

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION  
ATOMIC SAFETY AND LICENSING BOARD

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In the Matter of

POWERTECH (USA), INC.,  
(Dewey-Burdock In Situ Uranium  
Recovery Facility)

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Docket No. 40-0975-MLA  
ASLBP No. 10-898-02-MLA-BD01

September 1, 2017

**CONSOLIDATED INTERVENORS' OPPOSITION TO MOTION FOR  
SUMMARY DISPOSITION OF CONTENTIONS 1A AND 1B**

Consolidated Intervenors hereby oppose the NRC Staff's Motion for Summary Disposition of Contentions 1A and 1B filed August 3, 2017 (the "Motion"). Although the Consolidated Intervenors are a separate party from the Oglala Sioux Tribe ("Tribe" or "OST"), since members of Consolidated Intervenors are enrolled members of the Intervener OST, the Consolidated Intervenors hereby adopt the evidence, authority, and arguments presented in the OST Response to the Motion.

**INTRODUCTION**

Consolidated Intervenors oppose the Motion because a fundamental and genuine dispute continues to exist due to the NRC Staff's failures to communicate or negotiate in good faith with the Tribe or provide any reasonable proposal that contains any measure of compromise to address the Tribe's oft-stated and reasonable concerns. After all this time, there has been no site visit, no involvement of tribal elders, no ethnographic studies, and a complete failure on the part of the NRC Staff to comply with its obligations to the Tribe.

The term ‘Good faith bargaining’ has a legal definition: “Objective evidence of action satisfying the requirement that the parties to a contract regularly meet and willingly discuss resolution on proposed new contract terms. No demand exists on any party to make a concession or agree to any proposal.” See Black's Law Dictionary Free Online Legal Dictionary 2nd Ed. (2017). Consolidated Intervenors maintain that the NRC Staff has not willingly discussed any proposed new terms but has continued to make the same offer of a single site visit to take place in a specified short term window of time with complete disregard of the prior statements of the Tribe and its representatives in the hearing in this proceeding.

The term ‘Good Faith’ has a legal definition: “Good faith is defined as “A state of mind consisting in (1) honesty in belief or purpose, (2) faithfulness to one’s duty or obligation, (3) observance of reasonable commercial standards of fair dealing in a given trade or business, or (4) absence of intent to defraud or to seek unconscionable advantage” See Black’s Law Dictionary 701 (7th ed. 1999), quoted in Understanding “Best Efforts” And Its Variants (Including Drafting Recommendations), Kenneth A. Adams, The Practical Lawyer, August 2004 at 13 (August 2004)(available at: <http://www.adamsdrafting.com/downloads/Best-Efforts-Practical-Lawyer.pdf>).

Here, a higher standard than commercial standards should be applied due to the trust responsibility owed to the Tribe and tribal members. In the usual circumstance, “[t]he governing canon of construction requires that ‘statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit.’ This departure from the [normal deference to agencies] arises from the fact that the rule of

liberally construing statutes to the benefit of the Indians arises not from the ordinary exegesis, but ‘from principles of equitable obligations and normative rules of behavior,’ applicable to the trust relationship between the United States and the Native American people.” California Valley Miwok Tribe v. United States, 515 F.3d 1262 (D.C. Cir. 2008) quoting Albuquerque Indian Rights v. Lujan, 930 F.2d 49, 59 (D.C. Cir. 1991); Cobell v. Norton, 240 F.3d 1081, 1101 (D.C. Cir. 2001)(quoting Montana v. Blackfeet Tribe of Indians, 471 U.S. 759, 766, (1985)).

Here, the entire Motion is based on the personal opinion of one person, an environmental scientist in the Nuclear Regulatory Commission's (NRC) Office of Nuclear Material Safety and Safeguards (NMSS), Division of Fuel Cycle Safety, Safeguards and Environmental Review (FCSE), Environmental Review Branch named Kellee Jamerson. Ms. Jamerson may be an expert on nuclear material safety and fuel cycle safety but she is not an expert in tribal relations, tribal culture, tribal consultations, or even commercial contract negotiations. As a result, such opinion does not carry the weight of an expert because it is completely outside the area of Ms. Jamerson’s expertise.

Nonetheless, Ms. Jamerson has rendered her personal opinion that: “I understood these positions to be far apart from the discussions in the May 19, 2016 government-to-government meeting, the January 31 , 2017 teleconference, and the April 14, 2017 survey invitation. Based on this understanding, I did not and do not believe that the Staff and the Oglala Sioux Tribe are likely to reach consensus on acceptable survey parameters.” Attachment 2 to the Motion, Paragraph 8.

This personal opinion must be given little weight and no deference. Accordingly, there has been no valid or verifiable evidence presented by NRC Staff to support its position that the Tribe and the NRC Staff will not be able to reach a consensus on acceptable survey parameters. In fact, the Tribe has responded with specificity describing the parameters that would be acceptable and were the NRC Staff to consult with the Tribe in Good Faith, it would willingly discuss the potential for accepting some of the Tribe's requests and compromising. Rather, the NRC Staff has acted in Bad Faith with an express or implied intention to obtain an unconscionable advantage against the Tribe and tribal members, including some of the Consolidated Intervenors.

The Motion itself refers to this 'opinion' as an 'appearance' that the issues concerning site visits and TCP surveys will not be resolved without describing the details or specifics as to whether such appearance is a reality or just one person (Ms. Jamerson's) uneducated personal opinion. See Motion at 27.

This process, or lack thereof, violates the NRC's own rules for tribal consultations as stated in its January 2017 policy and described on pages 13-14 of the Motion. This NRC Policy requires that the NRC have meaningful interactions. If that is the case, why did NRC Staff simply and completely ignore what the Tribe has been clearly saying at the Hearing and elsewhere about how long it would take to complete a valid TCP survey (2 years) and what would be involved (multiple site visits with enough time in between to vet the issues among the various tribal interest groups and tiospayes, elders, etc.).

NEPA's 'hard look' rule of reason does not swallow the entire 'hard look' rule - which would be the case if it were used to say that failure to engage in meaningful two -

way conversations constitutes the same as a ‘hard look’ on the impacts of the project on cultural resources - that is an impossible conclusion and legally invalid. See page 33 of the Motion.

This is not a case of inability to obtain information but rather this is a case of unwillingness to address the Tribe’s requests in good faith and/or explain why addressing them would not be possible which would be a characteristic of Good Faith Bargaining. The NRC Staff made demands that were from the start inconsistent with what the Tribe has been saying for years - multiple site visits, time to vet and involvement of elders in addition to tribal officials - paid for by the company. The NRC Staff continued to offer a single site visit during a narrow window of time without giving the Tribe an opportunity to vet the information found during the first site visit with tribal elders, tribal officials and other interested tribal members. Thus, there has been a failure to comply with the NRC Staff’s obligations to consult and negotiate in ‘Good Faith’ with the Tribe.

The NRC Staff should not be rewarded for its own bad faith in the consultations and therefore the Motion should be denied on those grounds alone. NRC Staff’s continued failure to identify and describe any cultural sites or TCPs means the FEIS was never supplemented and remains deficient.

### **SUMMARY DISPOSITION STANDARDS**

10 C.F.R. § 2.1205(c) states, “[i]n ruling on motions for summary disposition, the presiding officer shall apply the standards for summary disposition set forth in subpart G of this part.” Subpart G, Section 2.710(d)(2), provides, “[t]he presiding officer shall render the decision sought if the filings in the proceeding, depositions, answers to

interrogatories, and admissions on file, together with the statements of the parties and the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a decision as a matter of law.” As conceded by NRC Staff, the moving party carries the burden of showing that it is entitled to summary disposition. Motion at 7. The NRC Staff has not met that burden.

Applicable NRC standards governing summary disposition are set forth in 10 C.F.R. § 2.710. The standards are based upon those the federal courts apply to motions for summary judgment under Rule 56 of the Federal Rules of Civil Procedure. See Advanced Medical Systems, Inc. (One Factory Row, Geneva, Ohio 44041), CLI-93-22, 38 NRC 98, 102 (1993).

Summary disposition is appropriate where relevant documents and affidavits “show that there is no genuine issue as to any material fact and that the moving party is entitled to a decision as a matter of law.” 10 C.F.R. § 2.710(d)(2). The correct inquiry is whether there are material factual issues that “properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party.” Anderson v. Liberty Lobby, 477 U.S. 242, 250 (1986).

At issue is not whether evidence “unmistakably favors one side or the other,” but whether “there is sufficient evidence favoring the non-moving party” for a reasonable trier of fact to find in favor of that party. Id. at 249-252. In ruling on a motion for summary disposition a licensing board (or presiding officer), “the judge’s function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for [hearing].” Id. at 249. “The evidence of the non-

movant is to be believed, and all justifiable inferences are to be drawn in his favor.” Id. at 255.

If “reasonable minds could differ as to the import of the evidence,” summary disposition is not appropriate. Id. at 250-51. Summary disposition is not appropriate if it would require a licensing board to engage in the making of “[c]redibility determinations, the weighing of evidence, [or] the drawing of legitimate inferences from the facts.” Id. at 255. Caution should be exercised in granting summary disposition, which may be denied if “there is reason to believe that the better course would be to proceed to a full [hearing].” Id.

#### **CONTENTION 1A: FAILURE TO MEET NEPA REQUIREMENTS REGARDING PROTECTION OF HISTORICAL AND CULTURAL RESOURCES.**

The Consolidated Intervenors are deeply concerned about the failure of the NRC Staff in the FSEIS and the Applicant to satisfy National Environmental Protection Act (NEPA) requirements of protection of historical and cultural resources in and adjacent to the proposed ISL project of Applicant.

This includes the failure to facilitate a scientifically based cultural resources surveys and analysis involving knowledgeable persons within the seven Bands of the Lakota of the potentially impacted area and the improper separation of compliance with the Section 106 requirements of the National Historic Preservation Act (NHPA) from the deficient NEPA analysis otherwise conducted. See, Declaration of Wilmer Mesteth, former OST Tribal Historic Preservation Officer (THPO) [Exhibit OST-15, Exhibit CI-6], the Declaration of then current OST THPO Michael Catches Enemy [Exhibit OST-14],

the described documents referenced in the FEIS and in Appendix A to the FSEIS [Exhibit NRC-008-B], letters to the NRC Staff from then Oglala Sioux President Brian Brewer and Standing Rock Sioux Tribe THPO [Exhibit NRC-0015], as well as omissions in the FSEIS. See, also, Opening Testimony of Dr. Louis Redmond. Exhibit CI-1.

The testimony at the hearing referred to herein demonstrates inadequacy of the cultural resource surveys and analyses conducted at Applicant's proposed mine/plant sites as of the date of the issuance of the FSEIS. Former OST THPO Mesteth testified that:

MR. MESTETH: ...**We have sacred places here in this country and we are the only ones that can determine those things. And sometimes we are reluctant to share this information with archaeologists because the nature of the information, sacred places.** Your understanding of a sacred place is different from mine. And I want those things clearly understood here today in these proceedings.

**We are the ones, and the only ones, that are qualified.** When we're talking about tribes in and around the Black Hills, the Lakota Nation, the Kiowa Nation, the Crow Nation, Arapaho, Northern Arapaho, Northern Cheyenne Nations, Hidatsa, Mandan and Arikara, the Ponca and Pawnee. These tribes are historical tribes. When we're looking at features and artifacts and you're talking about history of this Black Hills, then we are the experts. I want that clearly understood.

**And as far as this Level 3 survey, the way I understand it, these have to be included in that and it should be included. And it should be stated to that effect. And include the Native American tribes that are in question here. That's my understanding of that. And the cultural TCP surveys, cultural TCP surveys, that's where we are the ones that determine what is clearly Lakota, a stone feature, a plinth [SIC - 'flint'] artifact, arrowpoint.** Those things, because we still practice our culture and we can trace it back. And what kind of stones are used on this land?. What kind of medicines that we utilize? We still use -- I'm a medicine man. I use in my practice with these medicines on this country and I go into the Black Hills and I harvest these medicines yet today.

The knowledge of our people, you know, their existence here, you know, in the Black Hills area, some experts in the archeologist's field say that



we're newcomers here. But no, in my ohunka, it states in there that **we came forth upon creation here, not where Adam and Eve came in the Garden of Eden, wherever that is, you know. But here in (native language spoken) we call it, that's where our tradition states that we came forth upon this island here, the sacred Black Hills and we crossed over this land towards the east and then made our journey back here. That's our story and it's just as valid as this Holy Bible, you know. That's my understanding. HT at 765-67.**

This demonstrates that the Lakota people regard this area where Applicant seeks to mine as being as sacred as some people view the City of Jerusalem. This is why it is not possible to accomplish an adequate TCP survey in one limited open-site visit. The NRC Staff has never addressed or responded to the foregoing reasons as to why this sacred area requires more intensive study and has never offered more than a limited open-site visit. This fails to meet the standard of Good Faith even under commercial standards, much less the standards applicable to the Tribe and tribal members due to the trust responsibility.

Then OST THPO Catches Enemy testified that in his opinion if the project were allowed to proceed even under the Programmatic Agreement (which was never presented to the Tribe for signature and was never accepted or signed by the Tribe) it would cause irreparable harm to the Tribe's cultural resources and that the Programmatic Agreement is inadequate to protect cultural resources:

**MR. CATCHESENEMY: As soon as -- the project, if allowed to proceed, will have irreparable harm to the cultural resources there no matter what the avoidance, minimizing or mitigation acts that are proposed. It will still have irreparable harm to those cultural resources no matter what. So a Programmatic Agreement and the stipulations that are provided in there does not safeguard/protect cultural resources, in my opinion. HT at 862.**

Further, then OST THPO Catches Enemy testified that the NRC Staff's 'One Size Fits All' approach that has been applied by the NRC Staff to the interested tribes, including the Tribe, is not appropriate:

MR. CATCHESENEMY: A lot of what we're discussing right now between archaeology, the discipline of archaeology, the standards that are set for quite some time now and then the culmination of how TCPs came to be, there's a lot of things that occurred. Dr. Sebastian brought up Bulletin 38 in 1990. She brought up NAGPRA, which was also passed by Congress in 1990. And then two years after that that's when the amendments to the National Historic Preservation Act came to be to allow THPOs to be created. So there's a lot of changes that have occurred since that to come up to where we're at now. And as we're seeing now, there's not a lot of standards set or, as Mr. Kevin Hsueh has said, guidance for how these TCPs are created. **A lot of guidance nationally is kind of a one-size-fits-all. And for tribes, I know we will always assert that there's not such a thing. That's why I bring up the fact that if consultation was going to be reasonable they would have been consulted with individuals. So guidance such as this, we won't be able to agree to a one-size-fits-all as tribes.** HT at 862-863.

The testimony from former OST THPO Mr. Mesteth (HT at 764, 765-67 quoted herein) supports the Consolidated Intervenor's contentions that there has been a failure of both the NHPA and NEPA requirements for the NRC Staff to work to ascertain the existence and locations of TCPs in the project area and describe accurately the impacts thereon in the FSEIS. This failure of the NRC Staff to engage in Good Faith Bargaining is why the parties are far apart and the NRC Staff must not be rewarded for its own bad faith dealings.

As to the ethnographic, traditional knowledge based TCP surveys that could be provided by the Tribe, then OST THPO Catches Enemy testified that about the challenges

in keeping up with the NRC Staff's process without adequate resources or budget to do so:

MR. CATCHESENEMY: ...So here we are being asked to come and produce evidence outside of what the archeological report already identified. But at the same time, we're having to bring tribes as different takes on it within set deadlines, set cost parameters. That's a pretty harsh timeline to follow to bring tribes back together to ask them to set all these methodologies within a very short timeline.

These methodologies may have a little bit of differences or intricacies when we get out into the field. **We would rely, ourselves as Ogalas, on a lot of our elders, our traditional medicine people, spiritual leaders, historians, but all of them would be available to come up.** And maybe another tribe historically tied with us may have a different take on it. So we'd have to try to work out all those intricacies of how we're going to conduct our methodology because this isn't something that is TCP surveys on the most part are fairly new or at least being willing to be looked at. I know part of the evidence doesn't really include National Park Service guidance, but that's where it's in the literature about Bulletin 38, the identification of traditional cultural properties. I call the state of the TCPs, **that can go with any ethno group. It's not specific to Lakotas. It could be towards Asian-Americans, Hispanic-Americans. It's open when you consider it a TCP. But I think the big difference is the culture and how it's conducted. That's the biggest difference.** HT at 801-802.

Then OST THPO Catches Enemy testified as to the limited resources of the Tribe for conducting cultural resources reviews when requested by agencies like the NRC Staff in connection with federal actions:

MR. CATCHESENEMY: And he could speak more to his own résumé. but he was initially -- we have a three-member advisory council for our office and Mr. Mesteth was one of three founding members of our office and took that role. Initially it was supposed to be a temporary appointment and just until we got more funding. **The fact remains we didn't have any subsequent funding that came to the office of our National Park Service annual funding, so Mr. Mesteth was acting in a part-time capacity. And so the changeover came with some**

**additional funding that we're just receiving.** And I do more of the administrative responsibilities day-to-day in the office now --

CHAIRMAN FROEHLICH: Okay.

MR. CATCHESENEMY: -- as a full-time employee. HT at 813-14.

We note that the recent OST THPO, Ms. Lone Hill, likewise faced the same challenges concerning budgeting of her office and inability to keep up with her workload due to budgetary constraints.

NRC witness Ms. Yilma also testified that no ethnographic studies were conducted by NRC Staff but that they did discuss the existence of ethnographic studies, and that instead actually doing one, the NRC Staff coordinated a \$10,000 stipend with an invitation for each tribe to send up to three (3) representatives out to the project area and walk around looking for their TCPs:

CHAIRMAN FROEHLICH: Okay. I'll go back to Ms. Yilma. Did the staff investigate or review ethnographic reports or suggest at any point in this process visits with tribal elders to try to collect the type of data necessary to respond to the cultural and historic resources?

MS. YILMA: We did not conduct an ethnographic study, but we did have a discussion about them during our face-to-face interactions with the tribes. And the ultimate decision was instead of an ethnographic study a field survey was necessary, so we focused our attention on the field survey approach.

CHAIRMAN FROEHLICH: Was there any thought given to utilizing the tribal elders in a field survey approach?

MS. YILMA: Yes. So after we decided the statement of work wasn't going to work, we did seek out for alternative approach. And one of the approach was the open-side approach that we ended up deciding on, and that open-side approach, the idea was that each tribal representative

would select an elder or anyone that's knowledgeable of the tribe's culture to come out and identify sites within the Dewey-Burdock projects that are important to that tribe.

CHAIRMAN FROEHLICH: And of the tribes that took you up on that offer --

MS. YILMA: Yes.

CHAIRMAN FROEHLICH: -- how many people did they bring? I mean, how much of an undertaking

MS. YILMA: There were three representatives. They were allowed to have three representatives from each site. Some had three.

Others had a couple. And for some of them they did have tribal elders out with the tribal monitors doing a site survey and provided input on what was found and what was the interpretation of what was found.

CHAIRMAN FROEHLICH: Just trying to decide what's reasonable. They were allowed three? Why were they --

MS. YILMA: I should clarify. For purposes of reimbursements, because Powertech was covering the expenses, the expense allotment was for three representatives. But of course tribal entities could have brought more than three. But if they had brought more than three, the per diem and such were not going to be covered. HT at 846-48.

So, it is clear that Applicant's lack of financial resources has always been the real stumbling block in this process. Applicant simply lacks the funds to pay for an adequate TCP survey that would satisfy the reasonable requests of the Tribe.

**CONTENTION 1B: FAILURE TO INVOLVE OR CONSULT ALL INTERESTED TRIBES AS REQUIRED BY FEDERAL LAW.**

Former OST THPO Mesteth testified that:

MR. MESTETH: We are the ones that had rejection and we're the ones that are the experts, not the archaeologists. They make assumptions and

hypotheses about our cultural ways and it's not accurate. Some of the information is not accurate. And that's why we object in certain situations. HT at 764.

The foregoing testimony from Mr. Mesteth supports the Consolidated Intervenor's contentions that there has been a failure of both the NHPA and NEPA requirements for the NRC Staff to work to ascertain the existence and locations of TCPs in the project area and describe accurately the impacts thereon in the FSEIS. Such testimony further supports the contentions that there has been a continuous failure of consultation because the OST THPO at a relevant time during these licensing proceedings describes the treatment of the OST as being 'REJECTION.' HT at 764. This bad faith approach by NRC Staff has continued and is further evidenced by the interactions between the NRC Staff and the Tribe since the Board's Partial Initial Decision.

Mr. Mesteth stated his personal, professional and tribal (spiritual) credentials and he addressed the Board and the courtroom in Lakota first as is traditional. There is no doubt that Mr. Mesteth chose carefully the words he used to describe the treatment of the Tribe and his word was 'REJECTION.' Since the representative of the Tribe most knowledgeable about the issue has testified that the Tribe was rejected, then it must be accepted by the Board that there has been a failure of the consultation process. Significantly, nothing has changed since Mr. Mesteth's testimony was given at the Hearing.

Then OST THPO Catches Enemy testified that social media and teleconferences were not, in the views of the Tribe, a substitute for in person face-to-face to consultations:

MR. CATCHESENEMY: Throughout the whole process I can say that the tribes, especially the Oglala Sioux Tribe, have always advocated for the face-to-face. A lot of things can happen or not happen behind a teleconference call. There's not the same interaction that you and I are having right now as if we were on the phone with each other, so we would always be advocating for the face-to-face.

CHAIRMAN FROEHLICH: You're referring to I guess a session where there was a video conference among staff and various tribes, is that correct?

MS. YILMA: It's actually a teleconference.

CHAIRMAN FROEHLICH: Teleconference.

MS. YILMA: Yes.

CHAIRMAN FROEHLICH: Excuse me.

MS. YILMA: Due to the limitation of our budgets we couldn't really travel to do the face-to-face interactions for every single meeting we had. We did have three face-to-face interactions with the tribes to come up with methodologies and survey approaches and consider inputs from the tribes in our cultural resources, but we started developing the Programmatic Agreement. We did use alternative means to come to consensus of what needs to be included in the Programmatic Agreement. And we used a teleconference for that where we had a Webinar set and displayed the Programmatic Agreement on a computer. And we also had a line set up where we can discuss each step of the Programmatic Agreement that we had displayed on the Webinar and made appropriate changes that we were hearing from the tribes, the SHPO, the state historic preservation officer, and also the ACHP, Advisory Council on Historic Preservation. They were all on the teleconferences when we were developing the Programmatic Agreement.

CHAIRMAN FROEHLICH: I guess a simple question would be does Webinar and teleconference constitute consultation under 106 in your experience....

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DR. LUHMAN: I believe so. I mean, it is an interaction among the parties discussing the issues at hand. The Webinars, I facilitated the

Webinars for the development of the Programmatic Agreement. We went through every aspect of the document including all the comments that have been received. The Programmatic Agreement itself was distributed as a Word document so that everybody could insert their comments and track changes. So it was possible to go through and address everyone's comments. Ms. Yilma is correct, the advisory council was on the calls. The BLM was on the calls. The South Dakota SHPO was on the calls. The tribes that chose to participate were on the calls. Powertech was on the calls. They were very, very active and vibrant conversations relating to the issues that were at

CHAIRMAN FROEHLICH: I would ask the same of Dr. Hannus.

DR. HANNUS: We were not involved in that set of interviews, so we were not part of the Programmatic Agreement.

CHAIRMAN FROEHLICH: And the definition that you would use for "consultation," does that include Webinars or teleconferences or whatever, or is

DR. HANNUS: Are you asking me?

CHAIRMAN FROEHLICH: Yes.

DR. HANNUS: Well, I mean in the current parlance of what seems to be happening in the world of technology, I guess that that is a very common practice. I guess whether everyone that was involved would fully agree and embrace that practice is a different question, but it is certainly a common

CHAIRMAN FROEHLICH: Dr. Sebastian, in 25 your experience?

DR. SEBASTIAN: In my experience "consultation" is defined as seeking, discussing and considering the views of others and, where possible, seeking agreement with them. And that's the definition that we're giving for what "consultation" is. And I also would add, if I may, that in a lot of cases these kinds of electronic media are the only way to deal with them. If you think about folks working in Pennsylvania who all their tribes are in Oklahoma and so there's really no way for them to be able to have very many face-to-face meetings -- so they routinely do all of their consultation in electronic media or the exchange of drafts and comments. HT at 826-830.



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Dr. Redmond testified as to the importance to native people of having face-to-face in person consultations and not relying only on social media and/or teleconferences and how it can be viewed as disrespectful to avoid face-to-face in person consultations:

DR. REDMOND: But at least let's do it with respect. And today's world everything seems to be through media. It's not face-to-face, eyeball-to-eyeball. And in our culture it's a handshake and face-to-face. I look in your eye and see if you're telling me the truth. Because if I can't see your face, I don't know what you're telling me.

NEPA regulations demonstrate that a meaningful analysis requires adequately characterizing baseline data, including data concerning TCPs, both accurately and quantitatively. Demonstrable baseline conditions, including accurate assessment of TCPs are vital to informing the agency and the public about the environmental impacts of the project and are a prerequisite to making an informed decision. See 40 C.F.R. § 1500.1(b) (“NEPA procedures must insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken.”).

Federal courts have identified this requirement and held that lack of baseline data renders an agency decision arbitrary and capricious. In N. Plains Res. Council, Inc. v. Surface Transp. Bd., the Court of Appeals for the 9<sup>th</sup> Circuit rejected an Environmental Impact Statement for failing to collect baseline data, ruling that “without this [baseline] data, an agency cannot carefully consider information about significant environmental impacts.” 668 F.3d 1067, 1083-85 (9th Cir. 2011). Land Council v. McNair 537 F.3d

981, 987 (9<sup>th</sup> Cir. 2008). See also, N.C. Wildlife Fed. v. N.C. Dep’t of Transp., 677 F.3d 596, 603 (4<sup>th</sup> Cir. 2012) (finding NEPA decision must be based on accurate baseline data); Friends of Back Bay v. U.S. Army Corps of Engineers, 681 F.3d 581, 588 (4<sup>th</sup> Cir. 2012) (holding that “A material misapprehension of the baseline conditions existing in advance of an agency action can lay the groundwork for an arbitrary and capricious decision.”).

The Northern Plains court specifically discussed agency promises of establishing baseline data in the future:

[E]ven if the mitigation measures may guarantee that the data will be collected some time in the future, the data is not available during the EIS process and is not available to the public for comment. Significantly, in such a situation, the EIS process cannot serve its larger informational role, and the public is deprived of their opportunity to play a role in the decision-making process.

Id. at 1084-1085. See also, Robertson v. Methow Valley Citizens Council, 490 U.S. 332 (1989); LaFlamme v. F.E.R.C., 852 F.2d 389, 400 (9<sup>th</sup> Cir. 1988) (“[T]he very purpose of NEPA’s requirement that an EIS be prepared for all actions that may significantly affect the environment is to obviate the need for speculation by insuring that available data is gathered and analyzed prior to the implementation of the proposed action.”) (internal citation and quotation marks omitted). The danger in an approach that proposes the collection of so-called “baseline” data at some future date is that, “once a project begins, the ‘pre-project environment’ becomes a thing of the past” and correspondingly, meaningful evaluation of the project’s effect becomes “simply impossible.” LaFlamme, 852 F.2d at 400.

NEPA regulations require agencies to “insure the professional integrity, including scientific integrity, of the discussions and analyses in environmental impact statements.” 40 CFR § 1502.24. In doing so, “[T]hey shall identify any methodologies used and shall make explicit reference by footnote to the scientific and other sources relied upon for conclusions in the statement.” *Id.* “If an agency requires an applicant to submit environmental information for possible use by the agency in preparing an environmental impact statement,” then “the agency shall independently evaluate the information submitted and shall be responsible for its accuracy.” *Id.* § 506.5(a). The analysis of environmental impacts must be “of high quality.” 40 C.F.R. § 1500.1(b) (“Accurate scientific analysis [is] essential”).

Consolidated Intervenor ask where is the high quality evaluation that gives rise to the NRC Staff (Ms. Jamerson’s) conclusion that the parties are so far apart that it is unlikely that there will be a consensus; not including the NRC Staff’s own bad faith unwillingness to address or even discuss the Tribe’s well and often stated cultural concerns with the approach to surveying the area of their most sacred sites.

Federal courts have further refined the dictates of this language in NEPA regarding the appropriate standards to apply in assessing evidence such as before the Board. For example, in Ocean Mammal Inst. v. Cohen, the court ruled that, “an agency is required to engage in reasonable research *to supply missing information*” in preparing an EIS to fulfill its “affirmative duty under NEPA and its implementing regulations to undertake research in order to prepare a comprehensive EIS federal government officials can use to make a reasoned decision.” (Emphasis added.) Ocean Mammal Inst. v. Cohen, No. 98-

CV-160, 1998 WL 2017631, at \*5 (D. Haw. Mar. 9, 1998) ; See also, Idaho Pub. Util. Comm'n v. ICC, 35 F.3d 585, 596 (D.C. Cir. 1994); Or. Env'tl Council v. Kunzman, 817 F.2d 484, 495 (9th Cir. 1987) (NEPA “imposes a duty on federal agencies to gather information and do independent research when missing information is important, significant, or essential to a reasoned choice among alternatives.”) (citations omitted); Greenpeace Found. v. Mineta, 122 F. Supp. 2d 1123, 1135 n.16 (D. Haw. 2000). The foregoing cases contradict the NRC Staff’s position that there is a ‘rule of reason’ that allows it to completely ignore these duties.

As such, the NRC bears the burden for its own environmental determinations. The “consideration” required by NRC regulations places an affirmative duty on the agency. In contrast, the regulations do not allow for “reliance” as that would relieve the agency of its duty. The same can be said for any deference to state or local authority, which would certainly shift the NRC’s responsibilities under federal law into other jurisdictions.

Federal courts have agreed. See Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 349 (1989) (Explaining that NEPA requires federal agencies to examine the environmental consequences of their actions before taking those actions, in order to ensure “that important effects will not be overlooked or underestimated only to be discovered after resources have been committed or the die otherwise cast.”); Baltimore Gas & Elec. Co. v. Natural Res. Def. Council, Inc., 462 U.S. 87, 97 (1983) (explaining that NEPA “ensures that the agency will inform the public that it has indeed considered environmental concerns in its decision making process.”); Morongo Band of Mission Indians v. Federal Aviation Administration, 161 F.3d 569, 575 (9th Cir. 1998) (“NEPA

was created to ensure that agencies will base decisions on detailed information regarding significant environmental impacts and that information will be available to a wide variety of concerned public and private actors.”).

Under NEPA, the EIS is the central clearinghouse for the “detailed information regarding significant environmental impacts.” Id. As the acting agency, the NRC is responsible for “high quality” analysis of environmental impacts that NEPA requires. 40 CFR § 1500.1(b).

NEPA mandates that where there is data “essential to a reasoned choice among alternatives and the overall costs of obtaining it are not exorbitant, the agency shall include the information in the environmental impact statement.” 40 CFR § 1502.22(a). No one at the NRC Staff has suggested that the costs of obtaining the information would be exorbitant (assuming that Applicant is not bankrupt). Rather NRC Staff has merely suggested that the process is taking too long.

Consolidated Intervenors suggest that had the NRC Staff adopted the methods described by then OST THPO Catches-Enemy (multiple site visits with time in between to vet the information with tribal elders and interested tribal members, occurring at times when the ground was clearly visible), the entire process would have been over years ago. It has been the NRC Staff’s bad faith attempts to dilute the Tribe’s requests and bad faith negotiations that has truly harmed this process. Such bad faith not only frustrated the timelines desired by Applicant and NRC Staff but it also constitutes a violation of the trust responsibility.

The FSEIS has not been supplemented since the Board’s Partial Initial Decision

and, therefore, it fails to include the data essential to reasonably analyze and evaluate the impacts on the TCPs in the area proposed to be used by the Applicant.

### **DISPUTED MATERIAL FACTS**

Consolidated Intervenor point to the following disputed material facts:

- 1) The NRC Staff has never stated why it is not possible to have multiple site visits with time in between to vet the information with tribal elders and interested tribal members.
- 2) By relying on teleconferences and one-way communications such as phone and email messages, the NRC Staff has shown a callous disregard for tribal cultural mores.
- 3) The failure of NRC Staff to engage in Good Faith Bargaining is the basis of the current situation upon which it bases its own motion to dismiss. If this were the rule, then the NRC could just make a continued series of failed efforts comprised of leaving messages and sending emails and declare the failure to reach agreement as being legally binding failures on the part of the Tribe and then dismiss the contentions as is being attempted in this case.
- 4) There are still no TCP Survey that includes any ethnographic studies that cover the mining area.
- 5) The NRC Staff has never made any offers or proposals closer to what the Tribe has been requesting since the Hearing - multiple site visits, time in between to vet the information and involvement of tribal elders and the other tribes. There has been no attempt to compromise with the Tribe. As such, NRC Staff has been consulting in bad faith contrary to the NRC's own Tribal Policy (January 2017).

See footnote 183 of the Motion and surrounding text - re: the Makoche Wowapi survey proposal referenced again in the Jan 2017 teleconference consultation - the NRC has never provided a clear and reasonable statement why the Makoche Wowapi survey proposal could not be implemented or why it is not a commercially or culturally reasonable request.

6) See footnote 112 and surrounding text of the Motion: this is not a case of inability to obtain information this is a case of unwillingness to meet the Tribe's requests in good faith and/or explain why meeting them is not possible. Rather than make demands that are from the start inconsistent with what the Tribe has been saying for years - multiple site visits, time to vet and involvement of elders in addition to tribal officials - paid for by the company, the NRC Staff could have offered multiple site visits during a specified time frame giving the Tribe a reasonable amount of time in between visits to vet the information with tribal elders and interested tribal members. Its failure to do so constitutes bad faith in the consultations and violates the trust responsibility.

7) RE: communications; since the NRC Staff had trouble reaching the OST THPO or President of the Tribe, why didn't NRC Staff try communicating with counsel of record for the Tribe, namely Jeff Parsons & Travis Stills? The failure of the NRC Staff to do so constitutes a failure of Good Faith Bargaining.

8) NRC Staff got stuck on the nature and extent of the survey - the parameters - and so failed to obtain the information required to be included in the FEIS, namely, the actual identification of tribal cultural properties and mitigation of impacts. This is the fault of NRC Staff and should not be used as an excuse to dismiss the contentions.

## **REQUEST FOR ORAL ARGUMENT ON THE MOTION**

Consolidated Intervenor hereby request oral argument on the Motion.

### **CONCLUSION**

Based on the foregoing, the NRC Staff has failed to carry its burden that there are no genuine issues of material fact and, therefore, Consolidated Intervenor request that the Board DENY the NRC Staff's Motion for Summary Disposition of Contentions 1A and 1B.

Dated this 1st day of September, 2017.

Respectfully submitted,

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/s/

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POWERTECH (USA) INC., ) Docket No. 40-9075-MLA  
)  
(Dewey-Burdock In Situ Uranium Recovery )  
Facility) )

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing “CONSOLIDATED INTERVENORS’ OPPOSITION TO MOTION FOR SUMMARY DISPOSITION OF CONTENTIONS 1A AND 1B” in the captioned proceeding were served via the NRC EIE on September 1, 2017, which to the best of my knowledge resulted in transmittal of same to those on the EIE Service List for the captioned proceeding, and via email to Mr. Tom Ballanco and Mr. Travis Stills.

\_\_\_\_\_/s/\_\_\_\_\_  
\_\_\_\_\_

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