UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555-0001

OFFICE OF THE
GENERAL COUNSEL

October 23, 2017

Mark J. Langer, Clerk
United States Court of Appeals
for the District of Columbia Circuit
United States Courthouse
333 Constitution Avenue, NW
Washington, DC 20001

Re: *Oglala Sioux Tribe v. NRC*, No. 17-1059 (not yet scheduled for oral argument)

Dear Mr. Langer:

Pursuant to Rule 28(j) of the Federal Rules of Appellate Procedure, Respondent Nuclear Regulatory Commission (NRC), on behalf of Federal Respondents, hereby informs the Court of a pertinent development before the agency related to the above-referenced matter.

On October 19, 2017, the NRC's Atomic Safety and Licensing Board (Board) issued Memorandum and Order LBP-17-09, addressing two contentions raised by the Oglala Sioux Tribe (petitioner before the Court) related to the NRC's compliance with the National Historic Preservation Act (NHPA) and the National Environmental Policy Act (NEPA) in its licensing of the Powertech (USA), Inc. Dewey-Burdock uranium recovery project. The Board order is enclosed. As we discuss on pages 28-33 of our brief, the petition for review in this Court is incurably premature in this case because it was filed while the NRC administrative proceeding remained ongoing to resolve these two contentions.

In the context of this ongoing NRC proceeding, the Board's new order grants summary disposition, over objections filed by the Tribe, to the NRC staff as to the Tribe contention addressing NHPA compliance, but the Board's order agrees with the Tribe's objections that the other contention, regarding NEPA compliance, still presents a genuine dispute of material fact and cannot be resolved on summary disposition. The order sets a schedule contemplating Board resolution of the outstanding NEPA contention, either via settlement, a motion for summary disposition, or following an evidentiary hearing, on or before October 12, 2018. The parties can seek Commission review of the still-pending NEPA contention once the Board has resolved it, and the Tribe can seek review of the Board's grant of summary disposition on the NHPA contention.

The Board's decision in LBP-17-09 further demonstrates that the agency's decisionmaking was non-final when the Tribe filed its petition for review in this Court and that, indeed, it remains non-final. Accordingly, the Court lacks jurisdiction over the petition for review and the matter is not yet appropriate for judicial review.

Respectfully submitted,

/s/ James E. Adler
James E. Adler
Senior Attorney
Office of the General Counsel
U.S. Nuclear Regulatory Commission

Enclosure: LBP-17-09, Memorandum and Order Granting Summary Disposition as to Contention 1B, Denying Summary Disposition as to Contention 1A, and Establishing Further Procedures (Oct. 19, 2017)

CERTIFICATE OF SERVICE

I hereby certify that on October 23, 2017, the foregoing letter and its enclosure were 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.

/s/ James E. Adler
James E. Adler
Senior Attorney
Office of the General Counsel
U.S. Nuclear Regulatory
Commission
11555 Rockville Pike
Rockville, MD 20852
(301) 287-9173

LBP-17-09

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

William J. Froehlich, Chairman
Dr. Mark O. Barnett
G. Paul Bollwerk, III

In the Matter of	Docket No. 40-9075-MLA
POWERTECH USA, INC.	ASLBP No. 10-898-02-MLA-BD01
(Dewey-Burdock In Situ Uranium Recovery Facility)	October 19, 2017

MEMORANDUM AND ORDER
(Granting Summary Disposition as to Contention 1B, Denying Summary Disposition as to Contention 1A, and Establishing Further Procedures)

On April 30, 2015, this Licensing Board issued a Partial Initial Decision addressing seven contentions raised by the Oglala Sioux Tribe and the Consolidated Intervenors concerning the Source Materials License issued to Powertech (USA), Inc., (Powertech) to construct and operate an in situ uranium recovery (ISR) facility.[1] The Board ruled in favor of the NRC Staff and Powertech on all contentions save for Contentions 1A and 1B, on which the Board found for the Oglala Sioux Tribe and Consolidated Intervenors.[2] Regarding Contention 1B, the Board determined that the NRC Staff had not complied with the National Historic Preservation Act (NHPA) because meaningful government-to-government consultations between the Oglala Sioux Tribe and the NRC Staff had not taken place.[3] As to Contention 1A,

[1] LBP-15-16, 81 NRC 618 (2015), aff'd, CLI-16-20, 84 NRC 219 (2016).

[2] Id. at 708–10.

[3] Id. at 708.

the Board concluded that the NRC Staff had not satisfied its National Environmental Policy Act (NEPA) responsibility because the Final Supplemental Environmental Impact Statement (FSEIS) did not adequately address Sioux tribal cultural, religious, and historic resources.[4] The Board stated that these deficiencies could be remedied if the NRC Staff initiated government-to-government consultations with the Oglala Sioux Tribe[5] and took the steps necessary to ensure that an adequate analysis of tribal cultural resources was included in the FSEIS and the Record of Decision in this case.[6]

The NRC Staff now moves for summary disposition on both contentions. We grant the motion as to Contention 1B, concluding that over the past two years the combination of multiple attempts at direct correspondence, a May 19, 2016 face-to-face meeting, and a January 31, 2017 teleconference between the Oglala Sioux Tribe and the NRC Staff satisfies, at a bare minimum, the NHPA's requirement that the NRC Staff consult with the Oglala Sioux Tribe. However, we deny the NRC Staff's motion as to Contention 1A, concluding that the NRC Staff has failed to establish that there are no material facts in dispute relative to the NRC Staff's NEPA burden to adequately address the impact of the Dewey-Burdock project on tribal cultural resources. More specifically, the NRC Staff has failed to demonstrate that there is no material factual dispute regarding the reasonableness of its method for assessing impacts from the Dewey-Burdock project on Sioux tribal cultural resources. Finally, given this ruling, as steps toward resolving Contention 1A, we establish a schedule for this proceeding that provides the NRC Staff and the other parties an additional opportunity to establish a methodology for

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[4] Id.

[5] Id. at 656–57.

[6] Id. at 653–55.

assessing such cultural resource impacts, as well as, if necessary, an evidentiary hearing and a subsequent Board decision on the reasonableness of the NRC Staff's methodology.

I. Background

1. Procedural History Preceding the Partial Initial Decision

A detailed procedural history of this proceeding can be found in the Board's April 30, 2015 Partial Initial Decision.[7] In summary, on February 25, 2009, Powertech applied for a combined source and 11e.(2) byproduct material license to construct and operate the proposed Dewey-Burdock in situ leach uranium recovery facility in Custer and Fall River counties, South Dakota.[8] Subsequently, the Oglala Sioux Tribe filed an April 6, 2010 Request for Hearing and Petition for Leave to Intervene and, on March 8, 2010, six individuals and two organizations (collectively, Consolidated Intervenors) filed an additional Request for Hearing and Petition for Leave to Intervene.[9] In an August 5, 2010 ruling, the Board admitted both the Oglala Sioux Tribe and Consolidated Intervenors as Intervenors.[10] The Board admitted four of the Oglala Sioux Tribe's contentions and three of the Consolidated Intervenors' contentions.[11]

On November 26, 2012, the NRC Staff issued a Draft Supplemental Environmental Impact Statement (DSEIS).[12] In a January 25, 2013 submission, the Oglala Sioux Tribe and Consolidated Intervenors proposed new contentions based on the DSEIS.[13] In a July 22, 2013

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[7] Id. at 626–35.

[8] Id. at 626–27.

[9] Id. at 628.

[10] Id. at 629.

[11] Id. at 629–30.

[12] Id.

[13] Id.

decision, the Board admitted a total of nine contentions based on the new and original contentions.[14] Thereafter, with the January 29, 2014 issuance of the FSEIS, the admitted contentions migrated to challenge the FSEIS.[15] Subsequently, two of the admitted contentions—Contentions 14A and 14B—were voluntarily withdrawn by the Oglala Sioux Tribe.[16]

On April 8, 2014, the NRC Staff issued a 10 C.F.R. Part 40 source materials license to Powertech, authorizing it to possess and use source and byproduct material in connection with the Dewey-Burdock project.[17] With the license in effect, from August 19 through August 21, 2014, the Board held an evidentiary hearing on the Oglala Sioux Tribe's and Consolidated Intervenors' seven contentions.[18] On April 30, 2015, the Board issued a Partial Initial Decision on the merits of those seven contentions.[19]

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[14] LBP-13-9, 78 NRC 37, 112–13 (2013). The seven original contentions contesting the adequacy of various aspects of Powertech's Environmental Report were migrated to challenges of the applicable portions of the DSEIS. Id. at 50. Several of the original seven contentions were reformulated by the Board for a total of five admitted contentions, and of the three new contentions that were admitted, one was split into two contentions for a total of four new contentions. Id. at 112–13.

[15] LBP-15-16, 81 NRC at 631–32. Under the "migration tenet," when the information in the NRC Staff's final environmental impact statement is "sufficiently similar" to the NRC Staff's draft environmental impact statement, an existing contention based on the draft environmental impact statement can "migrate" to apply to the NRC Staff's final environmental impact statement as it applied to the draft environmental impact statement. See generally Strata Energy, Inc. (Ross In Situ Recovery Uranium Project), CLI-16-13, 83 NRC 566, 570 n.17 (2016) (citing Strata Energy, Inc. (Ross In Situ Recovery Uranium Project), LBP-13-10, 78 NRC 117, 132–33 (2013))

[16] LBP-15-16, 81 NRC at 633.

[17] Id. at 632. On April 30, 2014, the Board granted a temporary stay of the license in response to motions to stay from both intervenors. Id. However, after oral arguments on those motions, the Board lifted the temporary stay and denied the motion on May 20, 2014. Id.

[18] Id. at 633.

[19] Id. at 708–11.

2. The Partial Initial Decision and the Commission's Review

The Partial Initial Decision resolved all contentions in favor of the NRC Staff and Powertech except for Contentions 1A and 1B, on which the Oglala Sioux Tribe and Consolidated Intervenors prevailed.[20] Contention 1A pertained to the NRC Staff's NEPA obligation to assess the impacts to Native American cultural, religious, and historic resources.[21] The NRC Staff explained that its efforts to satisfy its NEPA obligation included inviting a total of twenty tribes "to participate in identification efforts" and "provid[ing] all interested tribes a reasonable opportunity to identify historic properties, advise on the identification and evaluation of such properties, comment on the undertaking, and participate in resolving potential adverse effects."[22] The NRC Staff noted that the Oglala Sioux Tribe "had the same opportunity to participate in each phase of the NRC Staff's review as all consulting tribes," and that it was "afforded an opportunity to participate in a field survey, but [they] chose not to participate."[23]

The Board found these efforts insufficient because "[t]o fulfill the agency's NEPA . . . responsibilities to protect and preserve cultural, religious, and historical sites important to the Native American tribal cultures in the Powertech project area, the NRC Staff must conduct a study or survey of tribal cultural resources before granting a license."[24] The Board determined that the NRC Staff failed to fulfill this obligation because the FSEIS does "not contain an analysis of the impacts of the project on the cultural, historical, and religious sites of the Oglala

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[20] Id. at 708–10.

[21] Id. at 653.

[22] Id. at 652.

[23] Id. at 652–53.

[24] Id. at 653.

Sioux Tribe and the majority of the other consulting Native American tribes."[25] Accordingly, the Board concluded that "[w]ithout additional analysis as to how the Powertech project may affect the Sioux Tribes' cultural, historical, and religious connections with the area, NEPA's hard look requirement ha[d] not been satisfied, and potentially necessary mitigation measures have not been established."[26]

On Contention 1B, the Board decided that the NRC Staff had failed to provide the Oglala Sioux Tribe with a meaningful opportunity for government-to-government consultation.[27] Attempts at consultation began in 2010 when the NRC Staff invited multiple tribes to participate as consulting parties in the NHPA section 106 process.[28] The Board concluded, however, that consultation efforts with the Oglala Sioux Tribe had broken down by 2014, resulting in a majority of the consulting tribes declining to participate in the open-site survey.[29] Although the NRC Staff held several large group meetings with representatives of multiple Native American tribes, solicited survey proposals, and included reports from three of the tribes, in the Board's estimation, these efforts were insufficient to constitute the requisite NHPA government-to-government consultation with the Oglala Sioux Tribe specifically.[30] The meetings held between the NRC Staff and the Oglala Sioux Tribe had not been one-on-one consultations, but instead were "large group meetings, with members of many diverse Tribes, all with varying degrees of

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[25] Id. at 655.

[26] Id.

[27] Id. at 657.

[28] Id. at 644.

[29] Id. at 648–49, 655.

[30] Id. at 656.

attachment" to the license area.[31] Additionally, while the NRC Staff sent many letters to the Oglala Sioux Tribe, the Board noted that "quantity does not necessarily equate with meaningful or reasonable consultation."[32] The Board determined that, while "[t]he NRC Staff [wa]s at least partly at fault for the failed consultation process[,] . . . the Oglala Sioux Tribe [did] share some responsibility for the inadequacy of the FSEIS and the lack of meaningful consultation" because "some of its demands to engage with the NRC Staff were patently unreasonable."[33]

The Board concluded that additional consultation with the Oglala Sioux Tribe, the tribe with "the most direct historical, cultural, and religious ties to the area," was required for NRC Staff to satisfy its consultation obligations under section 106.[34] The Board observed that the NHPA errors could be remedied by "promptly initiating a government-to-government consultation with the Oglala Sioux Tribe to identify any adverse effects to cultural, historic or religious sites of significance," adopting any mitigation measures, and supplementing, if necessary, the FSEIS and Record of Decision.[35]

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[31] Id.

[32] Id.

[33] Id. at 656–57. Specifically, the Board found that the cost of the survey proposal, estimated at close to $1 million, Tr. at 807 (Aug. 19, 2014),) was unreasonable. LBP-15-16, 81 NRC at 657 n.229. The Makoche Wowapi proposal was estimated to cost approximately $818,000. Makoche Wowapi/Mentz-Wilson Consultants, Proposal with Cost Estimate for Traditional Cultural Properties Survey for Proposed Dewey Burdock Project (Sept. 27, 2012) at 1 (ADAMS Accession No. ML15244B360) [hereinafter Makoche Wowapi Proposal] (this redacted version was created for use in an evidentiary hearing in another in situ mining license proceeding, a public version was not created when the Board held hearings prior to the Partial Initial Decision).

[34] Id. at 656–57.

[35] Id. at 657–58.

The Board thus retained jurisdiction over this proceeding pending further consultations between the Oglala Sioux Tribe and the NRC Staff.[36] The Board further required the NRC Staff to submit monthly status reports describing its consultation efforts with the Oglala Sioux Tribe.[37]

Subsequently, all four parties to the proceeding timely filed petitions for review of the Partial Initial Decision.[38] Relevant to the motion now before the Board, the NRC Staff and Powertech challenged the Board's rulings on Contentions 1A and 1B and the Board's retention of jurisdiction over these two contentions.[39] On December 23, 2016, the Commission agreed with the Board that the NRC Staff's efforts were inadequate, affirmed the Board's decision on Contentions 1A and 1B, and acknowledged the proceeding remained in the Board's jurisdiction to resolve the deficiencies identified in the Partial Initial Decision.[40]

Addressing Contention 1A, the Commission concluded that the Board did not commit "clear error" in its factual determination that the NRC Staff's consideration of Oglala Sioux Tribe and other Native American cultural resources failed to satisfy NEPA's hard look standard.[41] On Contention 1B, the Commission determined that "[t]he Board, after a merits hearing, reasonably concluded that the Staff's consultation with the Tribe was insufficient to meet these

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[36] Id. at 658.

[37] Id.

[38] See CLI-16-20, 84 NRC at 224–27.

[39] Id. at 227. The Oglala Sioux Tribe and the Consolidated Intervenors both also sought review of the Board's decision to leave the materials license in place, rather than suspending the license due to the deficiencies in the NEPA review. Id. at 225. The Board left the license in place, but provided the Oglala Sioux Tribe with the opportunity to petition for a stay within ten days of the Initial Decision if the Oglala Sioux Tribe believed that cultural, historic, or religious sites were subject to immediate and irreparable harm. LBP-15-16, 81 NRC at 658. The Oglala Sioux Tribe did not bring such a petition to the Board, and the Commission affirmed the Board's decision to leave the license in place. CLI-16-20, 84 NRC at 245.

[40] CLI-16-20, 84 NRC at 262.

[41] Id. at 247–48.

requirements."[42] Thus, the Commission found no legal error in the Board's findings on Contentions 1A and 1B.[43]

Lastly, as to the retention of jurisdiction, the NRC Staff and Powertech argued that the Board overstepped its authority by "prescribing a process for the Staff to resolve the deficiencies identified in Contentions 1A and 1B."[44] While the Commission agreed in principle that it would exceed the Board's authority to direct the NRC Staff to engage in "government-to-government" consultation with the Oglala Sioux Tribe, the Commission found that the Board's decision did not state that it would directly oversee the NRC Staff's review of cultural resources—"instead, it [left] it to the Staff—either by agreement among the parties or by motion for summary disposition—to determine when it has addressed the deficiencies identified by the Board."[45] The Commission thus concluded that the Board had not overstepped the bounds of its authority, and, in carrying out the Board's order, the NRC Staff "is free to select whatever course of action it deems appropriate to address the deficiencies identified in the Board's order, including, but not limited to further government-to-government consultation."[46]

3. Procedural History Subsequent to the Partial Initial Decision

Although the Oglala Sioux Tribe and the NRC Staff differ in how they characterize much of the NRC Staff's consultation efforts after the Partial Initial Decision, both parties' timelines begin on June 23, 2015, with a letter from the Director of the Division of Fuel Cycle Safety, Safeguards and Environmental Review, NRC Office of Nuclear Material Safety and Safeguards,

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[42] Id. at 249.

[43] Id.

[44] Id. at 250 (internal quotation marks omitted).

[45] Id.

[46] Id. at 251. The Commission also affirmed the Board's direction to the NRC Staff to submit monthly status reports. Id. at 262.

to John Yellow Bird Steele, the President of the Oglala Sioux Tribe, seeking to reinitiate government-to-government consultation.[47] In that letter, the NRC Staff stated that it "recognize[d] the purpose and importance of the consultation process in its evaluation of environmental effects . . . on cultural and historic resources" and that it "appreciate[d] the opportunity to further consult with the Oglala Sioux Tribe."[48] The letter "extend[ed] another invitation for the Oglala Sioux Tribe to meet with the NRC staff on a government-to-government basis."[49] The Oglala Sioux Tribe responded approximately one month later seeking to clarify the roles and responsibilities of the NRC Staff and its plans to fulfill its NHPA and NEPA obligations.[50]

Nearly a year passed before the first face-to-face consultation meeting took place on May 19, 2016, in Pine Ridge, South Dakota.[51] The Pine Ridge face-to-face meeting included a member from the Oglala Sioux Tribe's Executive Committee, the Oglala Sioux Tribe's Tribal Historic Preservation Officer (THPO), the Oglala Sioux Tribe's counsel, a Division Director for the NRC Staff, the NRC Staff's counsel, and the NRC Staff's project managers responsible for

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[47] NRC Staff's Motion for Summary Disposition of Contentions 1A and 1B at 20 (Aug. 3, 2017) [hereinafter NRC Staff's Motion]; Oglala Sioux Tribe's Response in Opposition to NRC Staff Motion for Summary Disposition of Contentions 1A and 1B at 4 (Sept. 1, 2017) [hereinafter Oglala Sioux Tribe's Response]; Letter from Marissa G. Bailey, Director, Division of Fuel Cycle Safety, Safeguards, and Environmental Review, to John Yellow Bird Steele, President, Oglala Sioux Tribe at 1–2 (June 23, 2015) (ADAMS Accession No. ML15175A411) [hereinafter NRC Staff June 23, 2015 Letter].

[48] NRC Staff June 23, 2015 Letter at 1–2.

[49] Id. at 2.

[50] Letter from Denis Yellow Thunder, Tribal Historic Preservation Officer (THPO), Oglala Sioux Tribe, to Marissa G. Bailey, Director, Division of Fuel Cycle Safety, Safeguards, and Environmental Review (July 22, 2015) (ADAMS Accession No. ML15203A108).

[51] Summary of Meeting with the Oglala Sioux Tribe Regarding Dewey-Burdock In Situ Uranium Recovery Project (May 19, 2016) (ADAMS Accession No. ML16182A069) [hereinafter May 19, 2016 Meeting Summary].

oversight of the Dewey-Burdock project.[52] The purpose, as described in the meeting summary, was to introduce the new NRC management team and to begin government-to-government discussions regarding identification of cultural resources in the license area.[53] At this meeting, the Oglala Sioux Tribe voiced its objections and concerns, asserting that "the tribal survey conducted in 2013 was incomplete and the survey methodology lacked scientific integrity."[54] The open-site survey methodology, proposed by the NRC Staff in February 2013, allowed each tribe to send representatives to the site to examine any area during a one-month period, and included per diem for three tribal representatives from each tribe, mileage reimbursement, and an unconditional grant from Powertech to each tribe of $10,000.[55] The Oglala Sioux Tribe requested "that additional comprehensive and meaningful surveys be conducted and that other Tribes should also be involved."[56]

After this first and only face-to-face meeting between the NRC Staff and the Oglala Sioux Tribe, consultation again stalled as the NRC Staff allegedly tried to make contact with the Oglala Sioux Tribe's staff, albeit apparently without involving the Oglala Sioux Tribe's counsel.[57] Noting that in nearly eighteen months, other than one face-to-face meeting, there had been no substantive progress toward agreeing upon a method to collect the missing data, the Board set

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[52] Id. at 1.

[53] Id.

[54] Id. at 2.

[55] Letter from Kevin Hsueh, Chief, Environmental Review Branch, Division of Waste Management and Environmental Protection, to THPOs at 1–2 (Feb. 8, 2013) (ADAMS Accession No. ML13039A336).

[56] May 19, 2016 Meeting Summary at 2.

[57] NRC Staff's Motion at 23–24; Oglala Sioux Tribe's Response at 6–7.

up a teleconference with the parties.[58] The teleconference was held on November 7, 2016.[59] At the teleconference, the NRC Staff proposed setting up a future meeting with the Oglala Sioux Tribe to further discuss the survey and reiterated that it was the NRC Staff's position that only the Oglala Sioux Tribe could provide the necessary information on sites of cultural and historical importance to the Tribe.[60]

On January 13, 2017, the Oglala Sioux Tribe confirmed its availability for "government-to-government consultation between the Oglala Sioux Tribe and the United States,"[61] including a discussion of a cultural resource identification process, and specifically how Powertech's stated position (allegedly that it would only pay for the cost of an open-site survey) would affect the NRC Staff moving forward with the cultural resources assessment process.[62] On January 31, 2017, the Oglala Sioux Tribe and the NRC Staff participated in such a conference call.[63] During that teleconference, the NRC Staff once again proposed an open-site survey with per diem and mileage reimbursement for those conducting the survey, and a $10,000 honorarium to be paid to the Oglala Sioux Tribe, to which the Oglala Sioux Tribe once again objected.[64] The

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[58] Memorandum and Order Requesting Scheduling Information for Telephone Conference Call (Oct. 13, 2016) (unpublished); see also, e.g., NRC Staff's Consultation Status Update (June 1, 2016).

[59] Tr. at 1–61 (Nov. 7, 2016).

[60] Tr. at 35 (Nov. 7, 2016).

[61] Letter from Trina Lone Hill, THPO, Oglala Sioux Tribe, to Jill Caverly, Acting Chief, Environmental Review Branch, Division of Fuel Cycle Safety, Safeguards, and Environmental Review at 1 (Jan. 13, 2017) (ADAMS Accession No. ML17017A505).

[62] Id.

[63] Summary of Teleconference with the Oglala Sioux Tribe Regarding the Dewey-Burdock In Situ Uranium Recovery Project (Jan. 31, 2017) (ADAMS Accession No. ML17060A260) [hereinafter January 31, 2017 Teleconference Summary].

[64] Id.

NRC Staff also requested information from the Oglala Sioux Tribe on any "known cultural or historic resources that may be impacted" and for input regarding an alternative survey approach, a timeframe, and proposed costs by mid-March.[65] The Oglala Sioux Tribe, having indicated its discontent with the open-site proposal, reminded the NRC Staff of its preference for a more comprehensive approach similar to that proposed by Makoche Wowapi/Mentz-Wilson Consultants in 2012 (Makoche Wowapi approach), and sought substantive input from the NRC Staff regarding that approach.[66] The parties departed with plans to draft a summary of the current meeting and organize another to further discuss survey alternatives.[67]

During February and March, the NRC Staff and the Oglala Sioux Tribe's counsel corresponded via email to schedule a conference call and to complete the summary of the January teleconference for submission to the Board.[68] On April 14, 2017, having not yet

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[65] Id. at 2.

[66] Id. at 1. On September 27, 2012, the consulting tribes presented a cultural resources survey prepared by Makoche Wowapi/Mentz-Wilson Consultants to the NRC Staff as a means to identify resources in the area. LBP-15-16, 81 NRC at 646. The Makoche Wowapi proposal was estimated to cost approximately $818,000. Makoche Wowapi Proposal at 1. The field operation would take approximately eight weeks, and a report would be provided 60 days after completion of the field work. Id. The field work would require a 20-person staff, including three "six-person crew[s] consist[ing] of a Crew Leader, a GPS Tech, a Cultural Advisor and three Field Crew members," and a Project Manager and Field Supervisor. Id. However, this survey proposal covered only 2,637 acres of the project area, id., as opposed to the NRC Staff's open-site survey which covered the full 10,000 acres of the Dewey-Burdock site when several tribes participated in 2013. Tr. at 724 (Aug. 19, 2015). When the NRC Staff received the proposal, it requested alternative methods for identification of cultural resources given the significant difference between the tribes' survey proposal and Powertech's proposal. LBP-15-16, 81 NRC at 646.

[67] January 31, 2017 Teleconference Summary at 2.

[68] E.g., Email from Kellee L. Jamerson, Project Manager, Environmental Review Branch, Division of Fuel Cycle Safety, Safeguards, and Environmental Review, to Trina Lone Hill, THPO, Oglala Sioux Tribe (Feb. 23, 2017) and Email from Jeffrey C. Parsons, Counsel for the Oglala Sioux Tribe, to Kellee L. Jamerson, Project Manager, Environmental Review Branch, Division of Fuel Cycle Safety, Safeguards, and Environmental Review (Feb. 27, 2017) (ADAMS Accession No. ML17060A280).

received the requested information or other input from the Oglala Sioux Tribe, the NRC Staff sent a letter to the Oglala Sioux Tribe's THPO again offering a two-week open-site survey proposal with specific arrangements and asking the Oglala Sioux Tribe to accept or reject the survey offer by May 5, 2017.[69] After delays due to confusion over staffing for the Oglala Sioux Tribe's THPO and due to the Oglala Sioux Tribe's need to devote time and resources to respond to a United States Environmental Protection Agency permit comment period relating to the Dewey-Burdock project site, it was not until May 31, 2017 that the Oglala Sioux Tribe sent a "detailed response" to the April 14 survey invitation with its objections.[70] In that response, the Oglala Sioux Tribe

> provided significant discussion as to the types of methodologies that the Tribe expected would be included in any NRC Staff courses of action to remedy the NEPA and NHPA violations, including references to the desire to engage a contractor to facilitate and coordinate a survey, with involvement of the other Sioux tribes . . . . The Tribe also described its strong desire to involve elders in the process, as well as the need for tribal members to carefully consider the survey findings and allow for subsequent trips to the site to ensure an accurate assessment.[71]

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[69] Letter from Cinthya I. Román, Chief, Environmental Review Branch, Division of Fuel Cycle Safety, Safeguards, and Environmental Review, to Trina Lone Hill, THPO, Oglala Sioux Tribe at 1–3 (Apr. 14, 2017) (ADAMS Accession No. ML17103A500) [hereinafter NRC Staff April 14, 2017 Letter].

[70] Letter from Trina Lone Hill, THPO, Oglala Sioux Tribe, to Cinthya I. Román, Chief, Environmental Review Branch, Division of Fuel Cycle Safety, Safeguards, and Environmental Review (May 31, 2017) (ADAMS Accession No. ML17152A109) [hereinafter Oglala Sioux Tribe May 31, 2017 Response]; Oglala Sioux Tribe's Response at 14–15. Although the NRC Staff requested a response from the Oglala Sioux Tribe by May 31, 2017, in a May 22 email from the NRC Staff's counsel, the NRC Staff expressed it was willing to wait until May 31, 2017, for a response from the Oglala Sioux Tribe on whether it would accept or reject the NRC Staff's invitation. Email from Emily Monteith, NRC Staff's counsel, to Jeffrey C. Parsons, Oglala Sioux Tribe's counsel (May 22, 2017) (ADAMS Accession No. ML17144A240).

[71] Oglala Sioux Tribe's Response at 16.

Following this last letter, the NRC Staff concluded that after more than two years, "further consultation [was] unlikely to result in a mutually acceptable settlement of the dispute"[72] and that it had satisfied its consultation responsibilities through the sole in-person meeting, the one teleconference, and the correspondence that had taken place since the Partial Initial Decision was issued.[73] Although the Oglala Sioux Tribe sought to engage in further consultation, noting that it "continued to believe there was significant opportunity for discussion and agreement on the survey approach,"[74] the NRC Staff claims it has sufficiently fulfilled its duties under the NHPA and NEPA. Accordingly, on August 3, 2017, the NRC Staff moved for summary disposition of Contentions 1A and 1B.[75] On September 1, 2017, Powertech filed a brief in support of the motion[76] while the Oglala Sioux Tribe and the Consolidated Intervenors

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[72] Letter from Cinthya I. Román, Chief, Environmental Review Branch, Division of Fuel Cycle Safety, Safeguards, and Environmental Review, to Trina Lone Hill, THPO, Oglala Sioux Tribe at 2 (July 24, 2017) (ADAMS Accession No. ML17205A063).

[73] NRC Staff's Motion at 27.

[74] Oglala Sioux Tribe's Response at 18–19 (citing Oglala Sioux Tribe's Response, Ex. 5, Email from Jeffrey C. Parsons, Counsel for the Oglala Sioux Tribe, to Emily Monteith, NRC Staff Counsel (Aug. 2, 2017)).

[75] NRC Staff's Motion. The NRC Staff's Motion included a statement of material facts in support of the motion and an affidavit of the NRC Staff Project Manager responsible for consultation efforts between the NRC Staff and the Oglala Sioux Tribe. NRC Staff's Motion, attach. 1, NRC Staff's Statement of Material Facts to Support Motion for Summary Disposition of Contentions 1A and 1B (Aug. 3, 2017) [hereinafter NRC Staff's Motion Statement of Facts]; NRC Staff's Motion, attach. 2, Affidavit of Kellee L. Jamerson Concerning the NRC Staff's Motion for Summary Disposition of Contentions 1A and 1B (Aug. 3, 2017).

[76] Brief of Powertech (USA), Inc. in Support of United States Nuclear Regulatory Commission Staff's Motion for Summary Disposition of Contentions 1A and 1B (Sept. 1, 2017) [hereinafter Powertech's Brief in Support].

filed responses opposing the motion.[77] Neither the Oglala Sioux Tribe nor the Consolidated Intervenors filed a reply to Powertech's response in support of the NRC Staff's motion.

II. Standards for Summary Disposition

The standards governing summary disposition in Subpart L proceedings are set out at 10 C.F.R. § 2.1205, and "are based upon those the federal courts apply to motions for summary judgment under Rule 56 of the Federal Rules of Civil Procedure."[78] Summary disposition may be granted

> if the filings in the proceeding, depositions, answers to interrogatories, and admissions on file, together with the statements of the parties and the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a decision as a matter of law.[79]

This standard establishes a two-part test: First, a board must determine if any material facts remain genuinely in dispute; second, if no such disputes remain, the board must determine if the movant's legal position is correct.[80]

The moving party carries the burden of demonstrating that summary disposition is appropriate and must explain in writing the basis for the motion.[81] To support its motion, the

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[77] Oglala Sioux Tribe's Response; Consolidated Intervenors' Opposition to Motion for Summary Disposition of Contentions 1A and 1B (Sept. 1, 2017) [hereinafter Consolidated Intervenors' Response].

[78] Entergy Nuclear Generation Co. (Pilgrim Nuclear Power Station), CLI-10-11, 71 NRC 287, 297 (2010).

[79] 10 C.F.R. § 2.710(d)(2) (2017). Although this proceeding is a simplified hearing governed by Subpart L of the regulations, 10 C.F.R. § 2.1205(c) states that "[i]n ruling on motions for summary disposition, the presiding officer shall apply the standards for summary disposition set forth in subpart G of this part." 10 C.F.R. § 2.1205(c).

[80] See Progress Energy Fla., Inc. (Levy Cty. Nuclear Power Plant, Units 1 & 2), LBP-11-31, 74 NRC 643, 648 (2011).

[81] Advanced Med. Sys., Inc. (One Factory Row, Geneva, Ohio 44041), CLI-93-22, 38 NRC 98, 102 (1993); 10 C.F.R. § 2.1205(a).

moving party must also "attach . . . a short and concise statement of the material facts as to which the moving party contends that there is no genuine issue to be heard."[82] "The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor."[83]

Alternatively, summary disposition should not be granted if it would require the board to engage in the making of "[c]redibility determinations, the weighing of the evidence, [or] the drawing of legitimate inferences from the facts."[84] Doing so would require the board to "conduct a trial on the written record by weighing the evidence and endeavoring to determine the truth of the matter."[85] Instead, the board's only role in deciding whether to grant a motion for summary disposition is to determine whether any genuine issue of material fact exists.[86]

III. Discussion

1. Contention 1B: Consultation Process Pursuant to the National Historic Preservation Act

a. Legal Standards for the National Historic Preservation Act

Section 106 of the NHPA requires federal agencies, prior to approving any "undertaking" such as the licensing of the Dewey-Burdock project, to "take into account the effect of the undertaking on any historic property."[87] A federal agency must make a reasonable and good faith effort to identify historic properties;[88] determine whether identified properties are eligible for

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[82] 10 C.F.R. § 2.710(a).

[83] Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986).

[84] Id.

[85] Fla. Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 6 & 7), LBP-16-3, 83 NRC 169, 176 (2016).

[86] Anderson, 477 U.S. at 249.

[87] 54 U.S.C. § 306108 (2012). "Historic property" includes any "district, site, building, structure, or object that is included in or eligible for inclusion in the National Register." Id. § 300308.

[88] 36 C.F.R. § 800.4(b).

listing on the National Register of Historic Places (National Register) based on the criteria in 36 C.F.R. § 60.4; assess the effects of the undertaking on any eligible historic properties found;[89] determine whether the effects will be adverse;[90] and avoid or mitigate any adverse effects.[91] The federal agency must also confer with a State Historic Preservation Officer and seek the approval of the Advisory Council on Historic Preservation (ACHP).[92]

The NHPA requires agencies to consider the unique interests and viewpoints of Native Americans in determining what to place on the National Register, such that "[p]ropert[ies] of traditional religious and cultural importance to an Indian tribe . . . may be determined to be eligible for inclusion on the National Register."[93] Section 106 also contains a role for Indian tribes as consulting parties in the NHPA process: "[I]n carrying out its responsibilities under [Section 106 of the NHPA], a Federal agency shall consult with any Indian tribe . . . that attaches religious and cultural significance to [eligible] propert[ies]."[94]

The ACHP's current regulations require each agency during the consultation process to "[g]ather information from any Indian tribe . . . to assist in identifying properties, including those located off tribal lands, which may be of religious and cultural significance to them and may be eligible for the National Register."[95] Agency consultation must provide each Indian tribe with "a reasonable opportunity to identify its concerns about historic properties, advise on the

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[89] Id. §§ 800.4(c), 800.5.

[90] Id. § 800.5.

[91] Id. § 800.6.

[92] Muckleshoot Indian Tribe v. U.S. Forest Serv., 177 F.3d 800, 805 (9th Cir. 1999).

[93] 54 U.S.C. § 302706(a).

[94] Id. § 302706(b).

[95] 36 C.F.R. § 800.4(a)(4).

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."[96] That opportunity should be both meaningful and timely.[97] Additionally, the ACHP's regulations also state that consultation efforts must "recognize the government-to-government relationship between the Federal Government and Indian tribes," and be sensitive to the needs of the tribal participants.[98]

On January 9, 2017, the NRC published its Tribal Policy Statement stating that the Agency seeks "to provide agencywide principles to achieve consistency but also encourage custom-tailored approaches to consultation and coordination that reflect the circumstances of each situation and the preference of each Tribal government."[99]

b. Parties' Positions

The NRC Staff argues that it is entitled to summary disposition because, although "the Section 106 consultation process did not ultimately result in a survey . . . by the Tribe, the Staff's efforts to consult with the Tribe have been both meaningful and reasonable."[100] The NRC Staff cites to several examples of its efforts to engage in meaningful government-to-government consultation with the Oglala Sioux Tribe. These include (1) extending an invitation to the President of the Oglala Sioux Tribe reiterating its commitment to consultation and inviting the Oglala Sioux Tribe to meet on a government-to-government basis; (2) holding a face-to-face meeting with members of the Oglala Sioux Tribe; (3) holding a teleconference with members of

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[96] Id. § 800.2(c)(2)(ii)(A).

[97] Exec. Order No. 13,175, § 5, 65 Fed. Reg. 67,249, 67,250 (Nov. 6, 2000).

[98] 36 C.F.R. § 800.2(c)(2)(ii)(C).

[99] NRC Tribal Policy Statement, 82 Fed. Reg. 2402, 2416 (Jan. 9, 2017).

[100] NRC Staff's Motion at 27–28.

the Oglala Sioux Tribe; and (4) maintaining ongoing correspondence and contact with the Oglala Sioux Tribe to address its concerns.[101] The NRC Staff argues that, having "promptly reaffirmed its commitment to government-to-government consultation" and having provided the Oglala Sioux Tribe with both an in-person meeting and a single teleconference, as well as the opportunity to offer concerns and objections to survey proposals in writing, it has diligently and proactively engaged in government-to-government consultation with the Oglala Sioux Tribe.[102]

As an initial matter, the Oglala Sioux Tribe argues in response that Contention 1B is not susceptible to summary disposition because the facts the NRC Staff relies on as support are in dispute.[103] Specifically, the Oglala Sioux Tribe contends that its own account of the past two years materially differs from that of the NRC Staff.[104] Moreover, the Oglala Sioux Tribe asserts that, even accepting the NRC Staff's characterization of the events over the past two years, the NRC Staff once again has not provided a meaningful opportunity for consultation due to a lack of substantive discussion.[105] The Oglala Sioux Tribe contends that the NRC Staff has not made a good faith effort to engage in government-to-government consultation because the NRC Staff has (1) been unresponsive over the past two years;[106] (2) remained inflexible in its engagement in identifying a potential cultural resource survey method;[107] (3) engaged in "behind the scenes strategy coordination with Powertech," focusing its resources on "driving the negotiations into an

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[101] See id. at 20–27.

[102] Id. at 28.

[103] Oglala Sioux Tribe's Response at 2–3.

[104] Id. at 3.

[105] Id. at 29.

[106] Id. at 27.

[107] Id.

unworkable position . . . instead of reasonably negotiating with the Tribe;"[108] and (4) "unilaterally abandon[ed] the [consultation] process with no coherent explanation or reasoning and proceed[ed] [to] immediately [file] for summary disposition," rather than carrying out the consultation in "a manner sensitive to the concerns and needs" of the Oglala Sioux Tribe.[109] The Oglala Sioux Tribe complains that, despite these behaviors on the NRC Staff's part, the NRC Staff now "paint[s] the Tribe as unresponsive and solely to blame" for the failure to find an agreeable means to conduct the survey.[110] Lastly, the Oglala Sioux Tribe asserts that the burden to comply with the NHPA lies exclusively with the NRC Staff, not with the Oglala Sioux Tribe.[111] The Tribe sees the NRC Staff's assertion that "adequate cultural resources information can only be obtained by the Tribe itself" as a means to push the burden onto the Oglala Sioux Tribe and to avoid its own NHPA responsibilities.[112]

Powertech, in support of the NRC Staff's motion, incorporates each of the NRC Staff's arguments, and adopts the NRC Staff's statement of material facts.[113] Further, Powertech argues that seven years of consultation has now occurred, and "enough time and opportunities for the Tribe have passed the point in time where the 'reasonableness' of continuing the process no longer exists," and that since this Board "prescribed direct, singular conduct with the Tribe," which the NRC Staff has provided, the NHPA obligations have been satisfied.[114] The

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[108] Id. at 30.

[109] Id. at 31.

[110] Id. at 27.

[111] Id. at 27, 31.

[112] Id. at 29.

[113] Powertech's Brief in Support at 9.

[114] Id. at 10, 12 & n.10.

Consolidated Intervenors, on the other hand, adopt the evidence, authority and arguments presented by the Oglala Sioux Tribe's response and support the Oglala Sioux Tribe's opposition to the NRC Staff's motion.[115] The Consolidated Intervenors argue that "a fundamental and genuine dispute continues to exist due to the NRC Staff's failure to communicate or negotiate in good faith with the Tribe or provide any reasonable proposal that contains any measure of compromise to address the Tribe's oft-stated reasonable concerns."[116] The Consolidated Intervenors also object to both the form and substance of the consultation process. As to form, they contend that the use of teleconferencing or video communication does not constitute consultation, and that the use of such technology shows "callous disregard for tribal cultural mores."[117] As to substance, Consolidated Intervenors assert that the NRC Staff lacked good faith by continually offering the Oglala Sioux Tribe the same open-site survey proposal and failing to provide an explanation for why the Makoche Wowapi approach was not reasonable.[118] We address the arguments from both Powertech and Consolidated Intervenors in conjunction with addressing those raised by the NRC Staff and the Oglala Sioux Tribe.

c. Board Determination Regarding Summary Disposition for Contention 1B

First, we address the Oglala Sioux Tribe's argument that summary disposition should not be granted on Contention 1B because material facts remain in dispute. Although the Oglala Sioux Tribe and the NRC Staff characterize the past two years differently, we conclude that the material aspects of the consultation process are not in dispute. The key undisputed material facts are that between the NRC Staff and the Oglala Sioux Tribe one in-person meeting occurred, one teleconference occurred, and numerous written letters and emails were sent. In

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[115] Consolidated Intervenors' Response at 1.

[116] Id.

[117] Id. at 14, 22.

[118] E.g., id. at 2, 22–23.

the meeting, teleconference, and correspondence, the Oglala Sioux Tribe provided meaningful, substantive input regarding both the NRC Staff's proposed open-site survey and the Oglala Sioux Tribe's own proposal to base the survey on the Makoche Wowapi approach. Additionally, the Oglala Sioux Tribe was afforded a reasonable opportunity to offer alternative approaches for a cultural resources survey. We also conclude that these undisputed factual aspects of the consultation process provide a sufficient basis for the Board to rule on this aspect of the NRC Staff's motion for summary disposition as a matter of law.[119]

To be sure, the record before the Board once more presents a close call as to whether the NRC Staff provided a meaningful opportunity under the NHPA for the Oglala Sioux Tribe to consult concerning the Dewey-Burdock project site. In this regard, the Board finds helpful the recent decision by the licensing board in the Crow Butte proceeding regarding what constitutes a meaningful opportunity under NHPA. In that proceeding, which factually parallels this case in many respects, that licensing board also faced the question whether the NRC Staff had satisfied its consultation obligations under the NHPA in the way the NRC Staff worked with the Oglala Sioux Tribe regarding the renewal of the ISR license for the Crow Butte facility in Nebraska.[120] The Crow Butte board found that while the NRC Staff's initial efforts were inadequate to satisfy the NHPA consultation requirement, by finally offering an in-person meeting with high level NRC management officials, the NRC Staff had met its obligations.[121]

Here, as in Crow Butte, after a long-standing strained consulting relationship, the NRC Staff attempted to rectify its errors (albeit because we ruled it had to do so) by providing the Oglala Sioux Tribe with a true government-to-government consultation effort. Over the past two

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[119] See 10 C.F.R. § 2.710(d)(2).

[120] See Crow Butte Res., Inc. (In Situ Leach Facility, Crawford, Neb.), LBP-16-7, 83 NRC 340 (2016), appeals pending.

[121] Id. at 381–83.

years, the NRC Staff continued to offer various opportunities for the Oglala Sioux Tribe to express tribal concerns, provide information, and bring forward an alternative survey proposal. The "NHPA does not empower an Indian tribe to delay or stall a licensing proceeding"[122] just because the tribe dislikes the possible outcome of the consultation process. Further, as is the case with the NEPA process, section 106 does not dictate an end result. Rather, the NHPA places a burden on the NRC Staff to provide an opportunity to consult without requiring the NRC Staff to come to an agreement with a consulting tribe. While the NHPA does require the parties to consult in good faith,[123] it does not require the NRC Staff to select a methodology it believes is unreasonable because a tribe prefers that method. Nor does the NHPA require the NRC Staff to reject a methodology it believes to be reasonable because a tribe objects to it. The NHPA simply affords a tribe a meaningful opportunity to consult on federal actions that affect properties of religious or cultural significance to the tribe.[124]

In the Board's Partial Initial Decision, we stated that the Oglala Sioux Tribe was "entitled to a meaningful, face-to-face, government-to-government consultation session with the NRC Staff regarding this specific project."[125] Although, as the Commission clarified, this was not the only way to accomplish the NHPA's consultation obligations, the NRC Staff nonetheless followed our suggestion and provided the Oglala Sioux Tribe with a one-on-one, face-to-face meeting in May 2016. As the Crow Butte board emphasized, NRC Staff leadership must attend any meeting along-side Oglala Sioux Tribal leadership for such a meeting to constitute

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[122] Id. at 383.

[123] 36 C.F.R. § 800.4(b)(1); 82 Fed. Reg. at 2402, 2416.

[124] 54 U.S.C. § 302706 (2012).

[125] LBP-15-16, 81 NRC at 656.

government-to-government consultation.[126] The May 2016 Pine Ridge meeting was attended by high-level NRC Staff project managers and tribal representatives holding sufficiently "similar levels of authority."[127] In addition, the NRC Staff held a second one-on-one teleconference on January 31, 2017, giving the Oglala Sioux Tribe another opportunity to consult meaningfully. Having followed the guidance provided to it by this Board in its Partial Initial Decision, we find that this series of opportunities to consult is minimally sufficient to fulfill the requirements of section 106 of the NHPA.

Arguably, much of the rest of the NRC Staff's consultation efforts, whether by email or letters to the Oglala Sioux Tribe, were focused on form over substance, or quantity over quality. As stated in Crow Butte, the "NRC Staff has been much better served when, instead of just checking the boxes to meet some procedural minimum, it has worked with Indian tribes to comply with the substance of NEPA and the NHPA."[128] Nonetheless, we find that the NRC Staff's efforts, particularly in its engagement with the Oglala Sioux Tribe on a one-on-one basis through the May 2016 face-to-face meeting and the January 2017 teleconference, are sufficient to satisfy the NHPA's requirement that the NRC Staff afford the Oglala Sioux Tribe a meaningful opportunity to consult on federal actions that may affect properties of religious or cultural significance, as well as to advise the agency on identification and evaluation of such properties, and to participate in the resolution of any possible adverse consequences.[129]

Accordingly, finding there to be no material facts in dispute regarding Contention 1B and having determined relative to the merits of the contention that the NRC Staff is entitled to a

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[126] Crow Butte, LBP-16-7, 83 NRC at 375.

[127] Id.

[128] Id. at 371.

[129] 54 U.S.C. § 302706 (2012); 36 C.F.R. § 800.2(c)(2)(ii)(A).

ruling in its favor regarding the substance of that contention as a matter of law, we grant the NRC Staff's summary disposition motion as to Contention 1B.

2. Contention 1A: The NRC Staff's National Environmental Policy Act Responsibility

a. Legal Standards for the National Environmental Policy Act

NEPA has two principal objectives. First, it seeks to ensure that an agency considers every significant aspect of the environmental impact of a proposed action.[130] Second, it is intended to guarantee that the agency informs the public that it has, in fact, considered environmental concerns in its decision-making process.[131] To effect these cardinal goals, NEPA directs agencies to prepare a detailed environmental impact statement for proposed actions "significantly affecting the quality of the human environment."[132] Adverse effects that must be evaluated include "ecological . . . , aesthetic, historic, cultural, economic, social, or health" effects.[133] And in assessing any adverse effects, NEPA requires that an agency take a "hard look" at the environmental consequences of a planned action.[134]

NEPA does not, however, require agencies to analyze every conceivable aspect of a proposed project.[135] Rather, NEPA's requisite "hard look" is subject to a "rule of reason."[136] This means that agencies need not consider risks that are "remote and speculative" or events

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[130] Balt. Gas & Elec. Co. v. Nat. Res. Def. Council, 462 U.S. 87, 97 (1983).

[131] Id.

[132] 42 U.S.C. § 4332(C) (2012).

[133] 40 C.F.R. § 1508.8. The NRC is not bound by Council of Environmental Quality regulations, however, the regulations are entitled to considerable deference. LBP-15-16, 81 NRC at 636.

[134] Marsh v. Or. Nat. Res. Council, 490 U.S. 360, 374 (1989).

[135] Private Fuel Storage, L.L.C. (Indep. Spent Fuel Storage Installation), CLI-02-25, 56 NRC 340, 349 (2002).

[136] See, e.g., Nat. Res. Def. Council v. Morton, 458 F.2d 827, 834 (D.C. Cir. 1972).

that have a very low probability of occurring.[137] Moreover, the Commission recognizes that an environmental impact statement is not a "research document," and, in assessing foreseeable impacts, there "will always be more data [that] could be gathered," so that agencies "must have some discretion to draw the line and move forward with decisionmaking."[138] In assessing these impacts, the agency is not required to use "the best scientific methodology" or study phenomena "for which there are not yet standard methods of measurement or analysis."[139] Rather, agencies are free to "select their own methodology so long as that methodology is reasonable."[140]

When an agency is unable to obtain complete information to fully assess foreseeable significant adverse effects on the human environment, "the agency shall always make clear that such information is lacking."[141] Furthermore, if the incomplete information is "essential to a reasoned choice among alternatives and the overall costs of obtaining it are not exorbitant," the agency shall obtain the information and include it in the environmental impact statement.[142] However, if the costs of obtaining the information are exorbitant, the agency must include in the FSEIS:

> (1) A statement that such information is incomplete or unavailable; (2) a statement of the relevance of the incomplete or unavailable information to evaluating reasonably foreseeable significant adverse impacts on the human environment; (3) a summary of existing credible scientific evidence which is relevant to evaluating the reasonably foreseeable significant adverse impacts on the human environment, and (4) the agency's evaluation of such

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[137] Limerick Ecology Action, Inc. v. NRC, 869 F.2d 719, 745 (3rd Cir. 1989).

[138] Pilgrim, CLI-10-11, 71 NRC at 315 (citing Town of Winthrop v. FAA, 535 F.3d 1, 11–13 (1st Cir. 2008)).

[139] Id. (quoting Winthrop, 535 F.3d at 12–13).

[140] Id. at 316 (quoting Winthrop, 535 F.3d at 13).

[141] 40 C.F.R. § 1502.22.

[142] Id. § 1502.22(a).

> impacts based upon theoretical approaches or research methods generally accepted in the scientific community.[143]

Finally, in an NRC adjudicatory hearing, even if a board finds the environmental impact statement inadequate in some respects, the board's findings, as well as the adjudicatory record, "become, in effect, part of the [FSEIS]."[144] Thus, a board's ultimate NEPA judgements are made on the basis of the entire adjudicatory record in addition to the NRC Staff's FSEIS.[145]

b. Parties' Positions

The NRC Staff asserts that it is entitled to summary disposition on Contention 1A because, even though it has not obtained information on the Sioux Nation's cultural, religious, and historic resources, it has satisfied NEPA's "hard look" standard because it "made reasonable efforts" to obtain the missing information.[146] According to the NRC Staff, despite its reasonable efforts to obtain information on the Oglala Sioux Tribe's cultural, religious, and historic resources, it is no closer to obtaining information on the Oglala Sioux Tribe's cultural resources than it was when the Board issued its Partial Initial Decision.[147] This is so, the NRC Staff maintains, because while the NRC Staff has provided the Oglala Sioux Tribe with multiple opportunities to provide this information, the Oglala Sioux Tribe has not availed itself of these opportunities.[148] Thus, the NRC Staff claims that its inability to obtain this information stems from the Oglala Sioux Tribe's refusal to cooperate, and not from the NRC Staff's failure to

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[143] Id. § 1502.22(b).

[144] In re Hydro Res., Inc. (P.O. Box 15910, Rio Rancho, NM 87174), CLI-01-4, 53 NRC 31, 53 (2001).

[145] La. Energy Servs., L.P. (Nat'l Enrichment Facility), LBP-05-13, 61 NRC 385, 404 (2005).

[146] NRC Staff's Motion at 34.

[147] Id. at 35.

[148] Id.

attempt to obtain the information.[149] According to the NRC Staff, because NEPA's rule of reason provides agencies with some discretion to "draw the line and move forward with decisionmaking,"[150] its reasonable efforts to obtain information on the Oglala Sioux Tribe's cultural resources satisfies its NEPA obligation.[151]

The Oglala Sioux Tribe contends that the NRC Staff has yet to satisfy its NEPA burden. Citing the Board's conclusion in its Partial Initial Decision that NEPA's hard look requirement cannot be satisfied without additional analysis "as to how the Powertech project may affect the Sioux Tribes' cultural, historical, and religious connections with the area," the Oglala Sioux Tribe argues that "[t]he Board need go no further than to hold that the NRC Staff has provided no evidence of any NEPA analysis that could cure the FSEIS deficiencies."[152] Further, the Oglala Sioux Tribe asserts that the NRC Staff, by trying to place the focus on the Oglala Sioux Tribe's refusal to participate in the open-site survey, is ignoring the fact it is the NRC Staff, not the Oglala Sioux Tribe, that bears the burden of satisfying NEPA.[153] The Oglala Sioux Tribe argues that its failure to agree with the NRC Staff on an acceptable method for assessing cultural resources does not obviate the NRC Staff's "independent duty to conduct NRC's cultural resources impact analysis."[154] Moreover, the Oglala Sioux Tribe maintains that the NRC Staff "is free to select whatever course of action it deems appropriate to address the [FSEIS]

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[149] Id.

[150] Id. at 34.

[151] Id. at 36.

[152] Oglala Sioux Tribe's Response at 33.

[153] See id. at 34.

[154] Id.

deficiencies,"[155] so long as its chosen method utilizes a "systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences."[156] The Oglala Sioux Tribe further disputes the NRC Staff's assertion that NEPA's rule of reason authorizes the NRC Staff to, under any circumstances, "neglect to analyze a foreseeable impact from its actions, such as impacts to cultural resources at issue here."[157]

Again, Powertech concurs with the NRC Staff that there is no material fact showing a genuine dispute that would prevent a grant of this aspect of the NRC Staff's motion for summary disposition. Like the NRC Staff, Powertech blames the Oglala Sioux Tribe for the fact that the NRC Staff has not obtained any information on the Native American cultural resources missing from the FSEIS. According to Powertech, "the satisfaction of the Licensing Board's LBP-15-16 [NEPA] directive is inextricably linked to satisfaction of its directive for compliance with the NHPA. . . . [T]he pivotal reason that no amicable solution can be reached . . . is that the Tribe will not even participate in the identification phase of this process."[158] For their part, the Consolidated Intervenors list eight disputed material facts[159] and note there has been "no site visit, no involvement of tribal elders, no ethnographic studies" since the Partial Initial Decision.[160] They further echo the Oglala Sioux Tribe's claim that it is the NRC Staff's responsibility to select a methodology for assessing tribal cultural resources that is "scientifically based . . . involving knowledgeable persons within the seven Bands of the Lakota of the potentially impacted

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[155] Id. at 33 (quoting CLI-16-20, 84 NRC at 251).

[156] Id. at 34 (quoting 42 U.S.C. § 4332(A) (1975)).

[157] Id. at 38.

[158] Powertech's Brief in Support at 14.

[159] Consolidated Intervenors' Response at 22–23.

[160] Id. at 1.

area."[161] Additionally, citing to testimony from the evidentiary hearing in this proceeding, the Consolidated Intervenors argue that "it is not possible to accomplish an adequate [tribal cultural resource] survey in one limited open-site visit."[162] We address the arguments from both Powertech and Consolidated Intervenors in conjunction with addressing those raised by the NRC Staff and the Oglala Sioux Tribe.

c. Board Determination Regarding Summary Disposition of Contention 1A

In its Partial Initial Decision, the Board found that the NRC Staff failed to satisfy its NEPA obligation to protect and preserve tribal cultural, religious, and historical sites in the Dewey-Burdock project site by providing an adequate analysis of the impacts of the project on the cultural resources "of the Oglala Sioux Tribe and the majority of the other consulting Native American tribes."[163] In particular, we concluded that, to fulfill its NEPA obligation relative to the cultural resources of Native American tribes, "the NRC Staff must conduct a study or survey of tribal cultural resources before granting a license."[164] On the record now before us, we still are unable to conclude that the NRC Staff has fulfilled this obligation to conduct such a study or survey because (1) the NRC Staff has yet to conduct any such study or survey—and thus the FSEIS deficiencies remain; and (2) there remains a material factual dispute as to whether the NRC Staff's chosen methodology for obtaining information on the tribal cultural resources was reasonable.

As the Commission noted in its review of the Partial Initial Decision, the NRC Staff is "free to select whatever course of action it deems appropriate to address the deficiencies [in the

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[161] Id. at 7.

[162] Id.

[163] LBP-15-16, 81 NRC at 655.

[164] Id. at 653.

FSEIS], including, but not limited to further government-to-government consultation."[165] On April 14, 2017, the NRC Staff selected its methodology for assessing the FSEIS deficiencies when it invited the Oglala Sioux Tribe to participate in an open-site survey of the Dewey-Burdock project site.[166] The open-site survey detailed in the April 14, 2017 invitation to the Oglala Sioux Tribe is effectively identical to the open-site survey that the Oglala Sioux Tribe has consistently objected to and declined to participate in since the outset of this proceeding.[167] Although NEPA permits the NRC Staff to "select their own methodology as long as that methodology is reasonable,"[168] the record before us indicates there is a material factual dispute as to the reasonableness of the terms and details of the NRC Staff's proposed open-site survey.[169]

The open-site survey, as proposed by the NRC Staff, includes the following terms: (1) the Dewey-Burdock project site will be open to the Oglala Sioux Tribe for a period of two weeks

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[165] CLI-16-20, 84 NRC at 251.

[166] NRC Staff April 14, 2017 Letter at 1.

[167] See NRC Staff's Motion at 33–36.

[168] Pilgrim, CLI-10-11, 71 NRC at 316. The NRC Staff also relies on the Commission's decision in Pilgrim for the proposition that because the Oglala Sioux Tribe will not cooperate with the open-site survey, the NRC Staff is entitled to "draw the line and move forward with decisionmaking." NRC Staff's Motion at 34. However, the Pilgrim decision only found the NRC Staff has some discretion in determining how much data to collect before issuing a decision; it does not state whether the NRC Staff has discretion not to collect essential data. Nothing in Pilgrim convinces us that the NRC Staff has discretion to forgo the collection of data necessary for a NEPA analysis without providing a sufficient justification for the information's absence.

[169] The Oglala Sioux Tribe has not specifically framed its dispute with the NRC Staff's chosen methodology as a factual matter. Nonetheless, the Oglala Sioux Tribe made clear in its response, as it did at the evidentiary hearing preceding the Partial Initial Decision, that it does not consider the open-site survey to be a reasonable approach for assessing tribal cultural resources. See Oglala Sioux Tribe's Response at 35–37, 47; see also Tr. at 800–07 (Aug. 19, 2014). The Board has the authority to deny a motion for summary disposition if it finds there is a material fact in dispute, even if the opposing party fails to make any claim there is a material fact in dispute. See Cleveland Elec. Illuminating Co. (Perry Nuclear Plant, Units 1 & 2), ALAB-443, 6 NRC 741, 753–54 (1977) (discussing Supreme Court precedent and ruling that under this standard a dispositive motion that does not establish the absence of a genuine dispute must be denied, even if no opposing evidentiary matter is presented).

to conduct the survey; (2) the Oglala Sioux Tribe may send up to three representatives to participate in the survey; (3) Powertech will pay for lodging and per diem for the three participating tribal representatives; (4) Powertech will pay a $10,000 honorarium to the Oglala Sioux Tribe for its participation; (5) the tribal representatives will receive a safety briefing and be required to sign a release of liability; (6) daily transportation will be provided and an NRC Staff member will be present each day of the survey; and (7) any tribal representatives that encounter potentially sensitive properties or features may request that Powertech use a GPS unit to record the boundaries of the identified feature.[170] Additionally, the open-site survey proposal requires the Oglala Sioux to "provide a written report to the NRC staff within 30 days following the survey, or other time as agreed upon between the Oglala Sioux Tribe and the NRC staff."[171]

The Oglala Sioux Tribe objects to reasonableness of this proposal on several grounds. First, the Oglala Sioux Tribe alleges that the open-site survey, as proposed, lacks scientific integrity. In its May 31, 2017 response to the NRC Staff's April 14, 2017 invitation to participate in the open-site survey, the Oglala Sioux Tribe noted that, since 2011, the Lakota Sioux Tribes have objected to the NRC Staff using any survey method "that lacks identification of acceptable protocols and methodologies for cultural site identification."[172] The May 31, 2017 response also specifically cited to a February 20, 2013 letter sent from multiple tribes to the NRC Staff stating that they objected to the open-site survey because it lacked "a proper methodological framework to conduct the necessary cultural resources survey."[173] In its May 31, 2017 response, the Oglala Sioux Tribe asserted that it believed the scientific integrity of the NRC

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[170] NRC Staff April 14, 2017 Letter at 1–2.

[171] Id. at 2.

[172] Oglala Sioux Tribe May 31, 2017 Response at 2.

[173] Id.

Staff's proposed survey could be addressed if the NRC Staff hired "a contractor(s) with the necessary experience, training, and cultural knowledge to carry out and facilitate the survey."[174]

Second, the Oglala Sioux Tribe objects to several of the terms of the NRC Staff's proposed open-site survey. Specifically, the Oglala Sioux Tribe objects to (1) the number of tribal members invited to participate; (2) the length of time provided for the survey; and (3) which tribes have been invited to participate in the survey. With regard to the number of tribal members invited to participate, the Oglala Sioux Tribe noted in its May 31, 2017 response to the NRC Staff's April 14, 2017 letter that, "specific protocols and methodologies that should be incorporated into any competent cultural survey approach," include involving "tribal elders, spiritual advisors, [and] spiritual leaders."[175] This view is reflected in the objections the Oglala Sioux Tribe had to the terms of the open-site survey proposed by the NRC Staff preceding the Partial Initial Decision. During the evidentiary hearing, the Oglala Sioux Tribe stated that, in conducting a competent survey, it would want to involve its "elders, [its] traditional medicine people, spiritual leaders, [and] historians."[176] Furthermore, the Oglala Sioux Tribe specifically rejected the NRC Staff's proposal to invite three individuals per tribe to participate in the survey, stating that "[e]ach family [in the Tribe] has different ideas of where [cultural resources] occur

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[174] Id. at 4. Notably, although the Oglala Sioux Tribe has suggested that the NRC Staff hire a contractor to conduct and coordinate the survey, it has indicated that the NRC Staff could use a qualified staff member to coordinate the survey. See Oglala Sioux Tribe's Response at 37 (noting that "other agencies routinely rely on qualified agency social scientists as trained ethnographers to carry out the necessary surveys and analysis, with significant input, participation, and consultation from the relevant tribes, without any mandate that a certain tribe conduct the survey (citing Ctr. for Biological Diversity v. U.S. Bureau of Land Mgmt., No. 2:14–cv–00226–APG–VCF, No. 2:14–cv–00228–APG–VCF, 2017 WL 3667700, at *54–55 (D. Nev. Aug. 23, 2017))).

[175] Id. at 4–5 (quoting Transcript of Proceedings, Crow Butte Res., Inc. (In Situ Leach Facility, Crawford, Neb.) at 2244–45 (ADAMS Accession No. ML15244B278) [hereinafter Crow Butte Tr.]).

[176] Tr. at 801 (Aug. 19, 2014).

within the geography of the Black Hills. Each family has different areas that they hold sacred. . . . That's more than three per tribe."[177]

Regarding the length of time for the survey, the Oglala Sioux Tribe asserts that a two-week period for the survey is inadequate to properly assess the potential impacts to tribal cultural resources. In its May 31, 2017 response, the Oglala Sioux Tribe stated that the Dewey-Burdock project site must be open to its tribal members "for the period that is required to do a proper identification."[178] In support of this objection, the Oglala Sioux Tribe cited to the testimony of the NRC Staff's witness, Dr. Paul Nickens, in Crow Butte, wherein he estimated that it could potentially take eight to nine months to conduct a realistic tribal cultural resource survey involving all of the relevant tribes.[179]

Lastly, the Oglala Sioux Tribe objected to the fact that the NRC Staff's April 14, 2017 proposed open-site survey only invited the Oglala Sioux Tribe to participate and did not coordinate the survey among the several Lakota Sioux Tribes. In its May 31, 2017 response to the NRC Staff's invitation, the Oglala Sioux Tribe emphasized that "there must be an effort to coordinate the several different Lakota Sioux Tribes before designing and conducting a cultural resource survey."[180] The Oglala Sioux Tribe expounded that while it understood that the NRC Staff "is under an obligation to conduct consultation meetings with the Oglala Sioux Tribe specifically . . . coordination of a cultural resources survey must include the other Lakota Sioux tribal governments . . . in order to be competent in its analysis of Lakota Sioux cultural

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[177] Tr. at 850 (Aug. 19, 2014).

[178] Oglala Sioux Tribe May 31, 2017 Response at 2.

[179] Crow Butte Tr. at 2276–78.

[180] Oglala Sioux Tribe May 31, 2017 Response at 3–4.

resources."[181] The Oglala Sioux Tribe's view on the proper scope of the survey is not new; during the evidentiary hearing, the Oglala Sioux Tribe stated that representation from one Sioux Tribe is insufficient for an adequate cultural resource survey, and would instead require participation from all of the Lakota Tribes.[182] The Oglala Sioux Tribe raised this point again during the January 31, 2017 teleconference between the Tribe and the NRC Staff, wherein the Oglala Sioux Tribe expressed "its desire to include other interested Tribes in the development of the survey approach and recommended that those Tribes participate in conducting the tribal survey."[183]

We conclude that these points—specifically, the Oglala Sioux Tribe's challenge to (1) the scientific integrity and lack of a trained surveyor or ethnographer coordinating the survey; (2) the number of tribal members invited to participate in the survey; (3) the length of time provided for the survey; and (4) the tribes invited to participate in the survey—establish a significant material factual dispute as to the reasonableness of the NRC Staff's proposed terms for an open-site survey to assess the identified deficiencies in this FSEIS.

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[181] Id. at 4.

[182] Tr. at 815–16 (Aug. 19, 2014).

[183] January 31, 2017 Teleconference Summary at 1. The Oglala Sioux Tribe disputes the reasonableness of the proposed open-site survey because it does not coordinate the survey among the several Lakota Sioux Tribes, of which the Oglala Sioux is one. This may not have been an obvious point of contention when the NRC Staff originally proposed the open-site survey in 2013, however this concern clearly contributes to the material factual dispute that is now evident. When the NRC Staff first chose the open-site survey as its method for assessing tribal cultural resources in 2013, it invited all of the potentially-impacted tribes to participate. LBP-15-16, 81 NRC at 648. Thus, the reasonableness of the 2013 proposed open-site survey in terms of which tribes were invited to participate would not have been in dispute. Nonetheless, as our Partial Initial Decision noted, the FSEIS analysis based on that survey is deficient for failing to address Sioux Tribe cultural resources generally. Id. at 655. Thus, to resolve the identified FSEIS deficiencies, the reasonableness of the NRC Staff's chosen methodology, in part, depends on its ability to assess all of the Lakota Sioux cultural resources missing in the FSEIS.

That being said, it certainly is not too late for the NRC Staff to consider an alternative method or framework for assessing impacts to tribal cultural resources and, if appropriate, to move for summary disposition if it opts for an alternative to its currently proposed open-site survey. At times in the past two years, the NRC Staff has appeared to show some degree of flexibility on what method it would use to assess impacts to tribal cultural resources. In particular, during the January 31, 2017 teleconference between the Oglala Sioux Tribe and the NRC Staff, the NRC Staff indicated it would consider the Oglala Sioux Tribe's perspective on "any other methodologies that they may wish to put forward for the provision of information on these cultural resources' importance to the [Oglala Sioux] Tribe."[184] Likewise, the Oglala Sioux Tribe previously expressed its willingness to consider participating in "any methodology that is appropriate" to assess tribal cultural resources.[185] Yet, despite both parties' stated flexibility, the NRC Staff has never actually proposed any methods of addressing the FSEIS deficiencies other than an open-site survey. Indeed, the NRC Staff's April 14, 2017 letter to the Oglala Sioux Tribe proposed yet again to employ the same open-site survey that the Oglala Sioux Tribe has consistently rejected since the outset of this proceeding.[186]

This stands in sharp contrast to the fact that on several occasions the NRC Staff has acknowledged there are various available methods for assessing tribal cultural resources. For instance, Appendix A of the FSEIS includes a letter sent to the Oglala Sioux Tribe from the NRC Staff in which the NRC Staff acknowledged:

> [T]here are additional methods for identifying potential properties of traditional religious and cultural importance to tribes . . . . Alternatives include opening the site to interested tribal specialists over a period of several weeks with payments to be made to the individual tribes, or seeking ethnohistorical and ethnographic

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[184] Tr. at 54 (Nov. 7, 2016).

[185] Tr. at 44–45 (Nov. 7, 2016).

[186] See NRC Staff April 14, 2017 Letter.

> information from tribal specialists in interviews at tribal headquarters.[187]

Furthermore, in the evidentiary hearing for the Crow Butte license renewal proceeding, the NRC Staff's own witness, Nathan Goodman,[188] noted that while the NRC Staff chose to evaluate tribal cultural resources through the open-site survey approach, there are other methods to identify tribal cultural resources.[189] This was echoed by the NRC Staff's other witness, Dr. Nickens,[190] who declared:

> In my experience, probably the best [tribal cultural resource] survey approach is to involve Tribal Elders, wherein if it's one tribe or a group of tribes would supply elders of their choice and then there would be a facilitator, something along the lines of a cultural anthropologist who would accompany the elders and provide logistics support, documentation, recording support, report preparation if that were necessary.[191]

We again emphasize that under NEPA, the NRC Staff is not required to use "the best scientific methodology"[192] to assess environmental impacts, but it is required to use a reasonable methodology. Thus, the NRC Staff may wish to consider available alternatives to determine if there is a reasonable method, other than its current open-site survey proposal, capable of yielding the information on the cultural resources of the Lakota Sioux Tribes.

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[187] Office of Federal and State Materials and Environmental Management Programs, Supplement to the Generic Environmental Impact Statement for In-Situ Leach Uranium Milling Facilities, Final Report, NUREG-1910, Vol. 2, app. A at A-107 (Supp. 4 Jan. 2014) (ADAMS Accession No. ML14024A478).

[188] Mr. Goodman was the Lead Environmental Project Manager for the Crow Butte license renewal. Crow Butte, LBP-16-7, 83 NRC at 362.

[189] Crow Butte Tr. at 2021–22.

[190] Dr. Nickens was a Senior Cultural Resources Specialist contracted by the NRC Staff to provide cultural resource expert support for Mr. Goodman. Crow Butte, LBP-16-7, 83 NRC at 362.

[191] Crow Butte Tr. at 2023.

[192] Pilgrim, CLI-10-11, 71 NRC at 315.

Exploration of such alternatives could result in an agreement among the parties on a survey methodology, the major bone of contention among them, so as to permit the resolution of Contention 1A.

We note, however, that if the NRC Staff chooses a methodology that does not include complete information about adverse effects on the Tribe's cultural resources, the NRC Staff would need to include an explanation that satisfies the requirements of 40 C.F.R. § 1502.22. As our Partial Initial Decision made clear, the FSEIS does not contain an analysis of Sioux tribal cultural resources even though this information is essential to determining "potentially necessary mitigation measures."[193] As noted supra, section 1502.22(b) states that, if information "is essential to a reasoned choice among alternatives, and the overall costs of obtaining it are not exorbitant, the agency shall include the information in the environmental impact statement."[194] Given the Oglala Sioux Tribe's assertions and the NRC Staff's own evidentiary input cited above, if the NRC Staff chooses a methodology, such as the open-site survey that does not yield information on the identified deficiencies in the FSEIS, the NRC Staff arguably would need to provide an explanation that the alternatives for obtaining the missing information were cost-prohibitive.

If the NRC Staff were to determine that its viable options for obtaining the essential information are cost-prohibitive, 40 C.F.R. § 1502.22(b)(3) and (4) would still require that the NRC Staff set forth a "summary of existing credible scientific evidence which is relevant to evaluating the reasonably foreseeable significant adverse impacts on the human environment,"[195] and "the agency's evaluation of such impacts based upon theoretical

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[193] LBP-15-16, 81 NRC at 655.

[194] 40 C.F.R. § 1502.22(b).

[195] Id. § 1502.22(b)(3).

approaches or research methods generally accepted in the scientific community."[196] In other words, in these circumstances, if the NRC Staff concludes there is no affordable alternative to the open-site survey for assessing the missing Native American cultural resources, it must at a minimum provide an explanation of this type to satisfy NEPA that is specific to the cultural resources of the Oglala Sioux Tribe and the other Native American tribes currently missing from the FSEIS.[197]

Yet, if the NRC Staff ultimately cannot provide an explanation of the adequacy of its chosen survey method that evidences appropriate factual and legal support sufficient for a successful dispositive motion—a motion the NRC Staff will have an additional opportunity to provide per the schedule we establish below[198]—the Board has concluded that, as generally the case in the face of an unsuccessful summary disposition motion, the appropriate next step will be to hold an evidentiary hearing on the reasonableness of the open-site survey, the scheduling details of which we discuss, infra.

Accordingly, finding there remains a material factual dispute regarding Contention 1A, we deny the NRC Staff's summary disposition motion as to Contention 1A.

3. NRC Staff's and Oglala Sioux Tribe's Continuing Obligations and Further Procedures

a. Errors in Consultation Process to Date

In addition to our findings on the NRC Staff's Motion for Summary Disposition, we are mindful that there are cross-allegations in the pleadings that the NRC Staff and Oglala Sioux Tribe generally conducted themselves poorly in their communications. The Oglala Sioux Tribe

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[196] Id. § 1502.22(b)(4).

[197] See LBP-15-16, 81 NRC at 655.

[198] Because the Board has concluded that there is a dispute of material fact on the terms of the NRC Staff's currently proposed open-site survey, a successful dispositive motion for summary disposition would present, at a minimum, a difference that would arguably eliminate the dispute of fact.

alleges that the NRC Staff violated its obligations pursuant to 10 C.F.R. Part 2. We outline these communications issues below.

i. Failure to Include Counsel

Over the past two years, there were several periods during which very little communication occurred between the NRC Staff and the Oglala Sioux Tribe. The NRC Staff has alleged that it made multiple attempts to contact the Oglala Sioux Tribe without receiving any response during the periods from September 24, 2015 to November 30, 2015, and during August 2016 and December 2016. However, it appears that during that time the NRC Staff did not include the Oglala Sioux Tribe's counsel in these attempted communications, and instead contacted Oglala Sioux Tribal staff directly.

In an effort to show that the Oglala Sioux Tribe did not avail itself of its opportunity to participate in the consultation process, the NRC Staff has pointed out that during the period of September 2015 to November 2015 the NRC Staff "attempted unsuccessfully to reach the Tribe's THPO by telephone and email to coordinate dates for the government-to-government meetings."[199] Yet, having failed to receive any response from the THPO, the NRC Staff did not contact the Oglala Sioux Tribe's counsel until two months of silence had passed.[200] Once copied on the emails, counsel for the Oglala Sioux Tribe responded relatively quickly and requested, given that "this matter is part of an ongoing adjudicatory matter and in an effort to ensure efficient communication between the parties," that all communication should include the Oglala Sioux Tribe's counsel.[201]

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[199] NRC Staff's Motion at 21.

[200] Oglala Sioux Tribe's Response at 4–5.

[201] Id. at 5 (quoting Email from Jeffrey C. Parsons, Counsel for the Oglala Sioux Tribe, to Kellee L. Jamerson, Project Manager, Environmental Review Branch (Dec. 1, 2015) (ADAMS Accession No. ML17209A078)).

A similar situation again arose during August 2016 and December 2016. During the month of August 2016, the NRC Staff alleges it made several attempts to contact the Oglala Sioux Tribe via phone and email with no success. There is no evidence the NRC Staff attempted to contact the Oglala Sioux Tribe's counsel, even after the Tribe's counsel had requested to be included in such communications.[202] The NRC Staff also claims, that beginning on November 23, 2016 and continuing throughout December 2016, it sent emails and made several calls to the Oglala Sioux Tribe's THPO—though, again, without communicating through the Tribe's counsel, to arrange a teleconference, but received no response.[203] After a month of virtual silence, the NRC Staff finally sent an email that included the Tribe's counsel.[204]

ii. Slow Response Times by Both Parties

The record before us also suggests that neither the NRC Staff nor the Oglala Sioux Tribe could be considered highly responsive as the consultation process has unfolded over the past two years. No one party is singularly to blame; both the Oglala Sioux Tribe and the NRC Staff have been slow to meet to resolve Contentions 1A and 1B. Along with the aforementioned periods during which there was no contact for weeks or months at a time, the "regular" correspondence exchange between the parties proceeded slowly and actual meetings took an overly long time to schedule. The first communication from the NRC Staff to the Oglala Sioux Tribe was on June 23, 2015. The Oglala Sioux Tribe's response came a month later, on July 22, 2015. The NRC Staff then waited another month, until August 26, 2015, to respond to the Oglala Sioux Tribe, which in turn did not respond until September 24, 2015. The parties

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[202] Oglala Sioux Tribe's Response at 6–7; NRC Staff's Motion Statement of Facts at 8, ¶¶ 26, 27. Not only did the NRC Staff not include counsel for the Oglala Sioux Tribe on these communications, it apparently did not include its own counsel either.

[203] NRC Staff's Motion Statement of Facts at 9, ¶ 30.

[204] Id. at 9, ¶ 31.

communicated back and forth for nearly one year before the May 2016 Pine Ridge meeting was finally held due to the lengthy delays between letters. Although the pace of their communication quickened somewhat between December 2015 and the May 2016 Pine Ridge meeting, it was nearly three months after that government-to-government consultation before the NRC Staff reached out again to the Oglala Sioux Tribe.[205] In all, between the Pine Ridge meeting and the Board ordered teleconference, the pleadings reflect only two attempts at contact by the NRC Staff and none by the Oglala Sioux Tribe.[206] The NRC Staff also repeatedly asserts that it had to send follow-up emails or make multiple calls to prompt a response from the Oglala Sioux Tribe.[207]

iii. Mandatory Disclosure Failures

Pursuant to 10 C.F.R. § 2.336(d), all parties bear an ongoing obligation to disclose any documents relevant to admitted contentions, which—following our issuance of the Partial Initial Decision—included Contentions 1A and 1B.[208] The Oglala Sioux Tribe has argued that the NRC Staff failed to comply with these requirements by withholding documents relating to communications between the NRC Staff and Powertech.[209] The Oglala Sioux Tribe asserts that, "[u]nbeknownst" to it, the survey terms that were proposed in the April 14, 2017 letter were "sent in draft form to representatives of Powertech for the company's input and edits" and that the email containing the draft "reference[d] unspecified prior discussions between NRC Staff and

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[205] Id. at 6–7, ¶ 23, 8, ¶ 25; Oglala Sioux Tribe's Response at 6.

[206] NRC Staff's Motion Statement of Facts at 8, ¶¶ 25–26; Oglala Sioux Tribe's Response at 6.

[207] E.g., NRC Staff's Motion Statement of Facts at 8, ¶¶ 25–26, 9, ¶¶ 29–31.

[208] 10 C.F.R. § 2.336(d); see also LBP-15-16, 81 NRC at 708.

[209] Oglala Sioux Tribe's Response at 12–13, 19–20, 30.

Powertech."[210] The Oglala Sioux Tribe maintains the "NRC Staff has in its possession but has not provided in Monthly [Disclosure] Reports, emails, letters, invoices and other documents addressing Powertech's refusal to pay for NRC Staff time spent complying with the Board and Commission Orders" as well as other documents pertaining to this adjudication.[211]

iv. Failure to Move from Negotiating Position

Throughout the consultation process, both the NRC Staff and the Oglala Sioux Tribe have appeared unwilling and/or unable to step away from their original negotiating position and move toward compromise. The Oglala Sioux Tribe finds fault with the NRC Staff's continued open-site survey proposal containing "the precise same parameters rejected by the Tribe for years" and for failing to "provide[] input on the methodology set out in the Makoche Wowapi proposal."[212] It further complains that each invitation to participate in a survey or discuss a proposal for the survey methodology involved the NRC Staff "describing the same open-site approach limiting a survey to two weeks and excluding all other tribes," which the Oglala Sioux Tribe "had repeatedly informed NRC Staff . . . was not based on any recognized discipline or methodology and was therefore unacceptable."[213]

The Oglala Sioux Tribe, however, appears to have taken a similarly inflexible approach to proposing other methods of conducting the survey. Although it claimed during the Board's November 7, 2016 teleconference that it was willing to participate in "any methodology that is appropriate," to assess tribal cultural resources, it also admits that it has continually used the

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[210] Id. at 12.

[211] Id. at 19–20.

[212] E.g., Oglala Sioux Tribe's Response at 11.

[213] Id. at 12.

Makoche Wowapi approach as its "starting point," despite the fact that the NRC Staff has never been receptive to that approach.[214]

The NRC Staff and the Oglala Sioux Tribe's disinclination to consider other approaches for obtaining information about the Oglala Sioux Tribe's cultural resources is most apparent in the correspondence between the parties directly preceding the NRC Staff's recent filing for summary disposition. After the Board held the November 7, 2016 teleconference with the NRC Staff and the Oglala Sioux Tribe, wherein both agreed they would consider the other's thoughts on an appropriate methodology to assess Oglala Sioux Tribe cultural resources,[215] the NRC Staff and the Oglala Sioux Tribe held their own teleconference on January 31, 2017. The summary of that teleconference states that the NRC Staff "presented its preliminary tribal survey approach," i.e., the open-site survey.[216] The Oglala Sioux Tribe, in turn, "expressed its disappointment with this proposal and noted that it was the same proposal offered to Tribes and rejected by the Oglala Sioux Tribe during the NRC's licensing review of the Dewey-Burdock ISR Project."[217] But rather than proposing alternatives other than its originally proposed methodology, the "Oglala Sioux Tribe expressed its preference to develop a survey methodology similar in nature to the Makoche Wowapi survey proposal that was submitted to the NRC in September 2012."[218]

Yet, despite both parties' apparent continued inflexibility, the NRC Staff also "expressed interest in receiving information about the survey methodology/approach," and the Oglala Sioux

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[214] Tr. at 44–45 (Nov. 7, 2016).

[215] See Tr. at 44–45, 54 (Nov. 7, 2016).

[216] January 31, 2017 Teleconference Summary at 1.

[217] Id.

[218] Id.

Tribe "committed to provide the NRC staff with information about a tribal survey approach."[219] However, further negotiations on an acceptable methodology by both parties never transpired. Thus, despite both parties expressed interest in finding a mutually acceptable method for conducting the tribal cultural resource survey, on April 14, 2017, the NRC Staff sent the Oglala Sioux Tribe its final proposal that once again stated the NRC Staff would provide an opportunity to participate in the same open-site survey approach offered to the tribes in the original licensing review.[220] In its May 31, 2017 response, the Oglala Sioux Tribe showed greater flexibility by identifying specific elements the Tribe believed were necessary for an adequate survey, and did so without referencing the Makoche Wowapi approach.[221] At that point, however, the NRC Staff rejected any further negotiation regarding a cultural resources survey and instead filed its motion for summary disposition.

b. Solutions Moving Forward

Having pointed out the pitfalls of the past two years, the Board provides the following observations on how the parties can improve their communication with, and better meet their obligations to one another. This guidance would apply to both the resolution of Contention 1A and the parties' prospective interactions pursuant to the existing Programmatic Agreement that governs any Powertech activities on site that may impact existing cultural resources.[222]

i. Strengthening Communication

The Board anticipates that going forward the parties will be more timely and responsive in their communications. Effective and productive discourse demands as much. For successful

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[219] Id. at 2.

[220] See NRC Staff April 14, 2017 Letter.

[221] See Oglala Sioux Tribe May 31, 2017 Response at 3–8.

[222] Programmatic Agreement Among U.S. Nuclear Regulatory Commission, Bureau of Land Management, South Dakota State Historic Preservation Office, Powertech (USA), Inc., and Advisory Council on Historic Preservation Regarding the Dewey-Burdock In Situ Recovery

negotiation and consultation and to create a strong working relationship, regular dialogue must develop through frequent exchanges. Both the NRC Staff and the Oglala Sioux Tribe and their counsel need to improve their response times as consultation continues under the Programmatic Agreement.[223] It should not take a year to schedule a meeting, and the Board should not have to order a teleconference to bring the parties together.

Likewise, failing to copy counsel created at least four months' worth of communication delay over the past two years. Although it appears that many of the missteps in communication during the past two years were between the Oglala Sioux Tribe's staff and the NRC Staff—and not their counsel—the parties should strive to include each other's counsel in their communications. This is particularly true when a staff member (from either the NRC Staff or the Tribe) has difficulty reaching the opposing party. Given that the parties' counsel have an ethical obligation in accord with the ABA Model Rules of Professional Conduct to make reasonable efforts to expedite litigation in a manner consistent with their party's interests,[224] including counsel in the communication process could drastically reduce the time between the parties' responses. As long as this case remains active before the Board, all communication concerning scheduling or consultation efforts should include counsel. Further, given the prior problems, counsel for the Oglala Sioux Tribe and counsel for the NRC Staff should come to an agreement regarding how future communication between the Tribal staff and NRC Staff should be conducted, and to what extent counsel needs to be involved in those communications. At minimum, when counsel for any party specifically requests that it be included as a recipient to a communication with its client, that request should be honored.

Project Located in Custer and Fall River Counties South Dakota at 5–6, § 3, 8–10, § 6 (Mar. 19, 2014) (ADAMS Accession No. ML14066A347) [hereinafter Programmatic Agreement].

[223] See id. at 5–6, § 3.

[224] Model Rules of Prof'l Conduct r. 3.2 (Am. Bar. Ass'n 1983).

While we have held that, even with these communications missteps, the NRC Staff's consultation-related actions were minimally sufficient to meet its NHPA burden, we once again reiterate that the "NRC Staff has been much better served when . . . it has worked with Indian tribes to comply with the substance of NEPA and the NHPA."[225] This involves the NRC Staff being prompt in its responses and including the Oglala Sioux Tribe's counsel, an approach that all other parties would be well served to abide by as well.

ii. Mandatory Disclosures

10 C.F.R. § 2.336 provides for "general discovery" in Subpart L proceedings.[226] In pertinent part, the regulation requires that "all parties . . . shall . . . disclose and provide . . . all documents and data compilations in the possession, custody, or control of the party that are relevant to the contentions."[227] The regulation establishes that each party's duty to submit these mandatory disclosures is ongoing, and that each party must make these mandatory disclosures once a month and without the filing of a discovery request by other parties.[228] Furthermore, the Commission has made clear that the scope of mandatory disclosures is "wide-reaching."[229] Because the mandatory disclosures are the only form of discovery in Subpart L proceedings, they, "like all discovery exchanges, cover a vast array of information and documents that are not evidence and need not meet the requirements of admissible evidence."[230]

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[225] Crow Butte, LBP-16-7, 83 NRC at 371.

[226] Although 10 C.F.R. § 2.336 is contained in Subpart C to the agency's Part 2 rules of procedure, Subpart C is generally applicable to all adjudications pursuant to the Atomic Energy Act, including Subpart L proceedings. 10 C.F.R. §§ 2.300, 2.1200.

[227] Id. § 2.336(a)(2)(i).

[228] Id. § 2.336(a), (d).

[229] Crow Butte Res., Inc. (N. Trend Expansion Project), CLI-09-12, 69 NRC 535, 572 (2009).

[230] Progress Energy Fla., Inc. (Levy Cty. Nuclear Power Plant, Units 1 & 2), LBP-09-30, 70 NRC 1039, 1046 (2009) (citing 10 C.F.R. § 2.705(b)(1)).

Given the broad scope of the mandatory disclosure obligation, absent some claim of privilege, all parties bore the continuing obligation following the issuance of the Partial Initial Decision to disclose any documents in their possession that were potentially relevant to (1) consultation between the NRC Staff and the Oglala Sioux Tribe, and (2) the NRC Staff's efforts in addressing the identified deficiencies in the FSEIS. This includes the disclosure of any correspondence between the NRC Staff and Powertech concerning the methodology for assessing impacts to Native American cultural resources.[231] Although our ruling on its dispositive motion for summary disposition means that the NRC Staff no longer has a continuing obligation to disclose documents relevant to Contention 1B,[232] documents relevant to the NRC Staff's consideration of methodologies for addressing the FSEIS deficiencies—such as correspondence between itself and Powertech on the preferred methodology for assessing tribal cultural resources—are relevant to Contention 1A, and thus the NRC Staff's and Powertech's obligation to disclose these documents is ongoing.

Furthermore, in its September 28, 2017 update to the Board, the NRC Staff seemed to recognize it erred with respect to this mandatory obligation.[233] That update identified several items of correspondence between the NRC Staff and Powertech that occurred between July 2016 and May 2017, which were "inadvertently not included in the Staff's previous monthly disclosures."[234] All of the parties need to re-review their records and ensure that they have disclosed any and all existing documents that have not been previously disclosed that are

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[231] Although the Oglala Sioux Tribe specifically allege that the NRC Staff violated its duty to disclose this correspondence, Powertech is equally obliged to disclose such correspondence to the other parties.

[232] See 10 C.F.R. § 2.336(d).

[233] NRC Staff, Supplementary Hearing File and Mandatory Disclosures (Sept. 28, 2017).

[234] Id. at 1–2.

potentially relevant to Contention 1A. Going forward, with Contention 1A still pending, the parties must continue to disclose any documents relevant to the NRC Staff's efforts to resolve the deficiencies identified in this decision, in general, and any documents pertaining to the selection of a preferred methodology for Native American cultural resources, in particular.[235]

iii. Negotiating Position

Both parties appeared to be reluctant to be the first to make a concession and offer a proposal that varied in any substantial degree from its original bargaining position. The NRC Staff has only offered an open-site proposal that the Oglala Sioux Tribe deems wholly objectionable. The Oglala Sioux Tribe has not put forward a proposal which varies from the Makoche Wowapi proposal that the NRC Staff has rejected. This has produced a hopeless impasse.

Nonetheless, we recognize that ultimately it is the obligation of the NRC Staff—not the Oglala Sioux Tribe—to select a methodology that will satisfy NEPA. As such, while the NRC Staff may continue to work with the Oglala Sioux Tribe in identifying a reasonable, affordable method to obtain information on the Oglala Sioux Tribe's cultural resources, the NRC Staff is not obligated to adopt any specific methodology. Moving forward, the NRC Staff's primary responsibility is to carefully consider what options may result in actually obtaining pertinent information on the Sioux Tribes' cultural resources, with or without the Oglala Sioux Tribe's input, and make a choice about which option to implement. If the NRC Staff chooses to continue to consult with the Oglala Sioux Tribe in identifying an acceptable approach to obtaining information on tribal cultural resources, both parties should come forward with constructive suggestions and comments, rather than simply dismissing the other's proposed approach. Even if the NRC Staff selects a methodology without further input from the Oglala

[235] See 10 C.F.R. § 2.336(b)(1)–(5).

Sioux Tribe, we do note that the Oglala Sioux Tribe will have additional meaningful opportunities to consult during future phases of the project pursuant to the Programmatic Agreement.[236]

c. Scheduling

While, as we have previously recognized, it is inappropriate for the Board to direct the NRC Staff in the completion of its NEPA review activities, it is also clear that the Board is given the responsibility to manage the schedule for this adjudicatory proceeding.[237] In this instance, the parties have had some two years to address the deficiencies in the NRC Staff's NEPA cultural resources analysis for the Dewey-Burdock project site as identified in Contention 1A and the Board's Partial Initial Decision. Under the circumstances, given the rulings and guidance now provided by the Board in this decision, it seems reasonable to the Board that over the next six months the parties have the following options: (1) in the near term, they may submit a joint motion to request the appointment of a Settlement Judge to conduct settlement negotiations to assist in the resolution of this dispute pursuant to 10 C.F.R. § 2.338, and pursue that avenue in an attempt to reach a settlement and dismissal of the contention; (2) they may continue to confer with one another in an attempt to find a method of addressing the deficiencies in the FSEIS that is mutually agreeable to both parties, and, if successful, file a joint motion for dismissal of the contention; (3) the NRC Staff may, without consultation with the Oglala Sioux Tribe, consider and select a method[238] for addressing the FSEIS deficiencies, and file a new motion for summary disposition; or (4) if options one through three do not result in a

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[236] Programmatic Agreement at 5–6, § 3, 8–10, § 6.

[237] See 10 C.F.R. §§ 2.319(k), 2.332.

[238] This may be a method entirely different from the currently proposed open-site survey or a version of the open-site survey that the NRC Staff can argue—with adequate legal and factual support—is not subject to the dispute of material fact on the method's reasonableness that has been identified in this decision.

resolution, prepare for and participate in an evidentiary hearing to resolve Contention 1A on the reasonableness of the terms of the NRC Staff's proposed open-site survey.

With regard to all of these prospects save for the first, we set out the following schedule for the parties' motion for summary disposition filings and the evidentiary hearing, and which is summarized in Appendix A.

i. Summary Disposition

If any party wishes to submit any motion for summary disposition to resolve Contention 1A, that filing is due no later than April 20, 2018. In accordance with 10 C.F.R. § 2.1205(b), any response supporting or opposing the motion must be filed on or before May 10, 2018, and any reply to a response in support of the motion is due on or before Monday, May 21, 2018.

Consistent with this schedule, the Board anticipates issuing a decision on the motions on or about June 1, 2018.

ii. Evidentiary Hearing

Assuming we do not resolve Contention 1A on any party's motion for summary disposition or do not receive any summary disposition motion by April 20, 2018, we will hold an evidentiary hearing to commence on June 26, 2018 and to conclude on June 28, 2018. Parties are to file position statements and pre-filed direct testimony no later than June 11, 2018, and rebuttals to the position statements and pre-filed direct testimony are to be filed no later than June 18, 2018. Any proposed cross-examination questions for the evidentiary hearing shall be submitted to the Board no later than June 22, 2018. Following the conclusion of the evidentiary hearing, parties are to submit their proposed findings of fact and conclusions of law no later than July 30, 2018, and replies to the findings of fact and conclusions of law shall be filed no later than August 29, 2018.

Consistent with this schedule, the Board anticipates issuing an initial decision finally resolving Contention 1A on or about October 12, 2018.

iii. Continuing Board Oversight of this Proceeding

Finally, to monitor the parties' progress relative to the schedule above, in addition to continuing to receive monthly reports, we anticipate holding more frequent teleconferences with the parties about their progress in their efforts to resolve Contention 1A. To this end, the parties are advised that the Board anticipates holding a telephone prehearing conference with the parties during the week of November 13, 2017, and will be contacting the parties in the near term regarding the details.

It is so ORDERED.

THE ATOMIC SAFETY
AND LICENSING BOARD

/RA/

William J. Froehlich, Chairman
ADMINISTRATIVE JUDGE

/RA/

Dr. Mark O. Barnett
ADMINISTRATIVE JUDGE

/RA/

G. Paul Bollwerk, III
ADMINISTRATIVE JUDGE

Rockville, Maryland
October 19, 2017

Additional Views of Bollwerk, A.J.,

While I agree fully with the Licensing Board's resolution of the NRC Staff's dispositive motions as to both Contentions 1A and 1B, in light of the history of this case since the Licensing Board's April 15, 2015 partial initial decision (PID), I write separately regarding the future course of this proceeding.

Delay in an adjudication generally favors one of the litigants. In this instance, given circumstances such as the diminished price of uranium; declining agency budgets; the prospect that something pertinent might come from a Commission decision on not dissimilar issues in the pending Crow Butte license renewal case appeal, see Crow Butte Resources, Inc. (In Situ Leach Facility, Crawford Nebraska), LBP-16-7, 83 NRC 340, 366–83, 394–404 (2016), appeals pending; and the pending federal court litigation on whether the effectiveness of the Powertech license should be rescinded in light of the Board's April 2015 PID, see Oglala Sioux Tribe's Response in Opposition to NRC Staff Motion for Summary Disposition of Contentions 1A and 1B (Sept. 1, 2017) at 15, the two-year-plus interval since the Board's April 2015 PID may have had value for all of the litigants in this proceeding.

Nonetheless, as the final portion of the Board's order indicates, this litigation cannot continue at its previous pace. All of the litigants are entitled to, and must participate in, an effort to reach a fair and efficient conclusion to this proceeding. Thus, with the schedule incorporated into the Board's decision denying the NRC Staff's dispositive motion regarding Contention 1A, the question of what constitutes an appropriate methodology for identifying Sioux tribal cultural resources on the Dewey-Burdock project site is now on a course to be resolved before the Board in 2018.

In setting this schedule, the Board initially has provided the parties with six months to reach an accommodation regarding how an NRC Staff-administered cultural resources study/survey for the Dewey-Burdock project site should be fashioned. As the Board's summary

disposition ruling indicates, this may involve further efforts by the NRC Staff to consider Oglala Sioux Tribe proposed options to create an appropriate study/survey, with suitable assistance from Powertech and pertinent tribal participants.

And while the NRC Staff ultimately is responsible for shaping the cultural resources survey/study, important components in such an effort may well include (1) in accord with the testimony of the NRC Staff's witnesses Goodman and Nickens in the Crow Butte license renewal case, see supra p. 38, obtaining pertinent ethnographic data, presumably from tribal elders or other knowledgeable sources, regarding the identification of culturally sensitive spaces that might exist on the Dewey-Burdock project site; and (2) identifying and employing methods that allow such ethnographic material to be utilized in an efficient, cost-effective manner to pinpoint any particular areas on the facility site that may have cultural resource sensitivity. Addressing these items in a mutually satisfactory manner undoubtedly will require significant party cooperation and accommodation, as well as a willingness to provide the essential resources for execution, whether financial, informational, or otherwise. Thus, for example, if tribal elders are to be the ethnographic information source, a mutually agreeable arrangement seemingly would need to be generated to make the pertinent individuals available timely and to provide logistical support so that the information they afford can be effectively employed. By the same token, to translate such ethnographic information into actual geographic locations on the expansive Dewey-Burdock project site may merit consideration about whether, for instance, the use of initial surveys incorporating light detection and ranging (LiDAR) and/or drone technology would aid in making traditional "boots on the ground" pedestrian surveys more efficient. Hopefully, these possibilities and others will be considered as the NRC Staff seeks to craft an archaeologically and anthropologically sound cultural resources survey/study for the Dewey-Burdock project site.

No doubt, the parties will be considering (as they should be) the costs involved in whatever options are scrutinized. But with the litigation schedule now established by the Board,

such calculations also should encompass the expenses involved for each in preparing for, participating in, and submitting post-hearing filings associated with an evidentiary hearing on Contention 1A, expenditures that may come into play in relatively short order if they are unable to reach a resolution of this contention among themselves.

APPENDIX A

SCHEDULE – Powertech USA, Inc. (Dewey-Burdock In Situ Uranium Recovery Facility) Proceeding

Event:	**Date:**
Licensing Board Order Denying Staff Dispositive Motion on Contention 1A	Oct. 19, 2017
Dispositive Motion(s) Schedule	
Additional Dispositive Motion(s) on Contention 1A Due	Apr. 20, 2018
Responses Supporting or Opposing Summary Disposition Motion(s) Due*	May 10, 2018
Reply to Responses Supporting Summary Disposition Motion(s) Due	May 21, 2018
Licensing Board Ruling on Summary Disposition Motion(s)	June 1, 2018
Evidentiary Hearing Schedule	
Positions Statements/Prefiled Direct Testimony Due	June 11, 2018
Rebuttal Statements/Prefiled Rebuttal Testimony Due	June 18, 2018
Proposed Cross-Examination Questions Due	June 22, 2018
Evidentiary Hearing	June 26–28, 2018
Proposed Findings of Fact/Conclusions of Law Due	July 30, 2018
Reply Findings of Fact/Conclusions of Law Due	Aug. 29, 2018
Licensing Board Initial Decision	Oct. 12, 2018

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **MEMORANDUM AND ORDER (Granting Summary Disposition as to Contention 1B, Denying Summary Disposition as to Contention 1A, and Establishing Further Procedures) (LBP-17-09)** have been served upon the following persons by Electronic Information Exchange, and by electronic mail as indicated by an asterisk.

U.S. Nuclear Regulatory Commission
Atomic Safety and Licensing Board (ASLB)
Mail Stop T-3F23
Washington, DC 20555-0001

William J. Froehlich, Chair
Administrative Judge
william.froehlich@nrc.gov

Mark O. Barnett
Administrative Judge
mark.barnett@nrc.gov

G. Paul Bollwerk, III
Administrative Judge
paul.bollwerk@nrc.gov

Margaret J. Bupp, Esq., Chief Counsel
margaret.bupp@nrc.gov

Nicole Simmons, Law Clerk
Nicole.Simmons@nrc.gov

Sarah B. Ladin, Law Clerk
Sarah.Ladin@nrc.gov

U.S. Nuclear Regulatory Commission
Office of Commission Appellate Adjudication
Mail Stop O-16B33
Washington, DC 20555-0001
OCAA Mail Center
ocaamail@nrc.gov

U.S. Nuclear Regulatory Commission
Office of the Secretary of the Commission
Rulemakings & Adjudications Staff
Mail Stop O-16B33
Washington, DC 20555-0001
hearingdocket@nrc.gov

U.S. Nuclear Regulatory Commission
Office of the General Counsel
Mail Stop O-15 D21
Washington, DC 20555-0001
Mary Spencer, Esq.
mary.spencer@nrc.gov
Susan Vrahoretis, Esq.
Susan.Vrahoretis@nrc.gov
Emily Monteith, Esq.
emily.monteith@nrc.gov
Sabrina Allen, Paralegal
sabrina.allen@nrc.gov
David Cylkowski
David.Cylkowski@nrc.gov
OGC Mail Center:
OGCMailCenter@nrc.gov

POWERTECH (USA) INC., DEWEY-BURDOCK IN SITU RECOVERY FACILITY
DOCKET NO. 40-9075-MLA
MEMORANDUM AND ORDER (Granting Summary Disposition as to Contention 1B, Denying Summary Disposition as to Contention 1A, and Establishing Further Procedures) (LBP-17-09)

Counsel for the Applicant (Powertech)
Thompson & Pugsley, PLLC
1225 19th Street, NW, Suite 300
Washington, DC 20036
Christopher S. Pugsley, Esq.
cpugsley@athompsonlaw.com
Cynthia L. Seaton, Paralegal
cseaton@athompsonlaw.com
Anthony J. Thompson, Esq.
ajthompson@athompsonlaw.com

Consultant to Applicant (Powertech)
WWC Engineering
1849 Terra Ave.
Sheridan, WY 82801
Jack Fritz
jfritz@wwcengineering.com

Counsel for the Oglala Sioux Tribe
Western Mining Action Project
P. O. Box 349
Lyons, CO 80540
Jeffrey C. Parsons, Esq.
wmap@igc.org

Counsel for the Oglala Sioux Tribe
Energy & Conservation Law
1911 Main Avenue, Suite 238
Durango, CO 81301
Travis E. Stills, Esq.
stills@frontier.net

Counsel for Consolidated Intervenors
Aligning for Responsible Mining (ARM)
David Frankel, Esq.
P.O.B. 3014
Pine Ridge, SD 57770
arm.legal@gmail.com

Counsel for Consolidated Intervenors
(Susan Henderson and Dayton Hyde)
Law Office of Bruce Ellison
P.O. Box 2508
Rapid City, SD 57709
Bruce Ellison, Esq.*
belli4law@aol.com
Roxanne Andre, Paralegal*
roxanneandre@yahoo.com

Counsel for Consolidated Intervenor
(Dayton Hyde)
Thomas J. Ballanco, Esq.*
945 Traval Street, #186
San Francisco, CA 94116
harmonicengineering@gmail.com

[Original signed by Clara Sola]
Office of the Secretary of the Commission

Dated at Rockville, Maryland
this 19th day of October, 2017