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February 5, 2014

Haimanot Yilma
Project Manager
FSME/DWMEP/EPPAD/ERB
U.S Nuclear Regulatory Commission
Mail Stop: T8F05
(via email)

RE: Submittal of comments on draft Programmatic Agreement for the proposed Dewey-Burdock ISR uranium mining project

Dear Ms. Yilma,

This is in response to the NRC's request for comment on the draft Programmatic Agreement (PA) for the proposed Powertech Dewey-Burdock in situ leach (ISL) uranium mine. As you know, the Oglala Sioux Tribe has attempted to maintain a high level of involvement in the National Historic Preservation Act (NPHA) Section 106 consultation process through our Tribal Historic Preservation Office (OSTHPO), as well as the preparation of the National Environmental Policy Act (NEPA) environmental impact statement. Unfortunately, these processes have not been conducted in a manner that complies with the letter or spirit of either the NHPA or NEPA, resulting in the effective exclusion of several of the most impacted Tribes to which ascribe this proposed project area as traditional homelands. As such, the Oglala Sioux Tribe, as part of the Great Sioux Nation, continues to have serious unresolved concerns with the proposed project, and cannot concur in the Programmatic Agreement as drafted.

We request that NRC revisit its NEPA and NHPA compliance on this proposed project in order to fulfill its prior commitments, and legal obligations, to provide meaningful opportunities for the OSTHPO participation within both the NHPA consultation and NEPA review. Principal among the Tribe's concerns are those raised previously regarding the lack of a credible cultural resources survey that includes the entire project area of 10,580 acres. As repeatedly communicated in prior correspondence by the Oglala Sioux Tribe and others, while the Tribe remains willing and able to participate in such a process, it must be done in a credible manner, using proper methodologies and expertise. In addition, it states on page 3 of the draft PA indicates that the Tribe has "participated in the preparation of this PA", which is incorrect. On the contrary, representatives of the Tribe were merely on a November 15, 2013 webinar

hosted by NRC for interested parties to review the draft PA prepared by the NRC, not with the OST. This is very misleading to anyone who reads this PA.

To date these cultural resources surveys, as well as the ones completed prior by archaeologists are not complete and the NRC and Powertech efforts to date have not provided sufficient resources nor incorporated sufficient THPO involvement to result in a credible product. The PA's repeated strong reliance on a prior "Class III" cultural survey is misleading at best, as that survey was conducted by Powertech consultants in 2008 and has been repeatedly criticized by the Tribe as incomplete, and even recognized by NRC Staff as insufficient. As the Staff explained when it issued the DSEIS, "it is working to facilitate a field survey of the Dewey-Burdock site in order to obtain additional information on historic properties. When the survey is complete, the Staff will supplement its analysis in the DSEIS and circulate the new analysis for public comment." NRC Staff's Answer to Contentions on Draft Supplemental Environmental Impact Statement, at 13. Indicative of the process thus far, this supplement to the draft SEIS never occurred. Instead, NRC Staff simply published a Final SEIS, with a selection of a proposed action and a purportedly complete cultural resource impact analysis, without providing the promised draft analysis in a NEPA context. It is a poor excuse for NRC to provide the Tribes and public an after-the-fact opportunity to comment on any cultural reviews outside of the NEPA process. NRC should rescind its statements in the PA that all effect determinations are considered "final" until all necessary information is collected and meaningfully reviewed within both the NEPA and NHPA processes.

In addition, the cultural resources survey findings conducted by the seven (7) participating Tribes have not been afforded to our Tribe for review. As we are to understand, only three (3) Tribes (Northern Arapaho Tribe, Northern Cheyenne Tribe, Cheyenne and Arapaho Tribes of Oklahoma) submitted their findings; however we have not seen those results for review. Additionally, there is a "Table. 1 Summary of Tribal Cultural Survey Activity and Participation during April-May 2013" received as an attachment that the field survey participating Tribes "examined approximately 95 percent of the entire project area within the license boundary". This brings to question how that claim can be true when only certain days were surveyed by those Tribes, and some for only three (3) days for the entire 10,580 acres.

Further compounding these problems is the PA's reliance on future analysis of the project area for cultural resources impacts and potential mitigation measures. Indeed, even the methodologies to be used for these future surveys and mitigation measure development are left without any specificity or clarification. Unspecified promises for Powertech to "provide funding to tribal representatives" to participate in future surveys is precisely the type of tactic that is partly to blame for the current problems with NRC's NHPA and NEPA processes. While some NHPA processes may be staged under certain circumstances, there is no compelling need to do so here, where proper surveys and analyses could be conducted and completed, albeit probably not on the applicant's preferred accelerated schedule. The applicant's preferred timeline for license approval should not supplant the need to ensure all data collection and analysis at the earliest possible time, as contemplated and required by both NEPA and the NHPA. The PA should not be finalized absent agreement with the Tribe on the methods and practices to be employed, and only those matters that truly cannot be accomplished beforehand should be left for the staged, future study and analysis.

We also remind you that there are two pending applications to the Environmental Protection Agency for underground injection control and plan for disposal of treated ISR processed fluids. Overall, the PA is not a document that the Tribe is comfortable signing at this stage. It fails to take account of the lack of a complete cultural resource survey to date and improperly and needlessly leaves significant data collection and analysis to future unspecified efforts, outside of the NEPA process. We continue to express our interest in fully engaging in the cultural resource analysis and protection processes related to this Project, and ask that NRC Staff abandon its current approach of prematurely finalizing its NEPA and NHPA documents until the proper steps can be taken to ensure a competent cultural resource impact review, as well as consideration for environmental concerns are met.

Sincerely,

Bryan V. Brewer/mrb

Bryan V. Brewer
President, Oglala Sioux Tribe

From:	Waste"Win Young
To:	Caverly, Jill; Yilma, Haimanot; Moore, Johari; Hsueh, Kevin; Goodman, Nathan; Melissa.Ryan@nrc.gove; Magwood, William; Mark.Sartorius@nrc.gov; Jamerson, Kellee; hluhman@louisberger.gov
Cc:	Russell Eagle Bear (reaglebear@yahoo.com); Ben Rhodd (brhodd1@yahoo.com); oglalathpo@goldenwest.net; Joyce Whiting (ostnrrapro@gwtc.net); Dennis Yellow Thunder (ostnrrafd@gwtc.net); Bryan@oglala.org; Steve Vance (stevev.crstpres@outlook.com); dianned@swo-nsn.gov; James Whitted (jmswhitted@yahoo.com); Tamara St John (tamara_stjohn@yahoo.com); jeddins@achp.gov; vhauser@achp.gov; Terence Clouthier
Subject:	SRST Comments
Date:	Thursday, February 20, 2014 12:27:38 PM
Attachments:	Final draft PA Dewey-Burdock SRST-THPO comments.doc

Good Morning,

It has come to my attention reading through the proposed programmatic agreements for Ross and Dewey Burdock how much tribal information, suggestions and critical issues raised by the tribes are purposefully being ignored and omitted. Initially, I did not want to bother you guys again because you are all aware of my sentiments but the gnawing disappointment of how you all have handled the Section 106 process under the NHPA is too overwhelming. (On another note, I seen a job opening for a Native American specialist to assist the NRC with Section 106 NHPA. That's such great news! I mean… In the meantime, 3 areas of historical, cultural and spiritual significance to our tribe will have been destroyed by NRC projects, but hey! At least you guys will get some guidance:)

I have attached comments for the proposed Dewey-Burdock PA to this email.

I am cautious to submit these knowing full well that the NRC has repeatedly ignored tribes who have historic, cultural and spiritual properties in proposed project areas.

Yesterday our office was told by Haimanot that other tribes are too scared to speak up in meetings or feel that their voice is not heard when Sioux tribes are present. I do not know which Sioux tribes she is referring to but I work for the Standing Rock Sioux Tribe—THPO. We will continue to hold federal agencies and call them out—including other tribes who attempt to bypass the federal regulations and smooth things over with false promises. For us, this is not about a ten thousand dollar pay check for three, five or ten days of work as what overwhelmingly happened on Dewey Burdock.

Another troubling incident is that the SD SHPO already received the letter to *concur* on eligibility determinations for Dewy Burdock in December 2013. In the meantime, tribes were sent a letter seeking comments on eligibility

determination at that same time and tribal comments were due January 7, 2014. The SD SHPO issued their concurrence on Jan 14 2014. This was all done without tribe's knowledge. When SD state legislators hosted a meeting in Rapid City two weeks ago staff from the Oglala Sioux Tribe said that tribes were still involved in the Section 106 process. A SD legislator said that SD had already signed off on it, tribal concerns were fixed and that the NRC was issuing their permit for Dewey Burdock shortly.

This timeline was confirmed yesterday with the SD SHPO via telephone. If Section 106 is a federal process between agencies and tribes—why was the SD SHPO given a concurrence letter on eligibility determinations the same date that tribes were asked for comments on those determinations? Why would the NRC issue a permit for an incomplete process based on incomplete Section 106 identification results? Why would it base those results off of 3 reports issued from tribes out of 23 the NRC claims to consult with—although only 7 tribes went out? This is not majority rules. It does not take an environmental or cultural resource manager to see that this is wrong. This also needs to be clarified in the PA.

Yesterday Haimanot told our staff that there will be no new identification efforts for Dewey Burdock—which is contrary to what Commissioner Bill Magwood told the Oglala Sioux Tribe and the SRST last summer in Kyle, SD. [I have the exact date. Our legal department and a Tribal councilperson was present].

The PA for Dewey Burdock needs to be accurate. It needs to document tribal concerns. It needs to detail the unbalanced, unfair process that the tribes were up against. It needs to detail the incestuous relationship between the NRC and applicant Powertech. Powertech is calling the shots and because the NRC does not know how to implement Section 106 or has no clue how to work with tribes, it is responsible for the destruction of this spiritual, cultural and historical landscape.

It has been made very clear to us that the NRC wants these projects over and done with. They will continue to operate haphazardly to accomplish this.

YOUR PA NEEDS TO TELL THE TRUTH. The NRC did not consult with 23 tribes. That is like me saying that I sat down and met with the 500 NRC employees in Rockville last January when actually I sat in a room with 7 of

you. Why would you willfully lie?

Just to make your PA and efforts look good and faithful? Dewey Burdock is an incomplete catastrophe that has an incomplete Section 106 process. Your sentiments are, " Why are you guys the only tribe speaking up?" We have a spiritual, cultural and historical tie to this area. We are not one to take the money and move onto the next project. The SRST THPO tried to meet with the NRC in good faith and offer our comments. Yet you decided to listen to the applicant and offer $10,000.00 per tribe because the applicant didn't like the idea of paying over $100,00.00 for the tribal identification survey. Our suggestions were ignored and instead, we were given pacifying promises of future collaboration.

The SRST is not your trustee. The tribal THPO's are the Section 106 experts, more so than the applicants and their cultural resource contractors who are hired to write documents that you think fulfills your regulatory responsibility.

If you think we were going to take your $10,000.00 for an inept survey tantamount to a payoff and not fight for what is right and what is ours then I guess what you have heard from other tribes is true. We are overbearing when it comes to protecting our future generations' land and water.

Thank you for your invitation to the Standing Rock Sioux Tribe inviting us to participate in Section 106 Consultation under the NHPA for Reno Creek. Due to the complete lack of confidence, bad faith and ill will that the Nuclear Regulatory Commission has shown towards the SRST as well as other tribes we will have to decline to participate in this consultation.

Please see our attached comments for the Dewey Burdock PA.

Waštė Wiŋ Young
Standing Rock Sioux Tribe
Tribal Historic Preservation Officer
(701)-854-8645 work
(701)-854-2138 fax

Final DRAFT

PROGRAMMATIC AGREEMENT
AMONG
U.S. NUCLEAR REGULATORY COMMISSION
U.S. BUREAU OF LAND MANAGEMENT
SOUTH DAKOTA STATE HISTORIC PRESERVATION OFFICE
POWERTECH (USA), INC.
AND
ADVISORY COUNCIL ON HISTORIC PRESERVATION
REGARDING THE
DEWEY-BURDOCK IN SITU RECOVERY PROJECT
LOCATED IN CUSTER AND FALL RIVER COUNTIES
SOUTH DAKOTA

Date 02-14-14

WHEREAS, the U.S. Nuclear Regulatory Commission (NRC) received an application from Powertech (USA), Inc. (Powertech or applicant) for a new radioactive source materials license to develop and operate the Dewey-Burdock Project (the undertaking) located near Edgemont, South Dakota in Fall River and Custer counties (Project) pursuant to the NRC licensing authority under the Atomic Energy Act of 1954 (AEA), 42 U.S.C. §§ 2011 *et seq.*; and

WHEREAS, NRC is considering issuance of a license for the Dewey-Burdock In Situ Recovery [ISR] Project pursuant to its authority under the Atomic Energy Act of 1954 (AEA), 42 U.S.C. §§ 2011 *et seq.* which makes the project an undertaking requiring compliance by NRC with Section 106 of the National Historic Preservation Act (NHPA), 16 U.S.C. § 470, and its implementing regulations (36 CFR § 800 (2004)); and

WHEREAS, if licensed, the proposed project will use an In Situ Recovery (ISR) methodology to extract uranium and process it into yellowcake at the Dewey-Burdock site; and

WHEREAS, the proposed project area consists of approximately 10,580 acres (4,282 ha) located on both sides of Dewey Road (County Road 6463) and includes portions of Sections 1-5, 10-12, 14, and 15, in Township 7 South, Range 1 East and portions of Sections 20, 21, 27, 28, 29, and 30-35 in Township 6 South, Range 1 East, Black Hill Meridian, (see Appendix A and Figure 1.0, for fuller description and a map of the project area); and

WHEREAS, under the terms of the General Mining Act of 1872 Powertech has filed Federal Lode mining claims and secured mineral rights on 240 acres [97 ha] of public lands open to mineral entry and administered by the U.S. Department of the Interior, Bureau of Land Management (BLM), and has the right to develop the mining claims as long as this can be accomplished without causing unnecessary or undue degradation to public lands and in accordance with pertinent laws and regulations under 43 CFR Subpart 3809; and

WHEREAS, review and approval of a Plan of Operations (POO) for the project that meets the requirements of 43 CFR Subpart 3809 by the BLM-South Dakota Field Office makes the project an undertaking requiring compliance by BLM with Section 106 of the NHPA, 16 U.S.C. § 470 and 36 CFR Part 800; and

Comment [TC1]: This "project area" conflicts with statements made throughout the consultation process that the project area would be confined to the area of direct impacts (2k acres). The tribes were specifically told they could not survey the license boundary (10k acres) during meetings between June 2011 and August 2012 even though this was what the tribes felt was the proper area of potential effects (APE). Why is the project area now suddenly the entire license boundary when that was a major stumbling block during consultation for over one year? The NRC switched gears at the last moment and allowed for the tribes to access the entire 10,000+ acres with the caveat that they only had 10k dollars to work with and a restricted timeline of 1 month. There is no way a proper tribal survey could be conducted with those caveats but this is the ultimatum that was forced upon the tribes.

WHEREAS, the BLM, by letter dated April 7, 2011, has designated the NRC as the lead agency for compliance with requirements of Section 106 of the NHPA regarding the Dewey-Burdock Project (ADAMS Accession No. ML11116A091) pursuant to 36 CFR § 800.2(a)(2) of the Section 106 regulations; and

WHEREAS, under the terms of the Safe Drinking Water Act, Powertech has submitted to the Environmental Protection Agency (EPA) two Underground Injection Control (UIC) Permit Applications for ISR uranium recovery and the disposal of treated ISR process fluids at the Dewey-Burdock site; the EPA will issue draft permit decisions that meet the requirements of UIC regulations found at 40 CFR Parts 124, 144, 146 and 147; and

WHEREAS, the NRC determined a phased process for compliance with Section 106 of the NHPA is appropriate for this undertaking, as specifically permitted under 36 CFR § 800.4(b)(2), such that completion of the evaluation of historic properties, determinations of effect on historic properties, and consultation concerning measures to avoid, minimize, or mitigate any adverse effects will be carried out in phases, as set forth in this Programmatic Agreement (PA) (see Appendix A for details); and

WHEREAS, the area of potential effects (APE) for the undertaking is the area at the Dewey-Burdock Project site and its immediate environs, which may be directly or indirectly impacted by construction and operation activities associated with the proposed project, as described in Appendix A; and

WHEREAS, Project activities may occur on lands outside the license boundary for the installation of electrical transmission lines, and will be addressed in accordance with Stipulations 3 and 4 of this PA; and

WHEREAS, in accordance with 36 CFR § 800.6(a)(1)(i)(C), the NRC, by letter dated April 24, 2013, notified the Advisory Council on Historic Preservation (ACHP) of the potential for adverse effects to historic properties from the undertaking and invited the ACHP to participate in Section 106 consultation and in the preparation of this PA; and

WHEREAS, the ACHP, by letter, dated October 28, 2013, formally entered the consultation; and

WHEREAS, the NRC initiated consultation with the South Dakota State Historic Preservation Officer (SD SHPO) on December 2, 2009 during a face-to-face meeting held in Pierre, South Dakota; and

WHEREAS, the NRC invited Powertech to participate in Section 106 consultation and preparation of this PA; and

WHEREAS, by letters dated March 19, 2010 (ML100331999) and September 8, 2010 (ML102450647), the NRC invited 23 federally-recognized Indian Tribes who may ascribe religious and cultural significance to historic properties that may be affected by the undertaking, including the Cheyenne and Arapaho Tribes of Oklahoma, the Cheyenne River Sioux Tribe, the Crow Nation, the Crow Creek Sioux Tribe, the Eastern Shoshone Tribe, the Flandreau Santee Sioux Tribe, the Fort Peck Assiniboine and Sioux Tribes, the Lower Brule Sioux Tribe, the Lower Sioux Indian Community, the Northern Arapaho Tribe, the Northern Cheyenne Tribe, the Oglala Sioux Tribe, the Omaha Tribe of Nebraska, the Pawnee Nation of Oklahoma, the Ponca Tribe of Nebraska, the Rosebud Sioux Tribe, the Santee Sioux Tribe of Nebraska, the Sisseton-Wahpeton Oyate, the Spirit Lake Sioux Tribe, the Standing Rock Sioux Tribe, the Three Affiliated Tribes (Mandan, Hidatsa & Arikara Nations), the Turtle Mountain Band of Chippewa Indians, and the Yankton Sioux Tribe (collectively referred to as Tribes), to each be a consulting party in the Section 106 process; and

Comment [HXY12]: EPA to revise this Whereas clasue later.

Comment [TC3]: Has the disposal method been determined? This was also a matter of contention in determining the APE for this project based on only surveying the direct effects.

Comment [TC4]: 36CFR800.14 (a) (1) requires the federal agency to consult with the public in the development of alternate procedures for Section 106 compliance. This allows for the public to have their input into the development of alternate procedures. Where is the documentation that this was ever conducted? 36CFR800.4 (2) also requires the federal agency to take into account the views of the tribes for a phased approach. The SRST-THPO has disagreed with the actions of the NRC since September of 2012. We disagree with the determinations of non-eligibility (TABLE 1) for any sites containing stone features. How is the NRC accounting for this in this PA and in their phased approach?

Comment [TC5]: Appendix A is not attached to any email for this PA. The SRST-THPO would like copies off all appendixes for this PA. It is impossible to make fully informed comments without the proper information being given to the tribes.

Comment [TC6]: This conflicts with the project area being licensed as pointed out in TC1 comment. Why is the NRC not considering the entire license boundary as the APE?

Comment [TC7]: A proper survey of the entire license boundary as the APE would have eliminated the need to develop this PA. The tribes pushed for this throughout 2011 and 2012 and were denied. The identification effort that was forced upon the tribes to accept could in no way properly document the sites given the time and money that was forced upon the tribe.

WHEREAS, the following 23 Tribes participated in consultation at varying levels with the NRC and BLM regarding the proposed Dewey-Burdock Project: the Cheyenne and Arapaho Tribes of Oklahoma, the Cheyenne River Sioux Tribe, the Crow Nation, the Crow Creek Sioux Tribe, the Eastern Shoshone Tribe, the Flandreau Santee Sioux Tribe, the Fort Peck Assiniboine and Sioux Tribes, the Lower Brule Sioux Tribe, the Lower Sioux Indian Community, the Northern Arapaho Tribe, the Northern Cheyenne Tribe, the Oglala Sioux Tribe, the Omaha Tribe of Nebraska, the Pawnee Nation of Oklahoma, the Ponca Tribe of Nebraska, the Rosebud Sioux Tribe, the Santee Sioux Tribe of Nebraska, the Sisseton-Wahpeton Oyate, the Spirit Lake Sioux Tribe, the Standing Rock Sioux Tribe, the Three Affiliated Tribes (Mandan, Hidatsa & Arikara Nations), the Turtle Mountain Band of Chippewa Indians, and the Yankton Sioux Tribe; and

WHEREAS, the NRC worked with consulting Tribes between November 2011 and October 2012 to develop an approach for identifying historic properties of cultural and religious significance to Tribes; the NRC conducted a face-to-face consultation focused on the identification of these properties in February 2012. Although several work plans for a Tribal survey were prepared and discussed by the consulting parties throughout 2012, the parties were unable to reach agreement on the scope and the cost of the Tribal survey (see Appendix B for details); and

WHEREAS, in October 2012, the NRC requested alternative approaches to conduct a field survey by a group representing all consulting Tribes and subsequently proposed opening the project area to all interested Tribes to complete the survey according to needs and interests, and with payments made to participating Tribes (see Appendix B for details); and

WHEREAS, the NRC offered all 23 consulting Tribes the opportunity to participate in a tribal field survey to identify properties of religious and cultural significance to them for the proposed Dewey-Burdock project ISR facility by letter dated February 8, 2013; and

WHEREAS, the following seven Tribes participated in the tribal field survey: the Northern Arapaho Tribe, the Northern Cheyenne Tribe, the Cheyenne and Arapaho Tribes of Oklahoma, the Crow Nation, the Santee Sioux Tribe, the Crow Creek Sioux Tribe, and the Turtle Mountain Band of Chippewa Indians as discussed in details in Appendix A; and

WHEREAS, surveys to identify historic properties have been completed for the project including Class III Archeological Surveys and tribal surveys to identify properties of religious and cultural significance; and

WHEREAS, the NRC received tribal survey reports with eligibility recommendations from the Northern Arapaho Tribe, the Northern Cheyenne Tribe, and the Cheyenne and Arapaho Tribes of Oklahoma, as well as field notes from the Crow Nation as discussed in Appendix A; and

WHEREAS, the NRC staff has reviewed and evaluated the results of the applicant's Class III archaeological surveys and tribal surveys in the development of its initial recommendations concerning eligibility of properties identified within the APE for the undertaking for inclusion on the National Register of Historic Places (NRHP) as presented in Appendix B; and

WHEREAS, the NRC has received concurrence from the SD SHPO on these eligibility determinations as discussed in Appendix B, eligibility determinations were also sent to the Tribes and requested a 30-day review and comment period; and

WHEREAS, the NRC invited each of the 23 consulting Tribes to participate in the development of this PA; and

Comment [TC8]: The applicant and their third-party consultant decided not to continue the discussions with the tribes by stating that further discussions would not be fruitful in an erroneous attempt to "move the project forward" in the 106 process. The applicant was unwilling to fund the project to a level that would have been acceptable to the tribes for proper identification efforts yet they funded all of the archaeological survey and evaluative testing with apparently no complaints. One of the main stumbling blocks was the definition of the APE between the tribes and federal agency and applicant.

Comment [TC9]: This request only came to the tribes due to the tribes not being intimidated by the NRC and their ultimatums. The NRC stated in September that if the tribes did not respond by a specified date that they would just move the process forward – echoing the words of the applicant and their third party consultant. The tribes pointed out that there is no provision for this within the regulation during the identification phase and that precipitated the "alternative approach" comments.

Comment [TC10]: The tribes were offered an ultimatum to either accept the proposal that would in no way properly identify sites of significance to them or be left out of the identification process. This is not a good faith effort to identify sites of significance to tribes. The proposal ignored the information gathered under 36CFR800.4 as to what is actually required to identify and instead the proposal amounted to just saying go drive around [1]

Comment [TC11]: This statement alone indicates that the identification process is incomplete for this project. The SRST-THPO objected to the approach adopted by the NRC as it in no way would properly document the sites in the license boundary in a manner consistent with Section 106.

Comment [TC12]: The SRST-THPO and other tribes have never been given the opportunity to identify sites of significance for their tribes in a manner consistent with their tribal identification efforts.

Comment [TC13]: 4 tribes providing comments on survey work somehow meets the standards of good faith effort? Almost three times that many were actively consulting since 2011 and their concerns for their sites are continuing to be ignored.

Comment [TC14]: The SRST-THPO disagrees with the recommendations made for the sites listed in Table 1. How will the NRC address our concerns as they are currently being ignored.

Comment [TC15]: The SRST-THPO is aware that the NRC submitted their eligibility determinations to the SD SHPO for concurrence on the same day that the tribes were asked to provide comments on eligibility in the 30 day window. How can the NRC imply that this was conducted in good faith? The SD SHPO issued their concurrence on Jan 14th, 2014.The [2]

WHEREAS, the following Tribes participated at varying levels in webinars and/or provided written comments during the preparation of this PA: Northern Cheyenne, Cheyenne River Sioux, Oglala Sioux, Standing Rock Sioux, Fort Peck Assiniboine and Sioux, and Cheyenne and Arapaho Tribes; (see Appendix B for list of participants) [TBD-include other tribes as necessary]; and

WHEREAS, each of the 23 consulting tribes will be invited to sign the PA as a Concurring Party; and

WHEREAS, the BLM, as a federal agency with a federal action related to this undertaking has participated in the Section 106 consultation and development of this agreement and will be a signatory; and

WHEREAS, the EPA has participated in discussions of this agreement; and

WHEREAS, the PA will be entered as a condition on the NRC license, if granted; and

WHEREAS, the PA will be entered as a condition of Powertech Inc.'s POO, if approved by the BLM; and

WHEREAS, Powertech, as the applicant for federal approvals has been invited to execute this agreement as an invited signatory in recognition of the responsibilities assigned to the applicant under the terms of this agreement;

NOW, THEREFORE, the NRC, BLM, SD SHPO, Powertech, and the ACHP agree that the undertaking will be implemented in accordance with the following stipulations in order to take into account the effects of the undertaking on historic properties.

STIPULATIONS:

NRC shall ensure that the following measures are carried out:

1) **Conditions for Federal Approval:**

~~i.~~a) The NRC will require that Powertech comply with all applicable stipulations and provisions of this PA, as a condition of the Powertech license for the Project.

~~ii.~~b) The BLM will ensure that a Record of Decision on an acceptable POO will not be signed until this PA has been executed by all required signatories.

~~iii.~~c) The NRC shall not grant a license to Powertech until all required signatories have executed this PA. Upon receipt of a fully executed PA, the NRC will issue the license provided that all other requirements for the license have been met.

2) **Identification and Evaluation of Historic Properties within the License Boundary:**

a) Appendix B provides information on the archaeological and Tribal cultural resource surveys and describes the historic properties identified within and adjacent to the boundary of the 10,580 acre project site. More than 300 cultural resources were identified.

Comment [TC16]: Why are the tribes not signatory parties?

Comment [TC17]: Please provide the non-acronym definition.

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Comment [TC18]: This whole PA appears to be developed for this entire purpose. The NRC is well beyond its stated timelines for issuance of the Dewey-Burdock license. This is documented by the fact that they stripped their Section 106 compliance out of their NEPA process due to not being able to conduct both within their stated timelines.

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Comment [TC19]: The SRST-THPO has not been provided with this information. Once again, the definition of the APE has changed from the direct effects to the licensed boundary.

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b) In consultation with SD SHPO and the Tribes, the NRC and BLM determined approximately 14 percent of identified sites are eligible for listing on the National Register of Historic Places (NRHP), 58 percent are not eligible, and 26 percent remain unevaluated.

*move oldstipulation 3(Future identification of Cultural Resources for Transmission Lines) to after Stipulation 6

3) Protection and Evaluation of Unevaluated Properties within the APE

a) Powertech will protect all unevaluated properties until an NHPA-eligibility determination is completed, in accordance with 36 CFR § 800.4(c)

b) If changes in the design or operation of the Project, including wellfield configurations, result in ground disturbance that could affect unevaluated properties, Powertech shall sponsor necessary supplemental research and/or field investigations prior to commencing any ground-disturbance activities. The additional studies will provide information to enable NRC, BLM, consulting Tribes, and the SD SHPO to make NRHP-eligibility determinations for unevaluated historic properties.

c) Powertech must provide a written plan of its investigation methodology at least four months prior to commencement of work, to enable the NRC and BLM to allocate staff resources for Section 106 reviews; additional review time may be necessary if NRC and BLM staff resources are limited or due to conditions beyond the staff's control.

d) The NRC will distribute the proposed investigation plan to the 23 consulting Tribes soon after it is received from Powertech.

e) Upon receipt of the Powertech investigation plan, the NRC, the BLM, consulting Tribes and the SD SHPO will have 30 days to review the proposed plan. If revisions to the plan are necessary, Powertech will circulate the revised investigation plan to the NRC, the BLM, consulting Tribes and the SD SHPO.

f) Upon approval of the investigation plan, Powertech will conduct supplemental research and/or field investigations to evaluate determine NRHP-eligibility of unevaluated cultural resources for NRC consideration. Testing will be conducted under the supervision of individuals meeting the Secretary of the Interior's Professional Qualifications Standards. The report shall follow documentation standards outlined in 36 CFR § 800.11

g) After the completion of any additional studies, the NRC will submit the findings of NRHP-eligibility evaluation to BLM, SD SHPO, and consulting Tribes, with a 45 day period of review and comment.

h) The NRC may request revisions to the reports or additional investigations after consideration of comments received from BLM, SD SHPO, and consulting Tribes. The NRC will provide revisions to BLM, SD SHPO, and consulting Tribes, with a 30 day period for a second review and comments.

i) The NRC will submit final determinations of NRHP-eligibility and effects to SD SHPO for review and concurrence; this review will be completed by the SD SHPO within 30 days.

Comment [TC20]: Which tribes were consulted?

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Comment [TC21]: How will Powertech be conducting this? Who will be conducting this evaluation. In particular, if the site is a site of significance to the tribes what assurances do the tribes have that they will be consulted for their expertise on their sites? The SRST-THPO is unagreeable with a private entity protecting our sites.

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Comment [TC22]: Who exactly will participate in this additional survey work? Will it just be the seven tribes who accepted the NRC forced identification requirements while ignoring the other 16 tribes who disagreed with this process.

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Comment [TC23]: This PA will take the tribes completely out of the consultation process according to this statement. Tribes have a right to comment on identification efforts per 36CFR800.2 yet this PA will take that right out of the tribes hands and put it squarely in the applicants hands. This was attempted by the applicant in the initial identification effort in August of 2011 when the NRC asked them to develop a plan for identification. That plan was unanimously disagreed to by every tribe … [3]

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Comment [TC24]: This didn't work the last time this was planned and once again it is being proposed. It resulted in the NRC dividing … [6]

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Comment [TC25]: The SRST-THPO is opposed to any testing of our sites of significance. We have stated this multiple … [8]

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j) When the NRC, BLM, and SD SHPO agree evaluated properties are NRHP-eligible, avoidance of the properties will be the preferred option. Avoidance measures may include, but are not limited to the relocation of pipelines, roads, facilities, monitoring wells, and other disturbances. When avoidance is unavoidable and adverse effects will result, adverse effects will be resolved in accordance with Stipulation 6.

k) If the NRC, BLM, and SD SHPO make the determination that identified historic properties are not eligible for listing on the NRHP, no further review or consideration of the properties will be required under this PA.

l) When the NRC and the SD SHPO disagree on NRHP-eligibility for a cultural resource, the cultural resource cannot be avoided, or the disagreement is not resolved by further consultation, the NRC will refer the issue to the Keeper of the National Register (Keeper) and request a formal determination of eligibility, in accordance with 36 CFR § 800.4(c)(2). The ACHP may also request referral of an NRHP-eligibility determination to the Keeper.

4) Assessment of Effects:

a) As part of its consideration of the effects of construction and operations on the landscape, the NRC conducted a line-of-sight analysis to assess the potential for adverse visual effects on all known historic properties located within three miles of the tallest buildings on both the Dewey and Burdock facilities.

b) The NRC and BLM consulted with SD SHPO and consulting Tribes in making its determination that eligible or unevaluated archaeological sites and properties of religious and cultural significance will be adversely affected by the undertaking. The effects determination is presented in Appendix B Table 1.

c) The NRC and BLM will consult with signatories to this agreement and consulting Tribes to develop proposals to resolve these adverse effects (as summarized in Appendix B Table 2) in accordance with the process set forth in Stipulation 6.

5) Resolution of Adverse Effects:

a) The NRC will solicit suggestions from consulting parties concerning potential measures to avoid, minimize, or mitigate adverse effects on historic properties described in Appendix B after the PA is executed.

b) The NRC and BLM, in consultation with consulting parties, will determine what treatment measures are appropriate to each adversely affected historic property.

c) Treatment measures can include, but are not limited to the following:

i. For archaeological historic properties that are significant for their research data potential (Eligibility Criterion D, National Register of Historic Places), the treatment measures may follow standard mitigation through data recovery. Treatment plan(s) for data recovery shall include, at a minimum, a research design with provisions for data recovery and recordation, analysis, reporting, and curation of resulting collection and records, and shall be consistent with the *Secretary of Interior's Standards and Guidelines* (48 FR 44734-44737). Treatment plan(s) must be consistent with easement and permit requirements of other agencies, when applicable. To the extent

Comment [TC26]: Include "in consultation with the tribes" as the SRST-THPO currently disagrees with the eligibility determinations made thus far and since the PA is made to supplant the requirements of Section B of 36CFR800.

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Comment [TC27]: Include "in consultation with the tribes" as the SRST-THPO currently disagrees with the eligibility determinations made thus far and since the PA is made to supplant the requirements of Section B of 36CFR800.

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Comment [TC28]: What provisions exist within this document if the tribes disagree with the determinations? This is never addressed throughout the entire document and since the PA will fulfil the NRC responsibilities for Section 106 compliance, the SRST-THPO would like this explained further.

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Comment [TC29]: Please provide the details of how this will be conducted. The tribes … [12]

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Comment [TC30]: Please provide the documentation for this statement.

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Comment [TC31]: This will require an amendment to the PA. The SRST-THPO … [17]

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Comment [TC32]: This should be developed currently within this PA and not at some … [19]

Comment [TC33]: These treatment plans do not take into account any specialized ex … [21]

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possible, treatment plan(s) should group related sites and areas, so related resources can be considered in context, and to minimize the burden of review and approval by agencies.

ii. Treatment plan(s) for properties eligible under Criteria A, B and C, or significant for values other than their potential research value, if warranted, shall specify approaches for treatment or mitigation of the property in accordance with the principles, standards, and guidelines appropriate to the resource. This may include, but not be limited to, use of such approaches as relocating the historic property, re-landscaping to reduce effects, public interpretation, ethnographic recordation, oral history, archival research, or prescribing use of a component or activity of this undertaking in such a way as to minimize effects to historic properties. Methods of recordation and documentation described in the treatment plan(s) shall conform to the *Secretary of the Interior's Standards for Architectural and Engineering Documentation* (48 FR 44730-44734) or other standards specified by NRC.

iii. In lieu of standard mitigation approaches described above, treatment plan(s) may adopt other alternative approaches to avoid, minimize or mitigate effects to historic properties, including, but not limited to, assisting in the development of Tribal historic preservation plans, developing detailed historic contexts for the region, developing educational materials, purchasing properties containing historic resources, or developing historic property management plans.

d) Following the development of potential treatment measures by consulting parties, to avoid, minimize, or mitigate adverse effects, Powertech shall prepare a treatment plan for each affected historic property.

e) In conjunction with the submission of their Plan of Activities, which detail construction and operations activities, for each year, Powertech will submit one or more draft treatment plans. A draft plan will identify properties that will be affected that year and measures that will be taken to avoid, minimize, or mitigate those effects. A draft treatment plan will be submitted for NRC and BLM review and approval four months prior to construction, so the NRC and BLM can appropriately allocate staff resources to the extent possible; additional time may be necessary in the event that NRC and BLM staff resources are limited due to conditions beyond the staff's control.

i. The treatment plan shall contain a description of the effects on each adversely affected historic property and a description of the proposed treatment for each of those historic properties.

ii. If any of the affected properties are unevaluated for NRHP eligibility, the treatment plan shall include provisions for evaluation, consistent with Stipulation 4.

iii. If monitoring by a qualified archaeologist and/or Tribal monitor is part of the strategy for resolving or preventing adverse effects, the treatment plan shall include a Monitoring Plan. The objective of monitoring is to protect known sites from construction impacts, identify at the time of discovery any archaeological materials exposed during ground disturbance, and protect such resources from damage until the procedures for discoveries per Stipulation 9 are implemented.

iv. If data recovery is part of the strategy for resolving adverse effects, the treatment plan shall specify all details of the research design, field and laboratory work methodology

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Comment [TC34]: Why is Powertech developing this for the Federal agency? This was attempted before and it failed to address tribal concerns. Why does the NRC keep relying on applicants to fulfil their Section 106 responsibilities?

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Comment [TC35]: This statement contradicts the statements concerning avoidance previously in the document. It doesn't sound like avoidance is the preferred option with such a statement.

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Comment [TC36]: Who decides when a tribal monitor is necessary? Powertech does according to this document. Once again the NRC is letting the applicant call the shots for Section 106 compliance for this project.

Comment [TC37]: The SRST-THPO will reiterate that testing should not occur on any stone feature site.

(including mapping, geomorphological or other specialized studies, controlled scientific excavation methods, analyses of data recovered, and photographic documentation as appropriate), and report preparation.

f) Upon receipt of a draft treatment plan, the NRC will submit the draft treatment plan to all signatories and consulting Tribes for a 45 day review and comment period. The NRC will consider any comments received in writing from consulting parties within the specified review period.

g) The NRC may ask Powertech to revise the draft treatment plan based on comments received from the consulting parties. The NRC will forward revisions to the draft treatment plan with a request for a second review by all signatories and consulting Tribes within a 30 day period.

h) The NRC will then distribute the final treatment plan to SD SHPO for a 30 day review period, and copies of the plan will be distributed to consulting parties.

i) Upon concurrence by the SD SHPO, or if the SD SHPO does not respond in writing within 30 days, the NRC shall direct Powertech to implement the treatment plan.

j) If, after consultation, the NRC and the SD SHPO cannot agree on appropriate terms for the treatment plan, the NRC will refer the matter to the ACHP for comment pursuant to Stipulation 14. The NRC will consider ACHP comments in making its final decision on measures to resolve the adverse effects.

6) Future Identification of Cultural Resources for Installation of Power Transmission Lines in Areas to be Determined:

a) Powertech will notify the NRC and BLM in writing, if it determines that ground-disturbing activities will be required for the installation of electrical transmission lines outside the license boundary. Powertech must provide written notification at least four months prior to commencement of work, to enable the NRC and BLM to allocate staff resources for Section 106 reviews; additional review time may be necessary if NRC and BLM staff resources are limited or due to conditions beyond the staff's control.

b) Powertech must provide the NRC, the BLM, and the SD SHPO a proposed work plan for an archaeological survey as part of the written notification. The plan will include methods for identification of all kinds of cultural properties within the transmission line corridor, including identification of properties of religious and cultural significance with the involvement of the Tribes. The proposed plan should also include report preparation requirements and schedules for the identification efforts.

c) The NRC will distribute the proposed work plan to the 23 consulting Tribes soon after it is received from Powertech.

d) Upon receipt of the Powertech work plan, the NRC, the BLM, consulting Tribes and the SD SHPO will review and provide comments on the plan within 30 days. If necessary, Powertech will revise work plan according to the instructions of the consulting parties.

e) Upon NRC approval of the work plan, Powertech will conduct surveys to identify cultural resources along the transmission corridor within an appropriate APE. Powertech will also

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Comment [TC38]: The SRST-THPO has submitted numerous comments to the NRC that were subsequently ignored. Other tribes have also submitted comments that were ignored by the federal agency. The fact that only 7 of 23 tribes participated in the NRC ultimatum for identification is proof of this. What assurances do the tribes have that their comments w … [23]

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Comment [TC39]: These surveys should be conducted now so that a federal tie is maintained to the project. The SRST-THPO is more than a little concerned that the app … [24]

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Comment [TC40]: The tribes did not accept the Powertech proposal for the initial survey at Dewey-Burdock yet this PA puts the onus on them again to develop this portion of it. … [25]

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undertake necessary testing to determine NRHP-eligibility of newly identified properties for NRC consideration. Survey and testing will be conducted under the supervision of individuals meeting the Secretary of the Interior's Professional Qualifications Standards. The report shall follow documentation standards outlined in 36 CFR § 800.11.

f) Powertech shall offer to provide financial compensation to Tribal Representatives for the work on the identification of properties of religious and cultural significance. The identification of properties of religious and cultural significance will occur at the same time or prior to identification of archaeological properties.

g) The NRC will consult with the 23 consulting Tribes on identification of properties of religious and cultural significance. This consultation could include using an open site approach to identify and evaluate places of religious and cultural significance to the Tribes.

h) Upon receipt of Powertech's completed survey report, the NRC will submit the findings to the BLM, SD SHPO, and the Tribes for a review and comment period of 45 days.

i) The NRC may request revisions to survey reports or additional investigations, after consideration of comments made by BLM, SD SHPO, and Tribes. The NRC will provide revised documents to BLM, SD SHPO, and Tribes. A second review period of 30 days may be requested.

j) The NRC will submit final determinations of NRHP-eligibility and effects to the SD SHPO for review and concurrence; this review will be completed within 30 days of the SD SHPO receiving complete information. The NRC will circulate copies of this correspondence to the other consulting parties. NRC will consider any comments received within the 30 day time period.

k) When the NRC, BLM, and SD SHPO agree evaluated properties are NRHP-eligible, avoidance of the properties will be the preferred option. When avoidance is unavoidable and adverse effects will result, adverse effects will be resolved in accordance with Stipulation 6.

l) If the NRC, BLM, and SD SHPO make the determination that identified historic properties are not eligible for listing on the NRHP, no further review or consideration of the properties will be required under this PA.

m) When the NRC and the SD SHPO disagree on NRHP-eligibility of cultural resource and the cultural resource cannot be avoided, and the disagreement cannot not be resolved by further consultation, the NRC will refer the issue to the Keeper of the National Register (Keeper) and request a formal determination of eligibility, in accordance with 36 CFR § 800.4(c)(2). The ACHP may also request referral of an NRHP-eligibility determination to the Keeper. The decision of the Keeper is final.

7) Coordination with Other Federal Reviews:

In the event that the Powertech applies for additional approvals or other assistance from federal agencies for the undertaking and the undertaking remains unchanged, the approving agency may comply with Section 106 by agreeing in writing to the terms of this PA and notifying and consulting with SHPO and ACHP. Any necessary modifications to this PA will be in accordance with the amendment process in Stipulation 15

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Comment [TC41]: The SRST-THPO and other tribes opposed this approach and continue to do so. It should not be acceptable as the preferred option as will be the case. It has been demonstrated by the NRC that they will use it regardless of the protestations by the tribes furthering the disharmony among the tribes and the federal agency. The NRC used this approach for the Crow Butte facility without consulting the tribes for their feedback on such an approach. The disharmony created by the NRC in dividing the tribes continues to be felt accross the Indian Country today but the NRC does not care about the results of their actions as long as they can issue their permit ar ... [26]

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Comment [TC42]: Will the process be the same flawed process that involved submitting the eligibility for sites for concurrence to the SD SHPO on the same day as the request f ... [27]

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Comment [TC43]: What provisions will be in place if the tribes disagree on the eligibility?

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Comment [TC44]: This is highly subjective as the impacts from a new federal undertaking might be taken. A blanket statement such as this is inappropriate.

8) Confidentiality:

The NRC, BLM, and other parties to this agreement acknowledge the need for confidentiality concerning tribal spiritual and cultural information, which was or may be provided to the NRC and BLM during the consultation process. Information provided by consulted tribal representatives, which has been identified as sensitive and was accompanied by a request for confidentiality, will remain confidential to the extent permitted by state and federal laws.

All consulting parties shall restrict disclosure of information concerning the location or other characteristics of historic properties, including properties of religious and cultural significance to Tribes, to the fullest extent permitted by law in conformance with Section 304 of the NHPA, South Dakota Codified Laws (SDCL), § 1-20-21.2, Section 9 of the ARPA, and Executive Order on Indian Sacred Sites 13007 (61 FR 26771; May 29, 1996).

9) Unanticipated Discoveries:

In the event a previously unknown cultural resource is discovered during the implementation of the Dewey-Burdock Project, all ground disturbance activities shall halt within 150 feet of the area of discovery to avoid or minimize impacts until the property is evaluated for listing on the NRHP by qualified personnel. The following additional steps shall be taken:

a) Powertech will notify the NRC, the BLM (if the site is on BLM land), and the SD SHPO of the discovery within 48 hours. Unanticipated discoveries may include artifacts, bone, features, or concentrations of these materials outside previously identified sites or in and adjacent to previously identified eligible and not eligible sites. Discoveries may also include stones and groups of stones that are out of place in their sedimentary contexts and may be parts of stone features. A "discovery" may also include changes in soil color and texture, or content suspected to be man-made, such as burned soil, ash, or charcoal fragments.

b) The NRC and BLM (as appropriate) will contact the THPO and/or the Tribal Cultural Resource Office to notify them of an unanticipated discovery soon after notification from Powertech is received.

c) Powertech will have the discovery evaluated for NRHP eligibility by a professional who meets the Secretary of the Interior's Professional Qualifications Standards in Archaeology (36 CFR § 61).

d) Powertech will provide results of evaluation and initial eligibility recommendation to the NRC and BLM within ten business days of the discovery.

e) The NRC and/or BLM, in consultation with signatories and consulting Tribes, shall evaluate the cultural resources to determine whether they meet the NRHP criteria and request concurrence of the SD SHPO. Evaluation will be carried out as expeditiously as possible in accordance with 36 CFR § 800.13(b).

f) When the NRC, BLM, and SD SHPO agree evaluated properties are NRHP-eligible, avoidance of the properties will be the preferred option. When avoidance is unavoidable and adverse effects will result, adverse effects will be resolved in accordance with Stipulation 6.

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Comment [TC45]: Include" but are not limited to,"

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Comment [TC46]: What provisions will be included in this evaluation for sites of significance to tribes? The SRST-THPO has repeatedly commented about not testing sites of significance to the tribes.

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Comment [TC47]: What provisions will be put in place for the tribes to properly identify these properties that might have significance to the them to ensure that we can make informed decisions regarding the properties eligibility? Currently this PA process cuts the tribes from the process which has been the intent of the NRC and the applicant since September of 2012.

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Comment [TC48]: The statement is redundant. Change the first avoidance to property or change unavoidable to not an option. The SRST-THPO believes that sites will not be avoided as the preferred option as the applicant is once again calling the shots as it were for the federal agency.

g) If the NRC, BLM, and SD SHPO make the determination that identified cultural resources are not eligible for listing on the NRHP, no further review or consideration of the properties will be required under this PA.

h) Human remains identified during ground disturbance activities will be treated in accordance with Stipulation 10 and Appendix D.

i) In the event of unanticipated discovery, Powertech may continue to work in other areas of the site; however, ground disturbance activities shall not resume in the area of discovery until the NRC and BLM have issued a written notice to proceed.

10) Human Remains:

a) The NRC, BLM, and Powertech recognize human remains, funerary objects, sacred objects, and items of cultural patrimony encountered during ground disturbance activities should be treated with dignity and respect.

b) Native American human remains, funerary objects, sacred objects, or items of cultural patrimony found on BLM land will be handled according to Section 3 of the Native American Graves Protection and Repatriation Act (NAGPRA) and its implementing regulations (43 CFR §10). BLM will be responsible for compliance with the provisions of NAGPRA on Federal land.

c) Native American human remains, funerary objects, sacred objects, or items of cultural patrimony found on state or private land will be handled in accordance with applicable law as described in Appendix D – Treatment of Human Remains.

d) Non-Native American human remains found on federal, state, or private land will also be treated in accordance with applicable state law.

11) Disposition of Archaeological Collections:

a) BLM will curate artifacts, materials or records resulting from archaeological identification and mitigation conducted on BLM land at the Billings Curation Center, in accordance with the Billings Curation Center Packaging Requirements in accordance with 36 CFR § 79, "Curation of Federally-Owned and Administered Archaeological Collections." BLM will consult with Indian Tribes as required in 36 CFR § 79.

b) Where testing or excavation is conducted on private land, any recovered artifacts remain the property of the landowner. Powertech will return the artifacts to landowners. Powertech will encourage landowners to donate the artifacts to the SD Archaeological Research Center or a Tribal entity, in coordination with the NRC, SHPO, and participating Tribes. Where a property owner declines to accept responsibility for the artifacts and agrees to transfer ownership of the artifacts to SD Archaeological Research Center or Tribal entity, Powertech will assume the cost for curating the artifacts in a facility meeting the requirements of 36 CFR § 79, "Curation of Federally-Owned and Administered Archaeological Collections."

Comment [TC49]: Include "in consultation with the tribes" as we are being ignored throughout this PA.

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Comment [TC50]: What provisions will be in place if the tribes disagree with the agencies and SHPO determinations? None currently.

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Comment [TC51]: Please forward this appendix to the SRST-THPO. This document should not be signed until such time as all appendixes are attached.

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Comment [TC52]: Who will be making the determination that remains are non-native? All remains should be considered to be Native American until such time as they are proven otherwise.

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12) Qualifications:

All historic property identification, evaluation, and mitigation carried out pursuant to this PA shall be performed by or under the direct supervision of qualified individuals in the appropriate historic preservation discipline meeting, at a minimum, the appropriate standards set forth in 36 CFR § 61.

In recognition of the special expertise Tribal experts have concerning properties of religious and cultural significance, the standards of 36 CFR § 61 will not apply to knowledgeable, designated tribal representatives carrying out identification and evaluation efforts for properties of religious and cultural significance to Tribes.

13) Compliance Monitoring:

NRC affirms avoidance of adverse effects to historic properties remains the preferred course of action.

a) Powertech will ensure employees and/or contractors involved in all phases of the Project are aware of and comply with the requirements of the PA. Powertech may use measures such as initial orientation training, as well as pre-job briefings to inform employees and contractors of their responsibilities under the PA. Compliance with this PA is a condition of the NRC license and a condition of the BLM POO.

b) Prior to initiating construction activities, Powertech will develop a Monitoring Plan specific to the project, identifying specific areas, activities, and if appropriate, historic properties that require monitoring during development of the Project, ensuring the requirements of this PA and the treatment plans developed under the provisions of Stipulation 6 are met. The monitoring plan will include provisions for annual reporting of the results of the monitoring program to the signatories and the consulting Tribes to this PA.

i) Powertech will provide the Monitoring Plan to the NRC, which will distribute it to the signatories and consulting Tribes to this agreement for a 30 day review and comment period.

ii) The NRC will request that Powertech make any necessary revisions to the plan, and the revised Monitoring Plan will remain in effect for all covered ground-disturbing activities during the license period.

c) Powertech will engage the services of a Monitor with specific responsibilities to coordinate the requirements of the monitoring plan, the treatment plans, and this agreement during project construction.

i) The Monitor will meet the Secretary of the Interior's Professional Qualifications for Archaeology. Preference will be given to individuals meeting those qualifications who are employed by tribal enterprises, especially during phases of the monitoring program where sites with religious and cultural significance to the Tribes might be affected. In the case of an unanticipated discovery or imminent threat to an avoided historic property, the Monitor shall have authority to stop certain construction activities.

ii) The Monitor will coordinate with Powertech and its contractors during the construction phases of the Project.

d) Powertech will provide periodic updates to all consulting parties on the status of the monitoring program as specified in Appendix C.

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Comment [TC53]: Include "and eligibility determinations"

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Comment [TC54]: The plans developed thus far by Powertech have not been acceptable to the consulting tribes. Why does the NRC allow them to essentially make their decisions for them? This further enforces the widely held belief that Powertech is deciding the 106 process and not the federal agency.

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Comment [TC55]: This statement allows for the applicant to decide which areas need monitoring for the tribes. I'm unaware of any action from our chairman which allows Powertech to decide for the Standing Rock Sioux Tribe which sites we require monitoring on. Please provide this documentation to the SRST-THPO so that we may discuss the issue with our chairman. This statement alone demonstrates the lack of good faith consultation which the NRC has embarked upon with this and all of their projects. The SRST-THPO and all tribes should be involved in this process as our concerns for our sites are certainly different than that of an applicant who refused to negotiate with the tribes after August of 2012.

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Comment [TC56]: So Powertech is once again deciding who can monitor sites of significance to the Standing Rock Sioux Tribe. By tribal resolution that decision rests s… [30]

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Comment [TC57]: Currently, there are very few archaeologists in the Great Plains who would meet those criteria and short of Powertech hiring Ben Rhodd there is no… [32]

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14) Dispute Resolution: *formatting

Should any signatory to this PA object in writing to any actions proposed or to the manner in which terms of the PA are implemented, the NRC shall consult with the party to resolve the objection. When the NRC determines an objection cannot be resolved, the NRC will:

a) Forward all documentation relevant to the dispute, including the NRC proposed resolution, to the ACHP and send a copy to all other consulting parties. The ACHP shall provide NRC with its advice on the resolution of the objection within 30 days of receiving adequate documentation.

b) Within 30 days after receipt of all pertinent documentation, the ACHP shall exercise one of the following options:

i. Advise the NRC that the ACHP concurs in the NRC proposed final decision, whereupon the NRC shall respond accordingly;

ii. Provide the NRC with recommendations, which the NRC will consider in reaching a final decision on the objection;

iii. Notify the NRC that the objection will be referred to the ACHP membership for formal comment and refer the objection to the ACHP membership for comment within 30 days. The NRC will consider comments in accordance with 36 CFR §800.7(c)(4);

iv. Should the ACHP not exercise one of the above options within 30 days after receipt of all pertinent documentation, the NRC may proceed with its proposed response.

c) Prior to making a final decision on the dispute, the NRC will prepare a written response that addresses timely comments from signatories and consulting Tribes to the PA. The NRC will provide signatories, consulting Tribes, and the ACHP with a copy of its written response. The NRC may implement its final decision.

d) The NRC will consider recommendations and comments made by the ACHP that are related to the objection. NRC responsibilities under this Agreement, which are not the subject of the objection, shall remain unchanged

15) Amendment:

A signatory to this agreement may request that it be amended, whereupon the signatory parties will consult to reach a consensus on the proposed amendment. Concurring parties will be provided an opportunity to consult and comment on the proposed amendment. An amendment will be effective on the date the amended PA is signed by all of the signatories to this PA. If a required signatory does not sign the amended PA, the amendment will be void. The amendment shall be appended to this PA as an Appendix.

Any federal agency, including the EPA, may in the future decide to rely on this agreement in connection with satisfying its Section 106 responsibilities and, may join the agreement by adding its signature and circulating the amended agreement to the appropriate parties.

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Comment [TC58]: Will this be the same timely comments that were utilized in the eligibility determinations in which the tribes were given the information on the sites on the same day that the SD SHPO was asked to concur on the eligibility determination by the NRC?

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Comment [TC59]: Will the NRC be considering any comments made by the tribes in any disputes according to section 14?

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Comment [TC60]: So basically, if one signatory decides the amendment does not fit into their plans they can refuse to sign it and the amendment is voided. Who wrote this statement? This greatly favors the applicant in all amendment decisions. If they disagree with a proposed amendment that would impac … [35]

Comment [TC61]: The SRST-THPO opposes this statement being included as each undertaking must follow through its own Section 106 process and not adopt the incorrect … [36]

16) Termination:

a) Any Signatory to this PA may initiate termination by providing written notice to the other signatories of their intent. After notification by the signatory initiating termination, the remaining signatories shall have 30 days to consult to seek agreement on amendments or other actions that could address objections and avoid termination. If consultation fails, the termination will be effective after 30 days, unless all signatories agree to a longer period.

b) In the event the PA is terminated, the signatories will comply with any applicable requirements of 36 CFR § 800.4 through 800.7 with regard to the original undertaking covered by this PA.

17) Duration:

Implementation of the stipulations in this agreement must begin within five years from the date of its execution. During that time, the NRC may consult with the signatories and concurring parties to amend the agreement in accordance with Stipulation 16. The agreement will be in place until ten years from the day of execution or the termination of the license.

18) Anti-Deficiency Act:

The stipulations of this Agreement are subject to the provisions of the Anti-Deficiency Act (Pub.L. 97–258, 96 Stat. 923; 31 U.S.C. §1341, Limitations on expending and obligating amounts). If compliance with the Anti-Deficiency Act alters or impairs the ability of the NRC to implement this Agreement, the NRC will consult in accordance with the amendment and termination procedures in this Agreement.

Execution of this PA by the NRC, BLM, SD SHPO, ACHP, and Powertech and the implementation of its terms is evidence the NRC and BLM have taken into account the effects of this undertaking on historic properties and afforded the ACHP an opportunity to comment.

Signatories:

United States Nuclear Regulatory Commission

By:_____ Date:_____
Title: Larry W. Camper, Director
Division of Waste Management and Environmental Protection

United States Bureau of Land Management

By:_____ Date:_____
Title: Marian M. Atkins, South Dakota Field Manager

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Comment [TC62]: These sections were not followed in the original undertaking. What provisions will be in place to ensure that the same bad policies initiated by the NRC which resulted in division amongst the tribes which continues to this day will not just continue?

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Comment [TC63]: So what exactly will be followed during the intervening 5 years? There is no mention of what stipulation will be issued between the time the NRC licensed this project which will be the very same day they get this PA signed and 5 years from now when it must be enforced. Once again who wrote this section? It heavily leans in the favor of the applicant.

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Comment [TC64]: This statement is an outright fallacy and insulting to all of the tribes who participated in consultation with this project. In particular, with the tribes who objected to the ultimatum enforced identification effort endorsed by the NRC at the urging of third party consultants. The tribes who did not accept the forced ultimatum approach have never been afforded the opportunity to address our sites of significance within the license boundary in a manner consistent with the needs of our acceptable identification efforts even though Commissioner Magwood assured the SRST-THPO officer that they would be. PA's should not be used to circumvent responsibilities within the Section 106 process as they are being used in this project. It is extremely premature of the NRC and the ACHP to embark upon execution of a PA when there are still so many questions surrounding the original identification effort and eligibility determinations. The NRC has and continues to ignore the tribes by stating they will not reopen identification under any circumstances. We had our chance according to them. That chance would not have resulted in a meaningful identification process being employed. The consulting tribes sent their objections to the NRC. The NRC chose to adopt it as the only solution anyway further enforcing the view that this project is run by the ap ... [37]

Final DRAFT

South Dakota State Historic Preservation Office

By:_____ Date:_____
Title: Jay Vogt, State Historic Preservation Officer

Advisory Council on Historic Preservation

By:_____ Date:_____
Title: John Fowler, Executive Director

Invited Signatories:

Powertech USA, Inc.

By:_____ Date:_____
Title:

Concurring Parties:

Cheyenne and Arapaho Tribes

By:_____ Date:_____
Title:

Cheyenne River Sioux Tribe

By: _____ Date:_____
Title:

Apsaalooke (Crow) Nation

By:_____ Date:_____
Title:

Crow Creek Sioux Tribe

By: _____ Date:_____
Title:

Eastern Shoshone Tribe

By:_____ Date:_____
Title:

Flandreau-Santee Sioux Tribe

By: _____ Date:_____
Title:

Fort Peck Assiniboine/Sioux

By:_____ Date:_____
Title:

Lower Brule Sioux Tribe

By:_____ Date:_____
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Lower Sioux Tribe

By:_____ Date:_____
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Northern Arapaho Tribe

By: _____ Date:_____
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Northern Cheyenne Tribe

By:_____ Date:_____
Title:

Oglala Sioux Tribe

By: _____ Date:_____
Title:

Omaha Tribe of Nebraska

By:_____ Date:_____
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Pawnee Nation of Oklahoma

By: _____ Date:_____
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Ponca Tribe of Nebraska

By:_____ Date:_____
Title:

Rosebud Sioux Tribe

By: _____ Date:_____
Title:

Santee Sioux Tribe of Nebraska

By:_____ Date:_____
Title:

Sisseton-Wahpeton Oyate Tribes

By: _____ Date:_____
Title:

Spirit Lake Tribe

By:_____ Date:_____
Title:

Standing Rock Sioux Tribe

By: _____ Date:_____
Title:

Mandan, Hidatsa & Arikara Nation
Three Affiliated Tribes

By:_____ Date:_____
Title:

Turtle Mountain Band of Chippewa

By: _____ Date:_____
Title:

Yankton Sioux Tribe

By:_____ Date:_____
Title:

Page 3: [1] Comment [TC10] **Terence Clouthier** **02/19/2014 12:37:00 PM**

The tribes were offered an ultimatum to either accept the proposal that would in no way properly identify sites of significance to them or be left out of the identification process. This is not a good faith effort to identify sites of significance to tribes. The proposal ignored the information gathered under 36CFR800.4 as to what is actually required to identify and instead the proposal amounted to just saying go drive around where you want – stay for up to one month or leave after three days. That was essentially the proposal put before the tribes.

Page 3: [2] Comment [TC15] **Terence Clouthier** **02/19/2014 4:16:00 PM**

The SRST-THPO is aware that the NRC submitted their eligibility determinations to the SD SHPO for concurrence on the same day that the tribes were asked to provide comments on eligibility in the 30 day window. How can the NRC imply that this was conducted in good faith? The SD SHPO issued their concurrence on Jan 14th, 2014.The SRST-THPO did not even receive the documents until January 7th, 2014 and the comment review period was barely a week old. This rush to complete the PA and SEIS to issue a licence is not being conducted in good faith. The SRST-THPO has no confidence that our concerns would have been addressed by the NRC as they did not even wait to recieve any comments from tribes before asking for concurrence from SD SHPO. This amounts to token checkmarks by the federal agency and not good faith consultation. The SRST-THPO would require field visits to the sites to propoerly assess their eligibility per our tribal expertise.

Page 5: [3] Comment [TC23] **Terence Clouthier** **02/20/2014 11:07:00 AM**

This PA will take the tribes completely out of the consultation process according to this statement. Tribes have a right to comment on identification efforts per 36CFR800.2 yet this PA will take that right out of the tribes hands and put it squarely in the applicants hands. This was attempted by the applicant in the initial identification effort in August of 2011 when the NRC asked them to develop a plan for identification. That plan was unanimously disagreed to by every tribe who was consulting at that time for this project. Yet, the NRC is once again trying to limit the participation of tribes.

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Page 5: [6] Comment [TC24] **Terence Clouthier** **02/18/2014 3:39:00 PM**

This didn't work the last time this was planned and once again it is being proposed. It resulted in the NRC dividing the tribes against each other and this will be the case again for this project. The NRC attempted to mislead some tribes into accepting their proposal by misconstruing the participation level of other tribes. There has been no good faith effort for identification on this project for the tribes who did not accept the powertech handout forced upon them by the NRC. An ultimatum is not good faith.

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Page 5: [8] Comment [TC25] **Terence Clouthier** **02/18/2014 3:42:00 PM**

The SRST-THPO is opposed to any testing of our sites of significance. We have stated this multiple times in consultation yet our expertise for evaluating our sites is being ignored by this PA.

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Page 6: [12] Comment [TC29] **Terence Clouthier** **02/19/2014 4:27:00 PM**

Please provide the details of how this will be conducted. The tribes might have concerns not addressed by non-tribal personnel.

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Page 6: [17] Comment [TC31] **Terence Clouthier** **02/18/2014 3:51:00 PM**

This will require an amendment to the PA. The SRST-THPO is concerned that an agreement is not binding if it is not included in this PA. The NRC should resubmit the PA with the proposals included so that no additional ammendments or agreements are neccessary. This further enforces the view that this PA is not a good faith effort but is rather a rush to issue the license.

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Page 6: [19] Comment [TC32] **Terence Clouthier** **02/20/2014 11:09:00 AM**

This should be developed currently within this PA and not at some future date. Concerns for this are outlined in TC 27.

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Page 6: [21] Comment [TC33] **Terence Clouthier** **02/19/2014 12:23:00 PM**

These treatment plans do not take into account any specialized expertise of the tribes for evaluating our sites of significance which can also be eligible under Criteria A-D. The SRST-THPO objects to this treatment plan as currently planned as it over emphasizes the use of archaeologists and not tribal expertise.

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Page 8: [23] Comment [TC38] **Terence Clouthier** **02/18/2014 4:02:00 PM**

The SRST-THPO has submitted numerous comments to the NRC that were subsequently ignored. Other tribes have also submitted comments that were ignored by the federal agency. The fact that only 7 of 23

tribes participated in the NRC ultimatum for identification is proof of this. What assurances do the tribes have that their comments won't just be used to document " good faith " consultation without addressing them as is currently the case with the NRC for all of their projects

Page 8: [24] Comment [TC39] **Terence Clouthier** **02/20/2014 10:38:00 AM**

These surveys should be conducted now so that a federal tie is maintained to the project. The SRST-THPO is more than a little concerned that the applicant will argue against having to involve the federal agency if their is no demonstrable tie to the transmission lines for the issuance of the NRC permit or no BLM involved land and therefore no tribal involvement due to no Section 106 tie. Keystone XL utilized this same mauneuver. This represents a complete lack of understanding of the definition of APE according to the 36CFR800.16 (d) and was a huge stumbling block in the scope of work process throughout 2011 and 2012. The NRC's own failures at properly defining the APE helped to create the impasse so that they would attempt to move the process forward in their own words.

Page 8: [25] Comment [TC40] **Terence Clouthier** **02/20/2014 11:13:00 AM**

The tribes did not accept the Powertech proposal for the initial survey at Dewey-Burdock yet this PA puts the onus on them again to develop this portion of it. This will result in the same failures occuring once again with the vast majority of the tribes unable to participate in the identification efforts because it will not meet our required standards for identification efforts. Should a PA really be used to circumvent the 106 process with a flawed methodology that did not already work and enforce it? The SRST-THPO submits that it should not.

Page 9: [26] Comment [TC41] **Terence Clouthier** **02/20/2014 11:14:00 AM**

The SRST-THPO and other tribes opposed this approach and continue to do so. It should not be acceptable as the preferred option as will be the case. It has been demonstrated by the NRC that they will use it regardless of the protestations by the tribes furthering the disharmony among the tribes and the federal agency. The NRC used this approach for the Crow Butte facility without consulting the tribes for their feedback on such an approach. The disharmony created by the NRC in dividing the tribes continues to be felt accross the Indian Country today but the NRC does not care about the results of their actions as long as they can issue their permit and be done with the tribes they are happy to create this disharmony. Other federal agencies have followed this practice as well now that the NRC has created it.

Page 9: [27] Comment [TC42] **Terence Clouthier** **02/19/2014 4:32:00 PM**

Will the process be the same flawed process that involved submitting the eligibility for sites for concurrence to the SD SHPO on the same day as the request for comments on eligibility determinations to the tribes?

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Page 12: [30] Comment [TC56] **Terence Clouthier** **02/20/2014 11:17:00 AM**

So Powertech is once again deciding who can monitor sites of significance to the Standing Rock Sioux Tribe. By tribal resolution that decision rests solely with the SRST-THPO office and not with an outside agency or entity. We can provide this resolution.

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Page 12: [32] Comment [TC57] **Terence Clouthier** **02/20/2014 11:18:00 AM**

Currently, there are very few archaeologists in the Great Plains who would meet those criteria and short of Powertech hiring Ben Rhodd there is not a single one that can properly address Standing Rock Sioux Tribe concerns for our sites of significance. The SRST-THPO would have no confidence in any other

archaeologist currently working on the Great Plains. Tribal monitors utilizing our specialized expertise must be employed in addition to any Secretary of the Interior Standards qualified personnel. We will accept monitors from the following tribes to address our concerns in addition to our own: Oglala Sioux Tribe, Cheyenne River, Rosebud Sioux Tribe, and Sisseton Wahpeton Oyate.

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Page 13: [35] Comment [TC60] **Terence Clouthier** **02/20/2014 9:51:00 AM**

So basically, if one signatory decides the amendment does not fit into their plans they can refuse to sign it and the amendment is voided. Who wrote this statement? This greatly favors the applicant in all amendment decisions. If they disagree with a proposed amendment that would impact their practices all they have to do is not sign it and it doesn't pass. This does not surprise the SRST-THPO as the NRC has been favoring the applicant and their timeleine since the inception of this project

Page 13: [36] Comment [TC61] **Terence Clouthier** **02/20/2014 10:26:00 AM**

The SRST-THPO opposes this statement being included as each undertaking must follow through its own Section 106 process and not adopt the incorrect and consitently terrible policies of the NRC to complete their Section 106 process. I'm surprised the ACHP would even consider this!

Page 14: [37] Comment [TC64] **Terence Clouthier** **02/20/2014 11:24:00 AM**

This statement is an outright fallacy and insulting to all of the tribes who participated in consultation with this project. In particular, with the tribes who objected to the ultimatum enforced identification effort endorsed by the NRC at the urging of third party consultants. The tribes who did not accept the forced ultimatum approach have never been afforded the opportunity to address our sites of significance within the license boundary in a manner consistent with the needs of our acceptable identification efforts even though Commissioner Magwood assured the SRST-THPO officer that they would be. PA's should not be used to circumvent responsibilities within the Section 106 process as they are being used in this project. It is extremely premature of the NRC and the ACHP to embark upon execution of a PA when there are still so many questions surrounding the original identification effort and eligibility determinations. The NRC has and continues to ignore the tribes by stating they will not reopen identification under any circumstances. We had our chance according to them. That chance would not have resulted in a meaningful identification process being employed. The consulting tribes sent their objections to the NRC. The NRC chose to adopt it as the only solution anyway further enforcing the view that this project is run by the applicants timeline and not any meaningful good faith effort. By endorsing this PA ; the ACHP is agreeing that a process whereby 4 tribes totalling 8 people were given two weeks to survey over 10,000 acres is a process that is acceptable under Section 106. This is unacceptable and unconscionable of the ACHP to agree to the execution of this PA knowing full well the issues that the tribes continue to have for this project and its identification and eligibility determination process.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of	)	
	)	
POWERTECH (USA) INC.	)	Docket No. 40-9075-MLA
(Dewey-Burdock In Situ Recovery Facility	)	
Source Materials License Application)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **Email of the Standing Rock Sioux Tribe Sent to Commissioner William Magwood and Others** have been served upon the following persons by Electronic Information Exchange, and by electronic mail as indicated by an asterisk*****.

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Dated at Rockville, Maryland,
this 28th day of February 2014.