**[ORAL ARGUMENT NOT YET SCHEDULED]**

**No. 17-1059**

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**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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OGLALA SIOUX TRIBE,

Petitioner,

v.

UNITED STATES NUCLEAR REGULATORY COMMISSION and the UNITED STATES OF AMERICA,

Respondents.

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PETITION FOR REVIEW OF FINAL ORDER OF THE UNITED STATES NUCLEAR REGULATORY COMMISSION

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# INITIAL OPENING BRIEF OF PETITIONER OGLALA SIOUX TRIBE

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## CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES AND RULE 26.1 DISCLOSURE

Pursuant to D.C. Circuit Rules 15(c)(3), 26.1 and 28(a)(1), 32 counsel for Petitioner certifies as follows:

### 1. Parties, Intervenors, and Amici Curiae

The parties to this Petition for Review are Petitioner Oglala Sioux Tribe and Respondents United States Nuclear Regulatory Commission ("NRC" or "Commission") and the United States of America. Powertech (USA), Inc. has intervened. There are no Amici.

### RULE 26.1 DISCLOSURE STATEMENT

Petitioner Oglala Sioux Tribe is a sovereign government. It has no parent corporations and issues no stock or shares.

### 2. Rulings Under Review

Petitioner seeks review of the Nuclear Regulatory Commission's ("Commission") December 23, 2016 Memorandum and Order in *In the Matter of Powertech (USA), Inc.* (Dewey-Burdock In Situ Uranium Recovery Facility), Docket No. 40-9075-MLA, CLI-16-20 (December 23, 2016), which in turn affirmed several decisions of the Atomic Safety Licensing Board and NRC Staff – *e.g.*, *In the Matter of Powertech (USA), Inc.* (Dewey-Burdock In-Situ Uranium Recovery Facility), LPB-10-16, 72 NRC 361 (2010); *In the Matter of Powertech*



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*(USA), Inc.* (Dewey-Burdock In-Situ Uranium Recovery Facility), LBP-13-9, 78 NRC 37 (2013); *In the Matter of Powertech (USA), Inc.* (Dewey-Burdock In-Situ Uranium Recovery Facility), LBP-14-5, 79 NRC 377 (2014); *In the Matter of Powertech (USA), Inc.* (Dewey-Burdock In-Situ Recovery Facility), Order Removing Temporary Stay and Denying Motions for Stay of Materials License Number SUA-1600) (May 20, 2014); *In the Matter of Powertech (USA), Inc.* (Dewey-Burdock In-Situ Uranium Recovery Facility), LBP-15-16, 81 NRC 618 (2015); the Commission's January, 2014 Final Environmental Impact Statement ("EIS") for the Dewey-Burdock In-Situ Recovery Project in Custer and Fall River Counties, South Dakota, as amended; the April 8, 2014 Record of Decision for the project; and the April 8, 2014 Materials License No. SUA-1600, Docket No. 040-09075.

**3. Related Cases**

Petitioner is not aware of any related cases.



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# GLOSSARY

| | |
|---|---|
| ACHP | Advisory Council on Historic Preservation |
| AEA | Atomic Energy Act |
| APA | Administrative Procedure Act |
| ASLB or Board | Atomic Safety Licensing Board |
| FSEIS | Final Supplemental Environmental Impact Statement |
| ISL | In situ leach |
| NRC or Commission | Nuclear Regulatory Commission |
| NRC Staff | Nuclear Regulatory Commission Staff |
| NEPA | National Environmental Policy Act |
| NHPA | National Historic Preservation Act |
| Powertech | Powertech (USA), Inc. |
| PA | Programmatic Agreement |
| ROD | Record of Decision |



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## STATEMENT OF JURISDICTION

Jurisdiction in this case is based on the Commission's December 23, 2016 Memorandum and Order affirming decisions of the ASLB. CLI-16-20, 84 NRC __. JA__. The underlying decisions, in turn, found violations of NRC Staff's review of cultural resource impacts under the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321, *et seq.*, and the NRC Staff's consultation under the National Historic Preservation Act ("NHPA"), 54 U.S.C. §§ 300101, *et seq.*, yet left the license in place as fully active and effective and rejected the Tribe's challenges to several aspects of the NRC Staff's NEPA compliance related to the analysis of environmental impacts of and mitigation proposals for the mine project. Thus, included in the Tribe's Petition to Review to this Court are challenges the Commission's decision to uphold the 2014 FSEIS(JA__) and ROD(JA__) for the Dewey-Burdock Project, as well as the April 8, 2014 License (No. SUA-1600)(JA__).

The Commission's decisions are reviewable under 42 U.S.C. § 2239(b), 28 U.S.C. § 2342(4), 5 U.S.C. § 702, and Federal Appellate Rule 15. This Petition was timely filed on February 21, 2017. See 28 U.S.C. § 2344.

## STATEMENT OF ISSUES

1. Whether the Commission erred in upholding the grant of an effective license to conduct uranium mining and processing operations and possess and dispose of

radioactive processing wastes despite finding violations and lack of compliance with both the cultural resource impacts analysis required by NEPA and the government to government consultation required by the NHPA.

2. Whether the Commission erred in affirming an effective license, ROD, and FEIS that failed to include a reviewable plan for, or analysis of direct, indirect, and cumulative impacts of the storage, transport, and disposal of radioactive processing wastes.

3. Whether the Commission erred in affirming an effective license, ROD, and FEIS that failed to present an adequate analysis of the impacts and effects associated with the thousands of abandoned boreholes on ground water quality or the ability of the applicant to successfully identify and abandon thousands of boreholes, nor how these efforts would be undertaken and accomplished.

4. Whether the Commission erred in affirming an effective license, ROD, and FEIS that failed to adequately assess baseline water quality conditions, and deferred the collection of monitoring data to the future.

5. Whether the Commission erred in affirming an effective license, ROD, and FEIS that failed to include an adequate analysis of mitigation measure and their effectiveness for impacts to the cultural, historical, and religious sites of the Oglala Sioux Tribe as well as unreviewed plans to mitigate other impacts to the environment.



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6. Whether the Commission erred in affirming an effective license and ROD based on a FEIS despite finding a failure to conduct lawful scoping process, thereby limiting the input from the affected public and the analysis of other federal agencies.

7. Whether, as asserted in the NRC's Motion to Dismiss filed with this Court on March 17, 2017, this Court lacks jurisdiction for lack of a final action as contemplated by the Hobbs Act, 28 U.S.C. § 2342.

## STATUTES AND REGULATIONS

The pertinent provisions of the Atomic Energy Act, 42 U.S.C. §§ 2011, *et seq.*, and implementing regulations, the NHPA, 54 U.S.C. §§ 300101, *et seq.*, and pertinent implementing regulations, the NEPA, 42 U.S.C. §§ 4321, *et seq.*, and pertinent implementing regulations, and Hobbs Act, 28 U.S.C. § 2342, are set forth in the Addendum.

## STATEMENT OF THE CASE

This case concerns the proposed Dewey-Burdock in situ leach ("ISL") uranium mine project in the Black Hills of South Dakota. The project lands are within the traditional aboriginal territory of the Oglala Sioux Tribe ("Tribe"), and included in the 1851 Fort Laramie Treaty and the 1868 Fort Laramie Treaty (15 Stat., 635). A significant number of cultural, historic, and archaeological resources have been identified in the Project area, including burial sites. FSEIS at

3-76 to 3-83. JA__. The Tribe has not had a meaningful opportunity to participate in the assessment or determination of the significance of the identified sites, development of mitigation measures that might be employed, nor had the opportunity to identify additional sites that may warrant evaluation or listing. The Applicant and NRC have entered into a Programmatic Agreement regarding analysis and evaluation of historic, cultural, and archaeological sites, but have not included the Tribe in this Agreement. JA__.

The Tribe also owns lands near the proposed project, leased for domestic, agricultural, water development, conservation, and other purposes. The Tribe derives benefit and value, economically and otherwise, from its lands, and has a strong interest in ensuring that these lands and waters remain in an unpolluted state. The Tribe brings this Petition for Review because the project poses serious threats to the Tribe's cultural, historic, economic, and conservation interests.

Throughout the administrative process, the Tribe's primary concerns have consistently been the lack of compliance with NEPA, the NHPA, and NRC regulations regarding protection of the Tribe's cultural and historic resources, and the lack of information necessary to determine the hydrogeology and geochemistry of the site and therefore protect groundwater from mining contamination. The latter includes the lack of a defensible baseline ground water characterization or a thorough review of the natural and manmade interconnections between aquifers in



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the area that may allow for cross-contamination with the aquifers slated for chemical mining.

Powertech proposes to mine uranium directly from the local aquifers using a process that involves injecting oxidized liquid mining fluid into an aquifer containing uranium deposits. The mining fluids are pumped under pressure through the ore zone, and the uranium and other heavy metals dissolve into the aquifer. The metal-bearing groundwater is then pumped back to the surface, where the uranium is separated out, processed into "yellowcake," and shipped to other facilities to be enriched for use as reactor fuel. After the uranium is removed, a portion of the fluid is recharged with oxygen and carbon dioxide and re-injected into the ore zone to repeat the cycle.

The long-term track record of ISL mine sites in the United States is replete with examples of failure to accurately predict groundwater dynamics, especially with respect to prevention of horizontal or vertical leakage, (called "excursions") and the inability to restore ground water to pre-mining conditions, as required. These impacts have occurred despite the repeated assurances from prospective mine operators that ISL mining is a safe and even benign activity. The recent factual record demonstrates that these projects are not benign, and that grounds for serious concerns exist concerning proper regulation of ISL mining.

The U.S. Geological Survey has confirmed that "[t]o date, no remediation of an ISR operation in the United States has successfully returned the aquifer to baseline conditions." Otton, J.K., Hall, S., *In-situ recovery uranium mining in the United States: Overview of production and remediation issues* (Abstract), U.S. Geological Survey, 2009, IAEA-CN-175/87ISL. JA__. This report goes on to state that "[o]ften at the end of monitoring, contaminants continue to increase by reoxidation and resolubilization of species reduced during remediation; slow contaminant movement from low to high permeability zones; and slow desorption of contaminants adsorbed to various mineral phases." Id. See also Hall, Susan, *Groundwater Restoration at Uranium In-Situ Recovery Mines, South Texas Coastal Plain*, U.S.G.S. Open-File Report 2009–1143 (2009) at 30. JA__.

The NRC Staff routinely allows for reductions in ground water standards away from baseline water quality. Thus, all the available evidence shows that all NRC-regulated ISL mining has resulted in degradation of ground water quality over the long-term. The question then becomes one of how much ground water degradation the NRC will allow, and how far the resulting contamination will spread.

The U.S. EPA has expressed substantial concerns with respect to the integrity of the ISL process in the West. March 3, 2010 Letter from Carol Rushin, Acting Regional Administrator, Region 8, U.S. EPA to Michael Lesar, Chief,

Rulemaking and Directives Branch, NRC. JA__. EPA cites the failure of NRC to "evaluate the potential effects that non-attainment of baseline groundwater restoration would have on surrounding [underground sources of drinking water]." Among the primary concerns raised related to ground water are the frequent relaxation of groundwater restoration standards and a lack of sufficient discussion of the causes of groundwater contamination outside the designated mining area at ISL sites. Id. at 4-5. JA__.

The FSEIS prepared for the Dewey-Burdock project held the opportunity for NRC Staff to address these long-standing problems. However, as discussed herein, the agency failed to do so. Instead of conducting the required NEPA process, the agency dispensed with the critically important scoping exercise, neglected to analyze impacts from the creation, transportation and disposal of radioactive wastes, deferred the collection of defensible baseline data and demonstrations of the ability to contain mining contamination until future non-NEPA processes, and failed to provide the required detail for environmental impact mitigation.

## STATEMENT OF FACTS

### A. Factual and Procedural Background

#### 1. Powertech's License Application and Tribe's Petition to Intervene

After its first combined source material and uranium processing license application was determined to be incomplete, Powertech resubmitted its



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application on August 10, 2009. JA__. On January 5, 2010, NRC Staff issued a notice providing interested and affected parties an opportunity to request a hearing on the application. 75 Fed.Reg. 467. On March 8 and 9, 2010, multiple local affected citizens petitioned to intervene in the NRC licensing proceedings raising multiple legal and factual issues (called "contentions") with the application. JA__. On March 18, 2010, NRC issued a notice announcing the establishment of an ASLB panel, made up of three administrative law judges, to preside over the administrative licensing process. 75 Fed.Reg. 13141.

On April 6, 2010, the Oglala Sioux Tribe also timely petitioned to intervene in the NRC licensing proceedings raising multiple legal and factual contentions. JA__. On August 5, 2010, the ASLB issued an Order (LPB-10-16, 72 NRC 361), granting the Tribe's petition to intervene and found several, but not all, of the Tribe's contentions admissible over the objections of NRC Staff and Powertech. JA__. Specifically, the ASLB admitted the Tribe's contentions alleging failure to comply with NEPA and the NHPA regarding: impacts to historic and cultural resources (Contentions 1A and 1B), protection of groundwater quality (Contention 2), establishment of baseline hydrogeologic conditions (Contention 3), and assessment of groundwater quantity impacts (Contention 4). JA__.

### 2. NRC Staff NEPA Process and ASLB Proceedings

On November 26, 2012, NRC issued a notice of the availability of the Draft SEIS for the Dewey-Burdock Project for public comment. 77 Fed.Reg. 70486. On January 10, 2013, the Tribe submitted timely comments on the Draft SEIS (JA__) and on January 25, 2013, the Tribe filed timely requests to admit several new or amended contentions in the licensing proceeding. JA__.

On July 22, 2013, the ASLB issued an Order (LBP-13-9, 78 NRC 37) granting the admission of three new NEPA-based contentions to the proceeding, over the objections of NRC Staff and Powertech. JA__. Specifically, the ASLB admitted the Tribe's contentions alleging the lack of analysis of: mitigation measures (Contention 6), connected actions (Contention 9), and Endangered Species Act consultation (Contentions 14A/B). The ASLB refused to allow any hearing on the alleged failure to review the impacts associated with the disposal of radioactive waste (known as "11e2 byproduct material"). JA__.

On January 29, 2014, NRC issued a notice of the availability of the Final SEIS for public comment. 79 Fed.Reg. 5468. Based on the FSEIS, on March 17, 2014, the Tribe submitted a request to admit new and amended contentions. JA__. On April 28, 2014, the ASLB issued an Order (LPB-14-5, 79 NRC 377) allowing the previously admitted contentions to "migrate" from the DSEIS to the FSEIS. JA__.

On April 8, 2014, despite the admitted contentions and prior to the administrative hearing, NRC Staff issued Powertech NRC License No. SUA-1600 (JA__) based on a ROD released the same day. JA__. Included in the ROD was a Programmatic Agreement ("PA"), which NRC Staff asserted was the culmination of its NHPA Section 106 Tribal Consultation process. JA__. The PA purported to resolve all issues related to the core NHPA Section 106 Tribal Consultation requirements of identifying of cultural resources at the site, evaluating those resources for eligibility of those resources for the National Register of Historic Places, and all mitigation for impacts to any such resources at the proposed mine site. Id. Not a single Tribe signed on to the PA, and the PA was adopted over the strong objections of the Tribes, who asserted that it was wholly inadequate to satisfy NRC Staff's NHPA Section 106 consultation obligations. JA__.

On April 14, 2014, the Tribe submitted a Motion to Stay the Effectiveness of Powertech's license. JA__. On May 20, 2014, after conducting telephonic oral argument, the ASLB issued an Order denying a stay of the effectiveness of License No. SUA-1600, finding that the Tribe could not meet the high burden of showing immediate irreparable harm necessary to uphold a stay. JA__.

In preparation for the evidentiary hearing scheduled to commence on August 19, 2014, all parties submitted statements of position outlining their legal and factual arguments regarding all admitted contentions. JA__. On August 1,



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2014, the ASLB denied the Tribe's motion to conduct any cross examination of Powertech's witnesses. JA__.

On August 16, 2014, prior to the hearing, the Tribe filed a motion to compel production of certain identified documents, including borehole data referenced in a Powertech press release dated July 16, 2014 (JA__) and Powertech's electronic mail message to the Licensing Board dated August 7, 2014. JA__.

On August 19-21, 2014, the ASLB held an evidentiary hearing in Rapid City, South Dakota, taking testimony from each of the parties' expert witnesses. JA__. At the conclusion of the hearing, the ASLB ruled from the bench that the withheld borehole log data should be disclosed by Powertech. JA__. By December 9, 2014, the Tribe, Powertech, and NRC Staff had submitted all supplemental testimony and exhibits regarding the post-hearing data disclosures.

On January 9, 2015 and January 29, 2015, all parties submitted final merits briefs and responses. JA__. These filings closed the administrative filings.

**3. ASLB Ruling on the Merits and Petitions for Review**

On April 30, 2015, the ASLB issued its merits ruling (LBP-15-16, 81 NRC 618). JA__. The ASLB found violations of NEPA in the failure to competently review the environmental impacts to Sioux cultural resources – largely because no competent survey had been conducted – and violations of the NHPA Section 106 government-to-government consultation requirements. Despite these violations of

federal law, and over the objections of the Tribe, the ASLB left the license in place and effective.

On May 26, 2015, all four parties to the administrative proceeding (NRC Staff, Tribe, Powertech, local citizens) filed NRC petitions for review. On December 23, 2016, the three sitting members of the NRC issued a final ruling on the petitions for review (CLI-16-20, slip.op.). JA__. Notably, the Commission split in its decision, with Commissioner Baran dissenting on the legality of leaving the license in place given the NEPA and NHPA violations, and Commissioner Svinicki dissenting on the finding of any NEPA and NHPA violations.

**B. <u>Background on NEPA Requirements</u>**

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).

In a NEPA document, the government 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).



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Closely related to NEPA's "hard look" mandate, NEPA prohibits reliance upon conclusions or assumptions that are not supported by scientific or objective data. "Unsubstantiated determinations or claims lacking in specificity can be fatal for an [environmental study] .... Such documents must not only reflect the agency's thoughtful and probing reflection of the possible impacts associated with the proposed project, but also provide the reviewing court with the necessary factual specificity to conduct its review." *Committee to Preserve Boomer Lake Park v. Dept. of Transportation*, 4 F.3d 1543, 1553 (10th Cir. 1993).

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 (Methodology and Scientific Accuracy). Further, where data is not presented in the NEPA document, the agency must justify not requiring that data to be obtained. 40 C.F.R. § 1502.22.

The CEQ regulations require 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). The statutory prohibition against taking agency action before NEPA compliance applies 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).



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To meet these requirements "an agency must set forth a reasoned explanation for its decision and cannot simply assert that its decision will have an insignificant effect on the environment." *Marble Mountain Audubon Society v. Rice*, 914 F.2d 179, 182 (9th Cir. 1990), *citing Jones v. Gordon*, 792 F.2d 821 (9th Cir. 1986).

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), *aff'd* 998 F.2d (9th Cir. 1993).

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).



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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 requires that all relevant information necessary for an agency to demonstrate compliance with NEPA be included in an environmental impact statement, and not in additional documents outside of the public comment and review procedures applicable to that environmental impact statement. 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."); *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*, 102F.3d1273, 1287 (1st Cir. 1996), *cert. denied sub nom. Loon Mountain Recreation Corp. v. Dubois*, 117S. 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.' . . . Because of the importance of NEPA's procedural and informational aspects, if the agency fails to properly circulate the required issues for review by interested parties, then the EIS is insufficient even if the agency's actual decision was informed and well-reasoned."); *Grazing Fields Farm v. Goldschmidt*, 626 F.2d 1068, 1072 (1st Cir.1980) (same).

## C. Background on NHPA Standards

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 Advisory Council on Historic Preservation ("ACHP") determines the methods for compliance with the NHPA's requirements. See *National Center for Preservation Law v. Landrieu*, 496 F. Supp. 716, 742 (D.S.C.), *aff'd per curiam,* 635 F.2d 324 (4th Cir. 1980). The ACHP's regulations "govern the implementation of Section 106," not only for the Council itself, but for all other federal agencies. Id.

NHPA § 106 requires 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." 54 U.S.C. § 302909. 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).

If an undertaking is the type that "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. 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. 54 U.S.C. § 302706(b). Consultation must provide the tribe "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).

Apart from requiring that an affected tribe be 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). The ACHP has published guidance specifically on this point, reiterating that consultation must begin at the earliest possible time in an agency's consideration of an undertaking, framing such early engagement with the Tribe as an issue of respect for tribal sovereignty. ACHP, Consultation with Indian Tribes in the Section 106 Review Process: A Handbook (November 2008), at 3, 7, 12, and 29. JA__.

Regarding respect for 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). 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. The federal courts echo this principle in mandating all federal agencies to 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").

NRC Staff is not entitled to deference to an agency interpretation of an ambiguous statutory provision involving Indian affairs. In the usual circumstance, "[t]he governing canon of construction requires that 'statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit.' This departure from the [normal deference to agencies] arises from the fact that the rule of liberally construing statutes to the benefit of the Indians arises not from the ordinary exegesis, but 'from principles of equitable obligations and normative rules of behavior,' applicable to the trust relationship between the United States and the Native American people." *California Valley Miwok Tribe v. United States*, 515 F.3d 1262 (D.C. Cir. 2008) *quoting Albuquerque Indian Rights v. Lujan*, 930 F.2d 49, 59 (D.C. Cir. 1991); *Cobell v. Norton*, 240 F.3d 1081, 1101

(D.C. Cir. 2001)(*quoting Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766, (1985)).

## SUMMARY OF ARGUMENT

The Commission violated NEPA and the NHPA in issuing an active and effective license to Powertech despite finding the FSEIS and ROD violate NEPA and the NHPA. Second, the Commission erred in refusing to allow a hearing on the Tribe's contention that the FSEIS failed to adequately analyze the storage, transportation, and disposal of radioactive wastes – and the FSEIS in fact failed to adequately analyze the same as required by NEPA, relying instead on a license condition simply requiring disposal to occur in compliance with applicable laws. Third, the Commission erred in finding the FSEIS adequately assessed the impacts and risks associated with thousands of historic abandoned bore holes and geologic faults in the project area – again substituting a mere license condition requiring the licensee to attempt to locate and seal the boreholes instead of the analysis required by NEPA. Fourth, the Commission violated NEPA and AEA regulations in failing to require the collection of admittedly necessary baseline water quality data, deferring that collection and analysis instead to a post-license and post-NEPA review. Fifth, the Commission violated NEPA by failing to require an adequate discussion of mitigation measures and their effectiveness in the FSEIS for impacts to cultural sites as well as the environment. Sixth, the Commission violated NEPA



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in excusing the failure of NRC Staff to conduct a scoping process prior to the completion of the FSEIS, which resulted in the inability of the Tribe to influence the process as contemplated by NEPA. Lastly, the Commission's December 23, 2016 Order is a final action as contemplated by the Hobbs Act, and is properly subject to this Court's jurisdiction.

## STANDING

The Oglala Sioux Tribe is a federally-recognized Indian Tribe, located on the Pine Ridge Reservation. The Oglala Sioux Tribe is a body politic comprised of approximately 41,000 citizens, with territory of over 4,700 square miles in southwestern South Dakota. The Oglala Sioux Tribe is the freely and democratically-elected government of the Oglala Sioux people, with a governing body duly recognized by the Secretary of Interior. The Oglala Sioux Tribe is the successor in interest to the Oglala Band of the Teton Division of the Sioux Nation, and is a protectorate nation of the Unites States of America. The Oglala Band reorganized in 1936 as the "Oglala Sioux Tribe of the Pine Ridge Indian Reservation" under section 16 of the Indian Reorganization Act of June 18, 1934, ch. 576, 48 Stat. 987, 25 U.S.C. § 476, and enjoys all of the rights and privileges guaranteed under its existing treaties with the United States in accordance with 25 U.S.C. § 478b.



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The Oglala Sioux Tribe has Article III standing in light of the risks the Dewey-Burdock Project poses to its members, as set forth in the Declaration of Trina Lone Hill, Oglala Sioux Tribal Historic Preservation Officer (filed with this Court March 24, 2017; Doc. #1667830 (Docketing Statement)) which testifies to the Tribe's interest in protecting its cultural and historical resources, along with its lands, natural resources, economic prosperity, and the health, safety, welfare of the tribal members as well as the public. A favorable decision from this Court will redress these injuries caused by the Project. See *Sierra Club & La. Envtl. Action Network v. EPA*, 755 F.3d 968, 973 (D.C. Cir. 2014) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

## ARGUMENT

### A. The Nuclear Regulatory Commission Cannot Leave a License in Place in the Face of NEPA and NHPA Violations

The ASLB, as affirmed by the NRC, found 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, 81 NRC 618, 657, *affirmed by* CLI-16-20 (slip.op.). Despite this finding of violations and a lack of compliance with both NEPA and the NHPA, the NRC nevertheless allowed the ROD and the license itself to stand. Granting a license despite the agency's admitted violation of NEPA and NHPA



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finds no basis in law and was forcefully challenged in Commissioner Baran's dissent:

> the agency did not have an adequate environmental analysis at the time it decided whether to issue the license. In fact, the deficiencies in the NEPA analysis remain unaddressed today, and therefore the Staff still cannot make an adequately informed decision on whether to issue the license. The Staff's licensing decision was based on (and continues to rest on) an inadequate environmental review. As a result, the Staff has not complied with NEPA.
>
> CLI-16-20 (slip.op.) at 66 (Baran dissent at *1). JA__.

On judicial review, the NEPA violation is governed by the APA, which provides that the reviewing court shall "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). The D.C. Circuit recognizes this plain language and confirms that vacatur is the "standard remedy" for a NEPA violation. *Pub. Employees for Envtl. Responsibility v. U.S. Fish & Wildlife Serv.*, 189 F. Supp. 3d 1, 2 (D.D.C. 2016) (*quoting Humane Soc'y of U.S. v. Johanns,* 520 F. Supp. 2d 8, 37 (D.D.C. 2007)). Here, the administrative adjudication confirmed NEPA and NHPA violations but left the license in place, a result that must be held unlawful and set aside. 5 U.S.C. § 706(2)(A). "[B]oth the Supreme Court and the D.C. Circuit Court have held that remand, along with vacatur, is the presumptively appropriate remedy for a violation of the APA." *Sierra Club v. Van Antwerp*, 719 F.Supp.2d 77, 78 (D.D.C. 2010) *citing Monsanto Co. v. Geerston Seed Farms*, 561 U.S. 139 (2010).



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Allowing the agency to bypass its NEPA and NHPA violations is contrary to the statutory requirements that compliance precede and inform the agency action, which here, is the license to conduct operations and possess/dispose of 11e2 byproduct material. Id. Here, the Commission exercised review over this important issue, but declined to ensure that its programs maintain compliance with its NEPA/NHPA mandates before issuing a license to carry out processing and mining of uranium that pose grave threats to the environment and the Tribe's interests.

NHPA Section 106 specifically requires that the NRC "shall, … **prior to the issuance of any license**, … take into account the effect of the undertaking…." 54 U.S.C. § 306108(emphasis added). Similarly, "[u]nder NEPA, each federal agency must prepare an Environmental Impact Statement ('EIS') **before taking** a 'major Federal action[] significantly affecting the quality of the human environment.' 42 U.S.C. § 4332(2)(C)." *New York v. NRC*, 681 F.3d 471, 476 (D.C. Cir. 2012), *accord*, 40 C.F.R. § 1500.1(b)("NEPA procedures must ensure that environmental information is available to public officials and citizens before decisions are made and before actions are taken.").

Given that the Commission confirmed the failure to comply with NEPA and the NHPA regarding consideration of impacts to cultural and historical resources of the Oglala Sioux Tribe, the proper remedy is to vacate the decision and remand

back to the agency for further proceedings necessary to achieve compliance. See *New York v. NRC*, 681 F.3d 471 (D.C. Cir. 2012).

### B. Failure to Address Impacts Associated with Creation and Transport of Radioactive Waste

The Commission upheld in summary fashion the ASLB's rejection of consideration of the Tribe's contention that NRC Staff failed to analyze the impacts of creation, storage, transport, and disposal of radioactive waste. CLI-16-20 (slip.op.) at 13-14. JA__. The Tribe raised this issue three separate times, only to have the Board side-step the issue each time. Id. Under applicable regulations, the Board must admit a contention where an intervenor provides (a) "a specific statement of the issue of law or fact to be raised," (b) an explanation as to how "the issue raised . . . is within the scope of the proceeding," and (c) "sufficient information to show that a genuine dispute exists . . . ." 10 C.F.R. § 2.309(f)(1). The Commission upheld the ASLB's ruling that the Tribe failed to "substantively dispute the analysis of impacts" in the FSEIS. CLI-16-20 (slip.op.) at 13. However, the Commission failed to review or cite any of the Tribe's filings, which do provide a "substantive" dispute. As such, the Commission's ruling is without basis in, and contrary to, the record. See Tribe's contention pleadings. JA__. One proper remedy would be a remand for the NRC to consider this issue. However, this Court should take up the issue, as it is a matter of law that does not require the development of a factual record.



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The FSEIS designates the White Mesa Uranium Mill near the White Mesa Ute Community in Utah as the site for disposal of more than 300 cubic yards of radioactive 11e2 byproduct wastes generated annually by at the proposed Powertech facility and other ISL facilities in the region. FSEIS at 2-53. JA__. However, the White Mesa Mill is not licensed to receive or dispose of Powertech's radioactive wastes. The license does not authorize Powertech to dispose of solid 11e2 byproduct Material at White Mesa. No NRC NEPA document addresses the cumulative impact or alternatives to using the White Mesa Mill as the disposal facility for the radioactive wastes.

The FSEIS fails to provide a meaningful review of foreseeable impacts of the wastes by merely stating that permanent disposal will occur in conformance with applicable laws, but without analysis of the applicable criteria of regulations applicable to 11e2 byproduct material disposal. FSEIS at 2-53. JA__. This failure to analyze the creation, storage, transport, and disposal of radioactive waste violates NEPA and implementing regulations. *New York v. NRC*, 681 F.3d 471, 476 (D.C. Cir. 2012), *accord*, 40 C.F.R. § 1500.1(b).

Instead, NRC must ensure that the impacts and alternatives of creation, storage, and disposal of radioactive wastes are fully analyzed and addressed. Permanent disposal of solid 11e2 byproduct material is a central feature of the modern Uranium Mill Tailings Radiation Control Act licensing regime under



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which Powertech seeks to operate its ISL facility. 10 C.F.R. Part 40, Appendix A. Nowhere do NRC regulations or NEPA allow reliance on the mere assertion that 11e2 byproduct materials will be handled in accordance with applicable law without further analysis. The opposite is required by federal law: the FSEIS firmly identifies the White Mesa Mill as the repository for its waste, and the FSEIS must analyze all impacts and alternatives involved with disposing of wastes created at an ISL facility, including the permanent disposal of 11e2 byproduct materials generated at the facility. The FSEIS reveals that Powertech proposes to create and store 11e2 byproduct materials on site for an indefinite period, with no disposal license, and no analysis of the impacts or alternatives to shipment and disposal at White Mesa. FSEIS at 3-116, 4-237. JA__.

The relevant regulations applicable to new uranium processing operations state in plain language:

> ***Every applicant for a license to possess and use source material in conjunction with uranium or thorium milling***, or byproduct material at sites formerly associated with such milling, ***is required by the provisions of § 40.31(h) to include in a license application proposed specifications relating to*** milling operations and ***the disposition of tailings or wastes resulting from such milling activities***.

10 C.F.R. Part 40 Appendix A (emphasis added). This regulation and NEPA require NRC to ensure that the specific proposal include plans for disposition of tailings and wastes. However, the FSEIS confirms that the White Mesa mill lacks

a license from Utah to accept and dispose of the wastes created by the draft license or other NRC-licensed ISL facilities in the region. FSEIS at 3-116. JA__.

Interstate transportation impacts across the Intermountain West are recognized, but are dismissed without specific analysis asserted on the naked assertion that impacts of shipping yellowcake to Tennessee in sealed containers poses the same risks as shipping 11e2 byproduct materials across the Intermountain West, for disposal at White Mesa. FSEIS at 4-22. JA__. The FSEIS presents no information on the type of containers that would be required for the shipments to White Mesa and no corresponding information on the moisture content of the11e2 byproduct materials or the anticipated decommissioning wastes. FSEIS at 4-22. JA__.

Ongoing NRC problems with delaying waste disposal decisions until after wastes are created should confirm that NEPA analysis and UMTRCA licensing cannot reasonably wait until a later time to be determined after the waste-generated activity is licensed. See *New York v. NRC*, 681 F.3d 471, 483 (D.C. Cir. 2012)(rejecting NRC attempts to avoid NEPA analysis of permanent disposal options).

NEPA regulations specifically require the agency to review all direct, indirect, and cumulative impacts related to the activity under review. 40 C.F.R. §§1502.16, 1508.8, 1508.25(c). Direct effects are caused by the action and occur

at the same time and place as the proposed project. §1508.8(a). Indirect effects are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable. §1508.8(b). Types of impacts include "effects on natural resources and on the components, structures, and functioning of affected ecosystems," as well as "aesthetic, historic, cultural, economic, social or health [effects]." Id. Cumulative effects are defined as:

> [T]he impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.

40 C.F.R. §1508.7.

Federal courts have rejected the argument that an EIS for a mining operation did not have to fully review the impacts from off-site ore processing and transportation. In *South Fork Band Council of W. Shoshone of Nev. v. Dep't of the Interior,* 588 F.3d 718, 725 (9th Cir. 2009), the Ninth Circuit found that an EIS violated NEPA in reviewing and approving a mining plan because it failed to evaluate the environmental impacts of transporting and processing the ore at an off-site facility. "The air quality impacts associated with transport and off-site processing of the five million tons of refractory ore are prime examples of indirect effects that NEPA requires be considered." Id.

In another decision considering a challenge to federal approval of mineral leasing and mining, the court required an agency to look at the impacts from the proposed mill that would process ore from mines/leases, despite the fact that the proposed mill would be on private lands and despite the fact that the mill was not directly associated with the mines/leases being proposed and was not included in the lease/mining proposals. *Colorado Environmental Coalition v. Office of Legacy Management*, 819 F.Supp.2d 1193, 1212 (D. Colo. 2011). Similarly, here, the agency's failure to analyze the impacts from the processing and transportation of the ore from the Dewey-Burdock site violates NEPA.

### C. The FSEIS Fails to Adequately Analyze the Groundwater Quality Impacts Associated with the Thousands of Abandoned Boreholes and Faults at the Site.

The Commission upheld the Board's finding of a NEPA deficiency regarding hydrogeological information, but excused this violation based on a new license condition added to cure this deficiency. See CLI-16-20 (slip.op.)(Baran Dissent) at 66, FN2. Thus, instead of conducting the required NEPA analysis, the agency relies on a license condition requiring the applicant to submit adequate hydrogeologic data – but only **after** the NEPA process is completed, after a license is issued, and with no chance for any public review. See e.g., FSEIS at E-51 ("The commenter is correct in stating that wellfield hydrogeologic data packages will not be made available for public review. However, by license condition, all wellfield

data packages must be submitted to NRC for review prior to operating each wellfield (NRC, 2013b). . . . Text was revised in SEIS Section 2.1.1.1.2.3.4 to clarify NRC license conditions with respect to review and approval of wellfield data packages at the proposed Dewey-Burdock ISR Project."). JA__. This approach violates NEPA – the lack (and deferral of collection and review to a later date) of necessary data and analysis to ensure a credible and NEPA and NRC regulation-compliant review of impacts to groundwater.

This approach to collect data later also violates 10 C.F.R. Appendix A, Criteria 5G(2), which specifically requires:

> The information gathered on boreholes must include both geologic and geophysical logs in **sufficient number and degree of sophistication to allow determining significant discontinuities, fractures, and channeled deposits of high hydraulic conductivity.**

10 C.F.R. Appendix A, Criteria 5G(2)(emphasis added).

This issue is addressed head-on by the Tribe's expert witness, Dr. Moran, who provided expert testimony on the significant contradictory evidence in the application and the FSEIS, including numerous potential pathways for groundwater conductivity, including inter-fingering sediments, fractures and faults, breccia pipes and/or collapse structures, and the 4000 to 6000 unidentified exploration boreholes present at the mine site. Exhibit OST-001, at 18-22. JA__. Regarding the poor condition of the historic boreholes, the Tribe's expert Dr. LaGarry's review demonstrates: 140 open, uncased holes; 16 previously cased,

redrilled open holes; 4 records of artesian water; 13 records of holes plugged with wooden fenceposts; 6 records of holes plugged with broken steel; 12 records of faults within or beside drilled holes; and 1 drawing of 2 faults and a sink hole within a drilled transect. Exhibit OST-029 (Written Supplemental Testimony of Dr. Hannan LaGarry) at 2. JA__.

The live testimony during the administrative hearing also demonstrates that the FSEIS fails to demonstrate an ability to contain the mining fluid. Applicant witness Mr. Lawrence readily admitted that to ensure containment of the fluid, the operator would need for the Fuson Shale to be relatively impermeable. August 20, 2014 Transcript at p. 1047, lines 20-23. JA__. However, as observed by Administrative Judge Barnett, "[i]nterpretations of both the 1979 and 2008 pumping test results were found to be consistent with a leaky confined aquifer model. … Based on the results of the numerical model, the Applicant concluded that vertical leakage through the Fuson shale is caused by improperly installed wells or improperly abandoned boreholes. So it does appear in the FSEIS that it acknowledges that it is leaky, whether it is coming from boreholes or whatever else, it is leaky." Id. at p. 1050, line 18 to p. 1051, line 5. JA__. In response, NRC Staff witness Mr. Prikryl responded: "Yes, that's correct." Id. at p. 1051, line 8. Applicant witness Mr. Lawrence also agreed: "Yes, there were certainly conditions that demonstrated communication." Id. at 1051, lines 15-16. JA__.

Critically, however, Mr. Lawrence then admitted that the required additional analysis would occur "outside of the FSEIS." Id. at p. 1052, lines 6-8. JA__. This critical admission demonstrates that, although impermeability of the Fuson shale is critical to effective fluid migration, the Fuson shale is leaking, and all additional review of that significant problem was deferred until after the NEPA process.

Instead of conducting the scientific review necessary to determine the hydrogeology conditions of the area, the FSEIS simply proposes to allow the applicant to collect this information in the future, after NEPA is complete and after a license is issued, through a so-called Safety and Environmental Review Panel (SERP). FSEIS at 2-18. JA__. Notably, this post-NEPA SERP review is not just a confirmation of information already in existence – rather:

> The wellfield hydrogeologic data package will describe the wellfield, including (i) production and injection well patterns and location of monitor wells; (ii) documentation of wellfield geology (e.g., geologic cross sections and isopach maps of production zone sand and overlying and underlying confining units); (iii) pumping test results; (iv) sufficient information to demonstrate that perimeter production zone monitor wells adequately communicate with the production zone; and (v) data and statistical methods used to compute Commission-approved background water quality….

Id. JA__.

Such a scheme violates the public disclosure and "hard look" impact review requirements of NEPA, which requires such basic information to be presented and analyzed in the FSEIS. The promised analysis will be conducted in the future, outside NEPA process, and cannot excuse an FSEIS that does not contain

admittedly necessary information. *South Fork Band Council v. Dept. of Interior*, 588 F.3d 718, 726 (9th Cir. 2009). The FSEIS provides no information even on where the mysterious leaking boreholes are, or why the applicant and NRC Staff could not have conducted available analyses or find and plug the boreholes, rerun the test and demonstrate the ability to retain confinement.

Upon further questioning by Administrative Judge Barnett, the applicant witness Mr. Demuth admitted that the applicant's test data did show a lack of sufficient confinement at least in portions of the project area "where we have a well which is completed in both zones and allows it to communicate." Id. at p. 1054, lines 11-13. JA__. In that case, Mr. Demuth states, "there may be one or two unplugged exploration boreholes which are identified in the application. So in that area, the wellfield, any wellfield test is going to have to be examined very carefully." Id. at 1054, lines 12-17. JA__. Thus, sufficient study has not been completed to demonstrate the ability to contain the mining fluids, but rather a later, post-NEPA, detailed scientific review will be necessary to "examine" this issue "very carefully." NEPA requires more. Where such serious questions exist as to such fundamental issues as the ability to contain mining fluids, those issues must be explored and resolved in the FSEIS.

Similarly, testimony given by Dr. LaGarry at the hearing demonstrated that the analysis in the FSEIS failed to account for faults and fractures in the geology at

the site which could cause similar leaky conditions as have been confirmed in the confining layers at the site. See August 20, 2014 Transcript at p. 1065 line 7 to p. 1067, line 10. JA__. The TVA report also demonstrates faults and fractures are prevalent in the area. Exhibit OST-009 at 60. JA__. See also, August 20, 2014 Transcript at p. 1074, line 4 to p. 1077, line 23 (JA__)(Dr. LaGarry discussing the commonly overlooked faults and fractures in the area).

Together, the testimony, admissions, TVA report (Exhibit OST-009)(JA__), USGS report (Exhibit NRC-081)(JA__), and USGS-derived Gott map (Exhibit APP-015(f))(JA__), all show faults, fractures, and collapsed breccia pipes in the immediate area of the proposed project. Yet, the FSEIS fails to take the requisite "hard look" by not including any actual physical surveys to confirm or deny the presence of these geological features – especially considering the applicant's pump tests proving leaky confining layers.

**D. Failure to Adequately Analyze Water Quality Baseline**

In its Partial Initial Decision dated April 30, 2015, the ASLB ruled in favor of NRC Staff and Powertech that the FSEIS presents an adequate analysis of baseline water quality conditions at the site. JA__. This determination was upheld by the Commission. CLI-16-20. This ruling constitutes an error of law in that the Board misapplied NEPA and Commission precedent in *Hydro Resources, Inc.*, CLI-06-1, 63 NRC 1, 6 (2006) by following, without detailed analysis, the

ruling of another ASLB panel in *Strata Energy, Inc.*, LBP-15-3, 80 NRC ___ (Jan. 23, 2015).

NEPA requires the agency to fully "describe the environment of the areas to be affected or created by the alternatives under consideration." 40 C.F.R. §1502.15. The establishment of the baseline conditions of the affected environment is a fundamental requirement of the NEPA process:

> Establishing appropriate baseline conditions is critical to any NEPA analysis. "Without establishing the baseline conditions which exist ... before [a project] begins, there is simply no way to determine what effect the [project] will have on the environment and, consequently, no way to comply with NEPA." *Half Moon Bay Fishermans' Mktg. Ass'n v. Carlucci*, 857 F.2d 505, 510 (9th Cir. 1988).

*Great Basin Resource Watch v. BLM*, 844 F.3d 1095, 1101 (9th Cir. 2016)(EIS for mining project failed to obtain adequate baseline air quality data). "[W]ithout [baseline] data, an agency cannot carefully consider information about significant environment impacts. Thus, the agency fail[s] to consider an important aspect of the problem, resulting in an arbitrary and capricious decision." *Northern Plains v. Surf. Transp. Brd.*, 668 F.3d 1067, 1085 (9th Cir. 2011).

Here, the ASLB failed to properly interpret NEPA's requirement that adequate baseline data be provided and misapplied the *Hydro Resources, Inc.* and *Strata* results to render ineffective both 10 C.F.R. § 51.45(b) requiring a scientifically defensible analysis of baseline water quality, and 10 C.F.R. Part 40,

Appendix A, Criterion 5, requiring "complete" baseline data. The Board instead followed the NRC Staff and Powertech arguments that NEPA and the regulatory provisions can be effectively supplanted by the post-licensing establishment of "pre-operational" background quality associated with 10 C.F.R. Part 40, Appendix A, Criterion 7. See 81 NRC at 665-66.

The ASLB erred by endorsing the concept that baseline water quality can be established by "collection of groundwater quality data in a staggered manner" after the licensing process is complete and outside of the NEPA review. Id. at 665. In agreeing with the NRC Staff and Powertech, the Board also adopted the NRC Staff's unsupportable legal position that "the EIS is sufficient as long as it adequately describes the process by which the monitoring data will be obtained" in the future. Id. at 661. While additional data gathering in the future under Criterion 7 may be allowable under the NRC regulations, it is only proper for purpose of "confirming" the already "complete" baseline data required to be included as part of the application and analyzed in the NEPA document as per Criterion 5. See Id. at 665, quoting *Hydro Resources, Inc.*, 63 NRC at 6. Establishing the baseline water quality after licensing violates NEPA and NRC regulations.

Lastly, the ASLB, as affirmed by the Commission, abused its discretion by ignoring the Tribe's argument that NRC Staff's reliance on NRC Regulatory Guide

4.14 is unsupportable in the context of ISR mining. See 81 NRC at 665-66. NRC Regulatory Guide 4.14 is an outdated document, created in 1980, and applicable by its own terms only to conventional uranium mills. See Exhibit NRC-074. JA__. NRC Staff applied the Guide to establish only a 2 kilometer boundary for collecting baseline water quality. The ASLB accepted this 2 kilometer limit despite unrebutted evidence in the record that the 2 kilometer radioactive plume "rule" is inapplicable to and unreliable in the context of ISL. 81 NRC at 664, *quoting* Exh. NRC-076 (recognizing that "uranium plumes…[e]xceed roughly 2km in length only in special cases e.g. where in situ leaching has been carried out."). The Board also conceded that despite unsupported assertions by NRC Staff witnesses that 2 kilometers is sufficient for ISL sites, it "was unable to find a specific mention of a 2 kilometer radius" in the NRC Staff exhibits. Id. at 664, n. 284. As such, the Board's finding that NRC Staff properly relied on 35-year old, pre-UMTRCA, conventional milling guidance for setting 2 kilometer limits on baseline water quality data collection is not supported by the record.

Importantly, the ASLB expressly recognized the ambiguity and lack of clarity presented by the regulations and staff guidance with respect to these matters. Id. at 659. The Board also wrestled with the lack of clarity as to how the 10 C.F.R. Part 40, Appendix A Criteria is meant to apply to ISL operations. Id. at 637. Similarly, the Board noted with emphasis the fact that key terms such as

"baseline" and "background" are not defined with any precision in the 10 C.F.R. Part 40 regulations or Appendix A, nor in NRC Regulatory Guide 4.14. Id. at 659.

**E. Failure to Adequately Review Mitigation Measures**

The review of NEPA compliance is limited to the NEPA document – here the FSEIS – which is the means to meet NEPA's twin aims: 1) to satisfy the agency's "the obligation to consider every significant aspect of the environmental impact of a proposed action [;and, 2) to] ensure that the agency will inform the public that it has indeed considered environmental concerns in its decisionmaking process." *Baltimore Gas & Elec. Co. v. Nat'l Res. Def. Coun., Inc.*, 462 U.S. 87, 97 (1983) (internal citations and quotation marks omitted). Where the Court finds that the mitigation analysis within the FSEIS is inadequate, the inquiry into the legal sufficiency of the NEPA document is complete. Id.

In order to inform the public and decisionmakers, NEPA mitigation regulations requires that NEPA documents: (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 regulations define "mitigation" as a way to avoid, minimize, rectify, or compensate for the impact of a potentially harmful action. 40 C.F.R. §§ 1508.20(a)-(e). "[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*, 490 U.S. 332, 353 (1989)(emphasis supplied).

The FSEIS does not provide a "reasonably complete discussion" of mitigation, but rather mere mentions and snippets related to mitigation. These "snippets do not constitute real analysis." *Natural Resources Defense Council, Inc. v. Hodel*, 865 F.2d 288, 299 (D.C. Cir. 1988) (mere mention that protected species may be exposed to risks of oil spills did not provide lawful NEPA analysis).

Although perfection is not required, the incomplete and cursory mention of mitigation in the FSEIS does not meet the NEPA mandate. Among other things, "Congress authorizes and directs that, to the fullest extent possible [...] all agencies of the Federal Government shall [...] include in [...] a detailed statement by the responsible official on[...] any adverse environmental effects which cannot be avoided should the proposal be implemented." 42 U.S.C. § 4332(2)(C)(ii) *cited by Robertson v. Methow Valley Citizens Council,* 490 U.S. 332, 351-2 (1989).

Reliance on a future, as yet-unsubmitted, mitigation to prevent/mitigate adverse impacts to these resources also violates NRC duties under NEPA. NEPA, and NRC implementing regulations, require full review of these impacts as part of the public review process – something which has not occurred here.



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> As the D.C. Circuit explained, "whether the analysis is generic or site-by-site, it must be thorough and comprehensive." [...] Thus, the NRC must produce a comprehensive and thorough NEPA analysis of all NEPA issues [...], including mitigation [...], and if the issue is not covered in a generic EIS it must be covered in the site-specific NEPA document.

*In re Calvert Cliffs 3 Nuclear Project, LLC*, (Calvert Cliffs Nuclear Power Plant, Unit 3), LBP-12-18, 76 NRC 127, 178 (2012) *discussing New York v. NRC*, 681 F.3d at 480-81. NRC precedent confirms the duty to examine mitigation of impacts (including with respect to "environmental justice" communities) in NEPA documents.

> We expect NRC EISs, and presiding officers in adjudications, to inquire whether a proposed project has disparate impacts on "environmental justice" communities <u>and whether and how those impacts may be mitigated.</u>

*In Re Hydro Resources*, 53 N.R.C. 31, 64 (NRC 2001) (emphasis supplied) *citing Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77, 106-110 (1998)(remanding for consideration of mitigation measures).

As stated by NRC Staff Counsel during the hearing with respect to the ongoing creation of mitigation after the publication of the FSEIS, "I don't see how the Staff could have evaluated something that did not exist until after – until seven months after it finalized the EIS." August 19, 2014 Transcript at p. 917, lines 20-23 (Mr. Clark). JA__. Similarly, it is impossible for NRC Staff to have evaluated still-developing mitigation disclosed by the applicant after the hearing closed and never discussed or analyzed in the FSEIS. Exhibit OST-028 (10/7/2014 letter

confirming "programmatic agreement" resources "currently being developed" and estimating "treatment plan should be complete by or before the end of 2014.")(JA__); OST-027 (10/10/2014 U.S. FWS email requesting additional information on eagles and completion date of Avian Plan)(JA__); OST-024 (Eagle take permit request)(JA__); OST-023 (Draft Avian Plan)(JA__); OST-022 (7/8/2014 BLM letter requesting information on mitigation plans)(JA__).

Applicant counsel's assertions confirm the deficiency in the FSEIS in arguing that "mitigation plans are permitted to be developed after license issuance per the Hydro Resources case…." August 21, 2014 Transcript at p. 1210, lines 2-3 (Mr. Pugsley). JA__. Applicant's counsel then listed the as-yet developed mitigation relied upon in the FSEIS, such as "post-license issuance pump tests and hydrologic wellfield packages" (id. at lines 9-10) and "continuing consultation […] to develop and evaluate alternatives or modifications to the undertaking that could avoid, minimize or mitigate adverse effects on historic properties." Id. at p. 1210, line 25 to p.1211 line 3. JA__.

Applicant witness Ms. McKee confirmed the lack of any of this necessary analysis in the FSEIS:

> Reference to the plans are in numerous locations in the FSEIS. The plan is not finalized. It is a draft plan at this time. It is still being collaboratively developed with the state and federal agencies and it's being tweaked. The format and content of the draft plan has been changed just over the course of the last few months. But the plan will be finalized and approved by the

> South Dakota Department of Environment and Natural Resources and Game and Fish as a permit condition before any construction begins.

Id. at p.1253, lines 10-20. JA__. Thus, instead of analysis in the FSEIS, the mitigation plans are to be developed later, outside of the NEPA process.

Compounding the vague description of mitigation, the FSEIS does not contain evaluation of the effectiveness of potential mitigation measures and therefore does not meet NRC's NEPA duties. *South Fork Band Council v. Dep't of Interior*, 588 F.3d 718, 726 (9th Cir. 2009); *Neighbors of Cuddy Mountain v. U.S. Forest Serv.*, 137 F.3d 1372, 1381 (9th Cir. 1998) (disapproving an EIS that lacked such an assessment). NEPA requires that all agencies fully review whether the mitigation of mineral development activities will be effective. See *South Fork Band Council*, 588 F.3d 718, 728 (9th Cir. 2009).

The Supreme Court recognizes that the purpose of the mitigation analysis is to evaluate whether anticipated environmental impacts can be avoided, as is required by NEPA's plain language. *Robertson*, 490 U.S. at 351-52 (citing 42 U.S.C. § 4332(C)(ii)). A NEPA analysis of mitigation without evaluation of effectiveness is useless determining which impacts cannot be avoided. *South Fork Band Council*, 588 F.3d 718, 726 (9th Cir. 2009). For the same reason, the FSEIS must provide evidence of effectiveness, which in the present case would reveal reliance on untested mitigation measures that are not likely to eliminate impacts of the project:



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> [T]he Court holds that the Corps' reliance on mitigation measures that were unsupported by any evidence in the record cannot be given deference under NEPA. The Court remands to the Corps for further findings on cumulative impacts, impacts to ranchlands, and the efficacy of mitigation measures.

*Wyoming Outdoor Council v. U.S. Army Corps of Eng'rs*, 351 F. Supp. 2d 1232, 1238 (D. Wyo. 2005).

The need to document effectiveness in the FEIS is particularly appropriate where, as here, the effectiveness of mitigation is challenged in the comments. See Exhibit OST-011 (JA__). "The comments submitted by [plaintiff] also call into question the efficacy of the mitigation measures and rely on several scientific studies. In the face of such concerns, it is difficult for this Court to see how the [agency's] reliance on mitigation is supported by substantial evidence in the record." *Wyoming Outdoor Council*, 351 F. Supp. 2d at 1251, n. 8.

Instead of presenting well-developed mitigation plans and analyzing their effectiveness in eliminating impacts, the FSEIS simply lists and mentions mitigation measures, both in Chapter 6 and throughout the document, and asserts that they may be successful in eliminating or substantially reducing the Project's adverse impacts. The Court must review the FSEIS as the best evidence and may not simply "defer to the [agency's] bald assertions that mitigation will be successful." Id. at 1252. Mitigation must be "supported by …substantial evidence in the record." Id. Without the necessary analysis in the environmental document, the FSEIS "was arbitrary and capricious in relying on mitigation to conclude that

there would be no significant impact to [environmental resources]." Id. Where the FSEIS does not contain scientific evidence or analysis to support those claims, the FSEIS is noncompliant with NEPA.

The FSEIS' disclosure and analysis of impacts is untenable where the mitigation analysis consists largely, if not exclusively, of a list of plans to be developed later, outside the NEPA process. FSEIS at 6-1 through 6-19. JA__. For instance, regarding cultural resources impacts, the FSEIS concedes that consultation was not complete upon the conclusion of the NEPA process, including the lack a signed Programmatic Agreement, which is supposed to describe mitigation measures, and is subject to considerable controversy and objection by the Tribes. See FSEIS at 3-94 ("At this time, consultation on the evaluation and effects determination of historic properties is ongoing with all consulting parties, including interested tribes. The outcome of this consultation effort will be included in the programmatic agreement.")(JA__); "Mitigation measures identified in the licensee's management plan or site specific Memorandum of Agreement (MOA) or Programmatic Agreement (PA) could reduce an adverse impact to a historic or cultural resource by reducing the adverse effect on a historic property. (NRC, 2009a)." FSEIS at 4-157. JA__. See also, FSEIS at 1-16, 1-22, 5-47, 5-48 (JA__); FEIS at E-190, E-197(all expressly relying on as-of-yet uncompleted PA, with as-of-yet undersigned and unreviewed future plans to mitigate



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impacts)(JA__). Compare, Exhibit NRC-0016 (letters from Oglala Sioux Tribe President Brewer and Standing Rock Sioux Tribe)(JA__).

Instead of providing a reasonably complete NEPA discussion of mitigation and providing an analysis of the effectiveness of those mitigation measures, the FSEIS repeatedly refers to various commitments by the applicant to mitigate impacts by submitting plans in the future as a result of license conditions imposed by NRC Staff. These future plans encompass mitigation for a broad scope of impacts, including such basic elements as requiring the applicant to conduct hydrogeological characterization and aquifer pumping tests in each wellfield to examine the hydraulic integrity of the Fuson Shale, which separates the Chilson and Fall River aquifers; a commitment from the applicant to locating unknown boreholes or wells identified through aquifer pump testing, and committing to plugging and abandoning historical wells and exploration holes, holes drilled by the applicant and any wells that fail mechanical integrity tests. FSEIS at E-135 to 136. JA__.

However, no discussion or analysis is provided to explain how an applicant might go about identifying abandoned holes or analyzing the effectiveness of long-after-the-fact plugging and abandonment, nor is any discussion given to what methodology or effectiveness criteria accompanies the pump tests or monitoring well systems. Similar gaps in the analysis exist in the failure in the FSEIS to



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assess its plan to review groundwater restoration only for a period of 12 months. FSEIS at 2-40. JA__. There is no support of basis for this time period, nor any discussion of the basis or effectiveness of such a time period. Further, no alternative time periods were analyzed.

Other proposed groundwater impact mitigation that lacks reasonably complete NEPA review and analysis as to effectiveness include a proposed, but unevaluated, monitoring well network for the Fall River aquifer in the Burdock area for those wellfields in which the Chilson aquifer is in the production zone in order to "address uncertainties in confining properties of the Fuson Shale" because leakage may occur through the Fuson Shale and "draw-down induced migration of radiological contaminants from abandoned open pit mines in the Burdock area." FSEIS at E-135 to 136. JA__. Despite having none of this information or plans developed, the FSEIS nevertheless concludes that the risks of this type of contamination are "expected to be small." FSEIS at E-136. JA__. Such unsubstantiated conclusions based on unsubmitted, unreviewed, and even undeveloped mitigation plans are not allowable under NEPA.

The same problems exist where the FSEIS lacks sufficient detail and simply requires plans to be submitted in the future to address other impacts, including air impacts (FSEIS at E-163 to 164)(JA__), land disposal of radioactive waste (FSEIS at E-56)(JA__), wildlife protections (FSEIS at E-158 to 159) (conceding that the



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applicant is still in the process of "actively working on an avian monitoring and mitigation plan.")(JA__), and "BMPs" for storm water control (see August 21, 2014 Transcript at p. 1273, line 20 to p. 1278, line 24 for extensive discussion on the lack of any detail on "BMP's" in the FSEIS)(JA__). For the most part, these mitigation measures are simply plans to make plans at some point in the future – outside of the NEPA process and shielded from public review or comment. Such assurances, without any details as to the mitigation to be proposed and without evaluation of how effective these restorations efforts are expected to be, do not satisfy NEPA.

**F. Failure to Conduct Scoping**

In its July 22, 2013 Memorandum and Order (LBP-13-09, 78 NRC 37), the ASLB found inadmissible the Tribe's proposed Contention 8 asserting NRC Staff failed to conduct NEPA's mandatory scoping process. 78 NRC at 74-75. Specifically, the Board ruled that 10 C.F.R. § 51.26(d) applies and when a supplement to an EIS is prepared, "NRC staff need not conduct a scoping process," and that scoping meetings on the Generic Environmental Impact Statement (GEIS) satisfied NEPA's scoping requirement. Id. at 75.

The Commission overruled the Board's ruling. CLI-16-20. JA__. The Commission recognized that the exception contained in 10 C.F.R. § 51.26(d) does not apply to site-specific EISs, such as the one at issue here, simply because NRC

Staff labels it as a "supplement." The Commission referenced the NRC Office of Inspector General (OIG)'s Audit Report titled "Audit of NRC's Compliance With 10 CFR Part 51 Relative to Environmental Impact Statements" OIG-13-A-20 (August 20, 2013). JA__. The OIG's Audit Report concluded, with specific reference to the Dewey-Burdock project, that "NRC did not fully comply with the scoping regulations because of incorrect understanding of the regulations related to scoping for EISs that tier off of a generic EIS." OIG-13-A-20 at 24. JA__. The OIG Audit identifies the specific error NRC Staff commits as "refer[ring] to the tiered site-specific EIS as a 'supplement' to the generic EIS, leading to the belief that the exception in 10 C.F.R. 51.26(d) applies to tiered EISs." Id. The Audit Report discusses this issue in depth, illuminating the substantial policy issues and the resulting limited scope of NEPA analysis. Id. at 17-26. JA__.

Although it overruled the ASLB's ruling, the Commission nevertheless found the lack of a scoping process harmless error. CLI-16-20 (slip.op.) at 20-21.

However, the Commission ignored the Tribe's identification of the concrete consequences of having forsaken site-specific scoping, which denied the Tribe the opportunity, among other things, to provide input to help define the proposed action, identify significant issues to be analyzed in depth, provide input on alternatives that NRC Staff proposed to eliminate from study, and ensure that other environmental review and consultation requirements related to the proposed action



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be prepared concurrently and integrated with the DSEIS. 10 C.F.R. § 51.29(a)(1)-(5). The failure to conduct scoping also denied the Tribe the benefit of 10 C.F.R. § 51.29(b), which requires that NRC Staff "will prepare a concise summary of the determinations and conclusions reached, including the significant issue identified, and will send a copy to each participant in the scoping process." In this case, no such summary was prepared.

The illegally truncated scoping process deprived the Tribe of the opportunity to present its concerns at the proper time ("as soon as practicable")(§ 51.29(a)) and to have significant issues identified and addressed when NRC Staff created the scope of the NEPA process.

The Commission's disregard for these consequences us unsupportable under NEPA. While some public meetings were conducted during the NEPA process, none of them gave the Tribe (or the public) the required influence over the direction of the NEPA process at its inception.

### G. The NRC's Ruling Was A Final Agency Action Subject to This Court's Jurisdiction

The Commission's Final Order (CLI-16-20) affirmed a prior decision of the ASLB issued on April 30, 2015. 81 NRC 618. The Board found that the FEIS, ROD, and License were issued and the License made effective without compliance with federal law. The Commission's Order finalized the issuance of the fully effective license to Powertech despite the admitted lack of compliance with both



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NEPA as to the survey for, and analysis of impacts to, the Tribe's cultural resources present at the proposed mine site, and the NHPA as to the failure to conduct lawful government to government consultation on the impacts, and mitigation of impacts, for cultural resources.

The "Hobbs Act governs review of '[any] final order entered in any proceeding of the kind specified in subsection (a) [of section 2239].'" *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 733 (1985) *quoting* 42 U.S.C. § 2239(a)(1). "Subsection (a) proceedings are those 'for the granting, suspending, revoking, or amending of any license.'" Id. Review here is sought for orders filed in a "subsection(a)" proceeding, including a final order by staff granting a fully operative license, final orders by the ASLB refusing to hear contentions, a final order of the Commission that upheld the grant of the license and allowed the license to remain effective despite upholding the ASLB's adjudicated finding that NRC failed to meet its NEPA and NHPA duties.

In its previously filed Motion, the government focused on the fact that the Commission's December 2016 adjudicatory decision (CLI-16-20) directed NRC Staff to conduct further narrow investigations on a subset of issues raised by the Tribe's Petition. The Commission imposed no deadline to complete these investigations. According to the Commission, this means that no part of the Order is final and thus cannot be challenged, even though the order affirms the grant of

the license allowing uranium mining, processing, and radioactive waste disposal. The NRC position would effectively preclude Hobbs Act review of an effective license indefinitely, even where NRC adjudications twice confirmed the License was granted without compliance with applicable federal laws.

Without judicial review, NRC Staff is allowed an indefinite period to prepare *post hoc* rationalization to support an effective license the NRC confirmed was issued without NHPA/NEPA compliance, a result precluded by controlling authority cited by Commissioner Baran. CLI-16-20 (slip.op.) at 66, FN 1 (dissent) *citing Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989). This Circuit has recently rejected *the create waste now, analyze disposal later* approach in reviewing the waste confidence rule. *New York v. NRC*, 681 F.3d 471 (D.C. Cir. 2012)(holding the "Commission did not calculate the environmental effects of failing to secure permanent storage").

This case is therefore properly filed under the Hobbs Act where NRC Staff granted a license and then the ASLB and Commission both issued orders finding the NRC Staff had violated NEPA and NHPA yet left the license to process uranium and create waste as remaining valid and effective. The Tribe maintains that because the December 2016 Order is final as to the grant of the license, it thereby gives rise to Hobbs Act review.



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The Order affirmed the agency's issuance of the license to Powertech, which is immediately effective and allows Powertech to begin certain on-the-ground operations. As held by this Circuit, the issuance of a permit or license by the NRC authorizing operations qualifies as a "final order" subject to the review:

> The court has jurisdiction over 'all final orders of the [NRC] made reviewable by Section 2239 of title 42.' 28 U.S.C. § 2342 (Hobbs Act). Section 2239(a) permits review of '[a]ny final order' entered by the NRC in any proceeding 'for the granting, suspending, revoking, or amending of any license.'

*City of Benton v. NRC*, 136 F.3d 824, 825 (D.C. Cir. 1998). This is despite that some additional proceedings remain before the agency. See *Blue Ridge Environmental Defense League v. NRC*, 668 F.3d 747, 757 (D.C. Cir. 2012)("order issued during ongoing administrative proceedings is reviewable … if, for example, it authorizes a plant operator to operate at full power pending further review by the Commission"), *citing Massachusetts v. NRC*, 924 F.2d 311, 322 (D.C. Cir. 1991).[1] Here, Hobbs Act finality of the NRC Order is confirmed where the Commission refused to suspend the granting of the license or otherwise limit authorizations in Powertech's license, despite the Tribe's specific appeal argument on this point

[1] Although these cases deal with the "immediate effectiveness" of permits for nuclear reactors, the focus on whether NRC has authorized on-the-ground operations, which the Commission's Order does here, is the critical determination for finality.

(See Oglala Sioux Tribe Petition for Review at 18-19)(JA__), and over Commissioner Baran's dissent.

Also, the fact that the Commission ordered staff to conduct additional administrative review related to a subset of issues raised by the Tribe – the acknowedleged failure of NRC staff to comply with NEPA and the NHPA in issuing the license to Powertech – does not mean that the Commission's Order is not final and reviewable. Rather, the NRC Order resolved once and for all a number of issues and contentions raised by the Tribe. No further administrative review will occur on these issues.

Moreover, the NRC has finalized its environmental impact statement in this case and "since the final EIS already has been published, [judicial] review will not disrupt the process of adjudication." *Envtl. Law & Policy Ctr. v. United States NRC*, 470 F.3d 676, 681 (7th Cir. 2006). "Consequently, the order is final and appealable under 28 U.S.C. § 2342." Id.

Thus, the NRC Order satisfies the Supreme Court's two-part test for "final agency action" under the APA and the Hobbs Act. ''First, the action must mark the consummation of the agency's decisionmaking process—it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which rights or obligations have been determined, or from which legal consequences will flow.'' *Bennett v. Spear*, 520 U.S. 154, 177-178 (1997).



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In *Army Corps of Engineers v. Hawkes*, 136 S.Ct. 1807 (2016), the Court held the finality test is met when an agency determines the rights and obligations of property owners under the Clean Water Act despite that the final permit, or permit denial, had yet to be issued. The CWA determination consummated the decisionmaking process because the agency conducted "extensive factfinding" and "ruled definitively" that the property had the "physical and hydrological characteristics" of jurisdictional waters and thus was subject to regulation under the CWA. Id. at 1813. The Court additionally held that, despite the fact that the final permit had yet to be issued and further administrative proceedings would occur, the agency's determination that the property was subject to the CWA "gives rise to 'direct and appreciable legal consequences,' thereby satisfying the second prong of *Bennett*." Id. at 1814.

The finality of the NRC Order in this case is even more pronounced than in *Bennett* and *Hawkes*. The Commission made detailed and specific factual and legal findings regarding the Tribe's contentions, rejecting all but two, and affirmed as a final decision of the Commission the issuance of a license to Powertech that remains in full force and effect.

Although some limited NRC staff work remains, there is no question that the Commission's Order marks the end of the administrative process for a number of issues. "Normally in an adjudication a final order is one that disposes of all issues

as to all parties." *NRDC v. NRC,* 680 F.2d 810, 815 (D.C. Cir. 1982). Yet that is not the case when a license has been issued. "[A] final order in a licensing proceeding under (42 U.S.C.) § 2239(a) would be an order granting or denying a license." Id.

Importantly, a fundamental legal contention by the Tribe – that the agency cannot issue a license when it admits that the Final EIS issued as support for the license decision violates NEPA and the NHPA – is also final and will not be subject to any further Commission ruling.[2] There is no question that the Commission's final ruling on this crticial issue, and the resulting affirmance of the issuance of the license "gives rise to direct and appreciable legal consequiences" to both Powertech and the Tribe, *Hawkes*, 136 S.Ct. at 1814, as it authorizes Powertech to commence on-the-ground operations – to the detriment of the Tribe's interests in, and uses of, the affected lands.

## CONCLUSION

Based on the foregoing, the Oglala Sioux Tribe respectfully requests the Court grant this Petition for Review, vacate the Final SEIS, Record of Decision,

[2] The fact agency staff was ordered to conduct further reviews to support issuance of the license does not change this issue, as the Commission's decision to validate the license, despite an inadequate and illegal EIS, will not be revisited by the Commission.



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and License for Powertech's Dewey-Burdock Project, and remand this matter to the Commission to comply with its statutory duties.

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE PURSUANT TO FED. R. APP. P. 32(a)(7)(C)**

I hereby certify that the foregoing Initial Opening Brief for Petitioner Oglala Sioux Tribe contains 12,996 words excluding the parts of the brief exempted by the Federal Appellate and Circuit Rules.

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## CERTIFICATE OF SERVICE

I, Jeffrey C. Parsons, hereby certify that the foregoing Initial Opening Brief for Petitioner Oglala Sioux Tribe and accompanying Addendum was served on all counsel of record in case number 17-1059 through the electronic filing system (CM/ECF) of the U.S. Court of Appeals for the District of Columbia Circuit.

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