LBP-13-09

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

William J. Froehlich, Chairman
Dr. Richard F. Cole
Dr. Mark O. Barnett

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)	July 22, 2013

MEMORANDUM AND ORDER
(Ruling on Proposed Contentions Related to the Draft Supplemental Environmental Impact Statement)

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MEMORANDUM AND ORDER
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I. Introduction

On August 5, 2010, the Board in the above-captioned matter ruled on two petitions to intervene and requests for hearing.[1] The Board admitted the Oglala Sioux Tribe and the then-designated Consolidated Petitioners[2] as intervenors in this proceeding challenging the application of Powertech (USA), Inc., ("Powertech" or "Applicant") to construct and operate an in-situ leach uranium recovery (ISR) facility in Custer and Fall River Counties, South Dakota.[3]

[1] LBP-10-16, 72 NRC 361 (2010).
[2] Although originally called the Consolidated Petitioners, the Board now refers to Susan Henderson, Dayton Hyde and Aligning for Responsible Mining (ARM) as the Consolidated Intervenors.
[3] LBP-10-16, 72 NRC at 380–93.

The Board also admitted a total of seven contentions proposed by the Oglala Sioux Tribe and the Consolidated Intervenors.[4]

On November 15, 2012, the Nuclear Regulatory Commission Staff (NRC Staff) notified the Board of the public availability of its Draft Supplemental Environmental Impact Statement (DSEIS) prepared pursuant to the National Environmental Policy Act (NEPA), 42 U.S.C. § 4332, and the agency's implementing regulations, 10 C.F.R. Part 51.[5] On January 25, 2013, both the Oglala Sioux Tribe and the Consolidated Intervenors filed proposed contentions relating to the DSEIS.[6] On March 7, 2013, NRC Staff filed its response to the proposed contentions,[7] followed on March 11, 2013, by the Powertech response.[8] On March 25, 2013, both the Oglala Sioux Tribe and the Consolidated Intervenors submitted replies in support of their respective motions for new contentions.[9]

In this Memorandum and Order, the Board concludes that three new contentions proposed in response to the DSEIS are admissible, seven contentions are admissible because of the migration tenet, and the balance of the proposed contentions are inadmissible.

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[4] Id. at 443–44.
[5] Letter to Administrative Judges Froehlich, Cole, and Barnett, from Patricia Jehle, Counsel for NRC Staff (Nov. 15, 2012) (ADAMS Accession No. ML12320A623); see Supplement to the Generic Environmental Impact Statement for In-Situ Leach Uranium Milling Facilities, NUREG-1910 (Supp. 4, Nov. 2012) (ADAMS Accession No. ML12312A040) [hereinafter DSEIS].
[6] See List of Contentions of the Oglala Sioux Tribe Based on the [DSEIS] (Jan. 25, 2013) [hereinafter Oglala Sioux Tribe's Proposed Contentions]; Consolidated Intervenors' New Contentions Based on DSEIS (Jan. 25, 2013) [hereinafter Consolidated Intervenors' Proposed Contentions].
[7] NRC Staff's Answer to Contentions on [DSEIS] (Mar. 7, 2013) [hereinafter Staff's Answer].
[8] Applicant Powertech (USA) Uranium Corporation's Response to Consolidated Petitioners' Request for a Hearing/Petition for Intervention (Mar. 11, 2013) [hereinafter Powertech's Response].
[9] Consolidated Intervenors' Consolidated Reply Re: DSEIS (Mar. 25, 2013) [hereinafter Consolidated Intervenors' Reply]; Consolidated Reply of the Oglala Sioux Tribe (Mar. 25, 2013) [hereinafter Oglala Sioux Tribe's Reply].

II. Background

The background of this case has been set forth in detail in the Board's August 5, 2010, opinion.[10] In that opinion and order, the Board first determined that the Oglala Sioux Tribe and the Consolidated Intervenors had standing to pursue their claims.[11] Additionally, the Board considered whether ten proposed contentions from the Oglala Sioux Tribe and nine proposed contentions from the Consolidated Intervenors met the contention admissibility standards set forth in 10 C.F.R. § 2.309(f)(1). In so doing, the Board admitted seven contentions, four proffered by the Oglala Sioux Tribe and three proffered by the Consolidated Intervenors.

As outlined in the Board's 2010 decision, the previously admitted contentions are as follows:

> For the Oglala Sioux Tribe—
>
> Contention 1 – Powertech's Application is deficient because it fails to address adequately protection of historical and cultural resources.
>
> Contention 2 – Failure to include necessary information for adequate determination of baseline ground water quality.
>
> Contention 3 – Failure to include adequate hydrogeological information to demonstrate ability to contain fluid migration.
>
> Contention 4 – Inadequate analysis of Ground Water Quantity Impacts.
>
> For the Consolidated Intervenors—
>
> Contention D – Powertech's presentation and analysis of baseline water quality data in its Application is inadequate. Further, Powertech's analysis of aquifer confinement fails to include an analysis of how artesian and horizontal flow could impact surrounding aquifers and surface waters.
>
> Contention E (merged with J) – The lack of adequate confinement of the host Inyan Kara aquifer makes the proposed operation inimical to public health and safety in violation of Section 40.31(d). Further, Applicant's failure to describe faults and fractures between aquifers, through which the groundwater can spread uranium, thorium, radium 226 and 228, arsenic, and other heavy metals, violates Section 51.45(c) and (e).

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[10] See LBP-10-16, 72 NRC at 376–80.
[11] Id. at 380–93.

> Contention K – The Application is not in conformance with 10 C.F.R. § 40.9 and 10 C.F.R. § 51.45 because the Application does not provide analyses that are adequate, accurate, and complete in all material respects to demonstrate that cultural and historic resources . . . are identified and protected pursuant to Section 106 of the National Historic Preservation Act. As a result, the Application fails to comply with Section 51.60 . . . .[12]

In its analysis of contention admissibility, the Board denied several of the Oglala Sioux Tribe's and the Consolidated Intervenors' proposed contentions for their failure to meet the contention admissibility standards set forth in 10 C.F.R. § 2.309(f)(1).[13] The Board rejected some of the proposed contentions because they were unsupported,[14] some because they were premature,[15] and some because they were outside the scope of the licensing proceeding.[16]

After the issuance of the Board's 2010 decision, which neither Powertech nor the NRC Staff challenged on appeal before the Commission, the Board held two prehearing conference calls with the parties regarding administrative matters.[17] As stated, the DSEIS was made public in November 2012 and both the Oglala Sioux Tribe and Consolidated Intervenors filed proposed new contentions based on the DSEIS. Now before the Board is the question of the admissibility of these parties' proposed new contentions.

III. Legal Standards

A. New and Amended Contentions

To be admissible, like a contention that is submitted with an initial hearing request, a post-hearing petition contention, i.e., a new or amended contention, also must satisfy the

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[12] Id. at 443–44.
[13] See infra Part III.A. for the contention admissibility standards.
[14] See LBP-10-163, 72 NRC at 395–400, 407–08, 409–11, 440–42 (rejecting Consolidated Intervenor's Contentions A, B, C, F, H, and Oglala Sioux Tribe's Contention 10).
[15] See id. at 419–22, 438–40 (discussing Oglala Sioux Tribe's Contention 9 and a portion of Oglala Sioux Tribe's Contention 1).
[16] See id. at 408–09, 428–38 (discussing Consolidated Intervenor's Contention G and Oglala Sioux Tribe's Contentions 5, 6, 7, and 8).
[17] See Tr. at 410, 478.

substantive contention admissibility standards set forth in 10 C.F.R. § 2.309(f)(1), namely the contention must

> (i) Provide a specific statement of the issue of law or fact to be raised or controverted . . . ; (ii) Provide a brief explanation of the basis for the contention; (iii) Demonstrate that the issue raised in the contention is within the scope of the proceeding; (iv) Demonstrate that the issue raised in the contention is material to the findings the NRC must make to support the action that is involved in the proceeding; (v) Provide a concise statement of the alleged facts or expert opinions which support the requestor's/petitioner's position on the issue . . . ; [and] (vi) . . . [P]rovide sufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact.[18]

Additionally, pursuant to 10 C.F.R. § 2.309(c),[19] if a party submits a proposed contention after the initial filing deadline announced in the applicable Federal Register notice for submitting a hearing petition, it "will not be entertained absent a determination by the presiding officer that a participant has demonstrated good cause."[20] Good cause exists when "(i) [t]he information upon which the filing is based was not previously available; (ii) [t]he information upon which the filing is based is materially different from information previously available; and (iii) [t]he filing has been submitted in a timely fashion based on the availability of the subsequent information."[21]

If the reason a motion to admit a new or amended contention was filed after the deadline does not relate to the substance of the filing itself, the standard contained in 10 C.F.R. § 2.307 applies in determining whether the motion can be considered timely.[22] Section 2.307 provides that a filing deadline "may be extended or shortened either by the Commission or the presiding

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[18] 10 C.F.R. § 2.309(f)(1).
[19] The current § 2.309(c) was established by 77 Fed. Reg. 46,561 and officially enacted on September 4, 2012. See 77 Fed. Reg. 46,561 (Aug. 3, 2012). In its October 16, 2012, Order memorializing the Board's October 4, 2012, conference call with the parties and establishing a supplemental initial scheduling order, the Board determined that the standards set forth in the now-current § 2.309(c) would apply to new or amended contentions submitted after the applicable deadline although this section's current language was not in place at the start of this proceeding. Licensing Board Order (Second Prehearing Conference Call Summary and Supplemental Initial Scheduling Order) at 4 (Oct. 16, 2012).
[20] 10 C.F.R. § 2.309(c).
[21] 10 C.F.R. § 2.309(c).
[22] 10 C.F.R. § 2.309(c)(2).

officer for good cause, or by stipulation approved by the Commission or the presiding officer."[23] Good cause in this section is not explicitly defined.[24] Therefore, to be admissible at this stage, a contention must not only meet contention admissibility standards of § 2.309(f)(1), but must also satisfy the timeliness requirements of § 2.309(c) or § 2.307.

B. Migration Tenet

Admitted contentions challenging an applicant's Environmental Report (ER) may, in appropriate circumstances, function as challenges to similar portions of the Staff's Environmental Impact Statement.[25] This "migration tenet" applies when "the information in the DEIS is sufficiently similar to the information in the ER."[26] In this circumstance, a party need not file a new or amended contention; the previously admitted contention will simply be viewed as applying to the relevant portion of the DEIS.[27] This is appropriate, however, only so long as the DEIS analysis or discussion at issue is essentially in para materia with the ER analysis or discussion that is the focus of the contention. Alternatively, an intervenor attempting to litigate an issue based on expressed concerns about the DEIS may need to amend the admitted contention or submit a new contention if the information in the DEIS is sufficiently different from the information in the ER that supported the original contention's admission.[28] A new or

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[23] 10 C.F.R. § 2.307(a).
[24] 77 Fed. Reg. at 46,571 ("The NRC notes that 'good cause' in § 2.307 does not share the same definition that is used for 'good cause' in final § 2.309(c) . . . ."). The Federal Register notice provides health issues or an unexpected weather event as examples of reasons that might constitute good cause for purposes of requesting an extension under § 2.307. Id.
[25] Private Fuel Storage, LLC (Independent Spent Fuel Storage Installation), LBP-01-23, 54 NRC 163, 172 n.3 (2001); see Louisiana Energy Services, LP (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77, 84 (1998).
[26] Progress Energy Florida, Inc. (Levy County Nuclear Power Plant, Units 1 and 2), LBP-11-01, 73 NRC 19, 26 (2011); accord. Southern Nuclear Operating Co. (Early Site Permit for Vogtle ESP Site), LBP-08-2, 67 NRC 54, 63–64 (2008).
[27] Detroit Edison Co. (Fermi Nuclear Power Plant, Unit 3), LBP-12-23, 76 NRC __, __ (slip op. at 29) (Nov. 9, 2012) ("The Board may construe an admitted contention contesting the ER as a challenge to a subsequently issued DEIS or FEIS without the necessity for Intervenors to file a new or amended contention.").
[28] Southern Nuclear Operating Co. (Early Site Permit for Vogtle ESP Site), LBP-08-2, 67 NRC 54, 63–64 (2008).

amended contention related to portions of the DEIS that differ from the ER must be timely filed under § 2.309(c), and meet the contention admissibility standards of § 2.309(f)(1) to be admitted.[29]

C. Contentions of Omission or Adequacy

There are two primary types of contentions—contentions of omission and contentions of adequacy.[30] "A contention of omission is one that alleges an application suffers from an improper omission, whereas a contention of adequacy raises a specific substantive challenge to how particular information or issues have been discussed in the application."[31] Based on its language, a contention can be characterized as a contention of omission, a contention of adequacy, or both.[32] An admitted contention of omission may be rendered moot by subsequent license-related documents filed by the NRC Staff that address the alleged omission.[33] In this circumstance, the party that filed the original contention of omission must file a new or amended contention if it wishes to challenge the adequacy or sufficiency of the NRC Staff's treatment of

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[29] Duke Energy Corp. (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-08, 56 NRC 373, 382 (2002) ("While a contention contesting an applicant's environmental report generally may be viewed as a challenge to the NRC Staff's subsequent draft EIS, new claims must be raised in a new or amended contention."); Southern Nuclear Operating Co., LBP-08-2, 67 NRC at 64 (explaining that, if the portion of the ER that an admitted contention challenges is not sufficiently similar to the DEIS, "an intervenor attempting to litigate an issue based on expressed concerns about the DEIS may need to amend the admitted contention or, if the information in the DEIS is sufficiently different from that in the ER that supported the contention's admission, submit a new contention").

[30] Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 6 and 7), LBP-11-06, 73 NRC 149, 200 (2011); see, e.g., Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-11-11. 74 NRC 427, 442 (2011) (discussing whether a contention should properly be characterized as a contention of omission or a contention of adequacy and the ramifications of such a designation with regard to contention admissibility).

[31] Florida Power & Light Co., LBP-11-6, 73 NRC at 200 n.53; accord. Duke Energy Corp., CLI-02-08, 56 NRC at 382–83 ("There is, in short, a difference between contentions that merely allege an 'omission' of information and those that challenge substantively and specifically how particular information has been discussed in a license application.").

[32] Duke Energy Corp., CLI-02-08, 56 NRC at 383 n.45; see Florida Power & Light Co., LBP-11-6, 73 NRC at 199–200.

[33] Id. at 383 ("Where a contention alleges the omission of particular information or an issue from an application, and the information is later supplied by the applicant or considered by the Staff in a draft EIS, the contention is moot.").

the relevant issue.[34] That new or amended contention must be timely filed and must meet the contention admissibility standards. Generalized grievances with the sufficiency of the NRC Staff's analysis or the adequacy of included documentation are not enough to raise a proposed contention to the level of admissibility.[35]

IV. Discussion

A. The Oglala Sioux Tribe's Proposed Contention 1:

"Failure to Meet Applicable Legal Requirements Regarding Protection of Historical and Cultural Resources, and Failure to Involve or Consult the Oglala Sioux Tribe as Required by Federal Law"

1. Positions of the Parties

The Oglala Sioux Tribe's proposed new Contention 1 is nearly identical to Consolidated Intervenors' proposed new Contention A. Contention 1 alleges the DSEIS's "failure to meet applicable legal requirements regarding protection of historical and cultural resources, and failure to involve or consult the Oglala Sioux Tribe as required by federal law."[36] The Oglala Sioux Tribe contends that the proposed site has not yet been adequately surveyed with regard to its potential cultural resources, which renders premature the DSEIS's determination that impacts resulting from the site's operation are "small."[37] Additionally, the Oglala Sioux Tribe contends that the NRC Staff has not engaged in the required National Historic Preservation Act

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[34] Id.
[35] PPL Susquehanna LLC (Susquehanna Steam Electric Station, Units 1 & 2), LBP-07-10, 66 NRC 1, 23 (2007); Shieldalloy Metallurgical Corp. (Amendment Request for Decommissioning of the Newfield, New Jersey Facility), LBP-07-05, 65 NRC 341, 352 (2007) ("'[T]he contention rule is strict by design' and does 'not permit the filing of a vague, unparticularized contention, unsupported by affidavit, expert, or documentary support.'" (footnotes omitted)); PPL Susquehanna, LLC (Susquehanna Steam Electric Station, Units 1 & 2), LBP-07-4, 65 NRC 281, 303–04 (2007).
[36] Oglala Sioux Tribe's Proposed Contentions at 4.
[37] Id. at 5.

(NHPA) consultation process with a number of tribes that have an interest in the proposed site.[38]

In response to this contention, the NRC Staff asserts that the contention is not based on any new or materially different information and is, therefore, not timely pursuant to 10 C.F.R. § 2.309(c). Additionally, the NRC Staff notes that the results of an additional survey being conducted by the NRC Staff may be challenged at a later date, if appropriate.[39]

Powertech takes the same stance as the NRC Staff in its response to the Oglala Sioux Tribe's contention. It argues that the contention does not satisfy the requirements for new and amended contentions set out in § 2.309(c).[40] It maintains that, to be considered timely, the contention should have been filed well before January 25, 2013.[41] Additionally, Powertech contends that the portion of the Oglala Sioux Tribe's contention alleging inadequate surveying related to cultural resources is not yet ripe because the Section 106 process, which provides a federally recognized Indian tribe with a procedural right to protect its interest in cultural resources,[42] is not yet complete.[43] When that process is complete, Powertech states that the Oglala Sioux Tribe may submit a new or amended contention, if appropriate.[44]

In its reply to the NRC Staff's and Powertech's arguments, the Oglala Sioux Tribe points out that the Board, in its August 5, 2010, Order that granted the petitions to intervene and requests for hearing, found that the Oglala Sioux Tribe's NHPA and NEPA contentions were not ripe because it is the duty of the Staff, not the applicant, to consult with interested tribes

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[38] Id. at 5–6.
[39] Staff's Answer at 12–13.
[40] Powertech's Response at 12.
[41] Id. at 12.
[42] National Historic Preservation Act § 106, 16 U.S.C. § 470.
[43] Powertech's Response at 13.
[44] Id. at 13.

concerning the proposed site.[45] The Oglala Sioux Tribe now argues that the contention is admissible because the DSEIS, which should reflect those Staff obligations, has been issued.[46]

The Oglala Sioux Tribe also rejects the arguments that it should wait to file contentions related to cultural surveys until future planned surveys have been completed. It asserts that the Staff "should not be able to pre-emptively 'moot' an otherwise admissible contention based on actions that it has not yet taken."[47] Further, it contends that the Staff's arguments inappropriately focus on the merits of the Oglala Sioux Tribe's contentions, rather than their admissibility pursuant to the standards set forth in 10 C.F.R. § 2.309(f)(1).[48]

Finally, the Oglala Sioux Tribe argues that its Contention 1 should not be found inadmissible for failing to be based on new or materially different information.[49] The Oglala Sioux Tribe declares that it raised an admissible contention in relation to the application that is similar to the one it currently proposes and no subsequent research or information has been released that alters the basis of its previously admitted contention.[50] Accordingly, the Oglala Sioux Tribe reasons that "the same sufficient information that formed the basis of Powertech's inadequate application materials now forms an inadequate basis for the NRC Staff's analysis in the DSEIS."[51]

2. Board Ruling

The Oglala Sioux Tribe's proposed Contention 1 is nearly identical to Consolidated Intervenors' proposed Contention A. Both allege a failure to protect historical and cultural resources and a failure to involve or consult with affected Native American tribes.

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[45] Oglala Sioux Tribe's Reply at 4.
[46] Id.
[47] Id. at 5.
[48] Id. at 6.
[49] Id.
[50] Id.
[51] Id.

These concerns (protection of cultural and historical resources and adequacy of consultation) have already been addressed in this proceeding. The Board in LBP-10-16 admitted two contentions that question the adequacy of the protection of historic and cultural resources.[52] With the issuance of the DSEIS, these concerns about the protection of historic and cultural resources have "migrated" because this previously admitted issue now appears in relation to information in the DSEIS. Strictly speaking, the Oglala Sioux Tribe and the Consolidated Intervenors did not need to refile their respective contentions 1 and A after the issuance of the DSEIS because no further information addressing the expressed concerns of the Oglala Sioux Tribe or the Consolidated Intervenors about the adequacy of the existing cultural resources surveys has been generated by the Staff. Moreover, in accordance with its authority to consolidate party contentions and presentations under § 2.316, the Board will combine these four iterations (two filed in response to the ER and two filed in response to the DSEIS) into a single contention addressing the protection of historic and cultural resources, the terms of which are set forth in Appendix A to this opinion.[53]

The issue of the adequacy of the consultation process with interested tribes was also addressed in 2010 in LBP-10-16. There the Board held that "the issue of the alleged failure to consult with the Tribe . . . is material and within the scope of this proceeding."[54] The Board further found that this portion of the contention was not yet ripe and directed the Oglala Sioux Tribe "to wait until the [DSEIS] is issued by the NRC Staff to interpose the issue of the adequacy

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[52] LBP-10-16, 72 NRC at 419–22.

[53] A contention alleging a failure to protect historic and cultural resources was similarly admitted in the pending Crow Butte Marsland and Crow Butte Renewal proceedings. See Crow Butte Resources, Inc. (Marsland Expansion Project, LBP-13-06, 77 NRC __, __ (slip op. at 29–33) (May 10, 2013); Crow Butte Resources, Inc. (In Situ Leach Facility, Crawford, Nebraska), LBP-08-24, 68 N.R.C. 691, 719–24 (2008).

[54] LBP-10-16, 72 NRC at 422; see Crow Butte Resources, Inc. (In Situ Leach Facility, Crawford, Nebraska), CLI-09-09, 69 NRC 331, 350–51 (2009) (discussing the Board's ruling that tribal consultation is within the scope of the proceeding).

of the agency's consultation efforts."[55] Both the Oglala Sioux Tribe and Consolidated Intervenors have now timely raised the lingering issue of the adequacy of the NRC's consultation process with the Native American tribes.

Although the NRC Staff notes that it "continues to work to resolve any remaining disagreements among the consulting parties," such actions do not moot this contention. It is apparent that, notwithstanding the issuance of the DSEIS, this process has not been completed and the intervenors are alleging only that the scope of the ongoing consultation process is inadequate.

As a consequence, the prior ripeness issue is no longer a bar to this contention. Additionally, the contention is supported by a showing sufficient to meet the contention admissibility requirements of § 2.309(f)(1), and it is timely in accord with § 2.309(c)(2). Consequently, pursuant to the Board's authority under § 2.316, the consultation portions of Contention 1 and Contention A questioning the adequacy of the Staff's consultation efforts with Native American tribes as required by 36 C.F.R. § 800.2(c)(2)(ii)(D) are admitted and are consolidated into one issue statement, Contention 1B.

B. The Oglala Sioux Tribe's Proposed Contention 2:

"The DSEIS Fails to Include Necessary Information for Adequate Determination of Baseline Ground Water Quality"

1. Positions of the Parties

The Oglala Sioux Tribe's proposed Contention 2 is identical to Consolidated Intervenors' proposed Contention B—"The DSEIS fails to include necessary information for adequate determination of baseline groundwater quality."[56] Like Consolidated Intervenors, the Oglala Sioux Tribe contends that the DSEIS contravenes NRC regulations, NUREG provisions providing Staff regulatory guidance, and NEPA because "it fails to provide an adequate baseline

[55] LBP-10-16, 72 NRC at 422.
[56] Oglala Sioux Tribe's Proposed Contentions at 10.

groundwater characterization or demonstrate that ground water samples were collected in a scientifically defensible manner, using proper sample methodologies."[57] The Oglala Sioux Tribe argues that baseline conditions are mandated by statute and regulation, and that the DSEIS is inadequate because it fails to include a proper analysis of the required baselines with respect to groundwater quality.[58]

To support this contention, the Oglala Sioux Tribe relies on the supplemental declaration of Dr. Robert Moran as well as a memorandum from Dr. Richard Abitz.[59] It also points to specific areas in the DSEIS that it claims "admit[] that substantial water quality data collection will only be conducted after license issuance."[60] In addition, the Oglala Sioux Tribe asserts these portions of the DSEIS lack a scientific basis because they "rely on Powertech's decision to only consider, review, and proposed [sic] monitoring (both quality and quantity) for groundwater wells within 2 [kilometer] of the proposed mining area."[61] The 2 kilometer figure, the Oglala Sioux Tribe notes, is from NRC Regulatory Guide 4.14, which "was drafted over 30 years ago, in 1980—and not updated since."[62] Because of its age and because it "applies exclusively to conventional uranium mills—and contains no analysis or guidance premised upon any review of in-situ leach uranium mining activities," the Oglala Sioux Tribe argues that the DSEIS's reliance on Regulatory Guide 4.14 is "not justified."[63] For these reasons, the Oglala Sioux Tribe argues that Contention 2 should be admitted.

In responding to these assertions by the Oglala Sioux Tribe, the NRC Staff makes essentially the same arguments for inadmissibility as it does in response to the arguments of

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[57] Id. at 10–11.
[58] Id. at 12 (citing Half Moon Bay Fisherman's Mktg. Ass'n v. Carlucci, 857 F.2d 505, 510 (9th Cir. 1988)) ("The establishment of baseline conditions of the affected environment is a fundamental requirement of the NEPA process.").
[59] Id. at 11, 13.
[60] Id. at 14 (citing DSEIS at 2-16, 7-8, 7-14, 7-17).
[61] Id. at 14 (citing DSEIS at xxxiv, xxxv, 3-6, 4-54, 4-57, 4-59, 5-31, 7-4).
[62] Id. at 14.
[63] Id. at 14.

Consolidated Intervenors in support of their Contention B. Specifically, the NRC Staff declares that the contention is not based on any new or materially different information and, therefore, does not conform to the standards for new or amended contentions set forth in 10 C.F.R. § 2.309(c).[64] It also argues that, like the Consolidated Intervenors, the Oglala Sioux Tribe misinterprets the DSEIS, citing portions of it to support its contention that relate to the operation of the Project, not establishing baseline conditions.[65] Further, the NRC Staff seeks to discredit the Oglala Sioux Tribe's reliance on Dr. Abitz's memorandum, asserting that the memorandum was created in 2009 and does not reference the DSEIS.[66]

Powertech, too, argues that the Oglala Sioux Tribe's Contention 2 is inadmissible for failure to meet the standards for new or amended contentions.[67] To support this, Powertech asserts the Oglala Sioux Tribe's allegations were addressed in documents that have been available for some time, namely the first draft license issued in July 2012 and responses to RAIs submitted in June 2011.[68] Therefore, Powertech argues, the Board should reject Contention 2 for failing to meet the timeliness standards set forth in 10 C.F.R. § 2.309(c).

In its reply to the NRC Staff's and Powertech's arguments, the Oglala Sioux Tribe argues that the lack of any baseline groundwater analysis is an omission that has been "carried forward from the application to the DSEIS."[69] The Oglala Sioux Tribe notes that the Board stated in its August 5, 2010, Order that violations of NEPA were not ripe as alleged against an applicant because it is the agency, not an applicant, that bears the burden of satisfying the

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[64] Staff's Answer at 15.
[65] Id. at 17.
[66] Id. at 16.
[67] Powertech's Response at 12.
[68] Id. at 13.
[69] Oglala Sioux Tribe's Reply at 8.

statute.[70] Thus, the Oglala Sioux Tribe contends, "this NEPA contention ripened with the publication of the DSEIS and the newly available contention is timely filed."[71]

The Oglala Sioux Tribe refutes the argument that it did not properly identify the portions of the DSEIS that it claims are not in accordance with NEPA and NRC regulations by pointing to its filing and the affidavit of Dr. Moran.[72] In these documents, the Oglala Sioux Tribe contends, specific references are made to the problematic sections of the DSEIS.[73] Moreover, the Oglala Sioux Tribe argues that the nature of contentions of omission makes it "irrational for the Oglala Sioux Tribe to be able to identify those portions of the DSEIS where missing necessary data is not presented."[74]

Finally, the Oglala Sioux Tribe challenges the argument that it should have raised its NEPA contentions when Powertech's response to NRC Staff's RAIs were submitted. The Oglala Sioux Tribe contends that it "had already successfully alleged that the Powertech information was inadequate" and that the additional information in the RAI responses is not a basis to find NEPA contentions based on the DSEIS inadmissible.[75] The Oglala Sioux Tribe again highlights the Board's assertion that NEPA challenges are only appropriate as applied to NRC Staff prepared documents, and it is the agency that is responsible for complying with NEPA, not the Applicant.[76] For these reasons, the Oglala Sioux Tribe maintains that Contention 2 is admissible.

2. Board Ruling

The Oglala Sioux Tribe's proposed Contention 2 and Consolidated Intervenors' proposed Contention B are identical to the Oglala Sioux Tribe's original Contention 2 and the

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[70] Id. at 8.
[71] Id.
[72] Id.
[73] Id.
[74] Id.
[75] Id. at 9.
[76] Id.

first part of the Consolidated Intervenors' original Contention D.[77] The Oglala Sioux Tribe argues that the analysis of the baseline conditions is mandated by statute and regulation, and that the DSEIS is inadequate because, like the ER, it fails to include a proper analysis of the required baselines with respect to groundwater quality.[78] As such, the migration tenet applies and this issue migrates from a criticism of the Powertech ER to a criticism of the NRC Staff's DSEIS. Moreover, as it did with Oglala Sioux Tribe Contention 1 and Consolidated Intervenors' Contention A, in accordance with § 2.316 the Board will combine the multiple iterations of these issue statements into a single contention as set forth in Appendix A to this decision.[79]

In making this ruling, the Board notes that it finds unpersuasive Powertech's assertion that this contention is untimely because there were document exchanges between Powertech and the NRC Staff that took place after the application was filed and before the DEIS issued. The key issue in Contention 2 is the adequacy of the DSEIS. Until the DSEIS is issued, the intervenors have no way to know in what form or manner, if any, the NRC Staff will use information from an RAI response. As a consequence, the intervenors could only file their contentions when the information appeared (or was omitted) from the DSEIS.[80] It would be patently unreasonable to require an intervenor, or a potential intervenor, to divine what use the information collected by the NRC Staff will or will not serve in the DSEIS. Therefore, the Board finds that this contention is timely and the issues therein have migrated from their original form challenging the ER to its current form challenging the DSEIS.

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[77] LBP-10-16, 72 NRC at 400–01.
[78] Oglala Sioux Tribe's Proposed Contentions at 10.
[79] A similar contention was admitted in the Strata Energy proceeding. See Strata Energy, Inc., (Ross In Situ Recovery Uranium Project), LBP-12-3, 75 NRC 164, 192–95 (2012).
[80] See Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 & 2), LBP-82-79, 16 NRC 1116, 1118 (1982) (noting that a late filed contention lacks good cause when it is based on a draft EIS that contains no new information relevant to the contention).

C. The Oglala Sioux Tribe's Proposed Contention 3:

"The DSEIS Fails to Include an Adequate Hydrogeological Analysis to Assess Potential Impacts to Groundwater"

1. Positions of the Parties

The Oglala Sioux Tribe's proposed Contention 3 is identical to the Consolidated Intervenors' proposed Contention C—"the DSEIS fails to include an adequate hydrogeological analysis to assess potential impacts to groundwater."[81] As a result of this failure, the Oglala Sioux Tribe argues that the DSEIS also does not "provide sufficient information to establish potential effects of the project on the adjacent surface and ground-water resources."[82] These inadequacies, the Oglala Sioux Tribe contends, are in contravention of 10 C.F.R. §§ 51.10, 51.70, 51.71 and NEPA.[83]

To support this contention, which is labeled a "contention of omission," the Oglala Sioux Tribe cites to Dr. Moran's supplemental declaration and points to NUREG-1569, "Standard Review Plan for In Situ Leach Uranium Extraction License Applications."[84] The Oglala Sioux Tribe argues that NUREG-1569 specifies the level of detail required of an application with respect to the hydrogeology of the site at issue.[85] According to the Oglala Sioux Tribe, "At minimum, the applicant must develop an acceptable conceptual model of site hydrology adequately supported by the data presented in the site characterization,"[86] which, the Oglala Sioux Tribe asserts, is not done in the DSEIS. The specific omissions the Oglala Sioux Tribe highlights include "unsubstantiated assumptions as to the isolation of the aquifers in the ore-bearing zones and failure to account for natural and man-made hydraulic conductivity through

[81] Oglala Sioux Tribe's Proposed Contentions at 15.
[82] Id. at 15.
[83] Id. at 15.
[84] See id. at 15.
[85] Id. at 15.
[86] Id. at 16 (citing Standard Review Plan for In Situ Leach Uranium Extraction License Applications, NUREG-1569, at 2-21 to 2-22 (June 2003) (ADAMS Accession No. ML031550302)).

natural breccias pipe formations."[87] The Oglala Sioux Tribe maintains that the DSEIS's assurances of future tests and actions do not make up for these deficiencies.[88] Accordingly, the Oglala Sioux Tribe argues that this contention should be admitted.

In response to this contention, the NRC Staff states that the Oglala Sioux Tribe did not demonstrate that its contention is based on new or materially different information from that in the application.[89] Therefore, the NRC Staff contends that the contention is inadmissible because it does not meet the standards for new and amended contentions contained in 10 C.F.R. § 2.309(c).[90]

Additionally, the NRC Staff states that Dr. Moran's declaration, on which the Oglala Sioux Tribe relies to support its contention, overlooks relevant information that was contained in the Applicant's 2011 RAI response.[91] As a result, the NRC Staff maintains that, to the extent the Oglala Sioux Tribe disputed the information contained in the RAI response, the Oglala Sioux Tribe was obligated to file a new contention within 30 days of the issuance of that document in order to be timely under the regulations.[92] The NRC Staff also points to areas of the DSEIS that purportedly contain the information Dr. Moran claims is missing.[93] Therefore, the NRC Staff states that "the Board must reject the Intervenors' arguments because they fail to specifically address the DSEIS."[94]

The NRC Staff also states that the future actions upon which the DSEIS purports to rely in its analysis of impacts constitute a license condition, the use of which is permitted in NEPA

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[87] Id. at 16.
[88] Id. at 17.
[89] Staff's Answer at 18.
[90] Id. at 18.
[91] Id.
[92] Id. at 18–19.
[93] Id. at 19–20 (citing DSEIS §§ 3.4.3, 4.5.2.1.1.2.2, 3.5.3.1, 3.5.3.2, 3.5.3.3).
[94] Id. at 20 (citing Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station), CLI-01-24, 54 NRC 349, 358 (2001)).

documents.[95] The NRC Staff argues further that the regulatory arguments the Oglala Sioux Tribe makes are inapplicable because the regulations the Oglala Sioux Tribe cite pertain to safety criteria dealing with conventional milling, not to ISR activities, and are relevant to the applicant, not to the agency's NEPA review.[96]

Powertech echoes the NRC Staff's response and argues that the contention does not meet the standards for new and amended contentions.[97] The information addressed in the Oglala Sioux Tribe's Contention 3, Powertech contends, has been previously presented in the RAI responses, the first draft license, and other areas of the record previously made available.[98] Accordingly, the contention is not based on new or materially different information and cannot be admitted.[99]

In support of its contention and in reply to the NRC Staff and Powertech, the Oglala Sioux Tribe argues that this is a "contention of omission" that "carries forward a contention admitted previously based on the same inadequate information contained in the application materials."[100] The Oglala Sioux Tribe also takes issue with the NRC Staff's argument that portions of the DSEIS contain the information the Oglala Sioux Tribe contends is missing.[101] In contrast to the case law the NRC Staff cites, the Oglala Sioux Tribe asserts that it has "include[d] citations and discussion of the applicable statutory and regulatory requirements, followed by detailed discussion of the aspects of the DSEIS . . . where the NRC Staff's NEPA document fails to meet those standards."[102] The detail and specific references to the DSEIS, the Oglala Sioux Tribe claims, distinguish it from the case law the NRC Staff cites to refute the

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[95] Id. (citing Hydro Resources, Inc. (2929 Coors Road, Suite 101, Albuquerque, NM 87120), CLI-99-22, 50 NRC 3, 17 (1999)).
[96] Id.
[97] Powertech's Response at 12.
[98] Id. at 13.
[99] Id.
[100] Oglala Sioux Tribe's Reply at 10.
[101] Id.
[102] Id. at 11.

contention.[103] Moreover, the Oglala Sioux Tribe asserts that the NRC Staff's "merits arguments is irrelevant and inappropriate at the admissibility stage"[104] Therefore, the Oglala Sioux Tribe maintains that Contention 3 is admissible.

2. Board Ruling

The Oglala Sioux Tribe's Contention 3 and Consolidated Intervenors' Contention C are the same as Oglala Sioux Tribe's original Contention 3 and portions of Consolidated Intervenors' original Contentions D and E.[105] As such, the migration tenet applies and this issue migrates from a criticism of the Powertech ER to a criticism of the NRC Staff's DSEIS.

The Consolidated Intervenors and the Oglala Sioux Tribe are presenting the same concern that was raised regarding Powertech's ER (and that was admitted as a contention) as a concern regarding the DSEIS. Thus it is not necessary to raise a new or amended contention because, as the Board has explained, if the "new" contention raises the same concern admitted at the initial stage of the proceeding, its admissibility need not be relitigated and redecided at each step of the NEPA process, namely the issuances of the DSEIS and the FSEIS. This contention is not new; it is merely the continuation of an admitted concern with the application. To the extent the intervenors have concerns with the adequacy of the hydrogeologic analysis necessary to show adequate confinement and potential impacts to groundwater, this is already an issue set for hearing. Once again, in accord with § 2.316, for efficiency and to clarify this concern, the Board combines the multiple iterations of this contention into a single contention for hearing as set forth in Appendix A to this order.[106]

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[103] Id.
[104] Id.
[105] See LBP-10-16, 72 NRC at 400–07, 424–26. Consolidated Intervenors' Contention E, as originally admitted, was a combination of Consolidated Intervenors' original Contentions E and J. LBP-10-16, 72 NRC at 404–07.
[106] A similar contention was admitted in the Strata Energy proceeding. Strata Energy, Inc., LBP-12-3, 75 NRC at 195–98.

D. The Oglala Sioux Tribe's Proposed Contention 4:

"The DSEIS Fails to Adequately Analyze Ground Water Quantity Impacts"

1. Positions of the Parties

The Oglala Sioux Tribe's Contention 4—"the DSEIS fails to adequately analyze ground water quantity impacts"—is identical to Consolidated Intervenors' Contention D.[107] The Oglala Sioux Tribe asserts that "the DSEIS presents conflicting information on ground water consumption such that the water consumption impacts of the project cannot be accurately evaluated."[108] This, the Oglala Sioux Tribe argues, violates 10 C.F.R. §§ 51.10, 51.70, 57.71, and NEPA.[109]

To support this contention of omission, the Oglala Sioux Tribe cites to Dr. Moran's declaration.[110] Like Consolidated Intervenors, the Oglala Sioux Tribe highlights Dr. Moran's concerns that "no data are provided for the volumes of ground water required for [non-construction] phases, throughout the life of the project," and that the DSEIS fails to explore the impacts on local and regional water sources of the projected large-volume water use at the site.[111]

The NRC Staff argues that the contention does not meet the standards for new and amended contentions because the Oglala Sioux Tribe has not demonstrated in what ways the contention is based on new or materially different information.[112] It also argues that the Oglala Sioux Tribe's claims "rest on an incomplete or inaccurate reading of the DSEIS" in part because Dr. Moran cites portions of the DSEIS that do not support his opinions and simultaneously

[107] Oglala Sioux Tribe's Proposed Contentions at 18.
[108] Id. at 18.
[109] Id.
[110] Id.
[111] Id. at 19–20.
[112] Id. at 21.

overlooks portions of the DSEIS that contain the information the Oglala Sioux Tribe alleges has been omitted.[113]

Similarly, Powertech challenges the admission of Contention 4 by asserting that the Oglala Sioux Tribe has not demonstrated that its contention is based on any new or materially different information in contravention of 10 C.F.R. § 2.309(c).[114] The information on which this contention is based, it asserts, has been previously made available and the time to challenge such information has since lapsed.[115] Accordingly, both the NRC Staff and Applicant argue that the Oglala Sioux Tribe's Contention 4 is inadmissible.

In reply, the Oglala Sioux Tribe argues that its contention specifically points to areas in the DSEIS that it claims violate NEPA and applicable regulations.[116] Additionally, the Oglala Sioux Tribe maintains that, because the NEPA issues "are based, in part, on the same information upon which the Oglala Sioux Tribe's contention regarding inadequate ground water quantity analysis in the application," it should be admitted.[117] It argues that "NRC Staff cannot release NEPA documents that blindly parallel the applicant's information and omissions and then be allowed to argue the applicant's omissions prevent filing of new contentions concerning the newly released NEPA [document]."[118]

Finally, the Oglala Sioux Tribe argues that the NRC Staff's assertion that the contention is inadmissible because certain portions of the DSEIS address the omissions the Oglala Sioux Tribe contends exist amounts to an argument on the merits and is, therefore, irrelevant at the

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[113] Id. at 21–22.
[114] Powertech's Response at 12.
[115] Id. at 13.
[116] Oglala Sioux Tribe's Reply at 11.
[117] Id. at 11.
[118] Id. at 12 (citing Citizens Against Burlington, Inc. v. Busey, 938 F.2d 190, 209 (D.C. Cir. 1991)).

contention admissibility stage.[119] Therefore, the Oglala Sioux Tribe maintains that Contention 4 is admissible.

2. Board Ruling

As noted, the Oglala Sioux Tribe's Contention 4—"the DSEIS fails to adequately analyze ground water quantity impacts"—is identical to Consolidated Intervenors' Contention D. Both of these contentions raise the same concern as the Oglala Sioux Tribe's previously admitted Contention 4 and parts of Consolidated Intervenors' Contention F, which was not admitted.[120]

The Oglala Sioux Tribe and the Consolidated Intervenors now present the same concern that was raised by the Oglala Sioux Tribe in the initial pleading stage (and that was admitted as a contention) as a concern regarding the DSEIS. It is, therefore, unnecessary to raise a new or amended contention. To the extent the "new" contention raises the same concern admitted at the initial stage of the proceeding, it need not be repeated to remain a viable contention. Accordingly, the Oglala Sioux Tribe's concerns with the adequacy of the analysis of groundwater quantity impacts is already an issue set for hearing. As before, pursuant to § 2.316 for efficiency and to clarify this scope of this concern, the Board combines the multiple iterations of this contention into a single contention for hearing as set forth in Appendix A to this decision.

The NRC Staff argues that, although Powertech's supplemental information might have served as the basis for a late-filed contention, the contention would have been due within 30 days after the information became available.[121] The Staff, relying on Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC 1041, 1049 (1983) and Power Authority of the State of New York & Entergy Nuclear Fitzpatrick LLC, Entergy Nuclear Indian Point 3 LLC, & Entergy Nuclear Operations, Inc., (James A. FitzPatrick Nuclear Power Plant; Indian Point, Unit

[119] Id. at 12.
[120] See LBP-10-16, 72 NRC at 400–07, 426–28. The Board rejected Consolidated Intervenors' original Contention F on a similar topic. See id. at 407–08.
[121] Staff's Answer at 21.

3), LBP–01-4, 53 NRC 121, 127 (2001), further contends that the Intervenors were not permitted to wait until that information reappeared in the DSEIS to file their contentions. The Board does not agree. The scheduling order,[122] as well as Commission regulation,[123] provide that intervenors and potential intervenors have a period of time to file new or amended contentions in response to a DSEIS. They are not required to file their contentions on information or studies that are published in the period between the date for initial contentions and the date the DSEIS is published. The gravamen of this contention is not that an RAI response contained new information, but that the DSEIS ignored it. There is no way for an intervenor to know what use, if any, the NRC Staff may make of a response to a request for additional information (RAI) or a study in the DSEIS. An intervenor is entitled to see the DSEIS and then file any new or amended contentions based on what appears in the DSEIS. To do otherwise would place an impossible burden on the intervenor and an unreasonable requirement that the intervenor divine what use, if any, the NRC Staff will make of that information in the DSEIS. As noted above, the Board combines the multiple iterations of this contention into a single contention for hearing as set forth in Appendix A to this decision.

E. The Oglala Sioux Tribe's Proposed Contention 5:

"The DSEIS Fails to Demonstrate Adequate Technical Sufficiency and Fails to Present Information in a 'Clear, Concise' Manner to Enable Effective Public Review"

1. Positions of the Parties

The Oglala Sioux Tribe's Contention 5 charges that "the DSEIS fails to demonstrate adequate technical sufficiency and fails to present information in a 'clear, concise' manner to enable effective public review."[124] This, the Oglala Sioux Tribe argues, contravenes 10 C.F.R. §§ 51.70(b), 51.120; 10 C.F.R. Part 51 Appendix A; the Administrative Procedure Act; NEPA;

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[122] See Order (Second Prehearing Conference Call Summary and Supplemental Initial Scheduling Order) (Oct. 16, 2012) at 3–4 (unpublished); Order (Supplementing Initial Scheduling Order) (Nov. 2, 2010) at 5–6 (unpublished).
[123] 10 C.F.R. § 2.309(b).
[124] Oglala Sioux Tribe's Proposed Contentions at 20.

Regulatory Guide 3.46; and NUREG-1569, "Standard Review Plan for In Situ Leach Uranium Extraction License Applications."[125] As support for this contention, the Oglala Sioux Tribe cites Dr. Moran's Supplemental Declaration.

Specifically, the Oglala Sioux Tribe argues that the NRC Staff's "use of citations to materials incorporated by reference into the DSEIS is inadequate to justify the scientific conclusions presented."[126] As an example, the Oglala Sioux Tribe notes the DSEIS's consistent citations to "Powertech 2011," which is a 5,000-page document, to support "fundamental conclusions."[127] Citations to this document, the Oglala Sioux Tribe argues, are "meaningless without more description and detail of where the information is contained in the document."[128] The Oglala Sioux Tribe also notes the DSEIS's reliance on the initial draft license, explaining that these are stale references because a revised draft license has been released.[129] As a result, the Oglala Sioux Tribe urges the republication of the DSEIS "in a manner that provides the necessary information, with the commensurate additional public comment period."[130]

In response to this contention, the NRC Staff argues that the Oglala Sioux Tribe has failed to demonstrate a genuine dispute because the relevant regulations do not mandate that NEPA documents employ a certain citation format nor do they require that "an agency support every assertion in its NEPA document."[131] The NRC Staff states that the document meets regulations so long as it provides references to the sources on which it relies.[132] In this respect,

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[125] Id. at 20.
[126] Id. at 21.
[127] Id.
[128] Id.
[129] Id. at 22.
[130] Id. at 23.
[131] Staff's Answer at 22.
[132] Id. at 21–22 (citing W. Watersheds Project v. Bureau of Land Mgmt., 552 F. Supp. 2d 1113, 1129–30 (D. Nev. 2008).

NRC Staff claims the Oglala Sioux Tribe's reliance on Dr. Moran's Declaration is misplaced because he does not address the citation formats used in the documents at issue.[133]

Additionally, the NRC Staff notes that the format of the DSEIS follows the recommendation set forth in NUREG-1749, "Environmental Review Guidance for Licensing Actions Associated with NMSS Programs."[134] This was the same format Powertech followed in its ER. Thus, NRC Staff reasons, references to the application in the DSEIS refer, generally, to parallel sections in the ER.[135] Moreover, the NRC Staff points out that the Oglala Sioux Tribe could have contacted the Staff with any questions it had regarding the DSEIS.[136]

Finally, the NRC Staff attempts to refute the Oglala Sioux Tribe's arguments regarding the revised draft license[137] by claiming that the documents that contain the information incorporated into the draft license were publicly available during the comment period.[138] Therefore, the NRC Staff concludes, the Oglala Sioux Tribe had access to and could have addressed the information contained therein at a prior time.[139] The NRC Staff states that the DSEIS does not need to be recirculated because the Oglala Sioux Tribe has failed to demonstrate there is new information that "presents a 'seriously different picture of the environmental impact[s].'"[140]

Powertech, likewise, contends that Contention 5 should not be admitted. Powertech asserts that the Oglala Sioux Tribe has failed to demonstrate that Contention 5 is based on any new or materially different information as required by 10 C.F.R. § 2.309(c) because the Oglala Sioux Tribe could have filed proposed contentions in response to the draft license, which it did

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[133] Id. at 24.
[134] Id. at 23.
[135] Id.
[136] Id.
[137] See id. at 24.
[138] Id.
[139] Id.
[140] Id.

not do.[141] Additionally, Powertech argues that "it is the [Oglala Sioux] Tribe's burden to review the DSEIS and find the references that are required to present admissible contentions."[142] All relevant documents, it claims, were submitted according to the standards set forth in applicable agency guidance, and, therefore, documents referenced by the DSEIS should be easily found.[143] Finally, with respect to republication and recirculation, Powertech asserts that "[t]he availability of new information after issuance of a DSEIS for comment is not enough to warrant re-publication."[144] Accordingly, Powertech contends Contention 5 is inadmissible.

In response to these arguments, the Oglala Sioux Tribe contends that most of Powertech's and the NRC Staff's responses focus on merits arguments that are not appropriate at the contention admissibility stage.[145] The Oglala Sioux Tribe also urges the Board to reject the NRC Staff's assertion that it could have contacted the Staff at any time with questions regarding the DSEIS.[146] This, the Oglala Sioux Tribe argues, is not supported by law or fact.[147] Moreover, the Oglala Sioux Tribe claims that it did contact the NRC Staff by filing "detailed written comments that NRC Staff required be filed within 45 days of the DSEIS release."[148]

The Oglala Sioux Tribe also notes that, in its previous contention admissibility decision, the Board dealt with a similar contention, finding that NEPA requirements relevant to the clarity of the documents were binding on the agency only, not the Applicant.[149] With the issuance of the DSEIS, the Oglala Sioux Tribe therefore asserts that this contention is admissible.[150] Finally, the Oglala Sioux Tribe reiterates its argument with respect to the draft license, clarifying

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[141] Powertech's Response at 14–15.
[142] Id. at 15.
[143] Id.
[144] Id. (citing Hydro Resources, Inc. (P.O. Box 15910, Rio Rancho, NM 87174), CLI-04-39, 60 NRC 657, 659 (2004)).
[145] Oglala Sioux Tribe's Reply at 12–13.
[146] Id. at 13.
[147] Id.
[148] Id.
[149] Id. at 14.
[150] Id.

that "[i]t is the timing and lack of notice of the revised draft license that contravenes NRC regulations, not the use of draft licenses."[151] Accordingly, the Oglala Sioux Tribe maintains that Contention 5 is admissible.

2. Board Ruling

As noted supra Part III.A, to be admissible at this stage a contention must meet both the timeliness requirements of 10 C.F.R. § 2.309(c) and the admissibility requirements of 10 C.F.R. § 2.309(f)(1). Failure to satisfy either one of these sections results in the contention not being admissible.

Contention 5 is similar to the Oglala Sioux Tribe's original Contention 6 filed with its hearing petition in response to the Powertech application.[152] The Board rejected Contention 6, in part, because the contention could be characterized as "[a] general complaint about how the information [was] presented," which was "not sufficient to raise a genuine dispute with the Application that is germane to the purpose of th[e] licensing proceeding."[153] Additionally, the Board rejected original Contention 6 because it was not adequately supported in fact and the Board was, and remains, "unaware of any legal precedent or any NRC regulations that require an application to meet any organizational criteria or else risk being classified as technically inadequate."[154] For these same reasons, the Board rejects the Oglala Sioux Tribe's proposed Contention 5 for failing to provide sufficient information to show that a genuine dispute exists in contravention of 10 C.F.R. § 2.309(f)(1)(vi) and for failing to state an adequate legal basis for the contention in contravention of 10 C.F.R. § 2.309(f)(1)(i). Further, the DSEIS follows the format recommended in NUREG-1748 "Environmental Review Guidance for Licensing Actions

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[151] Id. .
[152] See LBP-10-16, 72 NRC at 430–32. The Oglala Sioux Tribe's original Contention 6 read: "Inadequate technical sufficiency of the application and failure to present information to enable effective public review resulting in denial of due process." Id. at 431.
[153] Id. at 432.
[154] Id.

Associated with NMSS Programs," a format that Powertech followed in its Environmental Report.[155]

Additionally, the Oglala Sioux Tribe provides no support for its argument that the NRC Staff must recirculate the DSEIS for public comment based on the issuance of the revised draft license. The NRC Staff need not recirculate a supplemental NEPA document every time new information becomes available.[156] Recirculation is required only when, as the NRC Staff asserted, the information presents a "seriously different picture of the environmental impacts."[157] The Oglala Sioux Tribe fails to show how the issuance of the new draft license creates such a "seriously different picture of the environmental impacts." Because Contention 5 does not meet the contention admissibility standards in 10 C.F.R. § 2.309(f)(1),[158] the Board finds it inadmissible. The Board, therefore, need not analyze the issue of timeliness.

F. The Oglala Tribe's Proposed Contention 6:

"Failure to Adequately Describe or Analyze Proposed Mitigation Measures"

1 Positions of the Parties

In Contention 6, the Oglala Sioux Tribe claims that the DSEIS violates 10 C.F.R. §§ 51.10, 51.70 and 51.71, and the National Environmental Policy Act and implementing regulations and "fail[s] to adequately describe or analyze proposed mitigation measures."[159] The Oglala Sioux Tribe states that NEPA requires the DSEIS to include and discuss means to mitigate adverse environmental impacts.[160] The DSEIS, it claims, does not contain the requisite detailed analysis regarding mitigation measures, nor does it evaluate the effectiveness of any of

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[155] It is ironic, however, that the NRC Staff and Powertech insist that petitioners prepare contentions that refer to specific sections of an application or an environmental report, but, when preparing the required environmental documents, they merely provide blanket citations to documents that are hundreds, and in some cases thousands, of pages long.
[156] Hydro Resources Inc., CLI-04-39, 60 NRC at 659.
[157] Hydro Resources, Inc., CLI-99-22, 50 NRC at 14 (quoting Sierra Club v. Froehike, 816 F.2d 205, 210 (5th Cir. 1987)).
[158] 10 C.F.R. §§ 2.309(f)(1)(ii), (iii), (vi).
[159] Oglala Sioux Tribe's Proposed Contentions at 23.
[160] Id. at 23 (citing 40 C.F.R. § 1502.16(h)).

the mitigation measures it proposes.[161] For example, the Oglala Sioux Tribe states that the DSEIS relies on Powertech's "commitment to restore groundwater back to its pre-mining condition," without evaluating how effective the restoration efforts will be.[162] The Oglala Sioux Tribe then cites data supporting the fact that restoring groundwater to pre-mining conditions is difficult and seldom entirely successful.[163] The DSEIS, the Oglala Sioux Tribe contends, fails to address "the ISL industry's historic and ongoing inability to control aquifer contamination and restore groundwater" and does not detail how the Applicant will succeed in its own efforts to protect and restore groundwater.[164]

In response to this contention, the NRC Staff argues that Powertech's plans with respect to groundwater restoration were discussed in the ER and Technical Report.[165] Therefore, the NRC Staff maintains, the Oglala Sioux Tribe should have raised this argument at a previous time.[166] The NRC Staff recognizes that the Oglala Sioux Tribe raised this argument as part of admitted Contention 2, but notes that it does "not point to any information in the DSEIS concerning mitigation measures that is significantly different from the information in the [ER]."[167]

Additionally, the NRC Staff argues that the Oglala Sioux Tribe failed to address a portion of the Generic Environmental Impact Statement (GEIS) that concerns the effectiveness of ISR projects in restoring groundwater to baseline conditions.[168] GEIS section 2.11.5, the NRC Staff argues, provides the data the Oglala Sioux Tribe contends is omitted.[169] Moreover, the NRC Staff asserts that the Oglala Sioux Tribe "misidentifies the proposed mitigation measure at

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[161] Id. at 23–24. The Oglala Sioux Tribe states that "[t]he current mitigation measure discussion consists of a multi-page chart which simply lists a series of proposed mitigation measure[s], with no elaboration or other analysis of how the operator expects to accomplish these items, or the expected effectiveness/limitations of each measure, as required by NEPA." Id. at 27.
[162] Id. at 24.
[163] Id.
[164] Id.
[165] Staff's Answer at 25.
[166] Id. at 25.
[167] Id.
[168] Id.
[169] Id.

issue"[170] as "restoration to baseline conditions," when in fact all that is required is "groundwater restoration."[171]

Finally, the NRC Staff states that, in accordance with Commission precedent, the DSEIS need not contain more information on mitigation measures than it already contains, specifically with regard to the description of the mitigation measures on which the NRC relies and the explanation of the limiting effect of the mitigation measures on environmental impacts.[172]

Powertech responds to Contention 6 by arguing that it is not based on any new or materially different information in contravention of 10 C.F.R. § 2.309(c)(1)(ii).[173] Additionally, Powertech argues that the DSEIS accounts for mitigation measures in a way that is "consistent with standard NRC practice across the board and does not result in the need for a re-evaluation of the mitigation measures and re-issuance of the DSEIS."[174] Powertech further contends that the Oglala Sioux Tribe's arguments should be construed as an "impermissible collateral attack on NRC regulations" because NUREG-1910 and several other documents "demonstrate that the [Oglala Sioux] Tribe's statements regarding ISR groundwater restoration are erroneous" because groundwater need not be restored to baseline levels.[175]

In reply, the Oglala Sioux Tribe argues that the NRC Staff's and Powertech's responses are merits arguments that are inappropriate at the contention admissibility stage.[176] Additionally, the Oglala Sioux Tribe disputes that its contention is not based on new or materially different information, asserting that "the DSEIS proposes several mitigation measures that were listed in the DSEIS as newly proposed by NRC Staff to mitigate ground water

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[170] Id. at 26.
[171] Id.
[172] Id. (citing Hydro Resources, Inc. (P.O. Box 777, Crownpoint, NM 87313), CLI-06-29, 64 NRC 417, 427 (2006)).
[173] Powertech's Response at 16. Applicant specifically argues that "[t]he Tribe's Contention is nothing more than an allegation that the DSEIS is deficient without any attempt to distinguish any information as new or materially/significantly different." Id.
[174] Id. at 16.
[175] Id. at 17.
[176] Oglala Sioux Tribe's Reply at 15.

impacts."[177] The Oglala Sioux Tribe asserts that its contention is based on this new information, and, therefore, should be admitted.[178]

2. Board Ruling

The NRC Staff and Powertech raise four principal objections to this contention. They argue that (1) the Oglala Sioux Tribe failed to identify anything new and materially different in the DSEIS; (2) the Oglala Sioux Tribe did not identify or challenge relevant sections of the GEIS; (3) the Oglala Sioux Tribe misidentified the proposed mitigation measure standard at issue; and (4) the mitigation measures listed in the DSEIS are adequate.

The first objection—that the Oglala Sioux Tribe has not identified anything new and materially different in the DSEIS—is factually incorrect. The DSEIS explicitly states, "Based on the potential impacts identified in Chapter 4 of this draft SEIS, the NRC staff ha[s] identified additional potential mitigation measures for the proposed Dewey-Burdock ISR Project. These mitigation measures are summarized in Section 6.3."[179] In particular, "[t]he NRC staff ha[s] reviewed the mitigation measures the applicant proposed and ha[s] identified additional mitigation measures that could potentially reduce impacts (Table 6.3-1)."[180] Table 6.3-1 is a multi-page table that lists additional mitigation measures. It contains the new and significant information that makes any part of this contention based on those additional mitigation measures timely under 10 C.F.R. § 2.309(c).

The second objection raised by the NRC Staff and Powertech is that the contention does not cite relevant sections of the GEIS that demonstrate the alleged omission and inadequacies. This objection is unsupported. First, the GEIS section referenced by the NRC Staff in its response—Section 2.11.5 "Aquifer Restoration"—is merely a recitation of historical aquifer restoration results; it is not a discussion of mitigation plans (the subject of the contention).

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[177] Id. (citing DSEIS at 6-13 to 6-14).
[178] Id.
[179] DSEIS at 6-1 (emphasis added).
[180] DSEIS at 6-12.

Second, it is not clear NRC Staff relied upon this section of the GEIS when preparing the DSEIS, as it was not incorporated by reference or mentioned in any other manner. By contrast, the DSEIS explicitly incorporates by reference other sections of the GEIS—for example, the DSEIS explains that "NRC determinations of potential environmental impacts and the discussion of which GEIS impact conclusions were incorporated by reference are discussed in SEIS Chapter 4."[181]

The third objection raised by the NRC Staff and Powertech is that the contention misidentifies the proposed groundwater mitigation standard, namely whether groundwater must be restored to baseline conditions. On this objection, the NRC Staff and Powertech are correct. As noted in the DSEIS, Powertech will "be required to restore groundwater parameters affected by ISR operations to levels that are protective of human health and safety,"[182] though not necessarily to background levels if, for example, alternate concentration limits are identified as protective of human health.[183] In Contention 6, the Oglala Sioux Tribe correctly noted the "protective of human health and safety" standard, but incorrectly conflated it with requiring the aquifers to be restored to background conditions.

In Contention 6, the Oglala Sioux Tribe cites groundwater restoration as one example of an inadequate mitigation measure. However, the Oglala Sioux Tribe contends that "this lack of analysis of proposed mitigation measures is expansive, and not limited to ground water mitigation."[184] Specifically, in Contention 6 the Oglala Sioux Tribe contends "[t]he current mitigation measure discussion consists of a multi-page chart which simply lists a series of

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[181] DSEIS at 1-5. "The doctrine of expressio unis est exclusio alterius 'instructs that where a law expressly describes a particular situation to which it shall apply, what was omitted or excluded was intended to be omitted or excluded.'" Crow Butte Resources, Inc. (In Situ Leach Facility, Crawford, Nebraska), 68 N.R.C. 691, 759 (2008) (citing Reyes-Gaona v. N.C. Growers Ass'n, 250 F.3d 851, 865 (4th Cir. 2001)).
[182] DSEIS at 2-69.
[183] DSEIS at 4-64.
[184] Oglala Sioux Tribe's Proposed Contentions at 26–27.

proposed mitigation measure [sic], with no elaboration or other analysis of how the operator expects to accomplish these items, or the expected effectiveness/limitations of each measure, as required by NEPA."[185]

The fourth objection by the NRC Staff and Powertech—that the mitigation measures in the DSEIS are satisfactory—is essentially a merits challenge. Both the NRC Staff and Powertech cite case law that states that the "[t]he DSEIS need not contain 'a complete mitigation plan' or 'a detailed explanation of specific [mitigation] measures which will be employed.'"[186] However, the Oglala Sioux Tribe also cites to case law stating that "[a] reasonably complete discussion of possible mitigation measures" should be included in the DSEIS rather than "broad generalizations and vague references to mitigation measures."[187] Thus, the Oglala Sioux Tribe has demonstrated that a genuine dispute exists with respect to material issues of law and fact, a standard that must be met for purposes of contention admissibility.[188]

Additionally, this contention meets the other contention admissibility standards because the Oglala Sioux Tribe has provided a specific statement of the issue, has briefly explained the basis of the contention, has demonstrated that the issue is within the scope of this proceeding, has shown that the issue is material, and has proffered a concise statement of the facts supporting the contention.[189] Further, as noted, this contention is timely pursuant to the good cause standards set forth in § 2.309(c) for the admission of new and amended contentions. Accordingly, whether or not the list of mitigation measures in the DSEIS are satisfactory is a

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[185] Id. at 27.
[186] Staff's Answer at 26; Powertech's Response at 16.
[187] Oglala Sioux Tribe's Proposed Contentions at 24.
[188] 10 C.F.R. § 2.309(f)(1)(vi).
[189] Id. § 2.309(f)(1)(i)–(v).

valid basis for a contention.[190] Therefore, the Board admits the Oglala Sioux Tribe's Contention 6.

G. The Oglala Sioux Tribe's Proposed Contention 7:

"The DSEIS Fails to Include a Reviewable Plan for Disposal of 11e.(2) Byproduct Material"

1. Positions of the Parties

In Contention 7, the Oglala Sioux Tribe alleges that "the DSEIS Fails to Include a Reviewable Plan for Disposal of 11e.(2) Byproduct Material."[191] The Oglala Sioux Tribe notes that the DSEIS "indicates that Powertech may or may not use the White Mesa Uranium Mill in Utah, or some other unidentified facility, for disposal of the 11e.(2) byproduct generated at the proposed ISL Facility."[192] Thus, the Oglala Sioux Tribe argues that the DSEIS lacks "a meaningful review of impacts" in violation of NEPA and 10 C.F.R. §§ 51.10, 51.70, 51.71, which require the DSEIS to analyze impacts associated with permanent waste disposal.[193] The Oglala Sioux Tribe asserts that the discussion in the DSEIS of the permanent waste disposal plan and its impacts is deficient in several respects. First, the Oglala Sioux Tribe alleges that the DSEIS does not establish that the NRC Staff has fully evaluated the permanent waste disposal plan and its impacts. Second, the Oglala Sioux Tribe alleges that the DSEIS does not provide the public, intervenors, and other entities with sufficient information regarding the permanent waste disposal plan and its impacts to enable such interested parties to analyze fully the impacts associated with the application.[194] Additionally, the Oglala Sioux Tribe asserts that "the policies set forth by NEPA prevent the NRC [S]taff from segmenting the disposal issues from the inquiry into whether applicant will be allowed to create 11e.(2) Byproduct material in the first

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[190] See 10 CFR § 51.103(a)(4) (requiring the record of decision to summarize any license conditions and monitoring programs adopted in connection with mitigation measures).
[191] Oglala Sioux Tribe's Proposed Contentions at 27.
[192] Id.
[193] Id.
[194] Id. at 28.

instance."[195] Finally, the Oglala Sioux Tribe contends that the DSEIS's failure to analyze a disposal facility results in its failure to examine all the impacts of the proposal as required by NEPA.[196] For all these reasons the Oglala Sioux Tribe asserts this contention should be admitted.

In response, the NRC Staff notes that the draft licenses issued to Powertech contain a license condition requiring Powertech to have a disposal plan in place before operation begins.[197] The NRC Staff also states that it has "considered impacts related to the disposal of byproduct material," and that these considerations appear in the DSEIS and the GEIS.[198] The Staff argues that because the Oglala Sioux Tribe does not take issue with these specific sections of the DSEIS and GEIS, its contention is inadmissible.[199]

Furthermore, the NRC Staff states that the contention must be rejected because it is not based on new or materially different information and, therefore, is untimely.[200] Specifically, NRC Staff asserts that the Oglala Sioux Tribe is making the same arguments it made with respect to the ER.[201] Finally, the NRC Staff argues that Contention 7 "lacks a legal basis" because the standards the Oglala Sioux Tribe cites to support its contention do not apply to ISL facilities.[202]

Powertech, too, argues that the Board should reject Contention 7 because it is not based on any new or materially different information.[203] Specifically, Powertech points to the license condition in its application and First Draft License prohibiting Powertech from operating its

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[195] Id. at 28–29 (citing Pacific Gas & Electric Co. (Diablo Canyon Power Plant Independent Fuel Storage Installation) CLI-08-01, 67 NRC 1, 13 (2008)).
[196] Id. at 29.
[197] Id. at 27.
[198] Staff's Answer at 26–27 (citing DSEIS §§ 1.4.4, 1.4.5, 4.14, 4.3.1.1.2, 4.3.1.2.2; GEIS §§ 4.2.12, 4.2.12.2, 4.4.12.4).
[199] Id. at 27 (citing Millstone, CLI-01-24, 54 NRC at 358); see id. at 29.
[200] Id. at 27; see 10 C.F.R. § 2.309(c).
[201] Staff's Answer at 27.
[202] Id. at 27–28 (citing LBP-10-16, 72 NRC at 434).
[203] Powertech's Response at 18.

facility until a waste disposal plan is in place.[204] Powertech also argues that Contention 7 should have been raised in response to the information contained in the First Draft License, which was issued on July 31, 2012.[205]

The Oglala Sioux Tribe claims in its reply that the Board should reject the NRC Staff's and Powertech's arguments because the Board, in ruling on its intervention petition, found that a similar contention proposed by the Oglala Sioux Tribe that challenged the application was not ripe. According to the Oglala Sioux Tribe, the Board explained there that only the NRC Staff is bound by NEPA, not the Applicant, and, therefore, the Oglala Sioux Tribe could refile its contention if the DSEIS did not contain an analysis of waste disposal that the Oglala Sioux Tribe found adequate.[206] Now, the Oglala Sioux Tribe argues, "the binding requirements of NEPA are squarely at issue as a result of the publication of the DSEIS," and, therefore, the contention is timely and admissible.

The Oglala Sioux Tribe further asserts that, contrary to the NRC Staff's argument, it did set forth legal bases for its contention by citing 10 C.F.R. §§ 51.10, 51.70, and 51.71 as well as 40 C.F.R. Part 40, Appendix A, CEQ regulations, and various case law.[207] Finally, the Oglala Sioux Tribe asserts that the NRC Staff's argument that its analysis is adequate under NEPA should fail because it is a merits argument that is not appropriately made at the contention admissibility stage.[208]

2. Board Ruling

This contention mirrors the Oglala Sioux Tribe's original Contention 7, which this Board found inadmissible in LBP-10-16.[209] In that Order, although the Board agreed with the Oglala Sioux Tribe that the disposal issue should be addressed more fully than it was in the application

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[204] Id. at 18.
[205] Id. at 18–19.
[206] Oglala Sioux Tribe's Reply at 16.
[207] Id.
[208] Id.
[209] LBP-10-16, 72 NRC at 432–35.

before a license is issued to Powertech, the Board nevertheless rejected the contention on ripeness grounds.[210] In proposing the contention once again in response to the DSEIS, the Oglala Sioux Tribe states that it is a contention of omission.[211] As discussed earlier, a contention of omission is mooted if the relevant document contains the allegedly omitted information.[212] The NRC Staff correctly notes that it addresses impacts related to disposal of byproduct material in the DSEIS.[213] The Staff also addresses these impacts in the GEIS, specifically in sections 4.2.12, 4.2.12. 2, and 4.4.12.4. In addition, the draft licenses the NRC Staff has issued to Powertech include a license condition requiring that Powertech establish a disposal plan for byproduct material before beginning operations.[214] Therefore, this contention of omission is moot. Moreover, because the Oglala Sioux Tribe neither substantively disputes the analysis of impacts related to disposal of byproduct material in relevant sections of the DSEIS and the GEIS, nor addresses the license condition related to disposal of byproduct material, the Board rejects this contention as failing to comply with the admissibility dictates of 10 C.F.R. § 2.309(f)(1)(vi).[215]

H. The Oglala Sioux Tribe's Proposed Contention 8:

"Requiring the Tribe to Formulate Contentions Before a Final EIS Is Released and Failing to Follow Scoping Process Violates NEPA"

1. Positions of the Parties

The Oglala Sioux Tribe alleges that Applicant "requir[ed] the tribe to formulate contentions before a final EIS [was] released and fail[ed] to follow [the] scoping process" in violation of NEPA, specifically NEPA's public participation and informed decision-making

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[210] Id. at 434.
[211] Oglala Sioux Tribe's Proposed Contentions at 28.
[212] Duke Energy Corp., CLI-02-08, 56 NRC at 383.
[213] See DSEIS §§ 1.4.4, 1.4.5, 4.14, 4.3.1.1.2, 4.3.1.2.2.
[214] See Draft License SUA-1600 for Powertech (USA), Inc. (July 31, 2012) at 5, 12 (ADAMS Accession No. ML12207A480) (License Conditions 9.9 and 12.6).
[215] See Millstone, CLI-01-24, 54 NRC at 358.

mandates.[216] The Oglala Sioux Tribe contends that it has been denied the benefit of a final NEPA analysis because it was required to submit contentions prior to the culmination of the NEPA process.[217] This, the Oglala Sioux Tribe contends, wastes both its and the NRC Staff's resources.[218]

Additionally, the Oglala Sioux Tribe asserts that "the DSEIS was issued without the benefit of a required scoping process."[219] It claims that, pursuant to implementing regulations, certain procedures must be conducted with regard to defining the scope of the EIS in order to satisfy NEPA requirements.[220] The Oglala Sioux Tribe asserts that Powertech did not employ the mandated procedures and, thus, the Oglala Sioux Tribe was denied the opportunity, among other things, "to provide input to help define the proposed action . . . and to ensure that other environmental review and consultation requirements related to the proposed action [were] prepared concurrently and integrated with the DSEIS."[221] In connection with this, the Oglala Sioux Tribe argues that the NRC Staff failed to prepare a summary of determinations and conclusions and provide it to scoping participants as required by regulation.[222]

In response, the NRC Staff notes that the Board previously rejected this contention in ruling on the Oglala Sioux Tribe's initial hearing petition.[223] Additionally, NRC Staff argues that the Oglala Sioux Tribe "incorrectly states that it is the Staff who is requiring the Tribe to submit contentions on the DSEIS," when this is an obligation imposed by the regulations.[224] Because "regulations are not subject to collateral attack in NRC hearings," the NRC Staff asserts the

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[216] Oglala Sioux Tribe's Proposed Contentions at 30.
[217] Id. at 31.
[218] Id.
[219] Id. at 32.
[220] Id.
[221] Id. at 32–33.
[222] Id. at 33 (citing 10 C.F.R. § 51.29(b)).
[223] Staff's Answer at 29.
[224] Id. at 29.

contention must be rejected.[225] Moreover, the NRC Staff argues that the Oglala Sioux Tribe will not be denied the benefit of a final NEPA analysis because the Final Supplemental Environmental Impact Statement (FSEIS) is currently being prepared and will be provided to the Oglala Sioux Tribe upon completion.[226] At that point, the Oglala Sioux Tribe may submit additional contentions challenging the FSEIS if appropriate.[227]

With regard to the Oglala Sioux Tribe's scoping arguments, the NRC Staff asserts that the regulation on which the Oglala Sioux Tribe relies to support its arguments does not apply to a supplemental EIS, but only to an initial EIS.[228] Accordingly, the NRC Staff asserts that the Oglala Sioux Tribe's Contention 8 is inadmissible because it is outside the scope of the proceeding.[229]

Powertech, too, argues that Contention 8 is inadmissible. First, Powertech argues that the Oglala Sioux Tribe's contention does not have a legal basis because NRC regulations do not require contentions to be filed in relation to a DSEIS and the Oglala Sioux Tribe could have waited for the issuance of the FSEIS before filing new or amended contentions.[230] Additionally, Powertech argues that this contention "effectively offers a collateral attack on NRC regulations associated with administrative hearings," which is impermissible.[231]

With regard to the Oglala Sioux Tribe's scoping arguments, Powertech notes that the regulations require scoping for initial EISs, not SEISs,[232] and that the DSEIS in this case states that the "GEIS scoping process [is] sufficient for the purposes of defining the scope of this SEIS."[233] Powertech additionally points out that the NRC Staff "participated in three public

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[225] Id. at 29–30 (citing 10 C.F.R. § 2.335(a)).
[226] Id. at 30.
[227] Id.
[228] Id.
[229] Id. (citing 10 C.F.R. § 2.309(f)(1)(iii)).
[230] Powertech's Response at 19.
[231] Id. at 19.
[232] Id. at 20 (citing 10 C.F.R. §§ 51.26(d), 51.92(d)).
[233] Id.

scoping meetings . . . and eight public meetings to solicit comments on the draft GEIS," and received public comments on the GEIS.[234]

In reply, the Oglala Sioux Tribe takes issue with both the NRC Staff's and Powertech's assertions that the Oglala Sioux Tribe will be able to propose contentions related to the FSEIS, stating that both parties have "repeated[ly] and vociferous[ly]" opposed each contention the Oglala Sioux Tribe has proposed.[235] Additionally, the Oglala Sioux Tribe relies on the Board's assertion in its August 5, 2010, ruling on its hearing petition, which stated that the Oglala Sioux Tribe would have the opportunity to file new or amended contentions in response to the draft or final SEIS.[236]

With regard to scoping, the Oglala Sioux Tribe states that "a close read of 10 C.F.R. [§] 51.92(d) demonstrates that it does not support NRC Staff's and Powertech's position."[237] The regulation, the Oglala Sioux Tribe explains, is meant to guide NRC Staff's supplemental analysis of EISs.[238] The Oglala Sioux Tribe asserts that the different interpretations of this regulation as it pertains to the NRC Staff's NEPA review warrants a resolution and thus supports the admission of this dispute as framing a legal contention.[239]

2. Board Ruling

Contention 8 is similar to the Oglala Sioux Tribe's original Contention 8 proposed in relation to the application—"[r]equiring the [Oglala Sioux] Tribe to formulate contentions before an EIS is released violates NEPA."[240] The Board determined that the previously proposed Contention 8 was inadmissible in part because it could be properly characterized as "an

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[234] Id.
[235] Oglala Sioux Tribe's Reply at 17.
[236] Id. at 17 (citing LBP-10-16, 42 NRC at 440).
[237] Id.
[238] Id. at 17–18 ("The regulation speaks in terms of applicability to a site-specific 'action' and contains no reference to generic environmental impact statements.").
[239] Id. at 18.
[240] LBP-10-16, 72 NRC at 436.

impermissible attack on NRC regulations, in contravention of 10 C.F.R. § 2.335."[241] Further, the Board disagreed with the Oglala Sioux Tribe that the NRC's procedures concerning NEPA-related contentions violated the public participation and informed decision-making mandates of NEPA.[242] The Board rejects the portions of proposed Contention 8 that are identical to original Contention 8 for the same reasons.

Additionally, the Board rejects the remaining portion of Contention 8 that alleges that improper scoping was conducted. The Board finds that this contention fails to meet the contention admissibility standards because the Oglala Sioux Tribe did not demonstrate that a "genuine dispute exists with the applicant/licensee on a material issue of law or fact."[243] Specifically, as Powertech points out, 10 C.F.R. § 51.26(d) provides that when a supplement to an EIS is prepared, "NRC staff need not conduct a scoping process."[244] Because the NRC Staff was not required by regulation to engage in the scoping process for the DSEIS, the Oglala Sioux Tribe's contention lacks a legal basis. The Oglala Sioux Tribe will not be denied the benefit of a full NEPA analysis because the NRC Staff is preparing an FSEIS, and the Oglala Sioux Tribe will have an opportunity to submit contentions based on the FSEIS if appropriate.[245] The Board concludes the NRC Staff was not required by regulation to engage in the scoping process for the SEIS, and therefore the Oglala Sioux Tribe's contention lacks a legal basis. The NRC Staff prepared the DSEIS in compliance with 10 CFR § 51.92 "Supplement to the Final Environmental Impact Statement." Under this regulation, "a scoping process need not be used" for a supplemental EIS.[246]

Further, the NRC Staff states that it participated in three public scoping meetings (one in Casper, Wyoming) and eight public meetings to solicit comments on the draft GEIS, including

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[241] Id. at 437.
[242] Id. at 438.
[243] 10 C.F.R. § 2.309(f)(1)(vi).
[244] Id. § 51.26(d); see also Applicant's Response at 20.
[245] Id. § 2.309)(f)(2).
[246] Id. § 51.92(d).

one in Spearfish, South Dakota, which is within the region identified in the GEIS as being home to the proposed Dewey-Burdock project. The NRC Staff states it received and considered hundreds of public comments on the GEIS. The scoping process for the GEIS, which is applicable to Powertech and the Dewey-Burdock project as noted in the DSEIS,[247] satisfies the very scoping requirement about which the Oglala Sioux Tribe complains was disregarded. For this and the above-mentioned reasons, Contention 8 inadmissible.

I. The Oglala Sioux Tribe's Proposed Contention 9:

"The DSEIS Fails to Consider Connected Actions"

1. Position of the Parties

The Oglala Sioux Tribe's Contention 9 asserts that "the DSEIS fails to consider connected actions" in contravention of 10 C.F.R. §§ 51.10, 51.70, 51.71, and NEPA.[248] Specifically, it contends that the NRC has failed to engage other federal agencies that are considering Powertech's proposal and, therefore, "has failed to comply with the 'action-forcing' mandate and purpose of NEPA."[249] By way of example, the Oglala Sioux Tribe points out that Powertech has filed applications with the Environmental Protection Agency (EPA) concerning injection wells associated with the Dewey-Burdock site.[250] However, the Oglala Sioux Tribe argues that the DSEIS fails to conduct a NEPA analysis of the proposed injection wells, the request for which is a "connected action" that requires review pursuant to the mandates of NEPA.[251] But even if this were not considered a "connected action," the Oglala Sioux Tribe argues, injection wells, "must still be fully analyzed in the 'cumulative impacts' analysis, or . . . as part of the NRC's 'hard look' review."[252]

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[247] DSEIS at 1-5.
[248] Oglala Sioux Tribe's Proposed Contentions at 33.
[249] Id. at 33.
[250] Id. at 34.
[251] Id.
[252] Id.

The Oglala Sioux Tribe also takes issue with the DSEIS's reliance on the EPA's analysis to support its conclusions regarding environmental impacts.[253] This "blind reliance on other agencies," the Oglala Sioux Tribe argues, is impermissible—"[t]he DSEIS cannot rely on EPA and South Dakota permitting processes to excuse NRC's responsibilities to fully review the environmental impacts."[254]

Finally, the Oglala Sioux Tribe contends that Powertech has mischaracterized a requested permit for an injection well to dispose of chemical waste as Class V, when it is, in fact, a permit for a Class I underground disposal well.[255] The Oglala Sioux Tribe contends that the South Dakota Department of Environment and Natural Resources' classifications support this.[256] It argues that the class designation is significant because South Dakota prohibits Class I wells and that the DSEIS does not address this issue.[257] Therefore, the Oglala Sioux Tribe asserts that the DSEIS has unlawfully failed to conduct the appropriate analysis of other federal and state permits associated with the project.[258]

In response, the NRC Staff asserts that the Oglala Sioux Tribe fails to address the DSEIS and provides no support for its claim that the DSEIS inadequately addresses Powertech's applications to the EPA for certain well permits.[259] Additionally, the NRC Staff states that the Oglala Sioux Tribe's contention does not meet the admissibility standards for new and amended contentions because it not based on new or materially different information.[260] The NRC Staff argues that the ER discusses the permits Powertech seeks and that the Oglala Sioux Tribe should have raised its contention earlier and in relation to the ER.[261]

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[253] Id. at 35.
[254] Id.
[255] Id. at 34–35.
[256] Id. at 36.
[257] Id.
[258] Id.
[259] NRC Staff's Answer at 30–31.
[260] Id. at 31.
[261] Id.

The NRC Staff also argues that the contention does not meet the standards set forth in 10 C.F.R. § 2.309(f)(1) because the Oglala Sioux Tribe has not demonstrated that "there is a genuine issue over whether the Staff has adequately consulted with federal agencies during its review of Powertech's application."[262] The NRC Staff argues the Oglala Sioux Tribe overlooks the fact that Staff has consulted with various agencies.[263] With regard to the EPA, the NRC Staff argues that "[a]lthough the EPA is not involved as a formal cooperating agency, the NRC has consulted with the EPA to clarify aspects of [its] permitting process as it relates to the Dewey-Burdock project."[264]

The NRC Staff also takes issue with the Oglala Sioux Tribe's claim that the DSEIS "blindly relies" on the analyses of other agencies, contending that the Oglala Sioux Tribe has not supported this assertion.[265] The NRC Staff maintains that it has independently analyzed environmental impacts and has appropriately considered the roles of other agencies, both of which are evidenced in the DSEIS.[266]

With regard to the injection wells, the NRC Staff argues that the Oglala Sioux Tribe's assertions are based on an incomplete reading of the DSEIS.[267] The NRC Staff alleges that Powertech "plans to treat liquid wastes injected into deep disposal wells to meet applicable criteria in 10 C.F.R. Part 20," which means that the liquid waste may be disposed in Class V wells rather than Class I wells.[268] Relatedly, the NRC Staff argues that the Oglala Sioux Tribe's assertion with regard to the South Dakota permitting process should be rejected because "it lacks both the specificity and support required by 10 C.F.R. § 2.309(f)(1).[269]

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[262] Id.
[263] Id.
[264] Id. at 31–32.
[265] Id. at 32.
[266] Id.
[267] Id. at 33.
[268] Id.
[269] Id.

Powertech, too, contends that Contention 9 should fail.[270] Powertech argues that the NRC Staff specifically engaged the Bureau of Land Management as a cooperating agency; that the DSEIS was issued for public comment and the EPA was able to, and did, submit comments regarding groundwater protection; that the DSEIS addresses Class V wells; and that the Oglala Sioux Tribe did "not attempt to show how the DSEIS differs from the impact analyses offered by Powertech in previously submitted documents" in contravention of 10 C.F.R. § 2.309(c).[271]

In reply, the Oglala Sioux Tribe asserts that both Powertech's and the NRC Staff's arguments relate to the merits of the proceeding and are therefore irrelevant at the contention admissibility stage.[272] Additionally, the Oglala Sioux Tribe notes that "[t]his contention is yet another that the Tribe raised previously, which the Board held inadmissible because it raised NEPA issues that were held inapplicable to the Applicant."[273] Finally, the Oglala Sioux Tribe notes that NRC Staff's arguments themselves refute the Staff's assertion that the contention is not specific enough to satisfy contention admissibility standards because the contention was made with enough specificity that the NRC Staff could, and did, respond in detail.[274]

2. Board Ruling

Contention 9 is similar to the Oglala Sioux Tribe's original Contention 9 filed in response to Powertech's application. At that stage, the Board found that Contention 9 was premature because it is the NRC's responsibility, not the applicant's, to consider the actions of other federal agencies involved in the licensing action in the context of NEPA.[275] Therefore, the Board found that this contention would ripen for review only upon the issuance of the DSEIS and that the Oglala Sioux Tribe could raise its contention in relation to the DSEIS if it felt the

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[270] Powertech's Response at 21.
[271] Id. at 21.
[272] Oglala Sioux Tribe's Reply at 18–19.
[273] Id. at 18 (citing LBP-10-16, 72 NRC 440).
[274] Id. at 19–20.
[275] LBP-10-16, 72 NRC at 440.

same deficiencies remained. The Oglala Sioux Tribe believes the same deficiencies remain and, accordingly, filed the pending contention.

This contention is timely because it is based on new and materially different information published in the DSEIS that could not be challenged previously.[276] The issuance of the DSEIS provides the opportunity for intervenors to challenge the adequacy of the NRC Staff's review, which is mandated by NEPA. The contention was filed within the deadline established by the Board and is timely under the standards set forth in 10 C.F.R. §2.309(c)(1).

Additionally, this contention meets the admissibility standards of 10 C.F.R. § 2.309(f)(1). The contention presents issues that are material to the issues of this proceeding and it provides specific examples in the DSEIS where the NRC allegedly inappropriately defers to the EPA and South Dakota in determining that environmental impacts of the proposed project will be small.[277] Additionally, the Oglala Sioux Tribe has described an issue that is within scope of this proceeding, raised specific issues of law and fact, provided an explanation of the basis for the contention, and established that there exists a genuine dispute as to whether or not the NRC Staff has improperly deferred to the EPA and South Dakota in conducting its NEPA analysis. The Oglala Sioux Tribe's Contention 9 is, therefore, admitted.

J. The Oglala Sioux Tribe's Proposed Contention 10:

"The Narrow Scope of the NEPA Process Conducted by NRC Staff Excluded Actions, Alternatives, Impacts and Agencies"

1. Position of the Parties

In Contention 10, the Oglala Sioux Tribe asserts that "the narrow scope of the NEPA process conducted by NRC Staff excluded actions, alternatives, impacts, and agencies."[278] More specifically, the Oglala Sioux Tribe asserts that the NRC has failed to engage other relevant federal, state, and local agencies and "has not analyzed impacts subject to jurisdiction

[276] See 10 C.F.R. § 2.309(c).
[277] Oglala Sioux Tribe's Proposed Contentions at 35.
[278] Id. at 36.

and control of these other agencies," and has thus failed to comply with NEPA's action-forcing mandate and general purpose.[279]

The Oglala Sioux Tribe asserts that NEPA requires the agency to consider actions "connected" to the project under review as well as the "cumulative impact." Cumulative impact is defined as "the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency . . . undertakes such other actions."[280] To satisfy these requirements, NRC must conduct the NEPA process by consulting with "cooperating agencies."[281] The Oglala Sioux Tribe contends that "the unlawfully limited scope and absence of cooperating agencies in the preparation of the DSEIS has omitted these important components of the NEPA process."[282]

As an example of this omission, the Oglala Sioux Tribe asserts that Powertech has filed applications with the EPA for Class III and Class V injection well permits, which the Oglala Sioux Tribe maintains is a connected action.[283] However, the Oglala Sioux Tribe asserts that "the NRC did not invite the EPA to participate in the NEPA analysis of the proposal for these injection wells that is necessary to lawful NEPA analysis."[284] Additionally, the Oglala Sioux Tribe contends that the NRC Staff has not properly analyzed certain impacts.[285] The omission of this analysis was detailed in comments to the DSEIS that were provided to the NRC Staff on January 10, 2013.[286] The Oglala Sioux Tribe also asserts the DSEIS finds that certain statutory protections are not within the scope of the NEPA analysis, resulting in an "unlawfully narrow

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[279] Id. at 36–37.
[280] Id. at 37 (quoting 40 C.F.R. § 1507.7).
[281] Id.
[282] Id. at 38.
[283] Id.
[284] Id.
[285] Id.
[286] Id.

scope" of the NEPA review.[287] This, the Oglala Sioux Tribe claims, is compounded by the failure of the NRC to invite cooperating agencies to participate in the NEPA process.[288]

In response, the NRC Staff argues that the Oglala Sioux Tribe's contention is inadmissible.[289] First, the NRC Staff states, the Oglala Sioux Tribe repeats in Contention 10 arguments made in Contention 9, specifically the DSEIS's omission of an analysis of the EPA permitting processes and NRC Staff's alleged failure to consult cooperating agencies.[290] With regard to this piece of Contention 10, NRC Staff cites its response in opposition to Contention 9.[291]

Next, the NRC Staff states that the Oglala Sioux Tribe overlooks sections of the DSEIS and GEIS that contain information concerning the statutory protections the Oglala Sioux Tribe contends have been omitted.[292] Thus, the NRC Staff asserts, the Oglala Sioux Tribe "relies on a blanket claim that the DSEIS lacks required information, failing to address the actual content of the DSEIS and the GEIS."[293]

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[287] Id. at 38–39.
[288] Id. at 39.
[289] Staff's Answer at 34.
[290] Id. at 34. Additionally, with regard to the Oglala Sioux Tribe's argument regarding consultation with cooperating agencies, the NRC Staff asserts that the Oglala Sioux Tribe fails to point to any legal standards requiring the Staff to designate certain agencies as cooperating agencies. Id. The NRC Staff also contends that the Oglala Sioux Tribe "overlooks the substantial steps the Staff has taken to engage other agencies in the development of the DSEIS," including the U.S. Army Corps of Engineers, the U.S. Forest Service, and the South Dakota Department of Environmental and Natural Resources as well as numerous American Indian Tribes. Id. at 34–37.
[291] Id. at 34.
[292] Id.
[293] Id. at 35. The NRC Staff also rejects any argument the Oglala Sioux Tribe implicitly makes regarding the Uranium Mill Tailings Radiation Control Act, 42 U.S.C. §§ 7901–7942, which deals with the reclamation and long-term maintenance of uranium mill sites. Id. Any arguments the Oglala Sioux Tribe makes with respect to this Act or the actions governed by such must fail, the NRC Staff states, because the Oglala Sioux Tribe "fails to show those impacts are within the scope of this proceeding" and, with regard to the reclamation and maintenance of the White Mesa site—an operating uranium mill in Utah— the Oglala Sioux Tribe "fails to show [related impacts] are anything but remote and speculative." Id.

Finally, the NRC Staff asserts that the Oglala Sioux Tribe's claim that the DSEIS does not discuss impacts that fall within the jurisdiction of other agencies must fail because the claim should have been raised based on the ER, which, the NRC Staff states, addresses the permits Powertech must obtain from other agencies as well as environmental impacts of the project.[294] Thus, the NRC Staff states that Contention 10 is not based on any new or materially different information.

Powertech argues that Contention 10 should be rejected because the Oglala Sioux Tribe incorrectly claims that the EPA has not been involved in the NEPA review.[295] Powertech states that the EPA submitted extensive comments on previous DSEISs created for other ISR operating license applications and on the DSEIS prepared for the Dewey-Burdock Project.[296] Powertech asserts that the "NRC Staff is not required to formally consult with any party on the preparation of a 10 C.F.R. Part 51 DSEIS; but rather, it makes the document available for public comment from all interested stakeholders."[297] Moreover, Powertech claims that the Oglala Sioux Tribe was aware of the fact that EPA was not invited to be a formal consulting party in this process, and, therefore, this contention is not based on any new or materially different information in violation of the timeliness requirements of 10 C.F.R. § 2.309(c).[298]

Further, Powertech asserts that the Oglala Sioux Tribe's "allegation that the DSEIS omits discussions/analyses on a number of issues is incorrect."[299] Discussions of the relevant issues, it claims, can be found in the DSEIS's table of contents.[300] Therefore, Powertech asserts, Contention 10 must fail.

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[294] Id. at 35–36.
[295] Powertech's Response at 22.
[296] Id.
[297] Id.
[298] Id.
[299] Id.
[300] Id. at 22–23.

In reply, the Oglala Sioux Tribe contends that most of Powertech's and NRC Staff's arguments against Contention 10 are based on the underlying merits of the case, which is inappropriate at the contention admissibility stage.[301] Additionally, the Oglala Sioux Tribe asserts that Powertech's argument that there is no legal basis for Contention 10 is incorrect because the Oglala Sioux Tribe set forth "multiple legal bases" for this contention, including "NRC NEPA regulations, relevant federal NEPA case law, NEPA statutory provisions, [and] CEQ regulations."[302] Therefore, the Oglala Sioux Tribe maintains Contention 10 is admissible.

2. Board Ruling

Contention 10 is overly broad and lacks the specificity necessary to be admitted. For example, the Oglala Sioux Tribe's first illustration of the DSEIS's allegedly narrow scope repeats an argument from its original Contention 9 in which it claims the DSEIS fails to address EPA permitting processes. The DSEIS, however, addresses the necessary EPA permits.[303] Based on the Commission's Millstone decision, the Board must reject this argument.[304]

The Oglala Sioux Tribe next argues that the DSEIS improperly excludes impacts in areas covered by numerous federal laws, including the National Historic Preservation Act, the Endangered Species Act, the Safe Water Drinking Act, the Migratory Bird Treaty Act, and the Clean Air Act. The NRC Staff points out that the DSEIS contains the allegedly missing information.[305] Consultations under the NHPA and the Endangered Species Act appear in DSEIS Sections 1.7.1, 1.7.2, and 1.7.3.5. Environmental impacts in areas covered by these two statutes are addressed in DSEIS Sections 4.6.1 and 4.9.1. The Safe Drinking Water Act is addressed when the underground injection process and the protection of aquifers at ISR facilities is discussed in GEIS Section 1.7.2.1 and DSEIS Sections 2.1.1.1.2.3.1 and 2.1.1.1.4.

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[301] Oglala Sioux Tribe's Reply at 19.
[302] Id. at 19 (citing Oglala Sioux Tribe's Proposed Contentions at 37–38).
[303] See DSEIS § 2.1.1.1.2.3.1.
[304] Millstone, CLI-01-24, 54 NRC at 358 ("The intervenor must do more than submit 'bald or conclusory allegation[s]' of a dispute with the applicant." (alteration in original)).
[305] Staff's Answer at 34–35.

The NRC Staff also discusses the application of Safe Drinking Water Act provisions to groundwater resources at the Dewey-Burdock Project in DSEIS Section 4.5.2.1. The Migratory Bird Treaty Act is addressed in DSEIS Section 4.6, and the Clean Air Act is referenced in GEIS Section 1.7.2.2 and DSEIS Sections 3.7.2 and 4.7. Therefore, these portions of this contention of omission are moot and fail under 10 CFR § 2.309(f)(1)(vi) because they are addressed in the DSEIS and the Oglala Sioux Tribe has not challenged the substance of these discussions.

Finally, the Oglala Sioux Tribe argues that in preparing the DSEIS the NRC Staff improperly failed to invite other government agencies to participate as cooperating agencies. This argument is a variant of Contention 9, where the Oglala Sioux Tribe argues that the NRC Staff failed to consider impacts within the jurisdiction of other agencies. The Oglala Sioux Tribe does not point to any legal standard requiring that the NRC Staff enlist specific agencies as cooperating agencies. The regulation cited by the Oglala Sioux Tribe, 10 C.F.R. § 51.10, specifically reserves the NRC's right to prepare an independent EIS whenever the NRC has regulatory authority over an activity.

Moreover, the contention overlooks the steps the NRC Staff has taken to engage other agencies in the development of the DSEIS. Chapter 1 of the DSEIS states that the NRC and BLM are working as cooperating agencies to evaluate the environmental impacts of the Dewey-Burdock Project. Section 1.7.3 of the DSEIS provides summaries of the NRC Staff's interactions with other agencies and organizations, including the U.S. Army Corps of Engineers, the U.S. Forest Service, the U.S. Geological Survey, the South Dakota Department of Environment and Natural Resources, the South Dakota State Historic Preservation Office, the Edgemont Area Chamber of Commerce, and Custer County Planning and Economic Development. This contention is therefore inadmissible for its failure to satisfy § 2.309(f)(1)(vi), which requires that an intervenor demonstrate that a genuine dispute exists on a material issue of law or fact.

K. The Oglala Sioux Tribe's Proposed Contention 11:

"The DSEIS Fails to Adequately Analyze Cumulative Impacts"

1. Positions of the Parties

In Contention 11, the Oglala Sioux Tribe argues that "the DSEIS fails to adequately analyze cumulative impacts associated with the Dewey-Burdock proposal as required by 10 C.F.R. §§ 51.10, 51.70, and 51.71, and [NEPA]."[306] This contention is similar to the Oglala Sioux Tribe's initial Contention 7, which was ruled inadmissible.[307] To support the present contention, the Oglala Sioux Tribe discusses the cumulative impact requirement, stating that, in the mining context, "a [NEPA] analysis of cumulative impacts must give a sufficiently detailed catalogue of past, present, and future projects, and provide adequate analysis about how these projects, and differences between the projects, are thought to have impacted the environment."[308] This requirement, the Oglala Sioux Tribe claims, "prevents agencies from undertaking a piecemeal review of environmental impacts."[309]

Here, the Oglala Sioux Tribe asserts that Powertech has included in its application the proposal to use the Dewey-Burdock plant in the future to receive and process uranium from other proposed projects, ISL operators, and licensed facilities.[310] However, the Oglala Sioux Tribe contends that the "DSEIS mentions these mining projects only briefly in the 'affected environment' portion of the document with no analysis of the impacts."[311] The Oglala Sioux Tribe asserts this is insufficient and claims that other mining developments in the region must be evaluated.[312] Additionally, the Oglala Sioux Tribe specifically states that cumulative impacts

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[306] Oglala Sioux Tribe's Proposed Contentions at 40.
[307] LBP-10-16, 72 NRC at 432–35.
[308] Oglala Sioux Tribe's Proposed Contentions at 40 (alteration in original) (quoting Te-Moak Tribe of Western Shoshone, 608 F.3d 592, 603 (9th Cir. 2010)).
[309] Id. at 41 (citing Earth Island Institute v. U.S. Forest Serv., 351 F.3d 1291, 1306–07 (9th Cir. 2006)).
[310] Id. at 42 (citing Application at 1-25).
[311] Id.
[312] Id.

must be assessed with regard to what the Oglala Sioux Tribe views as well documented soil and groundwater contamination from the Black Hills Ordnance Depot.[313] Specifically, the Oglala Sioux Tribe asserts a "competent cumulative impact analysis must address potential exacerbation of ground water contamination associated with chemicals from the Depot caused by the proposed Dewey-Burdock project."

In response, the NRC Staff argues that this contention is inadmissible. It states that, in addition to the portion of the DSEIS cited by the Oglala Sioux Tribe, chapter 5 of the DSEIS contains the NRC Staff's analysis of the cumulative impacts "from past, present, and reasonably foreseeable uranium recovery actions in the vicinity of the Dewey-Burdock Project."[314] Because the Oglala Sioux Tribe did not address chapter 5 and its contents, NRC Staff argues Contention 11 must be rejected.[315]

Additionally, the NRC Staff argues that, although the DSEIS does not address the Black Hills Ordnance Depot or the Bear Lodge rare earth minerals mine, which is a second project the Oglala Sioux Tribe contends has not been adequately analyzed, the Oglala Sioux Tribe has not identified any new or materially different information on which this portion of its contention is based.

Powertech also argues that the Oglala Sioux Tribe's Contention 11 is inadmissible.[316] Specifically, Powertech states that the portion of the contention concerning past uranium mining should have been filed in response to its RAI responses that address potential impacts from historical mining and exploration drilling and that the time for doing so has lapsed.[317]

Powertech also asserts that the Oglala Sioux Tribe's contention is factually incorrect in two ways. First, Powertech states that the DSEIS addresses relevant ISR operations in its

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[313] Id. at 42.
[314] Staff's Answer at 38.
[315] Id.
[316] See Powertech's Response at 23–24.
[317] Id. at 23.

discussion of cumulative impacts, specifically noting the Edgemont Uranium District and the Cameco Crow Butte facility.[318] Second, Powertech states that the DSEIS recognizes that Powertech has not indicated that it will move forward with its nearby proposed mining facilities. Powertech contends that even if these facilities are completed, it has not indicated with certainty that it will employ the Dewey-Burdock site for processing.[319]

Finally, Powertech makes an argument similar to the NRC Staff's, noting that, with regard to two specific facilities—the Bear Lodge rare earths minerals mine and the Black Hills Ordnance Depot—the Oglala Sioux Tribe has not demonstrated that its contention is based on new or materially different information.[320]

In its reply in support of Contention 11, the Oglala Sioux Tribe argues that the NRC Staff's and Powertech's arguments are "inappropriately timed merits arguments."[321] Additionally, the Oglala Sioux Tribe argues that, "rather than showing that the DSEIS made a cumulative analysis, the only reference NRC Staff or Powertech points to is a single statement in the cumulative impacts analysis that states that NRC Staff declined to review the impacts from the activities that form the basis of the Tribe's cumulative impacts argument," namely the two other facilities Applicant has proposed.[322]

Finally, the Oglala Sioux Tribe urges the Board to reject Powertech's and the NRC Staff's argument that it should have filed this contention based on Powertech's RAI responses.[323] The Oglala Sioux Tribe argues that the Board stated that NEPA imposes obligations on the agency, not on the applicant, and, therefore, allegations of NEPA violations do not ripen until the issuance of the NRC Staff's environmental documents."[324] This

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[318] Id.
[319] Id. at 23–24.
[320] Id. at 24.
[321] Oglala Sioux Tribe's Reply at 19.
[322] Id. at 19.
[323] Id. at 20.
[324] Id.

contention, the Oglala Sioux Tribe asserts, is based solely on NEPA and was, therefore, not ripe for review until the issuance of the DSEIS.[325]

2. Board Ruling

Although this contention was timely raised as a challenge to the DSEIS, it is inadmissible because it does not provide sufficient information to show a genuine dispute exists on a material issue of law or fact.[326] There is no support for the allegation that cumulative impacts were not considered in the DSEIS. To the contrary, chapter 5 of the DSEIS contains the NRC Staff's analysis of the cumulative impacts "from past, present, and reasonably foreseeable uranium recovery actions in the vicinity of the Dewey-Burdock Project."[327] Because the Oglala Sioux Tribe did not address chapter 5 and its contents, the Board cannot admit Contention 11 based on this contention's failure to meet the requirements of 10 C.F.R. §§ 2.309(f)(1)(i), (vi).

L. The Oglala Sioux Tribe's Proposed Contention 12:

"The DSEIS Fails to Consider All Reasonable Alternatives"

1. Positions of the Parties

The Oglala Sioux Tribe contends that "the DSEIS fails to adequately analyze all reasonable alternatives as required by 10 C.F.R. §§ 51.10, 51.70, and 51.71, and [NEPA]."[328] The Oglala Sioux Tribe asserts that, pursuant to NEPA, agencies must analyze alternatives to proposed federal actions.[329] With regard to the proposed Dewey-Burdock Project, the Oglala Sioux Tribe claims that "[n]umerous unexplored and unreviewed alternatives exist."[330] Specifically, the Oglala Sioux Tribe states that the NRC Staff should consider (1) "an alternative that precludes adoption of any Alternate Concentration Limits . . . for ground water restoration," (2) an alternative that would prevent a proponent from mining additional well-fields until it has

[325] Id.
[326] See 10 C.F.R. § 2.309(f)(1)(vi).
[327] Staff's Answer at 38.
[328] Oglala Sioux Tribe's Proposed Contentions at 43.
[329] Id.
[330] Id. at 44.

demonstrated that it has operated without excursions and that previously mined well-fields have been restored, (3) an alternative of permitting operation of either the Dewey or Burdock sites only once the proponent has shown that the other area has been mined without excursion and with restoration, and (4) an alternative of prohibiting "any extraction from aquifers, or portions of aquifers, for which the applicant has not yet demonstrated confined conditions."[331]

In response to this contention, the NRC Staff argues that the Oglala Sioux Tribe's arguments are not timely.[332] Specifically, the NRC Staff states that the ER addresses alternatives to the proposed action, mitigation measures, and groundwater monitoring.[333] The NRC Staff asserts that Contention 12 should have been filed within 30 days of the issuance of the ER and is not based on any new or materially different information in contravention of 10 C.F.R. § 2.309(c).[334]

With regard to the Oglala Sioux Tribe's first suggestion that Alternate Concentration Limits (ACLs) be prohibited, the NRC Staff argues that the Oglala Sioux Tribe "overlooks the very purpose of [ACLs], which is to address situations where restoring groundwater to baseline conditions . . . would not be practicable."[335] The second and third proposals, the NRC Staff asserts, "would require a licensee to suspend ISR operations for at least one year and likely longer," and the Oglala Sioux Tribe does not address whether this is feasible for all ISR operations or for the Dewey-Burdock site.[336] Regarding the fourth alternative, the NRC Staff argues that "the [Oglala Sioux] Tribe overlooks that such a license condition has already been proposed," specifically license condition 10.10.B.[337] With respect to the other arguments, the NRC Staff asserts that the Oglala Sioux Tribe "fails to show there is a genuine issue as to

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[331] Id.
[332] Staff's Answer at 39.
[333] Id. at 39.
[334] Id. at 40.
[335] Id. at 41.
[336] Id.
[337] Id. at 40.

whether the alternative mitigation measures it identifies are feasible."[338] Overall, the NRC Staff argues that the Oglala Sioux Tribe has not demonstrated "a genuine issue as to whether the alternative mitigation measures it identifies are feasible."[339]

Powertech also asserts that Contention 12 is inadmissible. To support its assertion, Powertech first argues that the contention is premature because the DSEIS is not the final version of the NRC's environmental review.[340] Powertech states that, if appropriate, the Oglala Sioux Tribe can challenge the NRC's final analyses when the FSEIS is issued.[341] Additionally, Powertech argues that the NRC Staff need only analyze "reasonable" alternatives, and the Oglala Sioux Tribe has not distinguished reasonable alternatives from unreasonable ones.[342]

With specific regard to the Oglala Sioux Tribe's proposed alternative that ACLs be prohibited, Powertech argues that ACLs are a legal right under 10 C.F.R. Part 40, Appendix A, Criterion 5(B)(5) and, therefore, the Oglala Sioux Tribe's argument is an impermissible collateral attack on a regulation.[343] Finally, Powertech argues that Contention 12 is not based on information that is new or materially different from the ER.[344]

In reply to these arguments, the Oglala Sioux Tribe urges the Board to reject the NRC Staff's argument that Contention 12 is too late and Powertech's argument that it is too early.[345] Rather, the Oglala Sioux Tribe asserts, the contention is based on the NRC's analysis of alternatives that "was only put forth publicly upon the issuance of the DSEIS."[346] The Oglala Sioux Tribe claims that its contention concerns whether the NRC Staff fulfilled its NEPA

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[338] Id.
[339] Id.
[340] Powertech's Response at 25.
[341] Id.
[342] Id.
[343] Id. at 25–26.
[344] Id. at 26.
[345] Oglala Sioux Tribe's Reply at 20.
[346] Id.

obligations, a question that is ripe for review at this time.[347] Moreover, the Oglala Sioux Tribe states that the NRC Staff's and Powertech's arguments that the alternatives the Oglala Sioux Tribe suggested were not reasonable are merits arguments that are inappropriately raised at the contention admissibility stage.[348]

2. Board Ruling

The NRC Staff argues this contention is filed too late.[349] Powertech argues this contention was filed too early and is not yet ripe for consideration.[350] Both the NRC Staff and Powertech are incorrect. This contention has been timely filed. It addresses issues that arise from the DSEIS that could not have been raised at an earlier stage of the proceeding. It is also in conformance with the scheduling order in this case.[351]

This contention is inadmissible, however, because it does not meet the standards in § 2.309(f)(1). It is insufficient for the Oglala Sioux Tribe simply to allege that "numerous unexplored and unreviewed alternatives exist."[352] The Oglala Sioux Tribe fails to show there is a genuine issue as to whether the alternative mitigation measures it identifies are feasible. Under NEPA, an agency need not discuss alternatives that are "infeasible, ineffective, or inconsistent with the basic policy objectives for the management of the area."[353] An alternative might not be feasible for a variety of reasons, including a failure of the alternative to meet the

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[347] Id. at 21.
[348] Id.
[349] Staff's Answer at 39.
[350] Powertech's Response at 25.
[351] Order (Second Prehearing Conference Call Summary and Supplemental Initial Scheduling Order) (Oct. 16, 2012) at 3–4 (unpublished).
[352] Oglala Sioux Tribe's Proposed Contentions at 44.
[353] N. Alaska Envtl. Ctr v. Kempthorne, 457 F.3d 969, 978 (9th Cir. 2006) (quotation marks and internal citations omitted); see also Fuel Safe Washington v. Fed. Energy Regulatory Comm'n, 389 F.3d 1313, 1323 (10th Cir. 2004) (holding that an "agency need not analyze the 'environmental consequences of alternatives it has in good faith rejected as too remote, speculative, or . . . impractical or ineffective.'" (quoting All Indian Pueblo Council v. United States, 975 F.2d 1437, 1444 (10th Cir. 1992))).

project's purpose and need.[354] Here, the Oglala Sioux Tribe proposes that the NRC impose a license condition prohibiting the use of ACLs. This proposal overlooks the very purpose of ACLs, which is to address situations where restoring groundwater to baseline conditions or MCLs would not be practicable.[355] The Oglala Sioux Tribe must show that a particular alternative was not discussed in the DSEIS and provide some support that the alternative is reasonable.[356] The Oglala Sioux Tribe has not done this and therefore Contention 12 is inadmissible.

M. Tribe's Proposed Contention 13:

"Failure to Take a Hard Look at Impacts Associated with Air Emissions and Liquid Waste"

1. Positions of the Parties

The Oglala Sioux Tribe contends that the DSEIS fails to take a "hard look" at impacts of the proposed mine related to air emissions and liquid waste disposal in violation of 10 C.F.R. § 51.10, 51.70, 51.71, and NEPA.[357] With regard to air emissions, the Oglala Sioux Tribe asserts that "the DSEIS lacks current and confirmed information on air emissions and their impacts on various 'receptors' in the region," including "people, plants, animals, water bodies, soil, [and] National Parks."[358] Specifically, the Oglala Sioux Tribe argues that the modeling employed in the DSEIS is inadequate because it is based on information provided by the applicant that has since been revised.[359] Instead, the Oglala Sioux Tribe contends, the NRC

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[354] Exelon Generation Co. (Early Site Permit for Clinton ESP Site), CLI-05-29, 62 NRC 801, 806 (2005) (excluding an energy efficiency alternative because it would not advance the applicant's goals), aff'd, Envtl. Law and Policy Ctr. v. U.S. Nuclear Regulatory Comm'n, 470 F.3d 676 (7th Cir. 2006).
[355] See 10 CFR Part 40, Appendix A, Criterion 5(B)(5). Criterion 5(B)(5) prescribes three alternative standards for groundwater restoration at ISR facilities: (1) background concentrations, (2) maximum values from chart 5C, or (3) an ACL.
[356] Union Electric Co. (Calloway Plant, Unit 1), LBP-12-15, 76 NRC __ (slip op. at 52) (July 17, 2012).
[357] Oglala Sioux Tribe's Proposed Contentions at 44.
[358] Id. at 45.
[359] Id.

Staff should have delayed the DSEIS and permitted Powertech to provide updated information. Having failed to do so, the Oglala Sioux Tribe asserts that the DSEIS should be reissued for public review and comment.[360]

The Oglala Sioux Tribe maintains that the same deficiencies affect the air impacts analysis.[361] Specifically, the Oglala Sioux Tribe argues that "an emission inventory for PM2.5 particulate emissions, to which radioactive elements may attach and be dispersed via regional dispersion, were not available and were not considered in the DEIS dispersion modeling."[362] The Oglala Sioux Tribe also takes issue with the DSEIS's reliance on "Powertech's 'commitment' to provide accurate and useful information on air emissions in a final SEIS," claiming that this does not satisfy the NRC's obligations under NEPA.[363] It further argues that there are methodological flaws in the DSEIS's analysis of the impact of wind, including wind storms and tornadoes.[364] These deficiencies, it states, contribute to unresolved questions of radioactive contamination.[365]

Additionally, the Oglala Sioux Tribe argues that "the DSEIS states that the applicant proposes to rely on Reverse Osmosis (RO) for treatment of its liquid wastes," but fails to review the quality, extent, or impacts of the disposed waste or the potential limitations and failings of the RO process.[366] The Oglala Sioux Tribe also asserts that, in violation of NEPA and NRC regulations, the DSEIS "fails to adequately address disposal options should the Class V Underground Injection Control permit be denied".[367] Finally, with regard to waste, the Oglala Sioux Tribe argues that the DSEIS does not adequately address water treatment proposals and

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[360] Id. at 46.
[361] Id.
[362] Id. (citing DSEIS at C-16).
[363] Id. at 47.
[364] Id.
[365] Id.
[366] Id. at 48 (citing DSEIS at 3-105).
[367] Id. at 49.

it "does not detail any information regarding plans should the un-reviewed water treatment plan not perform as expected."[368]

The last part of Contention 13 alleges that "the DSEIS fails to properly account for impacts to wildlife resulting from land application of ISL wastes."[369] Specifically, the Oglala Sioux Tribe notes that the DSEIS does not address the risks of selenium contamination resulting from ISL waste disposal through land application that the Fish and Wildlife Service has identified.[370] This results in an incomplete review violative of NEPA's "hard look" requirement.[371]

In response, the NRC Staff asserts that the portion of Contention 13 related to the air emissions model in the DSEIS is based on an incomplete reading of the DSEIS.[372] The Oglala Sioux Tribe, NRC Staff argues, overlooks the fact that the DSEIS addresses the new information Powertech issued regarding air emissions.[373] According to the NRC Staff, because the Oglala Sioux Tribe did not directly challenge the information relevant to its argument, the Oglala Sioux Tribe's assertions in this regard must be rejected.[374] Even had the Oglala Sioux Tribe challenged the new information, the NRC Staff contends, the challenge would be untimely because the information was available prior to the issuance of the DSEIS.[375]

The NRC Staff argues that the portions of Contention 13 concerning wind are inadmissible for failing to meet the requirement that new or amended contentions filed after the initial deadline be based on new or materially different information.[376] Information regarding wind and the issues derived therefrom, the NRC Staff contends, was available in the ER and in

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[368] Id. at 49.
[369] Id. at 50.
[370] Id.
[371] Id.
[372] Staff's Answer at 42.
[373] Id.
[374] Id.
[375] Id.
[376] Id.

a 2011 submission from Powertech to the NRC.[377] Moreover, the Oglala Sioux Tribe specifically states that the potential impacts of tornadoes were not properly assessed in the DSEIS, an argument the Staff asserts was already raised and rejected by the Board in its ruling on the Oglala Sioux Tribe's initial hearing petition.[378] The Staff notes also that the Oglala Sioux Tribe fails to demonstrate why Powertech's submission of new data with regard to air emissions contravenes NEPA.[379] Moreover, the NRC Staff notes that it explained in the DSEIS that new data could emerge that affects its analysis.[380] There is no error, the NRC Staff asserts, in its basing the data in the DSEIS on information available at the time of its production.[381]

With regard to liquid waste disposal, the NRC Staff states that the information the Oglala Sioux Tribe claims is missing can be found both in Powertech's ER and the GEIS, which discusses the RO process, impacts on groundwater, and other relevant processes.[382] The NRC Staff claims that the information from Dr. Moran that the Oglala Sioux Tribe cites as support for this contention, "neither addresses this information nor explains how the information in the DSEIS is new or materially different from that in the GEIS or [ER]."[383] Additionally, the NRC Staff asserts that the DSEIS does account for impacts were the EPA to deny Powertech's request for a Class V Underground Injection Control permit.[384]

With regard to the portion of Contention 13 dealing with impacts to wildlife, the NRC Staff argues that the U.S. Fish and Wildlife Service report on which the Oglala Sioux Tribe relies was released in 2007.[385] Therefore, the Staff contends, this information was previously

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[377] Id. at 42–43.
[378] Id. at 43.
[379] Id.
[380] Id.
[381] Id.
[382] Id.
[383] Id. at 44.
[384] Id.
[385] Id.

available and the Oglala Sioux Tribe should have submitted its arguments as challenges to the ER.[386]

Powertech, too, argues against the admission of Contention 13. With regard to the air emissions modeling argument, Powertech asserts that the Oglala Sioux Tribe does not demonstrate that its contention is based on new or materially different information.[387] Moreover, Powertech argues that if the Oglala Sioux Tribe was dissatisfied with the plan for Powertech to submit a final corrected inventory prior to the issuance of the FSEIS, the Oglala Sioux Tribe should have proposed a new contention noting such a disagreement prior to January 2013.[388]

Regarding the Oglala Sioux Tribe's concerns with wind data, Powertech argues that the FSEIS will include an appropriate and comprehensive model.[389] Additionally, Powertech states that the Oglala Sioux Tribe did not demonstrate that it is disputing information that is new or materially different from the license application, RAI responses, and other relevant parts of the record.[390] Moreover, to the degree that the Oglala Sioux Tribe took issue with the DSEIS's alleged failure to discuss foreseeable impacts related to major wind storms, Powertech asserts that this information is contained in its technical review and that the Oglala Sioux Tribe has not shown that this portion of Contention 13 is based on any new or materially different information.[391]

Powertech makes the same argument with regard to the Oglala Sioux Tribe's allegations regarding liquid waste disposition, namely that the Oglala Sioux Tribe has not demonstrated that this claim is based on new or materially different information as required by 10 C.F.R. § 2.309(c).[392] Relevant information, Powertech asserts, can be found in the GEIS.[393]

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[386] Id. at 44–45.
[387] Powertech's Response at 26.
[388] Id. at 26–27.
[389] Id. at 27.
[390] Id.
[391] Id. at 28.
[392] Id.

Finally, Powertech argues that the portions of the Oglala Sioux Tribe's contention regarding water quality and water treatment isnot based on new or materially different information because these issues are addressed in Powertech's technical review RAI response.[394] Additionally, Powertech states that it is developing a plan regarding impacts to wildlife, the completed version of which the Oglala Sioux Tribe can challenge at a later time.[395] For these reasons, Powertech urges the Board to reject this contention.

In its reply in support of its contention, the Oglala Sioux Tribe maintains that it has asserted an admissible contention.[396] It notes that NRC Staff's and Powertech's assertions that the contention is not timely because it is not based on new or materially different information should be rejected because "NRC Staff and Powertech ignore the holdings of this Board that contentions based solely on violations of NEPA are not ripe based on the application materials alone."[397]

2. Board Ruling

The Oglala Sioux Tribe argues that this is a contention of omission.[398] It states that the DSEIS addresses neither the quality of liquid wastes nor the impacts from their disposal. It also alleges the air modeling data cited in the DSEIS is flawed and a more detailed inventory of particulate emissions is necessary. Although this contention of omission is timely raised, it is nevertheless inadmissible because it does not meet the contention admissibility standards of § 2.309(f)(1).

As to the air emissions model, the Oglala Sioux Tribe's contention was timely because the revised mobile source inventory used to model air emissions first appeared in the DSEIS. It is irrelevant that it was based on data submitted to the Staff in July 2012. The use of the

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[393] Id.
[394] Id.
[395] Id.
[396] Oglala Sioux Tribe's Reply at 21.
[397] Id. at 21.
[398] Oglala Sioux Tribe's Proposed Contentions at 45.

Powertech submission by the NRC Staff first occurred in the DSEIS. Contention 13 is not based on the 2012 RAI response, but is instead based on the fact that, in 2013, the DSEIS relied upon it. Although invervenors must respond to new information when it first becomes available, they need not do so until the information is actually used by the NRC Staff to form its conclusions on impacts in the DSEIS.

As to the assertion in this contention that the DSEIS omits analysis of air emissions, the Oglala Sioux Tribe overlooks Section 4.7.1 and Section C.2.1 of the DSEIS that describe the differences between the initial and revised emission inventory. The Oglala Sioux Tribe does not acknowledge the new inventory and argues that the prior inventory needs to be supplemented. Further, the Oglala Sioux Tribe's challenges to the DSEIS's sections discussing wind speed, wind direction, tornadoes, and other wind events are untimely because the Oglala Sioux Tribe fails to explain what information in these sections is new and how it is materially different from information previously available. The Board notes that the Oglala Sioux Tribe's original tornado contention (Contention 10) was rejected in LBP-10-16.[399]

The Oglala Sioux Tribe relies on Dr. Moran's Supplemental Declaration with regard to the liquid waste disposal issue.[400] This portion of the contention is inadmissible, however, because the information allegedly missing is contained in the GEIS. The GEIS discusses the RO process and related chemical processes (Section 2.5.3), the use of reverse osmosis in aquifer applications (Sections 2.5, 4.2, 4.3, 4.5), impacts on groundwater and waste management (Sections 4.2.12.2, 4.2.4.2, 4.3.4.2.3), and recovery rates for treated water reused as permeate (Sections 2.5.3 and 4.3.4.2.3). Because the Oglala Sioux Tribe fails to address

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[399] LBP-10-16, 72 NRC at 440–42.
[400] See Oglala Sioux Tribe's Proposed Contentions at 45 (citing Oglala Sioux Tribe's Proposed Contentions, Exh. 2, Supplemental Declaration or Dr. Robert E. Moran (Jan. 24, 2013) ¶¶ 52–53, 99–100).

information in the DSEIS and GEIS that is relevant to the issue it raises, the Board must reject the Oglala Sioux Tribe's arguments relating to liquid waste disposal.[401]

The Oglala Sioux Tribe further argues that the DSEIS fails to account for impacts if the EPA denies Powertech's application for a Class V Underground Injection Control permit. This is incorrect, however, because the DSEIS states that if Powertech's Class V application is denied, "the applicant would need to rely solely on land application disposal methods or seek an NRC amendment to approve another disposal option before it initiated operations."[402] The DSEIS next discusses alternative wastewater disposal methods, including evaporation ponds and discharge to surface waters.[403] The DSEIS thus summarizes impacts from these alternative methods and refers to the GEIS, which further discusses these alternatives.[404] For these reasons, the Oglala Sioux Tribe's arguments regarding the admissibility of its Class V permit denial concerns must be rejected.

Accordingly, for the reasons discussed above, the Board finds that the entirety of Contention 13 is inadmissible.

N. The Oglala Sioux Tribe's Proposed Contention 14:

"The DSEIS Fails to Comply with NEPA with Regard to Impacts on Wildlife, and Fails to Comply with the Endangered Species Act and Migratory Bird Treaty Act"

1. Position of the Parties

The Oglala Sioux Tribe's Contention 14 alleges that "[t]he DSEIS violates 10 C.F.R. § 51.10, 51.70, 51.71, and [NEPA] . . . and the Endangered Species Act . . . by failing to conduct the required 'hard look' analysis at impacts of the proposed mine and . . . by failing to

[401] Millstone, CLI-01-24, 54 NRC at 358.
[402] DSEIS at 2-54.
[403] DSEIS §§ 2.1.1.2.1, 2.1.1.2.2; DSEIS tbl. 2.1-8.
[404] For example, the GEIS discusses impacts associated with evaporation ponds and surface water discharge in Sections 4.4.3.1, 4.4.3.2, and 4.4.4.1. Generic Environmental Impact Statement for In-Situ Leach Uranium Milling Facilities, NUREG-1910 (May 2009).

consult as required with the U.S. Fish and Wildlife Service."[405] In support of this contention, the Oglala Sioux Tribe cites the supplemental declaration of Dr. Moran.[406]

The Oglala Sioux Tribe asserts that section 7 of the Endangered Species Act "requires that agencies 'conference' with the [Fish and Wildlife Service] on any action that is 'likely to jeopardize the continued existence of any proposed species or result in the destruction or adverse modification of proposed critical habitat.'"[407] In this instance, the Oglala Sioux Tribe argues that "section 7 consultation was not completed, and impacts to imperiled species were not analyzed and reviewed."[408] The Oglala Sioux Tribe recognizes that certain species, including the Greater Sage Grouse, have been identified in the DSEIS as a candidate species under the Endangered Species Act.[409] Despite this, the Oglala Sioux Tribe asserts, the DSEIS contains no NEPA analysis of the impacts to the Greater Sage Grouse and "ignore[s] the studies and draft recommendations" relevant to this species that the Fish and Wildlife Service have issued.[410] "The result," the Oglala Sioux Tribe declares, "is that the DSEIS fails to provide the required analysis of the conservation objectives that could be adopted to protect the imperiled Greater [S]age [G]rouse, and its habitat."[411]

The Oglala Sioux Tribe also asserts that the DSEIS inappropriately concludes that "[W]hooping [C]ranes will not likely occur at the proposed site" despite the Fish and Wildlife Service's finding that they are expected to be found there.[412] The NRC Staff, the Oglala Sioux Tribe claims, has not sought consultation with the Fish and Wildlife Service.[413] When an agency's conclusions are different from the Fish and Wildlife Service's in this regard, the Oglala

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[405] Oglala Sioux Tribe's Proposed Contentions at 50.
[406] Id. at 51.
[407] Id. (citing 50 C.F.R. § 402.10(a)).
[408] Id. at 53.
[409] Id.
[410] Id.
[411] Id.
[412] Id. at 54.
[413] Id.

Sioux Tribe asserts, the agency must clearly articulate its reasons for disagreement.[414] This, the Oglala Sioux Tribe states, the NRC has not done.

The Oglala Sioux Tribe next argues that "[t]he DSEIS . . . forwards an unreasonably bounded analysis regarding the Black-footed ferret" by concluding that construction would not affect current or future ferret populations because these species "are not present in the site vicinity" and that a nearby black-tailed prairie dog colony "is likely too small to support and sustain a breeding population of black-footed ferrets."[415] The Oglala Sioux Tribe asserts that this conclusion is inappropriate because the DSEIS does not demonstrate that the NRC Staff consulted with or obtained the concurrence of the Fish and Wildlife Service.[416]

Finally, the Oglala Sioux Tribe asserts that the consultation requirement of the Migratory Bird Treaty Act, in addition to that of NEPA, is not satisfied by the DSEIS "and cannot be deferred until a later stage of the licensing proceedings."[417] It also contends that the DSEIS does not appropriately examine the impacts on wildlife from waste disposal, particularly 11e.(2) byproduct materials disposal, water disposal, and decommissioning activities.[418]

In response, NRC Staff states that "Contention 14 is a belated attempt to raise issues that could have been presented on Powertech's [ER]."[419] The ER, the NRC Staff claims, discusses wildlife that could be affected by the Dewey-Burdock project, and the Oglala Sioux Tribe should have raised its concern previously.[420]

In addition to its being late filed, the NRC Staff asserts the Board must reject Contention 14 because no error was made in the consultation process.[421] NRC Staff states that it consulted with the Fish and Wildlife Service as early as March 2010 and determined that the Project would

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[414] Id. at 55 (citing Bennett v. Spear, 520 U.S. 154, 169 (1997).
[415] Id.
[416] Id.
[417] Id. at 56.
[418] Id. at 57.
[419] NRC Staff's Answer at 45.
[420] Id.
[421] Id.

not affect listed species. Therefore, the NRC Staff maintains, a formal section 7 consultation was not required because "this section applies only where threatened and endangered species or critical habitats are present and impacts on a species are expected as a result of the proposed project."[422] The Oglala Sioux Tribe, the NRC Staff asserts, fails to address the DSEIS's explanation that a section 7 consultation was not required, and; therefore, there is no basis for admitting this portion of Contention 14.[423]

Finally, the NRC Staff declares that the Oglala Sioux Tribe did not "address other documents showing the Staff ha[d] consulted on wildlife issues with [the Bureau of Land Management] and South Dakota Game, Fish and Parks Division . . . and accepted recommendations from both agencies."[424] The NRC Staff states that the Oglala Sioux Tribe must do more than merely allege that the DSEIS's treatment of these issues is inadequate; "it must evaluate the underpinnings of the DSEIS analysis and provide specific support for its claims."[425] This, the NRC Staff claims, the Oglala Sioux Tribe did not do.[426]

In its response, Powertech argues that Contention 14 should be rejected because it does not consider all the information contained in the DSEIS that relates to the section 7 consultation process, consultation with other agencies, and threatened and endangered species.[427]

Powertech also argues that the NRC Staff conducted an informal consultation with the Fish and Wildlife Service and the latter "concluded that there are no federally threatened or endangered species within 1.0 mile of the proposed Dewey-Burdock project area."[428] This

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[422] Id. at 46 (citing 50 C.F.R. §§ 402.02, 402.13).
[423] Id.
[424] Id. at 47.
[425] Id.
[426] Id.
[427] Powertech's Response at 29 (referencing, as an example, DSEIS § 1.7.1).
[428] Id. at 29. The NRC Staff explains that this determination was also indicated in two letters from the Fish and Wildlife Service dated March 29, 2010, and August 27, 2012. Id. at 30.

determination, Powertech explains, does not require additional analysis.[429] Additionally, Powertech notes that the Fish and Wildlife Service has an opportunity to comment on the DSEIS, and maintains that the NRC Staff will respond accordingly to any such comments.[430] Powertech asserts that Contention 14 is, therefore, untimely, because it could have been filed based on previously released information and does not satisfy the standards set forth in 10 C.F.R. § 2.309(c).[431]

In response to the Oglala Sioux Tribe's assertion that threatened and endangered species analyses are not addressed in the DSEIS, Powertech cites numerous portions of the DSEIS that, it claims, contain the allegedly omitted analyses.[432] Specifically, Powertech cites to portions of the DSEIS that analyze the status of the Greater Sage Grouse.[433] It further asserts that information regarding this species was contained in the license application and, therefore, the Oglala Sioux Tribe should have filed this contention at an earlier time.[434] Powertech makes similar arguments regarding the Whopping Crane, noting that the DSEIS addresses this species and asserting that the Oglala Sioux Tribe has not demonstrated that its allegations satisfy the standards for new and amended contentions.[435] With regard to the Black-Footed Ferret, Powertech argues that the Oglala Sioux Tribe's allegation goes against current practice because surveys on this species are not required in South Dakota.[436]

Concerning the Oglala Sioux Tribe's argument regarding the Migratory Bird Treaty Act, Powertech reiterates that the NRC Staff concluded that an informal consultation, rather than a formal section 7 consultation, was sufficient for the Fish and Wildlife Service to make relevant determinations. Additionally, Powertech notes that "[t]he DSEIS commits several lines of

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[429] Id. at 30.
[430] Id.
[431] Id.
[432] Id. at 30–31.
[433] Id. at 31.
[434] Id.
[435] Id.
[436] Id. at 31–32.

discussion to potential impacts to migratory birds . . . and such analysis is subject to additional public comments should [the Fish and Wildlife Service] deem it appropriate."[437] For these reasons, Powertech asserts that Contention 14 must be rejected.

In reply, the Oglala Sioux Tribe argues that NRC Staff's and Powertech's assertions that the contention is late filed are "undermined by the fact that . . . the DSEIS admits that it lack[s] necessary information."[438] Additionally, the Oglala Sioux Tribe notes that Powertech previously stated that the determinations regarding impacts to wildlife would be provided in the DSEIS.[439] Therefore, the Oglala Sioux Tribe contends that it could not be expected to file a contention based on information it was told would be available only in the DSEIS.[440] The Oglala Sioux Tribe accordingly maintains that Contention 14 is adequately supported and admissible.[441]

2. Board Ruling

Contention 14 can be broken down into three primary components: (1) the Endangered Species Act's section 7 consultation process was not conducted adequately; (2) impacts to threatened and endangered species, including the Greater Sage Grouse, the Whooping Crane, and the Black-Footed Ferret, were not sufficiently assessed; and (3) the DSEIS does not adequately consider the Migratory Bird Treaty Act.

The Board finds that the first component—the adequacy of NRC's consultation process—meets the good cause standard for new and amended contentions filed after the initial deadline. Although, as NRC Staff and Powertech point out, bits and pieces of the information upon which the contention is based were previously available in some form in documents exchanged between the NRC Staff and the Fish and Wildlife Service, the adequacy, vel non, of the inter-agency consultation process does not hinge on each e-mail between them.

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[437] Id. at 32.
[438] Oglala Sioux Tribe's Reply at 22 (citing Oglala Sioux Tribe's Proposed Contentions at 53).
[439] Id.
[440] Id.
[441] Id.

Intervenors cannot be expected to raise a claim each time a document is created relating to a proceeding, especially if that document is a mere part of a larger, arguably incomplete, process. In this case, a March 15, 2010 letter,[442] a March 29, 2010 letter,[443] and an August 27, 2012 e-mail[444] evidence the informal consultation process conducted between the NRC Staff and the Fish and Wildlife Service. The Board does not expect intervenors to raise a concern regarding each portion of the process, but instead notes that, in situations such as this, intervenors need not file a contention until all relevant parts of a process are completed. And in that regard, as the Board explains in more detail below, neither Powertech nor the NRC Staff point to documentation that demonstrates that the Fish and Wildlife Service concurred in the Staff's findings resulting from the information consultation process, a regulatory requirement that completes the informal consultation process. Furthermore, the documentation the NRC Staff and Powertech cite to support their responses in opposition to the admission of Contention 14 do not even suggest an end to the process until well after the deadline for the timely submission of the Oglala Sioux Tribe's contentions in April 2010. Therefore, the Oglala Sioux Tribe could not have proffered this argument in response to the application as part of its prior set of proposed contentions. Accordingly, the Board determines that the portion of this Oglala Sioux Tribe contention regarding the section 7 consultation process meets the good cause standard for late filed contentions found in 10 C.F.R. § 2.309(c) because it is based on information that was not previously available and that is materially different from previously available information and because it was filed by the deadline set forth in the Board's scheduling order.[445]

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[442] Letter from Kevin Hsueh, Chief, Environmental Review Branch, Office of Federal and State Materials and Environmental Management Programs, NRC, to Pete Gober, Fish and Wildlife Conservation Office (Mar. 15, 2010) (ADAMS Accession No. ML100331503).
[443] Letter from Scott Larson, Acting Field Supervisor, South Dakota Field Office, to Kevin Hsueh, NRC (ADAMS Accession No. ML100970556).
[444] E-mail from Terry Quesinberry, Fish and Wildlife Biologist, U.S. Fish and Wildlife Service, to Amy Hester, Research Scientist, Center for Nuclear Waste Regulatory Analyses, Southwest Research Institute (ADAMS Accession No. ML12240A317).
[445] See 10 C.F.R. § 2.309(c)(1).

To be admissible, this portion of the contention must not only meet the standards set forth in 10 C.F.R. § 2.309(c), but it also must meet the admissibility standards of 10 C.F.R. § 2.309(f)(1). The essence of the Oglala Sioux Tribe's claim is that the required consultation process was not completed. According to implementing regulations, the NRC must consult with the applicable entity, here the Fish and Wildlife Service, regarding the presence of listed species or critical habitat at the relevant site and the impacts the proposed project will have on those species and habitat. If the NRC engages in an informal consultation and it is determined that the project will not adversely affect listed species or critical habitat, it need not engage in formal consultation. The implementing regulation, 50 C.F.R. § 402.13, explains:

> Informal consultation is an optional process that includes all discussions, correspondence, etc., between the Service and the Federal agency or the designated non-Federal representative, designed to assist the Federal agency in determining whether formal consultation or a conference is required. If during informal consultation it is determined by the Federal agency, <u>with the written concurrence of the Service</u>, that the action is not likely to adversely affect listed species or critical habitat, the consultation process is terminated, and no further action is necessary.[446]

Here, as the Board has noted previously, Powertech and the NRC Staff point to several documents that evidence an exchange between the NRC and the Fish and Wildlife Service that, they claim, fulfill the requirements of the informal consultation process. The NRC Staff and Powertech reference two letters and one e-mail that they assert demonstrate that the NRC was engaged in conversations with the Fish and Wildlife Service about the Project's impact on listed species and habitat. The August 27, 2012, e-mail from the NRC Staff to the Fish and Wildlife Service explains that the NRC Staff concluded "that a biological assessment or Section 7 consultation under the Endangered Species Act are not warranted for this proposed project because no adverse effects to federally threatened, endangered, or candidate species are

[446] 50 C.F.R. § 402.13(a) (emphasis added).

expected. The bases for [this] determination will be provided in the draft SEIS."[447] Despite this conclusion, neither Powertech nor the NRC Staff point to documentation that demonstrates that the Fish and Wildlife Service concurred in this finding, a regulatory requirement that completes the informal consultation process. Accordingly, based on the information before us, the Board cannot determine whether the informal consultation process was completed. Further, to the extent that the DSEIS's impacts analyses are tied to the adequacy of the consultation process, the Board is unable to discern whether the DSEIS's impacts analyses relevant to the Greater Sage Grouse, the Whooping Crane, and the Black-Footed Ferret are sufficient.

Given this, the Board finds that the portions of Contention 14 relevant to the completion of the section 7 consultation process and the adequacy of the NRC Staff's impact analyses relevant to the three named species meet the admissibility standards of 10 C.F.R. §2.309(f)(1). The Oglala Sioux Tribe has (1) provided a specific statement of the issue, (2) provided a brief explanation of the basis of the contention, (3) demonstrated that the issue is within the scope of this proceeding, (4) demonstrated that the issue is material to the findings the NRC must make to approve the application, (5) provided a concise statement of the alleged facts that support its position on the issue, and (6) shown that a genuine dispute exists with the applicant on a material issue of law and fact.[448] Accordingly, as is set forth in Appendix A to this opinion, these portions of Contention 14 are admitted in the following form: 14A—Whether an appropriate consultation was conducted pursuant to the Endangered Species Act and implementing regulations; and 14B—Whether the DSEIS's impact analyses relevant to the Greater Sage Grouse, the Whooping Crane, and the Black-Footed Ferret are sufficient.[449]

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[447] E-mail from Terry Quesinberry, Fish and Wildlife Biologist, U.S. Fish and Wildlife Service, to Amy Hester, Research Scientist, Center for Nuclear Waste Regulatory Analyses, Southwest Research Institute (ADAMS Accession No. ML12240A317).
[448] See 10 C.F.R. § 2.309(f)(1)(i)–(vi).
[449] The Board notes that Applicant and the NRC Staff may respond to this contention with an appropriate motion for summary disposition if documentation or other information exists that would moot the reformulated Contention 14.

Insofar as the Oglala Sioux Tribe's second claim—that the DSEIS does not adequately assess the impacts to threatened and endangered species—is separate from its concern that the consultation process was not completed, resulting in an inadequate impacts analysis, the Board finds that its arguments in support of this aspect of the contention do not meet the contention admissibility standards of 10 C.F.R. § 2.309(f)(1)(v) and (vi) because the Oglala Sioux Tribe failed to present its claim with sufficient detail and support and failed to demonstrate that there exists a genuine dispute as to this issue. Accordingly, to the extent that the Oglala Sioux Tribe proffers concern regarding threatened and endangered species that is separate from its arguments regarding the consultation process and the above-named animals, that claim is rejected.

The Board finds that the Oglala Sioux Tribe's third claim in Contention 14—that the NRC Staff did not engage in the consultation process relevant to issues addressed by the Migratory Bird Treaty Act and that the impacts to wildlife with respect to this Act are inadequately analyzed—is likewise inadmissible. To the extent that the Oglala Sioux Tribe continues to argue that a proper consultation process was not conducted, this has been addressed supra. Insofar as the Oglala Sioux Tribe is making additional claims related to the MBTA, the Board finds that it has not provided a sufficient explanation of its concern nor has it provided a concise statement of the alleged facts supporting its position, as required by 10 C.F.R. § 2.309(f)(1)(ii) and (v), respectively.[450] It is not the responsibility of the Board to read between the lines of a filing to glean the essence of an intervenor's contention. Accordingly, this portion of Contention 14 is rejected.

[450] Where contentions are defective for whatever reason, licensing boards have no duty to make them acceptable under 10 C.F.R. § 2.309 (formerly § 2.714). Commonwealth Edison Co. (Zion Station, Units 1 & 2), ALAB-226, 8 AEC 381, 406 (1974).

O. Consolidated Intervenors' Proposed DSEIS Contention A:

"Failure to Meet Applicable Legal Requirements Regarding Protection of Cultural Resources, and Failure to Involve or Consult All Interested Tribes as Required by Federal Law"

1. Positions of the Parties

In proposed DSEIS Contention A, Consolidated Intervenors complain of the DSEIS's "failure to meet applicable legal requirements regarding protection of cultural resources, and failure to involve or consult all interested tribes as required by federal law."[451] Consolidated Intervenors argue that the DSEIS "lacks an adequate description of either the affected environment or the impacts of the project on archaeological, historical, and traditional cultural resources" in contravention of requirements contained in NEPA, the National Historic Preservation Act (NHPA), and the provisions of 40 C.F.R. Part 51.[452] Specifically, Consolidated Intervenors allege that, because no subsurface testing was conducted, many cultural resources have not been located so as to be properly evaluated.[453] Therefore, they maintain that the DSEIS's classification of impacts as "small" is premature.[454] Furthermore, they contend that certain tribes were not consulted in connection with the proposed Dewey-Burdock Project ISL uranium mine, which violates the NHPA's requirement that all interested tribes be contacted with regard to projects such as the one at issue.[455]

In response, the NRC Staff argues that the contention is inadmissible because it was filed after the initial hearing petition deadline and does not meet the good cause standards of § 2.309(c). Specifically, the NRC Staff argues that Consolidated Intervenors "do not point to any new and materially different information in the DSEIS as support for their contentions."[456] The NRC Staff argues that the DSEIS's analysis is based on survey results that were submitted with

[451] Consolidated Intervenors' Proposed Contentions at 2.
[452] Id. at 2.
[453] Id. at 2–3.
[454] Id. at 3.
[455] Id. at 6–7.
[456] Staff's Answer at 12.

Powertech's application and, therefore, the information is not new.[457] However, the NRC Staff notes that, as explained in the DSEIS, the Staff is conducting a field survey of the site to gather additional information on historic properties.[458] Once this is complete and the DSEIS has been properly supplemented and circulated for comment, the NRC Staff suggests that Consolidated Intervenors may file a contention if they dispute the analysis contained therein.[459] Therefore, though not currently timely pursuant to the standards set out in 10 C.F.R. § 2.309(c), the NRC Staff concedes that a similar contention could meet the timeliness standards at a later date.

Additionally, with regard to the portion of the contention alleging that certain tribes have not been adequately consulted, the NRC Staff notes that, beginning in 2010, letters have been sent to tribes inviting them to be involved in the Dewey-Burdock Project consultation process.[460] These letters are public and, therefore, the Staff contends, could have been the basis of a contention at a previous time, but the time to file such a challenge has since expired.[461] Accordingly, the NRC Staff argues, there is no new or materially different information related to this portion of Consolidated Intervenors' contention that would make it timely under the regulations.

Powertech's response to Consolidated Intervenors' DSEIS Contention A echoes the response of the NRC Staff. First, Powertech asserts that the portion of DSEIS Contention A regarding the survey of cultural resources is not yet ripe for review because the NHPA Section 106 process is not yet complete and will be finally resolved either as part of the NEPA process in the FSEIS or as an independent Memorandum of Agreement.[462]

Additionally, Powertech argues that the portion of DSEIS Contention A alleging that certain tribes have not been consulted does not meet the late-filed contention requirements

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[457] Id. at 13.
[458] Id.
[459] Id.
[460] Id.
[461] Id.
[462] Powertech's Response at 8.

because the list of Tribes to be consulted has been available since August 2012.[463] Therefore, the contention should have been filed prior to January 2013 to be deemed "timely" in accordance 10 C.F.R. § 2.307.[464]

In reply, Consolidated Intervenors support the timeliness of this contention by asserting it was filed on the deadline for filing challenges to the DSEIS set forth in the Board's scheduling order.[465] Consolidated Intervenors reason that, because their new proposed contentions, including Contention A, were filed before the applicable deadline, the timeliness standards established in the regulations should not preclude their admission—"Because of the exception for the DSEIS contentions in the Scheduling Orders, the usual rules concerning 'late-filed contentions' do not apply to the DSEIS contentions filed on January 25, 2013."[466]

Furthermore, Consolidated Intervenors challenge the NRC Staff's and Powertech's ripeness arguments by arguing that, once the DSEIS was issued, Consolidated Intervenors consulted their expert who compared the DSEIS to available research and ultimately opined that three interested tribes had not been consulted.[467] In their reply, however, Consolidated Intervenors do not address their ripeness arguments made with regard to the ongoing Section 106 process relative to the additional Staff cultural resource surveys.

2. Board Ruling

Consolidated Intervenors' Proposed DSEIS Contention A bears a marked resemblance to portions of Consolidated Intervenors' original Contention K, which was admitted by the Board

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[463] Id. at 9.
[464] Id.
[465] Consolidated Intervenors' Reply at 1.
[466] Id. at 2. Consolidated Intervenors specifically point to the Staff's recognition of the Board's scheduling orders, wherein it explains: "[T]he Board has issued two scheduling orders addressing the timeliness of contentions. Under these orders the Intervenors must submit contentions within 30 days after relevant information becomes available. . . . The exception is the DSEIS, which the Intervenors were given until January 25, 2013, to challenge." Id. (citing Staff's Answer at 7). See Licensing Board Order (Second Prehearing Conference Call Summary and Supplemental Initial Scheduling Order), at 3 (Oct. 16, 2012) ("[T]he parties will have 45 days following the issuance of the DSEIS to file new or amended contentions.").
[467] Consolidated Intervenors' Reply at 4.

in LBP-10-16.[468] To the extent Consolidated Intervenors' proposed DSEIS Contention A challenges the sufficiency of the DSEIS as it pertains to the protection of cultural resources it falls within the migration tenet and is admissible The NRC Staff states that it is working to facilitate a field survey of the Dewey-Burdock site to obtain additional information on historic properties[469] and, when that survey is complete, it "will supplement its analysis in the DSEIS and circulate the new analysis for public comment.[470] However, to the extent proposed Contention A challenges the ongoing consultation obligations undertaken by the NRC Staff as part of the Section 106 process, the contention is not ripe because the Section 106 process is not yet complete. As such, this portion of the contention is premature and inadmissible.

As noted supra,[471] the Board will consolidate the portions of admitted contentions that meet the migration tenet. The protection of cultural and historical resources and adequacy of consultation with the Native American tribes are two issues have already been admitted in this proceeding. The concerns about the protection of historic and cultural resources and the adequacy of consultation with the Native American tribes have "migrated," as these previously admitted issues now appear in relation to the DSEIS. The Board finds that this contention is not time barred and is a migration of the concerns originally raised in response to the Powertech ER. For efficiency and to clarify this contention the Board will combine the multiple iterations of the Consolidated Intervenors' contention with the corresponding contention of the Oglala Sioux Tribe into a single contention for hearing, the terms of which are set forth in Appendix A to this decision. [472]

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[468] LBP-10-16, 72 NRC at 416–18.
[469] Notice of Availability of DSEIS, at 1–2 (Nov. 15, 2012) (ADAMS Accession No. ML12320A623).
[470] Staff's Answer at 13.
[471] See supra Part III.B.
[472] 10 C.F.R. §§ 2.316, 2.333, 2.319.

P. Consolidated Intervenors' Proposed DSEIS Contention B:

"The DSEIS Fails to Include Necessary Information for Adequate Determination of Baseline Ground Water Quality"

1. Positions of the Parties

In Consolidated Intervenors' proposed DSEIS Contention B, Consolidated Intervenors argue that "the DSEIS fails to include necessary information for adequate determination of baseline ground water quality."[473] Consolidated Intervenors argue that NRC regulations and NEPA require the DSEIS to demonstrate the Staff's consideration of alternatives, methods and sources used in its analysis, and supportive resources and evidence.[474] They assert that NRC regulations and NEPA "require a description of the affected environment containing sufficient data to aid the Commission in its conduct of an independent analysis" as well as "complete baseline data on a milling site and its environs."[475] They also point to certain NUREG provisions that require proper assessment of groundwater with regard to the proposed site using certain methodologies.[476] Moreover, Consolidated Intervenors state that "[t]he establishment of the baseline conditions of the affected environment is a fundamental requirement of the NEPA process."[477] Based on the supplemental declaration of Dr. Robert E. Moran as support, Consolidated Intervenors argue that the DSEIS lacks "scientifically defendable-analysis . . . regarding potential impacts to ground water associated with the proposed Project."[478]

In response to this contention, the NRC Staff argues that Consolidated Intervenors' proposed DSEIS Contention B fails to meet the timeliness requirements of 10 C.F.R. § 2.309(c) because it is not based on new or materially different information.[479] To support this, NRC Staff

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[473] Consolidated Intervenors' Proposed Contentions 7.
[474] Id. at 7.
[475] Id. at 8.
[476] Id. at 8–9.
[477] Id. at 9.
[478] Id. at 10; see id. at 10–19 (discussing portions of Dr. Moran's declaration that detail the omitted analysis relevant to baseline water quality).
[479] Staff's Answer at 16.

points out that the portions of Dr. Moran's declaration cited by Consolidated Intervenors "merely restate arguments from his original Declaration, with DSEIS references substituted for reference to Powertech's application."[480] The NRC Staff also argues that Powertech submitted additional baseline groundwater data in June of 2011, and that Consolidated Intervenors were obligated to file a challenge to this information within thirty days of the submission.[481] The NRC Staff argues that the information released in June 2011, which has been incorporated into the DSEIS, cannot now be challenged by Consolidated Intervenors because it is no longer "new."[482]

Finally, the NRC Staff argues that Consolidated Intervenors misread the DSEIS because they challenge portions of the DSEIS that relate to the "groundwater monitoring programs that Powertech will implement during ISR operations."[483] The programs the Consolidated Intervenors highlight as nonresponsive to regulations, the NRC Staff states, are not intended to establish baselines.[484] For these reasons, the NRC Staff urges the Board to find this contention inadmissible.

In Powertech's response to Consolidated Intervenors' proposed DSEIS Contention B, the Applicant argues that this contention fails to satisfy the timeliness standards of 10 C.F.R. § 2.309(c)(i)–(ii) that require the information upon which a new or amended contention is based to be new or materially different from previously available information.[485] Powertech argues each portion of DSEIS Contention B relates to information that was available before the issuance of the DSEIS.[486] Therefore, Powertech declares, Consolidated Intervenors should have filed their

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[480] Id. at 16–17.
[481] Id. at 16.
[482] Id. at 17.
[483] Id.
[484] Id.
[485] Powertech's Response at 9.
[486] Id. at 10.

grievances prior to the issuance of the DSEIS so that proposed DSEIS Contention B should be rejected for failure to timely file.[487]

In their reply, Consolidated Intervenors repeat arguments they made in defense of proposed DSEIS Contention A, namely that the NRC Staff's and Powertech's arguments regarding timeliness should fail because the contention was submitted before the Board's deadline to file new or amended contentions related to the DSEIS.[488] Additionally, Consolidated Intervenors maintain in their reply that their proposed contentions, including DSEIS Contention B, meet each of the contention admissibility standards of 10 C.F.R. 2.309(f)(1).[489]

2. Board Ruling

Those portions of proposed DSEIS Contention B that challenge the technical adequacy of baseline water quality data and adequate confinement of the host aquifer are admissible. Proposed DSEIS Contention B is in para materia to previously admitted contention D in LBP-10-16. The Consolidated Intervenors' declarant, Dr. Moran, states at page 20 of his Declaration, that "the 2009 Powertech Application, carried forward in the DSEIS, includes what it incorrectly calls baseline."[490] To the extent the Consolidated Intervenors challenge the adequacy of the baseline water quality data and raise questions about the confinement of the host aquifer, these issues were admitted in LBP-10-16 and migrate. However, to the extent the Consolidated Intervenors seek to expand the scope of the previously admitted contention, such expansion is denied. Further, the Board will merge this contention with previously admitted Consolidated Intervenors' Contention D and the Oglala Sioux Tribe's original Contention 2 and DSEIS Contention 2, as discussed above.[491]

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[487] Id.
[488] Consolidated Intervenors' Reply at 2.
[489] Id. at 3.
[490] Oglala Sioux Tribe's Proposed Contentions, Exh. 2, Supplemental Declaration or Dr. Robert E. Moran (Jan. 24, 2013), at 20.
[491] See supra Part IV.B.

Q. Consolidated Intervenors' Proposed DSEIS Contention C:

"The DSEIS Fails to Include an Adequate Hydrogeological Analysis to Assess Adequate Confinement and Potential Impacts to Groundwater "

1. Positions of the Parties

Consolidated Intervenors' proposed DSEIS Contention C alleges that "the DSEIS fails to include an adequate hydrogeological analysis to assess adequate confinement and potential impacts to groundwater."[492] To support this contention, Consolidated Intervenors claim that NRC regulations and NEPA "require each Draft EIS to include a description of the affected environment and the impact of the proposed project on the environment, with sufficient data to enable the agency and the public to assess and review the potential impacts associated with the proposed mine."[493] Consolidated Intervenors then point to NUREG provisions that discuss the manner in which an applicant should collect and present hydrogeological data.[494] And in that regard, Consolidated Intervenors assert that the "DSEIS fails to present sufficient information in a scientifically defensible manner to adequately characterize the site and off-site hydrogeology to enable a meaningful review of the potential impacts of the proposed mine" in contravention of NEPA, NRC regulations, and NUREG provisions.[495]

Consolidated Intervenors also declare that the NRC Staff improperly relies on the Applicant's commitment to perform future actions to support its conclusions in the DSEIS.[496] According to Consolidated Intervenors this reliance, and the related lack of data, "undermines the public's (and the agencies') ability to understand and evaluate the potential impacts of the

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[492] Consolidated Intervenors' Proposed Contentions at 19.
[493] Id. at 19 (discussing 10 C.F.R. §§ 51.10, 51.70, 51.71, and NEPA).
[494] Id. at 20 (discussing NUREG-1569).
[495] Id. Consolidated Intervenors argue that "[t]hese deficiencies include unsubstantiated assumptions as to the isolation of the aquifers in the ore-bearing zones and failure to account for natural and man-made hydraulic conductivity through natural breccias pipe formations and the historic drilling of literally thousands of drill holes in the aquifers and ore-bearing zones in question, which were not properly abandoned." Id.
[496] Id. at 21–22.

operation."[497] By way of example, Consolidated Intervenors argue that, rather than requiring that data be collected to determine the impacts of mining in an area where the Fall River aquifer is not hydrogeologically confined, the Staff relies on the Applicant's commitment, contained in a license condition, to conduct investigations into this matter.[498] To support this and the other details of this contention, Consolidated Intervenors cite to specific portions of Dr. Moran's declaration that identify and describe the areas in the DSEIS that lack data and analysis required by regulation and statute.[499] For the above reasons, Consolidated Intervenors submit that this contention is a contention of omission and should be admitted.

In response, the NRC Staff and Powertech assert that proposed DSEIS Contention C is inadmissible because it is not based on new or materially different information as required by 10 C.F.R. § 2.309(c).[500] Specifically, the NRC Staff claims that the portions of Dr. Moran's declaration cited by Consolidated Intervenors either reiterate arguments previously made in relation to the application or reference information from Powertech's supplements to its application.[501] Therefore, the NRC Staff maintains, Consolidated Intervenors have not demonstrated the new information on which to base their Contention C.[502]

Additionally, the NRC Staff argues that Contention C "rest[s] on an incomplete reading of the DSEIS."[503] For example, the Staff contends that Dr. Moran's allegation that the "DSEIS fails to provide detailed information on the hydrogeologic performance of the bounding geologic units in the Dewey-Burdock area" cites only two pages in the DSEIS and overlooks "broad sections of the DSEIS that provide the very data he claims are missing."[504]

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[497] Id. at 22.
[498] Id.
[499] Id. at 22–26.
[500] NRC Staff's Answer at 18; Applicant's Response at 12.
[501] NRC Staff's Answer at 18.
[502] Id. at 18.
[503] Id. at 19.
[504] Id.

In response to Consolidated Intervenors' argument that the DSEIS improperly relies on Powertech's commitment to future action, the NRC Staff states that relying on a license condition in the DSEIS "is consistent with Commission precedent and NRC regulations."[505] Further, the NRC Staff argues that some of the regulations Consolidated Intervenors cite to support their claim of omitted information—specifically 10 C.F.R. Part 40, Appendix A, Criteria 4(e) and 5G(2)—refer to safety criteria that apply to applicants and licensees and are not relevant to the NEPA review.[506] Moreover, the Staff declares, the specific regulations cited concern conventional milling, not in situ recovery activities.[507] Accordingly, the NRC Staff asserts that DSEIS Contention C should be found inadmissible.

In reply, Consolidated Intervenors take the same stance as with their other contentions, reiterating that the proposed DSEIS Contention C is timely filed because it met the relevant deadline contained in the Board's scheduling order and that it is admissible because it meets the standards set forth in 10 C.F.R. § 2.309(f)(1).[508]

2. Board Ruling

Consolidated Intervenors' proposed DSEIS Contention C bears a marked resemblance to portions of Consolidated Intervenors' Contention E (merged with Contention J), which was admitted in LBP-10-16.[509] To the extent Consolidated Intervenors' proposed DSEIS Contention C challenges the failure of the DSEIS to include an adequate hydrological analysis to assess adequate confinement and potential impacts to groundwater, it falls within the migration tenet and is admissible.[510]

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[505] Id. at 20 (citing Hydro Resources, Inc. (2929 Coors Road, Suite 101, Albuquerque, NM 87120), CLI-99-22, 50 NRC 3, 17 (1999)).
[506] Id. at 20.
[507] Id.
[508] Consolidated Intervenors' Reply at 1–3.
[509] LBP-10-16, 72 NRC at 407.
[510] LBP-10-16 also modified Consolidated Intervenors' contention D so that it addressed, in part, aquifer confinement. Id. at 403–04.

R. Consolidated Intervenors' Proposed DSEIS Contention D:

"The DSEIS Fails to Adequately Analyze Ground Water Quantity Impacts"

1. Positions of the Parties

Consolidated Intervenors' fourth and final proposed contention, Contention D, asserts that "the DSEIS fails to adequately analyze ground water quantity impacts" in contravention of NRC regulations and NEPA.[511] Additionally, Consolidated Intervenors contend that "the DSEIS presents conflicting information on ground water consumption such that the water consumption impacts of the project cannot be accurately evaluated."[512]

To support these assertions, Consolidated Intervenors quote the declaration of Dr. Moran at considerable length.[513] Among other things, they highlight his opinions that (1) although the site, located in a semi-arid area, will use considerable amounts of water, the DSEIS provides no reliable estimates for the volumes and sources of water to be used; (2) no data are provided for the volume of ground water to be used in phases other than the construction phase; and (3) when calculated using current data, the volume of groundwater used over the course of the project will be very large, and the Applicant has not investigated the impact this may have on area groundwater levels.[514] Relying on these opinions, Consolidated Intervenors argue that the DSEIS does not meet NEPA and the relevant regulations that "require the agency to provide sufficient data for a scientifically-defensible review of the environmental impacts of the operation and for the Commission to conduct an independent analysis."[515]

In response to this contention, the NRC Staff states Consolidated Intervenors have failed to demonstrate how the information in the DSEIS with which they take issue is materially

[511] Consolidated Intervenors' Proposed Contentions at 26. Specifically, Consolidated Intervenors contend that this violates 10 C.F.R. §§ 51.10, 51.70, 51.71.
[512] Id. at 26.
[513] Id. at 27–29.
[514] Id.
[515] Id. at 27.

different from previously available information.[516] The data in the DSEIS, the NRC Staff explains, was previously submitted in the ER and in the supplements to Powertech's application, and the time within which to challenge the information contained in either the ER or the supplements has lapsed.[517]

In addition, the NRC Staff contends that Consolidated Intervenors' contention relies on an incomplete or inaccurate reading of the DSEIS.[518] For example, the NRC Staff asserts that the pages Dr. Moran cites do not support his claim and that he overlooks certain portions of the DSEIS that provide the information he claims has been omitted.[519]

Powertech also argues that Consolidated Intervenors' Contention D is not based on new or materially different information in contravention of 10 C.F.R. § 2.309(c).[520] Specifically Powertech argues, as it did with Consolidated Intervenors' Contentions A through C, that the allegations brought forth in this contention are based on information that was incorporated into the first draft license and the RAI responses, or could be found elsewhere in the public record.[521] Therefore, Powertech states Contention D should be found inadmissible.

In their reply in support of Contention D, Consolidated Intervenors argue, as they did with Contentions A through C, that the contention is timely because it meets the deadline set forth in the Board's scheduling orders.[522] Additionally, Consolidated Intervenors assert that Contention D, like Contentions A though C, meets the contention admissibility standards of 10 C.F.R. § 2.309(f)(1).[523]

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[516] Staff's Answer at 21.
[517] Id.
[518] Id.
[519] Id. at 21–22 (citing DSEIS at 4-57 to 4-60; 4-64 to 4-65; 4-70 to 4-71).
[520] Powertech's Response at 12.
[521] Id. at 13.
[522] Consolidated Intervenors' Reply at 1–3.
[523] Id. at 3.

2. Board Ruling

Consolidated Intervenors' proposed DSEIS Contention D is similar to Consolidated Intervenors' original Contention F.[524] Consolidated Intervenors' Contention F was rejected by the Board in LBP-10-16 because it lacked support.[525] In response to the publication of the DSEIS, however, the Consolidated Intervenors again put forth a contention that challenges the sufficiency of analysis of groundwater quantity impacts. The Board must, once again, reject this contention because the Consolidated Intervenors fail to explain how the information in the DSEIS is materially different from the information contained in Powertech's Environmental Report. Therefore, this contention is impermissibly late. Consolidated Intervenors' DSEIS Contention D cannot be admitted because it does not meet the requirements of § 2.309(c)(1). Further, as was the case with Consolidated Intervenors' original Contention F, this contention lacks adequate support to establish a genuine dispute exists on a material legal or factual issue so that its admission is precluded under § 2.309(f)(1)(vi) of the Commission's regulations.

The Board nonetheless notes that the Oglala Sioux Tribe raised a similar contention concerning the issue of groundwater quantity impacts in their original Contention 4 and the Board admitted it.[526] The Board has now admitted, via the migration tenet, the Oglala Sioux Tribe's Contention 4 filed in response to the publication of the DSEIS that raises essentially the same issue.[527] Therefore, the matter of adequate analysis of water quantity impacts under NEPA will be considered in the evidentiary hearing.

V. Conclusion

By this order the Board combines and consolidates the contentions filed by the Oglala Sioux Tribe and the Consolidated Intervenors, which were admitted in response to the 2010

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[524] See LBP-10-16, 72 NRC at 407.
[525] Id. at 407–08.
[526] See id. at 426–28.
[527] See supra Part IV.D.

notice of opportunity for hearing (original contentions) and addressed in LBP-10-16, with the admitted contentions filed in 2013 in response to the publication of the DSEIS (DSEIS contentions). The following Table summarizes our contention admissibility holdings to date:

Table of Admitted Contentions

Dewey-Burdock In-Situ Recovery Facility

Topic[528]	Oglala Sioux original-2010	Oglala Sioux DSEIS-2013	Consolidated Intervenors original- 2010	Consolidated Intervenors DSEIS-2013	Combined
Historical & Cultural resources	1	1	K	A	1-A
Failure to consult	1	1	-	-	1-B
Ground water quality	2	2	D	B	2
Hydrogeological information	3	3	E and J	C	3
Ground water quantity impacts	4	4	F*	D*	4
Mitigation measures	-	6	-	-	6
Connected actions	-	9	-	-	9
Consultation on Endangered Species Act	-	14	-	-	14A
Sufficiency of impact analyses	-	14	-	-	14B

*These contentions were rejected by the Board, but are included here for completeness.

VI. Board Order

A. As this case proceeds toward evidentiary hearing, the Board, exercising its obligation to conduct a fair and impartial hearing and to manage the hearing to restrict

[528] The statement of the admitted contention going forward is contained in the Board's Order, infra Part VI, and in Appendix A.

duplicative or cumulative evidence and/or arguments,[529] has combined and reworded the previously admitted contentions with the migrated contentions as follows:

Contention 1A: Failure to Meet Applicable Legal Requirements Regarding Protection of Historical and Cultural Resources.[530]

Contention 1B: Failure to Involve or Consult All Interested Tribes as Required by Federal Law.[531]

Contention 2: The DSEIS Fails to Include Necessary Information for Adequate Determination of Baseline Ground Water Quality.[532]

Contention 3: The DSEIS Fails to Include Adequate Hydrogeological Information to Demonstrate Ability to Contain Fluid Migration and Assess Potential Impacts to Groundwater.[533]

Contention 4: The DSEIS Fails to Adequately Analyze Ground Water Quantity Impacts.[534]

B. The Board further admits the following contentions submitted in response to the publication of the DSEIS:

Contention 6: The DSEIS Fails to Adequately Describe or Analyze Proposed Mitigation Measures.

Contention 9: The DSEIS Fails to Consider Connected Actions.

C. The Board admits the following portion of the Oglala Sioux Tribe's proposed Contention 14 in this proceeding:

Contention 14A: Whether an appropriate consultation was conducted pursuant to the Endangered Species Act and implementing regulations.

Contention 14B: Whether the DSEIS's impact analyses relevant to the greater sage grouse, the whooping crane, and the black-footed ferret are sufficient.

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[529] 10 CFR § 2.319(e).
[530] Contention 1A merges previously admitted Oglala Sioux Tribe Contention 1 (OST-1) and Consolidated Intervenors Contention K (CI-K) with migrated Oglala Sioux Tribe Contention 1 regarding the DSEIS (OST DSEIS-1) and Consolidated Intervenors Contention A regarding the DSEIS (CI DSEIS-A).
[531] Contention 1B merges previously admitted OST -1 with migrated OST DSEIS-1.
[532] Contention 2 merges previously admitted OST-2 and CI-D with migrated OST DSEIS-2 and CI DSEIS-B.
[533] Contention 3 merges previously admitted OST-3 and CI-E (as merged with CI-J), with migrated CI DSEIS-C and OST DSEIS-3.
[534] Contention 4 merges previously admitted OST-4 with migrated OST DSEIS-4.

D. The Board finds inadmissible the following contentions proposed by the Oglala Sioux Tribe in response to the publication of the DSEIS: Contentions 5, 7, 8, 10, 11, 12, 13.

E. The Board finds inadmissible the following contention proposed by the Consolidated Intervenors in response to the publication of the DSEIS: Contention D.

F. The Board will hold a telephone conference with the parties to discuss administrative matters, including the designation under 10 C.F.R. § 2.316 of the lead intervenor that will be responsible for the litigation of each of the consolidated contentions, i.e., Contentions 1A, 1B, 2, and 3, and a schedule for further proceedings in this matter, including a site visit and a Limited Appearance session pursuant to 10 C.F.R. § 2.315(a).

G. No specific section of the Commission's regulations, including 10 C.F.R. § 2.311, permits appeals from an order ruling on the admission of new or amended contentions. Nonetheless, interlocutory review of decisions and actions of a presiding officer may be available pursuant to § 2.341(f)(2) of the Commission's regulations.[535]

It is so ORDERED.

THE ATOMIC SAFETY
AND LICENSING BOARD

/RA/

William J. Froehlich, Chair
ADMINISTRATIVE JUDGE

/RA/

Richard F. Cole
ADMINISTRATIVE JUDGE

/RA/

Mark O. Barnett
ADMINISTRATIVE JUDGE

Rockville, Maryland
July 22, 2013

[535] The Board notes, however, that the Commission has issued an advanced notice of proposed rulemaking on April 5, 2013, entitled "Potential Changes to Interlocutory Appeals Process for Adjudicatory Decisions." See 78 Fed. Reg. 20,498 (2013).

Appendix A

Contention 1A: Failure to Meet Applicable Legal Requirements Regarding Protection of Historical and Cultural Resources.

Contention 1B: Failure to Involve or Consult All Interested Tribes as Required by Federal Law.

Contention 2: The DSEIS Fails to Include Necessary Information for Adequate Determination of Baseline Ground Water Quality.

Contention 3: The DSEIS Fails to Include Adequate Hydrogeological Information to Demonstrate Ability to Contain Fluid Migration and Assess Potential Impacts to Groundwater.

Contention 4: The DSEIS Fails to Adequately Analyze Ground Water Quantity Impacts.

Contention 6: The DSEIS Fails to Adequately Describe or Analyze Proposed Mitigation Measures.

Contention 9: The DSEIS Fails to Consider Connected Actions.

Contention 14A: Whether an appropriate consultation was conducted pursuant to the Endangered Species Act and implementing regulations.

Contention 14B: Whether the DSEIS's impact analyses relevant to the greater sage grouse, the whooping crane, and the black-footed ferret are sufficient.

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	)	
Source Materials License Application)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **MEMORANDUM AND ORDER (Ruling on Proposed Contentions Related to the Draft Supplemental Environmental Impact Statement)** have been served upon the following persons by Electronic Information Exchange.

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[Original signed by Brian Newell]
Office of the Secretary of the Commission

Dated at Rockville, Maryland,
this 22nd day of July 2013.