Tuesday, November 9, 2021 9:30 A.M. USCA (Live-Stream)
Judges Wilkins, Rao, Jackson
Case#: 20-1489 Oglala Sioux Tribe and Aligning v. NRC (15 minutes per side)
Hearing Begins at 42:12 in the original recording provided by the D.C. Circuit Court of Appeals at https://www.youtube.com/watch?v=Im3mS9pq-PgM.

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Court Clerk 0:00
Oglala Sioux Tribe and Aligning for Responsible Mining Petitioner versus US nuclear regulatory commission and the United States of America. Mr. PARSONS for the petitioner Mr. Adler, for the respondent, Mr. Pugsley by the intervener.

Jeff Parsons 0:14
Thank you, may it please the Court My name is Jeff Parsons on behalf of petitioners Oglala Sioux Tribe and Aligning for Responsible Mining. This case at base is about the significant cultural resources including burials, prayer sites, and habitation sites, in addition to an important regional groundwater aquifers, their risk from significant impacts as a result of the Nuclear Regulatory Commission's failure in this case, to follow the procedural requirements of the National Environmental Policy Act, NEPA and the National Historic Preservation Act. With respect to the National Environmental Policy Act, the process the Nuclear Regulatory Commission used violated NEPA in at least three ways I'd like to highlight. The first is that the agency prepared and finalized their environmental impact statement in a closed adjudicatory proceeding, without involving the public, or other agencies as required for a lawful NEPA process. The second NEPA

violation derives from revisions that the agency made attempted here, particularly an analysis of the reported unavailability of Cultural Resources Information that did not comply with the explicit requirements of the CQ Council on Environmental Quality regulation.

Judge Jackson 2:03
I guess assuming that those regulations apply, in and there's an argument that has been made in this case that they don't so can you speak to that?

Jeff Parsons 2:13
That is there has been an argument to that effect, Your Honor. And there are several cases that address that. I think that a good starting point for that for that is the Council on Environmental Quality regulation at 40 CFR 15 100.3, which specifically says that these regulations are applicable to all federal agencies, there is a narrow exception or exemption contained in 15 100.3. A, which allows an agency to escape or sort of not comply strictly with the C Q regulations, to the extent that is inconsistent with their statutory obligations or statutory requirements. All right, but

Judge Jackson 3:05
I don't think we have a concession here that they didn't comply. So let's assume they did. Do that commission find that whether or not they apply, they done enough the board in having an evidentiary hearing and fleshing out the inability unavailable ability finding in that respect, and don't we have case law that indicates that a hearing can sometimes device

Jeff Parsons 3:31
there is case law that says a hearing can sometimes suffice, but those cases are extremely limited to situations where the information is already included, has already been done? That was a an example in the Natural Resources Defense Council case. The court discusses that and indicates that

that I think in that case, the court certainly expressed some cynicism some some doubt that that kind of process is lawful or wise. But in that case, that the court found that sending it back a remand in that case would it would have been utterly futile, I think is

Judge Jackson 4:21
what would it be me and do in this case? I mean, I understood that the unavailability finding related primarily to alleged recalcitrance by the tribe. The information was all about, or the problem, allegedly was the tribes refusal to adhere to its original agreement concerning the survey process and methodology. So if that's the case, I'm not sure what sending it back for some sort of a supplement whatnot is going to accomplish that the hearing was held in public. All of those issues were aired. And so what? why would why would we move we remain Why wouldn't it be futile and reduced?

Jeff Parsons 5:15
Thank you, Your Honor. But obviously, the tribe disputes some of those characterizations made by the agency with respect to the tribe, not staying true to its commitments throughout the tribe throughout this process has been ready, willing and able to aid and participate in the survey work. But that's the fact is that there has been no survey of Cultural Resources at this site, no competent cultural resources survey that was the finding the adjudicated finding of the atomic safety and licensing board in 2015, affirmed by the Commission in 2016. What the agency did was come back and and propose different survey methods they try participated the whole time. Repeatedly, the the new nuclear regulatory commission staff unilaterally withdrew from those discussions and those those processes, because effectively the tribe was not in a position to fund the process. The record shows that the agency placed the burden of complying with the law on the tribe, and the tribe was not willing or able to to fund the entire survey effort, as far

as what could be accomplished on remand is exactly that the survey ought to be accomplished.

Judge Jackson 6:49
No, I'm talking about for the violation that relates to the CQ alleged CQ regulations violation.

Jeff Parsons 6:59
Right. So that regulation at the time it's gone through some changes, but the same language appears was 40 CFR 1502 22. And that requires the agency in an environmental impact statement. To do four things have a statement of the unavailability a statement of the relevance of the incomplete information, a summary of existing credible evidence, so that never occurred, there was never a summary of what exists out there that the tribe brought forth affidavits and other examples of existing available information that the Nuclear Regulatory Commission staff never investigated, never asked, never looked into. Fourth, and importantly, is that the 1502 22 requires that the agency evolved in that same process of the 15th 20 1502 22 exemption or unavailability finding that it evaluate the impacts based on theoretical approaches or research methods accepted in the scientific community. So even where there is an unavailability finding, it still requires the agency to conduct an analysis based on information. It has theoretical approaches and research methods accepted in the scientific community, Mr. Carson about occurs to persons

Judge Rao 8:20
if we assume for a moment that we agreed with the NRC that the CQ regulations are not binding on the nuclear Nuclear Regulatory Commission. In that instance, what would be your argument under NEPA or the NRC regulations themselves? You just your claim, wholly depend on the CQ regulations binding the NRC?

Jeff Parsons 8:47
No. So if you start with the statute, the National Environmental Policy Act as interpreted by this court, in public employees for environmental responsibility versus Hopper, it's 827 F 3010 7710 81 to 1082. It talks about the statute requiring in the language of the court, the principal way that government informs the public of this decision making is by publishing environmental impact statements 42 USC 43322 C, agencies must prepare and make publicly available these statements. Now that's reflected in the Commission's own regulations, that 10 CFR 51 point 73 and 10 CFR 51.74.

Judge Rao 9:42
Your claims are not that there wasn't an environmental impact statement. It's more about how they should have been amended and updated and further specified. I mean, are those requirements from the statute or the NRC regs Is there support for that? Because NEPA is pretty, I mean, NEPA doesn't provide very much guidance at all about what how precisely its mandates are to be implemented.

Jeff Parsons 10:11
That's true. What it does require is is robust public involvement. And what you have in this case is instead of a publication of an environmental impact statement, including this unavailability determination or any analysis of cultural resources, you have essentially briefing to an administrative adjudicatory body in a closed process, the public was not allowed to participate in this process, in order to have been involved, parties would have had to petition as the tribe did, to intervene over 10 years ago, and meet what Commissioner Baron in his dissent on the commission ruling indicates or describes as a strict and fairly restrictive process for for getting involved and so that there was never an environmental impact statement that included this information. It was only in the briefing of the agency, sent to that admin-

istrative body. So there was no opportunity for the public, to sit to supply comments, no opportunity for the eight other agencies state or federal to review. And, and deal with that as required, again, by the NRC, his own regulations at 10 CFR 51 point 73. And 51.74 requires that other federal agencies, other state agencies, Indian tribes, the public have opportunity to provide those comments. And that's essentially the purpose of NEPA is this cross pollination, this idea that you put this information out to the public so that the agency can be well informed and perform what's the hallmark of NEPA, which is that hard look, analysis, which

Judge Jackson 11:58
what, what I'm trying to assess is the extent to which the tribes alleged recalcitrance to participate in the process that they insisted happen over a period of years. Why doesn't that provide important context for us in evaluating whether or not the agency has satisfied its obligations? So, you know, I understand that ordinarily, would be in a world in which the agency has the obligation to determine cultural resources, it has to go out on its own and look for the information. And if it can't find it, then perhaps per these, the regulations that you point to the FY two regulations or other regulations, they might have to make certain statements. But that's in the sort of ideal world, where we haven't had prolonged engagement with a tribe that says, the way in which you do this is you have to have an interview with the elders, you have to, you know, engage us in a certain way, etc. And then changed its mind about it and made it difficult to follow that process. Why can't and why shouldn't the court take into account? What actually happened here? When deciding whether the hearing were all the unavailability was fleshed out in deciding whether or not that was sufficient to satisfy any duty regarding cultural resources in this case?

Jeff Parsons 13:40
Yes, thank you. Yeah. I think the record reflects that, that the tribe was engaged in and cooperative. And it was the Nuclear Regulatory Commission staff, in fact, that repeatedly pulled the plug so to speak. For instance, if you look at the if you look at the, the sort of the last interaction between the parties in February, March of 2019, what you ended up with is a example where the tribe brought together all of its leaders, including leaders of other tribes, and had a meeting with the Nuclear Regulatory Commission staff and its consultant, and everyone agreed at that meeting, that things would go forward and this was going to be a productive relationship. And we would put together this methodology that NRC staff never actually put together literally a week later on March 1 2019, NRC staff sends a letter saying, we're done with this. We're not going to go forward with those processes. This is that those letters you can find it join appendix 18 Eight deviate is the NRCS.

Judge Jackson 15:03
Give us the site's 1888.

Jeff Parsons 15:06
And then the tribes letter, is it J A 1857?

Judge Jackson 15:11
And Do you dispute that prior to that the NRC staff had provided a proposal or methodology, and the tribe at one point had agreed to it.

Jeff Parsons 15:25
The tribe had agreed to a process there was never a methodology put forward on the table. That's the problem is that the the NRC said that, here's here's the process, we're going to follow that. And as a component of that the tribe and the NRC staff and its consultants will develop a methodology

for the site survey. And the problem came when the Nuclear Regulatory Commission staff failed to provide any methodology for the tribe to review or assess what it did was relied on the tribe, both to provide the methodology as well as methodology

Judge Jackson 16:08
as you're using it in this time.

Jeff Parsons 16:11
I'm talking about the actual process by which the, the people would walk the site and figure out what kinds of cultural resources are on there, what kind of transects you'd use, how far apart people would be, how many days you would go, what kind of area you would review. Once you acquire that information, what would be the process by which the tribe and interested parties, and the commission staff and its consultants would review and analyze that information. The methodology

Judge Jackson 16:47
was supposed to be generated by the contractor, in consultation with the tribes, I thought that was one of the five prongs of the original March proposal that the tribe agreed to that is a very fact specific case. So I may have gotten it wrong. But I thought there was a proposal that had five steps to it or pieces to it, including the hiring of a contractor, and that the contractor was supposed to propose the methodology. The tribe agreed and there was per diem or whatnot, for a certain number of tribe people to be involved, and it was all basically put together and then the tribe pulled out. Am I wrong about that?

Jeff Parsons 17:28
I think you are wrong about that. The tank, the NRC staff consultant never put together that methodology. In fact, the methodology that they had sug-

gested in 2018, was what would we call an open site approach, which was not a methodology, it was a sort of you, you all go out there and see what you can find. And then let us know. And the tribe had informed NRC from the very beginning that that was unacceptable. And that's what led to the original adjudication, finding that there was a violation of both NHPA in the National Environmental Policy Act. So the tribe was prepared in working with the, with the consultant, the NRC staff consultant, to prepare that methodology to work on that. And that's when the Nuclear Regulatory Commission staff on March 1 2019, withdrew, unilaterally withdrew entirely from the process, and decided it would rather litigate instead, instead of do the work on the ground. And unfortunately, that what you mentioned is the per diem and that and the cost that was associated with what the record reflects, as an honorarium, a $10,000 honorarium to the tribe. And that was supposed to in in the agency's view, compensate for all the effort the tribe was supposed to put forward. But what came came out eventually, or ultimately, was that the NRC staff was relying on the tribe and its personnel to actually conduct the site specific pedestrian that is walking survey of the site. And the, in the in the atomic safety licensing board hearing, that the math was was done during the hearing, and even the most basic survey of a site like that would require a minimum 30,000 persons. If

Judge Jackson 19:31
I go back, and I read the board's decision coming out of the hearing, am I going to see a different story about who's responsible for the unavailability? And if so, depth of the board's version, get some deference from the court as long as there's substantial evidence in the record to support what the Board concluded the facts are about how this thing transpired. Don't we have to give that difference?

Jeff Parsons 19:59

Well, I think What you'll find in the record is the board was was equivocal on and did not want to assign blame. And in fact said, it's not sure it's not clear who did who did what, or who is to blame for this. The fact is the survey never got done. And now the Nuclear Regulatory Commission staff wants to come in and try to assert unavailable unavailability of information using relying on the CQ regulation at 40 CFR 5222. So that was the basis of the the ultimate the last hearing in the case. And as we argue, doing that process is not an environmental impact statement. It's a closed adjudicatory hearing for the public was excluded entirely. If you look at the summary disposition, ruling that the atomic safety and licensing board made on the National Historic Preservation Act issues. The Board found that the, the NRC staff had complied at a bare minimum with the National Historic Preservation Act Consultation requirements. And that was based literally on one introductory face to face meeting and two exchanges of letters, none of which were substantive. And if you look at the requirements of the National Historic Preservation Act, they're very clear that the meaningful in good faith consultation must be for identification, evaluation, and mitigation of impacts for cultural resources.

Judge Wilkins 21:37
Mr. Parson, you're over your time. Thank you, you know, want to take a minute to wrap up or for given overview of any other issues. Please do so (inaudible).

Jeff Parsons 21:56
I think I think the papers are pretty well, I will just note that what you find in this case repeatedly is instead of conducting the required analysis under the National Environmental Policy Act or the National Historic Preservation Act, what the board the atomic safety licensing board affirmed by the Commission did was essentially add conditions to the license whenever there was a problem they couldn't resolve or an issue that wasn't analyzed.

What they would do is add a condition to the to the license. They did that with respect to cultural resources, saying we'll place a monitor for construction. No, no input from the tribe, no consultation on that mitigation requirement. With respect to the boreholes, the 1000s of abandoned unidentified boreholes at the site, they did the same thing. Here's a licensed condition saying the company should make its best efforts to find those bore holes, no analysis of that or how they're going to do that or what the impacts might be with respect to the transportation and disposal of radioactive waste. That was not analyzed in any depth in any NEPA document.

Judge Jackson 23:07
It actually was in the EIS. Mr. Parsons. I mean, I found places where they talk about waste disposal. So it seems odd that you would argue that it wasn't addressed,

Jeff Parsons 23:17
what they did is relied on the generic environmental impact statement, which talked about a generic route through the southern half of the United States. What you have in this case, is a specific proposal to dispose of the radioactive waste in white Mesa, Utah, which would require a much different transportation route across high rocky mountain passes. That was not addressed, and nor was the disposal or the issues at White Mesa, discussed in any way, shape or form. And in the EIS, it has

Judge Jackson 23:55
to do with any actual record evidence that links, the substantive changes in the license to the procedure deficiencies that you say occurred here. I understand your argument, which is, every time we see a licensed provision been added? We think that's because they didn't do enough in the EIS. But is there something that expressly makes that connection in the record?

Jeff Parsons 24:23
Well, the those conditions were added in the board rulings in the commission rulings, where they identify Yes, this is a gap. And so we're going to add these add these conditions as a result of those.

Judge Jackson 24:38
I mean, they don't say here, we know that NEPA requires us to say or evaluate a certain condition or or certain impact, and instead of doing that, we are going to add a condition. I didn't see that anywhere in the record.

Jeff Parsons 24:54
So that that's how the borehole condition arose. That's effectively how the tribe cultural resource monitoring condition arose. If you look at the last ruling of the atomic safety licensing board, they they find that the Programmatic Agreement doesn't provide effective mitigation and thus they will add that condition. And unfortunately, at the end of the process, adding conditions that attempt to resolve those gaps, doesn't provide the National Environmental Policy Act process does not provide the tribe with the required National Historic Preservation Act consultation, the NFPA specifically requires meaningful and good faith consultation on things like mitigation of impacts. And by adding a condition at the last minute with with no opportunity for comment or review by the tribe.

Judge Jackson 25:53
I'm really, really worried about the implications of your arguments in this regard, because it seems that you will be disincentivizing agencies from actually making licensing provisions that would be beneficial to the environment or to your clients or to whatever. But I don't it's an odd argument to suggest that because in the license, they've decided to have a monitor, for example, to mitigate against any future impacts in environmental setting

that just because they've done that, it somehow means that they didn't do sufficient work upfront, free license for NEPA.

Jeff Parsons 26:35
I don't I don't think that's what we're arguing, of course, any any license condition that would be beneficial to the tribes interests or protection environment, I think would be welcomed. But the problem is, is the NEPA process is such that these draft environmental impact statements, all this, all these, all this information was provided to the agency in comments on the draft, Environmental Impact Statement, there's nothing new that arose. And so all these issues were in front of the agency. So they went through the Draft Environmental Impact process, decided not to including you that decided to finalize that impact statement and then go to litigation in front of the board on what they thought the staff thought was a legally compliant environmental impact statement, the the Board found that it was not legally compliant. And instead of sending it back for the public review process that NEPA requires, they simply tack on these conditions. And so it's it's not that the conditions shouldn't be considered. It's that the National Environmental Policy Act and the National Historic Preservation Act provide these processes that are necessary to comply with the law. And they're right out of the statute. In NEPA 42 USC 43322 C, it says the EIS issues must be prepared before taking any federal agency action. That means before the license is issued, these things have to be addressed. Similarly, in the National Historic Preservation Act that 54 USC 306108, it talks about prior to the issuance of any license, the agency must take into account the effects of on cultural resources of any undertaking. So the statute Congress mandates that the agency do these processes in a certain way that

Judge Jackson 28:32
you're and your argument is that they're adding the licensing provisions, which, by the way, indicates that they were cognizant of these issues, be-

cause they added a license provision. So but you're suggesting that that is not compliant with NEPA, even though that you said they had the information before them in the draft process, which I think is the purpose of meeting new people, right to make sure that they're considering things so they had it. It may not have put it into the Final EIS, but they made it into a licensing provision. And you say there's a NEPA violation as a result,

Jeff Parsons 29:11
yes, by adding those conditions without any public review, without allowing any other agencies or the tribe to comment or or give input, it violates both the National Historic Preservation Act with respect to the cultural resources, as well as the National Environmental Policy.

Judge Wilkins 29:27
All right, any questions, Judge route your checks, and

right, thank you.

We'll give you a couple minutes for rebuttal. Mr. Parsons. We'll hear from Mr. Add.

James Adler 29:41
Thank you. Your Honors, may it please the Court My name is James Adler represent the Nuclear Regulatory Commission in the United States. They Oglala Sioux Tribe and other intervenors in this case, filed numerous adjudicatory contentions through the NRCS adjudicatory hearing process which produced The number of board and commission decisions is some of your honors questions have recognized. All of the issues petitioners raised in their briefs for disposition through these hearing decisions. But petitioners briefs and really again, the petitioner interior argument, largely ignore what the board and commission actually said in these decisions. And petitioners

also largely ignored the underlying record documents that the board and the Commission relied on in making these decisions. Petitioners instead proceed essentially as if the NRC through this extensive decade long hearing process, never spoke to any of these issues. In our C's hearing decisions, as our brief discusses reasonably disposition, these various contentions that are the subject of this court case, as petitioners failed to grapple with the NRCS reasoning and the underlying records support for it in any meaningful way, this court she denied a petition for review.

Judge Wilkins 31:00
Can you just address for me? If we were to find that 40 CFR 1502 21. This regulation is applicable here. Will you agree that with the petitioners contention, that it was not that that regulation was not complied with in this instance?

James Adler 31:29
No, Your Honor, the finding the the hearing process was that whether or not it it applies, I think the NRCS position is is not legally binding, but even if even if it were the NRC complied with it through the adjudicatory record, developed in the hearing process consistent with court decisions, and I think the the licensing board met through the various went through the various criteria of of that CQ regulation, found that that they'd been complied with, and didn't see a need to require an essentially redundant EIS supplement to say, here's what the hearing process already said, and all these publicly available hearing decisions. Further, there's no,

Judge Wilkins 32:15
but I guess, I guess that begs the question of so. So you're saying that you understand it's not literal compliance. But the non compliance wasn't prejudicial error seems to be what your position?

James Adler 32:35
Your Honor, I think there are two things. The first is the the judicial acceptance, as far the NRC is approach of using this public hearing process, in appropriate situations to supplement EIS. And here there was no additional cultural resource information to report in a supplement to the already completed EIS. So this would have been a supplement explaining why there is no environmental impact information, which isn't something that trips the the judicial standard for requiring a supplement underneath, which is new, insignificant environmental impact information that paints a seriously different picture of the environmental landscape there. It's the same picture. There's just some additional hearing decisions that are already publicly available that provide more information on why no additional environmental impact information.

Judge Jackson 33:29
And the regulation has more specifics to it than that. Right. It's not just I understand it, the regulation that Judge Wilkins was asking about was just the part about explain why this information is not available. But it seems to me that 40 CFR 15 Oh, 2.2 to be one has some pretty detailed requirements for what the agency is supposed to say. So is it your position that the record of the hearing evaluated the impacts of based on theoretical approaches or research methods generally accepted in the scientific community? That's one of the problems here?

James Adler 34:16
Or I think the the, the licensing boards 2019 decision went through these issues in the most detail. I think this has to be understood in the context of the information the NRC was trying to gather, which was information that really only the Oglala Sioux tribe can provide just the Oglala Sioux tribes views on whether there are any features at the site or any properties at the site that are of cultural importance to the Oglala Sioux Tribe and the Oglala

Sioux tribes position aggressively throughout the proceeding was that only the Oglala Sioux tribe can provide this information before discusses this several times and decisions? And so, it I mean, the fact that the NRC tried several times to get this information from the Oglala Sioux to arrange surveys to the people all Sioux Tribe, representatives out at the site to provide input. And they didn't. I mean, this is the this is the context in which we're operating here. I don't think there's scientific methodologies and things like that the investigator here. Yes.

Judge Rao 35:23
To that point. After, you know, the survey didn't take place, why did the commission not conduct all interviews with the tribe, about the cultural resources? I mean, isn't that a step that the commission could have taken even without the surveys, or should have arguably taken?

James Adler 35:45
Your honor and the Commission discussed as soon as 20 9 decision a bit? He interviews, I think we're seemed like the petitioners are arguing that the NRC should have just gone out and conducted these oral interviews, but that that would go outside of the usual government to government consultation approach used in in this cultural resource content. And the tribe had been pushing all along for NRC to ensure that consultations were on a government to government basis. So the idea that the NRC would just go out and directly interview tribe members, not through the Oglala Sioux Tribe. It just wasn't consistent with anything that had been contemplated in the proceeding to that point. And I think that the methods

Judge Rao 36:45
more about that in terms of the government, so you think the individual oral interviews would be inconsistent with a government to government ap-

proach? What about the NRC's obligation to, you know, to satisfy NEPA and the NHPA EA?

James Adler 37:05
Right.The oral interviews, I think were considered as part of the overall approach that would involve a survey and oral interviews to provide additional information on properties identified through the survey. I don't think they were contemplated by the NRC at any point is just a standalone activity that wouldn't be related to the survey. So this would have been a very significant change, in addition to, you know, seemingly being outside of the government to government process, because this was not something that the Oglala Sioux tribe had arranged. This was something the Oglala Sioux Tribe said, Hey, you didn't do this. You could have done this, but was always contemplated as part of the in some agreed upon survey approach and as a component to inform a results of that survey.

Judge Jackson 38:00
I mean, excuse me, Mr. Adler, can you speak to Mr. Parsons' characterization of why the negotiations broke down, he suggested that it was really the staff that gave up on the process.

James Adler 38:17
Your Honor, in the staffs determination, and when it decided to cease negotiations, it was based on the clear, wide and even expanding gulf between the parties, and the fact that now many years into this process of consulting with with tribes, and then the additional years of focus consultation with the Oglala Sioux Tribe, things didn't seem to be getting towards any sort of actual survey being conducted. In 2018. The Oglala Sioux tribe had had the the licensing board and the staff convinced that big Oglala Sioux Tribe was fine with the so called March 2018 approach that the NRC staff working with a contractor had developed this is a J 1840. In appendix. And then,

this was in the spring and and the winter and spring in 2018. Then in June, the tribe called a halt to the survey as it was it was getting in motion said we want to hold the meeting instead. And NRC staff complied, put off starting the survey, went to the meeting. And at that meeting, the tribe presented this quality services contractor proposal that the tribe that obtained that would have involved many more people much more time to survey the site. A much larger geographical area survey would have cost in the neighborhood of $2 million. And then said, All right now NRC staff, your job is to take this new proposal we've just given you at the 11th hour right before a survey, and figure out a way to fit this into whatever you think is a reasonable budget and the NRC staff, I think, very reasonably did not know what to do with that. And then this similar cycle, not quite the same, but repeated in 2019. When the NRC staffs contractor, developed a methodology for to as the February 19 or 2019 methodologies, the Joint Appendix 1864 to 1887, which the petitioners say was not a methodology, but it was it was a draft methodology with the with room for the tribe to provide input to the extent that it wanted to as far as well as for other Sioux tribes that were participating at the tribes request in this process to provide input. And at a meeting to discuss this as the board, chronicled in its 2019, LBP, 19 -10 decision that the response to this methodology was essentially you need to read wrap this whole thing, and here are things we want in it, which sounded very much like the $2 million quality services proposal 18.

Judge Jackson
We do have that LBP 19-10. And I tried to ask Mr. Parsons, whether or not the story that he was telling about who was responsible for the unavailability was something that he was bleeding from the various records or what, whether the board sort of set it up that way. I hear you suggesting, and I see, for example, on ja 897, that there is a recognition of the Oglala Sioux tribes, noncooperation and that that is really the reason for the unavailabili-

ty, am I miss reading this or was there was there a commission finding or finding that the tribe really was why we don't have this information?

James Adler
I think it's two things there is the defining you're discussing and that Section B. The Oglala Sioux Tribe, noncooperation being a reason for the information being unavailable. The other component was the board with the Commission, they were affirming of finding that the NRC staff had proposed reasonable methods for obtaining this information through a survey. And the Oglala Sioux tribe had rejected those so I think, you know, absent at the NRC staff had proposed nothing, or its proposals have not been found reasonable then then we might be in a different place. But the board and the Commission found that the NRC staff had made reasonable proposals to to carry out what is the petitioner says the NRCS responsibility to try to obtain this information, but those proposals for are rejected. Right, I'm assuming, my time is up. Are there any specific issues you'd like me to address? I'm happy to

Judge Wilkins
Judge Rao Judge Jackson? Alright, thank you. Can we hear from counsel for intervener?

Christopher Pugsley
Morning your honors, may it please the Court My name is Christopher Pugsley. And I'm here on behalf of the intervener in this case and the current NRC licensing power tech USA Inc. While there have been a few other contentions raised on appeal by petitioners, other than cultural resources, I think this Court would benefit from a quick overview of how NRC conducts its licensing and regulated regulatory oversight over ISR projects in situ recovery. First, the Atomic Energy Act and the Commission's implementing regulations dictate that a multi tiered approach must apply the ISR not can

but must set first you have to obtain a license. All that requires is an application that shows sufficient information to assess the ore body in the surrounding license site area to make sure that NRC his statutory mandate is satisfied, which is that the measures taken are adequately protective of public health and safety in the environment from potentially significant adverse impact as we discuss on page 10 of our brief. Once the license is issued, before the licensee can even start doing site specific construction, they must demonstrate to NRC that they have obtained all other relevant permits. Power tech is currently in possession of a underground injection control permit and an aquifer exemption under a statute. The petitioners don't even bring into question, which is the Safe Drinking Water Act. And currently for the state of South Dakota, the US Environmental Protection Agency retains jurisdiction to issue that and that was issued and it is now on appeal. But most importantly, with respect to groundwater, the aquifer exemption clear cut objective definition in the statute is the water in the aura zone cannot now nor ever in the future, serve as a source of public drinking water. Power tank is also required to get two permits from the state of South Dakota, which we have not yet obtained. So truth be told, We can't do anything at the site right now. Anyway, After the all the permits are obtained, the licensee is allowed to construct the site. But that's not the end of the regulatory oversight from NRC. And RC is responsible for these projects for conducting what is known as a pre operational inspection. And this goes directly to the byproduct material issue petitioners raise the groundwater issue that they raise and the mitigation measures issue they raise the cause, if the standard operating procedures prescribed by an RC for mitigation are not in place to NRCS standards. Or if a byproduct material contract is not in place, or if power Tech has an adequately defined what Petitioner seem to think is turning baseline groundwater data, but it's not. The actual groundwater data has to establish what is known under 10 CFR Part 40, Appendix A criterion slide V five on what's known as Commission approved background. So, because you cannot actually get commissioned

for background without installing a complete wellfield with the monitor well rain, because the monitor wells are designed to detect motor cold excursions. And those are early warning systems that mobile constituents have release to the monitor well. And then at that point, you have to cease operations and bring back those constituents to NRC satisfaction.

Judge Jackson
Mr. Pugsley, you seem to be talking about whether and to what extent any harms are actually going to occur. Middle construction is yet started. And here are all the other regulations that will control it. Do you have a view about whether or not the commission has violated the procedural regulations concerning the preparation of the environmental impact statement? Do you have any any view of that part of this case?

Christopher Pugsley
Yes, Your Honor. I did. I believe that at the NRC staff, through the concurrence of the licensing board, and the Commission did satisfy both statutes. Most importantly, with respect to the National Historic Preservation Act. The statute basically says you are required to consult, but you cannot force a tribe to come out to the site. That's not a prerequisite to approval of a license issuance with respect to the rest of the seis. These matters like groundwater, byproduct material waste management, as you put it earlier. They were the lay of the land, the standard format, the lay of the land is set up in what's section three of the supplemental EIS. And the impact analysis is in section is in chapter four. So that is pretty much it. And what I would like to say about ISR projects, is they are handled, regulated and developed pretty much with limited exceptions, the same way. And that's the reason why the NRC staff was able to develop a generic or programmatic Environmental Impact Statement, which they use to tear the supplemental EIS off on and hearing. NRC snap said when they developed it is an ac-

cepted C EQ approach to dealing with a programmatic environmental impact

Judge Jackson
state. So you don't see anything deficient about the primary generic one or the supplements in this case, given your experience and you say this happens all the time.

Christopher Pugsley
No, ma'am. I see no defects. And you kind of have to also take that there are two aspects to a license approval. One is the supplemental EIS. And then there is also an accompanying safety evaluation report that addresses the technical matter. that, then there is the totality of the administrative record, which is known as the record of decision. And by committee by case law by commission case law. licensing boards can amend a license or an EI s by affirmative judicial decision. And the reason I'm saying this is it happened the same way. In the NRDC vs NRC case involving strata energy. The board instituted a brand new license condition, which frankly, if you asked me I think was a bit unprecedented. But they said you have to plug all the abandoned boreholes before you proceed. Now, the way ISR works, Your Honor, is they do what are called pump tests. When a wellfield is fully installed, the pump tests are designed to detect whether there's communication between abandoned boreholes and the orange zone water. And every site that has ever been licensed in this country has multiple abandoned boreholes because you got to find the origin and delineate it. So I would say you're on the short answer to your question is the record of decision is complete. I just like to offer one thought on the cultural resources. Very little has been mentioned about the Programmatic Agreement. And as Mr. Parsons said, The Programmatic Agreement was added as a condition they added condition to it, which is fine. We empower tech as an argument with that. But the point is the Programmatic Agreement on the 36 CFR Part

800, is by far the most stringent approach to site development, monitoring cultural resources, the Advisory Council on Historic Preservation, and this is ad J 898. Sign the letter. And this was almost unprecedented. I'm not familiar with any other time they've ever done this. But they signed a letter to NRC that said, you have satisfied the reasonable and good faith standard under the NHPA. So and that is very, very important. And then there is a Yep, one more additional safeguard that Mr. PARSONS has failed to allude to on cultural resources, which is there is a standard clause, a condition I'm sorry, Your Honor, a condition put in every single ISR license, called an unanticipated discovery clause, which is, if you are say, hypothetically, excavating some material to lay a foundation for a processing plant, or you're drilling a well, and you find something at 910 feet down, the rule is you have to immediately stop what you're doing, and get qualified experts out there, to evaluate it, to find out whether there is mitigation available, such as fencing and off, which they do did at the church rock site in New Mexico for hydro resources. That case was evaluated by the 10th circuit. And then, you know, then you if you, but it doesn't preclude you from destroying a cultural resource, if it's not significant. So and I'm not saying that something we want to do, because we really don't. But I would say that that is an additional safeguard, put in and on cultural resources. Now, most importantly, on the Programmatic Agreement, we can forget about all the provisions associated with it for the time being, but it is the tribe did not sign and typically in the case of Programmatic Agreements or memoranda of agreements under 36 CFR Part 800. tribes don't sign so which is fine what Mr. PARSONS client is allowed once we start to develop the site that they love, Sue can just come out and say, Look, we want to be part of the process. And they're free to do so. And I mean, it goes to show you that NRC along with EPA in the state of South Dakota. This is a three way regulation of a property that is by far the most environmentally benign form of mining in this country. So, your honors, I apologize, I've significantly gone over my time. If

I may sum up or answer any other questions, you have to drill just checks and

Judge Wilkins
all right. Thank you, counsel. Thank you. Alright, counsel for Petitioner you we're out of time. We'll give you two minutes for rebuttal.

Jeff Parsons
Thank you, Your Honor. I appreciate that. I just want to address a couple things with respect to Mr. Adler's argument on behalf of the agency, there was no bar to proceeding with conducting oral interviews, the tribe encouraged that. And in fact, 1502 22 or 21, there was some confusion just because the regs have been changed since it was 22, when all relevant matters in this case occur. So that's what we've been referring to it's 21 now does require additional information to be all existing information to be accounted for and, and as was laid out, in the record, there are multiple declarations from Lakota people who indicate that they have information about the site and would have been willing to provide that. It's not that the Oglala Sioux Tribe government is the keeper of all cultural resources information of the Lakota people. It's that the statute that National Historic Preservation Act requires consultation with the tribes. So there's certainly information, additional information out there that NRC could have and should have

Judge Rao
less. I think the NRC, his position was not that there might not be such information, but that seeking such information, individual interviews would upset the government to government relationship or consultation.

Jeff Parsons
I don't think there's any basis for that anywhere in the record, the government, the government, or the consultation issues derived from the National

Historic Preservation Act. What we're talking about is the National Environmental Policy Act is the 1502 22 requirements. And as you see in Joint Appendix 1709, and forward, there are multitudes of people with relevant information who are ready, willing and able to discuss with the agency, I just want to address the Mr. Pugs, Lee's reference to the Advisory Council on Historic Preservation letter and the Programmatic Agreement, both of those documents were finalized in 2014, prior to the atomic safety licensing board finding that neither NHPA nor the National Environmental Policy Act had been complied with. So those do not somehow rehabilitate the the statutory violations at this point, those were well in the record prior. And in fact, if you look at the Programmatic Agreement, it is predicated one of the predicates prerequisites for that document is that it's a finding that there have been adequate cultural resource analysis or surveys conducted. And that was found to be not true, adjudicated, found to be not true by the board as a four as affirmed.

Judge Jackson
Mr. Carson, join us. Can you point us in the record to the place in which the tribe encouraged direct interviews without a site survey?

Jeff Parsons
So the we did that in our in our briefing? Also, if you I think one of the best places to look are the letters that were exchanged between an RC and and the tribe, the tribes letter, again, at J. A 1857, I think is a good example of the tribe explaining how it's been consistent throughout and how it's been trying to require the agencies to come through and participate with the tribe and developing the methodology.

Judge Jackson
Over there. Mr. Parsons, my last question is yet it appears that the board and it's very lengthy recitation of what happened, according to it. Talking

about the final decision after the hearing At, gosh, I don't even know where I am J eight, in the eight hundreds and 900 talks about the facts in a way that seems inconsistent with the inferences that you would have us draw from things like the letters. And I'm wondering what we as the appellate body, what we can do, in terms of looking at the facts, partly to some extent, to give deference to what the Board found, where the facts about who cooperated, didn't cooperate, whether it was reasonable or unreasonable to interview witnesses or the like, whether there was a valid methodology proposed by the staff. I mean, it seems like all of that is covered in this lengthy determination of the board then involves a lot of facts that ordinarily give deference to an agency in its determinations of fact, particularly after a lengthy evidentiary hearing.

Jeff Parsons
Thank Your Honor, I would say that the the facts are that any findings with respect to who, who was at fault for pulling back on the cultural resources surveys is is largely irrelevant. On the law, the law applies, it's rather it's the Nuclear Regulatory Commission's obligation to comply with the National Environmental Policy Act. If the if the commission felt like the tribe was not going to participate, then it had other avenues to pursue and was legally obligated to do so it's the it's the agency's responsibility to meaningfully consult with the tribe in good faith under the National Historic Preservation Act. And it's the agency's responsibility to comply with its environmental review responsibilities for cultural resources. And as we quoted in our race a couple times, the ACC cannot push those obligations off on to third parties. And that's basically what's occurring in this case is that the NRC is saying, Well, if the tribe isn't playing the way we'd like them to play, then we don't have to comply with our statutory responsibilities. And that's just not what the law says. Again, we dispute that the tribe was was somehow recalcitrant. I think those in particular those interactions in February and March of 2019, that I alluded to, in the record at 1888, J 1888. In 1857, do shed con-

siderable light on that issue, so I would encourage a review of those interactions.

Judge Wilkins
All right, thank you. We have your argument, we'll take the case under advisement.

Court Clerk
This Honorable court is now adjourned until Wednesday, November 10, at 9:30am

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