December 14, 2012

Mr. Kevin Keckler, Chairman
Cheyenne River Sioux Tribe
P.O. Box 590
Eagle Butte, SD 57625-0590

SUBJECT: RESPONSE TO COMMENTS RECEIVED REGARDING TRIBAL SURVEY, DEWEY-BURDOCK IN-SITU RECOVERY PROJECT

Dear Chairman Keckler:

The U.S. Nuclear Regulatory Commission (NRC) staff would like to thank all consulting parties for their responses to the staff's October 31, 2012 letter. In that letter, we announced our intent to move forward with a survey to identify properties of significance to tribes within the Dewey-Burdock Project's area of known disturbance. The survey approach was based on a proposal sponsored by the Turtle Mountain Band of Chippewa Indians and the Three Affiliated Tribes, and it was prepared by the consulting firm Kadramas, Lee and Jackson (KLJ). The approach would have involved a three-week field survey of the area of known disturbance led by tribal members affiliated with the Turtle Mountain Tribe and the Three Affiliated Tribes. As part of this approach, the NRC staff invited all interested tribes to provide a qualified representative to join the survey team and participate in the three-week field survey, with compensation for each individual's time and expenses.

The NRC staff received written responses from the Standing Rock Sioux Tribe, Rosebud Sioux Tribe, Oglala Sioux Tribe, Sisseton-Wahpeton Oyate, and Yankton Sioux Tribe objecting to the proposed survey. The tribes stated that the NRC staff's endorsement of the KLJ proposal ignored information previously provided by the tribes. Specifically, the tribes argued that a field survey is needed to identify sites significant to tribes; that the field survey must include the entire project area, not just the area directly affected by the proposed project; that the field survey must be conducted by qualified tribal representatives, not archaeologists; and that survey approaches based on predictive modeling are not appropriate for identifying tribal sites. The tribes further stated that the NRC was not consulting in good faith because it was ignoring information provided by consulting tribes, and because it endorsed a survey proposal submitted by tribes who had previously told the NRC that the project was unlikely to have an effect on places of significance to them.

The NRC staff would like to address the concerns of the five tribes who objected to the KLJ survey approach. The NRC staff endorsed KLJ's survey proposal in response to information provided by the consulting tribes themselves. In particular, the staff agreed with the tribes' recommendation that a field survey conducted by qualified tribal representatives is the preferred approach for identifying and evaluating properties of significance to tribes. KLJ's survey would have accomplished this goal because it would have provided an opportunity for all tribes to participate directly and independently in the identification and evaluation of historic properties at the Dewey-Burdock site.

The NRC staff disagrees with all of the other objections raised by the five tribes. Given the nature and scale of the proposed Dewey-Burdock Project, and the nature and extent of the project's potential direct and indirect effects on historic properties, the staff does not believe an intensive-level survey of the entire project area is warranted. The Section 106 regulations at 36 CFR 800.4(b) require that the NRC make a reasonable and good faith effort to identify historic properties that may be affected by the Dewey-Burdock project. *See also* "*Meeting the 'Reasonable and Good Faith' Identification Standard for Section 106 Review* (November 10, 2011). Further, Section 106 regulations expressly permit an agency to take a phased approach to complying with the National Historic Preservation Act. *See* 36 CFR § 800.14(b). The NRC staff anticipated that the type of survey proposed by KLJ and its tribal sponsors would have produced results sufficient to meet that standard. This is why our previous letter to the consulting tribes, dated September 18, 2012, requested proposals that focused on a field survey for the 2,637-acre area of known disturbance for the proposed Dewey-Burdock project.

The NRC staff also disagrees with the suggestion that differing opinions among consulting parties with regard to appropriate survey methodologies somehow constitutes a failure on our part to consult as required under Section 106. The staff's endorsement of the KLJ proposal came after 14 months of consultations with the tribes over the identification of potential properties at the Dewey-Burdock site. Since February 2012, the staff had been trying to facilitate a statement of work (SOW) between the applicant and the tribes, under which either the tribes themselves or a tribal contractor would lead a survey of the Dewey-Burdock site. However, the parties were unable to agree on a SOW and the NRC staff therefore asked the consulting parties for alternative approaches to identify properties at the Dewey-Burdock site. In response to the staff's request, KLJ submitted its proposal, which the NRC reviewed and circulated among the consulting parties for comment.

The NRC staff endorsed the KLJ proposal because it included a clear statement of survey methodology and used a team-centered approach led by tribal representatives from the Turtle Mountain Band and the Three Affiliated Tribes. The proposal included participation by both Tribal Historic Preservation Officers affiliated with the two sponsoring tribes. While it is true that the survey proposal was prepared by a private firm that offers archaeological survey services, it was the NRC staff's understanding that the field survey would in fact be led by tribal representatives, not KLJ archaeologists, and that the survey would be conducted for the specific purpose of identifying cultural sites of importance to all tribes who chose to participate in the survey. The fact that the survey proposal was sponsored by tribes who had previously stated they were unlikely to have concerns about the project says nothing about the qualifications of the individuals leading the survey. Additionally, to ensure that the survey produced results responsive to the specific interests and concerns of all consulting tribes, the NRC staff invited each tribe to provide its own representative to join the proposed survey team. It was the NRC staff's intent that this survey effort provide each participating tribe with an independent opportunity to identify cultural properties of interest to its members, gather relevant information, and provide independent recommendations regarding the National Register eligibility of those properties.

The NRC has recently learned that KLJ will be unable to conduct the survey described in its proposal. Accordingly, the NRC staff intends to move forward with an alternative field survey approach. The staff will provide the consulting parties with more information on this approach in the near future, and we will notify the consulting tribes of any opportunities to participate in the field survey.

With winter weather fast approaching, and with KLJ no longer able to support a field survey, it is apparent that the NRC staff will not be able to meet our goal of completing a survey before the end of 2012. We are therefore postponing survey efforts until the spring of 2013. The applicant will offer specific times in the spring of 2013 where the Dewey-Burdock site would be opened for interested tribes to perform on-the-ground surveys. As communicated during the teleconference held on August 21, 2012, as well as in our letter dated September 18, 2012, the proposed field survey will focus on the 2,637-acre area of known disturbance. In the coming weeks, the NRC staff will send specific plans for initiating the field survey in the spring of 2013.

The NRC staff would also like to initiate discussions regarding development of a programmatic agreement (PA) over the next several months to address remaining areas of consultation under Section 106 for the Dewey-Burdock project. NRC invites all interested consulting parties to provide information relevant to the development of the PA. Finally, the NRC staff would emphasize that we are committed to maintaining the confidentiality of site location information. To be clear, this information will not be disclosed to the public.

NRC's Project Manager Haimanot Yilma or NRC's consultant Randy Withrow will be contacting each of you to discuss potential meeting dates and suggested agenda items for our next conference call.

Thank you once again for your comments. We value your participation in this consultation process.

Sincerely,

/RA/ A Mohseni for LCamper

Larry W. Camper, Director
Division of Waste Management
and Environmental Protection
Office of Federal and State Materials
and Environmental Management Programs

cc: Steve Vance

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Sincerely,

Larry W. Camper, Director
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Office of Federal and State Materials
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cc: S. Vance

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