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

In the Matter of POWERTECH (USA), INC.,. (Dewey-Burdock In Situ Uranium Recovery Facility)	Docket No. 40-0975-MLA ASLBP No. 10-898-02-MLA-BD01 April 11, 2014

CONSOLIDATED INTERVENORS' CONSOLIDATED REPLY TO APPLICANT AND NRC STAFF ANSWERS TO CONTENTIONS ON FINAL SUPPLEMENTAL ENVIRONMENTAL IMPACT STATEMENT

Consolidated Intervenors hereby submit this consolidated reply to the Response of Applicant POWERTECH (USA), INC. ("Applicant") dated April 4, 2014 (the "Applicant Response"), and to the Response of the NRC Staff dated April 4, 2014 (the "NRC Staff Response").

I. INTRODUCTION

On February 25, 2009, Applicant submitted its first attempt at preparing a license application, which the NRC Staff found inadequate. As a result, on June 19, 2009, Applicant voluntarily withdrew its license application for a re-do. On August 10, 2009, Applicant re-submitted its license application with some corrections and additional information requested by the NRC Staff in its rejection. NRC Staff accepted the second license application and docketed it on October 2, 2009.[1]

On January 15, 2010, counsel for Consolidated Intervenors (at that time in the position of being Consolidated Petitioners) submitted a request for access to SUNSI documentation which was opposed by both Applicant and the NRC Staff and was rejected

[1] Capitalized terms not defined herein have the meanings assigned in NRC Regulations and, if appropriate, in second license application.

by the Board and the Commission. This effectively has excluded Consolidated Intervenors from the entire process of ascertaining and evaluating cultural resources that are inside the Project Area.

On November 26, 2012, the NRC Staff issued the DSEIS. On January 25, 2013, Consolidated Intervenors and the OST Tribe, as Intervenor, filed contentions related to the DSEIS, which were opposed by the Applicant and the NRC Staff and were ruled on by the Board on July 22, 2013.

On January 29, 2014, the NRC Staff issued the FSEIS, which did not address the issues upon which the previously admitted contentions were based. Accordingly, on March 17, 2014, the Consolidated Intervenors and the OST Tribe each submitted contentions based on the FSEIS that were substantially the same as the contentions previously admitted based on the DSEIS.

II. DISCUSSION

1. The FSEIS Contentions Are Not Late-Filed Because They Were Filed Pursuant to the Board's Order in This Proceeding. Attempts to characterize the FSEIS contentions as 'late-filed' are a blatant attempt to dismiss the existing contentions without a proper motion for summary disposition or the hearing which Consolidated Intervenors have been promised. The Board has ordered that Consolidated Intervenors were entitled to file FSEIS contentions by March 17, 2014. Had such contentions been filed on March 18, 2014 or later they would be late-filed contentions.

> Consolidated Intervenors understand that the Board should not be made to
>
> sift through the administrative docket to determine if information is new and how it is materially different from information previously available. *Cf Hydro*

> *Resources, Inc.* (P.O. Box 15910, Rio Rancho, NM 87174), CLI-01-04, 53 NRC 31, 46 (2001) ("The Commission should not be expected to sift unaided through large swaths of earlier briefs filed before the Presiding Officer in order to piece together and discern the intervenors' particular concerns or the grounds for their claims."). Applicant Response at 5.

Consolidated Intervenors submit that neither should the parties be required to sift through large swaths of the administrative docket. This was specifically discussed with the Board and the NRC Staff and Applicant and the understanding of Consolidated Intervenors is that the Board's order has precedence and that the schedule set by the Board under its authority to manage the procedures and proceeding in an orderly fashion makes it so that any contentions filed pursuant to the Board's order cannot be deemed to be late-filed. This is why the parties in this proceeding have agreed to a process whereby the Intervenors have 30 days from actual receipt of a document or hearing file update, or such other date set by the Board, within which to file new contentions. Of course, if Intervenors seek to file a new contention after such 30 day period or after a date set by the Board, good cause and the other requirements for late-filed contentions must be proferred.

2. Applicant's Arguments Are Crafty and Specious. According to Applicant, the failure of the NRC Staff to address in the FSEIS the issues raised by Intervenors, upon which the previously admitted contentions are based, that were in the application and the DSEIS become grounds for denying Consolidated Intervenors' FSEIS contentions because they are not new. Well, they are not new because the FSEIS did not address the issues. Nothing about the sham of a Section 106 process that has been attempted in this matter satisfies the cultural resources issues upon which Consolidated Intervenors' previously admitted contentions were based. The purported 'consultation' excluded Consolidated Intervenors, and was so truncated and controlled by Applicant and

the NRC Staff as to offend and disrespect the Tribes that were involved. That is why Oglala Sioux Tribe and Standing Rock Sioux Tribe OFFICIALS (not just random tribal members but the duly elected President of OST and the appointed THPO of SRST) have formally objected in writing about the Programmatic Agreement and the Section 106 process. See Applicant Response at page 9 referring to elected and appointed tribal officials as "Tribal members" in an attempt to degrade the importance of official Tribal communications of dissatisfaction and complaint with the Section 106 process in this case.

As part of a continuing onslaught of disrespect and violations of trust duty and Nation-to-Nation obligations owed to the Tribes and the tribal members, the Applicant refers to the tribal officers referred to above as merely 'tribal members.' When will the disrespect stop? This is the question on the minds of those Consolidated Intervenors who are natives.

There is no doubt that the trust responsibility and applicable Executive Orders require a meaningful consultation. Much more than Applicant suggests at page 9 of its Response, which is that NRC Staff need only make some 'reasonable good faith effort' (in its own eyes) to consult with the Tribes. Applicant ignores the trust responsibility.

There was violent warfare between the Great Sioux Nation and the United States of America which killed many people on each side. Although the United States might have been able to overpower the Sioux in warfare, victory would have been very costly in human and economic terms. In an effort to avoid those costs, the United States entered into two significant peace treaties with the Sioux, the 1851 and 1868 Ft. Laramie Treaties. The Ft. Laramie Treaties remain in effect.[2] By the 1870s, the government had successfully placed

[2] Except that Article 2 of the 1868 Treaty was modified and Article 16 of the 1868 Treaty was expressly abrogated by Article I of the Act of Feb. 28, 1877, 19 Stat. 254, 255 (1877).

Native Americans in a state of coerced dependency' on the federal government." U.S. v. Kagama, 118 U.S. 375, 384-85 (1886); U.S. v. Sandoval, 231 U.S. 28 (1913).

Federal law applies to Indian tribe issues to the exclusion of state law. See US Const. Art. I, Sect. 8 (re: Congressional power to regulate commerce with the Indian tribes); US Const., Art. II, Sect. 2, cl. 2 (treaty clause); Worcester v. Georgia, 31 US 515 (1832). State laws "can have no force" on an Indian reservation without the express consent of Congress. Worcester at 561.

Federal Indian Law includes the Trust Doctrine, the Reserved Rights Doctrine, Federal Indian Treaty Law, Rights of Consultation, the Winters Doctrine, Hunting and Fishing Rights, applicable statutes such as the American Indian Religious Freedom Act (AIRFA), the Religious Freedom Restoration Act (RFRA) and the Native American Graves Protection and Repatriation Act (NAGPRA), and applicable Executive Orders such as the 1994 Executive Order (re: Government-to-Government relations) and the 2000 Executive Order (re: Consultation and Coordination with Tribal Governments). The pertinent elements of federal Indian Law are discussed below. Persuasive guidance is also taken from international standards like the UN Declaration and the persuasive and Senate-ratified treaty called the International Covenant on Civil and Political Rights (ICCPR).

In this case, Applicant's request for the NRC's approval constitutes a "federal action." Therefore, in this proceeding, Applicant must anticipate the obligations of the NRC to adhere to the high standards of trust responsibility when dealing with Indian tribes and the rights of Indian tribe members. Further, in anticipating such obligations, Applicant must be required not to take actions under its license that would violate the obligations owed by the issuer of such license; namely, the NRC.

The Trust Doctrine: Broadly, the trust doctrine requires the federal government to support and encourage tribal self-government and economic prosperity, duties that stem from the government's treaty guarantees to 'protect' Indian tribes and respect their sovereignty. "The undisputed existence of a general trust relationship between the US and the Indian people" has long dominated the government's dealings with Indians. US v. Mitchell, 463 U.S. 206, 225 (1983); see also, Cobell v. Norton, 240 F.3d 1081, 1098 (D.C. Cir. 2001) ("the government has longstanding and substantial trust obligations to Indians.")

Between 1787 and 1871, the US entered into nearly four hundred treaties with Indian tribes. During those years, "the native nations were still relatively powerful and autonomous," and although the US might have been able to overpower them in warfare, victory would have been very costly. In an effort to avoid those costs, the US frequently entered into peace treaties, like the 1851 and 1868 Ft. Laramie Treaties, with Indian tribes. In these treaties, the US obtained the land and other rights and accommodations it wanted from the tribes, and in return, the US set aside other reservation lands for those tribes and guaranteed that the federal government would respect "the sovereignty of the tribes…would 'protect' the tribes…[and would] provide food, clothing and services to the tribes." See M.C. Woods, "Indian Land and the Promise of Native Sovereignty: The Trust Doctrine Revisited," Utah L. Rev. 1471, 1497 (1994).

The Supreme Court has held that treaties of this nature create a special relationship between Indian tribes and the federal government – a unique bond – that obligates the government to keep its end of the bargain, now that the tribes have kept theirs. The promises made in exchange for millions of acres of tribal land impose on the federal

government 'moral obligations of the highest responsibility and trust." Seminole Nation v. US, 316 U.S. 286, 296-97 (1942); See also, US v. Mitchell, *infra*; Morton v. Mancari, 417 U.S. 535, 551-552 (1974); US v. Mason, 412 U.S. 391, 397 (1973).

The federal government's trust duty is owed to all Indian Tribes. Lincoln v. Vigil, 508 US 182, 195 (1993), quoting with approval Hoopa Valley Tribe v. Christie, 812 F.2d 1097 (9th Cir. 1986). The Trust Doctrine includes:

(1) a clear duty to protect the native land base and the ability of tribes to continue their ways of life;

(2) Duties arising from federal control or management of tribal land and property which are fiduciary in nature.

Under Trust Doctrine, federal officials that manage, control, or supervise tribal resources are duty bound to: (1) consult with the tribe in determining how best to use those resources, (2) to **carefully analyze all relevant information regarding how to manage them**, (3) to **make their decisions based on the tribe's best interests**; and (4) **to maintain and provide to the tribe an accurate accounting**. See Klamath Water Users Protective Ass'n v. Patterson, 204 F.3d 1206, 1214 (9th Cir. 1999), cert. den., 121 S.Ct. 44 (2000) (emphasis added). The Trust Doctrine requires federal officials to coordinate and consult with each other (e.g., NRC to consult with Bureau of Indian Affairs, Department of the Interior ("BIA"). See 36 CFR Section 800 et seq.; and the 1994 Executive Order and the 2000 Executive Order discussed below.

Courts have held that the Trust Doctrine is violated where federal agencies undertake or license actions off the reservation which either diminish on-reservation water supplies, or cause pollution on the reservation or to its water supplies. Pyramid Lake Paiute Tribe of Indians v. Morton, 354 F. Supp. 252 (D.DC. 1972), rev'd on other grounds, 499

F.2d 1095 (D.C. Cir.1974). Thus, federal officials, as a result of the Trust Doctrine, should interpret their responsibilities to Indians broadly and assist them to the maximum extent allowable under the treaties and statutes they are implementing. See also the Executive Orders discussed below.

Federal Indian Law Affects Statutory Interpretation and Action. A treaty is a contract between nations. Article VI, Section 2 of the US Constitution declares that treaties are the "supreme law of the land." Treaties are therefore superior to state constitutions, state laws, and are equal in authority to laws passed by Congress. See Worcester v. Georgia, *infra*. "The unique trust relationship between the federal government and Native Americans" requires that "if an **ambiguity in a statute** or treaty "can reasonably be construed as the Tribe would have it construed, it must be construed that way." Ramah Navajo Chapter v. Lujan, 112 F.3d 1455, 1462 (10th Cir. 1997), quoting Muscogee (Creek) Nation v. Hodel, 851 F.2d 1439, 1445 (D.C. Cir. 1988), cert. den., 488 U.S. 1010 (1989); See also Oneida County, NY v. Oneida Indian Nation of New York State, 470 U.S. 226, 247 (1985); US v. Washington, 157 F.3d 630, 643 (9th Cir. 1998), cert. den., 526 U.S. 1060 (1999); McNabb for McNabb v. Bowen, 829 F.2d 787, 792 (9th Cir. 1987) (emphasis added).

The Supreme Court has recognized that the United States has "moral obligations of the highest responsibility and trust" to Indians and must use "great care" in its dealings with them. See Seminole Nation v. U.S., 316 US 286 (1942); U.S. v. Mason, 412 US 391, 398 (1973).

Indian tribes have substantial rights to **meaningful consultation** under federal and international law. In 1994, President Clinton issued a Presidential Memorandum that

requires all federal agencies, including the NRC, to conduct their business with tribes on a "government-to-government" basis, respectful of tribal sovereignty. "Government-to-Government Relations with Native American Tribal Governments", 59 Fed. Reg. 22951, 1994 WL 16189198 (April 24, 1994).

The 1994 Executive Order states:

> The United States Government has a unique legal relationship with Native American tribal governments as set forth in the Constitution of the United States, treaties, statutes, and court decisions. **As executive departments and agencies undertake activities affecting Native American tribal rights or trust resources, such activities should be implemented in a knowledgeable, sensitive manner respectful of tribal sovereignty….**The purpose of these principles is to clarify our responsibility to ensure that the Federal Government operates within a government-to-government relationship with federally recognized Native American tribes.

Id. at 22952**.** The 1994 Executive Order further provides, in pertinent part, that:

> In order to ensure that the rights of sovereign tribal governments are fully respected, executive branch activities, including NRC activities, shall be guided by the following:
>
> (b) Each executive department and **agency shall consult, to the greatest extent practicable and to the extent permitted by law, with tribal governments prior to taking actions that affect federally recognized tribal governments**. **All such consultations are to be open and candid so that all interested parties may evaluate for themselves the potential impact of relevant proposals**.
>
> (c) Each executive department and **agency shall assess the impact** of Federal Government plans, projects, programs, and activities on tribal trust resources **and assure that tribal government rights and concerns are considered during the development of such plans, projects, programs, and activities**.
>
> (d) Each executive department and **agency shall take appropriate steps to remove any procedural impediments to working directly and effectively with tribal governments on activities that affect the trust property and/or governmental rights of the tribes**.
>
> (e) Each executive department and agency shall work cooperatively with other Federal departments and agencies to enlist their interest and

support in cooperative efforts, where appropriate, to accomplish the goals of this memorandum.

(f) Each executive department and agency shall apply the requirements of Executive Orders Nos. 12875 ("Enhancing the Intergovernmental Partnership") and 12866 ("Regulatory Planning and Review") to design solutions and tailor Federal programs, in appropriate circumstances, to address specific or unique needs of tribal communities. Id.

In 2000, President Clinton issued Executive Order No. 13175, Consultation and Coordination With Indian Tribal Governments, 65 FR 67249, 2000 WL 1675460 (Pres.Exec.Order Nov 06, 2000), which states, in pertinent part, as follows:

By the authority vested in me as President by the Constitution and the laws of the United States of America, and in order to establish regular and meaningful consultation and collaboration with tribal officials in the development of Federal policies that have tribal implications, to strengthen the United States government-to-government relationships with Indian tribes, and to reduce the imposition of unfunded mandates upon Indian tribes; it is hereby ordered as follows:
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Sec. 2. Fundamental Principles. In formulating or implementing policies that have tribal implications, agencies shall be guided by the following fundamental principles:

(a) The United States has a unique legal relationship with Indian tribal governments as set forth in the Constitution of the United States, treaties, statutes, Executive Orders, and court decisions. **Since the formation of the Union, the United States has recognized Indian tribes as domestic dependent nations under its protection.** The Federal Government has enacted numerous statutes and promulgated numerous regulations that establish and define a trust relationship with Indian tribes.

(b) Our Nation, under the law of the United States, in accordance with treaties, statutes, Executive Orders, and judicial decisions, has recognized the right of Indian tribes to self-government. **As domestic dependent nations, Indian tribes exercise inherent sovereign powers over their members and territory. The United States continues to work with Indian tribes on a government-to-government basis to address issues concerning Indian tribal self-government, tribal trust resources, and Indian tribal treaty and other rights.**

(c) The United States recognizes the right of Indian tribes to self-

government and supports tribal sovereignty and self-determination.

Sec. 3. Policymaking Criteria. In addition to adhering to the fundamental principles set forth in section 2, agencies shall adhere, to the extent permitted by law, to the following criteria when formulating and implementing policies that have tribal implications: ***67250**

(a) **Agencies shall respect Indian tribal self-government and sovereignty, honor tribal treaty and other rights, and strive to meet the responsibilities that arise from the unique legal relationship between the Federal Government and Indian tribal governments**.

(b) With respect to Federal statutes and regulations administered by Indian tribal governments, the Federal Government shall grant Indian tribal governments the maximum administrative discretion possible.

(c) **When undertaking to formulate and implement policies that have tribal implications, agencies shall:**

(1) encourage Indian tribes to develop their own policies to achieve program objectives;

(2) **where possible, defer to Indian tribes to establish standards**; and

(3) in determining whether to establish Federal standards, consult with tribal officials as to the need for Federal standards **and any alternatives that would limit the scope of Federal standards or otherwise preserve the prerogatives and authority of Indian tribes**.

Sec. 4. Special Requirements for Legislative Proposals. Agencies shall not submit to the Congress legislation that would be inconsistent with the policymaking criteria in Section 3.

Sec. 5. Consultation. (a) Each agency shall have an accountable process to **ensure meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications**. Within 30 days after the effective date of this order, the head of each agency shall designate an official with principal responsibility for the agency's implementation of this order. Within 60 days of the effective date of this order, the designated official shall submit to the Office of Management and Budget (OMB) a description of the agency's consultation process.

(b) To the extent practicable and permitted by law, no agency shall promulgate any regulation that has tribal implications, that imposes substantial direct compliance costs on Indian tribal governments, and that is not required by statute, unless:

(1) funds necessary to pay the direct costs incurred by the Indian tribal government or the tribe in complying with the regulation are provided by the Federal Government; or

(2) the agency, prior to the formal promulgation of the regulation,

(A) consulted with tribal officials early in the process of developing the proposed regulation;

(B) in a separately identified portion of the preamble to the regulation as it is to be issued in the Federal Register, provides to the Director of OMB a tribal summary impact statement, which consists of a description of the extent of the agency's prior consultation with tribal officials, a summary of the nature of their concerns and the agency's position supporting the need to issue the regulation, and a statement of the extent to which the concerns of tribal officials have been met; and

(C) makes available to the Director of OMB any written communications submitted to the agency by tribal officials.

(c) To the extent practicable and permitted by law, no agency shall promulgate any regulation that has tribal implications and that preempts tribal law unless the agency, prior to the formal promulgation of the regulation,

(1) consulted with tribal officials early in the process of developing the proposed regulation;

(2) in a separately identified portion of the preamble to the regulation as it is to be issued in the Federal Register, provides to the Director of OMB a tribal summary impact statement, which consists of a description of the extent of the agency's prior consultation with tribal officials, a summary of the nature of their concerns and the agency's position supporting the ***67251** need to issue the regulation, and a statement of the extent to which the concerns of tribal officials have been met; and

(3) makes available to the Director of OMB any written communications submitted to the agency by tribal officials.

(d) **On issues relating to tribal self-government, tribal trust resources, or Indian tribal treaty and other rights, each agency should explore and, where appropriate, use <u>consensual mechanisms</u> for developing regulations, including negotiated rulemaking.**

Id. (Emphasis added.) Neither of these Executive Orders has been rescinded, modified or revoked by President George W. Bush and, accordingly, remain in full force and effect and apply to the instant case.

In the Section 106 process in this case, there were no 'consensual mechanisms', no deference to the Tribes, no accountable process to ensure preservation of the prerogatives of the Tribes, no honoring of native rights.

In addition there are international human rights standards indicate that Indigenous peoples' whose lands are affected by development projects have the right to "free, prior and informed consent." In the United Nations Declaration on the Rights of the World's Indigenous Peoples ("UN Declaration"), Article 32, ¶ 1, "Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources," and ¶ 2, "States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources," and ¶ 3, "States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact." (See General Assembly Resolution A/61/L.67 of 7 September 2007.)

Rights Under Native American Graves Protection and Repatriation Act ("NAGPRA"). In 1990, Congress passed NAGPRA to: (1) allow tribes to recover religious and cultural items belonging to them that were held in federally funded institutions, and (2) to protect the right of tribes to safeguard remains and artifacts that might be found

or excavated in the future. 25 USC Sections 3001-3013. Rights under NAGPRA are not well defined. **However, when viewed through the lens of the Trust Doctrine, it requires giving a reasonable opportunity and ample time to tribal officials to inspect an area for artifacts and human remains and an opportunity to remove any objects discovered during the inspection.** See, e.g., Yankton Sioux Tribe v. U.S. Army Corps of Engineers, 83 F. Supp.2d 1047 (D. S.D. 2000) (enjoining federal officials from raising the water level of a lake until tribal officials were given an opportunity to remove artifacts and human remains discovered in the area to be flooded.)

Rights Under UN Declaration and International Law. A non-binding text, the UN Declaration sets out the individual and collective rights of indigenous peoples, as well as their rights to culture, identity, language, employment, health, education and other issues. The document emphasizes the rights of indigenous peoples to maintain and strengthen their own institutions, cultures and traditions and to pursue their development in keeping with their own needs and aspirations. It also prohibits discrimination against indigenous peoples and promotes their full and effective participation in all matters that concern them, and their right to remain distinct and to pursue their own visions of economic and social development.

In addition to the recent UN Declaration which has not been ratified by the United States Senate, there is the US Senate ratified International Covenant on Civil and Political Rights (ICCPR) which is persuasive.[3] Article 27 of the ICCPR provides that:

> In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in

[3] Adopted by General Assembly Resolution 2200A (XXI), December 16, 1966, entered into force March 23, 1976 in accordance with Article 49 thereof; ratified by US Senate, 102nd Cong. 2nd Sess., Exec. Rept. 102-23 (March 24, 1992); http://www2.ohchr.org/english/law/ccpr.htm.

> community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language. Id..

The ICCPR is under the jurisdiction and is enforceable against the United States by the UN Committee on Ethnic and Racial Discrimination (CERD).

> The UN Declaration, therefore, should apply to the NRC's consideration of the North Trend Expansion due to its focus on preventing disproportionate impacts to the environmental and cultural interests of the Indigenous Petitioners which are implemented at NRC through the its Environmental Justice Strategies.

Environmental Justice

On February 11, 1994, President Clinton issued Executive Order 12898, "Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations." This Order requires federal authorities to consider the environmental and human health conditions of low-income populations and to develop an environmental justice strategy to counter any additional impacts of proposed activities. As a result, Region 7 has developed an environmental justice strategy that identifies and addresses unfair environmental impacts on programs, policies, and activities in minority and low-income populations. See, http://www.epa.gov/rgytgrnj/ej/pdf/english_ej_factsheet.pdf.

Under the Trust Doctrine, and in accordance with the 1994 Executive Order and the 2000 Executive Order, and guided by the UN Declaration and the ICCPR above, the NRC is required to engage in a meaningful and respectful consultation process – not the so-called good faith reasonable effort to engage with the Tribes which is a much lower standard.

The consultation process in this proceeding is not one that complies with the Trust Doctrine. It lacks the due care, good faith, reasonableness that are indicative of compliance with the Trust Doctrine. Consistent with the UN Declaration, the 1994 and 2000 Executive

Orders and the Rights of Consultation described above, it is clear that Indian Nations, Tribes and people are to be treated with respect and dignity, which at a minimum, would include informed and meaningful consultation, deference to the Tribes and interested individual tribal members and a process that is accountable to ensuring meaningful input by the Tribes which is then received, and acted upon by the NRC – none of this happened.

Consolidated Intervenors contend "the trust relationship between the United States and the Native American people" requires that the NRC give a "liberal construction" of any provisions of law, that are "for the benefit of Indian tribes." Cobell v. Norton, 240 F.3d 1081, 1101 (D.C. Cir. 2001) [quoting, Bryan v. Itasca County, 426 U.S. 373, 392 (1976)].

Applicant would prefer to ignore and have the NRC ignore, the trust responsibility that is owed to Tribes and tribal members. However, the natives have not been exterminated. They are still here and they demand that they not be ignored.

.3. Applicant's Ongoing Disrespect of Natives Has Extended to Disrespecting Dr. Louis Redmond. On behalf of Dr. Redmond, Consolidated Intervenors demand a formal apology for the disrespect of Dr. Redmond caused by referring to him in Applicant's Response as 'Mr. Redmond' and in the NRC Staff Response as 'Louis Redmond.' See Applicant's Response at 10; NRC Staff Response at 15. We note that the parties manage to remember to properly address the non-native PhD's involved in this case as experts: Dr. Moran, Dr. Abitz and Dr. LaGarry. See, e.g., NRC Staff Response at 18. How is it then that Dr. Redmond is the only one of the experts being disrespected in this proceeding? Well, the disrespect has been duly noted and we object to the same in the most vociferous possible way.

Dr. Redmond is a serious man deserving of respect – personally and professionally. After serving 22 years in the United States Army, including multiple downrange combat deployments during the Vietnam War, Louis Redmond pursued a career in archaeology starting in 1988. He received his MA in Anthropology in 1989 from the University of New Mexico and his PhD in Anthropology in 2004. Since 1995, Dr. Redmond has provided professional consultation and training to Indian Tribes and Federal Agencies on NAGPRA, Tribal Historic Preservation Offices, state and the National Historic Preservation Laws; survey and evaluation of archeological resources; and evaluations of historical/archeological significance, through his own company, Red Feather Archeology.

Dr. Redmond's experience and credentials are beyond reproach and any attempt to degrade or besmirch Dr. Redmond or his opinions must be rejected and should be the subject of a written apology addressed to Dr. Redmond.

At Applicant's Response at Page 11, it states that Consolidated Intervenors' position on the lack of sub-surface testing is factually incorrect. First, this is not the time in the proceeding to be litigating the merits of the contention which Applicant is attempting to do here. Second, from a factual matter, Dr. Redmond asserts that the fact that there has been testing on 24 sites does not resolve the issue.

Applicant states without citation or reference of any kind that "existing professional guidance does not require subsurface testing for all sites at a proposed project location, particularly where the surface (hardpan clay) is not amenable to such testing." Applicant's Response at page 10. Applicant then goes on to argue that Contention 1A should be denied. Consolidated Intervenors take issue with Applicant's unsupported statement and refers to

the following from Dr. Redmond:

> In South Dakota, it is, to the best of my understanding, the policy that upon encountering cultural materials, a sub-surface investigation is undertaken to determine (a) whether the materials are an isolated manifestation; (b) whether they represent an insignificant archeological site; or (c) whether they represent a potentially significant archeological site. Simply encountering a so-called "hard-pan" surface does not preclude sub-surface testing. In my almost 30 years of experience excavating archeological sites, I have found that it is common for there to be multiple living floors below so-called "hard-pan" surfaces. I know of no "existing professional guidances" that does not require subsurface testing for all sites where the surface is not "amenable" to such testing. See Letter dated April 11, 2014 submitted herewith as Exhibit 1 hereto.

Accordingly, there is a genuine dispute that must be resolved in favor of admitting this contention based on the expert opinions and statements of Dr. Redmond which clearly overwhelms the unsupported argumentation of Applicant on this issue.

4. Admissibility of Contentions and Pleading Requirements. At page 12 of Applicant's Response, it attempts to argue the merits of Contentions 2, 3 and 4. However, it is totally inappropriate to argue the merits of a contention at this stage of the proceeding.

The threshold standard is necessary to ensure that hearings cover only genuine and pertinent issues of and that the issues are framed and supported concisely enough at the outset to ensure that the proceedings are effective and focused on real, concrete issues.

It also recognized that "**technical perfection is not an essential element of contention pleading," and that the "[s]ounder practice is to decide issues on their merits, not to avoid them on technicalities**." The rules are still held to "bar contentions where petitioners have only 'what amounts to generalized suspicions, hoping to substantiate

them later.'" Such is not the case in this Proceeding.

A party is not required to prove its case at the contention stage, and need not proffer facts in 'formal affidavit or evidentiary form,' sufficient 'to withstand a summary disposition motion. But a protestant does not become entitled to an evidentiary hearing merely on request, or on a bald or conclusory allegation that a dispute exists. **The protestant must make a minimal showing that material facts are in dispute**, thereby demonstrating that an 'inquiry in depth' is appropriate. In other words, "a petitioner 'must present sufficient information to show a genuine dispute' and reasonably 'indicating that a further inquiry is appropriate.' Some sort of minimal basis indicating the potential validity of the contention" is required. Consolidated Intervenors have done this.

A party is not required "to provide an exhaustive list of possible bases, but simply to provide sufficient alleged factual or legal bases to support the contention. Consolidated Intervenors have done this.

Finally, the "brief explanation of the basis" that is required by § 2.309(f)(1)(ii) helps define the scope of a contention — the reach of a contention necessarily hinges upon its terms coupled with its stated bases. But it is the contention, not "bases," whose admissibility must be determined. Contentions must give notice of facts which parties desire to litigate and must be specific enough to satisfy the requirements of 10 CFR §2.309(f)(1). Consolidated Intervenors have done this.

A contention that simply alleges that some general, nonspecific matter ought to be considered does not provide the basis for an admissible contention." Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), LBP-93-23, 38 NRC 200, 246 (1993). However, such is not the case in this proceeding where the contentions are specific

and contains specific references to the FSEIS, the license application as well as specific citations to NRC regulations and applicable law.

5. The Programmatic Agreement Is The Result of a Fatally Flawed Process. The NRC Staff seems to believe that it has engaged in some form of adequate, reasonable, good faith consultation. See NRC Staff Response at 4-5. However, the NRC Staff's belief is not shared by the affected Tribes, specifically including the OST and SRST, nor is it shared by the tribal members who are part of Consolidated Intervenors.

The letters from OST President Brewer and SRST THPO W. Young are clear evidence of the failure of the Section 106 process in this proceeding. And while it is true that on March 19, 2014, the NRC Staff provided the final Programmatic Agreement to all consulting parties, the NRC Staff fails to mention in its Response that the Tribes are not 'Required Signatories' to the Programmatic Agreement and that it has been executed and implemented without the Tribes' signatures. The Tribes, apparently, are considered 'Invited Signatories' but they are not 'Required Signatories.' The Consolidated Intervenors are excluded entirely from the Programmatic Agreement.

6. NRC Staff's Migration Arguments Must Fail. The NRC Staff bases much on its flawed Section 106 process and the Programmatic Agreement suggesting that such changes are enough to prevent migration of Contention 1A. This argument must fail because of the flawed nature of the Section 106 process as evidenced by the written complaints of the Tribes (OST and SRST), Tribes with substantial historical and cultural interest in the specific lands and waters the Application seeks to exploit for monetary

reasons to the detriment of the indigenous members of Consolidated Intervenors.

Reports from the NRC Staff that a couple of Tribes from far away who have the least amount of interest in the project area do not constitute the kind of 'considerable new information' that the NRC Staff asserts. The mere fact that the NRC Staff has been able to shove the Programmatic Agreement down the throats of the to-be-affected-Tribes after excluding the Consolidated Intervenors entirely does not give rise to a proper basis to deny Contention 1A. Rather, it is yet another example of the use of brute force by the federal government to oppress the native peoples and impose its will on them in derogation of their rights under federal and international law.

VI. CONCLUSION

For all the foregoing reasons, the Board should admit the FSEIS contentions.

Dated this *11th* day of April, 2014.

Respectfully submitted,

David Frankel,
Counsel for Consolidated Intervenors
POB 143
Buffalo Gap, SD 57722
Tel: 605-515-0956
E-mail: arm.legal@gmail.com

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' CONSOLIDATED REPLY TO APPLICANT AND NRC STAFF ANSWERS TO CONTENTIONS ON FINAL SUPPLEMENTAL ENVIRONMENTAL IMPACT STATEMENT" in the captioned proceeding were served by email and, per the Board's order, should be served via the Electronic Information Exchange ("EIE") on the 11Th day of April 2014, which to the best of my knowledge resulted in transmittal of same to those on the EIE Service List for the captioned proceeding.

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David Frankel
Attorney for Consolidated Intervenors
P. O. Box 143
Buffalo Gap, SD 57722
605-515-0956
E-mail: arm.legal@gmail.com