at 56.

The D.C. Circuit has sharply criticized NRC attempts to use its confined adjudicatory process to supplement a NEPA document that requires public comment and review. *NRDC, et al. v. NRC*, 879 F.3d 1202 (D.C. Cir. 2018)(confirming that the Commission's practice of attempting to supplement a NEPA document through the adjudicatory process "are not idle concerns" (879 F.3d at 1210) and the Commission's practice in this regard is neither "ideal or

[8]Notably, the Board's self-admitted exhibits included multiple examples of methodologies used and proposed for use in conducting cultural resources surveys, and each example contains specifics that are lacking in the February 2019 Draft Methodology. See Ex. BRD-003 (detailing specific elements used for the assessment of properties of religious and cultural significance for the Strata Energy, Inc., Ross ISR Project); Ex. BRD-011 (Non-public); Ex. BRD-012 (Non-public).

even desirable." Id. at 1212). The Court allowed the post-hoc supplementation only because a remand would be "utterly pointless" as the required analyses were already completed and part of the evidentiary record. Id. This is the critical distinguishing factor here – the cultural resources impact and mitigation analysis has not been conducted and the public never had a chance to comment on NRC Staff's 40 C.F.R. § 1502.22 compliance, which the agency admits is lacking.

Indeed, NRC Staff has determined that it will not conduct any additional cultural resources survey efforts including any oral history interviews or additional literature reviews. As argued herein, this refusal is without basis under NEPA or 40 C.F.R. § 1502.22. Even if NRC Staff's failure to collect any additional information or perform any additional reviews were justifiable under this regulation, NRC Staff must still follow NEPA statutory procedures in preparing a supplement to its NEPA document, and must include the information required by 40 C.F.R. § 1505.22 and provide the public and Tribes the opportunity to assess and comment on that analysis – as NEPA requires. In coordination with this public NEPA process, the Tribe and any other parties (including other Tribes, tribal members, and others not party to this adjudicatory proceeding) would have the opportunity to submit comment to inform NRC Staff's analysis, as well as submit new or amended contentions to the extent the supplemental NEPA analysis is found wanting. Because this further NEPA documentation is required, the Board's adverse ruling on the Tribe's Motion to Strike is also without basis.

The record confirms additional information remains available. The Board dismisses NRC Staff's failure to collect available information in the form of oral interviews in a footnote, finding that conducting interviews after the completion of a pedestrian survey is "preferable." LBP-19-10 at 48 n. 237. Although interviews informed by surveys may be preferable in some instances, the Board erred by ignoring the "unavailable" test under NEPA and 40 C.F.R. § 1502.22. The multitude of declarations submitted by Consolidated Intervenors (Ex. INT-023) confirm that

relevant information is available from scores of Lakota people with knowledge of the cultural significance of resources at the Dewey-Burdock site.

Availability is confirmed by the Board and by NRC Staff's concession that a contractor with relevant qualifications could identify sites on the ground during a pedestrian cultural resources survey, with or without the Tribe's direct participation. LBP-19-10 at 49. While the best practice is to involve the Tribe in the survey itself, NRC Staff always had the option of conducting the survey with reasonably qualified personnel and then allowing the Tribe (and others) to give input on the results during the NEPA process.[9]

Commission precedent confirms that NRC Staff has met this duty by hiring independent, qualified cultural resources consultants to coordinate and/or conduct the required survey in order to sufficiently inform the NEPA analysis. See *In the Matter of Hydro Resources, Inc.* (2929 Coors Road Suite 101 Albuquerque, New Mexico 87120), 62 N.R.C. 442, 451-452 (2005) (required NEPA cultural resources impact analysis upheld based specifically on the cultural resources studies and analyses prepared by the applicant's consultants). Importantly, the consultant must be qualified to develop and conduct interdisciplinary cultural resources inquiries and must appropriately coordinate and interact with the relevant tribal governments and communities. Id. Other agencies also routinely rely on qualified agency social scientists such as trained ethnographers to carry out the necessary surveys and analysis, with significant input, participation, and consultation from the relevant tribes, short of a mandate that a certain tribe conduct the survey. See e.g. *Ctr. for Biological Diversity v. United States BLM*, 2017 U.S. Dist. LEXIS 137089, at *54-55 (D. Nev. Aug. 23, 2017) (holding that BLM "engaged in a good-faith attempt to identify relevant cultural sites and consult with the tribes about how best to protect

[9] Dr. Morgan provides these types of services to the governmental entities a regular basis. Ex. OST-043 (Declaration of Dr. Kelly Morgan). Indeed, the Tribe itself has relied on qualified contractors during these proceedings. Ex. OST-042 (Declaration of Kyle White) at ¶ 46.

them" including preparation of significant cultural and ethnographic reports and studies).

The Board contradicts the record asserting that no aspect of the cultural resources survey could be implemented or conducted without the active participation of the Oglala Sioux Tribe. LBP-19-10 at 50. The Board misconstrues the Tribe's statements asserting that the cultural resources impact evaluation must involve the expertise of "the Lakota Sioux." Id. The Board's errors flow from its misconception that the Oglala Sioux Tribal government is the sole source of all relevant Lakota cultural knowledge, despite Kyle White's testimony that the Oglala Sioux Tribal government is not the "holder" of all Lakota cultural resource information. See Ex. OST-042 (Declaration of Kyle White) at ¶ 75. Contrary to the Board's assumptions that only the Oglala Sioux Tribal government possesses this information (LBP-19-10 at 43), tribal members, elders, community members and other tribes possess relevant information that can and should have been solicited through interviews and provided for public comment in a Supplemental EIS. Ex. OST-042 (Declaration of Kyle White) at ¶ 76.

D. Board Amendments to the License and the Programmatic Agreement do not remedy the NEPA violations

The Board found "there can be no doubt that, although their significance is indeterminate, some as-not-yet-identified Oglala Sioux Tribe cultural resources can be found on the Powertech site." LBP-19-10 at 57 n. 272. Yet, the Board also ruled that "NRC Staff has not updated its FSEIS to address the deficiencies identified in LBP-15-16…." Id. at 56. Instead of ensuring NRC Staff met its cultural resources obligations, the Board tries to remedy the NEPA and NHPA deficiencies by amending and then relying on the Programmatic Agreement (PA). LBP-19-10 at 58-62. There are multiple problems with the Board's attempt at *post hoc* remedies.

First, the PA is purely a creature of the NHPA, which provides protection only for those cultural resources sites that rise to the level of inclusion within the National Register of Historic Places. See Exhibit NRC-018-A, at 6 ¶ 3(k); 9, ¶ 6(l); 11 ¶ 9(g). Thus, any cultural resources not

eligible require no analysis under the NHPA or the PA, providing no basis to meet NEPA duties.

Second, the PA was finalized in 2014 when NRC Staff issued its Record of Decision and license. Adjudication negated the factual premise stated in the PA's recitals: "WHEREAS, surveys to identify historic properties have been completed for the project including Class III archaeological surveys and tribal surveys to identify properties of religious and cultural significance." Id. at 3. The Board confirmed that NRC Staff has objectively failed to conduct competent "surveys to identify properties of religious and cultural significance." LBP-19-10 at 59-60 (Board recognition of "the lack of a site survey identifying Oglala Sioux Tribe-recognized cultural resources…."). The PA relies on cultural resources surveys that the Board and Commission have ruled is both incomplete and incompetent. Id. *affd*. CLI-16-20, 84 NRC 219, 243-244 (2016). Simply put, the 2014 PA has been effectively invalidated by prior rulings.

Third, the Board recognized that the 2014 PA that is incorporated into the Record of Decision is not adequate to ensure identification and protection of Lakota cultural resources. LBP-19-10 at 60-62. Recognizing this fatal flaw, the Board inserted a new condition into the PA. Id. at 62. The new condition was never subject to any public notice or comment or otherwise incorporated into any NEPA document or NHPA consultation. Further, the new condition is inadequate to protect Lakota cultural resources or to satisfy NEPA's public comment requirements. The Board-inserted condition only provides the affected Tribes a thirty (30) day comment period on the identity of the archaeological monitor that Powertech may select construction but does nothing else. Id.

The Board's new condition does not remedy adjudicated violations and provides no recognized or enforceable mechanism to satisfy NEPA or the NHPA after the license is issued.

E. The Board misapplied NEPA's limited "rule of reason"

The Board relies on a "rule of reason" to excuse NRC Staff's decision to forego further

NEPA analysis on cultural resources. LBP-19-10 at 23-24, 54-55. The Board misapplies this caselaw, as the so-called "rule of reason" merely confirms an agency is not obligated to analyze wholly speculative or remote consequences from agency actions. Id.

The orders of the Board and Commission repeatedly confirm that Powertech's proposal will have certain and significant impacts on Native American cultural, historic, and religious resources that require NEPA analysis. 81 NRC at 658. There is also no dispute that NRC Staff has not carried out an informed NEPA analysis of these foreseeable impacts.

The consequences of the NRC license are not remote or speculative, and the "rule of reason" cannot excuse NRC's failure to prepare a supplemental NEPA analysis to address the deficient FSEIS analysis of foreseeable cultural resource impacts. See *Ground Zero Ctr. For Non-Violent Action v. U.S. Dept. of the Navy*, 383 F.3d 1082, 1090 (9th Cir. 2004)(the Navy, in siting a nuclear weapons facility, need not conduct a detailed NEPA analysis of potential nuclear accident with chances of a significant impacts ranging between one in 100 million and one in one trillion.).[10] In the present case, impacts to cultural resources are not highly remote or speculative and the "rule of reason" has no applicability. The near-certain impacts of Powertech's proposal are knowable and established on the record, and NRC Staff has not conducted a NEPA-compliant impacts or mitigation analysis.

F. The Board Exceeded its Role and Predetermined the Hearing Outcome

The Board undermined its role of neutral arbiter by convening and presiding over negotiations and predetermined the outcome of the license proceedings in favor of NRC Staff.

[10] See also *WildEarth Guardians v. U.S. Forest Serv.*, 828 F.Supp.2d 1223, 1236-37 (D.Colo. 2011)("Reasonable alternatives are those which are 'bounded by some notion of feasibility,' and, thus, need not include alternatives which are remote, speculative, impractical, or ineffective.") *citations omitted*; *Private Fuel Storage L.L.C.* (Independent Spent Fuel Storage Installation), CLI-02-25, 56 NRC 340, 348-49 (2002)(Commission ruling NRC Staff NEPA analysis need not consider the highly remote terrorism attack on a nuclear fuel facility only because event was entirely "remote and speculative.").

The longstanding NRC rules require Boards to maintain an adjudicatory role, with the NRC Staff acting in the role of party. 10 C.F.R. § 2.1202.[11] The inherent tension of having multiple components of an agency serve as both party and the judicial panel requires Boards to scrupulously honor the traditional roles of an adversarial proceeding.[12] See e.g. *Philadelphia Electric Company (*Limerick Generating Station, Units 1 and 2*)* 23 N.R.C. 59 (1986) (ASLB 'is not authorized to 'decide' matters not in controversy.") *citing* 10 C.F.R. § 2.760a.

The Board erred, as a matter of law, by inserting itself into negotiations, entering findings based on the parties' participation in Board-convened settlement negotiations, entering preliminary rulings that limited the scope of settlement negotiations, and basing its merits decision on the "evidence" derived from the Board's reliance on its own exhibits.

1. The Board Improperly Involved itself in Settlement Negotiations

NRC rules allow the assignment of a Settlement Judge, "upon joint motion of the parties." 10 C.F.R. 2.338(b)(1). No such motion was made. Instead, on November 7, 2016, the Board "*convened* the first of a series" of on-the-record conference calls and preliminary rulings to act in the role of a Settlement Judge. LBP-19-10 at 7 (emphasis supplied). Through these calls, and rulings on summary disposition, Board limited the Tribe's ability to reasonably negotiate a settlement of Contention 1A (NEPA). Id. at 7- 14. In particular, the Board limited the negotiation to the March 2018 Approach that NRC Staff prepared without benefit of person qualified to prepare a cultural resource survey. Id at 14 *quoting* LBP-18-05, 88 NRC at 135-36.

[11] See also Changes to Adjudicatory Process, 69 FR 2182 (January 14, 2004) at 2210 *citing* Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452 (45 FR 28533; May 27, 1981); Policy Statement on Alternative Means of Dispute Resolution (57 FR 36678; Aug. 14, 1992).

[12] See also, *Carducci v. Regan*, 714 F.2d 171 at 177 (D.C. Cir. 1983) (Scalia, J.) ("The premise of our adversarial system is that appellate courts do not sit as self-directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before them.").

When settlement is sought, NRC regulations allow formal Alternative Dispute Resolution ("ADR") processes by consolidating "former provisions in part 2 on settlement (10 CFR 2.203, 2.759, 2.1241" into 10 C.F.R.2.338. 69 FR 2182 (January 14, 2004) at 2225. In keeping with previous rules, "the Commission agrees that parties should not be forced to use ADR, and the final rule continues to make the use of ADR subject to voluntary agreement of all parties to any given contention." Id. Instead, the Board issued orders to "*convene* and preside over conferences and settlement negotiations," that forced the Tribe to participate in ADR procedures. 10 C.F.R.2.338(b)(2)(i) (emphasis supplied).

The harms that flow from Board overstepping the boundaries between ADR and adjudication are well documented by NRC's, *Statement of Policy on Conduct of Licensing Proceedings,* 13 NRC 452, 455 (1981). The guidance states:

> The parties should be encouraged to negotiate at all times prior to and during the hearing to resolve contentions, settle procedural disputes, and better define issues. Negotiations should be monitored by the board through written reports, prehearing conferences, and telephone conferences, but the boards should not become directly involved in the negotiations themselves.
> There are two inferences from this guidance. First, [the board is] not to be involved in the *process* of negotiation, presumably to prevent us from obtaining non-record information by participating in the ongoing negotiations. Second, [the board is] supposed to 'monitor' that process, presumably to assure that the effect of negotiations on the proceeding is in some way acceptable to the Board.

*Georgia Power Company, et al. (*Vogtle Electric Generating Plant, Units 1 and 2*)* 44 N.R.C. 59 (emphasis in original).

The Board convened, presided over, and ordered ADR participation, then limited negotiations to the contents of NRC Staff's March 2018 Approach.

2. Board Findings of Fact Rely on the Board's own exhibits and inadmissible Settlement Discussions

The Board violated basic rules of due process and NRC regulations by using the information gained during the Board's questioning of the parties on conference calls, and the

parties' response to the Board's "suggestions" on those calls, to inform its decision and as a basis for the partial initial decision. 10 C.F.R. 2.338(b)(2)(iii) (prohibiting a Settlement Judge from discussing merits of the case with any person). The parties, not the Board, are required to present evidence to meet their respective burdens in the adversarial hearing.

> [T]he responsibility for developing an adequate record for decision is on the parties, not the presiding officer. The presiding officer is responsible for overseeing the compilation of the record and for ensuring that the record is sufficiently clear and understandable to the presiding officer such that he or she can reach an initial decision. However, the parties are responsible for ensuring that there is sufficient evidence on-the-record to meet their respective burdens.

69 FR 2182. The Board went beyond the scope of the regulations and added exhibits, conducted examination on its exhibits, and based the initial decision on those materials. LBP-19-10 at 2 n. 4 (explaining the Board's proffers can be identified as BRD-###); see BRD-001-013. Compounding the problem of Board acting as a party, much of the information relied upon in the Order came from the conference calls and negotiation documents that are deemed inadmissible under the Settlement Judge provision. 10 C.F.R. § 2.338(d).

First, the Board based its opinion regarding the reasonableness of the Tribe's negotiating position on letters exchanged during negotiations and information gained in the Board-ordered conference calls the Board unilaterally convened to address the substantive issues involved in Contention 2A. See e.g. LBP-19-10 at 7-14. The members were directly involved in guiding the negotiations and the Board members were awash in what is considered non-record information of settlement negotiations. Id. Had a Settlement Judge been appointed based on a voluntary motion of the parties, evidence, statements, or conduct in settlement negotiations is clearly excluded, except by stipulation of the parties, and documents disclosed may not be used in litigation unless obtained through appropriate discovery or subpoena. 10 C.F.R. § 2.338(d). Even when the express regulatory prohibition is not applied, the prohibition against judges relying on the content of the parties' settlement discussions is prohibited by FRE 408, and NRC

precedent. *In re Chaisson*, 80 N.R.C. 125, 2014 NRC LEXIS 28 at FN 10 (N.R.C. September 8, 2014) (declining "to rehash who said what to whom during the "attempts to reach compromise.") *citing* F.R.E. 408. Yet, the Board premised its ruling almost entirely on documents and testimony rehashing and characterizing the negotiations.

Second, the Tribe was harmed by the Board's use of orders to narrow the negotiating space to the framework set out in the March 2018 Approach. LBP-19-10 at 14. The Board used its authority to support NRC Staff's positions and coerce the Tribe into negotiating based on what the Board members deemed reasonable during Board-ordered conference calls. Id. at 7-14. Simply put, the Board set the parameters of the negotiations, and when the Tribe sought a different path, the Board used those parameters to rule against the Tribe.

Third, the Board's infusion of its opinions into the reasonable outcome of the negotiations is contrary to the March 2018 Approach, which required NEPA comments. The Order treats the March 2018 Approach as if it is a contract[13] or settlement agreement that limits the Tribe's negotiating position and binds the Tribe's participation in the proceedings. Id. If that were true, the March 2018 Approach provisions that confirm NRC Staff's proposal to prepare an EIS and circulate it for comment must also be binding on NRC.[14] Ex. NRC-192 at 4.

In sum, the Board exceeded its authority and role of an impartial adjudicatory body, acted as an unauthorized Settlement Judge, and made findings based on non-record information gained by convening and directing an unauthorized, but mandatory, ADR process. 10 C.F.R. § 2.338.

[13]The Tribe disavows any binding effect of the March 2018 Approach, which was an attempt to set out initial positions and inform attempts to negotiate a settlement agreement.

[14]S*ee U.S. Dep't of Labor v. Ins. Co. of N. Am.*, 131 F.3d at 1042 ("When a contract incorporates a regulation by reference, that regulation becomes a part of the contract for the indicated purposes as if the words of that regulation were set out in full in the contract.") *citing Washington Metro. Area Transit Auth. v. Mergentime Cor*p., 626 F.2d 959, 962 n.3 (D.C. Cir. 1980).

IV. BOARD RULING MADE IN ERROR ON CONTENTION 1B (NHPA)

In LBP-17-09, the Board found that NRC Staff had complied with its National Historic Preservation Act (NHPA) by "a bare minimum." 86 NRC 167 (2017). The Tribe appeals this ruling, as NRC Staff had not then, and still has not, met its obligations to "take into account the effect of the undertaking on" cultural resources at the site. 54 U.S.C. § 306108. Further, NRC Staff has not made a good faith and reasonable effort to identify historic properties (36 C.F.R. §§ 800.4(a), (b)), determine whether identified properties are eligible for listing on the National Register of Historic Places based on the criteria in 36 C.F.R. § 60.4, assess the effects of the undertaking on any eligible historic properties found (36 C.F.R. §§ 800.4(c), 800.5), determine whether the effects will be adverse (36 C.F.R. § 800.5), and avoid or mitigate any adverse effects (36 C.F.R. § 800.6). NRC Staff also has not reasonably considered the Tribe's viewpoints in determining what to place on the National Register (54 U.S.C. § 302706(a)), nor provided the Tribe a reasonable opportunity to identify its concerns about historic properties, advise on the identification and evaluation of historic properties or articulate views on the undertaking's effects on such properties, nor participate in in the resolution of adverse effects. 36 C.F.R. § 800.2. In short, the Board ratified NRC Staff's refusal to comply with previous rulings establishing NHPA violations.

The Board granted summary disposition to NRC Staff on Contention 1B based on a single introductory face to face meeting that occurred on May 16, 2016, one follow up conference call on January 31, 2017, and an exchange of letters the even the Board characterized as lacking substance. LBP-17-09 at 25. Notably, the entirety of the discussion in the May 16, 2016 meeting, January 31, 2017 conference call, and the follow up letters was focused on the Tribe again explaining to NRC Staff the inadequacy of NRC Staff's chosen "open-site" survey approach, which contained no scientific methodology. LBP-17-09 at 11-14. When NRC Staff

failed to provide any input of any substance on an acceptable methodology, the Tribe provided a detailed letter on May 31, 2017 that set forth components that should be included in any cultural resources survey approach. Exhibit NRC-190. Instead of responding in kind or engaging in the type of good faith and reasonable discussions required by the NHPA and implementing regulations, NRC Staff simply abandoned the effort entirely and moved for summary disposition on Contentions 1A and 1B. Given this record, the Board wrongfully granted summary disposition on Contention 1B to NRC Staff.

The events that have transpired since the granting of summary disposition in LBP-17-09 confirm the inadequate effort to address historic and cultural resources under NEPA that flow from the failure to satisfy the NHPA standards. As discussed herein, while NRC Staff did come back to the table to put forth the proposed March 2018 Approach, the agency did not obtain the necessary expertise to fully develop and implement the Approach and denied the Tribe the necessary financial resources to carry forward the proposed Approach. Specifically, as recognized by the Board (LBP-19-10 at 46, n. 231), the resources put forward by NRC Staff were objectively insufficient to allow for the Tribe to meaningfully participate, let alone complete, an on-the-ground cultural resources survey required by the interrelated NEPA and NHPA mandates. The Tribe repeatedly proposed alternative means to secure the requisite resources and funding, but NRC Staff refused. Such tactics are not reasonable, nor good faith, efforts to ensure the Tribe was able to identify cultural properties and help ensure the evaluation and protection required by NHPA.

V. CONCLUSION

As the Tribe has shown "substantial questions" this Petition for review should be granted, and the ROD, license, and the underlying NHPA and NEPA analysis should be set aside.

Respectfully Submitted,

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Dated at Lyons, Colorado
this 21st day of January, 2020

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Petition for Review in the captioned proceeding were served via the Electronic Information Exchange ("EIE") on the 21st day of January 2020, and via email to those parties for which the Board has approved service via email, which to the best of my knowledge resulted in transmittal of same to those on the EIE Service List for the captioned proceeding.

/s/ signed electronically by

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