

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

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NRC STAFF'S ANSWER OPPOSING PETITIONS FOR REVIEW

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February 13, 2020

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NRC STAFF'S ANSWER OPPOSING PETITIONS FOR REVIEW

The NRC Staff hereby responds to the Oglala Sioux Tribe (Tribe) and Consolidated Intervenor's petitions for review of several Atomic Safety and Licensing Board decisions in this proceeding. The petitioners seek review of the Board's final partial initial decision, LBP-19-10, which found in favor of the Staff on Contention 1A; LBP-17-9, which granted the Staff's motion for summary disposition of Contention 1B; and the Board's August 12, 2019 Order denying the Tribe's August 2, 2019 motion to strike. The Commission should deny the petitions, as they fail to identify any factual, legal, or procedural error in the Board's rulings and thus fail to identify a substantial question for review as required by 10 C.F.R. § 2.341(b)(4).<sup>1</sup>

BACKGROUND

I. History Prior to LBP-17-9

The Board and the Commission thoroughly described the history of this decade-long case in LBP-19-10 and CLI-19-9, respectively. The Staff provides only a brief summary here as context for the petitions for review. In 2009, Powertech applied for an NRC license for its

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<sup>1</sup> The Consolidated Intervenor's petition relies almost entirely on the Tribe's petition and should be denied for the same reasons as the Tribe's petition. Because the Consolidated Intervenor's "adopt all the assertions and arguments" of the Tribe, the Staff refers primarily to the Tribe's petition throughout this answer. Consolidated Intervenor's Petition for Review of LBP-19-10, LBP-17-09 and Board Ruling on Motion to Strike (Jan. 21, 2020) at 1 (ML20023B549) ["Consolidated Intervenor's Petition"].

proposed Dewey-Burdock in-situ uranium recovery facility in South Dakota.<sup>2</sup> In accordance with 10 C.F.R. Part 51, the Staff prepared and issued a draft supplemental environmental impact statement (DSEIS) and a final supplemental environmental impact statement (FSEIS) for the project.<sup>3</sup> In the FSEIS, the Staff evaluated information about Indian Tribes' cultural resources that it was able to obtain from surveys conducted by seven Tribes, but which lacked specific input from the Lakota Sioux Tribes. The Staff included and described the information gathered from site surveys conducted in 2013 in the Staff's FSEIS evaluation of the potential impacts of the project.<sup>4</sup> The Staff presented its impact determinations and recommended mitigation measures in the FSEIS.<sup>5</sup> The Staff then provided the impact assessments and mitigation recommendations to all consulting Tribes for comment, including the Oglala Sioux Tribe.<sup>6</sup>

The Staff concluded that the project's overall potential impacts to historic and cultural resources would range from SMALL to LARGE.<sup>7</sup> Further, in accordance with 36 C.F.R.

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<sup>2</sup> On April 8, 2014, the Staff issued Source Material License No. SUA-1600. See Ex. NRC-012, Powertech Source Material License No. SUA-1600 (ML14043A392) ["Powertech License"].

<sup>3</sup> Exs. NRC-008-A-1 through NRC-008-B-2 [FSEIS].

<sup>4</sup> Ex. NRC-008-A-1, FSEIS, at 247, 257–63; Ex. NRC-008-A-2, FSEIS, at 466–86; Ex. NRC-176-R, Prefiled Direct Testimony of NRC Staff at A.17-A18 (ML19142A057) ["Staff Testimony"].

<sup>5</sup> Ex. NRC-008-A-2, FSEIS, at 474–86. In Tables 4.9-1 through 4.9-6, the Staff provided its determinations regarding both environmental impacts and National Register of Historic Places eligibility. These tables also included a column titled "Management Recommendation/Comments," which lists its mitigation recommendations under both the National Historic Preservation Act (NHPA) and NEPA. *Id.*

<sup>6</sup> Exs. NRC-059 and NRC-061 through NRC-063. These exhibits include the following documents: Letter to Oglala Sioux Tribe Transmitting TCP Survey Report for Dewey-Burdock Project (ML13357A234) (Dec. 23, 2013); NRC's Overall Determinations of Eligibility and Assessments of Effects (ML13343A155) (Dec. 16, 2013); NRC NRHP Determinations (ML13343A155) (Dec. 23, 2013); Table 1.0 for Draft PA (ML13354B948) (Nov. 22, 2013). The Staff sent copies of these documents to all consulting Tribes.

<sup>7</sup> Ex. NRC-008-A-1, FSEIS, at 43-44; Ex. NRC-008-A-2, FSEIS, at 462–95, 586. The Staff determined that the overall impacts from other phases of the project, such as operation and aquifer restoration, would range from "SMALL" or "SMALL to MODERATE" impacts on cultural resources because mitigation measures would be imposed before facility construction for both known and any newly discovered cultural resources in accordance with Condition 9.8 of Powertech's license. Ex. NRC-008-A-1, FSEIS, at 43-44; Ex. NRC-008-A-2, FSEIS, at 462–95, 495; Ex. NRC-012, Powertech License, at 5–6.

§§ 800.4(b)(2) and 800.14(b), the Staff finalized a programmatic agreement for the project.<sup>8</sup>

The Staff thereafter issued a Record of Decision for its NEPA review and the materials license.<sup>9</sup>

## II. Negotiations Following LBP-17-9 and the March 2018 Approach

After the Board's ruling in LBP-17-9, resolving Contention 1B in favor of the Staff,<sup>10</sup> the parties resumed efforts to resolve Contention 1A. In consultation with the parties, the Staff developed an approach (the "March 2018 Approach") to obtain additional information on cultural resources of significance to Lakota Sioux Tribes that accounted for the material concerns of the Tribe as identified in LBP-17-9.<sup>11</sup> Acknowledging the Tribe's position that a "physical site survey is a fundamental requirement,"<sup>12</sup> the March 2018 Approach provided the Tribe the opportunity to participate in a pedestrian survey of the Dewey-Burdock site<sup>13</sup> and included hiring a qualified contractor to help facilitate implementation of the approach, involving other Lakota Sioux Tribes, providing iterative opportunities for the tribal site survey, involving tribal elders, and conducting a site survey using a scientific methodology determined by the contractor in collaboration with the tribes.<sup>14</sup> Because the parties, including the Tribe, found the approach and its included timeline reasonable, and the Tribe expressed its intent to participate, the Staff moved forward with implementing the March 2018 Approach.<sup>15</sup>

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<sup>8</sup> Exs. NRC-018-A through NRC-018-H, Final Programmatic Agreement for the Dewey-Burdock Project (ML14066A347).

<sup>9</sup> Exs. NRC-011, NRC Record of Decision for the Dewey-Burdock Uranium In-Situ Recovery Project (ML14066A466) (Apr. 8, 2014); NRC-012, Powertech License.

<sup>10</sup> In LBP-17-9, the Board granted summary disposition in favor of the Staff on Contention 1B, holding that the NRC's interactions with the Tribe were sufficient to satisfy the NHPA's requirement that the NRC Staff afford the Tribe a meaningful opportunity to consult on the undertaking. *See Powertech (USA), Inc.* (Dewey-Burdock *In Situ* Uranium Recovery Facility), LBP-17-9, 86 NRC 167, 189–90 (2017).

<sup>11</sup> *See* Ex. NRC-176-R, Staff Testimony, at A.20.

<sup>12</sup> *Powertech (USA), Inc.* (Dewey-Burdock *In Situ* Uranium Recovery Facility), LBP-18-5, 88 NRC 95, 109 (2018); *see also* Ex. NRC-176-R, Staff Testimony, at A.20.

<sup>13</sup> Ex. NRC-176-R, Staff Testimony, at A.20.

<sup>14</sup> *Powertech*, LBP-18-5, 88 NRC at 112; Ex. NRC-176-R, Staff Testimony at A.20.

<sup>15</sup> *See Powertech*, LBP-18-5, 88 NRC at 111–12; Ex. NRC-176-R, Staff Testimony, at A.21.



Based on statements by the Tribe, the March 2018 Approach contemplated that a specific methodology for conducting the site survey component would be developed with the Tribe's input, in coordination with the Staff's expert contractor.<sup>16</sup> But the Tribe rejected the offered options as providing for only an "open-site survey," and proposed its own approach for providing the information sought by the Staff, which the Staff concluded was incompatible with the effectuation of the March 2018 Approach.<sup>17</sup> In June 2018, the Staff informed the Tribe that it considered the Tribe's proposal to be a constructive rejection of the March 2018 Approach, and that based on the Tribe's position concerning the essential elements of a cultural resources site survey, it did not anticipate reaching an agreement on a site survey methodology.<sup>18</sup>

The Staff and Tribe each moved to resolve Contention 1A by summary disposition.<sup>19</sup> In October 2018, the Board denied both motions.<sup>20</sup> In denying the Staff's motion, the Board found that the NEPA "hard look" requirement had not been met and that "there is a material factual dispute as to the reasonableness of the NRC Staff's implementation of the March 2018 Approach."<sup>21</sup> The Board found that the "Staff's March 2018 Approach, as agreed to by the parties, constituted a valid and reasonable approach for resolving Contention 1A,"<sup>22</sup> but that material factual disputes prevented the Staff from invoking 40 C.F.R. § 1502.22 as a basis for summary disposition.<sup>23</sup> Having found that the Staff's March 2018 Approach was reasonable,

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<sup>16</sup> See Ex. NRC-190, Oglala Sioux Tribe May 31, 2017 Letter Responding to NRC's April 14, 2017 Letter, at 4 (May 31, 2017) (ML17152A109); Ex. NRC-176-R, Staff Testimony, at A.33–34.

<sup>17</sup> Ex. NRC-176-R, Staff Testimony at A.22–23; see also Ex. NRC-198, Oglala Sioux Tribe's June 15, 2018 Updated Cultural Resources Survey Methodologies Proposal (ML18170A155) (June 15, 2018) (non-public).

<sup>18</sup> Ex. NRC-176-R, Staff Testimony, at A.23.

<sup>19</sup> See *Powertech*, LBP-18-5, 88 NRC at 99–100; Ex. NRC-176-R, Staff Testimony, at A.22.

<sup>20</sup> See *Powertech*, LBP-18-5, 88 NRC at 100.

<sup>21</sup> *Id.* at 125.

<sup>22</sup> *Id.*; see also *Powertech (USA), Inc.* (Dewey-Burdock *In Situ* Uranium Recovery Facility), CLI-19-9, 90 NRC \_\_, \_\_ (slip op. at 10) (2019).

<sup>23</sup> *Powertech*, LBP-18-5, 88 NRC at 130–34.

and that Tribe had likewise accepted it as reasonable,<sup>24</sup> the Board concluded that there nevertheless remained issues of material fact with respect to (1) the reasonableness of the methodology proposed by the Staff and its contractor for the site survey component of the March 2018 Approach, and (2) whether the Tribe's June 2018 proposal in fact constituted a constructive rejection of the March 2018 Approach such that it was reasonable for the Staff to forgo the remaining elements of the March 2018 Approach.<sup>25</sup> The Board thus identified two alternate avenues "to conclude expeditiously the litigation of the issues in this case": "(1) the NRC Staff can resume the implementation of its March 2018 Approach, with appropriate adjustments to the dates in the original timetable; or (2) the parties can prepare for a prompt evidentiary hearing, where testimony and evidence will be taken on the questions raised by the motions for summary disposition filed August 17, 2018."<sup>26</sup>

In November 2018, the Staff informed the parties that it intended to resume negotiations with the Tribe on a site survey methodology that fit within the parameters of the March 2018 Approach.<sup>27</sup> The Staff sought input on what the Tribe considered the appropriate aspects of a survey methodology and, with that input in mind – in particular, its concerns regarding the need for a survey methodology with "scientific integrity" – developed and provided the Tribe a draft methodology on which to continue discussions and reach agreement with the Tribe.<sup>28</sup> As

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<sup>24</sup> *Id.* at 131 ("The Oglala Sioux Tribe accepted the March 2018 Approach as reasonable to resolve Contention 1A and does not challenge the reasonableness of the March 2018 Approach as written."); see also *Powertech*, CLI-19-9, 90 NRC at \_\_\_ (slip op. at 10).

<sup>25</sup> *Powertech*, LBP-18-5, 88 NRC at 130–34. While finding that a material factual dispute existed on this question, the Board noted that it "acknowledge[d] that while the Oglala Sioux Tribe characterized the June 12 and June 15 proposals as proposals for a 'methodology,' those proposals may have been an attempt to renegotiate the entire approach, per the NRC Staff's interpretation." *Id.* at 132–33.

<sup>26</sup> *Id.* at 134–35.

<sup>27</sup> See Ex. NRC-195, NRC November 21, 2018 Letter to Oglala Sioux Tribe Resuming Implementation of the NRC Staff March 16, 2018 Approach at 2, 4 (ML18325A029) (Nov. 21, 2018); Ex. NRC-176-R, Staff Testimony, A.24–25.

<sup>28</sup> Ex. NRC-176-R, Staff Testimony, at A.24–26.

detailed in LBP-19-10, after many additional months of effort, these discussions did not result in an agreement on a survey methodology acceptable to the Tribe.<sup>29</sup> Accordingly, the Staff filed a motion for an evidentiary hearing, which the Board granted on April 29, 2019.<sup>30</sup> As specified in that Order, the hearing was granted to resolve the disputed issues of fact regarding the reasonableness of the Staff's proposed draft methodology for conducting a cultural resources site survey, and the reasonableness of the Staff's determination that the information it seeks to obtain from the site survey is unavailable.<sup>31</sup>

In LBP-19-10 the Board found that the Staff satisfied its NEPA obligation to take a reasonable hard look at potential impacts to Native American cultural resources by proposing and attempting to implement the March 2018 Approach. The Board also found that the information the Staff sought is effectively unavailable, consistent with the Council on Environmental Quality (CEQ) guidelines in 40 C.F.R. § 1502.22, and that no further supplemental EIS is necessary. The Tribe and Consolidated Intervenors challenge the Board's findings but, as discussed below, both petitions fail to identify a substantial question for review.

## DISCUSSION

The Tribe asserts that the three referenced Board decisions present "substantial questions" for review and raises various claims that the Board made errors of fact, law, and procedure. However, the Tribe fails to demonstrate how any of its asserted concerns meet the standards for Commission review articulated in 10 C.F.R. § 2.341(b)(4).

### I. Legal Standards for Commission Review

In deciding whether to grant a petition for review of a licensing board's initial decision, the Commission will consider whether the petitioner has raised a substantial question with

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<sup>29</sup> *Powertech (USA), Inc. (Dewey-Burdock In Situ Uranium Recovery Facility)*, LBP-19-10, 90 NRC \_\_\_, \_\_ (slip op. at 15–18) (2019).

<sup>30</sup> See NRC Staff's Motion to Set Schedule for Evidentiary Hearing (Apr. 3, 2019) (ML19093B813); Order (Granting NRC Staff Motion and Scheduling Evidentiary Hearing), at 4 (Apr. 29, 2019) (ML19119A322).

<sup>31</sup> Order (Granting NRC Staff Motion and Scheduling Evidentiary Hearing) at 5.

respect to one or more of the following considerations:

- (i) A finding of material fact is clearly erroneous or in conflict with a finding as to the same fact in a different proceeding;
- (ii) A necessary legal conclusion is without governing precedent or is a departure from or contrary to established law;
- (iii) A substantial and important question of law, policy, or discretion has been raised;
- (iv) The conduct of the proceeding involved a prejudicial procedural error; or
- (v) Any other consideration which the Commission may deem to be in the public interest.<sup>32</sup>

The Commission will not grant a petition for review “to the extent that it relies on matters that could have been but were not raised before the presiding officer.”<sup>33</sup> Further, an appeal that does not point to an error of law or abuse of discretion by the Board but simply restates the contention with additional support will not meet the requirements for a valid appeal.<sup>34</sup>

The Commission accords substantial deference to Board rulings on the merits of admitted contentions. Where the Board’s decision rests on carefully made factual findings, the Commission typically will not disturb it.<sup>35</sup> The Commission defers to Board factual findings unless they are “clearly erroneous.”<sup>36</sup> That standard is by design “a difficult one to meet,” requiring a showing that the Board determination is “not even plausible in light of the record as a whole.”<sup>37</sup> As a result, the Commission “seldom grant[s] review” when a petition for review

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<sup>32</sup> 10 C.F.R. § 2.341(b)(4).

<sup>33</sup> *Id.* § 2.341(b)(5).

<sup>34</sup> See *Shieldalloy Metallurgical Corp.* (Amendment Request for Decommissioning of the Newfield, New Jersey Facility), CLI-07-20, 65 NRC 499, 503 (2007).

<sup>35</sup> *Hydro Res., Inc.* (Rio Rancho, NM), CLI-01-4, 53 NRC 31, 45 (2001); see also *Pa’ina Hawaii, LLC*, CLI-10-18, 72 NRC 56, 72–73 (2010) (stating that the Commission refrains from making *de novo* findings of fact “in situations ‘where a Licensing Board has issued a plausible decision that rests on carefully rendered findings of fact.’” (internal citations omitted)).

<sup>36</sup> *Honeywell Int’l, Inc.* (Metropolis Works Uranium Conversion Facility), CLI-13-1, 77 NRC 1, 19 (2013) (citing *David Geisen*, CLI-10-23, 72 NRC 210, 224–25 & n.61 (2010)).

<sup>37</sup> *Powertech (USA), Inc.* (Dewey-Burdock *In Situ* Uranium Recovery Facility), CLI-16-20, 84 NRC 219, 228 (2016).

“relies primarily on claims that the Board erred in weighing the evidence in a merits decision.”<sup>38</sup>

The Commission reviews conclusions of law *de novo* and will reverse Board legal rulings if they depart from or are contrary to established law.<sup>39</sup> But in general, the Commission is hesitant to disturb the Board’s procedural case management decisions.<sup>40</sup> Furthermore, a party alleging procedural error must articulate an explanation of how it was prejudiced by the error.<sup>41</sup>

## II. The Tribe Has Not Identified Clear Error in the Board’s LBP-19-10 Factual Findings

The Tribe dedicates the majority of its petition to relitigating the disputed issues of fact that were the subject of the 2019 hearing. Specifically, the Tribe asserts that it did not “unconditionally” agree to a two-week time frame and \$10,000 honoraria and that as a result, the Staff’s methodology was not reasonable<sup>42</sup> and the information the Staff seeks is available.<sup>43</sup> These claims simply challenge the Board’s careful weighing of evidence and its well-reasoned findings of fact. Given the substantial deference to which the Board is entitled on findings of fact, none of the Tribe’s claims meets the standard to warrant Commission review.

### A. The Board Correctly Found That the March 2018 Approach and the Staff’s 2019 Methodology Were Reasonable

The Tribe disputes the Board’s factual findings both that the Tribe agreed to the March 2018 Approach and that the Staff’s 2019 methodology was a reasonable way for the Staff to fulfill its NEPA obligation. Despite its initial public statements of agreement, the Tribe asserts

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<sup>38</sup> See *Strata Energy, Inc.* (Ross In Situ Recovery Uranium Project), CLI-16-13, 83 NRC 566, 573 (2016) (citing *DTE Electric Co.* (Fermi Nuclear Power Plant, Unit 3), CLI-14-10, 80 NRC 157, 162–163 (2014)); *Entergy Nuclear Generation Co.* (Pilgrim Nuclear Power Station), CLI-12-1, 75 NRC 39, 45–46 (2012)).

<sup>39</sup> See, e.g., *Pa’ina Hawaii*, CLI-10-18, 72 NRC at 72–73.

<sup>40</sup> See *La. Energy Serv., L.P.*, CLI-04-35, 60 NRC 619, 629 (2004) (citing *International Uranium (USA) Corp.* (White Mesa Uranium Mill), CLI-02-13, 55 NRC 269, 273 (2002)); see also *Entergy Nuclear Vermont Yankee, LLC* (Vermont Yankee Nuclear Power Station), CLI-10-17, 72 NRC 1, 47 n.254 (2010).

<sup>41</sup> See *David Geisen*, CLI-10-23, 72 NRC at 245–46.

<sup>42</sup> See Oglala Sioux Tribe’s Petition for Review of LBP-19-10, LBP-17-09, and Board Ruling on Motion to Strike (Jan. 21, 2020) at 6–14 (ML20021A376) [“Tribe’s Petition for Review”].

<sup>43</sup> *Id.* at 14–17.

that it “never accepted a rigid application of the March 2018 Approach,” but rather “sought to continue negotiations by acknowledging that the Approach had potential to develop into an agreement on an actual survey methodology[.]”<sup>44</sup> The Tribe claims that the Board “mischaracterized the parties’ negotiations,” because the Tribe “never agreed to a specific dollar amount” or timeframe in which to conduct the survey, but instead “unambiguously stated that the methodology and tasks must be determined first, and only then could the costs be determined and agreed upon.”<sup>45</sup> The Tribe further disputes the reasonableness of the Staff’s February 2019 methodology by suggesting that the Staff contractor was not qualified, contrary to the Board’s findings.<sup>46</sup> The Tribe contends these constitute reversible factual errors.

Contrary to the Tribe’s characterizations, however, the Board carefully weighed an extensive body of evidence to determine that the Tribe had agreed to the March 2018 Approach and, further, that both the March 2018 Approach and the February 2019 methodology were reasonable proposals for developing and implementing the survey. The Commission will defer to the Board’s factual findings absent a showing that the Board’s findings were “not even plausible in light of the record viewed in its entirety.”<sup>47</sup> Here, each of the Board’s conclusions is thoroughly supported by the factual record. The March 2018 Approach consisted of five main elements that the Tribe previously stated were necessary for a competent site survey, and the Board found that the record evidence on each element demonstrated the reasonableness of the Staff’s subsequent 2019 methodology.<sup>48</sup> First, although the Tribe repeatedly challenged the

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<sup>44</sup> *Id.* at 7.

<sup>45</sup> *Id.* at 8.

<sup>46</sup> *Id.* at 9–10 (“Despite the option of directing SC&A to hire qualified persons, NRC Staff never even communicated this option to the Tribe for discussion.”).

<sup>47</sup> *Private Fuel Storage, LLC* (Independent Spent Fuel Storage Installation), CLI-05-16, 62 NRC 1, 3 (2005) (quoting *Private Fuel Storage, LLC* (Independent Spent Fuel Storage Installation), CLI-05-1, 61 NRC 160, 174 (2004)); see also *Powertech*, CLI-16-20, 84 NRC at 228.

<sup>48</sup> See *Powertech*, LBP-19-10, 90 NRC at \_\_ (slip op. at 29); see also Ex. NRC-190, Oglala Sioux Tribe May 31, 2017 Letter Responding to NRC’s April 14, 2017 Letter at 3–8 (ML19137A406); Ex. NRC-192,

qualifications of the Staff's contractor, the Board concluded that Mr. Spangler's National Park Service professional qualification standards for archaeology and historic preservation, 25 years of experience in archaeological research and public outreach, significant involvement in creating methodologies for cultural resources surveys, and extensive experience assisting federal and state agencies in conducting cultural resource surveys, firmly establish his qualifications to design and facilitate a survey here.<sup>49</sup> Second, although the March 2018 Approach and 2019 Methodology afforded Tribes other than the Oglala Sioux the opportunity to participate, the lack of other Tribes' willingness to do so did not render the Staff's approaches unreasonable.<sup>50</sup> Third, although the Tribe later disputed the total time necessary to complete the survey, it did not negate the reasonableness of the Staff's attempt to create two iterative opportunities for site surveys.<sup>51</sup> Fourth, by incorporating oral history interviews with tribal elders, the Staff provided a reasonable opportunity for Tribal elder input into the identification and interpretation of cultural resources at the site in its 2019 methodology.<sup>52</sup> And fifth, in response to the Tribe's criticisms that previous Staff proposals "lacked scientific integrity,"<sup>53</sup> the Staff appropriately balanced the incorporation of tribal input with the scientific method by building upon other successfully implemented scientific methodologies used for site surveys by other governmental agencies.<sup>54</sup> Therefore, the Board found, the Staff's March 2018 Approach and 2019 methodology were reasonable.

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NRC March 16, 2018 Letter to Oglala Sioux Tribe Transmitting NRC's Approach to Identify Historic, Cultural, and Religious Sites at 2–3 (ML18074A396).

<sup>49</sup> See *Powertech*, LBP-19-10, 90 NRC at \_\_\_ (slip op. at 32–34); Ex. NRC-178, Statement of Professional Qualifications of Jerry Spangler at 1–4 (ML19137A393); Tr. at 1773–75, 1782, 1784–86, 1788–91 (Aug. 28, 2019) (Spangler).

<sup>50</sup> *Powertech*, LBP-19-10, 90 NRC at \_\_\_ (slip op. at 35–36).

<sup>51</sup> *Id.* at 36–38.

<sup>52</sup> *Id.* at 38–39.

<sup>53</sup> Ex. NRC-186, Summary of May 19, 2016 Meeting with the Oglala Sioux Tribe at 2 (ML19137A401).

<sup>54</sup> *Powertech*, LBP-19-10, 90 NRC at \_\_\_ (slip op. at 39–43).

The Tribe also identifies no error in the Board's factual determination that the Tribe had agreed to the parameters of the March 2018 Approach. While the Tribe on appeal selectively quotes previous statements expressing its dissatisfaction with the Staff's March 2018 Approach and 2019 methodology,<sup>55</sup> it ignores its previous on-the-record statements of agreement with the parameters of the March 2018 Approach.<sup>56</sup> Additionally, when asked directly about the Tribe's change in position, Tribe witness Kyle White admitted that he "did not feel comfortable with what was agreed to by the previous [Tribal Historic Preservation Officer]."<sup>57</sup> And the only rationale Mr. White offered for that reversal was that he was uncomfortable with "the scientific method not being able to have some repeatable [sic], where we would be able to go out to the site and look at the entire site."<sup>58</sup> But as the Board held, the Staff fully explained how the 2019 methodology

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<sup>55</sup> See, e.g., Tribe's Petition for Review at 11–12 (quoting Tr. at 1478–79, 1480 (Dec. 6, 2018); Tr. at 1531–32 (Jan. 29, 2019); Ex. NRC-217, February 19, 2019 Teleconference Call Summary with Oglala Sioux Tribe Comments (Draft) (ML19137A435)).

<sup>56</sup> See, e.g., Ex. NRC-193, Oglala Sioux Tribe January 19, 2018 Response to NRC's December 6, 2017 Letter at 2 (ML19242C113) ("Lastly, the proposed timeline presented by the NRC staff appears achievable."); Ex. NRC-194, Oglala Sioux Tribe February 19, 2018 Responses at PDF 5 (ML18046A171) ("The Tribe would anticipate that an amount on the order of what was proposed previously would be appropriate."); Tr. at 1389 (Apr. 6, 2018) (counsel for the Tribe stating that the Tribe is "...comfortable with, as we stated multiple times, the approach that the NRC staff has laid out. So we are hopeful that won't be a problem"), 1395 ("The Tribe has, I think, been consistent with these dates. Although somewhat tight, I think are achievable. And so the Tribe is, at this point, comfortable with those."), 1432 ("[W]e maintain the position that the March 2018 approach is a reasonable one and would not like to see backsliding to the proposals that have led to this litigation from the start."); see also *Powertech*, CLI-19-9, 90 NRC at \_\_\_ (slip op. at 4).

The Tribe additionally claims that the Board erred in finding the 2019 methodology reasonable because it did not include a cost estimate for the site survey. Tribe's Petition for Review at 7, 9. But the Board made detailed factual findings both about the reasonableness of the Staff's approach and methodology and why the Tribe's response (notably the Tribe's proposals that contemplated a survey lasting at least a year and costing an estimated \$2 million) made it reasonable to conclude that an agreement could not be reached, particularly in light of the Tribe's previous statements that reimbursement to be provided by Powertech was "appropriate" for obtaining the Tribe's participation in the March 2018 Approach. *Id.* at 9; see also Ex. NRC-194, Oglala Sioux Tribe February 19, 2018 Responses at PDF 5. The Tribe's assertion regarding cost estimates accordingly fails to show any flaw in the Board's findings, much less reversible error.

<sup>57</sup> Tr. at 1975 (Aug. 29, 2019) (White).

<sup>58</sup> *Id.*



incorporated the scientific method and provided iterative opportunities to survey the site.<sup>59</sup> The Staff also explained that the entire site would be available to participating Tribes.<sup>60</sup>

In sum, the Tribe has not demonstrated that the Board's factual determinations are "not even plausible in light of the record as a whole." Based on the body of evidence, including the parties' public statements and negotiations, the Board properly found that the parameters of the March 2018 Approach and the 2019 methodology were reasonable.<sup>61</sup>

B. The Board Correctly Found That the Information Necessary to Resolve the NEPA Deficiency Was Unavailable

The Tribe additionally asserts that the Board erred in finding that the information the Staff sought was unavailable, based on the Tribe's premise that the Staff did not exhaust other potential avenues for obtaining the information. By disputing the Board's characterization of its June 2018 proposal, which the Tribe describes as a "discussion draft," the Tribe implies that it was open to participating in further negotiations that might have reached a mutually agreeable survey methodology.<sup>62</sup> The Tribe also claims that by ignoring the "multitude of declarations submitted by the Consolidated Intervenors...[which] confirm that relevant information is available from scores of Lakota people with knowledge of the cultural significance of resources at the Dewey-Burdock site," the Board erroneously dismissed the Staff's ability to obtain the

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<sup>59</sup> See *Powertech*, LBP-19-10, 90 NRC at \_\_ (slip op. at 36–38, 39–43).

<sup>60</sup> See Ex. NRC-214, Proposed Draft Cultural Resources Site Survey Methodology at 7 (stating that the 10,580 acres of the license area were available for Tribes to survey), 15 ("Access to the entire project area will be provided.") (Feb. 15, 2019) (ML19058A153).

<sup>61</sup> *Powertech*, CLI-16-20, 84 NRC at 228. The Consolidated Intervenors additionally assert that the Staff's evaluation of cultural resources should not be "entirely dependent upon the active participation of the [Tribe]." Consolidated Intervenors' Petition at 2. As a threshold matter, they do not articulate how this claim meets the standards in 10 C.F.R. § 2.341(b)(4) for Commission review. Further, the Board found that the Staff's Approach provided a reasonable methodology based on the Tribe's own statements and other record evidence, and it also concluded that the Approach reasonably depended on the Tribe's participation. See *Powertech*, LBP-19-10, 90 NRC at \_\_ (slip op. at 40, 42–43 n.215, 49–50). Therefore, the Consolidated Intervenors have likewise failed to identify a factual error that warrants review.

<sup>62</sup> Tribe's Petition for Review at 10.

necessary information.<sup>63</sup> The Tribe renews its criticism of the Staff's contractor's qualifications by claiming that the Staff "had the option of conducting the survey with reasonably qualified personnel," and it even suggests that the Staff could have hired the Tribe's witness, Dr. Kelly Morgan.<sup>64</sup> With these options still available, the Tribe claims, the Board erred in holding that the information the Staff sought was unavailable.<sup>65</sup>

Contrary to the Tribe's assertions, the Board carefully examined the extensive record in holding that, despite the Staff's reasonable efforts to obtain information necessary to perform a NEPA analysis of potential impacts on Lakota-specific cultural resources, the information was unavailable. The Staff reasonably relied on the Tribe's previous statements of accord with the timeline and reimbursement of the March 2018 Approach, but in June 2018 the Tribe instead developed its own proposals that contemplated a survey lasting at least a year and costing an estimated \$2 million.<sup>66</sup> Later, when the Staff sought to engage the Tribe in discussions over the essential elements of the 2019 methodology, the Tribe returned to the concerns that it raised in its June 2018 proposals rather than work with the Staff to incorporate elements it thought was missing in the Staff's draft.<sup>67</sup> Therefore, the Board correctly held that the Tribe's alternative is fundamentally incompatible with the March 2018 Approach.<sup>68</sup>

Additionally, the Board relied on the same large body of evidence to determine that the

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<sup>63</sup> *Id.* at 15–16.

<sup>64</sup> *Id.* at 16 n.9.

<sup>65</sup> *See, e.g., id.* at 15.

<sup>66</sup> *See Powertech*, LBP-19-10, 90 NRC at \_\_\_ (slip op. at 44–45); Ex. NRC-197, Oglala Sioux Tribe Survey Methodology Proposal at PDF 6 (June 12, 2018) (ML19137A413) (non-public); Ex. NRC-198, Oglala Sioux Tribe Updated Survey Methodology Proposal at 3 (non-public); Tr. at 1966, 1969 (Aug. 29, 2019) (White).

<sup>67</sup> *See Powertech*, LBP-19-10, 90 NRC at \_\_\_ (slip op. at 45, 47); Ex. NRC-203, Oglala Sioux Tribe January 11, 2019 Response at 2–3, 4–6 (ML19137A421); Ex. NRC-218, Oglala Sioux Tribe February 22, 2019 Meeting Summary at PDF 1–2 (ML19137A436); Ex. NRC-211, Oglala Sioux Tribe March 12, 2019 Response at 2–7 (ML19137A429).

<sup>68</sup> *Powertech*, LBP-19-10, 90 NRC at \_\_\_ (slip op. at 47).

Staff's decision to discontinue working with the Tribe was reasonable. Without the prospect of agreement on a methodology, the Staff could not reasonably complete other elements of the March 2018 Approach, such as the oral interviews.<sup>69</sup> And as described above, the Board appropriately found Mr. Spangler qualified to design and facilitate a site survey methodology. NEPA does not require the Staff to hire the Tribe or the Tribe's preferred contractor; it only requires the Staff to make reasonable efforts.<sup>70</sup> The Tribe's view that the Staff was obligated to renegotiate the parameters of the March 2018 Approach (or to hire a different contractor to implement it) reveals no error in the Board's finding that the information the Staff sought was unavailable and that the Staff's decision to discontinue was reasonable.

In summary, the Tribe has not demonstrated any error warranting Commission review of the Board's factual findings that the March 2018 Approach and 2019 methodology were reasonable and that the information the Staff sought was unavailable. In light of the record as a whole, the Board's findings are not only plausible but abundantly reasonable.

### III. The Board Correctly Applied Governing Law in LBP-19-10

The Tribe also asserts errors of law in LBP-19-10. Specifically, it asserts that the Board erred in applying NEPA's rule of reason, in holding that the adjudicatory record may supplement the NEPA document, and in holding that CEQ regulations are not binding on the NRC.<sup>71</sup> As discussed below, the Tribe has not demonstrated that the Board erred as a matter of law or abused its discretion in applying NEPA and its implementing regulations.

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<sup>69</sup> *Id.* at 49–50.

<sup>70</sup> See, e.g., *Powertech*, CLI-19-9, 90 NRC at \_\_\_ (slip op. at 18) (reiterating that the standard for the Staff is "reasonable efforts"). Further, the Tribe cites *Hydro Resources* for the proposition that "Commission precedent confirms that NRC Staff has met [its NEPA] duty by hiring independent, qualified cultural resources consultants to coordinate and/or conduct the required survey in order to sufficiently inform the NEPA analysis." Tribe's Petition for Review at 16. However, in that case, the Presiding Officer's conclusion that the Staff satisfied NEPA hinged not on contractor qualifications but instead on the substantive discussion of impacts in the FEIS. See generally *Hydro Resources, Inc.* (Crownpoint, New Mexico), LBP-05-26, 62 NRC 442 (2005).

<sup>71</sup> Tribe's Petition for Review at 14–17, 18–19.

A. The Board Correctly Applied NEPA's Rule of Reason

The Tribe first asserts error in the Board's application of NEPA's "rule of reason." It claims that the Board need only apply the rule of reason when analyzing remote or speculative consequences of agency actions. Specifically, it asserts that "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."<sup>72</sup> However, the Tribe incorrectly characterizes applicable law, in particular the Ninth Circuit Court of Appeals holding in *Ground Zero*. It accordingly fails to identify any error in the Board's well supported legal analysis.

First, as the Staff explained at length before the Board, case law does not support the Tribe's attempts to limit the application of NEPA's rule of reason.<sup>73</sup> The Tribe's argument is predicated on a fundamental misunderstanding of *Ground Zero*. In that case—which never mentions the phrase "rule of reason"—the court ruled that because the particular type of harm at issue was remote and speculative, it need not be analyzed.<sup>74</sup> The Tribe erroneously reverses the logic of that holding to state that in order for the rule of reason to apply, an agency must show that the harm is remote and speculative.<sup>75</sup>

Second, the Tribe's assertion rests on a fundamentally flawed premise: that the NRC Staff has conducted no cultural resources impacts or mitigation analysis for the Dewey-Burdock site.<sup>76</sup> To the contrary, the Board correctly acknowledges throughout LBP-19-10 that the FSEIS indeed describes impacts from the project and, far from trying to minimize the characterization of impacts to cultural resources or portray those impacts as remote and speculative, determines

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<sup>72</sup> *Id.* at 19.

<sup>73</sup> See NRC Staff's Reply Statement of Position at 27–28 (July 17, 2019) (ML19198A336).

<sup>74</sup> *Ground Zero Ctr. for Non-Violent Action v. U.S. Dep't of Navy*, 383 F.3d 1082, 1090–91 (9th Cir. 2004).

<sup>75</sup> Tribe's Petition for Review at 19; see also Oglala Sioux Tribe Response Statement of Position at 51–53 (June 28, 2019) (ML19179A337).

<sup>76</sup> Tribe's Petition for Review at 15.

that such impacts may be as high as LARGE in the area of potential effect.<sup>77</sup>

Finally, the Tribe attempts to apply its artificial limitation on NEPA's rule of reason to the CEQ regulations regarding incomplete or unavailable information. The Tribe asserts that the Board "misapplied NEPA's limited 'rule of reason'"<sup>78</sup> in holding that "NEPA's rule of reason acknowledges that in certain cases an agency may be unable to obtain information to support a complete analysis."<sup>79</sup> However, the Board did not, as the Tribe suggests, invoke the rule of reason to "excuse" the NRC from evaluating the impacts to cultural resources. Rather, the Board noted that the CEQ regulations themselves provide for circumstances where, as here, the information needed is unavailable.<sup>80</sup> After careful consideration, the Board determined that the information needed to address site-specific mitigation of impacts to Lakota-specific resources was unavailable, and that the Staff satisfied 40 C.F.R. § 1502.22.<sup>81</sup> The Tribe provides no support for the argument that § 1502.22 is not subject to the rule of reason. At any rate, as the Board noted, the statements of consideration for the CEQ regulations specifically invoke the rule of reason for application of 40 C.F.R. § 1502.22, stating that "this provision is intended to fulfill the goal of the "acquisition of [incomplete or unavailable] information if reasonably possible."<sup>82</sup>

In sum, the Tribe has not demonstrated legal error in the Board's application of NEPA (including its interpretation of 40 C.F.R. § 1502.22) and has not identified a substantial question of law. Accordingly, these claims articulate no basis for Commission review.

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<sup>77</sup> *Powertech*, LBP-19-10, 90 NRC at \_\_\_ (slip op. at 4, 49 n.238, 65).

<sup>78</sup> Tribe's Petition for Review at 18.

<sup>79</sup> *Powertech*, LBP-19-10, 90 NRC at \_\_\_ (slip op. at 24) (internal citation omitted).

<sup>80</sup> *Id.* at 24–25.

<sup>81</sup> *Id.* at 57.

<sup>82</sup> *Id.* at 26 (citing National Environmental Policy Act Regulations, Incomplete or Unavailable Information, 51 Fed. Reg. 15,618, 15,620 (Apr. 25, 1986)); see also *Powertech*, CLI-19-9, 90 NRC at \_\_\_ (slip op. at 18) (stating that the Commission has "consistently directed the Staff to undertake reasonable efforts to obtain unavailable information").

B. The Board Correctly Held That the Adjudicatory Record Supplements the NEPA Document

The Tribe also repeats its claim that the adjudicatory record cannot supplement the FSEIS and that the NRC must “follow NEPA statutory procedures in preparing a supplement to its NEPA document[.]”<sup>83</sup> The thrust of this claim is that 40 C.F.R. § 1502.22 requires any information to be in the NEPA document itself or in a formal supplement subject to public notice and comment.<sup>84</sup> But the Tribe again relies on a mistaken understanding of the D.C. Circuit’s ruling in *NRDC v. NRC*, incorrectly suggesting that the court opined on the Commission’s practice of allowing the NRC’s adjudicatory record to supplement the NEPA document.<sup>85</sup>

The Tribe fails to demonstrate a substantial question of law with respect to that well-established Commission practice. As the Board held in LBP-19-10, “[l]ongstanding agency precedent establishes that, in an appropriate circumstance, a deficiency in an agency NEPA statement can be rectified by a licensing board based on the record of an evidentiary hearing regarding an intervenor contention challenging that environmental statement.”<sup>86</sup> The Board provides a thorough history of the well-settled Commission case law and a sound basis for its holding.<sup>87</sup> The Tribe argues that the D.C. Circuit in *NRDC v. NRC* “sharply criticized NRC attempts to use its confined adjudicatory process to supplement a NEPA document that requires public comment and review.”<sup>88</sup> But contrary to the Tribe’s implication, the court did not invalidate the NRC’s practice of allowing the adjudicatory record to supplement a NEPA document while the action remains in NRC adjudication. The court did observe that in that

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<sup>83</sup> Tribe’s Petition for Review at 15.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 14–15; *see also Natural Res. Def. Council v. Nuclear Regulatory Comm’n*, 879 F.3d 1202, 1212 (D.C. Cir. 2018).

<sup>86</sup> *Powertech*, LBP-19-10, 90 NRC at \_\_\_ (slip op. at 68–69).

<sup>87</sup> *Id.* at 24, 68–71.

<sup>88</sup> Tribe’s Petition for Review at 14.

instance, the NRC's issuance of the license prior to the pendency of a contested NEPA issue was "not ideal."<sup>89</sup> But, far from overturning Commission law, the court explicitly stated that the NRC's practice of supplementing the NEPA document in the adjudicatory record (as well as issuing a license prior to completion of the NEPA process), was permissible.<sup>90</sup>

The Tribe also asserts that absent the opportunity for public comment, the NRC cannot supplement the NEPA record.<sup>91</sup> The Tribe states that the Staff "must include the information required by 40 C.F.R. § 1502.22 and provide the public and Tribes the opportunity to assess and comment on that analysis – as NEPA requires."<sup>92</sup> But the Tribe fails to address the Board's finding that the Staff did in fact satisfy § 1502.22 based on the extensive documentary evidence (including testimony from both the Staff and the Tribe) presented and considered at the hearing. Further, the Commission has observed that a public hearing "allows for additional and...more rigorous public scrutiny of the [EIS] than does the usual 'circulation for comment.'"<sup>93</sup>

In sum, the Tribe has not demonstrated legal error in how the Board applied well-established Commission law, and the D.C. Circuit's ruling in *NRDC v. NRC* provides no support for the Tribe's assertion. Accordingly, this claim articulates no basis for Commission review.

### C. The Board Correctly Held That CEQ Regulations Do Not Bind the NRC

Finally, the Tribe restates its argument that CEQ regulations are binding on the NRC,

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<sup>89</sup> *Natural Res. Def. Council v. Nuclear Regulatory Comm'n*, 879 F.3d at 1212. Specifically, the Court stated that "it would be preferable for the FEIS to contain all relevant information and the record of decision to be complete and adequate before the license is issued." *Id.*

<sup>90</sup> *Id.* (stating that "it is clear that even if this procedure was not ideal it was permissible" and that the court had "already held it was acceptable for the Board to augment the FEIS with additional information[.]") In short, the court upheld the Commission's practice of supplementing the NEPA document on the adjudicatory record when, as in the Dewey-Burdock proceeding, the Commission "adequately augmented its decision before being challenged in [federal] court, and did so in a publicly accessible opinion." *Id.*

<sup>91</sup> Tribe's Petition for Review at 14.

<sup>92</sup> *Id.* at 15.

<sup>93</sup> *Hydro Res., Inc.* (Rio Rancho, NM), CLI-01-4, 53 NRC at 53 (quoting *Phila. Elec. Co.* (Limerick Generating Station, Units 1 and 2), ALAB-819, 22 NRC 681, 706–07 (1985)).

citing *United Keetoowah Band of Cherokee Indians in Okla. v. FCC* for the proposition that “independent agencies, such as NRC, are entitled to no deference in interpreting NEPA.”<sup>94</sup> The Tribe fails to articulate an issue warranting review, because, contrary to the Tribe’s assertion, the Board did not hold that CEQ regulations are inapplicable to the NRC.

The Tribe inaccurately claims that the Board in LBP-19-10 “ruled that CEQ regulations do not apply to NRC’s NEPA procedures.”<sup>95</sup> The Board in fact stated that “the Commission has recognized that such CEQ regulations can be useful guides for determining what actions are reasonable under NEPA.”<sup>96</sup> The Board reiterated its previous position that the Staff should indeed provide the type of information contemplated by § 1502.22.<sup>97</sup> The Board did not base its ultimate holding on the applicability of CEQ regulations, but rather on the factual finding that even though the regulations are not substantively binding on the NRC, the Staff satisfied the requirements of § 1502.22.<sup>98</sup> Further, the Tribe’s invocation of *Keetoowah* is misplaced, as the Board’s ruling in LBP-19-10 simply acknowledges the Commission’s precedent that CEQ regulations cannot create substantive requirements for the NRC.<sup>99</sup>

In conclusion, because the Tribe merely challenges well-settled Commission precedent,

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<sup>94</sup> Tribe’s Petition for Review at 14; *see also United Keetoowah Band of Cherokee Indians in Okla. v. Fed. Comm’n Comm’n*, 933 F.3d 728 (D.C. Cir. 2019).

<sup>95</sup> *Id.* The Tribe also inaccurately asserts that the Staff “freely admits that it has not satisfied the procedural requirements of 40 C.F.R. 1502.22.” *Id.* In fact, the Staff testified that it had satisfied these requirements. The Tribe appears to base its mistaken inference on the Staff’s statement that no new information on Lakota-specific cultural resources has been added to the record. *See* Ex. NRC-176-R, Staff Testimony, at A.52; NRC Staff’s Initial Statement of Position on Contention 1A at 67–70 (May 17, 2019) (ML19137A446).

<sup>96</sup> *Powertech*, LBP-19-10, 90 NRC at \_\_ (slip op. at 55).

<sup>97</sup> *Id.* at 55–56 (citing *Powertech*, LBP-17-9, 86 NRC at 200).

<sup>98</sup> *Id.* at 56–57. The Board concluded that “the NRC Staff’s actions in connection with the unavailable cultural resources information needed to address those deficits are consistent with the provisions of section 1502.22.” *Id.* at 56; *see also Powertech*, CLI-19-9, 90 NRC at \_\_ (slip op. at 18).

<sup>99</sup> *Powertech*, LBP-19-10, 90 NRC at \_\_ (slip op. at 26) (“The Commission’s ‘longstanding policy is that the NRC, as an independent regulatory agency, “is not bound by those portions of CEQ’s NEPA regulations” that, like [40 C.F.R. §] 1502.22, “have a substantive impact on the way in which the Commission performs its regulatory functions.”’” (internal citations omitted)).



it has not raised a substantial question of law, nor has it pointed to any abuse of discretion by the Board in LBP-19-10. Therefore, the Commission should deny the Tribe's petition for review.

IV. The Board Did Not Commit Procedural Error in LBP-19-10 by Relying on the Parties' Public Statements or Board-Submitted Exhibits

The Tribe also generally asserts that the Board committed procedural errors that “violated basic rules of due process and NRC regulations.”<sup>100</sup> First, the Tribe claims that the Board improperly “considered non-record information of settlement negotiations” by “forcing” the parties into alternative dispute resolution (ADR) and by acting “as an unauthorized Settlement Judge.”<sup>101</sup> Second, the Tribe claims that by relying on the Board's own exhibits, the Board “went beyond the scope of the regulations” that require the parties to present evidence.<sup>102</sup> Contrary to the Tribe's characterizations, however, the Board acted within the scope of its authority, and neither claim demonstrates a reversible procedural error. In any event, the Tribe never attempted to explain how these asserted procedural errors had a prejudicial effect on its case. Therefore, these claims do not warrant Commission review.

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<sup>100</sup> Tribe's Petition for Review at 21.

<sup>101</sup> *Id.* at 22–23.

<sup>102</sup> *Id.* at 22. The Tribe additionally asserts that the Board erred by inserting “a new condition into the PA” because the condition was “never subject to any public notice or comment or otherwise incorporated into any NEPA document or NHPA consultation.” *Id.* at 18. However, the Tribe mistakenly interprets the *license condition* imposed on the licensee as an amendment to the PA. See *Powertech*, LBP-19-10, 90 NRC at \_\_\_ (slip op. at 61–62) (“...we add a new license condition provision to PA Stipulation 13(c)”). Although the license condition dovetails with the existing PA, it is simply a notification provision that does not alter any substantive rights of the parties to the PA; in fact, it provides a new 30-day comment period. Because the condition imposes a requirement only on Powertech, there is no requirement to consult with the PA parties. Therefore, the Board acted within its authority by imposing this new license condition.

Additionally, the Tribe claims that the PA has been invalidated by subsequent Board and Commission decisions holding that the previous surveys were insufficient. See Tribe's Petition for Review at 18. However, those surveys were insufficient for assessing the Oglala Sioux Tribe's cultural resources because the Tribe chose not to participate in them, despite the Staff's reasonable efforts. Nor did the referenced adjudicatory decisions purport to find the PA invalid; indeed, the Board's references to the PA in LBP-19-10 make it readily apparent that the Board reached no such conclusion. See, e.g., *Powertech*, LBP-19-10, 90 NRC at \_\_\_ (slip op. at 58 & n.275); see also *Powertech USA, Inc. (Dewey-Burdock In Situ Uranium Recovery Facility)*, CLI-19-1, 89 NRC 1, 9 n.41 (2019) (Commission emphasizing that Powertech remains bound to comply with the PA). Moreover, now that the NEPA and NHPA contentions have been resolved in favor of the Staff based on the Staff's reasonable efforts, the Tribe's argument that the PA “has been effectively invalidated” by subsequent NRC adjudicatory decisions is without merit.

A. The Board Acted Within the Scope of Its Authority by Relying on the Parties' Public Documents and Statements

The Tribe first claims that the Board overstepped its authority by relying on the parties' positions during site survey methodology negotiations. According to the Tribe, the Board "forced the Tribe to participate in [alternative dispute resolution (ADR)] procedures,"<sup>103</sup> and "acted as an unauthorized Settlement Judge."<sup>104</sup> In its petition, the Tribe argues for the first time that the Board exceeded its "neutral arbiter" role because it improperly relied on "the content of the parties' settlement discussions," which should have been excluded under Federal Rule of Evidence 408.<sup>105</sup> However, the Tribe's claims rest on a number of mistaken assumptions, and they fail to demonstrate any prejudicial error by the Board.

First, the parties did not participate in ADR. Instead, the Board engaged in normal case management by calling periodic status teleconferences and by resting its ultimate decision in LBP-19-10 on the voluminous and publicly documented record of the parties' years-long negotiations regarding a process for the Staff to meet its NEPA obligations.<sup>106</sup> Moreover, despite the parties' many years of public interactions before the Board regarding the intended approach to resolving the contention, this petition is the Tribe's first claim that it was "forced" into "ADR procedures."<sup>107</sup> The Commission will not grant a petition for review "to the extent that it relies on matters that could have been but were not raised before the presiding officer."<sup>108</sup>

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<sup>103</sup> Tribe's Petition for Review at 21.

<sup>104</sup> *Id.* at 23.

<sup>105</sup> *Id.* at 22–23.

<sup>106</sup> *See, e.g.*, Exs. NRC-191—95, NRC-200—05, NRC-207, NRC-208, NRC-210—20 (publicly available letters, emails, and meeting summaries exchanged between the parties in an effort to reach agreement on a site survey methodology).

<sup>107</sup> *See* Oglala Sioux Tribe's Response Statement of Position (June 28, 2019) (ML19179A337); Oglala Sioux Tribe's Motion to Strike (July 3, 2019) (ML19215A001).

<sup>108</sup> 10 C.F.R. § 2.341(b)(4).

The same logic refutes the Tribe's assertion that the Board was acting as a settlement judge. Contrary to the Tribe's claim, the Board relied on the well-established and publicly available positions of the parties in this proceeding, not on confidential settlement discussions. Therefore, the Tribe's argument that such evidence should have been excluded under Federal Rule of Evidence 408—which in any event is not controlling in NRC adjudications<sup>109</sup>—is unavailing, especially when the Board itself clarified that it was not acting as a settlement judge.<sup>110</sup> Given the substantial deference the Commission accords the Board's rulings on the merits of admitted contentions, those conclusions should go undisturbed.<sup>111</sup>

B. The Board's Holding That the Staff Fulfilled Its NEPA Obligation Did Not Rely Solely on Board-Submitted Exhibits

The Tribe asserts that the Board “erred, as a matter of law, by...basing its merits decision on the ‘evidence’ derived from the Board’s reliance on its own exhibits.”<sup>112</sup> And the Tribe bases its argument that the Board improperly based its decision on exhibits BRD-001—013 on its assertion that “[t]he parties, not the Board, are required to present evidence to meet their respective burdens in the adversarial hearing.”<sup>113</sup> Contrary to the Tribe’s implications, however, the Board-submitted exhibits were not the focus of (much less dispositive of) the Board’s decision in LBP-19-10. Rather, in holding that the Staff had satisfied NEPA’s obligation

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<sup>109</sup> See Fed. R. Evid. 408; *S. Cal. Edison Co.* (San Onofre Nuclear Generating Station, Units 2 & 3), ALAB-717, 17 NRC 346, 365 n.32 (1983).

<sup>110</sup> See Order (Denying Oglala Sioux Tribe Motion to Strike), at 6 (Aug. 12, 2019) (unpublished) (ML19224B885). To the extent that the Tribe seeks review of the Board’s August 12, 2019 ruling by simply alluding to arguments from its August 2, 2019 motion to strike, the Commission should also deny review of that ruling. The Tribe states in passing that it seeks review of the Order but never explains why it is warranted. See Tribe’s Petition for Review at 1. Absent a reasoned justification for the appeal, the claim does not meet the requirements for Commission review. See *Shieldalloy Metallurgical Corp.*, CLI-07-20, 65 NRC at 503-05.

<sup>111</sup> See, e.g., *Pa’ina Hawaii*, CLI-10-18, 72 NRC 56, 72–73 (2010) (stating that the Commission refrains from making *de novo* findings of fact “in situations where a Licensing Board has issued a plausible decision that rests on carefully rendered findings of fact.”).

<sup>112</sup> Tribe’s Petition for Review at 20.

<sup>113</sup> *Id.* at 22.

to take a reasonable hard look at potential impacts to Native American cultural resources, the Board-submitted exhibits were a small part of the much broader factual record, which spanned over ten years' worth of documents and on-the-record transcripts.<sup>114</sup> The Tribe does not dispute the relevance of any of the Board-submitted exhibits, nor does it explain how their consideration impeded the Tribe's opportunity to present its own case or adversely affected the legal or factual accuracy of any of the Board's findings. In short, the Tribe has not demonstrated in what way "issues material to the resolution of its contention were ignored or not explored fully," when the record contains extensive documentation of the Tribe's own testimony and exhibits, and the Board decision reflects how those were considered.<sup>115</sup> Further, supplementing the existing record with Board-submitted exhibits is not without precedent,<sup>116</sup> and NRC regulations governing this proceeding do not prohibit such supplementation. Therefore, the Tribe's claims that the Board exceeded its authority by admitting BRD-001–013 are without merit.

In sum, the Board fulfilled its normal case management responsibilities and properly relied on a lengthy public record of the parties' interactions over nearly a decade. The Tribe has not articulated an explanation as to how it was prejudiced by the asserted procedural errors, nor has it provided a substantial question for review under 10 C.F.R. § 2.341(b)(4).

#### V. The Tribe Articulates No Error Warranting Commission Review of LBP-17-9

The Tribe also seeks review of LBP-17-9, in which the Board found that that the Staff complied with the NHPA and granted summary disposition on Contention 1B. But rather than

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<sup>114</sup> See, e.g., *Powertech*, LBP-19-10, 90 NRC \_\_, \_\_ (slip op. at 11 n.53, 43–44 n.217, 66 n.302 (citing Board-submitted exhibits among Staff-submitted exhibits and the transcript of the proceedings)).

<sup>115</sup> *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-09-7, 69 NRC 235, 280 (2009).

<sup>116</sup> See, e.g., *Crow Butte Resources, Inc.* (License Renewal for the In Situ Leach Facility, Crawford, Nebraska), LBP-16-7, 83 NRC 340, 405–09 (2016) (overruling Staff's objections to Board-submitted exhibits); *Progress Energy Florida, Inc.* (Levy County Nuclear Power Plant, Units 1 & 2), LBP-13-4, 77 NRC 107, 117 (2013) (admitting three documents as Board Exhibits BRD001–BRD003); Order (Notice of Admitting Board Exhibits 001 and 002) (Oct. 25, 2013) (unpublished) (ML13298A747) (*Fermi, Unit 3* proceeding).

identifying a Board error that meets the standards set forth in 10 C.F.R. § 2.341(b)(4), the Tribe states only a cursory disagreement with the Board's conclusion, claiming that "a single introductory face to face meeting" and "one follow up conference call" was insufficient to justify summary disposition.<sup>117</sup> The Tribe also reiterates its criticism of the Staff's efforts to resolve Contention 1A after LBP-17-9, asserting those efforts were insufficient to "allow for the Tribe to meaningfully participate" in a cultural resources survey "required by the interrelated NEPA and NHPA mandates."<sup>118</sup>

The Board in LBP-17-9 carefully examined the lengthy evidentiary record and determined that the Staff satisfied the NHPA's requirement to make reasonable, good faith efforts to consult with the Tribe.<sup>119</sup> It found that the material facts surrounding the consultation process were not in dispute: one in-person meeting (attended by high-level NRC Staff managers) and one teleconference occurred, in addition to numerous letters and emails that were sent prior to those meetings.<sup>120</sup> The Board described how, in the meetings and correspondence, the Tribe "provided meaningful, substantive input," and the Tribe "was afforded a reasonable opportunity to offer alternatives for a cultural resources survey."<sup>121</sup> Notably, the Board explained why the Staff's consultation fulfilled what the Board had previously stated (in LBP-15-16) would constitute a meaningful opportunity to consult under NHPA.<sup>122</sup> As the Board

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<sup>117</sup> Tribe's Petition for Review at 24.

<sup>118</sup> *Id.* at 25.

<sup>119</sup> See *Powertech*, LBP-17-9, 86 NRC at 173; 36 C.F.R. § 800.4(b).

<sup>120</sup> *Powertech*, LBP-17-9, 86 NRC at 188, 189–90.

<sup>121</sup> *Id.* Additionally, the Advisory Council for Historic Preservation (ACHP), the agency that promulgates the regulations to implement NHPA Section 106 and is also required to have a reasonable opportunity to comment on the federal undertaking, was satisfied with the Staff's efforts, stating that "based on the background documentation, the issues addressed during consultation, and the processes established in the [Programmatic Agreement], [it] concluded that the content and spirit of the Section 106 process has been met by [the] NRC." Ex. NRC-031, Letter from John Fowler, Executive Director, ACHP, to Waste' Win Young, Standing Rock Sioux Tribe Historic Preservation Officer (Apr. 7, 2014) (ML14115A448).

<sup>122</sup> *Powertech*, LBP-17-9, 86 NRC at 188-90.

correctly found, the NHPA requires the Staff to make “a reasonable and good faith effort to identify historic properties” and to consult with the parties, but it does not require the Staff to “select a methodology it believes is unreasonable because a tribe prefers that method.”<sup>123</sup> The Tribe’s petition specifies no error in how the Board described the material facts or the applicable legal standard for NHPA consultation, only the Tribe’s dissatisfaction with the result.<sup>124</sup> Accordingly, it offers no basis for Commission review under 10 C.F.R. § 2.341(b)(4).

### CONCLUSION

The Tribe and Consolidated Intervenor have not identified any error in the Board’s rulings that warrants review under 10 C.F.R. § 2.341(b)(4). Accordingly, the Commission should deny the petitions.

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 13<sup>th</sup> day of February 2020

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<sup>123</sup> *Id.* at 184, 189; 36 C.F.R. § 800.4(b).

<sup>124</sup> To the extent the Tribe is challenging the disposition of Contention 1B based on criticism of the Staff’s subsequent efforts to resolve Contention 1A, it does not warrant Commission review of LBP-17-9. Those Staff efforts were directed to resolution of the NEPA contention (and in any event were not part of the record on which the Board granted summary disposition). As the Commission has observed in this proceeding, “NHPA and NEPA are separate statutes imposing different obligations on the Staff.” *Powertech (USA), Inc.* (Dewey-Burdock *In Situ* Uranium Recovery Facility), CLI-18-7, 88 NRC 1, 4 (2018).

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
	)	ASLBP No. 10-898-02- MLA-BD01
	)	
(Dewey-Burdock In Situ Uranium Recovery	)	Date: February 13, 2020
Facility)	)	

CERTIFICATE OF SERVICE

Pursuant to 10 C.F.R. § 2.305, I hereby certify that copies of the “NRC STAFF’S ANSWER OPPOSING PETITIONS FOR REVIEW” in this proceeding have been served via the Electronic Information Exchange (EIE), the NRC’s E-Filing System, this 13th day of February, 2020. Counsel for the Staff served those representatives exempted from filing through the EIE with copies of its update by electronic mail, also on February 13, 2020.

***/Signed (electronically) by/  
Lorraine Baer***

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