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STATE OF SOUTH DAKOTA
DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES
BOARD OF MINERALS AND ENVIRONMENT

IN THE MATTER OF CONSIDERATION)
OF PETITIONS TO PLACE PROPOSED)
POWERTECH (USA), INC., IN SITU)
LEACH MINING AREA ON THE PRELIMINARY)
LIST OF SPECIAL, EXCEPTIONAL,)
CRITICAL, OR UNIQUE LANDS)
_____)

TRANSCRIPT OF PROCEEDINGS

THURSDAY, FEBRUARY 19, 2009, 11:25 a.m.
523 EAST CAPITOL AVENUE
PIERRE, SOUTH DAKOTA 57501

BOARD MEMBERS PRESENT:

- LEE McCAHREN, Chairman
- DENNIS LANDGUTH
- ROBERT DUXBURY
- RICHARD SWEETMAN
- PETER BULLENE
- MIKE DeMERSEMAN
- GLENN BLUMHARDT

COPY

Preliminary List Determination For Powertech

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5	<p>1 THURSDAY, FEBRUARY 19, 2009</p> <p>2 CHAIRMAN McCAREN: This is the time and place set for</p> <p>3 the hearing on the scenic and unique request for inclusion and</p> <p>4 the first thing we'll do is determine who the parties are and</p> <p>5 who is present. Ms. Giedd.</p> <p>6 MS. GIEDD: Yes, Mr. McCahren, the Department of</p> <p>7 Environment and Natural Resources, the mining program, is</p> <p>8 present and I am here representing them in this matter.</p> <p>9 CHAIRMAN McCAREN: Mr. Main.</p> <p>10 MR. MAIN: Max Main representing Powertech and</p> <p>11 Powertech is present also with its witnesses.</p> <p>12 MR. ELLISON: Bruce Ellison, I'm here with Debra White</p> <p>13 Plume and representing, with her assistance, the issues that</p> <p>14 she has raised in this nomination.</p> <p>15 CHAIRMAN McCAREN: Thank you.</p> <p>16 MS. WHITE FACE: Charmaine White Face, I'm here as the</p> <p>17 coordinator for Defenders of the Black Hills and also as myself</p> <p>18 as an individual. And I have with me exhibits and expert</p> <p>19 witnesses.</p> <p>20 CHAIRMAN McCAREN: Thank you. Any other party or</p> <p>21 person that --</p> <p>22 MS. GIEDD: The Oglala Sioux Tribe did file a</p> <p>23 petition, their attorney withdrew on Friday, and I don't know</p> <p>24 if there's anyone present here for the tribe.</p> <p>25 CHAIRMAN McCAREN: Anybody representing the Oglala</p>	7	<p>1 Intent to Operate. The lands described in the petitions are</p> <p>2 the same lands. DENR made a determination, based on</p> <p>3 Powertech's Request for Determination, that the lands are not</p> <p>4 Special, Exceptional, Critical, or Unique, and filed a lengthy</p> <p>5 report to that effect and so Powertech has a direct interest.</p> <p>6 The lands that are described are its proposed permit boundaries</p> <p>7 and Powertech has a vested interest in this matter.</p> <p>8 MS. GIEDD: The department has no objection to the</p> <p>9 intervention.</p> <p>10 CHAIRMAN McCAREN: Mr. Ellison.</p> <p>11 MR. ELLISON: Yes, sir. We would have no objection to</p> <p>12 the intervention.</p> <p>13 CHAIRMAN McCAREN: Charmaine, et al?</p> <p>14 MS. WHITE FACE: Yes, sir. We do have an objection to</p> <p>15 the intervention. According to 74:29:10:15, quote, the lands</p> <p>16 described in the Notice of Intent to Operate shall be</p> <p>17 considered --</p> <p>18 CHAIRMAN McCAREN: You have to slow up for her.</p> <p>19 MS. WHITE FACE: -- shall be considered cleared for</p> <p>20 Special, Exceptional, Critical, or Unique land characteristics</p> <p>21 if the department determines that the lands do not constitute a</p> <p>22 Special, Exceptional, Critical, or Unique land and no</p> <p>23 nominating petitions pertaining to the lands described in the</p> <p>24 notice are filed. Even though the department has determined</p> <p>25 that they do not constitute Special, Exceptional, Critical, or</p>
6	<p>1 Sioux Tribe? Okay. Ms. Giedd.</p> <p>2 MS. GIEDD: Yes, if I can just talk for a minute about</p> <p>3 the procedure.</p> <p>4 CHAIRMAN McCAREN: Can you hear her on the phone</p> <p>5 there?</p> <p>6 MR. ELLISON: Yes, sir.</p> <p>7 MS. GIEDD: We have three petitions before you to act</p> <p>8 on in this matter. Powertech has filed a motion to intervene,</p> <p>9 which we need to take up preliminarily, as well as that Ms.</p> <p>10 White Plume has requested a continuance in this matter, and I</p> <p>11 think we need to take that up preliminarily. And then the</p> <p>12 regulations for these kind of hearings also specifically allow</p> <p>13 public comment to be taken during the course of this hearing</p> <p>14 and often the board will want to take those before we actually</p> <p>15 start the contested case procedure, and so I leave it up to you</p> <p>16 on how you want to deal with that. But probably the motion to</p> <p>17 intervene and the motion for continuance are the first two</p> <p>18 preliminary matters we ought to take up.</p> <p>19 CHAIRMAN McCAREN: Let's take up the petition to</p> <p>20 intervene. Mr. Main.</p> <p>21 MR. MAIN: Yes, Mr. Chairman. Powertech filed a</p> <p>22 motion to intervene on the basis that these nominating</p> <p>23 petitions that were filed are the direct result of Powertech's</p> <p>24 previously filed Request for Determination of Special,</p> <p>25 Exceptional, Critical, and Unique Lands and its Notice of</p>	8	<p>1 Unique land, we are presenting a nominating petition for the</p> <p>2 lands described. So if my understanding is correct, Mr. Main</p> <p>3 is asking that our nomination be dismissed.</p> <p>4 CHAIRMAN McCAREN: No, he's just asking to join the</p> <p>5 case; isn't that right?</p> <p>6 MR. MAIN: Yes, we are petitioning to intervene. We</p> <p>7 will be requesting that the petitions be dismissed.</p> <p>8 CHAIRMAN McCAREN: I know that, later on. What the</p> <p>9 department did is just part of the proof here. I'm going to</p> <p>10 allow the petition to intervene. I don't know if an order is</p> <p>11 required. You can submit one later if you want. Is this your</p> <p>12 paperwork, Ms. Giedd?</p> <p>13 MS. GIEDD: Thank you, Mr. McCahren. Next I think is</p> <p>14 Mr. Ellison or Ms. White Plume's motion for a continuance.</p> <p>15 CHAIRMAN McCAREN: Mr. Ellison.</p> <p>16 MR. ELLISON: Yes, sir, and I will need some</p> <p>17 assistance from Ms. White Plume in connection with this matter.</p> <p>18 We are asking for a continuance for a number of reasons. One,</p> <p>19 we feel that the board's determination, preliminary</p> <p>20 determination, is premature, and we will address that later on</p> <p>21 the merits, but with all of the sites, prehistoric sites that</p> <p>22 have been identified and of unique interest and concern to the</p> <p>23 Native American community, as well as the broader community,</p> <p>24 it's certainly premature.</p> <p>25 But addressing that question as well, there's also a</p>

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9	<p>1 question of witnesses. We have a number of witnesses that,</p> <p>2 because of their age, travel as far as to Pierre is really</p> <p>3 extremely difficult for them and if this matter were continued</p> <p>4 either in whole or in part and these hearings held, for</p> <p>5 example, in Hot Springs, which would be the county affected by</p> <p>6 this proposed action, that would permit these elderly people to</p> <p>7 testify. That would permit these elderly people to testify,</p> <p>8 and in the absence of their testimony, then a lot of the</p> <p>9 matters pertaining to identifying prehistoric sites as referred</p> <p>10 to will be incomplete and the board will not have before it all</p> <p>11 of the information that would be appropriate in determining how</p> <p>12 in fact these lands are of Special, Exceptional, Critical, or</p> <p>13 Unique value.</p> <p>14 So we would like to request a continuance to permit</p> <p>15 this matter to be reconvened in Hot Springs at a later date to</p> <p>16 allow for such testimony. If the board would permit, I would</p> <p>17 ask Ms. White Plume to just briefly make a proffer of some of</p> <p>18 the individuals who would have been called had this matter been</p> <p>19 closer to the affected area.</p> <p>20 CHAIRMAN McCAHREN: Thank you. Ms. White Plume.</p> <p>21 MS. WHITE PLUME: The witnesses that we wanted to</p> <p>22 bring in to speak about the heart of everything that is</p> <p>23 pertinent is Rick Two Dogs, he's a Lakota, he speaks to the</p> <p>24 sacred; Virgil Kills Straight, tribal historian; Charlotte</p> <p>25 Black Elk, tribal historian; Johnson Holy Rock, tribal</p>	11	<p>1 on our testimony. It appears that Charmaine White Face has her</p> <p>2 witnesses here. All parties have had more than adequate notice</p> <p>3 to prepare and have their witnesses here. Thank you, Mr.</p> <p>4 Chairman.</p> <p>5 CHAIRMAN McCAHREN: Ms. Gledd.</p> <p>6 MS. GIEDD: The department takes no position on the</p> <p>7 continuance. We are here. Whenever the board wants us to</p> <p>8 present, we will.</p> <p>9 CHAIRMAN McCAHREN: Your position?</p> <p>10 MS. WHITE FACE: We have no position.</p> <p>11 CHAIRMAN McCAHREN: Board.</p> <p>12 MR. SWEETMAN: I think the fact that the rule states</p> <p>13 the 45-day time frame does put the board under an obligation to</p> <p>14 hold the hearing as close to that date -- we have missed it,</p> <p>15 but this is as close as we are going to get to being in</p> <p>16 compliance with the rule. Therefore, I would recommend denying</p> <p>17 it.</p> <p>18 CHAIRMAN McCAHREN: Of the continuance request?</p> <p>19 MR. SWEETMAN: Of the request for continuance.</p> <p>20 MR. ELLISON: I'm sorry, I can't hear.</p> <p>21 CHAIRMAN McCAHREN: I know it, I was mumbling. I just</p> <p>22 wanted to make certain his argument was to deny the motion for</p> <p>23 continuance. It's Mr. Sweetman sitting next to me here.</p> <p>24 MR. ELLISON: In support, if I may just add in further</p> <p>25 support, in our nominating petition, we make reference to the</p>
10	<p>1 historian; and Joyce Whiting, she's the tribal historic</p> <p>2 preservation officer for the Oglala Sioux Tribe. We would ask</p> <p>3 also that all parties be allowed to make a site visit to this</p> <p>4 land area as part of the hearing.</p> <p>5 CHAIRMAN McCAHREN: Anything further?</p> <p>6 MR. ELLISON: I don't believe so, thank you.</p> <p>7 CHAIRMAN McCAHREN: Mr. Main.</p> <p>8 MR. MAIN: Thank you, Mr. Chairman. Powertech objects</p> <p>9 to the motion for continuance. These nominating petitions were</p> <p>10 filed on December 28th, so the petitioners who are seeking to</p> <p>11 have the lands declared or put on the Preliminary List of</p> <p>12 Special, Exceptional, Critical, or Unique lands have been in</p> <p>13 for over 50 days. They needed a basis on which to base those</p> <p>14 petitions and so their evidence was available to them at that</p> <p>15 time.</p> <p>16 The administrative rule 74:29:10:13 states that a</p> <p>17 hearing on a nominating petition, I am quoting, must be held on</p> <p>18 a date not more than 45 days following the final date allowed</p> <p>19 for submission of nominating petitions. That final date was</p> <p>20 December 28th. Forty-five days after December 28 is February</p> <p>21 11. We are now at February 19. Powertech did not object to</p> <p>22 missing the February 11 deadline because obviously the board's</p> <p>23 schedule is it normally meets today, on this time of the month.</p> <p>24 We do object to any further continuance. We have our witnesses</p> <p>25 here, some of them from out of state. We are prepared to put</p>	12	<p>1 cultural resource survey and evaluation summary that was done</p> <p>2 by the staff archaeologist, the GIS specialist at the</p> <p>3 Archaeological Laboratory at Augustana, and it lists four pages</p> <p>4 of mostly Native American sites which have so far been</p> <p>5 identified which require additional evaluation. And so within</p> <p>6 the deadline there was filed, and this report was certainly</p> <p>7 made as an exhibit to the board, these large number of sites</p> <p>8 require further evaluation before any such determination can be</p> <p>9 made.</p> <p>10 So it would seem to me that especially since there has</p> <p>11 been no consultation with the Oglala Sioux Tribe or the tribes</p> <p>12 that would be immediately affected by any operations in the</p> <p>13 southern Black Hills as a sacred area of worship, that a</p> <p>14 continuance would be appropriate to allow for these evaluations</p> <p>15 to be completed, for these consultations to occur so that the</p> <p>16 board can in fact have everything that the statutes require and</p> <p>17 fairness would require before it to make the determination, the</p> <p>18 preliminary determination that it apparently has already made.</p> <p>19 I guess I'm a little confused by some of the</p> <p>20 procedural stuff because we are here for a hearing for a</p> <p>21 preliminary determination and yet the board has already said</p> <p>22 it's already made that determination. But we are saying that</p> <p>23 this consultation is needed, these witnesses would need to come</p> <p>24 in, this work needs to get done before we even reach the stage</p> <p>25 that we are at now. And so this is, regardless of any time</p>

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13	<p>1 period that may have elapsed, this matter is not ripe before</p> <p>2 this board at this point.</p> <p>3 CHAIRMAN McCAREN: We haven't made a preliminary</p> <p>4 decision, by the way. The department did. We are separate</p> <p>5 entities.</p> <p>6 MR. ELLISON: Thank you very much for that</p> <p>7 clarification.</p> <p>8 MR. LANDGUTH: This is Dennis Landguth. Gut feelings,</p> <p>9 I always go by gut feelings, I have to, I guess, but are we</p> <p>10 sure that we have done everything we need to do and did all the</p> <p>11 investigation that we need to make in this case to act? I</p> <p>12 realize the state is saying that they are not taking -- the</p> <p>13 staff is saying that they are not taking any opinion on this</p> <p>14 thing, but if the state archaeological folks would come again</p> <p>15 and tell me that they are positively sure that they have done</p> <p>16 all the investigation they have needed to do, I would go along</p> <p>17 with this. But I've dealt in that area before in the highway</p> <p>18 business and they have come back later and told us there was</p> <p>19 something else that they needed to do. I don't know, Dick, I</p> <p>20 think I'm going to go along with the folks over here and tell</p> <p>21 them that we need to give them another chance to give us some</p> <p>22 more information.</p> <p>23 CHAIRMAN McCAREN: Good, I'm with you.</p> <p>24 MR. SWEETMAN: Can I ask Roxanne a question?</p> <p>25 MS. GIEDD: Yes, sir.</p>	15
14	<p>1 MR. SWEETMAN: Roxanne, the quote that Max gave us</p> <p>2 concerning the time line for holding a hearing, how does -- how</p> <p>3 would a continuance fit in that?</p> <p>4 MS. GIEDD: The hearing has been initiated today by</p> <p>5 the start of this. If it's continued, we are still in</p> <p>6 compliance with the statute to the extent possible. We also</p> <p>7 always view those kind of timing regulations to be directory,</p> <p>8 not mandatory. Clearly when due process rights of litigants</p> <p>9 are involved, on occasion things need to be continued to</p> <p>10 protect those due process rights, so we don't consider them to</p> <p>11 be a drop dead date, if you will.</p> <p>12 And if I might also add, to some degree to respond to</p> <p>13 Mr. Landguth, to some degree you are anticipating, I think, the</p> <p>14 evidence that will be presented to you in the course of this</p> <p>15 hearing. Certainly, and I think even Mr. Ellison suggested</p> <p>16 this, if at the end of the hearing you wanted to continue it</p> <p>17 out to Hot Springs to take additional testimony and evidence,</p> <p>18 you can do that. It doesn't have to be an all or none</p> <p>19 proposition I guess is what I'm saying.</p> <p>20 MR. LANDGUTH: That's better.</p> <p>21 CHAIRMAN McCAREN: How do you feel about that, Mr.</p> <p>22 Ellison?</p> <p>23 MR. ELLISON: Well, I guess I can't disagree with what</p> <p>24 Ms. Giedd has stated, if this board would consider continuing</p> <p>25 this matter for the undone areas. Of course the question is</p>	16
15	<p>1 until all of these studies are really done, these four pages of</p> <p>2 sites that require further work as identified in the October</p> <p>3 16th, 2008 letter from Jason Kruse, if that work -- it would</p> <p>4 seem to me that some of these witnesses may have to come back.</p> <p>5 It may be premature to try and question them because of all of</p> <p>6 this work that still is undone.</p> <p>7 Hearing what Ms. Giedd is saying, and there may</p> <p>8 certainly be some work that can be done today, but I do have a</p> <p>9 question, because until everything is done, why not just do it</p> <p>10 when we can do it all at once? Why not do it when we have all</p> <p>11 of the information that all of the parties need to effectively</p> <p>12 present and question witnesses that are presented or other</p> <p>13 evidence or studies that are presented would seem to make sense</p> <p>14 to try and do it that way, notwithstanding what Ms. Giedd had</p> <p>15 stated.</p> <p>16 MR. MAIN: May I make a comment? Mr. Ellison</p> <p>17 mischaracterizes the record that exists right now. Further</p> <p>18 studies do not have to be done in order for a determination to</p> <p>19 be made as to whether or not the 10,500 acres are Special,</p> <p>20 Exceptional, Critical, or Unique. The witnesses that we are</p> <p>21 prepared to put on today will testify that more than adequate</p> <p>22 study has been done to make that determination. Mr. Ellison is</p> <p>23 correct in that of the 217 identified sites on the 10,580, 81</p> <p>24 sites still need further evaluation to determine if they are</p> <p>25 eligible or not eligible to be recommended for inclusion on the</p>	16
16	<p>1 National Register of Historic Places.</p> <p>2 Those sites will not be affected or disturbed by</p> <p>3 Powertech at all in any way until that evaluation is made, and</p> <p>4 we have that evidence to present to you today. But to say that</p> <p>5 further study needs to be done to determine Special,</p> <p>6 Exceptional, Critical, or Unique is not correct. The state</p> <p>7 DENR does not agree with that and Powertech does not agree with</p> <p>8 that. That's not a correct statement.</p> <p>9 MR. DeMERSSEMAN: Mr. Chairman, the witnesses are</p> <p>10 here, I want to hear what they have to say. Ms. White Plume</p> <p>11 has a substantial amount of people with her --</p> <p>12 MS. WHITE FACE: White Face.</p> <p>13 MR. DeMERSSEMAN: Sorry, I heard White Plume.</p> <p>14 MS. WHITE FACE: She is White Plume.</p> <p>15 MR. DeMERSSEMAN: Are you Fred's daughter? Okay, and</p> <p>16 there are out-of-state witnesses, I want to hear what they have</p> <p>17 to say. Then we can decide whether or not there has to be a</p> <p>18 further continuance or not.</p> <p>19 CHAIRMAN McCAREN: Proceed. We are going to proceed</p> <p>20 with the possibility we will continue later. That would</p> <p>21 summarize it. First witness.</p> <p>22 MS. GIEDD: We still have some preliminary matters.</p> <p>23 CHAIRMAN McCAREN: Oh, yeah.</p> <p>24 MS. GIEDD: The Oglala Sioux Tribe's petition, I don't</p> <p>25 believe anyone is here representing the Oglala Sioux Tribe, so</p>	16

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17	<p>1 I would request that it be dismissed at this point.</p> <p>2 CHAIRMAN McCAHREN: So done.</p> <p>3 MS. GIEDD: Ms. White Face filed her petition on</p> <p>4 behalf of herself and on behalf of Defenders of the Black</p> <p>5 Hills. She is not an attorney and so I also would request that</p> <p>6 her petition be dismissed to the extent she is attempting to</p> <p>7 represent this association, Defender of the Black Hills. I</p> <p>8 have no objection to her representing herself pro se.</p> <p>9 CHAIRMAN McCAHREN: Do you understand that?</p> <p>10 MS. WHITE FACE: Yes, I do.</p> <p>11 CHAIRMAN McCAHREN: Do you disagree with it? Yes.</p> <p>12 Will you abide by it? Yes. Okay. So done.</p> <p>13 MS. WHITE FACE: I have no choice.</p> <p>14 MS. GIEDD: Mr. McCahren, what I would propose is that</p> <p>15 in terms of order of appearance, that the department proceed</p> <p>16 first. Basically what we have is background to what led up to</p> <p>17 the petitions, and then after the department is done providing</p> <p>18 you with this background information, then the petitioners</p> <p>19 would proceed, and Powertech as the intervening party would be</p> <p>20 last. If that is acceptable, I'd like to just give a very</p> <p>21 brief opening statement.</p> <p>22 MR. SWEETMAN: Should we have a public comment period?</p> <p>23 MS. GIEDD: Yes, thank you. Yes, the public comment</p> <p>24 period can come at the beginning or at the end, it's up to the</p> <p>25 board, and I'm certainly fine with it proceeding first. There</p>	19	<p>1 MS. GIEDD: You want to take public comment first?</p> <p>2 CHAIRMAN McCAHREN: Yes. Public comment. If you make</p> <p>3 comment, you can't testify thereafter. Anybody that wants to</p> <p>4 walk up to the podium and briefly state your point and tell who</p> <p>5 you are, where you are from, so forth, so the court reporter</p> <p>6 knows who you are.</p> <p>7 MS. WHITE FACE: Excuse me, I'd asked if there was</p> <p>8 some of our members that wanted to make comments after we</p> <p>9 finish our testimony.</p> <p>10 CHAIRMAN McCAHREN: Yes.</p> <p>11 MS. WHITE FACE: They would be part of public comment?</p> <p>12 CHAIRMAN McCAHREN: Are they here now?</p> <p>13 MS. WHITE FACE: Some of them are here now, but they</p> <p>14 would rather make comments after we finish.</p> <p>15 CHAIRMAN McCAHREN: Anybody now want to comment? I</p> <p>16 don't know when the finish is either. It might be in a month</p> <p>17 or whatever.</p> <p>18 MR. HECKENLAIBLE: I'll keep my comments short. I'm</p> <p>19 Gary Heckenlaible with the environmental group from Rapid City</p> <p>20 called Action for the Environment and we are here to support</p> <p>21 Charmaine White Face and the Defender of the Hills on this</p> <p>22 nomination of Special, Exceptional, Critical, and Unique.</p> <p>23 And the two points that I would like to make is Action</p> <p>24 for the Environment did tour the area in question down there</p> <p>25 some time ago and right off of a gravel road we didn't walk in</p>
18	<p>1 may be people who want to leave and I'm anticipating this may</p> <p>2 go on for a while, so I'm certainly fine with them proceeding</p> <p>3 first.</p> <p>4 CHAIRMAN McCAHREN: Is that what the board would like</p> <p>5 to do? Okay.</p> <p>6 MS. WHITE FACE: Is there any way that public comment</p> <p>7 could be taken also after we give our presentation?</p> <p>8 CHAIRMAN McCAHREN: After what?</p> <p>9 MS. WHITE FACE: After we give our presentation, if</p> <p>10 there's any -- If we have any other ones that want to support</p> <p>11 our position.</p> <p>12 CHAIRMAN McCAHREN: It's okay with me. I think we</p> <p>13 ought to break for lunch now.</p> <p>14 MR. SWEETMAN: Reconvene at one o'clock?</p> <p>15 CHAIRMAN McCAHREN: 1:15 I'd say, but he would say</p> <p>16 one.</p> <p>17 MS. GIEDD: Then when we return we are going to start</p> <p>18 with the public comment period?</p> <p>19 CHAIRMAN McCAHREN: Yes. Will your people all be here</p> <p>20 at that time? Then we won't have to bring them back. Thanks.</p> <p>21 (Whereupon, the hearing was in recess at 11:48 a.m.,</p> <p>22 and subsequently reconvened at 1:00 p.m., and the following</p> <p>23 proceedings were had and entered of record:)</p> <p>24 CHAIRMAN McCAHREN: We are gathered together to resume</p> <p>25 our hearing. Commence.</p>	20	<p>1 more than a quarter mile and during the day, during that small</p> <p>2 area, we discovered about seven graves and a variety of things,</p> <p>3 and that just opened my eyes, because when I first looked at</p> <p>4 the area, it kind of looked barren and stuff like that, but</p> <p>5 once you got in there, there was just a whole lot of stuff</p> <p>6 there.</p> <p>7 And secondly, as far as I think Charmaine is going to</p> <p>8 talk about the water situation, and certainly Action for the</p> <p>9 Environment's experience with a water situation is when some</p> <p>10 people tell you this is going to be secluded, if there is a</p> <p>11 problem to an aquifer, believe me, the way water works and it</p> <p>12 goes and so on, it's not going to be confined to one aquifer,</p> <p>13 it's going to go into a lot of different places, so if there's</p> <p>14 problems, then we have got real big problems.</p> <p>15 And I would just like to state that with the mining</p> <p>16 activity that has taken place in the past and stuff like that,</p> <p>17 and everybody told us that it was going to be contained to the</p> <p>18 site, it wasn't going to get into water and that kind of thing,</p> <p>19 it doesn't work that way. Witness Brohm, witness the problems</p> <p>20 that are going on with Wharf now, and every mine that was up</p> <p>21 there leaked. So assume that from the beginning, rather than</p> <p>22 to think that things are going to go well and everything is</p> <p>23 okay with the water, because we were told everything was going</p> <p>24 to be okay and it wasn't.</p> <p>25 So with that, I will just say that I hope the board</p>

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21	<p>1 considers this nomination and gives a lot of thought to it and 2 I think it has a tremendous amount of merit, so that's all I 3 got to say. 4 CHAIRMAN McCAREN: Do you favor the continuance? 5 MR. HECKENLAIBLE: Yes. 6 CHAIRMAN McCAREN: Do you favor a visit? 7 MR. HECKENLAIBLE: Yes. 8 CHAIRMAN McCAREN: That's all. Thanks. I didn't 9 want to put words in your mouth. 10 MR. HECKENLAIBLE: Well, thanks for asking, though. 11 CHAIRMAN McCAREN: Others, public comment. I sense 12 everybody is saving up for later. If not, that will conclude 13 that portion of our public comment. Roxanne. 14 MS. GIEDD: I would start with an opening statement. 15 Mr. McCaren, I don't know if you want to do all the parties' 16 opening statements first or if you want me to just start and 17 then go to my witness. 18 CHAIRMAN McCAREN: Start and then we'll see. 19 MS. GIEDD: I just want to give the board some 20 direction on the statutes and regulations that are involved 21 here. The preliminary list statute is at 45-6B-33.4, and it's 22 the statute, the operating statute, if you will. It's the one 23 that requires this board to establish a Preliminary List of 24 Special, Exceptional, Critical, or Unique lands. That statute 25 specifically states, any final determination as to such</p>	23	<p>1 ecologically fragile that once it is adversely affected, it 2 could not return to its former ecological role in the 3 reasonably foreseeable future. Two, the land has such a strong 4 influence on the total ecosystem of which it is a part that 5 even temporary effects felt by it could precipitate a 6 system-wide ecological reaction of unpredictable scope or 7 dimension. Or three, the land has scenic, historic, 8 archaeological, topographic, geologic, ethnologic, scientific, 9 cultural, or recreational significance. So that is basically 10 the definition set that you will be working with today. 11 Now, just to very quickly run through the procedure, 12 the procedure for initiating a determination of a preliminary 13 listing starts with a mine operator submitting a request for 14 preliminary determination and a Notice of Intent to Operate. 15 That request, by the regulations, is required to be submitted 16 to DENR, it must be public noticed and copies of that are sent 17 to various agencies. DENR then has an obligation to inspect 18 the land involved, review the comments submitted by various 19 agencies, and make its determination or its recommendation on 20 whether or not that land should be placed on the preliminary 21 list. 22 In addition, the regulations allow citizens, 23 organizations, or agencies to petition for the lands involved 24 to be placed on the preliminary list, and that is at 25 74:29:10:12, and 16 and 20 all talk about citizens petitioning</p>
22	<p>1 designations, which is the placement on the preliminary list, 2 may not be made until an application for a permit to mine is 3 filed, which application includes lands on the preliminary 4 list. And I raise that because I want to make it clear that 5 this is just a preliminary decision. The final decision on 6 whether or not the lands are suitable for mining comes with the 7 mine permit application and hearing on that mine permit. 8 The preliminary list is basically what we view as a 9 notice statute. It gives notice to those proposing to mine 10 lands on the preliminary list that the lands may be unsuitable 11 for mining and that they will have to address those concerns at 12 the mine permit application hearing. Unsuitable land for 13 mining is established at 45-6B-33, and it states, no permit may 14 be issued for a mining operation proposed on unsuitable land. 15 Land is unsuitable if the following conditions cannot be 16 satisfactorily mitigated, and then it lists a number of issues, 17 and the third one is land to be affected includes land that is 18 Special, Exceptional, Critical, or Unique as defined in 19 45-6B-33.3 and satisfactory mitigation is not possible. So 20 that's sort of the framework of the statutes that establish the 21 preliminary listing and what it means. 22 Now, the definition of Special, Exceptional, Critical, 23 or Unique lands is at 45-6B-33.3 and that says, land is 24 Special, Exceptional, Critical, or Unique if it possesses one 25 or more of the following characteristics. One, the land is so</p>	24	<p>1 and that's really where we are today before you at this 2 hearing. We are acting on some citizens' petitions that were 3 filed. So basically that's how we lead up to the contested 4 case hearing that's before you today. 5 Now, I will have one witness, Roberta Fivecoate, who 6 will testify basically on this background, the Notice of Intent 7 to Operate, and the procedure in terms of filing with all the 8 agencies, and the department's inspection and determination. 9 At that point then the petitioners will proceed. They have the 10 burden of proof, by the regulations, on their petitions, and of 11 course after that, the intervenor, Powertech, will proceed. If 12 you want me to, Mr. McCaren, I will call my first witness, or 13 if you want opening statements from other parties, that's fine, 14 too. 15 CHAIRMAN McCAREN: You want to reserve? 16 MR. MAIN: I'll reserve. 17 MS. WHITE FACE: Reserve. 18 CHAIRMAN McCAREN: Proceed. 19 MS. GIEDD: I would call Roberta Fivecoate. 20 MR. ELLISON: Ms. Giedd, could you please speak up? 21 MR. SWEETMAN: Roxanne, he's not hearing you. 22 CHAIRMAN McCAREN: Up there, otherwise it gets 23 conversational. 24 MS. GIEDD: Can you hear me now, Bruce? 25 MR. ELLISON: Yes, I can. Thank you.</p>

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25	<p>1 MS. GIEDD: I will try to talk loud.</p> <p>2 Thereupon,</p> <p>3 ROBERTA FIVECOATE,</p> <p>4 called as a witness, being first duly sworn as hereinafter</p> <p>5 certified, testified as follows:</p> <p>6 DIRECT EXAMINATION</p> <p>7 BY MS. GIEDD:</p> <p>8 Q. And would you state your name for the record, please?</p> <p>9 A. My name is Roberta Fivecoate.</p> <p>10 Q. And what is your educational background?</p> <p>11 A. I have a bachelor's degree in geology and a master's</p> <p>12 degree in geology and geological engineering from the South</p> <p>13 Dakota School of Mines and Technology.</p> <p>14 Q. By whom are you employed?</p> <p>15 A. The State of South Dakota Department of Environment</p> <p>16 and Natural Resources.</p> <p>17 Q. And you are in the mining program?</p> <p>18 A. Yes, I am.</p> <p>19 Q. And what do you do for the mining program?</p> <p>20 A. I work on mine permits, technical revisions, permit</p> <p>21 amendments, I also work on exploration permits, basically</p> <p>22 anything dealing with what our portion of the mining program</p> <p>23 deals with.</p> <p>24 Q. Okay, and are you familiar with the matter before the</p> <p>25 board today, the nominating petitions for inclusion on the</p>	27	<p>1 clarify that issue.</p> <p>2 Q. And did she submit documents clarifying that?</p> <p>3 A. She and I spoke over the phone and also had e-mail</p> <p>4 contact and I composed a contact memo regarding those phone</p> <p>5 calls and e-mails.</p> <p>6 Q. And that --</p> <p>7 A. And it clarified the issue so that she indicated that</p> <p>8 the lands she was nominating were those specifically listed in</p> <p>9 Exhibit A and Exhibit B of her petition.</p> <p>10 Q. Okay, and the contact memo that you are discussing, is</p> <p>11 that part of Exhibit 1?</p> <p>12 A. Yes, it is.</p> <p>13 Q. And Exhibit 2, what is that document?</p> <p>14 A. Exhibit 2 is the nominating petition submitted by the</p> <p>15 Oglala Sioux Tribe.</p> <p>16 Q. And Mr. McCahren, since we have dismissed that</p> <p>17 particular petition, I won't ask any further questions about</p> <p>18 it. Exhibit 3.</p> <p>19 A. Exhibit 3 is the nominating petition submitted by</p> <p>20 Charmaine White Face.</p> <p>21 Q. And when did you receive that?</p> <p>22 A. We received it by mail on December 29th.</p> <p>23 Q. And the first page of Exhibit 3 is actually a letter.</p> <p>24 A. Yes.</p> <p>25 Q. And what was that with regard to?</p>
26	<p>1 preliminary list?</p> <p>2 A. I am.</p> <p>3 Q. And how is it that you are familiar with that?</p> <p>4 A. I was the lead reviewer for Powertech's Special,</p> <p>5 Exceptional, Critical, or Unique lands application.</p> <p>6 CHAIRMAN McCAREN: How long has it been since we have</p> <p>7 done one of these? Five years?</p> <p>8 MS. GIEDD: Five or six years, as I recall, Mr.</p> <p>9 McCahren.</p> <p>10 Q. (BY MS. GIEDD) I placed a number of exhibits before</p> <p>11 you, and would you please identify Exhibit 1?</p> <p>12 A. Exhibit 1 would be the nominating petition submitted</p> <p>13 by Debra White Plume.</p> <p>14 Q. When was that submitted?</p> <p>15 A. That was submitted to us by e-mail on December 28th</p> <p>16 and then by mail on December 30th.</p> <p>17 Q. Were there any additions or addendums to that petition</p> <p>18 that were submitted?</p> <p>19 A. We did ask for a clarification on the description of</p> <p>20 the land being nominated. Originally it stated that He Sapa,</p> <p>21 including the land described in the legal description of</p> <p>22 Exhibit A. We wanted clarification on that because it sounded</p> <p>23 like she was requesting the entire Black Hills to be included</p> <p>24 in this nominating petition and that would have made this</p> <p>25 petition extremely incomplete, so we felt that we needed to</p>	28	<p>1 A. This is a letter we received on January 2nd from Ms.</p> <p>2 White Face requesting that the petition be accepted in both her</p> <p>3 name and Defenders of the Black Hills.</p> <p>4 Q. And were any other addendums or additions made to that</p> <p>5 petition?</p> <p>6 A. Yes, we did find that the map that she had provided in</p> <p>7 her petition had been incorrect and we asked for a correction</p> <p>8 on that map, which she submitted. We received it on January</p> <p>9 6th, 2009.</p> <p>10 Q. And is that also part of Exhibit 3?</p> <p>11 A. Yes, it is.</p> <p>12 Q. And what is Exhibit 4?</p> <p>13 A. Exhibit 4 is Powertech's petition to intervene.</p> <p>14 Q. And is this the petition the board already acted on</p> <p>15 this morning, correct?</p> <p>16 A. Yes.</p> <p>17 Q. Did the department receive any written comments from</p> <p>18 the public with regard to these petitions?</p> <p>19 A. Yes, we did.</p> <p>20 Q. And would you describe those to the board?</p> <p>21 A. We received one comment letter from a Mr. Richard</p> <p>22 Elston, who was in favor of Powertech's side, the determination</p> <p>23 to not put this land on the Special, Exceptional, Critical, or</p> <p>24 Unique lands preliminary list. And then we also received</p> <p>25 comment letters from Ms. L. Elaine B. Eagle, which contains,</p>

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1 also contains press releases from Defenders of the Black Hills
 2 regarding Powertech, several pictures of eagles. We also had a
 3 comment letter submitted by the Rosebud Sloux Tribe, which had
 4 several questions regarding exploration and allowing Powertech
 5 to continue. And we also had two more -- three more, we just
 6 got one today, three more petitions also for the nominating
 7 petitions to allow this to be put onto the Special,
 8 Exceptional, Critical, or Unique preliminary lands list from
 9 Ms. Susan Gronwall, Ms. Sylvia Lambert, and also from a Dr.
 10 Lllias Jarding.
 11 CHAIRMAN McCAREN: Who?
 12 A. Dr. Lllias Jarding.
 13 Q. (BY MS. GIEDD) Those are all part of an exhibit, are
 14 they not?
 15 A. Yes.
 16 Q. What exhibit is that?
 17 A. Exhibit 5.
 18 Q. Now, would you describe briefly for the board how the
 19 process, this process started?
 20 A. It started by Powertech submitted to us in late August
 21 an application to have us -- for a determination for Special,
 22 Exceptional, Critical, or Unique lands and also Notice of
 23 Intent to Operate. Through this process, they are also
 24 required to send this to several agencies the same time they
 25 send it to us. However, through this process we also did a

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1 back and forth, we requested more information where we felt
 2 maybe they needed to address more issues.
 3 We did this and they finally submitted what we
 4 considered to be a complete application on October 23rd, which
 5 is I think when we submitted the final decision. At that time
 6 we issued a notice of request which was published. Powertech
 7 was required to publish within two papers. They published in
 8 the Custer County Chronicle and the Hot Springs Star, and then
 9 we also published in five other newspapers, the Black Hills
 10 Pioneer, the Edgemont Herald Tribune, the Rapid City Journal,
 11 Capital Journal, and the Brookings Register. After that notice
 12 of request is issued, from that point there is a 60-day review
 13 period in which the public can provide a nominating petition or
 14 comments on this and the review agencies can also provide any
 15 recommendations or comments or petition on their own behalf.
 16 Q. Okay, and would you identify what Exhibit 6 is for me?
 17 A. Exhibit 6 is the application submitted by Powertech
 18 for the request for a determination of Special, Exceptional,
 19 Critical, or Unique lands and the Notice of Intent to Operate.
 20 Q. And does that particular exhibit include any
 21 supplemental information or addendums to the application?
 22 A. What it contains is the initial application form
 23 submitted on August 21st and then the amended report, they
 24 issued a report with this, and it's the amended report is
 25 within this exhibit.

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1 Q. And what is Exhibit 7?
 2 A. Exhibit 7 would be the additional information that we
 3 requested from them to fill out things that they might have
 4 been missing in the amended report they issued.
 5 Q. So is Exhibit 7 in response to questions the
 6 department had about their original submission?
 7 A. Yes.
 8 Q. And that's from Powertech?
 9 A. Yes.
 10 Q. And Exhibit 8.
 11 A. Exhibit 8 is the notice of Request for Determination
 12 as well as the affidavits of publication.
 13 Q. This is the document that was published?
 14 A. Yes.
 15 Q. Exhibit 9. What is Exhibit 9?
 16 A. Exhibit 9 is proof of filing with the register of
 17 deeds and the agencies.
 18 Q. And that was submitted to DENR?
 19 A. Yes, by Powertech.
 20 Q. Exhibit 10, what is that?
 21 A. Exhibit 10 is a letter written by myself to the
 22 agencies letting them know that their 60-day review period had
 23 started for this request.
 24 Q. And what is the 60-day review period for?
 25 A. This is basically to allow them to let us know if they

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1 have any recommendations for nominating the lands, to let them
 2 know how they would submit those recommendations to us if they
 3 wanted to do something.
 4 Q. What agencies are notified of this?
 5 A. We have the Department of Agriculture, the
 6 Archaeologic Research Center, the Game, Fish and Parks, State
 7 Historical Society, and also the Department of Tourism and
 8 State Development.
 9 Q. Now, did DENR get any responses from any of those
 10 state agencies that were notified?
 11 A. We received a response from Mike Fosha with the
 12 Archaeological Research Center.
 13 Q. And what is Exhibit 11?
 14 A. Exhibit 11 is a letter from Mr. Fosha.
 15 Q. And did Mr. Fosha make a recommendation in his letter
 16 to the department?
 17 A. Yes, he did.
 18 Q. And does that appear in the letter itself?
 19 A. Yes, it does.
 20 Q. And would you --
 21 (Phone conversation in back of the room.)
 22 CHAIRMAN McCAREN: You gotta get off the phone. She
 23 can't take this and listen to that also. Proceed.
 24 Q. (BY MS. GIEDD) Would you read that section to the
 25 board, please?

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1 A. Yes. Mr. Fosha states, from a cultural resource
 2 management perspective, the sites identified as being
 3 potentially impacted in the proposed mining area during this
 4 phase of exploration do not contain significant information
 5 that would give them exceptional, critical, or unique status.
 6 There are 76 cultural resources within the permit boundary that
 7 have not been evaluated for their archaeological content. The
 8 Memorandum of Agreement between Powertech, Incorporated and the
 9 Archaeologic Research Center establishes protection through
 10 avoidance and/or evaluation or archaeological data recovery for
 11 these sites. Providing the current MOA is followed, it is
 12 recommended that the project proceed as planned from a cultural
 13 resources perspective.

14 Q. Now, does this Memorandum of Agreement that Mr. Fosha
 15 references, is that in the application somewhere?

16 A. Yes, it is.

17 Q. Is it one of the appendices?

18 A. Yes, it is. I know it's in there. I think it's in
 19 Exhibit 6 and it would be Appendix D to the report I think is
 20 what it is. Yes, Appendix D.

21 Q. And at this point what did the department do with
 22 regard to this matter?

23 A. Since we had received no further comment from any
 24 other agency, and from Mike Fosha's letter, we determined that
 25 he felt that this did not need to be put on the Special,

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1 Exceptional, Critical, or Unique lands list, and also based on
 2 inspection that we did, we did not feel it needed to be placed
 3 on the list.

4 Q. And when did the department conduct an inspection of
 5 this land?

6 A. We conducted two inspections. We conducted our first
 7 inspection on August 26th, and then a second inspection on
 8 October 8th, both of 2008.

9 Q. And Exhibit 12 is what?

10 A. This is our inspection report.

11 Q. What agencies -- or were there any other agencies or
 12 persons who accompanied you on these inspections?

13 A. Several.

14 Q. And who were they?

15 A. For the August 26th inspection, we had several federal
 16 offices accompany us. We had representatives from the Bureau
 17 of Land Management, from the United States Forest Service and
 18 also from the Nuclear Regulatory Commission. We also had
 19 several people from within the DENR as well as several
 20 representatives from Powertech. We also had Stan Michals also
 21 attended that inspection.

22 Q. During the course of that inspection, did you take any
 23 photos of the site?

24 A. Yes, we did.

25 Q. And I asked you this morning to bring them up so we

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1 could look at them. Would you put them up and describe what
 2 you observed.

3 A. I will do that. This first picture we have here was
 4 in the Burdock area just inside the gate when you reach the
 5 Burdock site. As you can see, it's pretty dry, pretty flat,
 6 not a whole lot as far as just looking at it, there's just not
 7 a whole lot there.

8 CHAIRMAN McCAREN: Are these going to be introduced?

9 MS. GIEDD: I will be introducing all the exhibits at
 10 the -- these are actually photos taken from Exhibit 12, so when
 11 I introduce them, they will be in the record, yes, Mr.
 12 McCahren.

13 CHAIRMAN McCAREN: Thanks.

14 A. The next photo we have here was what we have written
 15 is the first well field area in the inspection report. This is
 16 near the pump test area. Powertech did a pump test in May of
 17 2008. This area is near the pump test area and this would be
 18 where they would be planning to have their initial well field
 19 is what they told us in the field at that time.

20 MR. ELLISON: Could the witness please speak into the
 21 microphone a little.

22 CHAIRMAN McCAREN: Hang on a second. Let's move it
 23 over there.

24 MS. GIEDD: How about moving the podium.

25 CHAIRMAN McCAREN: I don't want to block anybody off

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1 that's back there. Why don't you put it over here.

2 A. I don't mind moving, but so I have an option to use
 3 this, I will probably go ahead and give it -- I'll just stand
 4 here while we are doing this part.

5 MS. GIEDD: Just talk loudly.

6 A. I will try. As I indicated, this picture is of what
 7 Powertech indicated would be their first well field area. It
 8 is near the pump test site that they had. They did a pump test
 9 in May in the Burdock area and this is right near that area.

10 This picture, after we had done that, we went up and
 11 we looked at the Darrow-Neville mine. This is a picture of the
 12 Darrow-Neville pit you can see.

13 Q. (BY MS. GIEDD) What mine is this, is this an old
 14 abandoned mine?

15 A. This is an abandoned uranium mine.

16 Q. When was this mined, if you know?

17 A. I am not certain, it would have been probably the
 18 sixties. This is a picture here once we left the
 19 Darrow-Neville area, we drove to this site here and this is
 20 overlooking where Powertech indicated their proposed plant site
 21 would be and that would be in the distance here actually in the
 22 center of the picture.

23 Afterwards we left the Burdock area and went to the
 24 Dewey area. In the Dewey area, the South Dakota Game, Fish and
 25 Parks and GCC Dakota have a cooperative management area and we

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1 just took a picture of the sign noting that that was there.
 2 This picture is showing the location of the proposed
 3 Dewey satellite plant facility and again this would be located
 4 somewhat in the distance towards the center of the picture.
 5 There are a lot of prairie dogs in the area. We noticed
 6 prairie dogs throughout just about all of the Burdock area as
 7 well as the Dewey area and here is a lovely picture of a
 8 prairie dog hole. This right here is the location of the Dewey
 9 pump test area. I think we are pretty much parked right in the
 10 middle of it right there and we are taking a picture off to the
 11 side.
 12 MR. ELLISON: Is that picture number six or is that
 13 still five?
 14 A. That's picture number eight, we are up to picture
 15 number eight.
 16 MR. ELLISON: Please identify them, if you would, by
 17 number.
 18 A. We are actually up to the next set of pictures. These
 19 came from the October 8th inspection. During this inspection,
 20 we didn't have near as many people with us. This inspection
 21 consisted of DENR, we had Mike Fosha from the Archaeological
 22 Research Center, we had Stan Michals with Game, Fish and Parks,
 23 and representatives from Powertech as well. This first
 24 picture, photo number nine, is a picture of a flint chip site
 25 located in the Burdock area.

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1 This next picture was also taken in the Burdock area.
 2 It is a picture of a fire hearth. I forgot to mention we also
 3 had representatives from Augustana College at this inspection
 4 as well and they were taking us through some of the
 5 archaeological sites that they saw. We were snapping pictures
 6 as we went, so this is a fire hearth site we also saw in the
 7 Burdock area.
 8 This is up in the pine knob region. That's also in
 9 the Burdock area, it's along the eastern side. This was a fire
 10 hearth that is eroding out in a road ditch in that area. That
 11 was picture number 11. I'm sorry, you might want to remind me
 12 if I forget to identify the pictures. We are on picture number
 13 12 now. This is right in the area of the Burdock, proposed
 14 Burdock plant site and you can see quite a few little brown
 15 knobs here, those are all prairie dog holes.
 16 This right here is the proposed burial site that
 17 Augustana College indicated this was the only burial site they
 18 found. They took us there to show us this and this is located
 19 also in the Burdock area.
 20 MR. ELLISON: Is that number 13 or number 12?
 21 A. That's number 13, I'm sorry. Right next -- on photo
 22 14 we show the remains of an old pump house. This picture was
 23 taken -- it's almost right next to the location of that one
 24 grave site. After the Burdock area, again we went up to the
 25 Dewey area to take a look at things. We did have -- Mr.

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1 Michals did indicate that bald eagle nest, this is photo number
 2 15. The bald eagle nest, we did take a picture of it while we
 3 were there to just see where it was located.
 4 From the bald eagle's nest on photo 16, we see that
 5 there is a house. We took this picture in the same location as
 6 we took the previous picture, photo 15 of the bald eagle's
 7 nest, so the house is actually very close to it. You also see
 8 here several of those again little brown holes indicating the
 9 prairie dog town that's also in the area. In the Dewey area,
 10 we saw antelope in both the Burdock area and the Dewey area.
 11 In photo 17, this is a picture of antelope we saw running
 12 around in the Dewey area. They almost seemed to be following
 13 us. We ran into more antelope every time we turned around up
 14 there.
 15 Photo 18 is a picture of a fire hearth. If I remember
 16 correctly, this is one of the areas that Mike Fosha indicated
 17 would be possibly considered for listing on the National
 18 Register of Historic Places. This is located along a small
 19 drainage near Beaver Creek in the Dewey area and this is just a
 20 picture of a fire hearth coming out of the eroding banks of
 21 that drainage. I think that's all.
 22 Q. All of these photographs that you just went through
 23 appear in the department's inspection report, Exhibit 12; is
 24 that correct?
 25 A. Yes.

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1 Q. Did the inspection report contain a section designated
 2 comments and recommendations?
 3 A. Yes, it did.
 4 Q. And what is this section of the inspection report?
 5 A. This section discusses our reasoning behind our
 6 determination.
 7 Q. And what was the department's determination?
 8 A. We determined that it did not need to be placed on the
 9 Preliminary List for Special, Exceptional, Critical or Unique
 10 lands.
 11 Q. And what were the reasons behind that determination?
 12 A. The first -- well, we went through and we discussed
 13 several different things. Our first issue that we discussed
 14 was ecological fragility. We determined that this area has
 15 poor to good quality range land but vegetation seen in this is
 16 similar to vegetation found all over in many western South
 17 Dakota prairies and the area is also very similar to areas seen
 18 all around the edge of the Black Hills. We also felt that any
 19 impacts to streams could be prevented through proper erosion
 20 control.
 21 We also determined that there were no federally listed
 22 threatened or endangered species, though we did note that the
 23 bald eagle is still a state threatened and endangered species,
 24 and also we noted that there were several sensitive species
 25 within the area. However, because Game, Fish and Parks did not

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1 provide comment, that was not really considered to be an issue,
 2 we just wanted to note that in our determination.
 3 We also noted that there was antelope and prairie dog
 4 towns and that because of the presence of prairie dogs, we
 5 could have black-footed ferrets, but again, Department of Game,
 6 Fish and Parks had no comment, so as far as the first issue in
 7 ecological fragility, we did not determine -- recommend that it
 8 be placed on the preliminary list.
 9 For the second issue, for the influence of the area on
 10 its ecosystem, it was pretty much the same reasoning. We
 11 determined that it was not ecologically fragile in that it's
 12 very similar to western South Dakota prairies and also similar
 13 to the area surrounding the entire Black Hills. We also listed
 14 out all the species again, but again since we had not received
 15 any recommendations or petition from the Department of Game,
 16 Fish and Parks, we determined again from this standpoint it did
 17 not need to be placed on the preliminary list.
 18 From the third standpoint, and this was going through
 19 of course each of the points in 45-6B-33.3, the third one goes
 20 through each of those listed under number three of that
 21 statute. The first one we listed was scenic and we did not
 22 receive anything from the Department of Tourism and State
 23 Development indicating that there would be a problem. We also
 24 determined that this site is located along the Dewey Road and
 25 around several ranches, which it would be visible from those

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1 ranches and from the Dewey Road, but it would not be visible
 2 from Highway 18 nor Edgemont, and also would not impact Craven
 3 Canyon, which is located five miles east of this area. So from
 4 that standpoint, we also determined it was not eligible for the
 5 preliminary list.
 6 Q. What is Craven Canyon?
 7 A. Craven Canyon is a location just north of Edgemont
 8 where there are several Native American pictographs or
 9 paleo-Indian pictographs within the canyon and it has been
 10 listed already on our preliminary list.
 11 Q. Okay.
 12 A. As far as historical, archaeological, cultural or
 13 ethnologic, we did not receive any comments from the Office of
 14 History stating that this needed to be placed on the
 15 preliminary list, and again, we also received that letter from
 16 Mr. Fosha indicating that he felt that this could be handled
 17 through the MOA and through mine permit conditions and did not
 18 need to be placed on the preliminary list.
 19 For the next thing, topographic, we felt that this was
 20 very similar to the areas around the Hills, so it did not
 21 have -- we did not feel that there was any areas of topographic
 22 significance. Also, again, we did note the presence of the
 23 creeks in the area, Beaver Creek, Pass Creek, and Cheyenne
 24 River, and we felt again any impacts to those could be
 25 prevented through proper erosion control during operations, so

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1 again we did not determine that was significant.
 2 Q. Is it fair to say that the department relies on its
 3 sister agencies who have expertise in certain areas to make
 4 some of these determinations?
 5 A. Absolutely.
 6 Q. Would you identify Exhibit 13 for me, please?
 7 A. Sure. Exhibit 13 is our Notice of Determination.
 8 Q. This is the department's Notice of Determination?
 9 A. Yes, it is.
 10 Q. And was that a document that was published?
 11 A. No, it was not.
 12 Q. Was it provided to any other people?
 13 A. Yes, upon making the Notice of Determination, we sent
 14 this notice to Powertech, we sent it to the Custer County
 15 Commission, the Fall River County Commissioners, surface owners
 16 and mineral owners in the affected area, the interested persons
 17 list, and also the review agencies.
 18 Q. And then after this point, the department received
 19 petitions from the petitioners with regard to preliminary
 20 listing; is that right?
 21 A. We received those right about the same time we made
 22 the determination, yes.
 23 Q. And as a result of that, what did the department do?
 24 As a result of receiving the petitions, what did the department
 25 do?

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1 A. We issued a Notice of Hearing to bring the matter
 2 before the board.
 3 Q. And Exhibit 14, what is that?
 4 A. That is the Notice of Hearing.
 5 Q. And was that published?
 6 A. Yes, it was. It was published in five papers, the
 7 department published it in the Edgemont -- I take that back, it
 8 was only published in four, we sent it to five papers. It was
 9 published in the Edgemont Herald Tribune, the Black Hills
 10 Pioneer, the Capital Journal, and the Brookings Register. We
 11 did send it to the Rapid City Journal, but they failed to
 12 publish. Unfortunately, we don't have affidavits for that yet.
 13 We did all that through phone confirmation.
 14 Q. You called the newspapers and confirmed their
 15 publication?
 16 A. Yes.
 17 MS. GIEDD: Mr. McCahren, I have no further questions.
 18 I would move the admission of Exhibits 1 and then 3 through 14.
 19 MR. MAIN: No objection.
 20 CHAIRMAN McCAREN: Mr. Ellison.
 21 MR. ELLISON: Yes, sir.
 22 CHAIRMAN McCAREN: She moved the exhibits. Do you
 23 have any objection?
 24 MR. ELLISON: Subject to examination, no.
 25 MS. WHITE FACE: Same as Mr. Ellison. I have some of

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45	<p>1 them, but I don't have all of them.</p> <p>2 CHAIRMAN McCAHREN: Say again.</p> <p>3 MS. WHITE FACE: I have some of the exhibits, but I</p> <p>4 don't have all of them.</p> <p>5 CHAIRMAN McCAHREN: Which ones don't you have?</p> <p>6 MS. WHITE FACE: 13 for sure.</p> <p>7 MS. GIEDD: Mr. McCahren, I did not make copies of all</p> <p>8 of the exhibits. Some of them are pretty standard, but I will</p> <p>9 give them to Charmaine so she can take a look at all of them.</p> <p>10 They might be out of order.</p> <p>11 MR. ELLISON: May I ask a question? Are these</p> <p>12 exhibits available on any Web site or how might I be able to</p> <p>13 get a copy of each of these?</p> <p>14 A. All of these exhibits are available on the DENR Web</p> <p>15 site. I don't know if you are aware, we do have a Powertech</p> <p>16 page set up and all of these exhibits are available there.</p> <p>17 MR. ELLISON: Thank you.</p> <p>18 MS. WHITE FACE: After looking at it, I do have -- I</p> <p>19 have seen Exhibit 13, yes.</p> <p>20 CHAIRMAN McCAHREN: Thank you. Do you have any</p> <p>21 objection?</p> <p>22 MS. WHITE FACE: No.</p> <p>23 CHAIRMAN McCAHREN: The Exhibits -- your objection,</p> <p>24 Mr. Ellison, was you weren't going to object now but maybe</p> <p>25 later?</p>	47	<p>1 Q. Ms. Fivecoate, can you confirm again what agencies</p> <p>2 DENR notified that it had received a request from Powertech for</p> <p>3 a determination of Special, Exceptional, Critical and Unique?</p> <p>4 A. Yes, we notified the Department of Agriculture, the</p> <p>5 Office of History, the Archaeological Research Center,</p> <p>6 Department of Tourism and State Development, and also the Game,</p> <p>7 Fish and Parks.</p> <p>8 Q. Did you also notify the register of deeds in both</p> <p>9 counties?</p> <p>10 A. Powertech was required to file with the register of</p> <p>11 deeds and they did so.</p> <p>12 Q. Thank you. Of these agencies you have named, Game,</p> <p>13 Fish and Parks, agriculture, tourism, Office of History, and</p> <p>14 state archaeologist, who did you receive comments back from?</p> <p>15 A. Only the Archaeological Research Center we received</p> <p>16 comments back from.</p> <p>17 Q. And I believe that is Exhibit 11.</p> <p>18 A. Yes.</p> <p>19 Q. Refer then to Exhibit 11, and I know you pointed this</p> <p>20 out before, but directing your attention to the second full</p> <p>21 paragraph on page one, could you read the first sentence of</p> <p>22 that paragraph for us?</p> <p>23 A. It states, from a cultural resource management</p> <p>24 perspective, the sites identified as being potentially impacted</p> <p>25 in the proposed mining area during this phase of exploration do</p>
46	<p>1 MR. ELLISON: I guess what my objection would be is</p> <p>2 one objection I would have is that they are incomplete. That's</p> <p>3 more of a substantive objection rather than a procedural</p> <p>4 objection. I don't have an objection to their admission. I do</p> <p>5 have many questions regarding them of the witness when it</p> <p>6 becomes appropriate.</p> <p>7 CHAIRMAN McCAHREN: They will be received. Two is</p> <p>8 withdrawn?</p> <p>9 MS. GIEDD: Two is the Oglala Sioux Tribe's petition</p> <p>10 and that was dismissed.</p> <p>11 CHAIRMAN McCAHREN: Thank you.</p> <p>12 <u>EXHIBITS:</u></p> <p>13 (State's Exhibit Nos. 1 and 3 through 14 received into</p> <p>14 evidence.)</p> <p>15 CHAIRMAN McCAHREN: One and three through 14 will be</p> <p>16 received.</p> <p>17 MS. GIEDD: Thank you, Mr. McCahren. I have no</p> <p>18 further questions of this witness.</p> <p>19 CHAIRMAN McCAHREN: Mr. Main.</p> <p>20 MR. MAIN: Does the board have copies of Exhibit 11</p> <p>21 and 12? The reason I ask, I will be referring to those with</p> <p>22 the witness.</p> <p>23 CHAIRMAN McCAHREN: We got them. Proceed.</p> <p>24 CROSS-EXAMINATION</p> <p>25 BY MR. MAIN:</p>	48	<p>1 not contain significant information that would give them</p> <p>2 Exceptional, Critical, or Unique status.</p> <p>3 Q. That sentence and the rest of that paragraph, then,</p> <p>4 it's my understanding is what DENR relied on in part to</p> <p>5 determine that these lands are not Special, Exceptional,</p> <p>6 Critical, or Unique.</p> <p>7 A. That is correct.</p> <p>8 Q. Referring to Exhibit 12, my understanding is this is</p> <p>9 DENR's writup of the inspections that took place and also your</p> <p>10 conclusions.</p> <p>11 A. Yes.</p> <p>12 Q. I want to talk a little bit about the inspections and</p> <p>13 I know you testified briefly on this before, but when were the</p> <p>14 inspections held?</p> <p>15 A. The inspections were held on August 26th and October</p> <p>16 8th, both of 2008.</p> <p>17 Q. Were you present on both inspections?</p> <p>18 A. Yes, I was.</p> <p>19 Q. On the first inspection, it would be my understanding</p> <p>20 on page one, that listing of persons there were all the persons</p> <p>21 who participated in that inspection.</p> <p>22 A. That would be all the persons who participated in both</p> <p>23 inspections.</p> <p>24 Q. Both inspections.</p> <p>25 A. Yes.</p>

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1 Q. Then there is another list -- I see what you mean, on
 2 page two there's a breakout of the persons who attended the
 3 August 2008 inspection.
 4 A. Yes.
 5 Q. And then on page six there is an itemization of the
 6 persons who attended the October inspection.
 7 A. Yes.
 8 Q. And the total of those persons is on page one.
 9 A. Yes.
 10 Q. You had stated that BLM personnel, and you indicated
 11 this, BLM personnel attended the inspections, US Forest Service
 12 personnel attended the inspections, NRC personnel attended the
 13 inspections. Did DENR notify those entities of the inspections
 14 and invite them to attend?
 15 A. Yes, we did.
 16 Q. I know you indicate, but give us an idea of -- tell us
 17 a little bit about the inspections, where you met, how you
 18 traveled, how you viewed the property, conferences you would
 19 have on site, things you would talk about.
 20 A. The inspections, both inspections started at the
 21 Powertech office in Edgemont. On the August 26th inspection,
 22 we had a meeting. We discussed just generally -- it kind of
 23 goes through here with a lot of it. Powertech gave a brief
 24 presentation showing locations of historical exploration holes
 25 that had been drilled in the area. They also showed us where

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1 they might want to locate the first well field and also both
 2 the main processing facility, Burdock, as well as the
 3 processing facility at Dewey.
 4 After the meeting, after we did a general meeting over
 5 what they planned to do in their mining operation and
 6 historical issues, as far as previous mining in the area, we
 7 drove up to the Hollenbeck Ranch, which is located just north
 8 of Edgemont, to consolidate vehicles. Because of the number of
 9 people involved, we didn't want 20 vehicles going out to the
 10 site. So we consolidated vehicles at the Hollenbeck Ranch and
 11 then we drove out and did an inspection first at the Burdock
 12 area and at this point in time the United States Forest Service
 13 had not joined us. They were actually late coming to the
 14 inspection, but we went into the Burdock area and just took
 15 note of things like vegetation that was present in the area.
 16 While we were at the site during this inspection,
 17 there was a lot of arm waving going on where Powertech would
 18 say this is where we plan to do this part of our operation,
 19 this is where we plan to have our first well field, things like
 20 that. That's basically what that inspection entailed, just
 21 kind of showing and giving an idea of what their operation
 22 plans, general idea of what operations they might be doing at
 23 the site.
 24 After we had started into the Burdock area and gotten
 25 a few stops into the site, the United States Forest Service

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1 representatives were able to join us, and unfortunately, we got
 2 to the Darrow-Neville pit and they left us. They decided they
 3 wanted to stay there and inspect the Darrow-Neville pit instead
 4 of continue on with us.
 5 Q. If I might interrupt here, do you know, is there any
 6 United States Forest Service lands included within the 10,580
 7 acres requested to be determined by Powertech?
 8 A. There is not. That might be why they left.
 9 Q. Thanks.
 10 A. So after that, we finished up our inspection at the
 11 Burdock site and we started heading up to Dewey. We stopped on
 12 Dewey Road to just make a brief again arm waving, pointing out
 13 kind of what's going to be happening over the whole range of
 14 the Dewey area. At this point the NRC left us because they had
 15 previous engagements to attend to, and then we proceeded to go
 16 further into the Dewey area and just do a few brief inspections
 17 and more arm waving to give general description of what the
 18 operation plans would be.
 19 The October 8th inspection was very similar to this.
 20 We started out in a meeting, in which we actually discussed,
 21 since federal was not there, we discussed concerns that the
 22 state had as far as completeness issues with their request that
 23 they had given. We also discussed issues with the exploration,
 24 which the board heard in November. At that time we still had
 25 completeness issues regarding that and that was what the

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1 meeting was about, was those two things that were happening at
 2 the same time.
 3 Then we went out into the field. Mike Fosha, the goal
 4 of this was to get Fosha out with us so we could actually take
 5 a look and see what specific concerns he might have as far as
 6 archaeological sites in the area of cultural interest. So we
 7 went out into the field and that's where we went and stopped at
 8 so many archaeological sites on this one because this
 9 inspection was geared more towards the actual interest of
 10 archaeological, cultural, historic interests.
 11 Q. When you say Mr. Fosha, you mean --
 12 A. Mr. Fosha is an assistant state archaeologist I
 13 believe with the Archaeologic Research Center. He is the
 14 person that we send this stuff to for review.
 15 Q. And he accompanied you on this inspection?
 16 A. Yes, he did.
 17 Q. Which is in October.
 18 A. The October 8th inspection, yes.
 19 Q. You have mentioned just briefly some completeness
 20 matters that you wanted to discuss. Did Powertech resolve
 21 those completeness issues and then file all the information
 22 required to make this Request for Determination complete?
 23 A. Yes, they did.
 24 Q. If I could now turn your attention, Ms. Fivecoate, to
 25 photo 13 in this Exhibit 12, and that's the one that it's

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53	<p>1 captioned as a possible burial site.</p> <p>2 A. Yes.</p> <p>3 Q. Is it your understanding that that's a possible burial</p> <p>4 site for a Euroamerican?</p> <p>5 A. Yes. While we were at the inspection, it was</p> <p>6 explained to us by the Augustana representatives, at the time</p> <p>7 they told us that they believed this was a homesteader burial</p> <p>8 site and they also indicated that an elderly rancher near the</p> <p>9 site had also remembered that a homesteader had been buried</p> <p>10 here.</p> <p>11 Q. If I might now ask you, Ms. Fivecoate, to turn to page</p> <p>12 16 of Exhibit 12, and particularly the last -- not the last,</p> <p>13 second to last paragraph on page 16, which I take to be the</p> <p>14 conclusions and final summary of DENR, and could you read that</p> <p>15 for us, please?</p> <p>16 A. Yes. It states, no items of any significance were</p> <p>17 noted during the inspection. All of the state agencies which</p> <p>18 reviewed the determination felt that the area did not meet the</p> <p>19 criteria for Special, Exceptional, Critical, or Unique lands.</p> <p>20 Also, no nominating petitions were submitted by the review</p> <p>21 agencies. Therefore, the lands described in the Notice of</p> <p>22 Intent to Operate are not considered eligible for inclusion on</p> <p>23 the Preliminary List of Special, Exceptional, Critical, or</p> <p>24 Unique lands. The proposed area should not be included on the</p> <p>25 Preliminary List of Special, Exceptional, Critical, or Unique</p>	55	<p>1 A. A geologist and geological engineer.</p> <p>2 Q. Okay. You are not a historic preservation officer or</p> <p>3 had any such training.</p> <p>4 A. No.</p> <p>5 Q. Are you aware that the Black Hills are considered to</p> <p>6 be a place of worship for those tribes and other Indian nations</p> <p>7 in this area?</p> <p>8 A. I'm not sure how to answer that. I was aware, but not</p> <p>9 aware that this was an impact to that.</p> <p>10 Q. Were you aware that the Black Hills were regularly</p> <p>11 used by the Lakota and the Arapahoe and other nations</p> <p>12 historically as well as currently?</p> <p>13 A. No.</p> <p>14 Q. You did receive the report from Augustana College that</p> <p>15 listed numerous what are described as Native American cultural</p> <p>16 sites.</p> <p>17 A. Yes.</p> <p>18 Q. Did you consult with any tribes who might have</p> <p>19 knowledge of the significance of any of those sites?</p> <p>20 A. No.</p> <p>21 Q. Why?</p> <p>22 A. Basically we depend upon, when we submit these to</p> <p>23 agencies, we depend upon both the Archaeological Research</p> <p>24 Center and the Office of History to provide that information</p> <p>25 for us.</p>
54	<p>1 lands.</p> <p>2 MR. MAIN: Thank you, Ms. Fivecoate. That's all the</p> <p>3 questions I have, Mr. Chairman.</p> <p>4 CHAIRMAN McCAREN: Ms. Giedd. Let's see, Mr.</p> <p>5 Ellison.</p> <p>6 MR. ELLISON: Yes, sir.</p> <p>7 CHAIRMAN McCAREN: Do you have questions of the</p> <p>8 witness?</p> <p>9 MR. ELLISON: Yes, sir, I do.</p> <p>10 CHAIRMAN McCAREN: Proceed.</p> <p>11 MR. ELLISON: If the witness would please speak up so</p> <p>12 that I could hear all of her answers.</p> <p>13 CROSS-EXAMINATION</p> <p>14 BY MR. ELLISON:</p> <p>15 Q. I guess I would like to begin by asking is it clear,</p> <p>16 then, that the state Department of Environment and Natural</p> <p>17 Resources made no effort to contact the tribal historic</p> <p>18 preservation officer for the Oglala Sioux Tribe or the Rosebud</p> <p>19 Sioux Tribe or the Cheyenne River Sioux Tribe; is that correct?</p> <p>20 A. That is correct.</p> <p>21 Q. And you would agree that these are tribes that are</p> <p>22 within the borders of the state of South Dakota.</p> <p>23 A. Yes.</p> <p>24 Q. And you are a geologist and a hydrologist; is that</p> <p>25 correct?</p>	56	<p>1 Q. Is one -- now, do you have any idea of the quality of</p> <p>2 such consultation by either of those agencies?</p> <p>3 A. I do not.</p> <p>4 Q. Or whether even any such consultation takes place with</p> <p>5 the tribes.</p> <p>6 A. I do not.</p> <p>7 Q. Isn't one of the purposes of making this determination</p> <p>8 to try and get all of the potentially available information to</p> <p>9 make sure that the department does not okay or negate in this</p> <p>10 case a Special, Exceptional, Critical, or Unique land</p> <p>11 designation of an area that might otherwise qualify?</p> <p>12 A. Yes.</p> <p>13 Q. And with the numerous identification of Native</p> <p>14 American sites, though, you felt it unnecessary to consult with</p> <p>15 people who actually might have direct information about the</p> <p>16 significance of those sites; is that a fair statement?</p> <p>17 A. In our Special, Exceptional, Critical, and Unique</p> <p>18 regulations, it is not required for the minerals and mining</p> <p>19 program to consult with these agencies, the tribal agencies I</p> <p>20 mean. That is why we depend so heavily upon the Archaeological</p> <p>21 Research Center and the Office of History to perform some of</p> <p>22 these duties for us, and I do not know what their duties</p> <p>23 exactly are.</p> <p>24 Q. Okay, all right. Now, there is, in state government,</p> <p>25 isn't there an executive level agency for tribal/state</p>

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1 relations?

2 **A. I don't know.**

3 **Q.** Okay, so there was no effort really to contact any

4 state agencies that might specifically have as their purpose or

5 field of operation consultation with tribes about these issues

6 of possible significant sites.

7 **A. Not that I know of. Again, I'm not sure what the**

8 **requirements of the Archaeological Research Center and the**

9 **Office of History would be.**

10 **Q.** Do you think that this would be a good idea for

11 consultation with tribal governments about this particular

12 significance?

13 MS. GIEDD: Objection, speculation.

14 MR. ELLISON: I couldn't hear the objection.

15 MS. GIEDD: Objection, it's speculation.

16 MR. ELLISON: No, I'm asking for her opinion. She's

17 being called as an expert I would assume.

18 CHAIRMAN MCCAHHREN: Answer it if you can.

19 **A. Well, I'm definitely not an expert as far as**

20 **historical, cultural, or archaeological matters, so I can't**

21 **answer that.**

22 **Q.** (BY MR. ELLISON) Was there any effort to consult with

23 the Lakota Treaty Council --

24 **A. No.**

25 **Q.** -- regarding these sites? All right. So basically

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1 the department is relying upon whether or not agencies give any

2 input as to these sites having cultural significance and if

3 they either don't give any input or if they do give input but

4 you have no idea as to who they may have consulted as to the

5 completeness and reasonableness of their opinions, if they say

6 there's no problem, then DENR just simply accepts it; is that

7 basically what happens?

8 **A. Yes.**

9 **Q.** Let's look -- I've got some more specific questions.

10 Now, do I understand that some of these sites that you took

11 pictures of, for example, picture number 10 and picture number

12 11, include hearth sites?

13 **A. Yes.**

14 **Q.** All right, and those are what are currently called as

15 prehistoric or ancient living areas; is that right?

16 **A. I believe so.**

17 **Q.** Now, when you went out also to do these two

18 inspections, there was no representatives from either any

19 tribal governments or tribal historic preservation offices or

20 traditional governments, such as the treaty council, none of

21 them were invited or in attendance; is that right?

22 **A. That is correct.**

23 **Q.** Shifting just a little bit, you mentioned that there

24 were historic test holes that you observed and may even be in

25 some of the pictures; is that right?

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1 **A. No, that was part of the discussion prior to going out**

2 **into the field. We discussed historic test holes that had been**

3 **done during a meeting at the Powertech office prior to going**

4 **out into the field. The pictures that you see that show holes**

5 **are prairie dog holes.**

6 **Q.** All right, now, the historic test sites, are there

7 historic test sites within the acreage that Powertech is

8 applying to do its operations?

9 **A. Are you referring to historic drill sites?**

10 **Q.** Historic drill sites, yes, ma'am.

11 **A. Yes.**

12 **Q.** Do you know how many?

13 **A. I don't know, not exactly.**

14 **Q.** Are you familiar with the Dewey-Burdock study that was

15 done a number of decades ago regarding those historic test

16 sites?

17 **A. I have seen it.**

18 **Q.** And doesn't that study raise all kinds of questions

19 about the lack of proper plugging and capping of those

20 exploratory holes and the extreme likelihood of intermixing of

21 aquifers as a result thereof?

22 **A. I don't recall.**

23 **Q.** Wouldn't that be something that would be pretty

24 important to determine whether or not, under subparagraph two

25 of 45-6B-33.3 in terms of of there being a strong influence on

60

1 the total ecosystem, don't you think that would be important

2 information to have in assessing whether or not there would be

3 such an impact?

4 **A. Not at this time, for many reasons.**

5 **Q.** Would you please list them?

6 **A. We are discussing a ground water issue that Powertech**

7 **will have to address in future permitting efforts, as far as a**

8 **UIC mine permit, a ground water discharge permit, they would**

9 **have to -- they will be required to address all of these**

10 **issues. However, we are also discussing an aquifer that is 500**

11 **feet under the surface. From what I can say, minimal to no**

12 **impact to the surface, and also the Lakota and Fall River**

13 **aquifers are not considered to be exclusive, they are**

14 **considered together as the Inyan Kara aquifer, so as far as**

15 **what we know about that aquifer, we cannot state that one**

16 **aquifer would necessarily impact the other, as we consider them**

17 **to be already impacting each other through fractures in the**

18 **confining layers between the two aquifers, the just general**

19 **thinness of the confining layer. We just don't consider those**

20 **to be exclusive aquifers separately.**

21 **Q.** So basically you don't know the nature or extent of

22 potential problems from historic wells and that's just

23 something that will be explored later; is that correct?

24 **A. Powertech will have to address that later as part of**

25 **their mine permit, yes.**

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1 Q. Now, in terms of the fracturing, did you review, and
 2 if so, what reports did you review as to studies of the nature
 3 and extent of fracturing between and the intermixing or
 4 potential intermixing of each of these aquifers with the
 5 aquifer to be mined?

6 A. The general studies, as far as fracturing goes, it's
 7 just automatically assumed that there will be translation
 8 between those aquifers through general fractures of that
 9 confining layer. As far as studies that I've seen, I've seen a
 10 study done specifically on the stratigraphy of the Inyan Kara
 11 aquifer in this area, it was done by the United States
 12 Geological Survey, and that addresses some of these issues. At
 13 the moment my mind is kind of going blank.

14 Q. You are also aware that in the process that Powertech
 15 wants to use for its solution mining and even in their
 16 exploration, it requires pushing solution down at high pressure
 17 into the ground to force water with these heavy metals up for
 18 testing or extraction, and doesn't that high pressure injection
 19 into the ground also increase not only the danger of further
 20 fracturing but further intermixing of aquifers?

21 A. This is something that would have to be addressed by
 22 Powertech during the mine permit procedure, because at that
 23 time is when they will be going into their actual full
 24 description of operations and what they plan on doing and how
 25 they plan on doing it and how they plan to maintain their --

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1 maintain this solution into the particular part of the aquifer
 2 that they want to do. At this time, though, that's strictly
 3 operational, and so no, that was not considered during this
 4 preliminary list request.

5 Q. So it sounds to me, then, that you don't have enough
 6 information to make a firm recommendation that this land or
 7 this operation or this particular location, that there would
 8 not be a strong influence on the total ecosystem and even
 9 temporary effects could precipitate a system-wide ecological
 10 reaction of unpredictable scope or dimension. I'm quoting from
 11 subparagraph two of 45-6B-33.3. Ma'am, essentially you don't
 12 have enough information yet to reach the conclusions that you
 13 have stated to this board you have already reached.

14 A. The reason we came to the conclusion with the ground
 15 water was because, again, it is an aquifer, it is a confined
 16 aquifer. There is minimal to no impact to the surface. If
 17 Powertech can get into operation, that part of the aquifer will
 18 be exempted and therefore it is no longer usable as a drinking
 19 water source, you can't drill wells into it any more. And it
 20 will also be a huge violation of their permit to let any of
 21 that stuff exit this aquifer exemption area. So this is why we
 22 made this decision, because this area, if they get that far,
 23 will no longer be allowed to impact the ecosystem necessarily.

24 Q. Are you saying that there is no fracturing that exists
 25 and there are no exploratory wells that have been improperly

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1 plugged or capped that go down into the aquifer to be mined and
 2 go through any of the other aquifers that are in the area? Is
 3 that what your testimony is, ma'am?

4 A. Into other aquifers, which other aquifers?

5 Q. You mentioned that there were -- you mentioned there
 6 were a number of aquifers in this area. Are you saying they
 7 are all really one aquifer?

8 A. There is one surface aquifer, the Cheyenne River.
 9 This is located on the southern end of this area. We
 10 determined, as I stated earlier, that there would be no impact
 11 to surface as long as erosional -- as long as they maintain
 12 proper erosion measures.

13 As far as deeper aquifers, the next deepest aquifer is
 14 at least 500 to 1,000 feet deep below the Inyan Kara, so the
 15 Inyan Kara is sufficiently secluded to not impact other
 16 aquifers. The surface, as I said, is 500 feet deep. Any
 17 fracturing you might find in that 500 feet of shale would have
 18 very, very minimal flow through and that is evidenced by the
 19 fact that the area is so incredibly dry down there. If you go
 20 on an inspection, it's just -- the surface is very dry.

21 As far as historical drill holes, if there are any
 22 that are not closed properly, this is something again Powertech
 23 would have to address as part of their mining operation under a
 24 mine permit, as I feel that to do a successful ISL mine, they
 25 would probably be required to drill out and close these plugs

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1 properly, as these might influence the mining operation itself.

2 Q. And you mentioned that Powertech will have to seek a
 3 permit exemption under the Clean Water Act for this aquifer.

4 A. They will have to get an aquifer exemption, yes.

5 Q. And that's because in fact their operation
 6 contaminates water --

7 A. Actually --

8 Q. -- and makes it undrinkable.

9 A. No, to get an aquifer exemption, they have to prove
 10 that the water is already not usable.

11 Q. And you mentioned that there were some home sites in
 12 the area.

13 A. Yes.

14 Q. And do they have wells?

15 A. Yes, they do.

16 Q. And do you know what aquifers those wells are in?

17 A. Several of the homes are currently within Inyan Kara.
 18 I believe Powertech has also indicated in the past that they
 19 are trying to get several people into a deeper aquifer.

20 Q. Let's see what other questions I have. Will you be
 21 including the Dewey-Burdock study in any final recommendations
 22 to the board on this matter?

23 MS. GIEDD: The department is not making a final
 24 recommendation to this board.

25 MR. ELLISON: Okay.

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1 Q. (BY MR. ELLISON) Now, when you were going through
 2 the -- if I may digress just a moment, when you were going
 3 through the department's inspection report and you were going
 4 through the various criteria that were stated in subparagraph
 5 three of 45-6B-33.3, you did not mention ethnological,
 6 sociologic, or cultural significance. Was that an omission on
 7 your part or was that something that was missing from the
 8 report?

9 A. I did mention that. We do have it in our inspection
 10 report as well on page 13 is the start of that. And I
 11 mentioned that historic -- under this historic, archaeological,
 12 cultural, and ethnologic statement, we found the Office of
 13 History had no comments and did not recommend it to be placed
 14 on the preliminary list and also that Mike Fosha with the state
 15 archaeologist determined that the sites being impacted during
 16 proposed mining operation do not contain sufficient information
 17 that would exhibit Special, Exceptional, Critical, or Unique
 18 lands criteria from a historical, cultural, archaeological, or
 19 ethnologic perspective. So from both the lack of response from
 20 the Office of History as well as Mike Fosha indicating that
 21 this was just not necessary to put it on the list, we
 22 determined it was not necessary as far as this perspective.

23 Q. Now, you also mentioned, ma'am, that there was
 24 evidence of bald eagles being in the area; is that correct?

25 A. Yes.

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1 Q. Did you not receive a letter from Stan Michals, not
 2 you personally, the department, receive a letter dated -- from
 3 Stan Michals, the energy and minerals coordinator from Game,
 4 Fish and Parks, October 17th, 2008, recommending that no
 5 exploration activity occur after February and before the end of
 6 August to avoid disruption of bald eagle activity?

7 A. Yes, I believe his letter stated no activity in
 8 Sections 29 and 30.

9 Q. Yes, I'm not sure you mentioned that letter. I
 10 thought you said --

11 A. That letter was in response most specifically to the
 12 exploration permit that we were processing at that time and was
 13 not in relation to the scenic and unique.

14 Q. Do you think that would be something to consider,
 15 though, here?

16 A. Again, this was something -- Mr. Michals was notified
 17 of this and he was sent a letter indicating that he had review
 18 and he did not give us a response.

19 Q. Now, you mentioned -- so does that mean that you are
 20 suggesting to this board they not consider that letter or are
 21 you suggesting that, either way, that they consider input from
 22 Game, Fish and Parks, which the department is aware of, that
 23 they shouldn't consider it as well?

24 A. Well, that letter specifically was for exploration. I
 25 mean, it can be considered at this time just to note that the

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1 bald eagle nest is there, although we have noted that
 2 repeatedly in our inspection report. As far as what further
 3 recommendations Mr. Michals would have requested as far as the
 4 Special, Exceptional, Critical, or Unique lands list, he did
 5 not provide a response for that, which constituted the Game,
 6 Fish and Parks clearance of those lands from their point of
 7 view.

8 Q. So essentially is it the DENR's position that if other
 9 agencies don't do their jobs, then that relieves the department
 10 of doing its job in ascertaining whether or not the
 11 requirements under 45-6B-33 and 33.3, basically you can ignore
 12 anything that there isn't an other agency response from?

13 A. There is a regulation that specifies if an agency does
 14 not respond, it constitutes clearance of those lands. That
 15 regulation I believe is 74:29:10 I want to say 7, is seven
 16 correct?

17 MS. GIEDD: Yes.

18 A. 74:29:10:7, if an agency fails to respond, that
 19 constitutes their clearance of the lands for the Preliminary
 20 List of Special, Exceptional, Critical, or Unique lands.

21 Q. (BY MR. ELLISON) So essentially the answer is if
 22 other agencies don't do their job, then that relieves the DENR
 23 of any further inquiry; is that what your position is?

24 A. Yes.

25 Q. One other area of questioning. You mentioned the

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1 Memorandum of Understanding between Powertech and who is that
 2 with?

3 A. That is with I believe the Archaeologic Research
 4 Center.

5 Q. Now, the DENR is not a party to that Memorandum of
 6 Understanding; is that right?

7 A. That is correct.

8 Q. And nor are any tribal governments, as far as you
 9 know.

10 A. Correct.

11 Q. Now, can you tell the board -- Powertech has never
 12 done a mine itself, has it?

13 A. Not that I know of.

14 Q. But they do have history in other states, for example,
 15 like in Wyoming.

16 A. I don't know.

17 Q. For example, do you contact the Wyoming equivalent of
 18 the Department of Energy and Natural Resources and say, hey, we
 19 have this company that wants to operate in our state, we are
 20 looking at these particular issues, how has the parent company
 21 dealt with these issues in Wyoming? Have you done any of that?

22 A. No. If we do that, that would be covered under the
 23 mine permit.

24 Q. Okay. Are you aware of repeated problems that have
 25 been happening with Power Resources over in Wyoming with regard

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1 to compliance with reclamation laws and et cetera?

2 **A. Not really. I have heard of it, but only just in**

3 **passing.**

4 **Q. Don't you think that that would be something that the**

5 **department would want to take cognizance of and look at very**

6 **seriously in deciding whether another child of this company**

7 **which wants to operate in South Dakota to make sure that the**

8 **same things don't happen here?**

9 **A. Again, that would be something that we would be**

10 **looking at under the mine permit application.**

11 MR. ELLISON: I believe that's all the questions I

12 have at this time.

13 CHAIRMAN McCAHREN: Thank you. Do you have any

14 questions of the witness?

15 MS. WHITE FACE: Yes, I do.

16 CROSS-EXAMINATION

17 BY MS. WHITE FACE:

18 **Q. Regarding this MOA --**

19 **A. Yes.**

20 **Q. -- I'm wondering under what authority does the state**

21 **have -- the state Archaeological Research Center or whatever**

22 **the agency is, State Historical Society, under what authority**

23 **can they make a Memorandum of Agreement?**

24 **A. I don't know.**

25 **Q. How would we find out that information?**

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1 **A. You would have to talk to -- I'm looking at the**

2 **Memorandum of Agreement and it says between Powertech and the**

3 **Archaeological Research Center, so you would have to speak to a**

4 **representative of the Archaeological Research Center.**

5 **Q. Is anyone here?**

6 **A. Mr. Mike Fosha is here.**

7 **Q. I'll ask him later. You mentioned that the Inyan Kara**

8 **aquifer is currently used by some homes out there, some**

9 **families out there.**

10 **A. Yes, I do believe it is being used as a water source**

11 **for some homes.**

12 **Q. Okay, so that it is drinkable?**

13 **A. No, actually, the water quality, from what we have**

14 **seen so far from samples that we have taken, it is elevated in**

15 **uranium, radium, and radon to a point where it is not an**

16 **acceptable drinking water source under state ground water**

17 **standards as well as federal drinking water standards.**

18 **Q. But yet a family is using it.**

19 **A. Yes.**

20 **Q. How many, do you know?**

21 **A. I do not know.**

22 MS. WHITE FACE: That's all I have right now.

23 MS. GIEDD: I have just a few questions.

24 REDIRECT EXAMINATION

25 BY MS. GIEDD:

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1 **Q. Some of the questions Mr. Ellison asked you related**

2 **to, for example, what we call the Certificate of Applicant. Do**

3 **you know what that is?**

4 **A. I know what it is, but I'm drawing a blank. I do know**

5 **what it is. Can you refresh my memory? I'm sorry.**

6 **Q. When an application is submitted to the department, is**

7 **there a document called a Certificate of Applicant that also**

8 **has to be submitted that relates to the applicant's past**

9 **history?**

10 **A. Yes. Yes, that is correct. I'm sorry. My mind went**

11 **blank on that one. Yes, the company has to submit a**

12 **Certification of Applicant, which basically indicates that they**

13 **have been honest in their past dealings and that their company**

14 **has not performed any illegal operations or anything like that,**

15 **and if at any time we find that those statements within the**

16 **Certification of Applicant is not true, then the company will**

17 **lose any rights to operate a mine within the state.**

18 **Q. And that has to be submitted with an application; is**

19 **that right?**

20 **A. Yes.**

21 **Q. And that's an application for a mine permit in this**

22 **case.**

23 **A. Yes, in this case it would be an application for a**

24 **mine permit, yes.**

25 **Q. The Request for Preliminary Listing that we are here**

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1 before you on today, that's not actually based any more on

2 Powertech's Request for Determination, is it?

3 **A. No. No, this --**

4 **Q. What's it based on?**

5 **A. This hearing today is based on the nominating**

6 **petitions we received on December 28th and 29th.**

7 **Q. From the petitioners?**

8 **A. From the petitioners, yes.**

9 **Q. And one thing you indicated is that there were some**

10 **families in the area that are drinking water that is in**

11 **violation of the state's drinking water standards and ground**

12 **water quality standards.**

13 **A. Yes.**

14 **Q. Have those families been notified that there is an**

15 **issue with their drinking water?**

16 **A. I'm not sure, you would have to ask Powertech.**

17 **Q. The state didn't do it, though?**

18 **A. No, we did not.**

19 MS. GIEDD: I have no further questions.

20 CHAIRMAN McCAHREN: Mr. Ellison, do you have any

21 further questions?

22 MR. ELLISON: Yes, sir, in one area.

23 RE-CROSS-EXAMINATION

24 BY MR. ELLISON:

25 **Q. Ma'am, you just mentioned in response, I believe it**

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<p style="text-align: right;">73</p> <p>1 was a question from Ms. Gledd, about in the application that</p> <p>2 the applicant has to make a statement that they have been</p> <p>3 honest in past dealings; do you recall that area of</p> <p>4 questioning, ma'am?</p> <p>5 A. Yes, I do.</p> <p>6 Q. All right, now, is this limited to Powertech South</p> <p>7 Dakota or is this limited to the parent company of Powertech?</p> <p>8 A. I believe it would be Powertech in general.</p> <p>9 Q. Okay. So it would be the department's position, then,</p> <p>10 that their dealings really anywhere in the world, they have to</p> <p>11 certify that they have, what, been in compliance with all state</p> <p>12 and federal rules and regulations; is that what they have to</p> <p>13 certify?</p> <p>14 CHAIRMAN McCAHREN: If you know.</p> <p>15 Q. (BY MR. ELLISON) If you know, ma'am.</p> <p>16 A. They would definitely have to comply with South</p> <p>17 Dakota's state laws and rules, as far as they would also have</p> <p>18 to comply with other states within the United States. I don't</p> <p>19 know about internationally.</p> <p>20 MR. ELLISON: Thank you. That's all the questions I</p> <p>21 have.</p> <p>22 RECCROSS-EXAMINATION</p> <p>23 BY MS. WHITE FACE:</p> <p>24 Q. There's just a couple of questions. I wanted to ask</p> <p>25 on Exhibit 12, you have one, two, three, four, five names on</p>	<p style="text-align: right;">75</p> <p>1 MS. WHITE FACE: Thank you.</p> <p>2 MR. MAIN: If I might, Mr. Chairman, I have one</p> <p>3 follow-up question.</p> <p>4 RECCROSS-EXAMINATION</p> <p>5 BY MR. MAIN:</p> <p>6 Q. Ms. Fivecoate, you testified that when you get a</p> <p>7 request like you did from Powertech for a determination of</p> <p>8 Special, Exceptional, Critical or Unique, you notify a number</p> <p>9 of agencies; is that correct?</p> <p>10 A. That is correct.</p> <p>11 Q. And in this case you did that.</p> <p>12 A. Yes.</p> <p>13 Q. And you got a response from the state archaeologist's</p> <p>14 office.</p> <p>15 A. Yes, we did.</p> <p>16 Q. But you did not --</p> <p>17 A. The Archaeological Research Center, yes.</p> <p>18 Q. Yes. But you did not get any written responses from</p> <p>19 any other of the agencies.</p> <p>20 A. That is correct.</p> <p>21 Q. And that doesn't mean that those agencies didn't do</p> <p>22 their job, does it?</p> <p>23 A. No, it does not.</p> <p>24 Q. It could mean that they did their job exceedingly well</p> <p>25 and decided that they had no concerns about Special,</p>
<p style="text-align: right;">74</p> <p>1 here. Do these represent --</p> <p>2 A. Yes.</p> <p>3 Q. Who do these represent?</p> <p>4 A. These are all members of the Minerals and Mining</p> <p>5 Program that were in attendance at least one, if not both of</p> <p>6 these inspections.</p> <p>7 Q. And so most of these people, then, that signed this</p> <p>8 are geologists or work in the Minerals and Mining Program?</p> <p>9 A. They all work in the Minerals and Mining Program, yes.</p> <p>10 Q. Another question I wanted to find out was why on page</p> <p>11 11 of Exhibit 12, okay, it says the department said no state</p> <p>12 EIS would be required since many of the items required in an</p> <p>13 EIS would be addressed in the mine permit application. Also an</p> <p>14 EIS will probably be required for the federal permits.</p> <p>15 A. Yes.</p> <p>16 Q. Okay, I was wondering if your determination, then, on</p> <p>17 this -- on determining these lands were not -- should not be</p> <p>18 listed, would your determination stand up to a federal EIS?</p> <p>19 A. I don't know.</p> <p>20 Q. Do you know if a federal mine permit has been applied</p> <p>21 for by Powertech?</p> <p>22 A. I don't know. I don't believe so, but I'm not sure.</p> <p>23 Q. How soon are you notified, then, if they do apply for</p> <p>24 a federal permit?</p> <p>25 A. I don't know. It would have to happen first.</p>	<p style="text-align: right;">76</p> <p>1 Exceptional, Critical, or Unique, couldn't it?</p> <p>2 MR. ELLISON: Objection, calls for speculation, move</p> <p>3 to strike the answer.</p> <p>4 CHAIRMAN McCAHREN: She can answer if she knows.</p> <p>5 Q. (BY MR. MAIN) It could mean they did their job very</p> <p>6 well and have no concerns.</p> <p>7 A. It could.</p> <p>8 MR. MAIN: Thank you.</p> <p>9 MR. ELLISON: I guess I have a follow-up question.</p> <p>10 CHAIRMAN McCAHREN: Ask it.</p> <p>11 RECCROSS-EXAMINATION</p> <p>12 BY MR. ELLISON:</p> <p>13 Q. Ma'am, then that also means it could mean that they</p> <p>14 may not have done their jobs.</p> <p>15 A. It could.</p> <p>16 MR. ELLISON: Thank you.</p> <p>17 CHAIRMAN McCAHREN: Any other questions? Board</p> <p>18 members.</p> <p>19 MR. SWEETMAN: I probably shouldn't specifically say</p> <p>20 this, but characterizing a nonresponse, which is a part of the</p> <p>21 rule, should not be characterized as the agency not doing its</p> <p>22 job. Secondly, I think I need a little clarification. Every</p> <p>23 now and then I think I get the drift and it shifts away. Are</p> <p>24 we holding a hearing on the scenic and unique attributes of</p> <p>25 this piece of land or is this a prehearing for Powertech?</p>

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<p>1 A. This hearing, if I may answer, this hearing is to 2 address whether the nominating petitions provided have the 3 information required to put this land onto the preliminary 4 list. It actually doesn't have anything to do with Powertech's 5 request. 6 CHAIRMAN McCAREN: Others? 7 MS. GIEDD: Thank you. 8 CHAIRMAN McCAREN: We are going to take a break. 9 (Whereupon, the hearing was in recess at 2:31 p.m., 10 and subsequently reconvened at 2:42 p.m., and the following 11 proceedings were had and entered of record:) 12 CHAIRMAN McCAREN: We will come to order. 13 MS. GIEDD: Department has no more witnesses. The 14 petitioners would proceed next. I think you can proceed with 15 him. 16 CHAIRMAN McCAREN: Charmaine. You got any witnesses 17 you want to call? 18 MS. WHITE FACE: I have testimony and witnesses and 19 exhibits, but I understood that Debra White Plume and Bruce 20 Ellison submitted their -- I thought they were to be considered 21 first. 22 CHAIRMAN McCAREN: Mr. Ellison. 23 MR. ELLISON: Yes, sir. 24 CHAIRMAN McCAREN: Have you got a witness you want to 25 call?</p>	<p>1 Face's petition and any exhibits that she submitted as well. 2 CHAIRMAN McCAREN: Very well. 3 MS. WHITE FACE: I also would like a copy of Exhibit 5 4 before I leave. 5 MS. GIEDD: The court reporter has the exhibits. You 6 want a copy to use? 7 MS. WHITE FACE: I don't need a copy to use, but I 8 would like to have a copy for my records. 9 CHAIRMAN McCAREN: We will get you one later. 10 MS. WHITE FACE: That's fine. Okay, I have given 11 you -- I was hoping to have this as a part of my presentation, 12 but I didn't have time to get it all done, so I made copies for 13 the board. I wish I had more copies for the other people here. 14 But I will try my best with what I have. 15 MS. GIEDD: Mr. McCahren, if she's going to testify, 16 you need to swear her in. 17 CHAIRMAN McCAREN: I know that, I was wondering if 18 that's what she was doing. Is that what you plan to do? 19 MS. WHITE FACE: Yes. 20 Thereupon, 21 CHARMAINE WHITE FACE, 22 called as a witness, being first duly sworn as hereinafter 23 certified, testified as follows: 24 CHAIRMAN McCAREN: Proceed. 25 MS. WHITE FACE: What I have given you is the</p>
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<p>1 MR. ELLISON: We have no witnesses that are available 2 today and would renew our motion for a continuance, especially 3 around the cultural resource areas in Item subparagraph three 4 of 45-6B-33.3. 5 CHAIRMAN McCAREN: Thank you. 6 MR. ELLISON: Thank you, sir. 7 CHAIRMAN McCAREN: Now. 8 MS. WHITE FACE: I have quite a bit here. 9 MR. ELLISON: I do state, if I may, Mr. Chairman, the 10 letter that was -- I don't recall the exhibit number, but there 11 was a letter from Dr. Jarding that, in addition to Ms. White 12 Face, it also was in support of Ms. White Plume's petition, and 13 I would ask that that be made a part of our record in 14 connection with this matter, without waiving any of our 15 requests for a continuance to be able to get live testimony 16 from elders about the significance of this area. 17 CHAIRMAN McCAREN: Who has the letter? 18 MS. GIEDD: That is attached to Exhibit 5. 19 CHAIRMAN McCAREN: That's already a part of the 20 record? 21 MS. GIEDD: That's already a part of the record. 22 CHAIRMAN McCAREN: It's already in the record, Mr. 23 Ellison. 24 MR. ELLISON: I wanted to incorporate it as part of 25 our presentation, and we also would like to adapt Ms. White</p>	<p>1 testimony of Charmaine White Face and the Defenders of the 2 Black Hills with exhibits and expert testimony at the hearing 3 on the Request for Determination of Special, Exceptional, 4 Critical, or Unique lands, February 19th, 2009. 5 CHAIRMAN McCAREN: You have to slow down, the court 6 reporter is going to be yelling at you. 7 MS. WHITE FACE: Before the Board of Minerals and 8 Environment in Pierre. 9 MS. GIEDD: Mr. McCahren, I would renew my objection 10 to the testimony on behalf of the Defenders of the Black Hills 11 because they are not represented by counsel. 12 CHAIRMAN McCAREN: I understand. Proceed. 13 MS. WHITE FACE: This first portion has been already 14 discussed quite a bit about 74:29:10:15, clearance. The lands 15 described in the Notice of Intent to Operate shall be 16 considered cleared for Special, Exceptional, Critical, or 17 Unique land characteristics if the department determines the 18 land -- the lands do not constitute Special, Exceptional, 19 Critical, or Unique lands, and that no nominating petitions 20 pertaining to lands described in the notice are filed. 21 However, this is a nominating petition. We have sent 22 in our nominating petition to the department according to the 23 procedures. The department received it on December 29th, 24 although it was mailed on December 26th, and I do have the 25 record of the receipt by the department that we sent it out</p>

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<p style="text-align: center;">81</p> <p>1 with postage posting on December 26th, so that it did reach the 2 department in time.</p> <p>3 One of the things it says in nominating lands for 4 Special, Exceptional, Critical, or Unique, the lands do not 5 have to meet all four definitions but only must meet one, 6 Special or Exceptional or Critical or Unique. And then I have 7 Webster's definition of -- dictionary of definitions. Special 8 is defined as distinguished by some unusual quality, peculiar, 9 additional, extra, for a particular purpose or occasion. 10 Exceptional is defined as one that is excluded as or having the 11 quality of being rare, better than average, superior. Critical 12 is defined as of or relating to or being a turning point or 13 specially important juncture, about to change, crucial, 14 decisive, indispensable. Unique is defined as single, sole, 15 being without a like or equal, unequaled, so-called one of a 16 kind or at least very rare. So our nomination is going to try 17 to address these qualities that we feel this land that we are 18 nominating has.</p> <p>19 Furthermore, the land so nominated must also meet one 20 of the characteristics as delineated in South Dakota Compiled 21 Law 45-6B-33.3, which are: One, the land is so ecologically 22 fragile that, once it is adversely affected, it could not 23 return to its former ecological role in the reasonably 24 foreseeable future. Two, the land has such a strong influence 25 on the total ecosystem of which it is a part that even</p>	<p style="text-align: center;">83</p> <p>1 note, since 1874, and prehistoric sites observed in the project 2 area is also not unexpected. However, and author bolded, the 3 sheer volume of sites documented in the area is noteworthy.</p> <p>4 The land evaluated as part of the level three cultural 5 resources evaluation has an average site density of 6 approximately one site per 8.1 acres. Even greater site 7 densities were reported in 2000 during the investigation of 8 immediately adjacent land parcels for the Dakota Cement land 9 exchange, brackets Winham, et al., 2001, end bracket. This 10 indicates that the permit area is not unique in regards to the 11 number of documented sites and is typical of the periphery of 12 the Black Hills, end quote. This is the quote that was given 13 by Powertech.</p> <p>14 The last sentence is subjective rather than factual.</p> <p>15 There is no documentation to support this statement that it is 16 typical of the periphery of the Black Hills. Where is the 17 documentation concerning the remainder of the periphery of the 18 Black Hills that shows one site per every 8.1 acres?</p> <p>19 However, the factual information does indicate that 20 this specific area is very special, exceptional, critical, and 21 unique in the number of antiquities that are located there. 22 Many other places in the world prize their areas of ancient 23 treasures that are irreplaceable and protect and preserve them 24 to the best of their ability. This nominated land area is just 25 such a rare treasure and must be protected and preserved.</p>
<p style="text-align: center;">82</p> <p>1 temporary effects felt by it could precipitate a system-wide 2 ecological reaction of unpredictable scope or dimension.</p> <p>3 Three, the land has scenic, historic, archaeological, 4 topographic, geologic, ethnologic, scientific, cultural or 5 recreational significance.</p> <p>6 And the reasons for the nomination, the following are 7 the reasons why this specific land area on the map that has 8 been given to the department and is a part of Powertech USA 9 Incorporation's Notice of Intent to Operate is being nominated 10 for a Special, Exceptional, Critical, or Unique listing.</p> <p>11 Our first reason is cultural resources protection.</p> <p>12 The following addresses the characteristics of SDCL 45-6B-33.3 13 that apply to the nominated lands with supporting evidence, 14 specifically subsection three, the land has scenic, historic, 15 archaeological, topographic, geologic, ethnologic, scientific, 16 cultural or recreational significance. The August 20th, 2008, 17 Powertech USA Inc. submittal of a Request For Determination of 18 Special, Exceptional, Critical, or Unique lands and Intent to 19 Operate on page 10 states that a level three cultural resources 20 evaluation was conducted by the Archaeology Laboratory, 21 Augustana College, Sioux Falls, South Dakota.</p> <p>22 Quote, the small number of Euroamerican sites 23 documented was not unanticipated, given the peripheral nature 24 of the project area in relation to the Black Hills proper. The 25 disparity existing between the number of historic, author's</p>	<p style="text-align: center;">84</p> <p>1 According to the Teton Sioux oral tradition, the area being 2 nominated was used as a burial grounds, at least for the Teton 3 Sioux people, but also for other indigenous nations in North 4 America.</p> <p>5 Many people call us Lakota, but we are not Lakota. We 6 speak the Lakota language. We are called Teton, Teton Sioux. 7 Our real name is Tetunwan. It means the dwellers of the 8 plains. That's who we really are and I brought this to you 9 before in a couple of other appearances that I've had here. In 10 my -- this first part of my testimony, I say that according to 11 Teton Sioux oral tradition, and I am Oglala Tetunwan, I am a 12 member of the Oglala Sioux Tribe, but I am Oglala Tetunwan, 13 which is my real lineage.</p> <p>14 In our culture, we pass down history and knowledge by 15 oral tradition and so one of my experts that I have asked to 16 come here and speak about the specific land area is Mr. Garvard 17 Good Plume. I would ask him to tell us what some of the oral 18 tradition about this specific place that we are nominating.</p> <p>19 CHAIRMAN McCAREN: Are you done?</p> <p>20 MS. WHITE FACE: No, I'm not done. I am asking for 21 this expert witness, I would like my expert witness to come 22 forward now. I'm not done yet. Because I have other --</p> <p>23 CHAIRMAN McCAREN: It's irregular, but I'm going to 24 let you do it.</p> <p>25 MS. WHITE FACE: Thank you.</p>

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<p>1 CHAIRMAN McCAHREN: Stand up and raise your right 2 hand. 3 Thereupon, 4 GARVARD GOOD PLUME, 5 called as a witness, being first duly sworn as hereinafter 6 certified, testified as follows: 7 CHAIRMAN McCAHREN: State your name. 8 THE WITNESS: My name is Garvard Good Plume. 9 (Speaking Lakota.) It's Good Plume. 10 DIRECT EXAMINATION 11 BY MS. WHITE FACE: 12 Q. Mr. Good Plume, what is your tribal affiliation? 13 A. My tribal affiliation is Oglala Sioux, member of the 14 Oglala Sioux Tribe and of the nation of Tetuan. 15 Q. This land area that's being nominated, have you ever 16 been there? 17 A. I have been there since I was a kid. 18 Q. You have been in that area? 19 A. Yeah. 20 Q. Can you tell us some about what you know about that 21 area? 22 A. That area, my great grandfather, my grandfather's 23 father, was born in that area, so that would be like four 24 generations. His father, mother dwelled in those areas and his 25 grandparents were buried in those areas, plus their relatives.</p>	<p>1 CHAIRMAN McCAHREN: Yeah, stand up. I got lost in the 2 system. Cross. 3 CROSS-EXAMINATION 4 BY MR. MAIN: 5 Q. Mr. Good Plume -- 6 MR. ELLISON: Counsel, could you please speak up? 7 MR. MAIN: Yes. 8 Q. (BY MR. MAIN) Mr. Good Plume, when you stated that 9 you have been to the area many times, where on these 10,580 10 acres have you been? 11 A. We drive through those territories because the roads 12 are there and we can't get off the road because there's no 13 trespassing signs, there's signs in those areas. So we just 14 view from the road and then they will tell us what's going on 15 in these areas. So it's kind of more like a historical, then 16 we drive up into Jewel Cave, up in those areas, back down. 17 So those are like our Sunday and weekend drives, 18 because they try to keep that up and that's where they are 19 from, so until he died, we hardly went back, but we still go up 20 there during the summer just to take food, put it along the 21 road or whatever we can to remember our ancestors that are 22 buried up there. 23 Q. So these are public roads that you are driving on? 24 A. Well, that's the only ones we can be on, otherwise we 25 will get shot or something.</p>
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<p>1 That was a camp, a migratory camp and usually the camp there, 2 some of the men would go up to Wyoming to hunt and come back 3 and then they will come back again to Cascade Falls and there's 4 ceremonial grounds throughout all those areas. As a child, I 5 used to be taken up there because most of my relatives worked 6 at the Igloo depot there, they worked there, so on weekends 7 they will take my grandfather back up there and we would go and 8 would listen to the stories that he would tell in that area. 9 Also there's another elderly man that would tell a lot 10 of stories that took place in those areas and my grandfather 11 would usually drive up in those areas after my great 12 grandfather died, we continued to go up in those areas and he 13 will tell us these same stories. At this same time I always 14 take my grandchildren up there and we tell them the same 15 stories, too, this is where you come from, this is where our 16 great grandfather was born, and so it has a historical value to 17 me, and this is the reason why I joined the Defenders of the 18 Black Hills, because the old ones used to say protect those 19 lands, this is who you are, this is where you are from. So 20 this is why I have been there many times. 21 Q. Is there anything else? I don't have anything. 22 A. That's all. 23 CHAIRMAN McCAHREN: Thank you. 24 MS. GIEDD: Mr. McCahren. 25 MR. MAIN: Do we get to cross?</p>	<p>1 Q. I just want to -- 2 A. We respect your laws. 3 Q. I want to make sure I understand. You are not driving 4 off on private surface, you are staying on public roads? 5 A. Yeah, we stay on public roads and we have to view it 6 and use binoculars. So there is relatives buried in there. 7 Sometimes they bury them in those canyons, crevices, they put 8 them in there. Some of the stones, they will tell us, the 9 landmarks, they are bones of elders that they can't be moved 10 because many times when there's a battle and someone falls, 11 they leave them there and then they pile rocks on them after a 12 while, it will show who is buried there. 13 Q. When did -- 14 A. These are some of the stories that I was told. 15 Q. Do you know specific locations of burial sites? 16 A. I know of one. 17 Q. Where is that? 18 A. It's in that area, but my family don't want me to 19 really tell anything about it because they are afraid of being 20 exposed, taken. 21 MR. ELLISON: I can't hear the witness. 22 A. My family really don't want them to know where they 23 are buried because they are afraid that their bodies will be 24 taken out or removed or whatever, so we just view from 25 different areas and we kind of keep some things to ourselves.</p>

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1 But this is what I have to share, because I can't really go
 2 into details because of them asking us not to do this stuff.
 3 We are afraid of anything, bodies being moved, you know. We
 4 see a lot of this stuff going on, especially along the Missouri
 5 River.
 6 Q. Are you aware of the specific lands that are described
 7 in the nominating petitions in this matter?
 8 A. I think I do. I think I know where they are at.
 9 Q. And are you able to point out where any burial
 10 sites -- where the one burial site is that you mentioned is on
 11 those lands?
 12 A. I could. I have a grandfather that's still alive,
 13 great uncle, he will know the specific areas.
 14 MR. ELLISON: Could counsel and the witness please
 15 speak up?
 16 Q. (BY MR. MAIN) Is the one burial site that you are
 17 mentioning, is it on the 10,580 acres?
 18 A. It could be, I really don't -- I'm not seeing where
 19 all this stuff has taken place. We drive out there, so it
 20 might be.
 21 Q. If you had a map, could you say?
 22 A. If you take me to the road, off the road, I can show
 23 it to you, but I can't from the map or anything because there's
 24 ravines, there's places, there's land, you know, and then I
 25 have to get one of the older ones to tell me especially where

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1 it is.
 2 Q. It would be fair to say that as you are standing here
 3 today, you don't know if that burial site is on these lands or
 4 not, do you?
 5 A. Well, see, again there's a lot of stuff you guys are
 6 showing, different areas. I have to go there to really look at
 7 it, where the specific place it is so I can tell you if it is
 8 or not.
 9 Q. So today you can't say that it is on these lands.
 10 A. That area was not just my family, there was other
 11 families. We are a big family. There's 10 brothers or 10
 12 sisters and they are all married and we move as a big band of
 13 people. So that area, I probably could tell.
 14 Q. When was the last time you were to this burial site?
 15 A. I was there last year.
 16 Q. Is it by the road?
 17 A. It's kind of off the road.
 18 Q. Did you go off the road?
 19 A. No. Like I said, there's signs and we just respect
 20 those signs and we just have to point over there where this is,
 21 just show from a distance, because it's walking distance. I
 22 don't know, like you say, there is private lands and I don't
 23 want to go off and start walking out there.
 24 Q. What evidence would there be on the surface of the
 25 ground that you could tell this was a burial site you talked

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1 about?
 2 A. Pile of rocks. A lot of times they piled the rocks,
 3 like I said, there's bones, because they didn't have shovels
 4 back then, they didn't have those so they had to put rocks on
 5 top of them. Sometimes tipi rings, circles represent a burial
 6 site, because they will put the body in the tipi and put the
 7 rocks around it to keep animals from bothering it. Things like
 8 that.
 9 Q. So these were burials on the ground and not above the
 10 ground on a scaffold?
 11 A. Some people -- at the time -- well, some were buried
 12 in the trees, but when their bones fall to the ground they put
 13 them -- then they put rocks on them, so scaffolds just kind of
 14 came in during the early 1800s because during those times they
 15 were being chased by the government, so when someone died or
 16 something happened, they had to bury them right away and put
 17 them in a tree, so they were always on the move. So that's why
 18 these graves are there in that way. That's how they buried
 19 them.
 20 Q. So evidence that we should look for on the surface of
 21 the ground would be rocks?
 22 A. A pile of rocks.
 23 Q. What else?
 24 A. That's about it. Mostly for the bones because some of
 25 them, they bury them in those ravines, some of the crevices,

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1 they put the rocks and dirt on top of them. In some places
 2 they keep them there and they put the rocks on top of them.
 3 MR. ELLISON: Mr. Good Plume, if you could speak into
 4 the microphone.
 5 MR. MAIN: Thank you, Mr. Good Plume. That's all the
 6 questions I have for now, Mr. Chairman.
 7 MS. GIEDD: The department has no questions.
 8 CHAIRMAN McCAREN: Mr. Ellison.
 9 CROSS-EXAMINATION
 10 BY MR. ELLISON:
 11 Q. Mr. Good Plume, sir, were you or any members of your
 12 family, to your knowledge, ever contacted by any state agencies
 13 as to the information that you apparently have as to the
 14 historic and ethnologic and cultural significance of this area?
 15 A. No.
 16 Q. If there was a site visit that was ordered by this
 17 board as part of these determinations, I understand that your
 18 family would be reluctant to point out grave sites, but you
 19 mentioned that there was a migratory camp that your family has
 20 historically used through the generations. You mentioned
 21 ceremonial grounds and I would imagine that this would be other
 22 than or include other than burial ceremonies. Would it be
 23 possible for you and other family members to point out some of
 24 these areas to the board or to agents of the board so that the
 25 board would have a better understanding of the realities of the

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1 history and the cultural and the ethnocentric nature of these
 2 lands?
 3 **A. I'm pretty sure, yeah.**
 4 **Q.** Now, as to you were asked a question I believe by Mr.
 5 Main as to signs above ground, for example, of burial sites.
 6 Is it fair to say that the way that Native Americans traveled
 7 through and even camped at that time period, that there were
 8 often little physical remains of people's presence after they
 9 left?
 10 **A. Yeah.**
 11 **Q.** Would it also be fair to say that certain ceremonial
 12 sites or even particularly sacred sites are geologic in nature,
 13 they may be a particular creek or part of a creek or particular
 14 rock formation?
 15 **A. Yeah.**
 16 **Q.** Would these be things that also you and your family
 17 would be able to point out if a site visit were permitted and
 18 granted by this board?
 19 **A. I'm pretty sure they will.**
 20 MR. ELLISON: Thank you, sir. That's all the
 21 questions I have.
 22 CHAIRMAN McCAHREN: Do you have any more questions of
 23 him?
 24 MS. WHITE FACE: No, I don't. I'd like to go on.
 25 CHAIRMAN McCAHREN: Proceed.

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1 MS. WHITE FACE: I have on the papers that you have, I
 2 had four expert witnesses that I wanted to call. I wanted to
 3 call Mike Fosha and the exhibit that I had was the letter from
 4 him to Eric Holm on October 15th, and this one was 12 sites are
 5 located within the proposed exploration area supplied by
 6 Powertech on the table in this letter, and it goes on, and I
 7 know that you have seen this letter before. This letter was
 8 the one I think that was given for the exploration permit, but
 9 since then I didn't know about his other comments or his other
 10 letter, so I wanted to ask him some things about the Memorandum
 11 of Agreement that he has made between himself and Powertech,
 12 and following that, then I would also like to have Mr. Ben
 13 Rhodd, an archaeologist, testify some more about this area,
 14 especially since those fire hearths were brought up, and also
 15 Mr. Tim Mentz, a former tribal historic preservation officer.
 16 CHAIRMAN McCAHREN: You want to call Mr. Fosha as a
 17 witness?
 18 MS. WHITE FACE: Yes, please.
 19 MS. GIEDD: Mr. Fosha is here, although as I
 20 understand it, he is not under subpoena. I think he's here
 21 because Powertech asked him to be. As far as I know, do you
 22 have any objection to testifying now? I guess the only
 23 objection I would have on behalf of the state witness is that
 24 he only have to testify once, so if there's some way we can do
 25 both Powertech's examination of Mr. Fosha and Ms. White Face's

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1 examination of Fosha all together so he only has to testify
 2 once, I would encourage that.
 3 CHAIRMAN McCAHREN: That would be wonderful, but it
 4 won't happen.
 5 MR. MAIN: We do intend to call Mr. Fosha as a witness
 6 and discuss the Memorandum of Agreement and if that would work
 7 for Ms. White Face, we could do it at that time.
 8 MS. WHITE FACE: That would be fine.
 9 CHAIRMAN McCAHREN: You can question him now or you
 10 can cross-examine him later.
 11 MS. WHITE FACE: I'll cross-examine later. I'll go on
 12 with Mr. Ben Rhodd.
 13 Thereupon,
 14 **BEN RHODD,**
 15 called as a witness, being first duly sworn as hereinafter
 16 certified, testified as follows:
 17 CHAIRMAN McCAHREN: You have to speak up so it goes in
 18 the microphone here.
 19 **EXAMINATION**
 20 **BY MS. WHITE FACE:**
 21 **Q.** Mr. Rhodd, could you tell us first your tribal
 22 affiliation?
 23 **A. I'm from the citizen band of Pottowatomie of Oklahoma**
 24 **originally.**
 25 **Q.** How long have you lived in this region?

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1 **A. 35 years.**
 2 **Q.** Could you tell us your background and experience?
 3 **A. My background in archaeology in particular and history**
 4 **I guess you could say of this area dates back about 30 years.**
 5 **I've been involved in archaeology and history and**
 6 **ethnographies, oral history quite a number of years.**
 7 **Q.** Do you work with other tribes as a consultant or do
 8 you work on other archaeological sites?
 9 **A. Oh, yes, many. I work in Montana, Wyoming, North**
 10 **Dakota, Minnesota, and scattered over a very broad area that**
 11 **constitutes a lot of my experience of what I understand about**
 12 **this particular area in regard to this nomination. As far as**
 13 **my experience shows is that you had what was mentioned earlier**
 14 **about a migratory pattern, that there was a movement, but yet**
 15 **there was also wintering places, and one of them in particular**
 16 **supports Mr. Good Plume, was the southwestern corner of the**
 17 **Hills, and that is documented, southwestern area or corner of**
 18 **the Hills as far as a winter camp, especially along the**
 19 **Cheyenne. So what he has said I concur with because I have**
 20 **researched this before and also with other groups that occupied**
 21 **the Black Hills and/or the periphery of the Black Hills.**
 22 **Q.** In this letter that was sent to Powertech from
 23 Augustana College, it says there's one site per every 8.1
 24 acres. However, an earlier study said there were more.
 25 **A. Right.**

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1 Q. Do you have any -- could you give us a little
 2 explanation about what that would be?

3 A. What that means is that there was a class three that
 4 was done by Augustana and according to the topography, when you
 5 are an archaeologist, what you do is you stay within a linear
 6 transect pattern. In other words, you try to stay at the
 7 minimum of 15 meters, sometimes you go closer if you have to,
 8 according to the topography. Otherwise sometimes you are out
 9 at 20, 25 meters distance from each other as you walk over the
 10 landscape, and again, according to the topography.

11 What Augustana, what they have done at the Dakotah
 12 Cement and BLM land exchange is said that there was a greater
 13 density in that area. Now, why would that be? We as
 14 archaeologists look at it from two points of view. One is
 15 there is a resource and a primary one is that there's a
 16 resource there that was important to that group of people,
 17 whether it be a spring, whether it be a plant gathering area,
 18 whether it be a known bison migratory or elk or antelope or
 19 whatever. A number of things could be at that spot.

20 And so you get a greater density in some areas, but it
 21 does not negate that periphery to that there may be outlying
 22 camps, what we call ephemeral camp sites. So what Augustana
 23 has said is that there is a greater density of sites in that
 24 other 240 acres that is greater than usual. That means that
 25 there's something there and that has not been answered, what is

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1 there. So that's one thing that may be supported back through
 2 the graphic or maybe back from a historical text or it may take
 3 greater and more investigation.

4 Q. Just another question. In other places of the world
 5 or like even of the United States where you would find such a
 6 great density of antiquities, what would usually happen?

7 A. What would usually happen is that the area would be
 8 intensely studied and it would include references to either an
 9 oral history tradition and/or other ethnographic, as I said
 10 before, that would support the scientific claim or the
 11 scientific investigation, archaeological investigation, to
 12 support why the density of that area is what it is.

13 So then you would go to some other type under some
 14 regulatory or law, you would go back to that law or regulatory
 15 practice and perhaps nominate it as a cultural landscape, a
 16 sacred landscape, traditional cultural property, et cetera, et
 17 cetera. You would put some type of label on it that would
 18 support what it is and its significance to all the living
 19 peoples of the day and for the future generations.

20 So a landmark status or whatever right now, and in
 21 association with this and in one sense, when you look at the
 22 Bear Butte issue, it's the same thing. It's a landmark status,
 23 it has attained landmark status, but yet it is an ongoing area
 24 that is still used. Mr. Good Plume is saying the same thing.
 25 By going back to there and remembering and being shown, he's

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1 supporting what that place is in regards to his family and to
 2 the Oglala Sioux Tribe as a whole in actuality.

3 Q. So whenever you can have someone that shows through
 4 oral history a connection to a place like this, does it give it
 5 a different kind of a status?

6 A. It will, but it is supportive information as the way
 7 that the laws are written that we are currently dealing with as
 8 far as the National Historic Preservation Act and such as in
 9 that Dakotah Cement/BLM exchange where ARPA is part of the law,
 10 would be part of what is followed. Yes, there is a tremendous
 11 amount of information that would need to be pulled together and
 12 the ethnographic is definitely one of them or oral history.

13 Q. So in this certain place, it says here that in order
 14 to meet the characteristic, the land has scenic, historic,
 15 archaeological, topographic, geologic, ethnologic, scientific,
 16 cultural or recreational significance. In your opinion, how
 17 would you consider this specific land area that we are putting
 18 up for nomination?

19 A. Due to the density of the sites and the number of
 20 sites, one site per every 8.1 acres, I've got two things that I
 21 look at there as an archaeologist. Again at the density, I
 22 don't know how many of the sites that are listed by Augustana
 23 are within what was at one time the Dakotah Cement or if that's
 24 part of this, I am not real sure. But my point is that the
 25 density and number of sites that are there are definitely

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1 supportive of the archaeological, the historic, the ethnologic,
 2 cultural, and those right there are more my area of expertise
 3 rather than some of the others. But those four definitely, it
 4 is a significant area. It's demonstrating it physically on the
 5 ground.

6 Now, as many of you have the report from Augustana,
 7 there is a deflation issue that they call it, they call it a
 8 deflated area, and archaeologically when we say that, what we
 9 are talking about is that there has been what we could call
 10 sheet erosion, meaning that there has been soils that have been
 11 washed off by rain, by snow runoff, and what it has done has
 12 compacted the cultural resources. In other words, taking out
 13 the soils that would be in between the artifacts.

14 Now, that brings us to another question. When you
 15 have a number of sites that are unevaluated, that's another
 16 issue because once you step into that as part of this and the
 17 determinations that have been made in regards to those 217
 18 sites and the number of them that are unevaluated, now, while
 19 you do have good surface visibility down in that area, you also
 20 do have some and at certain sites you will have in-situ
 21 stratigraphy, soil stratigraphy. It's not going to be all of
 22 them or a blanket to say that all of them are deflated. That
 23 has to be done professionally and when you look at an area, you
 24 look at it from the point of view again that is there potential
 25 for subsurface?

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<p style="text-align: right;">101</p> <p>1 I want to say this, because as part of this</p> <p>2 archaeologically, we are finding many sites now or a number of</p> <p>3 sites that have previously been investigated, they are going</p> <p>4 deeper into these resources and finding more older cultural</p> <p>5 arisals. That's something very powerful for us as</p> <p>6 archaeologists. It says our techniques were not as good as</p> <p>7 they should have been at one time. So now we should be looking</p> <p>8 at these. That would provide greater, more supportive</p> <p>9 information to the scientific, cultural, historic,</p> <p>10 archaeological record.</p> <p>11 MS. WHITE FACE: Thank you.</p> <p>12 CROSS-EXAMINATION</p> <p>13 BY MR. MAIN:</p> <p>14 Q. I'm sorry, your last name is pronounced how?</p> <p>15 A. Rhodd.</p> <p>16 Q. Thank you, Mr. Rhodd. Could you please detail your</p> <p>17 education for us?</p> <p>18 A. I have my BA from the University of South Dakota and</p> <p>19 my master's is pending from the Central Washington University.</p> <p>20 Q. And the BA is in what?</p> <p>21 A. Anthropology/archaeology.</p> <p>22 Q. Your master's is in?</p> <p>23 A. In resource environmental management.</p> <p>24 Q. When did you obtain your degree from the University of</p> <p>25 South Dakota?</p>	<p style="text-align: right;">103</p> <p>1 is going to be unique, critical, whatever status. So I'm</p> <p>2 making that statement to clarify it.</p> <p>3 Q. Do you know how many acres are in the petitions, how</p> <p>4 many acres are at issue here today?</p> <p>5 A. Let me see, I'm going to have to go back there. I was</p> <p>6 calculating figures over here. I gotta figure out which figure</p> <p>7 was what. I think it was all total 9,000 -- no, I'm not sure.</p> <p>8 I'm not real sure how many. I was going off, like I said,</p> <p>9 several sources.</p> <p>10 Q. And the record and the evidence indicates that the</p> <p>11 DENR made a determination on 10,580 acres.</p> <p>12 A. Okay.</p> <p>13 Q. So if we can use that.</p> <p>14 A. Right.</p> <p>15 Q. How many sites are you aware that the Archaeological</p> <p>16 Laboratory of Augustana College documented on those acres?</p> <p>17 A. Total of, let me see, I was reading that as part of</p> <p>18 the information that was just given to me. I don't remember</p> <p>19 how many were there.</p> <p>20 Q. I believe you testified earlier 217 sites.</p> <p>21 A. Yeah, 217, yeah, you're right, I did mention that.</p> <p>22 Q. If you divide -- do the math on that, if you have got</p> <p>23 a calculator. Divide the 217 into 10,580, how many acres per</p> <p>24 site is that?</p> <p>25 A. Oh, gosh, I have no idea because I don't have a</p>
<p style="text-align: right;">102</p> <p>1 A. 1984.</p> <p>2 Q. And can you tell us where you have worked and the type</p> <p>3 of work you have done since then?</p> <p>4 A. I have worked for a number -- I have worked for the</p> <p>5 State of South Dakota actually, Mr. Fosha was a colleague of</p> <p>6 mine. At that time I worked for them for 12 years, left the</p> <p>7 state in 1994 or '95, yeah, state employ, and since then I have</p> <p>8 worked for private firms and actually now I have my own private</p> <p>9 business, Black Hills Consulting.</p> <p>10 Q. You are located where?</p> <p>11 A. Hill City, South Dakota.</p> <p>12 Q. You had mentioned -- or let me back up. Are you aware</p> <p>13 of the size of the lands described in the nominating petitions?</p> <p>14 A. I think it was -- well, this is another point I want</p> <p>15 to make, too, and to answer you, you said 10,500 acres. I had</p> <p>16 originally listed it at 11,710. Now, why is there a</p> <p>17 discrepancy? I'm not real sure because it's coming out of</p> <p>18 several different sources that I have arrived at that figure.</p> <p>19 Additionally, they are saying there's going to be -- this still</p> <p>20 answers your question -- another acquiring of 6,000 acres</p> <p>21 total. That's very interesting because that's the potential</p> <p>22 for 75 more sites archaeologically, and yeah, I'm aware of the</p> <p>23 size of it. But I'm also looking at what perhaps would be</p> <p>24 relevant to an EIS in the future. There's another part, they</p> <p>25 all are parts of this that we are eyeing to arrive at if this</p>	<p style="text-align: right;">104</p> <p>1 calculator with me, unless somebody has one.</p> <p>2 Q. This doesn't have an equals sign on it. 10,580.</p> <p>3 A. There it is. I think that's 580. I'm not real sure</p> <p>4 on that one either.</p> <p>5 Q. Can you do it on the board? We will go back to</p> <p>6 nontech.</p> <p>7 A. Old school, there we go.</p> <p>8 Q. 10,580 divided by 217.</p> <p>9 CHAIRMAN McCAHREN: What's the numbers?</p> <p>10 A. 10,580 by 217. I think that's right.</p> <p>11 MR. MAIN: I come up with about 54 acres.</p> <p>12 MR. BLUMHARDT: It's 48.39.</p> <p>13 CHAIRMAN McCAHREN: How about 50?</p> <p>14 Q. (BY MR. MAIN) If you take 50 times 217, do you get</p> <p>15 close to 10,580?</p> <p>16 A. Right. Was that 53?</p> <p>17 CHAIRMAN McCAHREN: 50. Just say you think it's 50.</p> <p>18 A. Okay, I haven't done this in so long, I forgot.</p> <p>19 Q. (BY MR. MAIN) Can we agree that the density of sites</p> <p>20 is about one per 50 acres, using those numbers?</p> <p>21 A. Well, that would be correct.</p> <p>22 Q. I'll tell you that the reason I had you do this is the</p> <p>23 density of one site per 8.1 acres was an error in the summary</p> <p>24 submitted by Powertech.</p> <p>25 CHAIRMAN McCAHREN: Now you say it.</p>

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1 Q. (BY MR. MAIN) So the true density is closer to one
 2 site per 50 acres. Does that change your opinion, the opinions
 3 you have testified about earlier?

4 A. Well, it would to a degree, except for one. One
 5 aspect as far as Peter Winham is concerned, the Winham report
 6 originally from Dakota Cement/BLM exchange, Winham et al.
 7 2001, if the density, a density demonstrated there, whether
 8 that works out -- maybe it worked out to 8.1, one site per 8.1
 9 in that area, again, that constitutes or says that there's a
 10 resource there that is important, whatever it is, whether again
 11 it's water, plant, hunting, whatever.

12 Then looking at these figures, that's what we were
 13 working off of and the statements that were made. Now, if they
 14 are incorrect, I think it behooves us to then look at this
 15 again or to be able to go out and look at this area again in
 16 collusion with an ethnographic. There's a reason I'm saying
 17 that.

18 Q. You have testified to that earlier and it's my
 19 understanding that it's your opinion that the result of an
 20 ethnographic study of the Dewey-Burdock area would be useful to
 21 the board in this matter.

22 A. Oh, definitely. Definitely. There are a number of --
 23 there's two parts to why I'm going to answer it this way. The
 24 ethnographic supportive data or information, oral history,
 25 would support what the archaeologist has found to date.

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1 However, there's another aspect, that what Mr. Good Plume
 2 mentioned and someone else has mentioned earlier about rings,
 3 they call them tipi rings. Now, this is not totally accepted
 4 by the archaeological profession, but it's going to be, it's
 5 going to have to become part of the archaeological record,
 6 supported by the ethnographic, and that constitutes -- what I'm
 7 saying from that perspective is that within those rings are
 8 burials on a number of cases, and so it's not just the pile of
 9 rocks, the cairns, yes, they are markers for burials. On
 10 another level, the rings are burial sites, can be burial sites.
 11 So I want to make sure I'm putting that in there because it's
 12 according to -- it would have to take -- it would take
 13 archaeological investigation to negate or --

14 MR. ELLISON: Could the witness please speak into the
 15 mike.

16 A. It would take archaeological investigation to be able
 17 to substantiate what exactly that particular ring is.

18 Q. (BY MR. MAIN) Have you done any on the ground
 19 archaeological, cultural resource surveys on these 10,000
 20 acres?

21 A. I have, with the DM&E Railroad survey as of a year and
 22 a half ago I think it was.

23 Q. Was that on these 10,500 acres?

24 A. It's off on the south end I think it is, if I remember
 25 correctly.

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1 Q. Would it have been on these acres?

2 A. Right, that I remember. We were out on a ranch just
 3 to the west -- or east of Edgemont and there were a number of
 4 the drill hole markers or whatever they are going to put in, a
 5 hole, and we questioned it, what is this out here, what is this
 6 for. And so we noticed they had a stamp on them and it was
 7 just our curiosity at that point. But as far as other surveys,
 8 I have done other surveys in that area over the years.

9 Q. While you were working with the state archaeology
 10 office?

11 A. The state archaeological and also for contracts down
 12 in that area.

13 MR. MAIN: Thank you, Mr. Rhodd. That's all the
 14 questions I have, Mr. Chairman.

15 MS. GIEDD: No questions.

16 CHAIRMAN McCAREN: Mr. Ellison.

17 MR. ELLISON: Could I get the spelling of your last
 18 name again, sir?

19 THE WITNESS: R-H-O-D-D.

20 MR. ELLISON: R-H-O-B-E?

21 THE WITNESS: No, D-D, two Ds.

22 MR. ELLISON: R-H-O-D-D, Rhodd.

23 CROSS-EXAMINATION

24 BY MR. ELLISON:

25 Q. When you did these other surveys, are those surveys a

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1 matter of or available as public record or available to the
 2 DENR, should it request them?

3 A. Yeah, they should be listed, well, probably with the
 4 state archaeological research they are on file.

5 Q. And essentially from your work in the area, you are
 6 advising this board, are you not, that there is significant
 7 further study that seems to be necessary in order to properly
 8 determine whether or not this area has some unique or special
 9 or critical cultural, historic, archaeological or ethnological
 10 components to it?

11 A. Oh, definitely. I think it is going to require some
 12 further analysis of what is apparent on the surface, but also
 13 again we go back to that unevaluated. While we can look at
 14 them and make a determination visually from surface indicators,
 15 we need to look at -- we need to look at some of these sites
 16 and that would need to take some of the ethnographic
 17 information and look and see what is subsurface. Now, the only
 18 reason I'm saying that is to substantiate their eligibility for
 19 the national register. At this point they are left
 20 unevaluated, but what is subsurface?

21 Q. Would it be important in that evaluation process for
 22 members of the indigenous community, elders who have been in
 23 that area, medicine people, oral historians, others who are
 24 familiar with this area, would it be important that they be
 25 consulted in order to have as complete a picture as might be

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1 appropriate to evaluate this area?

2 **A. Definitely, because the ethnographic, the ethnologic,**

3 **as it's stated in here, as far as the way that the critical**

4 **lands and like that or unique, that type of information is**

5 **essential to the record so that we all may arrive at what can**

6 **be discerned as a truth about an area, a truth about the**

7 **peoples that occupied that area, what were they doing there,**

8 **how were they living there. We need to encapsulate as much of**

9 **the information as possible. Yes, I would totally agree that**

10 **there needs to be further work done down there.**

11 **Q.** And this would be prior to any determination of

12 whether or not these lands should belong on the preliminary

13 list of special lands?

14 **A. I think definitely so, because it would need to be a**

15 **part of the record of if there is going to be a requirement of**

16 **an EIS eventually by the Nuclear Regulatory Commission, that**

17 **will need to be, and when Powertech puts that together, then**

18 **they need to have all the information that is pertinent to that**

19 **area, so it does not become -- it does not become or these**

20 **sites are not impacted to the degree that they are totally**

21 **destroyed. We need to have all the information that we can get**

22 **to make a valid determination of it, of the nomination.**

23 **Q.** And you are aware, sir, that -- have you ever seen an

24 in-situ uranium mining operation? Have you ever seen the

25 surface of such an operation?

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1 **A. Not really. Numerous other mines. I probably walked**

2 **through them and was unaware of what they were. Northern Cave**

3 **Hills down by Edgemont actually. I'm not very familiar with**

4 **what they look like after 50 years or 40 years or whatever. I**

5 **just know that they were a mine, I suppose, but some ground**

6 **disturbance.**

7 **Q.** If, in the in-situ uranium mining process in terms of

8 drilling wells, in terms of drilling and laying pipes, in terms

9 of -- if all of this requires tremendous surface activity, does

10 that put these cultural resources at risk?

11 **A. Oh, definitely so.**

12 MR. MAIN: I object, Mr. Chairman. We are into

13 operations and operations aren't relative to a determination of

14 these lands of being special.

15 CHAIRMAN McCAREN: I'll agree, there's too many ifs.

16 Ask another question.

17 MR. ELLISON: I guess that was a preliminary question

18 that had to be decided before the company could even file, so I

19 would respectfully take exception because I believe that this

20 is an important question. If this determination is made, one

21 of the next steps would be for the company to submit a mining

22 permit application, having already passed or gotten the board's

23 approval at least theoretically on this particular issue. So I

24 would submit it is an important issue for the board to consider

25 because if the board rejects designating this as something for

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1 a Preliminary List on Special, Exceptional, Critical or Unique

2 lands and the mining permit process comes in and these matters

3 are then ignored through surface disturbance, even further

4 operations to get ready for its mining permit application, then

5 my question to the witness would be about the importance of or

6 the potential destruction of these areas and therefore these

7 surveys need to be done first.

8 MR. MAIN: Same objection.

9 CHAIRMAN McCAREN: Same ruling. Ask him a question

10 if you have one.

11 MR. ELLISON: I guess I was stating my objection. I

12 think the witness tried to answer my question and I would ask

13 that he be allowed to answer it, that if -- my only if would be

14 assume it hypothetically, that in-situ uranium mining

15 operations, as an example, down south of us outside of

16 Crawford, Nebraska, where there is almost complete surface

17 destruction of the land in the areas where everything from

18 exploration holes to mining holes to related

19 intercommunications with piping and wiring and travel of

20 vehicles, as to whether or not that these things could

21 potentially destroy all these cultural resources and should be

22 protected first.

23 MR. MAIN: Same objection and we will add lack of

24 foundation and relevancy.

25 CHAIRMAN McCAREN: Correct. Ask him a question.

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1 MR. ELLISON: Does the board want me to ask it again?

2 I misunderstood the objection.

3 CHAIRMAN McCAREN: Say it again.

4 MR. ELLISON: Is the board asking me to reask the

5 question?

6 CHAIRMAN McCAREN: No. Do you have another question?

7 MR. ELLISON: No, that's all I have. Thank you, sir.

8 Thank you, Mr. Rhodd.

9 **A. Thank you.**

10 CHAIRMAN McCAREN: Raise any questions by anybody?

11 You are excused, thank you.

12 MS. WHITE FACE: In your packet of information, it's

13 going to be I had it listed later as an exhibit for you, but

14 what we did, this is a picture, this is a picture and it's in

15 the information you have, it's in your packets. I didn't put

16 exhibit numbers on these. I didn't know if -- I am not sure of

17 the procedure here how you number these or if it's a state's

18 exhibit or if this is Charmaine's exhibit or what.

19 CHAIRMAN McCAREN: If it's in your packet, we will

20 give your packet a number.

21 MS. WHITE FACE: Give my packet a number, that would

22 be great and I can say it's in my packet.

23 CHAIRMAN McCAREN: Stop so we can talk to the court

24 reporter. She would like to mark this as an exhibit.

25 **EXHIBITS:**

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1 (White Face Exhibit No. 1 marked for identification.)
 2 CHAIRMAN McCAHREN: It's been marked White Face 1.
 3 You are offering it?
 4 MS. WHITE FACE: Pardon?
 5 CHAIRMAN McCAHREN: You are offering it as an exhibit,
 6 correct?
 7 MS. WHITE FACE: Yes.
 8 CHAIRMAN McCAHREN: Is there any objection?
 9 MS. GIEDD: I have some objections to foundation on
 10 some of the attachments and also some of the attachments
 11 apparently are summaries of federal laws. I have no idea who
 12 did these summaries. I don't know whether they are accurate or
 13 not. I can tell you exactly which ones I object to if you
 14 want, Mr. McCahren.
 15 CHAIRMAN McCAHREN: I don't want. It goes to the
 16 weight, not the admissibility, my old saying. It's going to be
 17 received. Thank you.
 18 MR. MAIN: Same objections as Roxanne had and we need
 19 some examination to determine what some of it is.
 20 CHAIRMAN McCAHREN: You can do it on cross. Proceed.
 21 EXHIBITS:
 22 (White Face Exhibit No. 1 received into evidence.)
 23 MS. WHITE FACE: This picture is of a grave site and
 24 it's old, very, very old. I wish an archaeologist could come
 25 and really look at it and tell us exactly how old it is, but it

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1 is within the area that Powertech plans on mining and it's in
 2 the walk-in area that is where Powertech plans on mining.
 3 What you see here is a real ancient grave site, it's
 4 about seven feet long. Now, I was hoping to get a PowerPoint
 5 presentation so I could have it up there and point out things,
 6 and since it's so small for these guys over here, I will just
 7 try to explain it to you. Where this grave site is right here,
 8 about 20 feet further away is another one and if you look at
 9 this picture, back here there is a man standing by these trees.
 10 Behind those trees is another grave site and over here about 30
 11 feet from this grave site there are three more. We asked
 12 permission from the elder advisor that we have with us usually
 13 whether we could take a picture of this. We usually do not
 14 take pictures of these, it's against our culture. He said yes,
 15 go ahead.
 16 We do not try to tell where these are at, same as Mr.
 17 Good Plume stated before, because too many of our burial sites
 18 have had grave robbers come in and dig them up for either the
 19 skeletons or the bones or maybe for other funerary objects that
 20 are left there. And so that's why we usually don't tell people
 21 where these grave sites are at or where they are located and we
 22 have to ask permission to even take a picture, which we did on
 23 this one.
 24 The other thing about this site is that, I don't know,
 25 probably about 20 yards west of this site is a huge sacred

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1 site, and sacred sites are different than tipi sites also.
 2 There is also two tipi sites there which could be burial sites,
 3 as you heard from Mr. Rhodd here. And I just brought this so
 4 that you can get an idea of some of the burial sites and so
 5 when we got that first -- when we read Powertech's notice and
 6 when we had Augustana in there where there was one site per
 7 every 8.1 acres, it fit with what we had already seen, because
 8 we went out there, this is about two or three years ago when we
 9 were first -- the first exploratory permits were being
 10 considered and so that's how long ago we were there and took
 11 these pictures.
 12 Now, I would like to ask Mr. Tim Mentz -- It was
 13 brought up earlier that tribal historic preservation officers
 14 were not notified, and Mr. Tim Mentz used to be the tribal
 15 historic preservation officer for Standing Rock Sioux Tribe,
 16 and even though we have been separated onto different
 17 reservations, that doesn't mean that we still don't retain our
 18 old connections or our own relatedness. Mr. Mentz still has
 19 relatives at Pine Ridge, I have relatives at Standing Rock,
 20 actual blood relatives. So even though we have been placed on
 21 a different reservation, we still have strong connections and
 22 also we all have this common history, this common understanding
 23 of the Black Hills and of all this whole land area within
 24 western South Dakota, North Dakota, Montana, Wyoming, Nebraska,
 25 we all have a real good understanding of that. I wanted to ask

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1 Mr. Mentz if he would come up and I would like to ask him to
 2 talk about these burial sites that are there. He would have to
 3 be sworn in as one of my expert witnesses.
 4 CHAIRMAN McCAHREN: Raise your right hand.
 5 Thereupon,
 6 TIM MENTZ, SR.,
 7 called as a witness, being first duly sworn as hereinafter
 8 certified, testified as follows:
 9 CHAIRMAN McCAHREN: Proceed.
 10 DIRECT EXAMINATION
 11 BY MS. WHITE FACE:
 12 Q. Mr. Mentz, could you give us a little bit of your
 13 background?
 14 MR. ELLISON: Could I get the name of the witness and
 15 could the witness please speak into the mike, please?
 16 A. My name is Tim Mentz, M-E-N-T-Z, Senior. I'm a member
 17 of the Standing Rock Sioux Tribe. I come from the (speaking
 18 native language) band, and also on my mother's side I come from
 19 the (speaking native language) Lakota band, and my ties
 20 directly to areas are within the five-state area, our
 21 aboriginal home lands. I was brought up in a traditional way.
 22 First of all, I want to say that I apologize for
 23 speaking to some of my elders in front of them on these types
 24 of issues because you are asking for some very sensitive
 25 information, knowing that these types of areas that we talk

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<p style="text-align: right;">117</p> <p>1 about usually go with the lunar, usually goes with the stars 2 constellations, it usually goes with seasonal things that we 3 are allowed to talk about. It's fortunate that we are able to 4 talk about this type of an area.</p> <p>5 I was brought up when I was real young, I was brought 6 up through the society of our family on my mother's side, I was 7 brought up in an area where the individuals that my grandfather 8 was part of was the Red Hand Society and it was a society that 9 protected not only the burial sites but also protected the men 10 that perished, that gave their life in battle. And when we go 11 through Red Hand Society, I was five years old when I had my 12 hands painted red. That red constitutes that my hands now have 13 gone to the other side. So I don't know if you understand what 14 I'm saying, but I'm offering that to my relatives here because 15 they understand what I'm saying here.</p> <p>16 First of all, I will also say that as I was growing 17 up, there was a lot of history that was given to us and we were 18 required to set there and listen to the history that our 19 ancestors handed down to us. One of them was particularly on 20 our family's side was the leader that protected these areas, 21 that had a responsibility to our culture and to our people, 22 that they had to take certain obligations that were given to 23 them in relation to the family's tie to that society.</p> <p>24 I'm part of that society. I brought my boy with me, 25 he's part of that. I started off in this when I was five years</p>	<p style="text-align: right;">119</p> <p>1 1851 Treaty.</p> <p>2 My involvement from 1996, August of '96 -- I resigned 3 here August of 2008 -- required me to step into a number of 4 federal areas. The Black Hills was one of our number one 5 requirements, it was prioritized that I be involved with 6 anything that happened within the Black Hills. So I'm very 7 well aware of this area that he's talking about, including the 8 cement plant, the BLM land exchange, I was part of that. We 9 were negotiating, we were consulting parties to that process, 10 that federal undertaking.</p> <p>11 Understanding that there is certain sensitive 12 information, in this case now that I'm not a THPO, I'm not 13 really privy to that type of information, so I was looking at 14 what Augustana did and when I seen the volume of unevaluated 15 sites, it really raised a red flag with me. And basically 16 understanding that my involvement coming from my family 17 required me to not only step into a process where I had to 18 assume certain responsibilities, but also taking an interest, 19 added interest into these areas of responsibility from a 20 federal side. In other words, the tribal historic preservation 21 officers are basically federal officers, similar to your state 22 historic preservation officer, because he does concur with 23 determinations on undertakings, particularly the ones that have 24 adverse effects to certain properties that are identified.</p> <p>25 Knowing that, I had a responsibility looking at the</p>
<p style="text-align: right;">118</p> <p>1 old, knowing that I was picked already when I was young, that I 2 had to carry on this responsibility as I got older. It's given 3 to us, we are picked when we are real small, so my involvement 4 in these types of areas goes back to my family that gave me the 5 oral history in these types of areas that we have been involved 6 with.</p> <p>7 I've been part of the tribal historic preservation 8 office. We were the first tribal historic preservation office 9 that was established under the 1992 amendment to the National 10 Historic Preservation Act. In 1991 I was on the tribal council 11 for the Standing Rock Sioux Tribe and we pushed for the '92 12 amendments and what the '92 amendments allowed was tribes to 13 assume responsibilities from a state historic preservation 14 officer in relation to federal undertakings that were happening 15 within a defined boundary.</p> <p>16 In this case the '92 amendments allowed tribes to 17 assume SHPO responsibilities within their tribal lands. It 18 also allowed us to be consultants, be consultant parties to any 19 federal undertakings that happened within our aboriginal home 20 lands and that's how our process was written in relation to 21 assume these responsibilities, was it basically amounted to the 22 1851 Treaty boundaries. That's how our THPO was set up in 23 Standing Rock. So that gave me a responsibility to be involved 24 with a number of undertakings in the five-state area. 25 Basically it amounted to 61 million acres originally in the</p>	<p style="text-align: right;">120</p> <p>1 process that was happening here and me being involved with this 2 now, I looked at how I came to be involved with my 3 responsibilities even back to when I was a child. I started in 4 1985 when I first helped my uncle bury the first individual 5 that came off the Missouri River adjacent to Standing Rock. 6 From 1996 to 2008, I personally, along with my family and my 7 two uncles, we designated a small area on Standing Rock and we 8 buried 478 individuals that came off the river. Basically 9 almost all of them we had to retrieve them, in other words, 10 what I mean by that is we had to collect, with the federal 11 agency, those remains, and we generally took them into a sweat 12 lodge, a nipl, and we would cleanse them one more time before 13 we would bury them.</p> <p>14 So NAGPRA naturally was kicked in so I was very 15 familiar and became familiar with the NAGPRA law, the Native 16 American Graves Protection and Repatriation Act, a federal law 17 that was enacted in 1990 to do a number of things with the 18 museums, but also in Section 3 required our involvement when 19 any permit, particularly an ARPA permit, Archaeological 20 Resource Protection Act, permit required excavation or 21 intentional excavation. So I have been very much involved with 22 that also.</p> <p>23 But in relation to this site and to that picture, 24 since '85 I have been involved with a number of sites that they 25 come from whether it's a sacred site, the component of the</p>

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<p style="text-align: right;">121</p> <p>1 sacred site includes burials, there's different types of site 2 types out there that basic archaeology doesn't understand. 3 That's why the '92 amendments were pushed, because it also 4 allow, and the '92 amendments allowed for tribes, if this was a 5 federal undertaking now at this point, and it's unclear whether 6 it is. At this point, reading what I seen here, there is no 7 federal involvement yet, but yet there is federal participation 8 in the inspections. 9 But when you have federal involvement of that nature, 10 it kicks in certain requirements and certain laws, one of which 11 is the National Historic Preservation Act with Section 12 101(d)6(b) that allowed tribes to designate lands of religious 13 and cultural significance. I think at this point just looking 14 at that, that should occur first, but yet we are doing this the 15 other way around, we are doing it kind of backwards, and maybe 16 rightfully so, because there is a lot of private lands on this 17 and so naturally state law takes precedence over those types of 18 areas. 19 It's kind of disheartening to see that federal part of 20 it, the federal shroud of the National Historic Preservation 21 Act has not been included in this process, because what I heard 22 earlier, notices were sent out to all these departments, these 23 parties, and what I heard was all state departments, although 24 there was federal involvement in relation to going onto the 25 site, in particular this area. They never really signed onto</p>	<p style="text-align: right;">123</p> <p>1 When you start talking about Christianity and you 2 start talking about this Catholic minister would go into the 3 Protestants or the Baptists and have him take over church in 4 that area, you probably would never see it. Well, this is 5 similar. These spiritual men all have a cardinal direction, 6 but we are talking about a time when we had spiritual men that 7 used all of them. I don't know if you understand what I'm 8 saying, but I'm saying they took those directions and the gift 9 that was in them and walked into these areas that were required 10 to walk into a specific topography for a specific area that 11 required certain things that he needed, whether it was 12 botanical or medicinal plants that are required from his walk 13 of life in this area. 14 So you will see these types of areas like this that 15 they are not the same, in nature, in the placement of the 16 rocks. But when you start walking into the ring sites, these 17 are fasting sites, these are humblecha sites. These are places 18 where men, when we were young, this big, we walked into these 19 little circles and archaeology can't define them because it's 20 maybe a meter. Well, geez, that's not a tipi ring, but if they 21 understood our walks of life from our spiritual men, those 22 required for the young boys and young girls to step into 23 certain rings like that. You find them in these types of 24 areas. 25 Getting back to this picture, this rock cairn, like</p>
<p style="text-align: right;">122</p> <p>1 an MOA that is part of the National Historic Preservation Act, 2 so I don't know what the authority is on this MOA in relation 3 to state law, what governs that state law in relation to 4 allowing an MOA, a Memorandum of Agreement, to be made to 5 resolve adverse effects. In this case there is some sites here 6 that Mr. Fosha says that particularly I believe it was five 7 that need more evaluation. But if you look at it, there's 81 8 that are undetermined. 9 In getting to this picture here, in that area, I 10 understand myself that there was a number of bands, including 11 our band, the Cuthead band of Dakota came into these areas as a 12 society that came into a lot of these areas, particularly all 13 the way west. There was pledges made on a number of these 14 sites. Well, knowing and understanding that my relatives are 15 here, my elders that are here, I just want to say this for the 16 record, that when you start coming onto certain sites like 17 this, you start bringing in those types of spiritual men that 18 are required to have kind of a responsibility that oversees the 19 responsibility of these types of sites, because every site, if 20 you look at it, it's connected to one of these men, whether 21 he's (speaking native language), whether he's (speaking native 22 language), whether he's eagle, he's an elk medicine man, or he 23 walks a different type of life that requires society to have 24 governance over these areas. Each one of them have a cardinal 25 direction.</p>	<p style="text-align: right;">124</p> <p>1 you heard earlier, some of them can be markers. If I made a 2 pledge and if I went over there to fast and my fasting would 3 require me putting a round ring in this area, I have made my 4 grave. We call that a (speaking native language), so already 5 I've picked, because I follow this medicine person, that 6 probably is a part of my family also, I follow him, I would 7 walk into an area where he's walked into because that's 8 required of him to take that specific drainage, that specific 9 topography, that specific environment, and the plants that are 10 for his walk of life are right there. 11 So it's not a real nice hill that you see all these 12 sites are, no, it's because of the walk of life he walks. So 13 I'm standing here and young as I am, I'll walk over there, I 14 can identify these types of areas based on the knowledge that 15 was handed to us from our elders that's sitting here, that are 16 the actual evidence of that walk of life is sitting in here 17 today, these older people, they know that. So they ask some of 18 us younger people to step forward. I was asked to step forward 19 to do this. 20 I also walked into a way that from a governmental 21 perspective I had to look at certain things from a process, 22 whether it was that federal law, trying to deal with the state 23 laws that really don't recognize our spiritual sites. This 24 site you are looking at here is considered sacred simply 25 because a man gave his life. He maybe wanted to be put back to</p>

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1 where he fasted, where he made his first grave, where he made
 2 his first (speaking native language), where he fasted and he
 3 connected and he wanted to go back to there.
 4 You will find the rock cairn inside a ring. You may
 5 find that rock cairn out 20 feet, depending on the direction.
 6 How you know is you go in and you look at the color of the
 7 rock. I know and I can say that with Mr. Fosha, because I
 8 talked to him before, and Mr. Rhodd here, the altar is very
 9 important, that color of that rock, because every direction has
 10 a color, so we look and when we see this ring, we see whether
 11 the altar is on the inside or the outside of the ring. We also
 12 look at the coloration. Archaeology doesn't do that. That's
 13 why when I was looking at this and I noticed there's 81 sites
 14 here that are undetermined, look at them, a lot of them are
 15 ring circles that need to be determined yet.
 16 You also look at the beginning of that where they are
 17 saying these are not considered eligible, but yet there's rock
 18 rings included in that. So I don't know as far as I guess the
 19 adequacy of that determination, whether that was made proper,
 20 because for one, you heard from Mr. Ellison, he asked the
 21 question, has any tribes been consulted? I'm not aware of it.
 22 I'm also aware that there was no spiritual people involved with
 23 this, so you are stepping into an area where that's where those
 24 types of things can be included or enhance the understanding of
 25 individuals that have to sit there and make a decision on

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1 whether you have adequate information in front of you or not.
 2 Secondly, if you have people that have understanding
 3 of these areas, and I'm only one of many, and I'm younger, I'm
 4 54 years old, I'm considered young, I shouldn't even be
 5 speaking in front of my elders, I'm too young to do this. But
 6 I was asked to come here to give you some type of understanding
 7 of what you are dealing with and the adequacy of the
 8 information currently that you have available or rather that's
 9 coming in front of you and you will eventually make a
 10 determination, right now in my personal opinion, you do not
 11 have all the information.
 12 You have to go there and see yourself what I'm talking
 13 about. You would have to go to this site. This site right
 14 here has a little cup. If you have the picture, look, there's
 15 a little cup in there. Look at that cup. That's very
 16 important to sites of this nature. Those spirits make those
 17 cups. That person must have been a leader of prominence to
 18 have a cup placed at his rock cairn. The other thing is that
 19 the coloration of the rocks, you will find in this lower area,
 20 I went to the area right close by this where there was 58 rock
 21 cairns, rock piles, what people normally call rock piles.
 22 Every one of them had a white crystal on top of it. That's
 23 very specific to the west direction, hail, (speaking native
 24 language). Certain individuals that walked that way of life
 25 marked their grave with those rocks, so when the elders took me

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1 out there along with them and we stood there and tried to
 2 explain that to the Black Hills National Forest, they had a
 3 better understanding of what they needed to protect.
 4 I would ask you to consider that, that if you want to
 5 understand more about what we are talking about, I would say
 6 that the request that Mr. Ellison has made for a site visit be
 7 considered very strongly for you to understand these types of
 8 areas that could be even in your back yard, because the problem
 9 with what we have now today is there's a lot of sites that are
 10 on private land. We can't protect them, tribal people.
 11 I think the lawyer here from Powertech was getting to
 12 that with Mr. Good Plume. Did you walk off that road? Did you
 13 get off that road? Did you cross on to that private land? You
 14 know, we have a hard problem with that, to protect. Right now
 15 the state laws don't really go that far to protect, but the
 16 federal laws are trying to attain that type of responsibility.
 17 Hence NAGPRA, the Native American Graves Protection and
 18 Repatriation Act is part of one. But to assess effects, if you
 19 really want to get down to identifying and assessing adverse
 20 effects, you have to use the National Historic Preservation
 21 Act. That is the law, the federal law that allows you to
 22 identify these areas and determine their significance. And you
 23 also have a right to consult. That federal agency makes that
 24 determination.
 25 If this was a federal project, it wouldn't be

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1 Powertech and Archaeological Resource Center that would be
 2 making an MOA, it would be a federal agency, because they are
 3 delegated that responsibility to consider those types of
 4 effects, federal adverse effects, and 36 CFR 800 allows them to
 5 make a Memorandum of Agreement. That's why my question, I
 6 don't know where the authority came in relation to an MOA of
 7 this nature. There must be a state codified section in your
 8 law that allows for MOAs to be made.
 9 The only thing you have left on that and what I seen
 10 was you are going to make conditions within the permit that
 11 will take away or resolve these types of mitigative processes.
 12 But that's not the save all. A permit is only certain and goes
 13 so far, it only has certain requirements and you could put
 14 conditions on permits. An MOA under National Historic
 15 Preservation Act has legal teeth. So as far as sacred sites is
 16 concerned, just from what I understand and heard from Defenders
 17 of the Black Hills, there is more sites within that area. I
 18 have not specifically walked into this area where this picture
 19 is, but I would like to. I would like to get into the area.
 20 If there's going to be a visit there, I would sure like to
 21 accompany this team here and the board here to assist in your
 22 understanding, along with my elders here, the men here, because
 23 they can tell you also about these types of areas. So that's
 24 what I have to offer for now, if you have anything else.
 25 MS. WHITE FACE: That's all I have for him.

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130	<p>1 NAGPRA, a process for transferring possession and control of</p> <p>2 human remains, funerary objects, sacred objects, and objects of</p> <p>3 cultural patrimony to culturally affiliated Indian tribes and</p> <p>4 individual Indians and native Hawaiian organizations. The</p> <p>5 Archaeological Resources Protection Act, a process for</p> <p>6 protecting material remains of human life or activities that</p> <p>7 are at least 100 years of age and of archaeological interest.</p> <p>8 The American Indian Religious Freedom Act, requiring federal</p> <p>9 agencies to evaluate their policies and procedures, in</p> <p>10 consultation with native traditional religious leaders, in</p> <p>11 order to determine appropriate changes necessary to protect and</p> <p>12 preserve native religious cultural rights and practices. The</p> <p>13 National Historic Preservation Act, a process of protecting</p> <p>14 historic and prehistoric archaeological sites. And then I have</p> <p>15 included in here part of my packet the exhibit, which is page</p> <p>16 110 from the report.</p> <p>17 In this land area that has been nominated are</p> <p>18 archaeological resources that are at least 100 years of age and</p> <p>19 of archaeological interest. Tetunwan people from the Pine</p> <p>20 Ridge and other South Dakota reservations were forbidden to</p> <p>21 leave the reservations after 1889 so the burial sites that are</p> <p>22 there are more than 100 years of age. These burial sites meet</p> <p>23 the criteria for protection under the Archaeological Resources</p> <p>24 Protection Act, ARPA, and give a Special and Exceptional status</p> <p>25 to the area.</p>	132	<p>1 South Dakota's threatened or endangered species. The bald</p> <p>2 eagles' survival in the United States has been precarious for</p> <p>3 decades, and to destroy even one nest is to promote the</p> <p>4 extinction of this species that is a symbol of the United</p> <p>5 States. A place where a naturally occurring nest is found is</p> <p>6 Special, Exceptional, Critical, and Unique and must be</p> <p>7 protected and preserved as well as the food source surrounding</p> <p>8 the nesting site.</p> <p>9 Agricultural operations such as cattle grazing usually</p> <p>10 will not have an adverse effect, but any kind of development</p> <p>11 that includes machinery, prolonged human presence or</p> <p>12 disturbance and removal of the food source or forage area will</p> <p>13 contribute to the destruction of the nesting site and eradicate</p> <p>14 future progeny, which is a violation of federal law. The Bald</p> <p>15 Eagle Protection Act specifically states in the selected</p> <p>16 definitions category that the word, quote, take, includes,</p> <p>17 quote, molest or disturb, and includes the molesting or</p> <p>18 disturbing of any nest or egg. Disturbance of the forage area</p> <p>19 so that the parent eagles could not adequately feed their young</p> <p>20 would also mean a disturbance of the nest.</p> <p>21 And for my exhibit here I have the Bald Eagle</p> <p>22 Protection Act, 16 USC Sections 668 to 668d, June 8th, 1940, as</p> <p>23 amended in 1959, 1962, 1972, and 1978.</p> <p>24 In the letter dated October 17, 2008 to the South</p> <p>25 Dakota Department of Environment and Natural Resources, and</p>

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1 this is the one from the South Dakota Game, Fish and Parks,
 2 this letter stated that no activity should be conducted on the
 3 land discussed in this request for seven months per year
 4 between February 1st to October 31st (sic) to avoid
 5 disruption -- quote, to avoid disruption of bald eagle activity
 6 at the nest, end quote, and also because of a nearby redtail
 7 hawk nest. This letter was submitted as Exhibit No. 3 in the
 8 nomination and also is included here.

9 This does not address other threatened or endangered
 10 species which were mentioned in Powertech's Notice of Intent to
 11 Mine, species such as the long-billed curlew, Numenius
 12 americanus, the golden eagle, Aquila chrysaetos.

13 CHAIRMAN McCAREN: Read the English.
 14 MS. WHITE FACE: You don't want the Latin?
 15 CHAIRMAN McCAREN: She would have trouble, too.
 16 MS. WHITE FACE: The merlin, the Cooper's hawk, the
 17 American white pelican, and the long-eared owl. The Migratory
 18 Bird Treaty Act of 1918 as amended further addresses
 19 disturbance of migratory bird areas, of which most of the named
 20 species are migratory birds. Quote, Public Law 95-616 also
 21 ratified a treaty with the Soviet Union specifying that both
 22 nations will take measures to protect identified ecosystems of
 23 special importance to migratory birds against pollution,
 24 detrimental alterations, and other environmental degradations.
 25 And in my packet, I have in here also the -- for your use the

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1 Migratory Bird Treaty Act.
 2 The fact that there is a place in South Dakota with
 3 enough food and water to sustain a --

4 CHAIRMAN McCAREN: We are going to run out of time.
 5 We can read what you are reading.
 6 MS. WHITE FACE: Don't you need it for the record?
 7 CHAIRMAN McCAREN: This is part of the record.
 8 MS. WHITE FACE: Anyway, this area, right now it still
 9 sustains not just the bald eagle nest, but it is also an area
 10 where all these other birds are coming to and the forage area
 11 means the mice, the grasses, the bugs, everything that is in
 12 there that will help these birds, migratory birds, bald eagles,
 13 the young in the nest and everything, and so that is why it is
 14 crucial that this land area nominated in this request be listed
 15 as Special, Exceptional, Critical, and Unique in South Dakota.
 16 I have a picture in here and it's in your packet.
 17 Now, this is a picture of the Smith Highlands in-situ recovery
 18 mining operation in Wyoming and the reason I put it in here was
 19 to show you the destruction to the land because this
 20 destruction will hurt the forage area of these migratory birds
 21 and the bald eagle. Mice, small animals, all the rodents will
 22 not be able to live in there.
 23 Earlier it was brought to your attention by Roberta
 24 Fivecoate that there are a number of prairie dogs and she had a
 25 number of prairie dog holes in her pictures up there. Prairie

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1 dogs are an index species. Prairie dogs show you that the
 2 ecology in that area is fairly healthy and so to have this kind
 3 of destruction happen in that area would also hurt the prairie
 4 dogs, which would show that this whole ecology of that area
 5 would be disturbed and the threatened and endangered species
 6 there would definitely be disturbed.

7 Finally, I want to go on to our third reason for
 8 having this area nominated, and that is for water protection.
 9 In subsection one of South Dakota Codified Law 45-6B-33.3 it
 10 states that the land is so ecologically fragile that once it is
 11 adversely affected, it could not return to its former
 12 ecological role in the reasonably foreseeable future.
 13 Subsection two states that the land has such a strong influence
 14 on the total ecosystem of which it is a part that even
 15 temporary effects felt by it could precipitate a system-wide
 16 ecological reaction of unpredictable scope or dimension.

17 Now, the reason I am bringing this up to you, and this
 18 evidence was in my nominating petition, is because -- so I
 19 won't read what I have written here, but because why I am so
 20 concerned about this area is that the Black Hills are the
 21 recharge area of aquifers, of many aquifers. In that exhibit,
 22 you have figure five, I'm not going to read the rest of what I
 23 wrote. You have figure five in there, in your exhibit, okay.
 24 I blew this up, this schematic five and I added it
 25 extra special in here because if you look at this, this figure

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1 here, the recharge area for these aquifers start with the Black
 2 Hills and this whole picture here shows you all of South
 3 Dakota. Now, the recharge area of these areas stick out as
 4 outcrops in the Black Hills. My written testimony is a lot
 5 more explanatory than what I'm going to be giving you, but as
 6 Mr. McCahren wants me to just talk about this from my
 7 understanding, I am not going to be able to quote other
 8 geologists and others much more expert than I am. But I have
 9 studied this recharge area and I am concerned about these
 10 aquifers.

11 I am concerned about them today, but I am concerned
 12 about protection of the water and it's not just for the water
 13 resources for that area. It's for the protection of the water
 14 resources of the whole state. And so this addresses that one
 15 portion where it will have a systematic, a whole bigger effect
 16 on a bigger system, and that's why I am bringing this to you.

17 What this shows here is that the water is recharged in
 18 the Black Hills and as it goes down, it also comes up over here
 19 on the eastern side of the state. I have been coming here for
 20 a number of years asking the state to do water tests on the
 21 east side of the state to see if those 4,000 wells that were
 22 drilled 40 years ago and that impacted these aquifers, if they
 23 are now, because the Madison aquifer travels at 1,000 feet per
 24 day, if those have already impacted eastern South Dakota.
 25 This whole -- my whole presentation about the water

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<p style="text-align: right;">137</p> <p>1 preservation has to be looked at. It has to be really, really 2 looked at. In my presentation, it talks about the Dakota 3 aquifer right here on the eastern side of the state and how 4 that is always recharged by the underlying Madison. Now, one 5 of the things why this is real important to me is because they 6 are thinking, they are talking about the mining and what they 7 want to mine is in the Inyan Kara formation.</p> <p>8 Now, in my exhibits you have in here a report from the 9 Tennessee Valley Authority that shows the cross-contamination 10 of those aquifers. In my report here you also have older 11 evidence that the Madison is a leaky aquifer, that it has many, 12 many fractures and many, many faults, and so that these 13 aquifers could cross-contaminate each other. It also, in my 14 report, in my exhibits, it also shows that there were questions 15 raised a number of years ago by geologists about those 4,000 16 exploratory wells, those old uranium exploratory wells and that 17 went down, some of them down to 1,000 feet and did they 18 cross-contaminate, how many of these aquifers did they 19 cross-contaminate.</p> <p>20 And so this system, although -- I have one more thing 21 I need to show you because it will show you the specific area. 22 Of course anybody here that wants a copy of my whole thing, 23 just let me know. I can send it to you. This diagram -- this 24 is a schematic diagram, figure number seven, it's in your 25 packet. What this shows is the flow of the aquifers from the</p>	<p style="text-align: right;">139</p> <p>1 chose to write about the underground water because when I first 2 saw this schematic and I saw what happens, that the recharge 3 area is in the Black Hills and that it flows to the eastern 4 side underneath the Missouri River, that it's going to impact 5 the whole state.</p> <p>6 In one of my exhibits here, you have first of all the 7 ground water velocities of the Madison aquifer are in the order 8 of 1,000 feet per day, that's here. But finally, the Madison 9 aquifer, and I just want to read this one little portion, it 10 says, why is the Madison aquifer important? And this is on a 11 fact sheet that was written by Arden Davis, the Department of 12 Geology at South Dakota School of Mines. It says, about 90 13 percent of South Dakota's population relies on ground water 14 from aquifers such as the Madison for drinking water supplies. 15 The Madison aquifer is vitally important because it contains 16 approximately 66 million feet of drinking quality water in 17 South Dakota. Cities such as Rapid City use water from wells 18 drilled into the Madison aquifer. Unfortunately, in some 19 places the aquifer is too far beneath the surface for the water 20 to be economically pumped for use. The water in the Madison 21 will become more important in the future as South Dakota's 22 population grows and more people require water from scarce and 23 dwindling supplies.</p> <p>24 As you saw in my earlier schematic and if you read the 25 rest of my exhibit, geologists have said that the Dakota over</p>
<p style="text-align: right;">138</p> <p>1 recharged area in the Black Hills over to the east, okay. And 2 what this shows is that the recharge area -- and in the rest of 3 my presentation which you want to read, it shows how many 4 studies were done and how they were done dating back to 1890, I 5 think it was, when they first started doing the hydrogeologic 6 mapping over here and over here, which became the classic kind 7 of mapping. And they show the flows go from the west, from the 8 Black Hills area, over to the east, over to the James River.</p> <p>9 Now, Powertech plans on mining right here. This is 10 the nominated area that I am bringing to you right here where 11 this little X is. The flow, as you can see, goes to the east 12 and my concern is that because they will be dissolving stuff in 13 there in the ground water and because the aquifers start here 14 in the Black Hills area, even though it is a small portion of 15 its total recharge of these aquifers that go to the east, that 16 it will still have some effect. The 4,000 old wells, yes, they 17 have had an effect. How much? We don't know. We need to get 18 more studies done over here.</p> <p>19 But if this area, if the aquifers over here are again 20 disturbed in any way chemically, geothermally, which always is 21 happening underground, that the flow of all of this disturbance 22 is going to go to the east and that's why our third reason for 23 this area being nominated, is because the water, the 24 underground water needs to be protected.</p> <p>25 I could have written about the surface water, but I</p>	<p style="text-align: right;">140</p> <p>1 here is recharged by the Madison. So whatever happens to the 2 Madison over here is going to eventually affect eastern South 3 Dakota and that's why this area that we are asking to be 4 nominated needs to be considered Special, Exceptional, Critical 5 and Unique because it will have a far-reaching and long-lasting 6 effect on the ecology of this whole state. Thank you.</p> <p>7 CHAIRMAN McCAHREN: We got questions. You want to 8 cross her?</p> <p>9 MR. MAIN: Can we take a break?</p> <p>10 CHAIRMAN McCAHREN: Yes. He would say very briefly.</p> <p>11 MS. GIEDD: Before we take a break, can I have some 12 direction on how long we are going to go tonight?</p> <p>13 CHAIRMAN McCAHREN: He asked me a little while ago if 14 I brought a suitcase. I haven't.</p> <p>15 MS. GIEDD: I am aware that Powertech has some 16 witnesses yet who will be presented, so how long are you 17 thinking?</p> <p>18 CHAIRMAN McCAHREN: Let's take the break and talk 19 about it.</p> <p>20 (Whereupon, the hearing was in recess at 4:32 p.m., 21 and subsequently reconvened at 4:50 p.m., and the following 22 proceedings were had and entered of record:)</p> <p>23 CHAIRMAN McCAHREN: We will come to order. I may 24 look like I'm crying, but I'm not. I have been advised you 25 have an hour's worth of witnesses.</p>

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1 MR. MAIN: I don't have that much direct exam. I've
 2 got direct exam on three witnesses, it will take about a half
 3 hour.
 4 CHAIRMAN McCAHREN: Proceed.
 5 MR. MAIN: Call Gwyn McKee to the stand. For the
 6 board, Ms. McKee's letter report dated October 1, 2008 is
 7 attached to Exhibit 6. Now, there is also another letter from
 8 her that's dated July 2 attached after that, but the letter
 9 that is obviously the most recent and the one that has the most
 10 current data is the October 1, 2008 letter. It is Appendix B,
 11 as in Baker, to DENR Exhibit 6. It's right after the surface
 12 owners and mineral owners.
 13 Thereupon,
 14 Gwyn McKee,
 15 called as a witness, being first duly sworn as hereinafter
 16 certified, testified as follows:
 17 DIRECT EXAMINATION
 18 BY MR. MAIN:
 19 Q. Would you please state your name?
 20 A. My name is Gwyn McKee.
 21 Q. By whom are you employed?
 22 A. I am employed by IYF Jones and Stokes out of Gillette,
 23 Wyoming.
 24 Q. Could you please describe for the board your
 25 educational background?

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1 A. Yes, I have a bachelor's degree in wildlife management
 2 and I also have a master's degree in wildlife and management
 3 ecology. In addition to my educational background, I've been a
 4 professional wildlife biologist for 20 years, the last 15 of
 5 which have been in northeast Wyoming, western South Dakota, and
 6 southeastern Montana.
 7 Q. Did there come a time when you became familiar with
 8 Powertech's proposed operations in Fall River and Custer
 9 County?
 10 A. Yes.
 11 Q. And were you then -- was your firm, Jones and Stokes,
 12 retained by Powertech to do some wildlife evaluations?
 13 A. Yes.
 14 Q. Could you just briefly describe when you did those,
 15 how you did those, and we will talk about the results after
 16 that.
 17 A. Yes. We were contacted in 2007 to start the baseline
 18 process for wildlife and fisheries resources. Part of that
 19 process is for me to contact South Dakota Game, Fish and Parks,
 20 which I did, I contacted Mr. Stan Michals. We had an initial
 21 site visit with Mark Hollenbeck, Stan Michals and myself in
 22 early June I believe it was of 2007 to take a site tour, make
 23 some preliminary decisions about the types of surveys that we
 24 would be doing, the survey area, the habitats that we would
 25 concentrate on and those kinds of things.

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1 The scope of work for those surveys was then finalized
 2 and sent back to South Dakota Game, Fish and Parks for their
 3 approval, so everything that we did was reviewed by biologists
 4 and terrestrial and fisheries biologists to insure that we were
 5 following the proper protocols for South Dakota wildlife
 6 surveys and aquatic surveys, and once that was finalized, we
 7 began the work.
 8 It was a full year of baseline survey requirements in
 9 the permit area and a one-mile perimeter for some of the
 10 species, just the permit area for other species like small
 11 mammals, and quite a ways upstream and downstream from the
 12 project area for the aquatics work.
 13 So we did a wide variety of surveys, from July of '07
 14 through actually early August of '08, so just slightly more
 15 than a year. They included upland game bird surveys, small
 16 mammal trapping, breeding bird surveys, bald eagle winter roost
 17 surveys, surveys for nesting raptors, aquatic sampling, and
 18 that included macro invertebrates, the stream channel
 19 characterizations, and fisheries collections as well.
 20 We did some general surveys for amphibians and
 21 reptiles in the area. We did some general surveys for bats.
 22 Let's see, we were not required to do big game surveys per se,
 23 but it is our policy to record everything that we see in the
 24 survey area, which is the permit area and the one-mile
 25 perimeter on every single site visit, and that is how four of

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1 the seven species referred to by Ms. White Face got onto the
 2 list. They were seen flying over the area one time and one
 3 time only, but because it's our policy to record everything we
 4 see, we recorded them, even though they were not physically
 5 using the area.
 6 Q. Can you tell the board what those species were,
 7 identify those four species?
 8 A. Yes, the four species that were observed one time
 9 flying over the permit area were the golden eagle, the American
 10 white pelican, Cooper's hawk, and great blue heron.
 11 Q. Thank you. You said that you consulted with South
 12 Dakota Game, Fish and Parks regarding these surveys.
 13 A. That's correct. We cannot proceed until we have
 14 approval from the agency that the types of surveys we are
 15 proposing are meeting their standards.
 16 Q. And did they approve your surveys you were performing?
 17 A. Yes, they did.
 18 Q. There has been testimony and indication in the record
 19 that there is a bald eagle nest --
 20 MR. ELLISON: Mr. Main, I can't hear your questions.
 21 MR. MAIN: Excuse me.
 22 Q. (BY MR. MAIN) I'll repeat. There's been testimony
 23 about the observance of a bald eagle nest. Can you tell the
 24 board a little bit about that, where it's located, what you
 25 observed?

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1 **A.** Yes, the bald eagle nest is in the extreme western
 2 portion of the proposed permit area. It was an active nest, it
 3 was successful in 2008. There is, as we heard earlier today,
 4 an occupied residence in line of sight very near to the nest.
 5 We did see -- It's somewhat relevant in my mind -- we also saw
 6 wintering bald eagles along Beaver Creek and this nest is along
 7 Beaver Creek. We saw individual eagles in individual trees
 8 during our winter surveys three times. We did those surveys in
 9 the winter and I'm assuming, but I cannot say for sure, that at
 10 least two of the eagles that we saw in the winter I think it's
 11 possible that those were the pair that bred. It makes sense to
 12 me that it was, but the birds are not marked, so I cannot say
 13 for sure.

14 **Q.** You think they would be from the nest, then?

15 **A.** I think they may live in the area year round, but I
 16 can't say for sure.

17 **Q.** Is the bald eagle on the federal threatened or
 18 endangered species list?

19 **A.** No, it was delisted because it was deemed by the US
 20 Fish and Wildlife Service to have recovered sufficiently to no
 21 longer be in danger of extinction.

22 **Q.** Is it on the threatened or endangered state, South
 23 Dakota state species list?

24 **A.** It is considered a threatened species by South Dakota
 25 State Game, Fish and Parks.

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1 **Q.** Are there other -- In the general area, are there
 2 other bald eagle nests of which you are aware?

3 **A.** It depends on how wide you go for general. There are
 4 almost 90 nests in South Dakota, there are numerous nests in
 5 Wyoming across the border. In that particular area, that's the
 6 only nest that I'm aware of, but again, we only surveyed what
 7 we were required to survey, which was the permit area and a
 8 one-mile perimeter, so I cannot say that there are no --

9 MR. ELLISON: Can you please speak into the
 10 microphone.

11 MR. MAIN: We will try to get a little closer.

12 MR. ELLISON: Thank you.

13 **Q.** (BY MR. MAIN) In your opinion, Ms. McKee, is it
 14 extraordinary or unique, in your experience, to have a bald
 15 eagle nest in this location?

16 **A.** I don't believe that I would consider it extraordinary
 17 or unique. It perhaps is not a typical nesting situation
 18 because there are no big reservoirs there, no big fisheries
 19 there to attract them. But as we heard, there is a large
 20 prairie dog colony there, the Cheyenne River is a little more
 21 than a mile away, there are fish in there, there are fish in
 22 Beaver Creek. So there obviously are adequate resources there
 23 for a bald eagle to nest there and we do have bald eagles
 24 nesting periodically in similar habitats elsewhere in western
 25 South Dakota and eastern Wyoming.

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1 **Q.** Thank you. I believe in your report, in addition to
 2 the four species that, as I understand it, the only observation
 3 of them was that they flew over once.

4 **A.** That is correct. They flew over the area one time,
 5 they were never observed perched or walking or hunting or
 6 anything. It was a direct flight, it was not a soaring
 7 situation where we felt that they were actively hunting. They
 8 merely flew over, and as I say, we try to be very thorough in
 9 our work, so we wrote them down because we saw them and that's
 10 how we do our job.

11 MR. MAIN: Thank you, Ms. McKee. That's all the
 12 questions I have, Mr. Chairman.

13 CHAIRMAN McCAHREN: Ms. Giedd.

14 MS. GIEDD: No questions.

15 MS. WHITE FACE: No questions.

16 CHAIRMAN McCAHREN: Mr. Ellison.

17 MR. ELLISON: Thank you.

18 CROSS-EXAMINATION

19 BY MR. ELLISON:

20 **Q.** Ma'am, how much time did you actually spend in the
 21 field on these 10,000 acres?

22 **A.** We were there repeatedly throughout the entire year
 23 every season for a minimum of two days per trip. Many times we
 24 were there for up to a week at a time, depending on the type of
 25 survey that we were doing.

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1 **Q.** Now, when you -- 10,000 acres, that's quite a bit of
 2 land. When you would go to the area, say, for a couple of
 3 days, would you camp in a particular area? How would you --
 4 one border is miles from the other border. How would you cover
 5 an area?

6 **A.** It's very survey specific. We stayed near by at the
 7 Hollenbeck Ranch because it gave us the opportunity to be on
 8 site very quickly. We would, depending on the type of survey,
 9 we were there from before dawn until well into the night. We
 10 covered the area, depending on the type of survey that we were
 11 doing, we were either targeting certain areas for certain
 12 species or certain survey methods, or we would try to do a more
 13 general reconnaissance. There is no one way. We were all over
 14 that place repeatedly throughout the season. But it very much
 15 depends on the type of survey that we were doing.

16 **Q.** Any animals that you saw in one place, you don't know
 17 whether there was similar animals the same day or the next day
 18 several miles away but still within the project area.

19 **A.** Well, I could make some logical assumptions as to
 20 whether they were there, but we usually had at least two of us
 21 on site and we were not working together, we were spread out
 22 across the area. So the information that was provided in the
 23 summary was representative of multiple people being on site at
 24 the same time throughout the area recording everything that
 25 they saw.

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1 Q. All right, but I mean so you have two people there,
 2 you have got one person on the eastern boundary and one person
 3 on the western boundary, you can't even see each other with
 4 binoculars, can you?
 5 A. **Not necessarily, no.**
 6 Q. And by the way, when you stayed at Mr. Hollenbeck's
 7 ranch, he's the project manager for Powertech, isn't he?
 8 A. **That's correct, and conveniently, he happens to have a**
 9 **personal property near by that afforded us an opportunity to**
 10 **get to our research areas quickly.**
 11 Q. Convenience for your purposes.
 12 A. **Excuse me?**
 13 Q. Convenience for your purposes.
 14 A. **Convenience for the purpose of making sure that we had**
 15 **access to the site in a timely manner.**
 16 Q. And are you on contract right now for Powertech,
 17 ma'am?
 18 A. **I do not work directly for Powertech. I work for a**
 19 **different permitting contractor that I'm subbing to.**
 20 Q. All right, so you are on subcontract, but you are
 21 being paid ultimately by Powertech?
 22 A. **Ultimately, that is correct.**
 23 Q. Thank you. I believe that's all the questions that I
 24 have. I'm sorry, I do have another question. You mentioned
 25 about how this bald eagle nest that you did discover was not in

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1 a typical area of bald eagle nesting even within the Black
 2 Hills; is that correct?
 3 A. **No, that's not what I said. I said --**
 4 Q. Correct me, then.
 5 A. **I believe I said that it was not a typical setting of**
 6 **what we would all as individuals normally think of as bald**
 7 **eagle habitat. I don't recall saying anything about the Black**
 8 **Hills specifically.**
 9 Q. Now, you mentioned that there's a lot of prairie dogs
 10 in the area of that nest, prairie dog holes.
 11 A. **There are prairie dog colonies in the area, yes.**
 12 Q. And a major surface disturbance would affect the
 13 population of those prairie dogs, would it not, ma'am?
 14 A. **Not necessarily. Well, it depends on if you mean**
 15 **affect in a negative way or a positive way. Prairie dog**
 16 **colonies, as I'm sure you know, or prairie dogs and all rodents**
 17 **in fact are colonizers of disturbed areas and oftentimes will**
 18 **take advantage of freshly turned dirt to expand their prairie**
 19 **dog colonies.**
 20 Q. Well, yes, but heavy truck traffic, drilling holes for
 21 pipes, running and laying pipe, that's not exactly conducive to
 22 freshly turned earth habitat, is it?
 23 A. **Well, I don't know, drilling a hole does pull up fresh**
 24 **dirt and laying pipelines, I have seen any number of prairie**
 25 **dog colonies expanding into fresh pipeline areas.**

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1 Q. Okay. And in terms of fish in the creek, what creek
 2 were you talking about?
 3 A. **Beaver Creek and then -- we had two sample sites on**
 4 **Beaver Creek and one sample site on the Cheyenne River.**
 5 Q. What's the fish population there?
 6 A. **It's a very common species, carp, catfish, sunfish, we**
 7 **did have a plains top minnow, which is a tract species that was**
 8 **outside of the permit area, it was in the one-mile perimeter,**
 9 **but the standard species you would expect to find in a warm**
 10 **water, slow, low flow stream.**
 11 Q. In a stream that was healthy?
 12 A. **Well, again, I'm not a fisheries biologist per se, but**
 13 **they are the standard fish you would find in a warm water**
 14 **fishery.**
 15 Q. In a self-propagating fishery.
 16 A. **In a standard warm water fishery.**
 17 Q. Is that the same thing?
 18 A. **I am not a fisheries biologist.**
 19 Q. I thought you were a wildlife management specialist.
 20 What I'm trying to find out is, are you saying that your
 21 training and expertise would not cover what a healthy stream is
 22 like and whether that existed on Beaver Creek?
 23 A. **As far as I'm aware, with the information that we**
 24 **collected in combination with the water sampling, that is a**
 25 **healthy stream.**

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1 Q. Okay, and when you say you did water sampling, what
 2 did you do with those results?
 3 A. **I did not collect the water samples, those water**
 4 **samples were collected by other contractors, but we did --**
 5 Q. Do you know who, ma'am?
 6 A. **Excuse me?**
 7 Q. Do you know who?
 8 A. **I do, Respec.**
 9 Q. Respec.
 10 MR. ELLISON: That's all the questions I have.
 11 CHAIRMAN McCAHREN: Did you have questions?
 12 MS. WHITE FACE: No.
 13 CHAIRMAN McCAHREN: Board members.
 14 A. **I keep trying to escape and you keep asking for more**
 15 **questions.**
 16 CHAIRMAN McCAHREN: I just went to a seminar put on by
 17 Wildlife Experiences with eagles and so so forth. Did you pick
 18 up any pellets to see what they had eaten?
 19 A. **We did not. We tried to stay away from the nest so we**
 20 **did not cause any disturbance and usually of course they eat**
 21 **fish, but that's a good question. I did not pick up any**
 22 **pellets.**
 23 CHAIRMAN McCAHREN: Thank you.
 24 MR. MAIN: Call Crystal Hocking.
 25 Thereupon,

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1 CRYSTAL HOCKING,
 2 called as a witness, being first duly sworn as hereinafter
 3 certified, testified as follows:
 4 DIRECT EXAMINATION
 5 BY MR. MAIN:
 6 Q. Would you please state your name for the record?
 7 A. My name is Crystal Marie Hocking.
 8 Q. And can you spell your last name?
 9 A. Hocking, H-O-C-K-I-N-G.
 10 Q. By whom are you employed?
 11 A. I am employed currently with RESPEC as a geologist.
 12 MR. ELLISON: I can't hear the witness.
 13 MR. MAIN: We will work harder.
 14 MR. DeMERSEMAN: This young lady just indicated she
 15 works for RESPEC. I have had some contact with RESPEC. I
 16 formed the corporation in 1969 or so and this room is named
 17 after Floyd Matthews, there were five School of Mines
 18 professors and me a million years ago, and I think it must have
 19 been about 20 years ago I sold out and I know a bunch -- some
 20 people there, so I thought I should make that disclosure.
 21 CHAIRMAN McCAREN: You didn't know him 40 years ago,
 22 did you? Thank you, proceed.
 23 Q. (BY MR. MAIN) And you are employed by --
 24 A. I am employed by RESPEC.
 25 Q. Located where?

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1 A. Located in Rapid City, South Dakota.
 2 Q. Could you briefly give the board your educational
 3 background?
 4 A. Yes, I received my bachelor's in 2005 from the South
 5 Dakota School of Mines in geology and I also received my
 6 master's degree there in geology and geological engineering
 7 under the supervision of Dr. Arden Davis.
 8 MR. ELLISON: Could the witness please speak into a
 9 microphone.
 10 MR. MAIN: Come on over.
 11 Q. (BY MR. MAIN) You gave your educational background
 12 and please repeat that.
 13 A. I said I graduated from the South Dakota School of
 14 Mines in 2005 with a bachelor's in geology and I graduated in
 15 2007 from the School of Mines with a master's in geology and
 16 geological engineering under the direction of Dr. Arden Davis.
 17 Q. And has your employment history been with RESPEC since
 18 you graduated from the School of Mines with a bachelor's?
 19 A. Yes, since June of 2007 I've been employed at RESPEC.
 20 Q. What is your -- what would you characterize that you
 21 do with RESPEC? What field do you concentrate in?
 22 A. I'm typically a geologist. I also focus in
 23 geohydrology. Geohydrology is basically the study of ground
 24 water, the characterization of the flow and the water quality
 25 and the rock layers, the aquifers that make up the -- that the

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1 water is contained within.
 2 Q. Can you tell the board what the subject of your
 3 master's thesis was at the School of Mines?
 4 A. My master's thesis was on aquifer vulnerability and
 5 susceptibility within the Madison aquifer within the Hayward
 6 quadrangle in the Black Hills, which is kind of just a little
 7 piece of land that contains a portion of Custer State Park.
 8 CHAIRMAN McCAREN: You are going to have to slow
 9 down. It's late in the day.
 10 Q. (BY MR. MAIN) Just orient the board geographically,
 11 where would that be, that area, that Hayward quadrant? Custer
 12 State Park, but where?
 13 A. The Hayward quadrangle is on the eastern most side of
 14 the Black Hills, it's just maybe 10, 15 miles north northwest
 15 of the town of Custer.
 16 Q. The subject of your thesis was how aquifers, the
 17 Madison aquifer could be contaminated?
 18 A. Yeah, basically it was the aquifer vulnerability and
 19 susceptibility, which means areas that the Madison could
 20 potentially be contaminated, looking at the outcrop areas and
 21 near surface areas, where the Madison is exposed to potential
 22 contamination and also looking at areas that could be current
 23 contaminant possibilities, such as septic tanks and highway
 24 transport spills and such.
 25 Q. Okay. And have you heard the testimony -- you heard

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1 the testimony today by Ms. Charmaine White Face regarding
 2 hydrology and geohydrology.
 3 A. Yes, I did.
 4 Q. And I'm referring to what was marked as White Face
 5 Exhibit 1 and Ms. White Face -- do we have another one of
 6 these? Thanks. Here is the original of that exhibit and then
 7 if we can turn towards the back, there is this report, this
 8 Regional Ground Water Flow Concepts in the United States:
 9 Historical Perspective; do you see that?
 10 A. Yes.
 11 Q. And are you familiar with that?
 12 A. Yes, I've read that report.
 13 Q. Let's talk about that one first. That report is dated
 14 1982. Is that report, based on your experience and knowledge,
 15 now outdated?
 16 A. Yes.
 17 Q. Is there better, more recent data?
 18 A. There is a lot more data that's been collected in the
 19 last 25 plus years since this report has come out that makes
 20 this report outdated.
 21 Q. And can you just briefly indicate to the board in what
 22 respects, what conclusions might be outdated?
 23 A. Well, in general, typically the potentiometric surface
 24 maps in this report are outdated for the state of South Dakota.
 25 There's been more recent ground water measurements. In the

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1 **Black Hills there's been a lot more recent ground water**
 2 **measurements, and across the entire state, so the**
 3 **potentiometric surface map in this report is quite outdated,**
 4 **and then as well the cross-section in the exhibit here from the**
 5 **report is also considered outdated.**
 6 Q. Is that this --
 7 A. **It's figure five in the paper by Bredehoeft that's**
 8 **part of the exhibit.**
 9 Q. Then I think there was an enlargement, I think Ms.
 10 White Face had an enlargement of that back here. Is this the
 11 one you are talking about?
 12 A. **Yes.**
 13 Q. One question I want to ask you about that, that shows
 14 the Inyan Kara as being connected to the Dakota Sandstone
 15 aquifer, those two aquifers being connected. Is that the case,
 16 are they connected? Are they the same aquifer?
 17 A. **The Dakota Sandstone in the eastern side of South**
 18 **Dakota is not the same as the Inyan Kara in the Black Hills.**
 19 Q. Is there another report back here further, too, or is
 20 that the only one? I think that's the only one.
 21 A. **There is just an abstract in here by Dr. Arden Davis**
 22 **and Scott Miller.**
 23 Q. There was also some testimony by Ms. White Face about
 24 the concern of Powertech's operations in the Inyan Kara, and
 25 I'm paraphrasing, so if I get it wrong, she will correct on

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1 cross, but of Powertech's operations in the Inyan Kara on this
 2 site having the potential to contaminate or impact the Madison
 3 aquifer. In your opinion, is that possible?
 4 A. **No, it's not.**
 5 Q. Why is that?
 6 A. **The Madison aquifer and the Inyan Kara are not**
 7 **connected at this site. There's a very thick confining layer**
 8 **that separates the two.**
 9 Q. How about relative pressures in the formations?
 10 A. **Well, the pressure in the Inyan Kara is an upward**
 11 **pressure so water typically flows upward. If you drill a well**
 12 **or whatever, you have artesian pressures in the Inyan Kara and**
 13 **the well would be flowing typically at the surface and the same**
 14 **thing kind of exists for the Madison aquifer. The closest well**
 15 **to the Dewey area in the Madison is at Edgemont. The well**
 16 **there is a flowing artesian aquifer.**
 17 Q. So flowing at the surface?
 18 A. **It's flowing at the surface, which that basically**
 19 **means that the water pressure in the Madison is above the top**
 20 **of the Inyan Kara, so that means that water flows, rather than**
 21 **flowing downward, water flows upward from the Madison, so any**
 22 **water -- it's basically impossible for water from the Inyan**
 23 **Kara to flow downward into the Madison.**
 24 MR. MAIN: Thank you, Crystal. That's all the
 25 questions I have, Mr. Chairman.

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1 CHAIRMAN McCAREN: Ms. Giedd.
 2 MS. GIEDD: No questions.
 3 CHAIRMAN McCAREN: Mr. Ellison.
 4 CROSS-EXAMINATION
 5 BY MR. ELLISON:
 6 Q. Yes, a number of questions. Ma'am, where is your
 7 master's thesis available for review?
 8 A. **It is available at the South Dakota School of Mines**
 9 **library.**
 10 Q. Okay, in any particular section?
 11 A. **Yeah, it's in the thesis and dissertation section.**
 12 Q. Dissertation section, okay. Thank you. And you
 13 mentioned, ma'am, that the 1982 report that you were referring
 14 to, what was the name of that report?
 15 A. **Let me see here. The actual name of it is Regional**
 16 **Ground Water Flow Concepts in the United States: Historical**
 17 **Perspective. It's by Bredehoeft and others.**
 18 Q. And you mentioned that much more data has been
 19 collected. Are there any more recently published reports that
 20 you can tell us about?
 21 A. **There are numerous other reports. Just to name one**
 22 **general broad report, the USGS in Rapid City did a large -- a**
 23 **large scale hydrology study in the Black Hills beginning in the**
 24 **nineties and ending, well, in the early 2000s and that's the**
 25 **Black Hills Hydrology Study. Their publications are available**

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1 **on line through the USGS.**
 2 Q. That was the one that just became available about a
 3 year ago?
 4 A. **They have publications that have been out for over 10**
 5 **years now, some more than that, but there are recent**
 6 **publications that have been out within the last year, too.**
 7 Q. And you talked about a figure five, I think was
 8 that -- I couldn't quite hear you, were you talking about
 9 outcroppings?
 10 A. **No, figure five is from the Bredehoeft paper, it's the**
 11 **cross-section that shows the aquifer system across the state of**
 12 **South Dakota.**
 13 Q. Now, when you refer to the Inyan Kara formation, you
 14 mentioned that the Dakota Sandstone was different from the
 15 Inyan Kara formation in the Black Hills; is that correct?
 16 A. **Yes, it is, across the state the Dakota Sandstone is**
 17 **not the same as the Inyan Kara anywhere, in any part of the**
 18 **state.**
 19 Q. You can find the Inyan Kara formation throughout the
 20 Black Hills or around the Black Hills, can't you?
 21 A. **Yes.**
 22 Q. And all east, west, north, south.
 23 A. **The Inyan Kara encircles the entire Black Hills, yes.**
 24 Q. And when the Black Hills thrust upward, they went
 25 through this formation, didn't they?

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1 A. No, they did not.

2 Q. It was laid down afterwards?

3 A. No, the Black Hills were not thrust upward through

4 this formation. This formation existed before the Black Hills

5 were here. This formation is a fluvial unit that was deposited

6 in a stream and deltaic type environment. Basically what that

7 means, it was kind of like the Mississippi river down in

8 Louisiana today. That's kind of what kind of environment that

9 this rock unit was laid down in and this was before the Black

10 Hills were uplifted that these rocks were deposited.

11 Q. So when the Black Hills were up thrust, you are

12 saying it did not disturb, affect, come in contact with the

13 Inyan Kara formation?

14 A. The Black Hills, when they were uplifted approximately

15 63 million years ago, these formations were on top of the Black

16 Hills and they have been subsequently eroded since that time.

17 Q. So what we have left is what's left of the Inyan Kara,

18 what's now called the Inyan Kara formation.

19 A. Yes.

20 Q. You mentioned, ma'am, that there was no potential

21 contamination to the Madison formation because of thick

22 containing layers --

23 A. Yes.

24 Q. -- in Inyan Kara. You are talking about the specific

25 area of the Powertech mine site?

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1 A. I am talking, yes, specifically in the Dewey-Burdock

2 area, there is a thick confining layer between the Inyan Kara

3 and the Madison aquifer.

4 Q. And how far down is the Madison aquifer?

5 A. The Madison aquifer in the Dewey-Burdock area is

6 probably between 1,000 to 1,500 feet deep below the surface.

7 Q. And what other aquifers, if any, exist besides the

8 Inyan Kara in the project area?

9 A. Basically there is, as Ms. Fivecoate mentioned

10 earlier, there is the surficial or alluvial aquifer at the

11 surface. That basically contains the drainages of the site.

12 Below that then would be the Inyan Kara aquifer, and then the

13 next viable aquifer then is the Madison aquifer below that.

14 Q. And the Inyan Kara formation in this area, what

15 direction does the water flow from the project area?

16 A. From the project area, the water flows towards the

17 southwest basically into Wyoming.

18 Q. And it goes into Wyoming and does it go into other

19 aquifers from there?

20 A. No, it does not.

21 Q. It just continues on in the Inyan Kara formation?

22 A. Yes.

23 Q. Okay. And you are familiar with the Dewey-Burdock

24 study of that area.

25 A. If you are referring to TVA's Dewey-Burdock study,

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1 yes.

2 Q. That's the one that studied all of the exploration of

3 thousands of exploration holes that were done in that area.

4 A. Yes, I'm very familiar with that.

5 Q. And have you incorporated that into your reports?

6 A. Yes, we have.

7 Q. And that would be where, ma'am?

8 A. Which reports that's in?

9 Q. What reports -- are these reports you did for

10 Powertech?

11 A. Yes, the baseline studies reports that we have done

12 for Powertech have mention of the bore holes that have been

13 drilled in that area.

14 Q. When you say they mention them, did they study the

15 potential impacts?

16 A. Basically the potential impacts have been studied,

17 yes.

18 Q. Are they addressed in that report?

19 A. Yes, briefly, but yes.

20 Q. And do you know where that report is?

21 A. That report is unpublished at this time. It's going

22 to be part of and incorporated into Powertech's large mine

23 permit.

24 Q. So do I understand this correctly, you have been doing

25 this for about a year?

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1 A. A year and a half, almost two years, yes, working

2 pretty much solely on this project.

3 Q. Sure. What would you say, is the US Geological Survey

4 study of the hydrology of the Black Hills, is that the best

5 hydrological study that includes the Southern Hills in this

6 project area?

7 A. That's the best regional study, yes. Not the best

8 local study, no.

9 Q. What's the best local study?

10 A. The best local study is the study we have been

11 conducting for the past year and a half, two years at the site.

12 Q. And that's a RESPEC study?

13 A. Yes, it is.

14 Q. That's also going to be part of the eventual report?

15 A. Yes, it will be.

16 MR. ELLISON: Thank you, ma'am. That's all the

17 questions I have.

18 CHAIRMAN McCAREN: Charmaine.

19 CROSS-EXAMINATION

20 BY MS. WHITE FACE:

21 Q. I have a couple. Could you tell us what is

22 fracturing?

23 A. Fracturing, fracture basically is a break in a rock,

24 it can be a separation, but not necessarily a separation

25 between the rock, but it's basically a crack.

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1 Q. Does the Madison aquifer have any -- or the Madison
 2 formation -- first of all, what is it composed of?
 3 A. It is dominantly dolomitic limestone, which is calcium
 4 carbonate and magnesium carbonate.
 5 Q. Is the Madison, the limestone, is it easy to be
 6 dissolved by water?
 7 A. The Madison is dissolved by water only easily at the
 8 outcrop areas. If you want a description of how it happens, I
 9 can tell you that.
 10 Q. Where are the outcrop areas?
 11 A. The outcrop areas encircle the Black Hills. The big
 12 geologic map on the board back there, basically the Madison
 13 aquifer, from here it's kind of the bluish purplish region on
 14 that map that encircles the Black Hills.
 15 Q. And then could you describe how it is fractured or if
 16 there is other -- how the water -- how water will have an
 17 effect on it?
 18 A. Recharge occurs on the Madison through basically
 19 precipitation and then also through loss along stream zones
 20 that recharge the aquifer. Basically water infiltrates into
 21 the aquifer and it seeps down into the surface and there then
 22 it can flow as ground water through the system and water,
 23 precipitation, the pH of rain water is typically around 5.6, so
 24 the lower pH actually is what dissolves the limestone and the
 25 limestone then, as it's dissolving, acts as a buffer that then

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1 raises the pH of the water. Then as it's dissolved and then so
 2 as you get further downstream, the pH of the water is no longer
 3 acidic so the limestone stops dissolving, so it's no longer
 4 karstic as you move further away from the recharge of the
 5 outcrop area.
 6 CHAIRMAN McCAREN: I would hate to diagram that
 7 sentence.
 8 Q. (BY MS. WHITE FACE) Can you define what karstic
 9 means?
 10 A. Karstic is basically, in simple terms, it's cave like,
 11 has large fractures or voids, just large, cavernous areas.
 12 Q. So you would say the mines -- the Madison is a karstic
 13 area?
 14 A. The Madison is karstic very near the outcrop area,
 15 yes.
 16 MS. WHITE FACE: That's all the questions I have.
 17 MR. MAIN: I have no redirect.
 18 CHAIRMAN McCAREN: Any redirect, Mr. Ellison?
 19 MR. ELLISON: No, sir.
 20 CHAIRMAN McCAREN: Board members.
 21 EXAMINATION
 22 BY MR. DeMERSSEMAN:
 23 Q. Ma'am, in this older diagram that you said there's
 24 newer information, but this figure five, it shows that there is
 25 approximately 10 feet between the Madison -- the Madison

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1 confining layer. What is that composed of? Is that a clay or
 2 a shale?
 3 A. Well, it's not 10 feet, it's 10 to the negative nine
 4 feet per second. That's a conductivity value and basically
 5 what the Madison confining layer is in geologic terms, it's a
 6 very thick sequence of shales basically that kind of prohibit
 7 the movement of ground water flow vertically, so the ten to the
 8 minus ninth is the conductivity value, which is a very low
 9 conductivity value that says that basically water from the
 10 Madison is not going to be allowed to move upwards through this
 11 thick shale that's between the two.
 12 Q. And does that cover the Madison formation all the way
 13 out for miles away from the Black Hills or not?
 14 A. Basically, yeah, it is fairly extensive, the overlying
 15 confining unit, I don't know the exact aerial extent of the
 16 Spearfish formation, but I know it is quite extensive and
 17 extends for at least several dozen miles outside of the Black
 18 Hills.
 19 MR. DeMERSSEMAN: Thank you.
 20 CHAIRMAN McCAREN: You and Fred Steece could put
 21 together a hell of a course, I'll tell you. That's a
 22 compliment. Thank you. Do you have any further witnesses?
 23 MR. MAIN: Yes, Mr. Chairman, call Michael Fosha.
 24 Thereupon,
 25 MICHAEL FOSHA,

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1 called as a witness, being first duly sworn as hereinafter
 2 certified, testified as follows:
 3 DIRECT EXAMINATION
 4 BY MR. MAIN:
 5 Q. Would you please state your name?
 6 A. Michael Fosha.
 7 Q. And spell your last name.
 8 A. F-O-S-H-A.
 9 Q. By whom are you employed, Mr. Fosha?
 10 A. The State of South Dakota, State Historical Society,
 11 Archaeological Research Center.
 12 Q. What is the title of your position there?
 13 A. Assistant state archaeologist.
 14 Q. How long have you held that position?
 15 A. 17 years or so.
 16 Q. Before we cover what your duties are a little bit, can
 17 you please describe for the board what your education is?
 18 A. I received my science undergraduate degree in
 19 anthropology at Kansas State University and my graduate degree
 20 in anthropology from the University of Kansas.
 21 Q. How is archaeology related to anthropology?
 22 A. Archaeology is a sub discipline of anthropology, with
 23 anthropology being the study of humanity and all of its
 24 aspects, from its medicines, sciences, its technologies, its
 25 cultures, its way of life, its burial patterns, its birth

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1 patterns. Archaeology takes what we know about fairly modern
 2 or modern living populations and takes it back into the past to
 3 try to explain the phenomenon we see either on the land surface
 4 or within archaeological features beneath the ground surface.
 5 Q. Can you describe for the board, then, what your
 6 general duties, in general, not with regard to these petitions
 7 or Powertech's request, but your general duties and
 8 responsibilities as the assistant South Dakota state
 9 archaeologist are?
 10 A. There are a lot of them and I'll hit on the high
 11 points. I do all the -- I'm the mining archaeologist for the
 12 State of South Dakota. I'm also research and outreach
 13 archaeologist for the State of South Dakota. Those are really
 14 the high points, and many duties as assigned.
 15 Q. Then let's come down to specifically with regard to
 16 either a Request for Determination of Special, Exceptional,
 17 Critical, and Unique such as Powertech submitted, or petitions
 18 such as the three, now two petitions that have been filed.
 19 What are your specific duties with regard to that process?
 20 A. In regards to scenic, unique, critical, et cetera,
 21 normally these are smaller scale projects and quite often a
 22 cultural resource survey is done, I review the results of that,
 23 and based upon that, I'll make a determination that from a
 24 cultural resource perspective, this does not meet Scenic,
 25 Unique or Critical elements of this particular property. In

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1 this case, it was a larger scale project and it encompassed
 2 several cultural resource surveys, some data recovery, and so I
 3 did the same thing I would on a smaller scale project. I
 4 reviewed the documents, concurred or didn't concur, but finally
 5 reached a point of concurrence and I was able to make my
 6 determination of scenic or unique.
 7 Q. Let's back up. Are you familiar with the 10,580 acres
 8 that are included in Powertech's request and that are also
 9 described in the petitions?
 10 A. I am.
 11 Q. And with where those acres are located and the general
 12 area?
 13 A. Yes, I sure am.
 14 Q. What's the approximate location of this area from,
 15 say, the town of Edgemont?
 16 A. It would be northwest of Edgemont 16 miles or so, I
 17 can't remember.
 18 Q. Now, for convenience and for the record, I'll probably
 19 sometimes refer to these 10,580 acres as Powertech's proposed
 20 permit boundary.
 21 A. Okay.
 22 Q. How is it that you have, before this application came
 23 in and before these petitions were filed, how did you come to
 24 be familiar with this area and these acres that we are talking
 25 about?

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1 A. Well, through my general education, I'm aware of
 2 reports and certain archaeological sites in this region that
 3 are fairly well-known to any student of archaeology. When I
 4 came to South Dakota, I conducted my own research in
 5 conjunction with Nebraska National Forest, Black Hills National
 6 Forest, and on private land as well in this general area. I've
 7 also been exposed to this area through these surveys conducted
 8 by Augustana College for GCC Dakotah. I've taken field trips
 9 to that location and observed the cultural resources. And many
 10 other small surveys throughout the area over my course of
 11 having the position that I do.
 12 Q. And there's been reference to GCC Dakotah lands and
 13 archaeological work earlier today. To the extent you are able,
 14 can you tell the board where those lands and surveys were
 15 conducted and took place in general in relation to these lands
 16 we are talking about?
 17 A. We are talking about GCC Dakotah. GCC Dakotah was a
 18 very large survey done for what was the state cement plant. It
 19 included state, federal, and private lands that border
 20 Powertech's area and extends to the north for some miles, as I
 21 recall.
 22 Q. And let's now get back to the specific request by
 23 Powertech and then the subsequent petitions we are here on
 24 today. You mentioned you had data in the reports that you
 25 reviewed. Had Powertech engaged the Archaeological Laboratory

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1 at Augustana College to do cultural resource surveys of these
 2 lands?
 3 A. Yes.
 4 Q. When did those surveys start?
 5 A. Let me think. I have no recollection of that. I
 6 believe it was 2007, but I'm not real sure of that. It was
 7 after we received their first notice to explore. It was very
 8 shortly after that and I'm not sure what the date of that
 9 notice was.
 10 Q. Would it help if you referred to -- this is Exhibit
 11 11, which is your letter to DENR, and I don't know if that
 12 would help you pinpoint the date or not.
 13 A. As far as when Augustana College started surveying
 14 these areas?
 15 Q. Yes.
 16 A. I don't have it in my letter when they started.
 17 Q. Okay. Just so we get it --
 18 CHAIRMAN McCAREN: The hour is late, tell him.
 19 Q. (BY MR. MAIN) Here is Exhibit 6, which is Powertech's
 20 final application, on page nine under 5.2 historic, does that
 21 help?
 22 A. Yes, Augustana College began their field
 23 investigations April 17th of 2007.
 24 CHAIRMAN McCAREN: A round of applause. (Laughter)
 25 Q. (BY MR. MAIN) So when you got these petitions and

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1 this request from Powertech regarding the Special, Exceptional,
 2 Critical and Unique, did you have those 2007 reports or report
 3 from Augustana?
 4 **A. I did.**
 5 **Q.** Did Augustana then in 2008 do additional surveys?
 6 **A. Yes, they did.**
 7 **Q.** And did you get those reports in this process?
 8 **A. I did. There was one more report that had evaluation**
 9 **of five additional sites that when I wrote this letter, I did**
 10 **not yet have. But I had been in close contact with Augustana**
 11 **College, I visited the area when they were evaluating the**
 12 **sites, and I concurred with what they were telling me these are**
 13 **their results.**
 14 **Q.** Do you know, has the Archaeological Laboratory at
 15 Augustana College conducted a cultural resource survey on all
 16 10,580 acres?
 17 **A. Yes.**
 18 **Q.** Can you describe for the board what that type of --
 19 how you would characterize those cultural resource surveys and
 20 how they are done, just briefly?
 21 **A. When I'm in charge of a project like this, I'll have**
 22 **my group go out and do systematic pedestrian surveys coupled**
 23 **with shovel testing. Now, I have these -- I have performed**
 24 **these surveys in the same manner that meet or exceed in this**
 25 **case National Park Service recommendations as well as the**

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1 **state's recommendations to conduct on the ground cultural**
 2 **resource surveys. This may include walking and shovel testing,**
 3 **if necessary, test units for them to get a good feel for what's**
 4 **on the land surface or directly beneath it.**
 5 **Q.** And when you say pedestrian, the whole surface is
 6 walked?
 7 **A. That's correct.**
 8 **Q.** And about how far apart are the people when they are
 9 walking the surface?
 10 **A. No more than 30 meters and that's what's required by**
 11 **the National Park Service. I have other requirements that I**
 12 **may put on people to bring that in a little bit, but that's the**
 13 **standard pedestrian transect.**
 14 **Q.** When you say a shovel test, is a shovel test something
 15 that's done when you already suspect or already have identified
 16 a site just to see how big it is?
 17 **A. Yes, it is. Often the site may be expressed beneath**
 18 **the ground surface as well. In order to define those**
 19 **boundaries, you need to do systematic shovel tests extending**
 20 **out from the last known part of this site to determine its**
 21 **extent.**
 22 **Q.** And are shovel tests done where you don't see any
 23 indication?
 24 **A. That's correct, too.**
 25 **Q.** Why would that be?

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1 **A. An archaeologist, a trained archaeologist, as they are**
 2 **walking across the landscape, if they are in an area that**
 3 **appears to be a location where a site should be located, they**
 4 **should not and they do not leave that spot until they test**
 5 **beneath the ground surface to see if it's buried. For**
 6 **instance, where as you are walking along and there's nothing on**
 7 **the ground surface, but yet I'll bet there is something beneath**
 8 **the ground surface, it's their duty to inspect subsurface to**
 9 **try to make a determination if there is or is not a cultural**
 10 **component there.**
 11 **Q.** So as I understand that, even though a pedestrian
 12 survey might not show anything, if you think there should be
 13 something there based on what you know, you should do a shovel
 14 test.
 15 **A. Yes.**
 16 **Q.** Are you aware of how the Archaeological Laboratory at
 17 Augustana College conducted their cultural resource surveys?
 18 In other words, did they do them like you have just described?
 19 **A. Yes, they did.**
 20 **Q.** Are you aware of the quality of work that is performed
 21 by the Archaeological Laboratory at Augustana College?
 22 **A. I'm very aware.**
 23 **Q.** What is that quality of work?
 24 **A. They are one of the main reasons I came to South**
 25 **Dakota 19 years ago, because of their reputation and the people**

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1 **they hire, to me second to none.**
 2 **Q.** Is that true of their field work as well as their
 3 writeups and reports?
 4 **A. Yes, it is, as well as their books and other**
 5 **publications.**
 6 **Q.** Mr. Fosha, did you physically inspect the 10,580 acres
 7 or parts thereof in the course of your evaluation of them?
 8 **A. I did pay field visits to the sites, to the location.**
 9 **Q.** And in fact did you attend one of the inspections done
 10 by DENR?
 11 **A. I did.**
 12 **Q.** Did Augustana College Archaeological Laboratory also
 13 attend?
 14 **A. Yes, they did.**
 15 **Q.** In the course of what I call evaluating these lands
 16 for determination if they are Special, Exceptional, Critical Or
 17 Unique, did you consult with any Native American tribes?
 18 **A. I did not.**
 19 **Q.** And why not?
 20 **A. That's the next stage of this process.**
 21 **Q.** Would you please describe that?
 22 **A. Certainly. In this case, since we knew that this was**
 23 **going to go under a federal licensing, that triggers Section**
 24 **106, and at that stage interested parties, tribes, THPOs, and**
 25 **people like that have the opportunity to be consulted or to**

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1 join into the consultation process of this stage, and I see
 2 what my job was was to make absolutely certain that all the
 3 important and necessary information was present when that
 4 consultation begins.
 5 Q. When you refer to a Section 106, for those of us who
 6 may not know, what does that mean?
 7 A. The federal dollars, federal permitting, things like
 8 that that involve ground disturbing activities trigger certain
 9 federal laws and statutes that require that basically this is
 10 going to go through virtually the same process that I've taken
 11 it through.
 12 Q. And you are referring to Section 106 of the National
 13 Historic Preservation Act.
 14 A. That is correct.
 15 Q. Which your understanding is that process is triggered
 16 when there's a federal undertaking.
 17 A. Yes.
 18 Q. Such as federal licensing for uranium extraction.
 19 A. Exactly.
 20 Q. And your understanding or your knowledge is that will
 21 be triggered later when Powertech makes those license
 22 applications.
 23 A. Yes.
 24 Q. Under state law, the Special, Exceptional, Critical Or
 25 Unique designation that we are here for now, is that a federal

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1 undertaking?
 2 A. No, it is not.
 3 Q. So there is no trigger for mandatory contact with
 4 Native American tribes.
 5 A. Correct.
 6 Q. Even though there is no trigger for the requirement
 7 that you consult tribes, Native American tribes in this
 8 Special, Exceptional, Critical or Unique process, is it
 9 necessary that you do that to make your determination?
 10 A. No, it is not.
 11 Q. And why not?
 12 A. I deal with the scientific aspect of the cultural
 13 phenomenon present in that particular landscape.
 14 Q. By scientific, you mean observable things?
 15 A. Correct.
 16 Q. After reviewing Augustana College's reports and any
 17 other literature you reviewed and inspecting the area, what did
 18 you conclude regarding the presence of the number of cultural
 19 resource sites on Powertech's proposed permit boundary?
 20 A. It was not unexpected for there to be quite a number
 21 of sites, given the fact you are surveying over 10,000 acres.
 22 Q. Do you know how many total sites were identified?
 23 A. I believe 217 sites were identified.
 24 Q. That's total sites identified on the 10,000 acres?
 25 A. Correct.

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1 Q. Can you tell the board how many of those sites have
 2 been evaluated and deemed to be recommended as not eligible for
 3 NRHP listing?
 4 A. 132 sites located within the 10,000 plus acres have
 5 been identified or recommended as not eligible for the National
 6 Register of Historic Places.
 7 Q. And you have to describe for the board what does that
 8 mean when a site, a cultural resource site is evaluated and is
 9 determined to be either eligible or not eligible for listing in
 10 the National Register of Historic Places, and why is that
 11 criteria used?
 12 A. Let me start with the last part first. That criteria
 13 is used because that's something you can use across the board.
 14 If we are evaluating a site for the National Register in
 15 Kansas, it's the same thing they are doing in Canada, so
 16 everybody is on the same playing field and we can talk, we can
 17 converse in a scientific method about that. The first part of
 18 your question I already forgot, though, I'm sorry.
 19 Q. It was a bad question. You have explained what the
 20 criteria is that you use to evaluate a site. You use these
 21 objective criteria, the National Register of Historic Places
 22 criteria, to look at a specific site and then make a
 23 recommendation if it's eligible or not eligible. What's the
 24 consequence if you make the recommendation that it's not
 25 eligible?

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1 A. The site has no protection under federal law.
 2 Q. And what is the practical consequence of what can be
 3 done on the surface?
 4 A. As far as if the site is not eligible?
 5 Q. Not eligible.
 6 A. Anything that the landowner wishes.
 7 Q. What if you examine -- evaluate a site and make a
 8 determination that you recommend that site as eligible based on
 9 National Register of Historic Places criteria?
 10 A. The federal government has to take that consideration
 11 or has to consider -- take into consideration my consideration,
 12 so to speak.
 13 Q. We don't have the federal government involved yet.
 14 A. We do not.
 15 Q. It's the state and we are scenic and unique, so what
 16 happens, what's your recommendation for those sites that you
 17 would recommend as eligible for National Register of Historic
 18 Places?
 19 A. Avoidance.
 20 Q. Avoidance?
 21 A. Yes.
 22 Q. I want to back up one second, too. Just because you
 23 may make -- do an evaluation and make a recommendation that a
 24 site is eligible for NRHP listing, does that mean it's ever
 25 listed on the National Register of Historic Places?

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1 A. Typically they are not.
 2 Q. You are just using those criteria.
 3 A. Yes.
 4 Q. And so if you meet the criteria, you say I'd recommend
 5 they are eligible?
 6 A. Yes.
 7 Q. If they don't meet the criteria, you recommend they
 8 are not eligible?
 9 A. That is correct.
 10 Q. Let's go to how many sites now did you say of the 217
 11 have already been evaluated and recommended as not eligible?
 12 A. 132 sites have been recommended as not eligible.
 13 Q. How many sites of the 217 have been recommended as
 14 eligible?
 15 A. Four.
 16 Q. Can you describe those sites to the board?
 17 A. Two of these sites are abandoned railroad beds. I
 18 know that sounds funny, but many sites in this state receive
 19 protection. One happens to be in Fall River County, the other
 20 in Custer County. Even though they are the same railroad beds,
 21 they get two separate site numbers when you cross the county
 22 line. The other two sites have cultural material that are
 23 prehistoric in nature that is located beneath the ground
 24 surface. That doesn't make them eligible at this time, but it
 25 makes them potentially eligible at this time.

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1 Q. So if you have sites -- you have sites you recommended
 2 as potentially eligible.
 3 A. Yes.
 4 Q. Again, if any one or all of those four sites are
 5 ultimately determined then to be eligible for listing, would
 6 they be listed?
 7 A. You would first have to do quite a bit of what we call
 8 data recovery. That is, you would have to excavate enough of
 9 the site to answer very specific research questions that are
 10 unique to that site and to that site alone. So once that is
 11 done, the next stage would be to nominate it for the National
 12 Register of Historic Places.
 13 Q. In your experience, most that are recommended for
 14 potentially eligible are not listed.
 15 A. That is correct.
 16 Q. So we have got 132 that are recommended not eligible,
 17 four that are recommended as potentially eligible, and that
 18 leaves 81 sites of the 217. What's their status?
 19 A. They are at this time unevaluated. That is, we don't
 20 know what their potential to offer information specific to that
 21 site is.
 22 Q. And why are they not evaluated?
 23 A. Because they will not be impacted at this stage, for
 24 the next five years.
 25 Q. They will not be disturbed?

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1 A. That's correct.
 2 Q. What is your requirement with regard to those sites?
 3 What is your procedure to preserve them until they are
 4 evaluated?
 5 A. One thing that we did was develop an MOA with
 6 Powertech. In doing this, it became part of their permit, so
 7 in the event that -- it gives me the opportunity to be more of
 8 a player in this in the event that they accidentally destroy or
 9 were intruding on that portion of the land for which they have
 10 not yet done the evaluation of the sites and things like that.
 11 And that would and could result in the loss of their permit to
 12 extract uranium.
 13 Q. I will hand you what's been -- are you familiar with
 14 this Memorandum of Agreement?
 15 A. I am.
 16 Q. And has it been amended?
 17 A. Yes, it has.
 18 Q. Why was it amended?
 19 A. There was a small parcel of land or characters of the
 20 land description that were omitted the first time and so they
 21 brought those back in.
 22 Q. I hand you what's been marked as Powertech Exhibit 1
 23 and can you identify that?
 24 A. Yes, I can.
 25 Q. What is that?

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1 A. That's the Memorandum of Agreement that the
 2 Archaeological Research Center has with Powertech.
 3 Q. Does it also have the first amendment on the back of
 4 it?
 5 A. Yes, it does.
 6 MR. MAIN: Move the admission of Powertech Exhibit 1.
 7 MS. GIEDD: No objection.
 8 CHAIRMAN McCAHREN: Mr. Ellison.
 9 MR. ELLISON: Yes, sir.
 10 CHAIRMAN McCAHREN: He offered Powertech Exhibit 1.
 11 MR. ELLISON: Unfortunately, I don't have that and
 12 can't see it so I cannot object or concur to its admission.
 13 MR. MAIN: It's part of DENR Exhibit 6; is that right?
 14 CHAIRMAN McCAHREN: Do you have any of the DENR
 15 exhibits?
 16 MR. ELLISON: I have the DENR Web site. I don't see
 17 it here.
 18 MR. MAIN: It is also Exhibit D to Powertech's
 19 petition or request that was received by DENR on October 6th.
 20 MR. ELLISON: I do have Appendix D. I have no
 21 objection for purposes of this hearing.
 22 CHAIRMAN McCAHREN: Charmaine.
 23 MS. WHITE FACE: No objection.
 24 CHAIRMAN McCAHREN: Powertech Exhibit 1 will be
 25 received.

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1 **EXHIBITS:**
 2 (Powertech Exhibit No. 1 received into evidence.)
 3 **Q.** (BY MR. MAIN) Mr. Fosha, since we are on this, we
 4 were going to do this a little bit later, but we are talking
 5 about the 81 unevaluated sites.
 6 **A. Yes.**
 7 **Q.** And under the Memorandum of Agreement, how are they
 8 preserved until the need may come when they are evaluated?
 9 **A. Given the MOA, Powertech will advise certainly DENR**
 10 **and myself, given this Memorandum of Agreement, that they do**
 11 **intend to proceed in a different direction or to a different**
 12 **property.**
 13 **Q.** Let me back up. If they never want to disturb any of
 14 these 81 sites, is avoidance how they are preserved?
 15 **A. Yes.**
 16 **Q.** If it later happens that Powertech sees a need to go
 17 into an area where an unevaluated site is, what's the procedure
 18 under the MOA?
 19 **A. The procedure, they contact this office, we look at**
 20 **the surveys that have been done there. If there are sites**
 21 **located that have not yet been evaluated, they are to contract**
 22 **with an archaeological firm and have these sites evaluated.**
 23 **Q.** But Powertech first contacts your office.
 24 **A. I believe so, yes.**
 25 **Q.** And then those sites are evaluated to your

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1 satisfaction?
 2 **A. Yes.**
 3 **Q.** And that may require data recovery or other
 4 documentation?
 5 **A. It will typically require at least some test units as**
 6 **well as shovel testing and things of that nature, yes.**
 7 **Q.** What happens if, after that evaluation, that site is
 8 determined to be not eligible for recommendation to be listed?
 9 **A. Then they are free to proceed.**
 10 **Q.** What if, after that evaluation, it is determined that
 11 the site is eligible to be recommended to be listed?
 12 **A. That triggers a number of things, the first of which,**
 13 **they will need a scope of work from an archaeological firm**
 14 **outlining exactly what they expect to recover, what questions**
 15 **they have at this site will answer about a particular people,**
 16 **place, or time that we don't know, didn't know before, and**
 17 **their other option is to say, gee, this is going to cost a lot,**
 18 **let's avoid it after all.**
 19 **Q.** So avoidance could still be the result?
 20 **A. Yes.**
 21 **Q.** How about enforcement of this Memorandum of Agreement,
 22 Mr. Fosha? If you perceive that Powertech -- let me back up.
 23 In your experience, will your Memorandum of Agreement be made a
 24 permit condition to any permit granted to Powertech?
 25 **A. It is.**

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1 **Q.** How is this Memorandum of Agreement enforced, then?
 2 **A. In the event that they knowingly or accidentally**
 3 **impact an archaeological site, they can lose their mining**
 4 **permit from the State of South Dakota.**
 5 **Q.** In your experience, is the presence of four
 6 potentially eligible sites on 10,580 acres a relatively low
 7 number when compared to similar sized areas in this vicinity?
 8 **A. Yes, it is. There are conditions here that bury the**
 9 **sites more quickly. You have greater separation between the**
 10 **components that you don't have out there. So it's much more**
 11 **common in localities like we are here on the Missouri River**
 12 **where the majority of the sites you are going to have a much**
 13 **higher number of significant sites versus sites that do not**
 14 **meet the criteria.**
 15 **Q.** We did a little bit of this earlier today, but with
 16 217 sites on 10,580 acres, what's the average site density?
 17 **A. One per every 50 or so acres.**
 18 **Q.** Is that a typical site density for this area, in your
 19 experience?
 20 **A. For the area that we are talking about?**
 21 **Q. Yes.**
 22 **A. That is a little lower than I expected somewhat, to be**
 23 **honest with you.**
 24 **MR. ELLISON:** I guess I object to that question.
 25 There's been no foundation laid for how this witness can give

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1 that opinion.
 2 **CHAIRMAN McCAREN:** Read the question back.
 3 (Whereupon, the Court Reporter read back the requested
 4 portion.)
 5 **A. Can I reanswer the question in a different way, then?**
 6 **Q.** (BY MR. MAIN) Go ahead.
 7 **A. It's lower than the survey areas directly to the north**
 8 **of this project area, so it surprised me in that way.**
 9 **Q.** And the survey areas directly to the north, are those
 10 the GCC ones we talked about before?
 11 **A. Yes, they are.**
 12 **Q.** You were directly involved with reviewing those survey
 13 reports?
 14 **A. I was directly involved with the state land in that**
 15 **project and in doing so I saw the entire sites and I saw the**
 16 **site forms and recommendations and things like that. But that**
 17 **wasn't one under my purview, I was not the lead agency in this**
 18 **case.**
 19 **Q.** Did you ask the Archaeological Laboratory at Augustana
 20 College to ask Powertech to do any special physical
 21 investigations beyond the usual cultural resource surveys?
 22 **A. I did.**
 23 **Q.** What did you want to have done?
 24 **A. I requested that Augustana College brings out a**
 25 **backhoe at a time where I could be out there and we wanted to**

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1 look at the past hydrologic events of the valleys to see is
 2 this -- just the nature of the sediments, is it a grading, are
 3 we losing sediments, and to get an idea are there soils beneath
 4 the ground surface that represent stable climatic periods and
 5 soil forming processes for which we might expect to find
 6 archaeological, intact archaeological sites.

7 Q. And was this test done?

8 A. Yes, it was.

9 Q. What do you call that type of test, a sedimentary --

10 A. Well, that's what I was looking at, it's more of a
 11 geomorphological investigation, just so I can get a handle on
 12 the basic landscape and how it formed or why it's forming the
 13 way it is today.

14 Q. From your direct experience with Powertech and with
 15 the Archaeological Laboratory at Augustana College as their
 16 contractor, what's your perception of Powertech's attitude
 17 towards archaeological evaluation, preservation, and
 18 documentation?

19 A. From a mining perspective of a large company, it's the
 20 best ever witnessed in this state.

21 Q. Can you tell the board what a traditional cultural
 22 property is?

23 A. In my view, now, it's been a long time since I read
 24 the laws explaining what this is, I see a traditional cultural
 25 property as a spot or a region where people go there for

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1 basically the same purpose, whether it be a shrine to perform
 2 certain activities, whether it be a heavily wooded area that's
 3 thick with wild plums or other things like that where they go
 4 back to annually and things like that, or a place where you
 5 give gifts on a very regular basis. That's what I consider to
 6 be traditional cultural property. It also has to be known in
 7 the current by people living today, who either use it or know
 8 of its use. That's a real rough interpretation, but it's mine.

9 Q. As an archaeologist, have you ever identified a
 10 traditional cultural property in South Dakota?

11 A. I observed what I believed to be a traditional
 12 cultural property that was in excess of 2,000 years of age. It
 13 was no longer being used as a traditional cultural property,
 14 but in my estimation, this is what it was at that point in
 15 time, so I thought it important to bring that to light.

16 Q. Are you able to describe a little bit about that site?
 17 Not the location, but the site.

18 A. This was a large glacial erratic quite some distance
 19 from the Missouri River to the west. It sat well -- about a
 20 quarter mile away from a bluff that had an archaeological
 21 component on top. When I saw this large erratic, it looked
 22 very much like -- when Lewis and Clark came up the Missouri
 23 River, they were being guided by a Native American scout who
 24 pointed out three rocks. These rocks represented a maiden
 25 holding grapes, a male and a dog that had been turned to stone

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1 because it disobeyed their elders. And the guide that was with
 2 Lewis and Clark said, whenever this other population comes by
 3 here, they stop and give gifts. This looked a lot like that to
 4 me, not like those people, but it looked like something they
 5 might stop and give gifts at. A lot of times you will see very
 6 large glacial erratics in the landscape that look like bison or
 7 an animal form or a person form in which gifts are typically
 8 given in the past when they are passing by that area. So at
 9 the base of this boulder, I did see what I believe to be gifts
 10 in the form of bone beads, ceramic, broken ceramics and stone
 11 tools.

12 Q. Thank you. Based on all the information you acquired
 13 and the facts you learned from the Augustana College
 14 Archaeological Laboratory reports, all the other information
 15 you looked at, your experience and your inspections, did you
 16 discover any evidence of traditional cultural properties on the
 17 lands within Powertech's proposed permit boundary?

18 A. I did not.

19 Q. Based on that same information, all the surveys, your
 20 personal experience, your inspections, your review of the
 21 literature, from an anthropological standpoint, is there any
 22 evidence of a Native American or other ethnic group sacred site
 23 on the lands within Powertech's proposed permit boundary?

24 A. I would say that there are no manifestation, no
 25 physical manifestations of that in the landscape there, in my

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1 interpretation and my life experience.

2 Q. And based on that same information and facts, is there
 3 any evidence of Native American burials on the lands within
 4 Powertech's proposed permit boundary?

5 A. No.

6 Q. Can you please tell the board what an ethnographic
 7 study is?

8 A. An ethnographic study would be one in which an
 9 individual, many times an anthropologist, would go live with a
 10 population, record perhaps -- ask specific questions to gain a
 11 better understanding of their way of life or something along
 12 that line, or perhaps currently it might be used to ask the
 13 question, do you know of any activities, burials, or very
 14 important locations within an area that we need to take into
 15 consideration.

16 Q. Mr. Fosha, are you aware of the recent completion of
 17 an ethnographic study covering approximately 20,000 acres
 18 immediately adjacent to Powertech's proposed permit boundary --

19 A. I am.

20 Q. -- and in fact includes 640 acres within that proposed
 21 permit boundary?

22 A. I am.

23 Q. Who did the study?

24 A. Donovan Sprague did the study.

25 Q. Where is Donovan Sprague located?

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<p style="text-align: right;">193</p> <p>1 A. He works at Crazy Horse monument.</p> <p>2 Q. Do you know why this ethnographic study was done?</p> <p>3 A. It was requested by the tribes that an ethnographic</p> <p>4 study needed to be done for that region of the Black Hills.</p> <p>5 Q. Is a summary of this ethnographic study available for</p> <p>6 review?</p> <p>7 A. Yes, it is.</p> <p>8 Q. Have you obtained a copy?</p> <p>9 A. Yes, I have.</p> <p>10 Q. I will hand you what's been marked as Powertech</p> <p>11 Exhibit 2 and ask you if you can identify that.</p> <p>12 A. This is what I received from I believe the BLM office.</p> <p>13 Q. This is a copy of what you obtained regarding the</p> <p>14 summary of the ethnographic study?</p> <p>15 A. That's correct.</p> <p>16 Q. Does it contain that summary of the ethnographic study</p> <p>17 which you have testified about?</p> <p>18 A. It does.</p> <p>19 MR. MAIN: Move the admission of Exhibit Powertech No.</p> <p>20 2.</p> <p>21 MS. GIEDD: No objection.</p> <p>22 CHAIRMAN McCAHREN: Mr. Ellison.</p> <p>23 MR. ELLISON: I would object. This is so far multiple</p> <p>24 hearsay, we have no idea of any of the facts and circumstances</p> <p>25 of the conducting of this study other than some reference that</p>	<p style="text-align: right;">195</p> <p>1 MR. ELLISON: I would at this point like to move for a</p> <p>2 continued examination of Mr. Fosha until I have an opportunity</p> <p>3 to receive this document and examine it before I complete my</p> <p>4 cross-examination. I would add that to my list of grounds for</p> <p>5 a continuation of this hearing.</p> <p>6 CHAIRMAN McCAHREN: I'll take it under consideration.</p> <p>7 Proceed, Mr. Main.</p> <p>8 MR. MAIN: Thank you, Mr. Chairman.</p> <p>9 Q. (BY MR. MAIN) In looking at Powertech Exhibit 2, is</p> <p>10 it your understanding that this summary of the ethnographic</p> <p>11 study, which is depicted as starting on page numbered 132, is</p> <p>12 that going to be part of an Environmental Impact Statement for</p> <p>13 the Dewey Conveyor Project?</p> <p>14 A. Yes, it is.</p> <p>15 Q. That relates to those GCC cultural resource surveys</p> <p>16 that were done to the north and adjacent to Powertech's lands?</p> <p>17 A. That is correct.</p> <p>18 Q. Have you read this ethnographic study summary that</p> <p>19 begins on page 132 and ends on 134? And by the way, there is</p> <p>20 no page 133, apparently that's a map. Have you read that?</p> <p>21 A. Yes, I have.</p> <p>22 Q. And for the record, on page 134 -- well, first of all,</p> <p>23 can you describe, based on your review of the summary, what Mr.</p> <p>24 Donovan Sprague did in general in his study?</p> <p>25 A. Yes. He met with tribal elders of the area. He</p>
<p style="text-align: right;">194</p> <p>1 it may contain a few hundred acres of this project area. I</p> <p>2 would submit that this witness is not competent to really</p> <p>3 answer any questions or to lay the foundation for this</p> <p>4 particular study.</p> <p>5 MR. MAIN: Mr. Chairman, if I might respond.</p> <p>6 Q. (BY MR. MAIN) Mr. Fosha, is this summary of this</p> <p>7 ethnographic study the type of information reasonably relied</p> <p>8 upon by experts in your field?</p> <p>9 A. Yes, it is.</p> <p>10 MR. MAIN: Under Rule 703 of the Rules of Evidence,</p> <p>11 such information is admissible.</p> <p>12 MR. ELLISON: Then I would further object that outside</p> <p>13 of the acreage that is included within the project area, it is</p> <p>14 irrelevant.</p> <p>15 CHAIRMAN McCAHREN: Ms. Giedd.</p> <p>16 MS. GIEDD: I have no objection.</p> <p>17 MS. WHITE FACE: I also object. I also object because</p> <p>18 I question the qualifications of Donovan Sprague.</p> <p>19 CHAIRMAN McCAHREN: I'm going to admit the exhibit.</p> <p>20 It will speak for itself.</p> <p>21 EXHIBITS:</p> <p>22 (Powertech Exhibit No. 2 received into evidence.)</p> <p>23 MR. MAIN: Thank you, Mr. Chairman.</p> <p>24 MR. ELLISON: Was the exhibit admitted?</p> <p>25 CHAIRMAN McCAHREN: Yes.</p>	<p style="text-align: right;">196</p> <p>1 interviewed -- and I can't be specific how wide ranging he</p> <p>2 went, if he went to every tribe in a several state region, but</p> <p>3 certainly he met with a number of tribal elders, people he</p> <p>4 thought may know something about this area, and asked them</p> <p>5 questions as to what do you consider to be important or do you</p> <p>6 know of any special occurrences or events that we should or</p> <p>7 could bring out.</p> <p>8 Q. And just for the tribe identification, I think on page</p> <p>9 134 at the end of that second paragraph, does he identify</p> <p>10 tribal members there that he contacted?</p> <p>11 A. Yes. He presented to tribal members from Pine Ridge,</p> <p>12 Rosebud, Cheyenne River, Standing Rock, and Lower Brule, along</p> <p>13 with Lakota members located in the large urban population in</p> <p>14 Rapid City.</p> <p>15 Q. Then down towards the bottom in the last paragraph on</p> <p>16 the left-hand column, which is highlighted in yellow, is his</p> <p>17 summary of some of the conclusions Mr. Sprague came to. Could</p> <p>18 you read those?</p> <p>19 A. I can. Hardly anyone had heard of Dewey, South</p> <p>20 Dakota, and the proposed project. There was also no one who</p> <p>21 could pinpoint present cultural, ceremonial, or religious use</p> <p>22 in the proposed area.</p> <p>23 Q. Do those conclusions match your experience in your</p> <p>24 study of this area for the past 25 years?</p> <p>25 A. Yes.</p>

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<p style="text-align: right;">197</p> <p>1 Q. Mr. Fosha, do the four sites that have been evaluated 2 and determined to be potentially eligible for listing, does 3 that cause you to conclude that all the lands within 4 Powertech's proposed permit boundary have archaeological 5 significance? 6 A. Could you ask that question again, please? 7 Q. I probably should. Do the four sites that are listed 8 as potentially eligible, which will be avoided, or any of the 9 217 sites for that matter, do they cause you to conclude that 10 all of the lands within Powertech's proposed permit boundary 11 have archaeological significance? 12 A. No. 13 Q. Do they cause you to conclude that all of the lands 14 within Powertech's proposed permit boundary have ethnological 15 significance? 16 A. No. 17 Q. Do they cause you to conclude that all of the lands 18 within Powertech's proposed permit boundary have historic 19 significance? 20 A. No. 21 Q. Do they cause you to conclude that all of the lands 22 within Powertech's proposed permit boundary have cultural 23 significance? 24 A. No. 25 Q. Do they cause you to conclude that all the lands</p>	<p style="text-align: right;">199</p> <p>1 A. I did. 2 Q. And particularly about potential burial site 3 locations? 4 A. I did. 5 Q. Have you seen any burial evidence of the type 6 testified to by him today on Powertech's lands? 7 A. No, I have not. 8 Q. There was also some discussion about the cultural 9 surveys done for DM&E Railroad that maybe overlapped 10 Powertech's lands. Did the DM&E cultural surveys involve any 11 of the lands we are talking about here today? 12 A. I don't believe so. 13 MR. MAIN: Thank you, Mr. Fosha. That's all the 14 questions I have, Mr. Chairman. 15 CHAIRMAN McCAREN: Cross, Ms. Giedd. 16 MS. GIEDD: I have no questions. 17 CHAIRMAN McCAREN: Mr. Ellison, do you have 18 questions? 19 MR. ELLISON: Yes, I do. 20 CROSS-EXAMINATION 21 BY MR. ELLISON: 22 Q. Your answer working backwards, your answer is you 23 don't know if any of the DM&E sites overlap Powertech, correct? 24 A. Now that I've had an opportunity to think about it, 25 they do not.</p>
<p style="text-align: right;">198</p> <p>1 within Powertech's proposed permit boundary have scientific 2 significance? 3 A. No. 4 Q. Mr. Fosha, I'll ask you about a photograph that Ms. 5 White Face admitted into evidence. It is not separately 6 marked, it's part of White Face Exhibit No. 1. It's a color 7 photograph with a person standing in the background. Have you 8 had a chance to look at that photograph? 9 A. I am now and I looked at it a little bit earlier 10 today. 11 Q. Does that indicate a burial site to you, a Native 12 American burial site? 13 A. Not at this time. 14 Q. I'll hand you what's previously been admitted as 15 Exhibit 12, Mr. Fosha. I want to direct your attention in 16 particular to photos nine, 10, 11 and 18. Nine and 10 are on 17 page eight, 11 is on page nine, and 18 is on the subsequent 18 page. Do those photographs -- have you seen those locations 19 yourself or at least some of them? 20 A. At least some of them, yes. No, I saw all of these. 21 Q. Do they indicate living areas to you? 22 A. No. 23 Q. And are they particularly unique or unusual sites? 24 A. No. 25 Q. Did you hear Mr. Garvard Good Plume testify today?</p>	<p style="text-align: right;">200</p> <p>1 Q. I see. And you mentioned about the photographs nine, 2 10, 11 and 18, and despite Mr. Good Plume's testimony, whose 3 family dates back generations going into this area, you think 4 you are more knowledgeable than he is about what burial sites 5 look like for Native Americans back over time? 6 A. Can you run that question by me one more time, please? 7 Q. Sure. You heard Mr. Good Plume's testimony that for 8 generations his family has been in that area and that certain 9 rock formations, the way rocks are piled are indicative of 10 burial sites. My question to you, sir, is do you feel you are 11 more knowledgeable than he is about the way his family was in 12 this area and buried people? 13 A. I can't speak for the way his family buried people in 14 that area. 15 Q. Now, you also mentioned that one of the ways that an 16 anthropologist studies a people is to go and live with them for 17 a period of time; is that right? 18 A. That's correct, that's one of the ways. 19 Q. How much time have you lived with the Lakota, sir? 20 A. They live -- we are neighbors. 21 Q. Have you lived on a reservation for a long time, sir? 22 A. I have not ever lived on a reservation. 23 Q. Your neighbors, do they consider themselves 24 traditional Lakota people? 25 A. I haven't asked them.</p>

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201	<p>1 Q. You mentioned, sir, that one photograph that you were</p> <p>2 shown, the first photograph before the nine, 10, 11 and 18, you</p> <p>3 mentioned it didn't look like a burial site to you at this</p> <p>4 time. That's because you would have to get closer and look at</p> <p>5 it; is that right?</p> <p>6 A. That would certainly help. I would need to inspect</p> <p>7 the ground surface to see, to understand are these land forms</p> <p>8 that are being lifted up, that is, is bedrock being exposed by</p> <p>9 erosion, has this been bedrock that's been let down over time,</p> <p>10 or are these stones that have been moved there by people. So I</p> <p>11 would need to physically inspect the land surface in order to</p> <p>12 do that.</p> <p>13 Q. And that might be something important to do to protect</p> <p>14 a burial site, wouldn't it, sir?</p> <p>15 A. In any case, yes.</p> <p>16 Q. Now, you would agree with me, sir, that of the study</p> <p>17 that was done by Augustana College, that more than 90 percent</p> <p>18 of the sites that were identified were Native American sites.</p> <p>19 A. That's correct.</p> <p>20 Q. And you have heard the testimony so far today that as</p> <p>21 far as we know, there was no consultation with tribal historic</p> <p>22 preservation officers, elders, the treaty council, or anyone</p> <p>23 from the native community that might have actual knowledge as</p> <p>24 to the cultural, historic, or ethnologic value of these sites;</p> <p>25 is that right, sir?</p>	203	<p>1 information; wouldn't that be a fair thing to conclude or</p> <p>2 include?</p> <p>3 A. That's what I certainly hope happens.</p> <p>4 Q. Okay? So really if you make a statement -- you were</p> <p>5 asked by Mr. Main not all lands have an archaeological</p> <p>6 significance. In other words, 100 percent of the lands don't</p> <p>7 have an archaeological significance as far as you could tell,</p> <p>8 right? That's what you were answering.</p> <p>9 A. I don't understand your question.</p> <p>10 Q. Mr. Main asked you, do all of the lands have an</p> <p>11 archaeological significance and you said no. Do you remember</p> <p>12 that question and answer?</p> <p>13 A. In my recollection, he asked me if all the lands</p> <p>14 within Powertech's boundary of 10,000 plus acres is what he</p> <p>15 asked, and you are saying all the lands; is that what you are</p> <p>16 referring to?</p> <p>17 Q. All the lands within the 10,000 acres, you are saying</p> <p>18 that 100 percent of the lands don't have scientific or cultural</p> <p>19 or historic or ethnological value; is that right?</p> <p>20 A. I did not say that. I was indicating it did not meet</p> <p>21 Scenic, Unique and Critical requirements.</p> <p>22 Q. I see, and you base that even though there has been no</p> <p>23 consultation regarding the overwhelming majority of the sites.</p> <p>24 A. Yes.</p> <p>25 Q. You also cited with regard to the study that Donovan</p>
202	<p>1 A. I believe you got that correct, yes.</p> <p>2 Q. And your recommendation to this board is because this</p> <p>3 is going to have to be a federal project at some point, that</p> <p>4 this board should still designate it as not having unique and</p> <p>5 scenic values or historic, archaeological, ethnologic,</p> <p>6 scientific or cultural significance, even if we don't know</p> <p>7 that, because later some federal agency may come in and do the</p> <p>8 consultation that might actually give us the answers?</p> <p>9 A. Excuse me, sir, did you indicate that we don't know?</p> <p>10 Because I think we know quite fully the archaeological extent</p> <p>11 and the nature of the majority of the sites that are located</p> <p>12 within the project area.</p> <p>13 Q. Well, if most of the sites are Native American, you</p> <p>14 haven't consulted with any Native Americans that might have</p> <p>15 information, you are basing this upon kind of a Eurocentric</p> <p>16 evaluation rather than an ethnocentric evaluation; is that</p> <p>17 right?</p> <p>18 A. No, I'm basing this on scientific method and theory.</p> <p>19 Q. I see. And does your scientific method and theory</p> <p>20 include gathering all of the available facts and evidence</p> <p>21 before reaching conclusions?</p> <p>22 A. As much as we can.</p> <p>23 Q. And as much as you think would easily include</p> <p>24 consulting with local tribal historic preservation officers and</p> <p>25 cultural resource people and elders who would have that</p>	204	<p>1 Sprague did -- by the way, who paid for that study?</p> <p>2 A. GCC Dakota, I believe.</p> <p>3 Q. And what is that?</p> <p>4 A. In conjunction -- that's the cement plant, formerly</p> <p>5 the state cement plant.</p> <p>6 Q. Okay. And am I correct in understanding that the</p> <p>7 findings that you presented to this board were that there is no</p> <p>8 present cultural or ceremonial use of that area?</p> <p>9 A. That is what Donovan Sprague came up with, I was just</p> <p>10 reading his words.</p> <p>11 Q. Okay. So that has nothing to do with historic or</p> <p>12 ethnologic or scientific or cultural significance, it just has</p> <p>13 to do with current usage; is that right?</p> <p>14 A. Let me go back and look at it one more time. I</p> <p>15 thought at some point he indicated a block of time, but he just</p> <p>16 indicates that nobody knows of any present cultural,</p> <p>17 ceremonial, or religious use of the proposed area.</p> <p>18 Q. Right, and Lakota people and Arapahoe people and the</p> <p>19 Cheyenne people have basically been prohibited from using the</p> <p>20 Black Hills for religious purposes for over 100 years, have</p> <p>21 they not?</p> <p>22 A. No, I believe they can use the Black Hills like</p> <p>23 anybody else can.</p> <p>24 Q. Well, you should probably check with the Forest</p> <p>25 Service.</p>

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206	<p>1 unknown about whether or not these sites or others or the land</p> <p>2 in question or parts of the land in question, in fact from a</p> <p>3 Native American perspective, whether they contain historic,</p> <p>4 ethnologic, scientific, or cultural resources of significance.</p> <p>5 You don't really know that yet, do you, sir?</p> <p>6 A. That was a pretty long sentence. One moment, please.</p> <p>7 I believe there is more that is known than is not known at this</p> <p>8 point in time from a cultural resource and scientific</p> <p>9 perspective.</p> <p>10 Q. Okay, so say we know 51 percent of what we know, what</p> <p>11 we should know, we still have a good percentage that we don't</p> <p>12 know; is that correct, sir? It's premature.</p> <p>13 A. There are a number of sites out there that we do not</p> <p>14 know anything about at this time.</p> <p>15 Q. Now, with regard to the 81 sites that have not even</p> <p>16 been fully examined yet, is it your recommendation to this</p> <p>17 board that that entire geographical area that contains these</p> <p>18 sites be excluded from any consideration by the board as to</p> <p>19 whether or not they meet Special, Exceptional, Critical or</p> <p>20 Unique lands?</p> <p>21 A. Not at all.</p> <p>22 Q. Because if we don't know really anything about them,</p> <p>23 we know we need to study them more, it's certainly premature to</p> <p>24 make any designation regarding those lands; wouldn't that be a</p> <p>25 fair statement?</p>	208	<p>1 you spent in the project area?</p> <p>2 A. On that 10,500 acres, 16.</p> <p>3 Q. Okay. So you certainly didn't walk all of it.</p> <p>4 A. No, I didn't.</p> <p>5 Q. You didn't even see all of it.</p> <p>6 A. No, I haven't.</p> <p>7 Q. Now, from listening to Mr. Good Plume and Mr. Mentz,</p> <p>8 would it be fair to say that these are two gentlemen that may</p> <p>9 have some very important information and leads to other people</p> <p>10 who might have some very important information about the</p> <p>11 cultural, historic, and ethnologic use of this area and</p> <p>12 importance of this area?</p> <p>13 A. I think they have potentially some great information</p> <p>14 that can be used --</p> <p>15 Q. Well --</p> <p>16 MR. MAIN: Allow the witness to answer.</p> <p>17 CHAIRMAN McCAREN: Continue.</p> <p>18 A. I think they have some potentially great information.</p> <p>19 MR. ELLISON: I may be done. I think that that is all</p> <p>20 of the questions then that I have at this time, sir. Thank</p> <p>21 you.</p> <p>22 A. You bet, thank you.</p> <p>23 CHAIRMAN McCAREN: Charmaine.</p> <p>24 CROSS-EXAMINATION</p> <p>25 BY MS. WHITE FACE:</p>

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1 Q. Just a few. You kept saying this is all private land
 2 and so that there would be no way Section 106 would come in.
 3 A. No, I didn't say that at all. Section 106 will come
 4 in on the entire project.
 5 Q. But just for this state, what about the BLM land in
 6 this area?
 7 A. BLM is not part of their mining activity.
 8 Q. I know, but in this area we are talking about, one of
 9 the parcels is BLM land.
 10 A. The current project will have no ground disturbing
 11 impact on that property.
 12 Q. What I'm talking about, though, is about if there is a
 13 site on that BLM land, does that trigger Section 106?
 14 A. Does that what?
 15 Q. Would that trigger further evaluation under federal --
 16 A. Not if they weren't going to impact it, it wouldn't,
 17 no. Well, let me make sure I understand your question. You
 18 were asking is that going to require further investigations?
 19 No, because it's not going to be impacted.
 20 Q. When you talked something about it's a -- the question
 21 that I wrote down when you were talking, and I forget, it was
 22 when Mr. Main was asking you questions, but what I want to know
 23 is who is the watchdog to make sure that no damage is done?
 24 You said that Powertech would lose their permit to mine, but
 25 who is the watch dog to make sure that no damage is done to a

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1 site?
 2 A. They have to and will be updating me periodically. I
 3 believe in the MOA there's a certain amount of time that goes
 4 by they have to update me with their progress and things like
 5 that. If they exceed -- there's nobody going to be standing
 6 out there watching them on a daily basis, I'll say that now,
 7 except for them. I find them to be people of good character
 8 and you have to trust people in any particular undertaking to
 9 do the correct thing, and if they are caught later on when they
 10 want to expand or to move and more work needs to be done, if
 11 it's observed that they went through the landscape and tore it
 12 up, there's a good chance they will lose their license, and I'm
 13 sure that itself to me is pretty much an overriding factor of
 14 their continued stewardship with these cultural resources.
 15 Q. Do you know what are the qualifications of Donovan
 16 Sprague?
 17 A. I don't, no. I'll leave it at that. You didn't ask
 18 me anything more.
 19 Q. Okay, but you took his report as being legitimate,
 20 even though you did not know his qualifications?
 21 A. There's a number of things that made him the person to
 22 do this report. Now, this is just from knowing what certain
 23 agencies do. For instance, the BLM follows National Park
 24 Service guidelines, so whenever they are doing a report that's
 25 within the criterion of Section 106, the person doing that work

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1 has to meet minimum qualifications identified by the park
 2 service. Then also I know that talking with the BLM people, I
 3 work a lot with them because I work with mines a lot, that this
 4 was a person agreed upon by the tribes that would best
 5 represent and fulfill the obligations of this study.
 6 Q. I want to ask some more questions about that, but I
 7 also would like to study this report a little bit more, so I
 8 guess this is going to go back to asking for a continuance. I
 9 really want to study the Sprague report because I know Donovan
 10 Sprague and that's why I want to know about these
 11 qualifications and about who asked him to do this study. You
 12 have to remember that many of our -- we call it the lost
 13 generation, many of those people that are in that elder
 14 category were in boarding schools all their formative years and
 15 we never have had the access to the information, for example,
 16 that Mr. Good Plume has or for information that I have, because
 17 it was our grandparents who were the generation before that who
 18 were born in the late 1800s who still had a lot of access and
 19 information. And so I would like to study the Sprague
 20 information before I could make a decision on it and how you
 21 might consider that a legitimate study.
 22 A. I might add that the entire report is not at this time
 23 available for dissemination. I don't have a copy of the entire
 24 report. I have what BLM sent me as his summary of the report.
 25 Q. And will we be able to get a copy of the entire

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1 report?
 2 A. You are asking the wrong person. I'm sorry.
 3 Q. I had one more question -- a couple more questions.
 4 Why have those sites been left unevaluated?
 5 A. Because they will not be impacted. And to evaluate
 6 them at this point in time could be viewed as an adverse effect
 7 to those resources.
 8 Q. To those sites, okay. And another question, under
 9 what authority is the Archaeological Research Center able to
 10 enter into a Memorandum of Agreement with Powertech? Is there
 11 a state law or something?
 12 A. I don't believe I need a state law or any authority to
 13 enter an MOA with any agency that I'm overseeing. Basically
 14 what I interpreted this MOA to be was the very same thing an
 15 MOA with a federal agency or with the tribes to be. I'm here
 16 to protect it, I'm here to look after the resources the very
 17 best I can, and this gave me the opportunity to maybe just a
 18 little bit more show in that we are really concerned, we want
 19 to work with Powertech, and eventually when this goes through
 20 the federal process, I'm assuming there will be new MOAs
 21 written and things like that. I don't know that with
 22 certainty, but I've seen that happen in other projects.
 23 MS. WHITE FACE: That's all the questions I have,
 24 thank you.
 25 CHAIRMAN McCAREN: Board members. The hour is late.

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<p>1 Thank you.</p> <p>2 A. You bet, thank you.</p> <p>3 CHAIRMAN McCAREN: More witnesses.</p> <p>4 MR. MAIN: Powertech rests.</p> <p>5 CHAIRMAN McCAREN: Ms. Giedd.</p> <p>6 MS. GIEDD: I have no witnesses.</p> <p>7 CHAIRMAN McCAREN: Mr. Ellison.</p> <p>8 MR. ELLISON: We would again move for a continuance so</p> <p>9 we could present our witnesses. We have clearly established</p> <p>10 from Mr. Good Plume's and Mr. Mentz's testimony and even from</p> <p>11 this last witness there is clearly a need for consultation with</p> <p>12 Native American tribal historic preservation officers, with</p> <p>13 elders, with treaty council people, with medicine people. The</p> <p>14 majority of the sites that have been identified are Native</p> <p>15 American sites and no one who has the information about them</p> <p>16 has been talked with. So it is completely premature for this</p> <p>17 board at this time to make a decision one way or another on the</p> <p>18 petitions to have these lands Special, Exceptional, Critical or</p> <p>19 Unique lands and we would like an opportunity to present the</p> <p>20 board with further witnesses who can show that in fact such a</p> <p>21 designation would be appropriate.</p> <p>22 CHAIRMAN McCAREN: Thank you. Board action.</p> <p>23 MS. WHITE FACE: You forgot me. I have one last thing</p> <p>24 I wanted to say. I also asked for a continuance. I would like</p> <p>25 to be able to have more time to study this Dewey Conveyor</p>	<p>1 then there are federal rules that are going to be triggered</p> <p>2 that are going to address the issues that Charmaine has</p> <p>3 proposed, that Mr. Ellison and his client have brought to us,</p> <p>4 and so those are going to be covered. So it would be my motion</p> <p>5 that we agree that -- It would be my motion that this land does</p> <p>6 not meet the criteria for Special, Exceptional, Critical or</p> <p>7 Unique.</p> <p>8 CHAIRMAN McCAREN: Not designated so, right?</p> <p>9 MR. DeMERSEMAN: Second.</p> <p>10 CHAIRMAN McCAREN: Further discussion.</p> <p>11 MR. DeMERSEMAN: I think the discussion, the</p> <p>12 aboriginal stories were fascinating and they may be of some</p> <p>13 importance in the future. I think one of the key factors is</p> <p>14 that Ms. White Face or Bruce have not said anything that would</p> <p>15 contradict as to when those issues should be raised and that</p> <p>16 they will be raised under the federal statute, not here. And</p> <p>17 there has been no testimony contrary to that position. For</p> <p>18 that reason, I support Mr. Sweetman's motion.</p> <p>19 CHAIRMAN McCAREN: This has been as well presented a</p> <p>20 case as I've seen in all the years I've been here and I</p> <p>21 understand the motion. I also have a friend who says local</p> <p>22 knowledge is always worth far more than a map, and I believe in</p> <p>23 that. And I am for a visit and for additional testimony, but</p> <p>24 that's all going to happen. It's going to happen because you</p> <p>25 stirred it up, Charmaine, too, I can tell you that.</p>
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<p>1 Project document. I would also ask for more time to study the</p> <p>2 Memorandum of Agreement and I also think that it would behoove</p> <p>3 the board to do a site visit out there to see what we are</p> <p>4 talking about, some of these sites that we can show you and Mr.</p> <p>5 Good Plume can show you where his family has had these</p> <p>6 connections. So I also ask for a continuance. Thank you.</p> <p>7 CHAIRMAN McCAREN: I agree with you, but I'm not</p> <p>8 going to rule on that, we are going to have a board decision</p> <p>9 here.</p> <p>10 MR. SWEETMAN: I would make a motion. I think</p> <p>11 Charmaine and her expert witnesses have brought up some very</p> <p>12 interesting issues. A number of issues that have been</p> <p>13 discussed today really don't involve Special, Unique,</p> <p>14 Exceptional, Critical or whatever. They seem to be looking</p> <p>15 downstream as to what may happen sometime in the future and</p> <p>16 what that effect might be just on land use.</p> <p>17 We have heard from the state, their experts, we have</p> <p>18 heard from the experts that Max has brought before us, and I</p> <p>19 think all state agencies have agreed the site does not qualify</p> <p>20 as Special, Exceptional, Critical or Unique. The experts that</p> <p>21 Powertech presented concurred in that, the wildlife, the</p> <p>22 hydraulics of the aquifers, the archaeological issues. The</p> <p>23 petitioner, Charmaine, has raised certain issues that were not</p> <p>24 addressed by the state agencies, mostly because they don't have</p> <p>25 to. But if the site becomes an object of a permit request,</p>	<p>1 But what we do here today isn't going to have any</p> <p>2 effect on that regardless of how we vote, because until it gets</p> <p>3 to the permit and federal input, it's going to be reviewed</p> <p>4 again. And everybody knows the parties are going to go out and</p> <p>5 do that for that stage of the proceeding. We haven't done any</p> <p>6 scenic and unique for a long time and we viewed the premises on</p> <p>7 all but about one, I think. I can't remember. And I'm always</p> <p>8 reluctant to consider one of these. Usually these are</p> <p>9 designed, as a friend of mine sitting next to me says, is to</p> <p>10 make that guy's land scenic and unique, not mine. He's also</p> <p>11 quoted as saying if you like the view, you better own it.</p> <p>12 And practical application, and I know we will go for a</p> <p>13 view at this site and I know there's going to be a lot more</p> <p>14 testimony on it, but I'm going to go along with the motion</p> <p>15 because that's what we have to do at this point in time, and</p> <p>16 until the application is made, not much is going to take place.</p> <p>17 But there are sure a lot of good, unanswered questions here.</p> <p>18 Thanks. Anybody else? Ready for a vote? The motion is not to</p> <p>19 designate as Special and Unique the lands as described in this</p> <p>20 application. All those in favor say "aye."</p> <p>21 (Whereupon, the motion passed unanimously.)</p> <p>22 CHAIRMAN McCAREN: All opposed "nay." Motion</p> <p>23 carried. Thank you one and all.</p> <p>24 (Whereupon, the proceedings were concluded at 6:46</p> <p>25 p.m.)</p>