UNITED STATES OF AMERICA NUCLEAR
REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of	)	
	)	
POWERTECH (USA) INC.	)	Docket No. 40-9091-MLA
	)	ASLBP No. 10-898-02-MLA-BD01
(Dewey-Burdock In Situ Uranium Recovery Family)	)	
	)	

NRC STAFF'S PETITION FOR REVIEW OF LBP-15-16

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May 26, 2015

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May 26, 2015

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of	)	
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POWERTECH (USA) INC.	)	Docket No. 40-9075-MLA
	)	ASLBP No. 10-898-02-MLA-BD01
(Dewey-Burdock In Situ Uranium Recovery Facility)	)	
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NRC STAFF'S PETITION FOR REVIEW OF LBP-15-16

I. Introduction

The NRC Staff petitions for Commission review of the Atomic Safety and Licensing Board's Partial Initial Decision.[1] In particular, the Staff asks the Commission to review the Board's findings on Contentions 1A and 1B. In Contention 1A, the Board found that when considering how the Dewey-Burdock Project may affect cultural resources, the Staff failed to meet the "hard look" standard of the National Environmental Policy Act, 42 U.S.C. §§ 4321–4347 (NEPA). In Contention 1B, the Board found that the Staff failed to satisfy the consultation requirements of the National Historic Preservation Act, 16 U.S.C. §§ 470–470x6 (NHPA). The Commission should reverse the Board's findings because they depart from established law and conflict with the Board's separate finding under Contention 1A that the Staff complied with the NHPA's identification requirements. In addition, the Commission should vacate the Board's decision to retain jurisdiction over Contentions 1A and 1B so that the Staff can take further action to address its concerns, because this action improperly results in the Board supervising the Staff's licensing activities.

[1] *Powertech (USA) Inc.* (Dewey-Burdock In Situ Uranium Recovery Facility), LBP-15-16, 81 NRC __ (Apr. 30, 2015) (slip op.).

II. Background

In its Partial Initial Decision, the Board ruled on seven admitted contentions: Contentions 1A, 1B, 2, 3, 4, 6, and 9. The Staff focuses here on background information relevant to Contentions 1A and 1B, which are the subject of this petition. For additional background information relevant to Contentions 1A and 1B, the Staff respectfully refers the Commission to answers A1.1 through A.1.19 of the Staff's initial written testimony (Ex. NRC-001), where the Staff addresses these contentions; Sections 3.9.3 and 4.9 of the Final Supplemental Environmental Impact Statement (FSEIS) for the Dewey-Burdock Project (Exs. NRC-008-A-1 and NRC-008-A-2), which summarize the Staff's evaluation of historic and cultural resources; and Exhibits NRC-008-A-1 (at 76–84) and NRC-015, which summarize the Staff's consultations with American Indian tribes.

A. Receipt of Application through the DSEIS

In October 2009, the Staff accepted Powertech's uranium recovery application for detailed review. The next month, the Staff requested a meeting with the leadership of the Oglala Sioux Tribe, the tribe in closest proximity to the Dewey-Burdock site, to discuss Powertech's application.[2] Due to a recent change in tribal leadership, however, the Tribe was unable to meet with the Staff at that time.[3]

In January 2010, the Staff notified the public that it intended to prepare a supplemental environmental impact statement (SEIS) in connection with Powertech's application.[4] In March 2010, the Staff sent letters to the leaders of 17 American Indian tribes with historical ties to the

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[2] Hearing Transcript at 771, lines 1–7; Ex. NRC-015 at 1 (citing ADAMS Accession No. ML102380609).

[3] *Id.*

[4] *Notice of Intent to Prepare a Supplemental Environmental Impact Statement, Powertech (USA) Inc. Dewey-Burdock In Situ Uranium Recovery Facility Project New Source Material License Application,* 75 Fed. Reg. 3,261 (Jan. 20, 2010). The environmental impact statement for the Dewey-Burdock Project is an SEIS because it supplements the Final Generic Environmental Impact Statement for In-Situ Leach Uranium Milling Facilities (NUREG-1910) (Exs. NRC-010-A-1 through NRC-010-B-2).

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Black Hills area of South Dakota, where the Dewey-Burdock site is located.[5] The Staff invited the tribes to consult with the NRC on a government-to-government basis concerning how the Dewey-Burdock Project may affect properties that are historically or culturally significant to the tribes. The Staff also informed the tribes that it would be using a "substitution" process to obtain information on historic and cultural resources. Under this process, which is specifically permitted by regulations of the Advisory Council on Historic Preservation (ACHP), the agency charged with administering the NHPA, an agency may use its NEPA documents to obtain public comments on issues relevant to the NHPA.[6]

In addition to inviting the tribes to consult on a government-to-government basis, the Staff asked that the tribes provide information on historic and cultural resources that may be affected by the Dewey-Burdock Project. The Staff initially made this request through its March 2010 letter to tribal leaders.[7] The Staff thereafter renewed its request for information on historic and cultural resources, through both additional letters and oral requests.[8]

The Staff began its review of cultural resources by focusing on a Level III archeological survey of the Dewey-Burdock site that Powertech submitted with its license application.[9] A Level III survey is "a professionally prepared study that includes a compilation and analysis of all reasonably available cultural resource data and literature, and a management-focused, interpretative, narrative overview, and synthesis of the data."[10] Powertech's Level III survey was

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[5] Ex. NRC-021. The Staff later invited 6 additional tribes to consult on the Dewey-Burdock Project, bringing the total number of consulting tribes to 23. Exs. NRC-009-A-1 at 240, NRC-015 at 3–4, NRC-018-B at 15, NRC-034, NRC-035, NRC-036.

[6] 36 C.F.R. § 800.8, "Coordination with the National Environmental Policy Act."

[7] Ex. NRC-021.

[8] *See, e.g.,* Exs. NRC-001 at A1.14 (summarizing communications with tribes), NRC-015 at 2–5 (listing letters sent to tribal officials).

[9] Exs. APP-009, NRC-072, NRC-073.

[10] *Southern Utah Wilderness Alliance v. Burke*, 981 F. Supp. 2d 1099, 1108 (D. Utah 2013) (citing BLM Manual 8110 (Release 8-73, Dec. 3, 2004) at § 8110.2.21.A).

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prepared by the Archeology Laboratory at Augustana College. Augustana College conducted field investigations at the Dewey-Burdock site in 2007 and 2008, performing evaluative testing at 43 archeological sites. In 2011, Augustana College performed evaluative testing at 20 additional sites.[11]

The Staff took into account Augustana College's Level III survey, including its evaluative testing of additional sites, in both its NEPA and NHPA analyses. In addition, the Staff reviewed an ethnohistoric study of academic information on American Indian cultural sites prepared by Powertech's consultant, SRI Foundation.[12] In its ethnohistoric study, SRI identified landscape features associated with the traditional cultural practices and spiritual beliefs of the Sioux tribes and other tribes with a historical presence in southwestern South Dakota. SRI also identified types of resources that are sacred to these tribes.

While the Staff was reviewing Powertech's Level III survey, evaluative testing, and ethnohistoric study, it continued to consult with interested tribes to obtain information on properties that are historically or culturally significant to the tribes. The Staff communicated with tribal representatives through letters, phone calls, and emails, keeping them informed of the progress of the Staff's NEPA and NHPA reviews.[13] The Staff also held two face-to-face meetings in South Dakota—a June 2011 meeting on the Oglala Sioux Tribe's Pine Ridge Reservation and a February 2012 meeting in Rapid City—to obtain information on historic and cultural resources.

During these meetings certain tribal representatives stated that, because they lacked access to the privately owned Dewey-Burdock site, they were unable to provide specific information on historic or cultural properties at the site. Responding to this concern, in August 2011 the Staff began working with tribal representatives and Powertech on an approach

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[11] Exs. NRC-136-A through NRC-136-C.

[12] Ex. NRC-008-A-1 at 257–59; Ex. NRC-144.

[13] *See* Ex. NRC-015 at 2–17.

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whereby tribes could conduct field surveys of the Dewey-Burdock site for historic and cultural properties.[14] Tribal representatives and Powertech initially considered an approach involving a statement of work, under which Powertech would hire tribal representatives to conduct surveys of the Dewey-Burdock site. The Staff facilitated this approach, circulating draft statements of work and communicating with tribal representatives and Powertech frequently on related issues.[15] The Staff also held another face-to-face meeting with consulting tribes, in September 2012, to further discuss preparing a statement of work for field surveys of the Dewey-Burdock site.[16]

By late 2012 the Staff had finalized the draft SEIS (DSEIS) for the Dewey-Burdock Project. At that time, however, tribal representatives and Powertech still had not agreed on a statement of work for field surveys of the Dewey-Burdock site. Because weather in the Dewey-Burdock area was expected to preclude field surveys until the spring of 2013, in November 2012 the Staff issued the DSEIS for public comment.[17] The Staff ensured tribal representatives, however, that it would continue working to secure field surveys of the Dewey-Burdock site. In addition, the Staff committed to providing an additional time period in which tribes and the general public could comment on the results of tribal field surveys.[18]

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[14] Ex. NRC-008-B-2 at 187–93, 196–98; Ex. NRC-015 at 4; Ex. NRC-041.

[15] Exs. NRC-040, NRC-041, NRC-044, NRC-049, NRC-055.

[16] Exs. NRC-052, NRC-055. The Staff held this meeting in Bismarck, North Dakota. Representatives from the Oglala Sioux Tribe and six other tribes attended the meeting.

[17] The DSEIS addressed impacts to all resource areas, including cultural resources. Ex. NRC-009-A-2 at 418–430. The only information on cultural resources that the Staff could not include in the DSEIS was the results of tribal field surveys.

[18] Ex. NRC-151 at A1.9; NRC Staff Notification of DSEIS Availability (Nov. 15, 2012) (ADAMS Accession No. ML12320A623).

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B. DSEIS through the FSEIS

When the Staff issued the DSEIS in November 2012, tribal representatives, Powertech, and the Staff had been discussing a statement-of-work approach to field surveys for over eight months.[19] The tribes and Powertech were unable to agree on a statement of work, however, due in part to disagreements over the scope of the surveys, the methodologies to be used, the timing of reports associated with the surveys, and compensation.[20] Because these disputes appeared intractable, the Staff proposed a different survey approach, under which each interested tribe could survey the Dewey-Burdock site using the methodologies best suited to identifying its own historic or cultural resources.[21] This individual survey approach has been used by other federal agencies to obtain information on tribal resources.[22] To address tribal concerns about the scope of the survey area, the Staff worked with Powertech to ensure that tribal representatives would have access to the entire Dewey-Burdock site. Powertech, moreover, agreed to provide both per diem funding and an honorarium to compensate tribes for their survey efforts.[23]

In April 2013, seven tribes began field surveys at the Dewey-Burdock site: the Crow Creek Sioux Tribe, the Santee Sioux Tribe, the Northern Arapaho Tribe, the Northern Cheyenne Tribe, the Turtle Mountain Band of Chippewa Indians, the Crow Nation, and the

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[19] On March 9, 2012, the Staff had circulated Powertech's draft statement of work to the tribes, seeking their comments. Ex. NRC-015 at 5 (citing ADAMS Accession No. ML120730509).

[20] For example, a survey approach endorsed by certain tribes, including the Oglala Sioux Tribe, would have cost approximately $1 million to survey only 2,637 acres of the 10,580-acre Dewey-Burdock site. Hearing Transcript at 804, lines 11–12; 807, lines 9–10, 14–16; Ex. NRC-018-B at 19.

[21] Ex. NRC-008-B-2 at 284–286. Several tribes had informed the Staff that only their own representatives were qualified to identify sites of significance to the tribes. *See, e.g.,* Ex. NRC-064 (Letter from John Yellow Bird Steele, President of the Oglala Sioux Tribe) at 2 ("It is self-evident that each tribe will have expertise in recognizing its own sacred sites. *The Oglala Sioux Tribe strongly objects to the use of persons without any expertise in Sioux TCP to identify Sioux TCP.*") (emphasis in original). The Staff received similar input from other tribes. *E.g.,* Ex. NRC-065 at 1, ¶ 1; Ex. NRC-066 at 2, ¶ 2.

[22] Ex. NRC-071; Hearing Transcript at 805, lines 12–22.

[23] Exs. NRC-015 at 13 (citing ADAMS Accession No. ML13039A366); NRC-052.

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Cheyenne and Arapaho Tribes of Oklahoma.[24] The Oglala Sioux Tribe chose *not* to conduct a field survey.[25] The participating tribes conducted the field surveys using conventional transect survey methods, and tribal representatives recorded discoveries with global-positioning-system equipment capable of identifying sites with sub-meter accuracy.[26] The participating tribes completed their surveys in May 2013.

At approximately this same time, in April 2013, the Staff invited the ACHP to become a consulting party on its NHPA review process for the Dewey-Burdock Project. The Staff provided the ACHP a summary of its review activities to date, and it sought guidance from the ACHP on certain aspects of the NHPA process.[27] On October 28, 2013, the ACHP advised the NRC that it would serve as a consulting party for the Dewey-Burdock Project.[28]

In May 2013, the Staff also held another government-to-government meeting to discuss issues related to the Dewey-Burdock application and other uranium recovery applications pending before the NRC.[29] The Staff held the meeting in Rapid City, South Dakota, with the expectation that leaders of the Oglala Sioux Tribe and other Sioux tribes would attend the meeting. Representatives from five tribes, including three Sioux tribes, participated in the meeting either in person or by teleconference.[30] The Oglala Sioux Tribe, however, did not participate in the meeting.[31]

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[24] Exs. NRC-018-B at 11, NRC-008-A-1 at 259, NRC-008-B-2 at 635–36.

[25] More specifically, the Oglala Sioux Tribe initially accepted the invitation to survey the Dewey-Burdock site, but it later withdrew its acceptance. Exs. NRC-146 through NRC-148.

[26] Exs. NRC-001 at A1.3, NRC-008-B-2 at 636–38, NRC-18-B at 11, NRC-019 at 1–4; NRC-151 at A1.8.

[27] Exs. NRC-015 at 13 (citing ADAMS Accession No. ML13037A411), NRC-018-B at 21.

[28] Ex. NRC-015 at 14 (citing ADAMS Accession No. ML13304A940).

[29] Ex. NRC-143.

[30] Ex. NRC-018-B at 22.

[31] The Oglala Sioux Tribe initially stated that it would participate in the meeting, but it failed to send a representative to the meeting. ADAMS Accession No. ML13106A197 (March 29, 2013), Ex. NRC-018-B at 22.

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Between June and September 2013, the Staff received results from three tribes that participated in the April–May 2013 field surveys.[32] The Staff considered the tribal survey results in both its NHPA and NEPA reviews. For its NHPA review, the Staff used the survey results to evaluate sites for eligibility on the National Register of Historic Places.[33] After completing its National Register eligibility determinations, the Staff evaluated how the Dewey-Burdock Project might affect the eligible sites, both in terms of direct and indirect effects.[34] For its NEPA review, the Staff evaluated how the Dewey-Burdock project might affect *all* sites within the area of potential effects, not merely those sites that were eligible for listing on the National Register. The Staff presented its impact determinations in Tables 4.9-1 through 4.9-6 of the FSEIS, along with its recommended measures to mitigate these impacts.[35] In particular, in Tables 4.9-4 through 4.9-6 the Staff provided its determinations regarding both environmental impacts and National Register eligibility.[36] In these tables the Staff also included a column titled "Management Recommendation/Comments," which lists its mitigation recommendations under both the NHPA and NEPA. After the Staff completed its evaluations, it provided its impact assessments and mitigation recommendations to all consulting tribes for comment, as it had committed to doing when it released the DSEIS.[37]

Beginning in August 2013, the Staff also worked with the tribes and the other consulting parties to prepare a Programmatic Agreement for the Dewey-Burdock site. A Programmatic

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[32] One additional tribe submitted field notes to the Staff, but the notes did not contain NHPA-eligibility recommendations. The three other participating tribes did not submit survey results. Ex. NRC-001 at A1.7.

[33] The Staff accepted all of the recommendations made under Criterion A of the National Register eligibility standards that were provided by the tribes submitting survey results. Ex. NRC-19 at 10–29.

[34] Under the NHPA, "direct effects" include ground disturbances that affect eligible sites, while "indirect effects" include visual and auditory disturbances. Ex. NRC-048 at 41.

[35] Ex. NRC-008-A-2 at 466–86.

[36] *Id.* at 474–86.

[37] Exs. NRC-058 and NRC-061 through NRC-063.

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Agreement is a document that an agency may use to describe the steps it will take to protect sites that are eligible, or potentially eligible, for listing on the National Register. The ACHP's regulations allow an agency to use a Programmatic Agreement where the agency or applicant has proposed a phased approach to developing a project, such as Powertech has proposed here.[38] The purpose of the Programmatic Agreement is to protect not only those historic and cultural properties that may be affected during the initial phase of a project, but to describe an approach that will protect properties potentially affected by future phases of the project.

The Staff prepared the Dewey-Burdock Programmatic Agreement in consultation with the tribes, Powertech, the ACHP, the South Dakota State Historic Preservation Office (SHPO), and the U.S. Bureau of Land Management (BLM).[39] The Staff used the information provided by the consulting tribes, including the field survey results, to develop the Programmatic Agreement. The Staff also sent the consulting parties multiple draft versions of the Programmatic Agreement to obtain their input at all stages of the Agreement's development.[40]

By late 2013, the Staff had largely finalized the FSEIS for the Dewey-Burdock Project. The Staff continued to work with the consulting parties on a Programmatic Agreement, but a final version of the Agreement did not appear imminent. To ensure the parties had sufficient time to resolve all issues related to the Programmatic Agreement, and to not delay issuance of the FSEIS, in November 2013 the Staff separated its NEPA and NHPA processes.[41] In January 2014, the Staff issued the FSEIS for the Dewey-Burdock Project.[42]

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[38] 36 C.F.R. § 800.4(b)(2).

[39] Ex. NRC-015 at 13–17.

[40] *Id.* at 14–17 and Exs. NRC-056 through NRC-059.

[41] Exs. NRC-069, NRC-070. The Staff notified the consulting parties in advance that it would be separating its NEPA and NHPA processes, thus complying with ACHP and Council on Environmental Quality (CEQ) guidance in this area. *See* Ex. NRC-048 at 32 ("Terminating the Substitution Process").

[42] Exs. NRC-008-A-1 through NRC-008-B-2.

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C. FSEIS through the Record of Decision

After the Staff issued the FSEIS, it continued to work with the consulting parties on the Programmatic Agreement for the Dewey-Burdock Project. The Staff continued to hold teleconferences with the parties, seek input by email, and accept comments on multiple draft versions of the Agreement.[43] For example, the Staff revised several sections of the Programmatic Agreement in response to comments from the Oglala Sioux Tribe and the Standing Rock Sioux Tribe.[44]

On April 7, 2014, the Staff finalized the Programmatic Agreement for the Dewey-Burdock Project.[45] The signatories to the Programmatic Agreement include the NRC, Powertech, the ACHP, the South Dakota SHPO, and the BLM. Notably, the ACHP signed the Programmatic Agreement because "based on the background documentation, the issues addressed during consultation, and the processes established in the [Programmatic Agreement], [it] concluded that the content and spirit of the [NHPA] Section 106 process has been met by the NRC."[46] Neither the Oglala Sioux Tribe nor any other consulting tribe chose to sign the Programmatic Agreement.

The Staff subsequently issued its Record of Decision for the Dewey-Burdock Project, along with Powertech's NRC license.[47] The Record of Decision is the Staff's NEPA decision document.[48] The Record of Decision includes all documents upon which the Staff relied in

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[43] Ex. NRC-015 at 16–17.

[44] Exs. NRC-001 at A1.18, NRC-016, NRC-018-B at 22–23, NRC-028, NRC-030, NRC-067, NRC-142, NRC-149, NRC-150.

[45] Exs. NRC-018-A through NRC-018-H.

[46] Ex. NRC-031, Letter from John Fowler, Executive Director, ACHP, to Waste' Win Young, Standing Rock Sioux Tribe Historic Preservation Officer (ADAMS Accession No. ML14115A448) (April 7, 2014).

[47] Exs. NRC-011, NRC-012.

[48] *See* Ex. NRC-048 at 35 (stating that "an agency must complete the NEPA and Section 106 reviews before signing a decision document" but explaining that "[u]nder [Council on Environmental Quality (CEQ)] regulations . . . EISs are not decision documents."). *See also Id.* at 17 ("Only the ROD is a decision document under the CEQ regulations.").

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completing its NEPA review for Powertech's application, including the FSEIS and the Programmatic Agreement. Accordingly, the Record of Decision, and by extension the Staff's NEPA review, incorporates the numerous mitigation measures listed in the Programmatic Agreement. These measures will be used to mitigate any impacts the Dewey-Burdock Project may have on historic or cultural resources, including resources of significance to the consulting tribes. These mitigation measures are discussed throughout the Programmatic Agreement.[49]

D. The Board's Decision

The Board addressed two admitted contentions related to historic and cultural resources. In Contention 1A, the Oglala Sioux Tribe and the Consolidated Intervenors argued that the FSEIS fails to comply with NEPA and the NHPA because it inadequately considers how the Dewey-Burdock Project may affect American Indian historic and cultural resources. In Contention 1B, the Oglala Sioux Tribe argued that during its NHPA review the Staff failed to consult adequately with American Indian tribes.

For Contention 1A, the Board found that the Staff complied with the NHPA when identifying historic properties in the Dewey-Burdock area.[50] In particular, the Board found that the Staff made a reasonable and good faith effort to identify such properties, using a number of methodologies endorsed by ACHP regulations: background research, consultation, field investigations, and field surveys. "The more difficult question," according to the Board, was whether the Staff took the "hard look" at tribal cultural, religious, and historic resources required by NEPA.[51] The Board found the Staff failed to do so, because "the cultural, historical, and religious sites of the Oglala Sioux Tribe have not been adequately catalogued" and because the FSEIS does not include mitigation measures to protect such sites.[52] The Board also found that

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[49] Exs. NRC-018-A and NRC-018-B at 52–54.

[50] LBP-15-16, 81 NRC at __ (slip op. at 38).

[51] *Id.* at 39.

[52] *Id.* at 40.

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the tribal field surveys conducted in April–May 2013 were inadequate because they "did not contain any tribal ethnographic studies, oral histories, or a survey of sites of significance to the intervenor, the Oglala Sioux Tribe."[53]

For Contention 1B, the Board acknowledged that when reviewing the Dewey-Burdock application the Staff consulted with numerous American Indian tribes. The Board found, however, that the "NRC Staff/tribal consultation process broke down, and the vast majority of the consulting tribal parties, including the Oglala Sioux Tribe, did not participate in the field survey opportunity provided by the NRC Staff and Powertech."[54] The Board stated that it was "not able to decide definitively which party or specific actions led to the impasse preventing an adequate tribal cultural survey."[55] The Board found the Staff at least partially at fault, however, stating that the Staff "has not held a single consultation session, on a government-to-government basis, solely with members of the Oglala Sioux Tribe."[56] The Board acknowledged that the Staff sent numerous consultation letters to the Oglala Sioux Tribe and held several face-to-face meetings to which the Tribe was invited.[57] The Board found, however, that these efforts did not satisfy the NHPA, in part because the Staff did not hold individual meetings with the Oglala Sioux Tribe. The Board found such meetings necessary because the Oglala Sioux Tribe "has the most direct historical, cultural and religious ties to the [Black Hills area]" and the Tribe's reservation is approximately 50 miles from the Dewey-Burdock site.[58]

Although the Board found that the Staff failed to meet NEPA's hard look standard and the NHPA's consultation requirements, it also stated that it "will retain jurisdiction of this case

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[53] *Id.* at 40 n.219.

[54] *Id.* at 40.

[55] *Id.* at 41.

[56] *Id.*

[57] *Id.*

[58] *Id.* at 42–43.

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pending the NRC Staff's curing of the deficiencies in Contentions 1A and 1B."[59] The Board stated that the Staff can resolve these deficiencies by promptly initiating government-to-government consultation with the Oglala Sioux Tribe.[60] In addition to retaining jurisdiction over Contentions 1A and 1B, the Board directed the Staff to submit monthly reports, beginning June 1, 2015, addressing its progress in resolving the issues that the Board identified.[61]

III. Standard of Review

The Commission may review a Board's partial initial decision and, where appropriate, reverse the Board's erroneous ruling. In deciding whether to grant a party's petition for review, the Commission considers whether:

> (i) A finding of material fact is clearly erroneous or in conflict with a finding as to the same fact in a different proceeding;
>
> (ii) A necessary legal conclusion is without governing precedent or is a departure from or contrary to established law;
>
> (iii) A substantial and important question of law, policy, or discretion has been raised;
>
> (iv) The conduct of the proceeding involved a prejudicial procedural error; or
>
> (v) [there is] Any other consideration which the Commission may deem to be in the public interest.[62]

IV. Discussion

The Commission should review the Board's finding on the NEPA component of Contention 1A, its finding on Contention 1B, and its decision to retain jurisdiction over both contentions until the Staff takes further action consistent with its findings. The Board's finding on Contention 1A is contrary to Commission and federal court precedent defining NEPA's hard look standard, and it conflicts with the Board's NHPA finding on the same contention. The Board's finding on Contention 1B likewise conflicts with its NHPA-related finding under

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[59] *Id.* at 44. Although the Board informed the parties that under 10 C.F.R. § 2.341 they could seek Commission review of the Board's decision on Contentions 2, 3, 4, 6, and 9, the Board did not refer to Contention 1A or 1B when providing this notice. *Id.* at 114.

[60] *Id.* at 44, 112, 114.

[61] *Id.* at 114.

[62] 10 C.F.R. § 2.341(b)(4).

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Contention 1A. In addition, the Board's decision to retain jurisdiction over Contentions 1A and 1B pending further Staff action is inconsistent with NRC rules defining the scope of the Board's authority.

The Staff presented its arguments on Contentions 1A and 1B before the Board during the hearing, and the hearing record contains extensive evidence showing that the Staff evaluated cultural resources consistent with NEPA and the NHPA. In particular, the Staff presented its position on these issues through written and oral testimony, as supported by numerous exhibits.

Below, the Staff explains why the Board's decision to retain jurisdiction over Contentions 1A and 1B pending further Staff action is erroneous, as are its findings on the NEPA component of Contention 1A and its finding on Contention 1B. The Commission should exercise review in this case to ensure that the Board acts consistent with its delegated authority. The Commission should also exercise review to clarify what is required under NEPA's hard look standard and to resolve the inconsistency between the Board's NEPA finding on Contention 1A and its other findings on both Contention 1A and Contention 1B.

A. The Board Exceeded Its Authority by Retaining Jurisdiction over Contentions 1A and 1B

Although the Board found that the Staff failed to meet NEPA's hard look standard (Contention 1A) and consult adequately with the Oglala Sioux Tribe (Contention 1B), it did not simply rule on the contested issues presented by the admitted contentions. Rather, the Board stated that it will retain jurisdiction over the case until the Staff takes the actions specified in its decision. The Board's action, which both exceeds its authority and does not fulfill its responsibilities, raises a substantial question of law warranting Commission review under 10 C.F.R. § 2.341(b)(4)(iii). By retaining jurisdiction over Contentions 1A and 1B the Board also committed a procedural error that, if left uncorrected, would prejudice the Staff by subjecting its actions to the Board's direct oversight. Accordingly, the Commission should also grant review under 10 C.F.R. § 2.341(b)(4)(iv).

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In a contested hearing, the Board's jurisdiction is limited to making findings of fact and conclusions of law on matters put into controversy by the parties.[63] For example, "[a] Board which has been authorized to consider only the question of whether fundamental flaws were revealed by an exercise of an applicant's emergency plan does not also have the authority to retain jurisdiction to determine whether the flaws have been corrected."[64] A Board lacks authority in these areas because NRC regulations do not authorize the Board to direct the Staff's performance of its independent responsibilities.[65] In particular, the Board has no supervisory authority over the Staff's preparation of a draft or final EIS or any of the analyses contributing to these documents.[66]

Here, the Board exceeded its authority by "retain[ing] jurisdiction of this case pending the NRC Staff's curing of the deficiencies in Contentions 1A and 1B."[67] The Board did not merely find deficiencies in the Staff's FSEIS and Record of Decision, but prescribed a process for the Staff to resolve those deficiencies—by promptly initiating government-to-government consultation with the Oglala Sioux Tribe—and stated that the Staff must report to the Board monthly on its progress in this area.[68] The Board thus went beyond making findings of fact and

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[63] *Philadelphia Elec. Co.* (Limerick Generating Station, Units 1 & 2), ALAB-830, 23 NRC 59, 60 & n.1 (1986).

[64] *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), LBP-88-7, 27 NRC 289, 291 (1988).

[65] *Metro. Edison Co.* (Three Mile Island Nuclear Station, Unit 1), ALAB-772, 19 NRC 1193, 1263 (1984), *rev'd in part on other grounds*, CLI-85-2, 21 NRC 282 (1985); *see also U.S. Army* (Jefferson Proving Ground), LBP-05-9, 61 NRC 218, 222 (2005) (citing *Duke Energy Corp.* (Catawba Nuclear Station, Units 1 & 2), CLI-04-6, 59 NRC 62, 74 (2004) (holding that, in materials licensing proceedings conducted under informal procedural rules, a presiding officer's jurisdiction does not extend to superintending the Staff's discharge of its review functions)).

[66] *Offshore Power Sys.* (Floating Nuclear Power Plants), ALAB-489, 8 NRC 194, 206-07 (1978).

[67] LBP-15-16, 81 NRC at __ (slip op. at 44).

[68] *Id.* at 44, 112, 114.

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conclusions of law, which is within its authority, to supervising the Staff's performance of its independent functions, which falls outside its authority.[69]

At the same time, the Board did not fulfill all of its responsibilities in the hearing. Under the NRC's rules, the Board must issue an initial decision addressing "all material issues of fact or law admitted as part of the contentions in the proceeding[.]"[70] Once the Board has ruled on all contested issues, and barring further action from the Commission, the Board's jurisdiction is terminated.[71] In this case, although the Board ruled against the Staff on Contentions 1A and 1B, it did not extend its Partial Initial Decision to these contentions.[72] The Board, in other words, did not issue an initial decision addressing all of the material issues on which it ruled, as it was required to do under 10 C.F.R. § 2.1210(c)(1).

In conclusion, the Board erred by attempting to exercise oversight over the Staff's performance of its licensing duties and by failing to give effect to its rulings on Contentions 1A and 1B. The Commission should review the Board's actions and clarify that the Board cannot retain jurisdiction over Contentions 1A and 1B, or oversee the Staff's review activities, merely because it found that the Staff needs to take additional action to comply with NEPA and the NHPA.[73]

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[69] *Catawba*, CLI-04-6, 59 NRC at 74.

[70] 10 C.F.R. § 2.1210(a), (c)(1).

[71] *Virginia Electric and Power Co.* (Combined License Application for North Anna Unit 3), CLI-12-14, 75 NRC 692, 699 (2012).

[72] *See* LBP-15-16, 81 NRC __ (slip op. at 114) (stating that parties can petition for Commission review of the Board's rulings on Contentions 2, 3, 4, 6, and 9, but not mentioning Contentions 1A and 1B).

[73] The Board's decision to retain jurisdiction over Contentions 1A and 1B would, moreover, meet the standard for interlocutory review at 10 C.F.R. § 2.341(f)(2)(ii). The Board's decision meets this standard because it "[a]ffects the basic structure of the proceeding in a pervasive or unusual manner" by subjecting any further Staff review of cultural resources to Board oversight and by denying the parties an initial decision on Contentions 1A and 1B. The Staff raises this point because, although the Board ruled on these contentions, it did not include them when listing the contentions for which the parties could petition for Commission review under 10 C.F.R. § 2.341(b). LBP-15-16, 81 NRC __ (slip op. at 114). This suggests that, in the Board's view, the appropriate vehicle for challenging its actions regarding Contentions 1A and 1B would be 10 C.F.R. § 2.341(f)(2)(ii).

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B. Contention 1A: The Board Erred in Finding that the Staff Failed to Comply with NEPA's "Hard Look" Standard

The Commission should grant review because, in making its NEPA finding under Contention 1A, the Board failed to apply Commission and federal court precedent recognizing limits to the actions an agency must take under NEPA's hard look standard. The Commission should also grant review because the Board's finding departs from its NHPA finding under the same contention, and the Board failed to provide an adequate rationale for its divergent findings. Because the Board's NEPA finding under Contention 1A either departs from established law or is without governing precedent, Commission review is warranted under 10 C.F.R. § 2.341(b)(4)(ii).

i. The Board Did Not Properly Apply NEPA's Hard Look Standard

The Board did not properly apply the hard look standard when finding that the Staff failed to comply with NEPA. In particular, the Board failed to acknowledge that, while the Staff must make substantial efforts to obtain information on Sioux cultural resources, it need not devote endless study to this, or any other, issue. The Board's finding departs from decisions of both the Commission and the federal courts, which place limits on the agency actions required under the hard look standard.

a. Applicable Law

When preparing an EIS, the Staff must take a hard look at the environmental impacts of its proposed action.[74] The hard look standard is, however, subject to NEPA's "rule of reason."[75] Under NEPA's rule of reason, the Staff need not address every environmental effect that could potentially result from the proposed action. Rather, the Staff need only provide "[a] reasonably

[74] *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989).

[75] *Ground Zero Ctr. for Non-Violent Action v. U.S. Dept. of the Navy*, 383 F.3d 1082, 1089-90 (9th Cir. 2004) (citing *NoGWEN Alliance of Lane County, Inc. v. Aldridge*, 855 F.2d 1380, 1385 (9th Cir. 1988)).

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thorough discussion of the significant aspects of the probable environmental consequences[.]"[76] While the Staff must analyze environmental consequences in an EIS where it is "reasonably possible" to do so, NEPA's rule of reason acknowledges that in certain cases an agency may be unable to obtain information to support a complete analysis.[77]

Commission precedent further defines the scope of the Staff's NEPA review. "An environmental impact statement is not intended to be 'a research document.'"[78] NEPA does not require the Staff to analyze every conceivable aspect of the proposed project.[79] NEPA also does not require the Staff to commit virtually infinite study and resources to a proposed project.[80] Although the Staff can always gather more data in a particular area, it "must have some discretion to draw the line and move forward with decisionmaking."[81]

b. Discussion

The Board reached its NEPA finding on Contention 1A because it concluded that the Record of Decision for the Dewey-Burdock Project lacks certain information on cultural resources of the Sioux tribes. Under the hard look standard, however, the proper inquiry is not whether the Staff obtained complete information on Sioux cultural resources, but whether it made reasonable efforts to do so.[82] By finding that a lack of information on Sioux resources in

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[76] *Trout Unlimited v. Morton*, 509 F.2d 1276, 1283 (9th Cir. 1974); *Warm Springs Dam Task Force v. Gribble*, 621 F.2d 1017, 1026–27 (9th Cir. 1980).

[77] *Kern v. Bureau of Land Mgmt.*, 284 F.3d 1062, 1072 (9th Cir. 2002); *see also* 40 C.F.R. § 1502.22 (explaining how an agency should proceed when faced with incomplete or unavailable information).

[78] *Entergy Nuclear Generation Co.* (Pilgrim Nuclear Power Station), CLI-10-22, 72 NRC 202, 208 (2010) (citing *Town of Winthrop v. FAA*, 533 F.3d 1, 13 (1st Cir. 2008)).

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

[80] *Entergy Nuclear Generation Co.* (Pilgrim Nuclear Power Station), CLI-10-11, 71 NRC 287, 315 (2010) (footnote omitted).

[81] *Id.*

[82] *Ground Zero Ctr. for Non-Violent Action*, 383 F.3d 1082 at 1089–90; *Warm Springs*, 621 F.2d at 1026–27; *Pilgrim*, CLI-10-11, 71 NRC at 315.

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the FSEIS is, in itself, a NEPA violation, the Board departed from precedent defining the hard look standard.

When the Staff's efforts are evaluated under the correct standard, it is clear that the Staff took a hard look at how the Dewey-Burdock Project may affect Sioux cultural resources. To obtain complete information on Sioux cultural resources, the Staff needed input from the Sioux tribes themselves.[83] The Staff tried for almost four years to obtain information on Sioux cultural resources, communicating on a government-to-government basis with each tribe that is historically or culturally connected to the Black Hills area. Because tribal representatives stated that they lacked current information on cultural resources in the Dewey-Burdock area, the Staff worked with Powertech to provide each tribe, including each Sioux tribe, the opportunity to survey the area using representatives designated by the tribe.

While the Staff did not obtain additional information on Sioux cultural resources as a result of the tribal field surveys, that is irrelevant under NEPA's hard look standard. The field surveys did not generate new information on Sioux resources because, although two Sioux tribes participated in the surveys, those tribes did not submit survey results to the Staff. The five remaining Sioux tribes, including the Oglala Sioux Tribe, chose not to participate in the surveys. The failure of the two participating Sioux tribes to submit survey results, and the decisions of the other Sioux tribes to not participate in the surveys at all, in no way reflects the level of effort expended by the Staff in its NEPA review.

Although the Oglala Sioux Tribe and certain other tribes chose not to participate in the field surveys, the Staff took numerous steps to align the surveys with the tribes' stated views.

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[83] The FSEIS does, in fact, include certain information on Sioux cultural resources. In Chapter 3, the Staff describes various types of sites that could have been identified if the Sioux tribes provided field survey results. Ex. NRC-008-A-1 at 257–63. Furthermore, the Programmatic Agreement lists numerous measures for protecting cultural resources at the Dewey-Burdock site, many of which will protect any Sioux cultural resources that are currently unidentified. *See* Ex. NRC-018-A at 5–8 (Stipulation 3, "Protection and Evaluation of Unevaluated Properties within the APE"), 8–10 (Stipulation 6, "Future Identification of Cultural Resources for Installation of Power Transmission Lines in Areas to be Determined"), 10–11 (Stipulation 9, "Unanticipated Discoveries"), and 11 (Stipulation 10, "Human Remains").

When it became apparent that Powertech and the consulting tribes would be unable to agree on a statement of work for a survey of the Dewey-Burdock site, the Staff proposed an alternative approach that was sensitive to the Oglala Sioux Tribe's position that only Sioux tribes could identify Sioux cultural resources. Specifically, the Staff proposed a survey approach that allowed each consulting tribe to send its own representatives to the Dewey-Burdock site.[84] The Staff also responded to tribal concerns over the survey area, working with Powertech to ensure that tribes would have access to the entire Dewey-Burdock site.[85] Although the Oglala Sioux Tribe stated that the survey schedule did not allow sufficient time for it to obtain approval from its Tribal Council, the Staff began discussing individual tribal surveys in late 2012, and it sent the survey schedule to the consulting tribes on February 8, 2013, well before the surveys began in April 2013.[86] Finally, although the Oglala Sioux Tribe stated that the participating tribes would not be adequately compensated for the surveys, NHPA does not require either an agency or private applicant to fund surveys for cultural properties such as those conducted here. In any event, Powertech provided per diem compensation and an honorarium to each participating tribe.[87]

In summary, the Staff complied with NEPA's hard look standard by making substantial efforts to obtain information on Sioux cultural resources. The Staff's inability to obtain such information resulted not from inaction on its part, but from the decisions of the Sioux tribes to either not participate in field surveys or not provide survey results. The Board's finding—that the lack of information about Sioux cultural resources is a *de facto* NEPA violation—departs from established precedent governing the hard look standard. Accordingly, the Commission

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[84] Ex. NRC-068 at 2.

[85] Exs. NRC-001 at A1.9; NRC-008-B-2 at 280–82, NRC-068 at 2.

[86] *See* Exs. NRC-008-B-2 at 251, 271–72, 280–83 and NRC-029 (NRC correspondence discussing the use of individual tribal surveys to identify sites of religious and cultural significance to tribes); *cf. also* Ex. NRC-071 (Department of State proposal allowing tribes 10 days to make a decision on survey invitations and approximately 2 months to both complete surveys and submit survey reports).

[87] Ex. NRC-068 at 2–3.

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should grant review of the Board's decision and reverse its finding on the NEPA component of Contention 1A.

ii. The Board Lacked a Legal Basis for Its Divergent Findings under NEPA and the NHPA

The Board's finding that the Staff failed to take a hard look at the impacts to Sioux cultural resources is also inconsistent with its finding that the Staff complied with the NHPA by making a reasonable and good faith effort to identify historic properties. Under the ACHP's regulations, historic properties *include* properties that are religiously and culturally significant to consulting tribes.[88] In other words, the Staff could not have complied with the NHPA without making a reasonable and good faith effort to identify the very properties for which, in the Board's view, the Staff failed to take a hard look under NEPA.

The Staff emphasizes that it did not conduct separate reviews for historic properties, on one hand, and properties of religious and cultural significance to tribes, on the other hand. Consistent with NEPA regulations, the Staff conducted a single effort designed to identify all properties that might be affected by the Dewey-Burdock Project, including properties that are significant to tribes.[89] Furthermore, although the Staff determined that not all of the sites it identified were eligible for the National Register, the Staff nonetheless evaluated the impacts to those sites and developed measures to mitigate such impacts.[90]

In its decision, the Board notes that the requirements of the NHPA and NEPA differ, and that complying with the NHPA does not necessarily demonstrate compliance with NEPA.[91]

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[88] 36 C.F.R. § 800.2(c)(2)(ii)(A), (D); 36 C.F.R. § 800.4(c)(1).

[89] *See* 40 C.F.R. § 1502.25(a) ("To the fullest extent possible, agencies shall prepare draft environmental impact statements concurrently with and integrated with environmental impact analyses and related surveys and studies required by . . . the National Historic Preservation Act of 1966 . . . and other environmental review laws and executive orders.").

[90] Ex. NRC-008-A at 462–95.

[91] LBP-15-16, 81 NRC __ (slip op. at 39–40) (citing *Hydro Res., Inc.* (Crownpoint, New Mexico), LBP-05-26, 62 NRC 442, 472 (2005) and *Te-Moak Tribe of Western Shoshone of Nevada v. U.S. Dep't of Interior*, 608 F.3d 592, 606, 610 (9th Cir. 2010)).

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While true, this is because NEPA imposes certain requirements not found under the NHPA, such as the requirement that the agency evaluate cumulative impacts.[92] In this case, however, the Board did not identify any NEPA-specific requirement that the Staff failed to meet when identifying cultural properties. Rather, the Board effectively found that while the Staff made a reasonable and good faith effort to identify properties that are religiously and culturally significant to tribes, as required by the NHPA, it did not take a hard look at whether such properties were present, as required by NEPA. The Board did not cite any authority supporting its divergent findings on whether the Staff complied with a common requirement of both statutes—the identification of religiously and culturally significant sites. Because the Board's NEPA finding is without governing precedent, the Commission should review its finding.

The Commission should, moreover, reverse the Board's finding on the NEPA-related component of Contention 1A. As the hearing record demonstrates, the Staff took a hard look at how the Dewey-Burdock Project may affect properties that are religiously and culturally significant to the Sioux tribes. The ACHP found that the Staff made a reasonable and good faith effort to identify such properties, as reflected in its finding that the Staff complied with the NHPA generally, and the Board concurred with that finding when ruling for the Staff on the NHPA-related component of Contention 1A. The Board failed to explain, however, why the Staff's efforts were insufficient to meet NEPA's hard look standard. In addition, the Board failed to take into account that the Staff's inability to gain additional information on Sioux cultural resources resulted from the decisions of the Sioux tribes to not participate in, or not provide their recommendations following, the individual tribal surveys held in April–May 2013.

In brief, the Board's findings on the NEPA- and NHPA-related components of Contentions 1A are in conflict. The Commission should grant review of the Board's decision and resolve this conflict by ruling in favor of the Staff on the NEPA component of Contention 1A.

[92] In *Te-Moak*, the court found that the agency complied with the NHPA, but not NEPA, because it failed to adequately analyze cumulative impacts to cultural resources. 608 F.3d at 610.

C. Contention 1B: The Board's Finding Conflicts with Its Finding under Contention 1A

The Commission should grant review of the Board's finding that the Staff failed to consult adequately with the Oglala Sioux Tribe. The Commission should grant review because this finding conflicts with the Board's finding under Contention 1A that the Staff complied with the NHPA when identifying cultural resources. The Board's finding on Contention 1B is therefore a departure from established law holding that, when an agency complies with the NHPA, it necessarily satisfies the NHPA's consultation requirements. Accordingly, Commission review is warranted under 10 C.F.R. § 2.341(b)(4)(ii).

The NHPA requires an agency to make a reasonable and good faith effort to identify historic properties that may be affected by a project. In its regulations and guidance, the ACHP explains what an agency must do to meet this standard. In particular, the agency must consult on a government-to-government basis with any American Indian tribe that attaches religious and cultural significance to historic properties that may be affected by the project.[93] In other words, an agency *cannot* meet the NHPA's reasonable and good faith standard unless the agency consults on a government-to-government basis with any tribe that attaches religious and cultural significance to potentially affected sites.

For Contention 1A, the Board found that the Staff complied with the NHPA by making a reasonable and good faith effort to identify historic properties in the Dewey-Burdock area. For Contention 1B, however, the Board found that the Staff failed to comply with the NHPA because it did not consult with the Oglala Sioux Tribe on a government-to-government basis. These findings are contradictory, because the Staff could not have identified properties as required

[93] 36 C.F.R. § 800.2(c)(2)(ii)(C); *see also* Meeting the "Reasonable and Good Faith" Identification Standard in Section 106 Review (Ex. NRC-047) at 2 (explaining that to meet this standard an agency's identification efforts must be "carried out in consultation with, as appropriate, the SHPO, THPO, and any Indian tribe or Native Hawaiian organization that might attach religious and cultural significance to historic properties within the [area of potential effects].").

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under the NHPA unless, during its identification efforts, it consulted on a government-to-government basis with the Oglala Sioux Tribe.[94]

The Commission should resolve the conflict between the Board's findings in favor of the Staff. The record contains ample evidence that the Staff consulted as required under the NHPA. The best evidence is the concurrence of the ACHP and the South Dakota SHPO on the Programmatic Agreement for the Dewey-Burdock Project. Both the ACHP and the South Dakota SHPO are expert agencies that are responsible for administering and monitoring compliance with the NHPA. Both agencies were also directly involved with the Staff's preparation of the Programmatic Agreement, and they were well aware of the Staff's consultation efforts related to the Dewey-Burdock Project. The ACHP, for example, acknowledged that the Staff's "effort to identify historic properties of religious and cultural significance to tribes and the nature of tribal participation in that effort was particularly challenging."[95] Nonetheless, the ACHP stated that "based on the background documentation, the issues addressed during consultation, and the processes established in the [Programmatic Agreement], [it] has concluded that the content and spirit of the [NHPA] Section 106 process has been met by the NRC."[96] In other words, the ACHP, like the South Dakota SHPO, found that the Staff consulted as required under the NHPA. The findings of these expert agencies should be viewed as dispositive proof that the Staff did, in fact, comply fully with the NHPA.[97]

Finally, although the Board found that the Staff should have held a government-to-government meeting with the leadership of the Oglala Sioux Tribe alone, the Board did not

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[94] 36 C.F.R. § 800.2(c)(2)(ii)(C); Ex. NRC-047 at 2.

[95] Ex. NRC-031.

[96] *Id.*

[97] As reflected by the opinions of the ACHP and the South Dakota SHPO, the NHPA's "government-to-government" consultation requirement presumes that both governmental entities are willing to work together when identifying, evaluating, and developing measures to protect historic properties. When one governmental entity is either unable or unwilling to participate in these efforts, this must be taken into account when determining whether the governmental agency has met the NHPA's "reasonable and good faith" standard.

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identify any legal requirement for such a meeting.[98] In fact, neither the ACHP's regulations nor its guidance requires individual meetings with tribes, and neither the ACHP nor the South Dakota SHPO found the Staff needed to hold such meetings. Furthermore, the Board's suggested approach is inconsistent with the preference of the Oglala Sioux Tribe and other tribes for group meetings when discussing issues involving cultural resources.[99]

In conclusion, the Board's finding on Contention 1B conflicts with its finding on the NHPA component of Contention 1A. Because the Board's finding on Contention 1A is supported by the ACHP's opinion, the South Dakota SHPO's opinion, and the other evidence of record, the Commission should review the Board's decision and reverse its finding on Contention 1B.

V. Conclusion

The Commission should grant review of the Board's Partial Initial Decision and vacate its decision to retain jurisdiction over Contentions 1A and 1B. The Commission should also reverse the Board's finding on the NEPA component of Contention 1A and its finding on Contention 1B.

Respectfully submitted,
/Signed (electronically) by/
Michael J. Clark
Michael J. Clark
Counsel for the NRC Staff

/Signed (electronically) by/
Patricia A. Jehle
Patricia A. Jehle
Counsel for the NRC Staff

Dated at Rockville, Maryland
this 26th day of May 2015

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[98] Decision at 42–43.

[99] Hearing Transcript at 863, lines 17–25; 864, lines 1–20; *see also* Ex. NRC-008-A-1 at 77 ("The Sisseton Wahpeton Oyate and Rosebud Sioux [Tribal Historic Preservation Officers (THPO)] recommended that NRC undertake group consulting, whereby a number of tribal representatives would participate in a meeting, possibly hosted by the Oglala Sioux Tribe."); Ex. NRC-008-B-2 at 164 (letter from THPO suggesting group consultation).

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May 26, 2015

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

CERTIFICATE OF SERVICE

Pursuant to 10 C.F.R. § 2.305, I certify that counsel for the NRC Staff served copies of the "NRC Staff's Petition for Review of LBP-15-16" via the NRC's Electronic Information Exchange (EIE) on May 26, 2015. Counsel for the Staff served those representatives exempted from filing through the EIE with copies of its motion by electronic mail, also on May 26, 2015.

/Signed (electronically) by/
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