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Defenders of the Black Hills
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Jan. 4, 2013

Cindy Bladey, Chief, Rules, Announcements and Directives Branch
Division of Administrative Services
Office of Administration, Mailstop TWB-05-B01M
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001

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RULES AND DIRECTIVES
BRANCH
USNRC

RE: Docket NRC-2012-0277, Dewey-Burdock Project SEIS, Edgemont, SD
Report No. NUREG - 1910 Supplement 4

Dear Ms. Bladey:

The following are our comments on Report No. NUREG - 1910 Supplement 4, Docket NRC-2012-0277, Dewey-Burdock Project SEIS, Edgemont, SD, submitted by Powertech (USA) Inc.

We have been following this project since the very beginning of their application processes in South Dakota, and have attended and participated at the state regulatory meetings. We have also researched and presented information regarding this company and the processes to acquire the permits necessary for the success of this endeavor.

The Executive Summary on page xxvii states:

"The Atomic Energy Act of 1954 (AEA), as amended by the Uranium Mill Tailings Radiation Control Act of 1978, authorizes NRC to issue licenses for the possession and use of source and material and by product material. These statutes require NRC to license facilities, including ISR operations, in accordance with NRC regulatory requirements to protect public health and safety from radiological hazards."

"This draft SEIS was prepared in cooperation with the U.S. Bureau of Land Management (BLM). BLM has requested to be and is acting as a cooperating agency with NRC to evaluate the impacts of Powertech's Plan of Operations (POO) in accordance with the National Memorandum of Understanding with NRC.... Under 43 CFR Part 3809, BLM is required to review the environmental impacts of federal actions on surface lands to assure that there is no "unnecessary or undue degradation of public lands."

First, there is the question of the legality of the authority of the Nuclear Regulatory Agency and the Bureau of Land Management as well as any other agencies of the United States to be able to authorize a license or grant a permit in the geographic region that includes all of western South Dakota and parts of northwestern Nebraska, northeastern Wyoming, southeastern Montana, and southwestern North Dakota. This entire geographic area continues to be the legal land holding of the Great Sioux Nation.

Article 12 of the 1868 Fort Laramie Treaty could only be changed with three-fourths approval of all adult males of the Great Sioux Nation. This never has happened to this day. Furthermore, as recently as 2009, an American Federal court decision upheld and enforced Article One of the Articles of the 1868 Fort Laramie Treaty in the Lavetta Elk versus the United States case. The Federal court decision to uphold the enforcement of one Article of the Treaty is additional proof of the validity of the entire document.

The land where the Dewey-Burdock Project is planned to be operated is located within the boundaries specifically outlined in Article Two of the 1868 Fort Laramie Treaty which states the land so designated in the Treaty will be for the “undisturbed use and occupation of the Indians.”

A treaty made between the United States and another nation or nations, such as the Great Sioux Nation, is protected under Article VI (2) of the US Constitution, and the March 3rd Act of 1871 [U.S. Statues at Large, 16:566].

Article VI (2) of the Constitution of the United States declares:

“This Constitution, and the Laws of the United States which shall be made in pursuance thereof; **and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land;** and the judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.” (Author’s emphasis in bold.)

This portion of the Constitution of the United States has never been changed.

The March 3rd Act of 1871 states:

Provided, further, That nothing herein contained shall be construed to **invalidate or impair the obligation of any treaty heretofore lawfully made** and ratified with any such Indian nation or tribe... (Author’s emphasis in bold.)

The March 3rd Act of 1871 was enacted after the 1868 Fort Laramie Treaty and reaffirmed the obligations assumed by the United States. Therefore, the immigration by American citizens into the portions of the states previously named was unlawful and illegal, and constituted trespass into the Territory of the Great Sioux Nation. Forcing the Indians into Prisoner of War camps, currently called American Indian Reservations, still did not invalidate the Treaty. The federal government lied to their own American people.

Furthermore, not only is the Dewey-Burdock area located within the confines of the Fort Laramie Treaty of 1868, but the 1980 Supreme Court decision (*United States v. Sioux Nation of Indians*, 448 U.S. 371 (1980)), which falls under a Fifth Amendment taking from American citizens, also reiterates the fact that the land still belongs to the Great Sioux Nation. Until this issue of legal land title is resolved, no actions of any kind can be taken in this geographic area without the express permission of the members of the Great Sioux Nation. For any federal employee or agency to do otherwise is a violation of their oath of office to uphold the Constitution of the United States and federal law.

By submitting our comments does not mean that we are relinquishing or waiving our position regarding the legality of the 1868 Fort Laramie Treaty. We offer our remarks for the protection of the environment and human beings. We continue to hope that there are American citizens and federal agencies with the integrity and ethics to uphold and support the Constitution of the United States.

Surface Waters and Wetlands and Groundwater

The Dewey Burdock area is within the recharge area of many aquifers that traverse the Region, and also a river, the Cheyenne River, that eventually empties into the Missouri River. To allow any kind of pollution into these water systems will eventually contaminate the entire system which serves the entire Upper Midwest Region. The water systems must be protected and preserved.

Water is the link and essential in all ecosystems. Because the land area in the Dewey Burdock is usually very dry, consequently very fragile, the flora and fauna living here have adapted to this ecology. It is because of the sparcity of water, that all water in this Region is precious, and any adverse effects on the water, any tiny amount of pollution to the ground or surface water, will harm all living organisms.

Adverse effects would include well drilling to any depth, and open-pit mining through which runoff water pours onto surface areas, or seepage into the ground water. Any type of pollution to the water, both surface and ground, will have an irreversible impact not just on the local ecosystem, but in this case, pollution will have an impact on the ecosystems of the entire state and greater region.

Although the Dewey Burdock area plays a small part in the recharge area of many aquifers, these aquifers have an influence on the entire state of South Dakota. As stated on page 299 of *Regional Ground-Water Flow Concepts in the United States: Historical Perspective* by J.D. Bredehoeft, W. Back, BB. Hanshaw, Geological Society of America, Special Paper 189, 1982:

“The Dakota aquifer in South Dakota is the classic artesian aquifer. Many modern ideas concerning artesian aquifers stem from M.H. Darton's investigation of the Dakota aquifer during the 1890s and early 1900s. Darton recognized that the recharge to the system occurred in the Black Hills in western South Dakota while the major discharge was in eastern South Dakota, 300-500 km to the east.”

Darton and his colleague, J.E. Todd, mapped the groundwater geology in the area

along the James River in eastern South Dakota from Nebraska to North Dakota. While Todd covered eastern South Dakota, Darton mapped the entire Black Hills.

"Darton (1909) summarized his Dakota investigations in USGS Water Supply Paper 227 in which he pointed out that potentials within the Dakota system are controlled by the elevation of the sandstone outcrops in the Black Hills.

"The evidence of this pressure, as found in many wells in eastern South Dakota, is conclusive that the water flows underground for many hundreds of miles. Such pressures can be explained only by the hydrostatic influence of a column of water extending to a high altitude on the west. If it were not for the outflow of the water to the east and south the initial head which the waters derive from the high lands of the intake zone would continue under the entire region, but owing to this leakage the head is not maintained, and there is a gradual diminution toward the east known as "hydraulic grade," a slope sustained by the friction of the water in its passage through the strata."

Further studies reiterate the fact that the groundwater in eastern South Dakota is recharged by the Madison aquifer in the Black Hills. The Madison aquifer is one of the water sources of many population centers in western South Dakota as well.

"Swenson (1968) reexamined the ability of the Dakota system, under existing hydraulic gradients, to transmit the quantity of water known to be produced in eastern South Dakota...the bulk of Dakota water in eastern South Dakota is recharged from these underlying Madison group limestones. The suggestion that the Dakota is recharged by water from the Madison group limestones had been stated previously by Dyer and Geohring (1965) in an open-file study of the Dakota aquifer in southeastern South Dakota."

Of particular importance is the fact that the Madison formation is overlain by the Inyan Kara group which contains the formations, Lakota and Fall River, which are planned to be used by Powertech for their In Situ Recovery mining of uranium. Furthermore, a report by the Tennessee Valley Authority, Norris (USA). Div. Of Water Resources, 1980 May 01, states:

"Separate aquifer tests were conducted in two aquifers which may be affected by TVA's proposed uranium mining operation near Burdock, South Dakota. In April 1979, a constant-discharge test was conducted in the Chilson member of the Lakota formation which comprises the principal ore body and an aquifer of regional importance. The hydraulic properties of both the Lakota (Chilson) aquifer and the overlying Fuson shale aquitard were determined. A second test was conducted in July 1979 in the Fall River aquifer which overlies the Fuson. The hydraulic characteristics of the Fall River aquifer and a second estimate of the Fuson aquitard properties were obtained from the test. The test results indicate that the two aquifers are hydrologically connected via: (1) general leakage through the Fuson shale; and (2) direct pathways: probably in the form of numerous old (pre-TVA) unplugged exploration boreholes..."

As stated in Regional Ground-Water Flow Concepts in the United States: Historical Perspective by J.D. Bredehoeft, W. Back, BB. Hanshaw, Geological Society of America, Special Paper 189, 1982, Darton states,

“Another factor which undoubtedly somewhat influences the hydraulic grade in the Great Plains region is a certain but unknown amount of general leakage through the so-called impermeable strata, especially when under great pressure.”

This raises the question that any disturbance to the groundwater in the Dewey Burdock area, no matter how small, will have an eventual effect on the entire state of South Dakota. There are currently more than 4,000 uranium exploratory wells that were drilled more than 40 years ago and allowed for cross contamination of the aquifers. Any disturbance of radioactive materials will have an effect lasting hundreds of thousands of years. For this reason alone, Powertech should not be granted a license to do In Situ Recovery mining for uranium in the Dewey Burdock area.

In addition, the ground water velocities of the Madison Aquifer are approximately 1,000 feet per day due to a well-developed fracture system as stated in a report entitled Vulnerability (Risk) Mapping of the Madison Aquifer near Rapid City, South Dakota, by Scott L. Miller, Dr. Arden D. Davis, and Dr. Alvis L. Lisenbee.

“About 90% of South Dakota's population relies on ground water from aquifers such as the Madison for drinking water supplies. The Madison aquifer is vitally important because it contains approximately 66 million acre-feet of drinking-quality water in South Dakota. Cities such as Rapid City use water from wells drilled into the Madison aquifer... The water in the Madison will become more important in the future, as South Dakota's population grows and more people require water from scarce and dwindling supplies.”

From Jan. 2000 to Jan. 2008, the City of Rapid City and the US Geological Survey conducted a study of the aquifer levels of the Madison Aquifer on the western edge of Rapid City. The study shows that the Madison Aquifer dropped a total of 30 feet. Was this due to increased use as the population of Rapid City increased? Was it due to increasing use of the Dakota Aquifer in Eastern South Dakota as the Madison is the recharge area for the Dakota Aquifer? Since 2008 there has only been one reasonably wet year and that was 2010. In 2011, 2012, and continuing into 2013, western South Dakota is in an exceptionally severe drought. More studies of the levels of the Madison Aquifer need to be completed. Until the Aquifer is once more replenished, no new large draw downs of water such as those planned by the Powertech Uranium ISR project, should be allowed. The human population of Rapid City and the surrounding area, and the populations in eastern South Dakota rely almost solely on the Madison Aquifer for their domestic use.

“Wellhead protection emphasizes the prevention of drinking water contamination as a principal goal, rather than relying on correction of contamination once it occurs...”

The previous statement is from the U.S. Environmental Protection Agency. As most of the water use in western and much of eastern South Dakota, and particularly in the Dewey Burdock area, comes from wells tapped into the groundwater, it would behoove the protection of all groundwater. Powertech cannot protect the Madison aquifer from contamination, and the draw downs of water from the Madison for their ISR project will only make an already precarious situation worse. Drinking water for the human population in South Dakota will be threatened. Therefore, the Nuclear Regulatory Commission should not issue a license for the Dewey-Burdock ISR Project.

Ecological Resources

The Dewey Burdock geographic area is already ecologically fragile due to the aridity of the area. Once it is adversely affected, it could not return to its former ecological role in the reasonably foreseeable future. With the current drought situation, the area will become even more fragile, and any flora or fauna in the area will become very threatened.

The area is home to at least one small family of bald eagles which is listed in South Dakota's threatened or endangered species. The bald eagles' survival in the United States has been precarious for decades, and to destroy even one nest is to promote the extinction of this species that is a symbol of the United States. A place where a naturally occurring nest is found is very unique and must be protected and preserved as well as the food source area surrounding the nesting site.

Agricultural operations such as cattle grazing, usually will not have an adverse effect on nesting birds, but any kind of development that includes machinery, prolonged human presence, or disturbance and removal of the food source, or forage area, will contribute to the destruction of the nesting site and eradicate future progeny which is a violation of federal law. A federal law, the Bald Eagle Protection Act specifically states in the Selected Definitions category that the word 'take' includes "molest or disturb" and includes the molesting or disturbing of any nest or egg. Disturbance of the forage area so the parent eagles could not adequately feed their young would also mean a disturbance of the nest.

In a letter dated Oct. 17, 2008, to the SD Department of Environment and Natural Resources, the South Dakota Game, Fish, and Parks stated that no activity should be conducted on the land in the Dewey Burdock area that is planned to be used by Powertech, for seven months per year, between Feb. 1st to Aug. 31st, "...to avoid disruption of bald eagle activity at the nest" and also because of a nearby redbill hawk nest.

Furthermore, the water and forage available for the eagles will be polluted with the radioactivity from dust, the holding ponds, and any seepage into the surrounding soil. Small rodents, part of the nourishment of eagles, will be contaminated and the contamination passed on to the offspring as well as the parent eagles.

This does not address other threatened or endangered species such as the long-billed curlew (*Numenius americanus*), the golden eagle (*Aquila chrysaetos*), merlin (*Falco columbarius*), Cooper's hawk (*Accipiter cooperii*), American white pelican (*Pelicanus*

erythrorhynchos), long-eared owl (*Asio otus*) and the whooping crane (*Grus Americana*).

The Migratory Bird Treaty Act of 1918 as amended further addresses disturbance of migratory bird areas of which most of the named species are migratory birds.

“Public Law 95-616 also ratified a treaty with the Soviet Union specifying that both nations will take measures to protect identified ecosystems of special importance to migratory birds against pollution, detrimental alterations, and other environmental degradations.”

The fact that the Dewey Burdock area has enough food and water to sustain a breeding bald eagle nest when South Dakota recognizes the threatened and endangered status of the bald eagle should be enough to stop any mining or other human activity. The fact that other threatened and endangered species can also be found in this same area gives further credence to the need to protect and preserve this special and unique environment that they all need to continue to survive. These kinds of places are becoming more and more threatened with the increasing human population. The survival of what is remaining of these species depends on long range foresight and planning by human beings. Therefore, Powertech’s application for a license to conduct In Situ Recovery mining in the Dewey-Burdock area needs to be denied.

Historic and Cultural Resources

Archaeological and cultural resources are not necessarily mitigatable. The protection of Archaeological and cultural resources which have no way of being protected from project activities far outweigh safety issues. These archaeological resources are irreplaceable, exceptional, and unique and can be found no where else in the world. Nor can they be replaced. Their spiritual importance to many Native American nations is incalculable.

The Aug. 21, 2008, Powertech (USA) Inc. submittal of a “Request for Determination of Special, Exceptional, Critical, or Unique Lands and Intent to Operate” to the state of South Dakota and which is available on the website of the South Dakota Department of Environment and Natural Resources, states that a Level III Cultural Resources Evaluation was conducted by the Archeology Laboratory, Augustana College, Sioux Falls, SD.

“The small number of Euroamerican sites documented was not unanticipated given the peripheral nature of the project area in relation to the Black Hills proper. The disparity existing between the number of historic [since 1874 - author’s note] and prehistoric sites observed in the project area is also not unexpected; however, **the sheer volume of sites documented in the area is noteworthy.** [Author’s emphasis] The land evaluated as part of the Level III cultural resources evaluation has an average site density of approximately 1 site per 8.1 acres. Even greater site densities were reported in 2000 during the investigation of immediately adjacent land parcels for the Dacotah Cement/land exchange [Winham et al., 2001].”

This information given by Powertech given by the applicants own cultural experts shows that this specific area is very exceptional in the number of antiquities that are located there. Many other places in the world prize their areas of ancient treasures that are irreplaceable and protect and preserve them to their best ability. This land area proposed to be mined by Powertech is just such a rare treasure and must be protected and preserved.

According to Sioux oral tradition, the area being nominated was used as a burial grounds by the Sioux and other Indigenous nations in North America. It contains not only burial sites, but prayer sites, and dwelling sites as well. Powertech (USA) Inc. was very cognizant of this information and had access to tribal sources at the SD Board of Minerals Hearing on the Special, Exceptional, Critical and Unique aspects of the project area. Testimony was given by many tribal experts including an archaeologist, a Tribal Historic Preservation Officer, and elders.

Cultural resources once destroyed cannot be replaced. Powertech's contention that they could mitigate any destruction of cultural resources is false and misleading as they clearly understood the Sioux peoples' position. Their actions beg the question of what else has been excluded or changed in the License Application. The Nuclear Regulatory Commission should deny the license based on this falsehood by Powertech.

In February, 2008, in their report to the United Nations Committee on the Elimination of Racial Discrimination, the United States delegation states on page 110, Paragraph 346:

"Moreover, the special laws and executive orders relating to Indian tribes... include numerous programs designed to help preserve and protect the cultural and ethnic identities of Indian tribes. For example:

- The Native American Graves Protection and Repatriation Act (NAGPRA) - a process for transferring possession and control of human remains, funerary objects, sacred objects, and objects of cultural patrimony to culturally affiliated Indian tribes and individual Indians and Native Hawaiian organizations;

- The Archaeological Resources Protection Act - a process for protecting material remains of human life or activities that are at least 100 years of age and of archaeological interest;

- The American Indian Religions Freedom Act - requiring federal agencies to evaluate their policies and procedures, in consultation with native traditional religious leaders, in order to determine appropriate changes necessary to protect and preserve native religious cultural rights and practices;...

- The National Historic Preservation Act - a process for protecting historic and prehistoric archaeological sites:..."

The area which Powertech plans on disturbing for their mining processes are "archeological resources that are at least 100 years of age and of archaeological

interest." The Sioux people from the Pine Ridge and other South Dakota reservations were forbidden to leave the reservations after 1889 so the burial sites that are there are more than 100 years of age. These burial sites meet the criteria for protection under the federal Archaeological Resources Protection Act (ARPA) even though the area is not federal land but the project is a federal undertaking as it must be licensed by a federal agency, the Nuclear Regulatory Commission, and also overseen by the Bureau of Land Management, another federal agency.

Near these grave sites is a very large sacred site, a prayer site. This site cannot be moved or mitigated and would be protected not only by ARPA but also by the American Indian Religious Freedom Act. As there are federal lands located within the area and adjacent to the area, and as the process of the Nuclear Regulatory Commission is federal with regard to obtaining a permit for mining of uranium, this law will apply to the cultural resources in this entire area. Other prayer sites are probably in the area and would also be protected by ARPA and the AIRFA as the Black Hills was used for tens of thousands of years by many Indigenous nations for prayer and funerary reasons. This specific area planned to be used by Powertech is an old burial ground.

For the above reasons, the Dewey-Burdock area is under the auspices and protection of federal laws: The Native American Graves Protection and Repatriation Act (NAGPRA); the Archaeological Resources Protection Act (ARPA); the American Indian Religious Freedom Act (AIRFA); and the National Historic Preservation Act (NHPA).

Powertech's application for a license to conduct In Situ Recovery mining in the Dewey Burdock Project Area must be denied due to the destruction of innumerable Traditional Cultural Properties which fall under the protection of the above named federal laws.

Respectfully submitted by

A handwritten signature in cursive script that reads "Charmaine White Face".

Charmaine White Face, Coordinator