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

In the Matter of POWERTECH (USA), INC., (Dewey-Burdock In Situ Uranium Recovery Facility)	Docket No. 40-0975-MLA ASLBP No. 10-898-02-MLA-BD01 March 17, 2014

CONSOLIDATED INTERVENORS' STATEMENT OF CONTENTIONS

Consolidated Intervenors[1] hereby timely submit this statement of contentions based on the Board's Scheduling Order dated February 20, 2014, and the Final Supplemental Environmental Impact Statement ("FSEIS") for Powertech (USA) Inc.'s proposed Dewey-Burdock Project in-situ leach (ISL) uranium mine.

I. INTRODUCTION

The FSEIS fails to meet the requirements of the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4231, et seq., the National Historic Preservation Act ("NHPA"), 16 U.S.C. § 470, et seq., and implementing regulations, including NRC regulations in 40 C.F.R. Part 51, specifically including 10 CFR §51.45, §51.10, §51.70, and §51.71, because the FSEIS does not provide analyses that are adequate, accurate, and complete in all material respects to demonstrate that cultural and historic resources within the project area are identified and protected pursuant to Section 106 of the NHPA. As a result, the FSEIS fails to comply with Section 51.60 because its analyses are not adequate, accurate and complete in all material respects concerning archaeological sites and materials within the project area. No sub-surface testing was performed in order to demonstrate that archaeological sites within the project area are properly identified, evaluated and

[1] Susan Henderson, Dayton Hyde and Aligning for Responsible Mining ("ARM").

protected and to show that it has submitted a proper analytic discussion under Sections 51.45 and 51.60. Not all interested tribes were consulted. Proper baseline information is lacking in the FSEIS and it fails to demonstrate adequate confinement and protection of groundwater resources.

As required by 10 C.F.R. § 2.309, Consolidated Intervenors set forth below specific contentions with respect to the sufficiency of the FSEIS under the NEPA, NHPA, and applicable regulations, including those of NRC, the federal Advisory Council on Historic Preservation ("ACHP"), and the Council on Environmental Quality ("CEQ"). Each contention set forth below implicates and asserts violations of 10 C.F.R. §§ 51.10, 51.70, and 51.71, which require NRC compliance with all provisions of NEPA as well as the NHPA, and any other applicable federal, state, and local requirements.

As detailed herein and in the Consolidated Intervenors' Statement of New Contentions on the Draft Supplemental Environmental Impact Statement (DSEIS) filed January 25, 2013 (the "DSEIS Contentions"), NRC staff has failed to meet the requirements of the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4231, *et seq.*, the National Historic Preservation Act (NHPA), 16 U.S.C. § 470, *et seq.*, and implementing regulations, including NRC regulations in 40 C.F.R. Part 51. These failures remain a constant in this proceeding.

Consolidated Intervenors note that none of the issues identified in the DSEIS Contentions have been addressed in the FSEIS; rather, the NRC Staff has simply decided that it has a different view than Consolidated Intervenors as to the meaning of the law and that is the gravamen of this case. Consolidated Intervenors further note that the majority of the same issues were identified both in the initial statement of contentions premised on

Powertech's Environmental Report, Technical Report, and Supplemental Report that comprised the Application as well as the DSEIS Contentions. Despite having over four years since the date of the application to collect the necessary data and information, it appears that very little, if any, additional primary date or information has been collected by Powertech or required by NRC Staff to resolve the serious environmental and cultural issues identified by the Consolidated Intervenors and the Oglala Sioux Tribe (the "Tribe").

As discussed herein, the FSEIS has failed to address substantial concerns regarding impacts to the Tribe's cultural and historic resources, and the lack of information necessary to determine the hydrogeology and geochemistry of the site. In fact, the NRC Staff's decision to separate the National Historic Preservation Act ("NHPA") section 106 'consultation' from the NEPA process has exacerbated the problems, and effectively relegated cultural and historic resource protection to an afterthought in violation of NEPA and of the trust responsibility and treaty obligations owed to the Tribe and its members.

The result is that any meaningful review of the impacts associated with cultural and historic resources and any mitigation associated with these impacts has been inappropriately and illegally excluded from the NEPA process. Subsurface testing has never occurred to date within the proposed project area. The Augustana College survey has never been upgraded to a complete analysis despite the protestations of Consolidated Intervenors, the Tribe and others federally-recognized and interested tribes such as the Standing Rock Sioux Tribe. These Sioux Tribes have consistently complained at meetings and in writing but to no avail.

All native complaints in this case have fallen on deaf ears and this has been noticed by the Sioux Tribes. See recent letters to the NRC Staff from Oglala Sioux President Bryan Brewer and Standing Rock Sioux Tribe Tribal Historic Preservation Officer W. Young previously filed in this proceeding and attached as Exhibit 2 to the Statement of Contentions filed March 17, 2014 by the Tribe in this matter.

Ongoing hydrologic and geologic inadequacies include the lack of a defensible baseline ground water characterization, the lack of a thorough review of the natural and manmade interconnections between aquifers in the area that may allow for cross-contamination with the aquifer slated for chemical mining, and the lack of the required analysis of proposed mitigation measures.

The Second Supplemental Declaration of Dr. Robert E. Moran (attached to the Tribe's FSEIS filing today as Exhibit 1 thereto) incorporates by reference his prior Supplemental Declaration, and further details the lack of scientifically-defensible analysis in the FSEIS regarding potential impacts to ground water associated with the proposed Project. See Second Supplemental Declaration of Dr. Robert E. Moran, attached as Exhibit 1 to March 17, 2014 OST Contentions. Dr. Moran's Second Supplemental Declaration supports many of the contentions raised and admitted to this proceeding. As discussed below, these contentions as admitted should be considered both contentions of omission and contentions of inadequacy and revolve around the failure of the FSEIS to portray the required analyses and review regarding necessary components of the project.

II. DISCUSSION OF ADMITTED CONTENTIONS, CONTENTIONS OF OMISSION AND INADEQUACY, AND MIGRATION TENET

As required by 10 C.F.R. § 2.309, sets forth below are the specific contentions that Consolidated Intervenors seek to have litigated in this proceeding. Each contention raises issues with respect to the sufficiency of the FSEIS under the National Environmental Policy Act ("NEPA"), National Historic Preservation Act ("NHPA"), and applicable regulations, including those of NRC, the federal Advisory Council on Historic Preservation ("ACHP"), and the Council on Environmental Quality ("CEQ"). At minimum, each contention set forth below implicates and asserts violations of 10 C.F.R. §§ 51.10, 51.70, and 51.71, which require NRC compliance with all provisions of NEPA as well as the NHPA, and any other applicable federal, state, and local requirements.

As stated by the Board in its February 20, 2014 Memorandum, the Board considers the "migration tenet" to apply to contentions in this case. Memorandum at 4-5. As a result, where information in the FSEIS is sufficiently similar to the information in the DSEIS, a party need not file a new or amended contention. Rather, the previously admitted contention will simply be viewed as applying to the FSEIS, "so long the FSEIS analysis or discussion is essentially in para materia with the DSEIS analysis or discussion that is the focus of the contention." Id at 5. Consolidated Intervenors contend that the FSEIS discussion of each of the already-admitted contentions is in para materia with the analysis from the DSEIS. This pleading addresses each admitted contention in turn, with reference and discussion to any new analysis or discussion in the FSEIS, to the extent it exists. Further, in an abundance of caution, Consolidated Intervenors hereby incorporate by reference the detailed discussion of contentions in the Tribe's Statement of Contentions dated March 17, 2014.

Lastly, Consolidated Intervenors affirmatively assert that each admitted contention already consists of a contention of adequacy or a combined contention of adequacy and omission. This is borne out by the verbiage used to describe the contentions as set forth in the Board's July 22, 2013 Order (LBP-13-09) at 95-96, where the Board uses the word "adequate" in the context of admission of Contentions 2, 3, 4, 6. Based on the discussions provided in both the prior contention pleadings on the application and the DSEIS, Consolidated Intervenors assert that inadequacy is also alleged with respect to the subject matter contained in Contentions 1A, 1B, 9, 14A, and 14B. Thus regardless of how the DSEIS contention pleading referred to some of these contentions as contentions of omission, the discussions contained therein and in the original contention pleading on the application materials, clearly demonstrate that these contentions are also contentions of omission and inadequacy.

III. CONTENTIONS

Contention 1A: **Failure to Meet Applicable Legal Requirements Regarding Protection of Historical and Cultural Resources.**

The FSEIS fails to meet the requirements of NEPA, the NHPA, and 40 C.F.R. §§ 51.10, 51.70 and 51.71, along with the NRC, ACHP, and CEQ regulations because it lacks an adequate description of either the affected environment or the impacts of the project on archaeological, historical, and traditional cultural resources – in this way it is no different than the DSEIS. The FSEIS, like the DSEIS, also fails to analyze or demonstrate compliance with the relevant portions of NRC guidance included at NUREG-1569 section 2.4. Section 51.71(a) provides that the DSEIS is to "address the

topics in paragraphs (b), (c), (d) and (e) of this section and the matters specified in §§ 51.45, 51.50, 51.51, 51.52, 51.53, 51.54, 51.61 and 51.62."

10 C.F.R. § 51.71(d) and NEPA require the FSEIS to include an analysis of all environmental impacts of a proposed action, including cultural impacts. 10 C.F.R. §51.70(a) places an affirmative duty on NRC Staff to conduct all NEPA analysis in conjunction with other surveys or studies required under federal law. This includes necessary surveys required under NEPA and the NHPA. In this case, the FSEIS demonstrates that a significant number of archaeological, historical, and traditional cultural resources on site have not been evaluated because no sub-surface testing has been done; therefore, the potential impacts to these resources have not been addressed.

Despite this confirmed lack of adequate survey, the FSEIS prematurely determines that the impacts from operations fit within the "small" category. Such pre-ordained and categorical conclusions, without the benefit of necessary information and a competent analysis raise serious legal and procedural questions regarding the integrity of the entire FSEIS analysis, and form the basis for a contention as to whether or not the FSEIS conforms with NRC regulations, the NHPA, and NEPA, and the implementing regulations for these laws.

Among the applicable requirements are those under the NHPA and related Executive Orders. Under these authorities, the NRC is required to fully involve Native American Tribes in all aspects of decision-making affecting Tribal interests such as those directly impacted by the project. NHPA also requires that federal agencies consult with any "Indian tribe ... that attaches religious and cultural significance" to the sites. 16 U.S.C. § 470(a)(d)(6)(B). Consultation must provide the tribe "a reasonable opportunity

to identify its concerns about historic properties, advise on the identification and evaluation of historic properties, including those of traditional religious and cultural importance, articulate its views on the undertaking's effects on such properties, and participate in the resolution of adverse effects." 36 C.F.R. § 800.2(c)(2)(ii).

To date, the cultural resources evaluation consists of merely an inventory of sites based on previously existing information; as such it lacks analytical content. There has been no evaluative report of the cultural resources in the area which would be required to satisfy Sections 51.45(c) and (d). Therefore, the FSEIS fails to comply with Section 51.71(a).

No sub-surface testing was performed in these areas. Accordingly, the archaeological submission upon which FSEIS relies, is not adequate, accurate and complete in all material respects and does not demonstrate that the cultural and historic resources identified at the sites within the project area are not eligible for inclusion in the National Register of Historic Places. Further it does not provide sufficient information as an inventory alone, lacking analytic content and without results of sub-surface testing, in order to be compliant with Sections 40.9, 51.45 and 51.71(a).

SUPPORTING EVIDENCE

Previously filed in this matter is the expert opinion of Louis A. Redmond, PhD, Red Feather Archeology, dated April 21, 2010, and the expert opinion of Dr. Redmond dated January 14, 2010. Attached hereto is the expert opinion of Dr. Redmond dated November 29, 2012. Dr. Redmond is a qualified expert in his field, having worked for almost 20 years as a Principal Archaeological Investigator in South Dakota.[2] Dr.

[2] A copy of Dr. Redmond's abbreviated CV is on file in this proceeding.

Redmond states:

> It is my considered opinion that without an in-depth investigation of any of these areas, involving both surface and subsurface areas on at least a strong sampling effort, that there is the strong possibility of massive disturbance of cultural materials.
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> It has been my experience that in the majority of areas that are defined by either current or extinct water resources, there is a high degree of probability of encountering both historic and prehistoric cultural remains, to include human burials (see the above reports and overview). As both a professional archeologist and a responsible citizen of this region, I would find any degree of ground disturbance without some form of in-depth surface and subsurface investigation to be not only remiss, but disrespectful of our collective heritage.

Dr. Redmond has rendered a professional opinion, based on his knowledge, experience and review of the materials, that there is a strong possibility of massive disturbance of cultural materials and that the Augustana Report on which the Application and the FSEIS are based:

> is essentially an inventory of cultural resources in the area and primarily avoids the required analyses directed by the State of South Dakota. A number of the sites were found by ALAC personnel to be ineligible for inclusion to the National Register of Historic Places. Apparently by the information currently available to me, this was accomplished by simply stating that the surface area was disturbed; no sub-surface testing was performed in these areas. In the approximately 20 years that I have worked as a Principal Investigator in South Dakota, it has always been required that prior to the finding of ineligibility of any cultural materials, sub-surface testing must be accomplished; this is so even if the item involved is an isolated artifact. This sub-surface testing must be a specific size, minimum of 50 by 50 centimeters, and taken down through a minimum of 2 sterile 10-centimeter levels. None of the sites that I reviewed where a finding of ineligibility was recorded was this accomplished.

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> Also there were a number of sites that were found to be unevaluated and needing further work. These sites cannot be counted as either ineligible or eligible for inclusion to the National Register of Historic Places. There is, however, an implication by omission that these sites or at least a majority of them, are ineligible; this finding is erroneous at best.
>
> At this point, no true professional evaluation of the impact of the current proposed project(s) in this area can be done with the information available, as required in a Section 106 investigation/evaluation.

Dr. Redmond's final conclusion is that there has been no true professional evaluation of the current proposed project, as required by Section 106 of NHPA.

In Dr. Redmond's November 29, 2012 opinion letter, attached to the DSEIS Contentions, he states that:

> One of the most sought-after resources, other than wild game, in this specific area around the current projects is that of the remarkable lithic sources in the immediate area between Edgemont and Hot Springs South Dakota. **Within that zone are at least 3 major sources of very fine tool-making materials**. Not far to the south and west is another area around Spanish Diggings in Wyoming that has also been utilized by many tribes for exquisite lithic materials through vast prehistoric times. In that area I personally found indications of Lakota, Cheyenne, Crow and Omaha teepee rings just east of Spanish Diggings on private property in 1995. (Emphasis added.)
>
> Part of the current problem of defining which tribes were specifically utilizing the project areas is that the treaties enacted with the above noted tribes do not specify the range of the treaty tribe(s). I have added a map (incl. 1) of the military forts in the general Dakota/Nebraska/Wyoming territories. It can be seen that there were a number of forts scattered over this area by the time the Fort Laramie Treaty of 1868 was signed. (NOTE: all but Fort Robinson were built by 1867). At the time of the Fort Laramie Treaty of 1851, there were only 2 Forts built in this area, Fort Laramie and Fort Kearney II, and Fort Randall was built a few years after, in 1856.
>
> Accordingly, it can reasonably be inferred that the Oglala, Brule, Minnecoujou, Sicangu, Hunkpapa, Izipaco, Siha Sapa, Ooinunpa, Yanctonai, Arapaho (both North and South), Cheyenne (both North and South), Pawnee (at least the Skidi), Omaha, and Crow at a minimum utilized these project areas in the past in some cultural manner

Section 11.2 of the DSEIS lists all the tribes who were consulted in connection with this project but the Omaha, Skidi and Southern Cheyenne are not on the list. Dr. Redmond opines that such tribes likely have an interest in the cultural resources in that area.

16 U.S.C. § 470(a)(d)(6)(B) requires all interested tribes to be contacted. This has not been done for the Omaha, Skidi or Southern Cheyenne resulting in a violation of that Section.

There is nothing in the FSEIS that addresses the problems identified by Dr. Redmond above. Therefore, the migration principle clearly applies to Contention 1. In furtherance of this argument, Consolidated Intervenors further submit the following.

The Board recognized in LBP-13-09 that these contentions "question the adequacy of the protection of historic and cultural resources" and "the adequacy of the consultation process with interested tribes." LBP-13-09 at 15. These contentions of inadequacy carry over to the FSEIS, despite the NRC Staff's attempts to include additional cultural and historical resource impacts discussion in the FSEIS.

Regarding cultural and historic resources, the FSEIS carries forward serious problems from the application and DSEIS stage. As stated previously, despite having years to do so, neither Powertech nor NRC Staff has conducted an adequate and competent cultural resources survey within the project area, as required by NEPA. This is even despite express promises from NRC Staff to do so.

The FSEIS discusses the NRC Staff's attempt to secure a scientifically-valid independent cultural survey of the project area, but shows that instead of having such a survey completed, **NRC Staff abandoned that approach and did not pursue it any**

further. FSEIS at 1-23 to 24. NRC Staff and the applicant will no doubt point to the concerns of various Tribes, including the Oglala Sioux Tribe with regard to that proposed survey as the basis for abandoning that approach (see FSEIS at 1-24), but that does not excuse NRC Staff's failure to have a proper survey conducted. The Tribe's objections centered on the methodology sought to be employed, not on the survey itself.

Rather than put together a competent survey that included proper scientific expertise, proper methodology, and the participation of the Tribal representatives, NRC Staff instead simply invited Tribes to visit the site for themselves, making no provision for methodologies or scope. Several Tribes, including the Oglala Sioux Tribe, rejected the terms of the survey exercise as dictated by NRC Staff as improper and insufficient. FSEIS at 1-25. Instead of resolving these issues, NRC Staff simply charged forward, collecting information from the small selection of Tribes that did participate in the exercise and deemed it sufficient. This clearly violates the trust responsibility and puts tribal cultural resources at great and imminent risk of irreparable harm.

Bulldozer operators are not trained to identify or evaluate burial markers, gravesites, or any sub-surface archaeological or cultural resources. By refusing to conduct sub-surfacing testing in the project area, the NRC Staff and Applicant have intentionally turned a blind eye to the risk that bulldozer operators employed by Applicant will simply crush sub-surface cultural resources before they can be properly identified and evaluated. While that is a sure way to minimize delay and maximize the profits of Applicant and its shareholders, such a process is offensive and violates the legal duties owed to the Tribe and its members. Such is the 'massive disturbance' that Dr.

Redmond has predicted will result from the failure to do proper sub-surface testing as contemplated by applicable archaeology standards.

During this time period, NRC Staff also opted to "separate" the NHPA 106 process from the NEPA process. FSEIS at 1-26. The result of this separation is that the NHPA 106 process is still ongoing, despite the finalization of the FSEIS – relegating any results from that consultation as an afterthought to the NEPA process. This is yet another violation of the trust responsibility owed by the NRC to the Tribe and its members.

Further, regardless of how NRC Staff attempts to discharge its duties under NHPA and NEPA the fact remains that the FSEIS lacks the required competent, adequate, and scientifically-valid cultural resources inventory and analysis – despite having committed to the Tribe and this Board to have one conducted and provide for public comment and review prior to finalizing the FSEIS. As a result, the NRC Staff's cultural and historic resources impact analysis violates NEPA.

This contention is supported by the Declaration of Wilmer Mesteth, Oglala Sioux Tribe Tribal Historic Preservation Officer (Attached as Exhibit 7 to the Tribe's April 6, 2010 Petition to Intervene), record documents referenced in the FEIS as described and in Appendix A to the FSEIS, recent letters to the NRC Staff from Oglala Sioux President Bryan Brewer and Standing Rock Sioux Tribe Tribal Historic Preservation Officer (attached hereto as Exhibit 2), as well as omissions in the DSEIS.

As described in the DSEIS Contentions, NEPA and its implementing regulations from both NRC and CEQ require an analysis beyond that contained in the FSEIS. Specifically, 10 C.F.R. § 51.71(d) and NEPA require each FSEIS to include an analysis of all environmental impacts of a proposed action, including cultural impacts. 10 C.F.R.

§ 51.70(a) places an affirmative duty on NRC Staff to conduct all NEPA analysis in conjunction with other surveys or studies required under federal law. This includes necessary surveys required under NEPA and the NHPA. In this case, the FSEIS demonstrates that a significant number of archaeological, historical, and traditional cultural resources on site have not been evaluated because the agency never completed an independent cultural resource inventory as it committed to in the DSEIS (DSEIS at xxxix); therefore, the potential impacts to these resources have not been adequately addressed.

As a result of this confirmed lack of adequate survey or analysis, the FSEIS determines that the impacts from the proposed action will range from "small to large." This broad range demonstrates the lack of information inherent in the scant analysis. In any case, any pre-ordained and categorical conclusions, without the benefit of necessary information and a competent analysis demonstrate a lack of scientific integrity of the FSEIS cultural and historic resource impact analysis, and form the basis for a contention as to whether or not the FSEIS conforms with NRC regulations, the NHPA, and NEPA, and the implementing regulations for these laws.

Contention 1B: Failure to Involve or Consult All Interested Tribes as Required by Federal Law.

Among the applicable requirements to NRC's licensing process are those under the National Historic Preservation Act ("NHPA") and related Executive Orders. Under these authorities, the NRC is required to fully involve Native American Tribes in all aspects of decision-making affecting Tribal interests such as those directly impacted by the project. These mandates require NRC to consult with Tribes as early as possible in the decision-making process. Such consultations are supposed to be different than simply

using the force of the US federal government to shove pre-ordained results down the throats of the Tribes despite the protestations of the Tribes. Accordingly, what the NRC Staff refers to as consultations in the FSEIS should rather be referred to as 'Ultimatums' not 'Consultations.'

Here, despite having the applicant's materials since 2009, and the parties' contentions regarding lack of adequate surveys since April 6, 2010, the NRC has not meaningfully engaged in the required consultation process. These problems were described in email and letter correspondence between affected Tribes and the NRC Staff (see communications regarding NEPA and NHPA compliance attached to OST Statement of Contentions on the DSEIS as Exhibit 3) and detailed in the Tribe's DSEIS contentions pleading. See List of Contentions of the Oglala Sioux Tribe Based on the Draft Supplemental Environmental Impact Statement at 6, 9-10.

More recently OST President Bryan Brewer and the Standing Rock Sioux Tribal Historic Preservation Officer have described at length the problems they have encountered with a lack of adequate consultation and lack of meaningful review of cultural resources in the NEPA process. See Exhibit 2 attached hereto. These detailed concerns have not been addressed and support both Contention 1A and 1B in this proceeding. The email from W. Young of the Standing Rock Sioux Tribe aptly describes whey the Sioux Tribes perceive the NRC Staff's actions to be that of handing out ultimatums rather than engaging in meaningful consultation.

As these letters make abundantly clear, these problems are a significant issue and reveal that NRC Staff is not carrying out its agency responsibilities in a manner that recognizes and respects the government-to-government relationship. Indeed, as stated in

the FSEIS, the 106 consultation process is ongoing. FSEIS at 1-26. This includes the failure to have any finalized Programmatic Agreement (PA) which is designed to set forth the process for identifying impacts, future processes for identifying sites while construction and operations occur, and mitigation measures to be implemented. Yet, remarkably, the FSEIS has already been finalized, a proposed action selected, all but finalizing the issuance of a completed license to the applicant. The failure to engage the Tribe on NHPA issues in a meaningful way, including failing to do so at the earliest possible time and within the NEPA process violates the NHPA and NEPA.

Further, we note that the PA lists the 'Required Parties' as including the Applicant and the South Dakota State Historical Preservation Office but as not including any of the Tribes. The Tribes, in the view of the PA, are 'invited' to sign the PA but their signatures are not 'required.' This means that the terms of the PA are being forced onto the Tribes and their members in violation of applicable law including the trust responsibility.

The federal courts have addressed the strict mandates of the National Historic Preservation Act:

> Under the NHPA, a federal agency must make a reasonable and good faith effort to identify historic properties, 36 C.F.R. § 800.4(b); determine whether identified properties are eligible for listing on the National Register based on criteria in 36 C.F.R. § 60.4; assess the effects of the undertaking on any eligible historic properties found, 36 C.F.R. §§ 800.4(c), 800.5, 800.9(a); determine whether the effect will be adverse, 36 C.F.R. §§ 800.5(c), 800.9(b); and avoid or mitigate any adverse effects, 36 C.F.R. §§ 800.8[c], 800.9(c)**.** The [federal agency] must confer with the State Historic Preservation Officer ("SHPO") and seek the approval of the Advisory Council on Historic Preservation ("Council").

Muckleshoot Indian Tribe v. U.S. Forest Service, 177 F.3d 800, 805 (9th Cir. 1999). See also 36 CFR § 800.8(c)(1)(v)(agency must "[d]evelop in consultation with identified consulting parties alternatives and proposed measures that might avoid, minimize or

mitigate any adverse effects of the undertaking on historic properties and describe them in the [NEPA document].") These requirements are impossible to fulfill when the consultation process is still ongoing, including discussion of impacts and proper mitigation, when the NEPA process is completed.

NRC Staff interpretations of these requirements are not entitled to deference. The Advisory Council on Historic Preservation ("ACHP"), the independent federal agency created by Congress to implement and enforce the NHPA, has exclusive authority to determine the methods for compliance with the NHPA's requirements. See *National Center for Preservation Law v. Landrieu*, 496 F. Supp. 716, 742 (D.S.C.), *aff'd per curiam,* 635 F.2d 324 (4th Cir. 1980). The ACHP's regulations "govern the implementation of Section 106," not only for the Council itself, but for all other federal agencies. *Id*. See *National Trust for Historic Preservation v. U.S. Army Corps of Eng'rs*, 552 F. Supp. 784, 790-91 (S.D. Ohio 1982).

NHPA § 106 ("Section 106") requires federal agencies, prior to approving any "undertaking," such as this Project, to "take into account the effect of the undertaking on any district, site, building, structure or object that is included in or eligible for inclusion in the National Register." 16 U.S.C. § 470(f). Section 106 applies to properties already listed in the National Register, as well as those properties that may be eligible for listing. See *Pueblo of Sandia v. United States*, 50 F.3d 856, 859 (10th Cir. 1995). Section 106 provides a mechanism by which governmental agencies may play an important role in "preserving, restoring, and maintaining the historic and cultural foundations of the nation." 16 U.S.C. § 470.

If an undertaking is the type that "may affect" an eligible site, the agency must make a reasonable and good faith effort to seek information from consulting parties, other

members of the public, and Native American tribes to identify historic properties in the area of potential effect. *See* 36 CFR § 800.4(d)(2). See also *Pueblo of Sandia*, 50 F.3d at 859-863 (agency failed to make reasonable and good faith effort to identify historic properties).

The NHPA also requires that federal agencies consult with any "Indian tribe ... that attaches religious and cultural significance" to the sites. 16 U.S.C. § 470(a)(d)(6)(B). Consultation must provide the tribe "a reasonable opportunity to identify its concerns about historic properties, advise on the identification and evaluation of historic properties, including those of traditional religious and cultural importance, articulate its views on the undertaking's effects on such properties, and participate in the resolution of adverse effects." 36 C.F.R. § 800.2(c)(2)(ii).

Apart from requiring that an affected tribe be involved in the identification and evaluation of historic properties, the NHPA requires that "[t]he agency official **shall ensure that the section 106 process is initiated early in the undertaking's planning**, so that a broad range of alternatives may be considered during the planning process for the undertaking." 36 CFR § 800.1(c) (emphasis added). This requirement exists so that the agency does not put itself in the exact position NRC Staff has here – finalization of the NEPA process prior to gaining all relevant information. The ACHP has published guidance specifically on this point, reiterating in multiple places that consultation must begin at the earliest possible time in an agency's consideration of an undertaking, even framing such early engagement with the Tribe as an issue of respect for tribal sovereignty. ACHP, Consultation with Indian Tribes in the Section 106 Review Process: A Handbook (November 2008), at 3, 7, 12, and 29.

Regarding respect for tribal sovereignty, the NHPA requires that consultation with Indian tribes "recognize the government-to-government relationship between the Federal Government and Indian tribes." 36 CFR § 800.2(c)(2)(ii)(C). See also Presidential Executive Memorandum entitled "Government-to-Government Relations with Native American Tribal Governments" (April 29, 1994), 59 Fed. Reg. 22951, and Presidential Executive Order 13007, "Indian Sacred Sites" (May 24, 1996), 61 Fed. Reg. 26771. The federal courts echo this principle in mandating all federal agencies to fully implement the federal government's trust responsibility. See *Nance v. EPA*, 645 F.2d 701, 711 (9th Cir. 1981) ("any Federal Government action is subject to the United States' fiduciary responsibilities toward the Indian tribes").

Here, the application was initially submitted to the NRC in February of 2009, almost a full four years ago. Yet, the FSEIS was completed even though no adequate cultural survey of the site has yet been conducted (no sub-surface testing has ever occurred to date), and with the requisite level of Tribal participation (the ultimatums do not a consultation make). The result is to effectively exclude the Tribe from the NEPA/NHPA process until after a draft NEPA document is finalized.

This scheme contravenes the requirements of the NHPA and NEPA, and NRC and NHPA regulations, and harms the Tribe's ability to participate in the identification of historic/cultural properties and hampers its ability to effectively participate at the later stage when, if ever, the specific impacts from a particular project are analyzed. See, e.g., 36 CFR §§ 800.4 ("Identification of historic properties") and 800.5 ("Assessment of adverse effects"). Given these requirement of the NHPA, NEPA, and applicable regulations, the harms to the Tribe began accruing immediately upon NRC consideration

of the Application in a manner that segregated the Tribe's interdisciplinary, culturally-based consultation on the project from what NRC Staff considers technical and environmental concerns.

These harms are exacerbated by the NRC Staff's decision to issue the FSEIS despite the completion of NHPA section 106 consultation and the lack of meaningful involvement the survey of the affected areas. The only meaningful relief available in a case as egregious as this is to reissue a draft SEIS for public review and comment once the requisite reviews are completed. In sum, this contention seeks to reintegrate the interdisciplinary study requirements of NEPA to ensure that the purposes of NEPA, the NHPA, and the government-to-government relationship are honored by NRC Staff, and included in a new, comprehensive SDEIS issued for review and comment for the Tribe, Tribal members, the public, and other interested persons.

Contention 2: Failure to Include Necessary Information for Adequate Determination of Baseline Ground Water Quality

The FSEIS violates 10 C.F.R. Part 40, Appendix A, Criterion 7, 10 C.F.R. §§ 51.10, 51.70 and 51.71, and the National Environmental Policy Act, and implementing regulations – each requiring a description of the affected environment and impacts to the environment – in that it fails to provide an adequate baseline groundwater characterization or demonstrate that ground water samples were collected in a scientifically defensible manner, using proper sample methodologies.

With regard to this contention, there appears to be no additional baseline water quality information in the FSEIS so as to undermine the migration of this contention from the DSEIS. Indeed, in response to comments from the Tribe on the DSEIS specifically

detailing the problems with lack of adequate baseline water quality data, NRC Staff confirms that the applicant collected data from 2007 to 2009 and that "the NRC staff used this information when drafting the affected environmental section of the SEIS as well as analyzing impacts of the proposed action." FSEIS at E-32.

Exacerbating these problems previously alleged in detail by the Tribe as the basis for this contention, NRC Staff states that:

> the applicant will be required to conduct additional sampling if a license is granted to establish Commission-approved background groundwater quality before beginning operations in each proposed wellfield in accordance with 10 CFR Part 40, Appendix A, Criterion 5B(5). However, this does not mean that the NRC staff lacks sufficient baseline groundwater quality information to assess the environmental impacts of the proposed action.
>
> **No change was made to the SEIS beyond the information provided in this response.**

FSEIS at E-32 (emphasis added). This establishes that not only has NRC Staff not required or used the collection of any additional baseline data for its characterization of baseline water quality, it will require additional data in order to establish a credible baseline for use in the regulatory process. Simply put, while the FSEIS contains data from 2007-2009, the "real" background water quality will be established a future date, outside of the NEPA process, and outside of the public's review.

The Second Supplemental Declaration of Dr. Robert E. Moran (attached as Exhibit 1)(hereinafter "Moran Second Suppl. Decl.") provides additional support for this contention. This is in addition to the previously submitted Supplemental Declaration of Dr. Moran and the Declaration of Dr. Richard Abitz detailing the requisite standards for scientific validity in a baseline analysis. *See e.g*. Moran Second Suppl. Decl. at ¶58 ("The DSEIS, like the Powertech Application, fails to define pre-operational baseline

water quality and quantity—both in the ore zones and peripheral zones, both vertically and horizontally."); ¶¶ 47-74, 75, 82-84, 92-94, 95.

10 C.F.R. §§ 51.10, 51.70 and 51.71, and the National Environmental Policy Act, and implementing regulations, require a description of the affected environment containing sufficient data to aid the Commission in its conduct of an independent analysis. Further, applicable regulations require the applicant to provide "**complete** baseline data on a milling site and its environs." 10 C.F.R. Part 40, Appendix A, criterion 7 (emphasis added). These authorities and scientific bases for the Tribe's contention were discussed at length in the Tribe's original contention pleading and its DSEIS contention pleading, including the improper reliance on the outdated NRC Regulatory Guide 4.14 (1980), and those discussions are expressly incorporated herein by reference.

Overall, based on these discussions, the FSEIS carries forward the NRC Staff's failure to adequately describe the affected aquifers at the site and on adjacent lands and fails to provide the required quantitative description of the chemical and radiological characteristics of these waters necessary to assess the impacts of the operation, including potential changes in water quality caused by the operations.

Contention 3: Failure to Include An Adequate Hydrogeological Analysis To Assess Potential Impacts to Groundwater

The FSEIS fails to provide sufficient information regarding the hydrologic and geological setting of the area to meet the requirements of 10 C.F.R. § 40.31(f); 10 C.F.R. § 51.45; 10 C.F.R. § 51.60; 10 C.F.R. §§ 51.10, 51.70 and 51.71, 10 C.F.R. Part 40, Appendix A, Criteria 4(e) and 5G(2), and the National Environmental Policy Act, and implementing regulations. As a result, the FSEIS similarly fails to provide sufficient information to

establish potential effects of the project on the adjacent surface and ground-water resources, as required. In its ruling on the DSEIS Contentions, the Board held that "to the extent the intervenors have concerns with the adequacy of the hydrogeologic analysis necessary to show adequate confinement and potential impacts to groundwater, this is already an issue set for hearing." July 22, 2013 Order (LPB-13-09) at 24. This is contention is both one of omission and inadequacy.

As with Contention 2, the FSEIS does not identify any new data associated with the proposal that could defeat the migration tenet with respect to this contention. Indeed, in the FSEIS response to comments on issues related to confinement and fluid migration, NRC Staff repeatedly state that "no change was made to the SEIS" based on those comments. See e.g., FSEIS at E-30 to 31, E-150. The result is that the bases for this contention as set forth in the DSEIS remains fully applicable to the FSEIS.

As with the DSEIS, where the FSEIS contains any changes, it notes only that a proposed license condition was added to further clarify that the applicant will be required to submit adequate hydrogeologic data, but only after the NEPA process is completed, after a license is issued, and with no chance for any public review. See .e.g., FSEIS at E-51 ("The commenter is correct in stating that wellfield hydrogeologic data packages will not be made available for public review. However, by license condition, all wellfield data packages must be submitted to NRC for review prior to operating each wellfield (NRC, 2013b). . . . Text was revised in SEIS Section 2.1.1.1.2.3.4 to clarify NRC license conditions with respect to review and approval of wellfield data packages at the proposed Dewey-Burdock ISR Project."). This was the gravamen of the DSEIS contention on this point – the lack (and deferral of collection and review to a later date) of necessary data

and analysis to ensure a credible and NEPA and NRC regulation-compliant review of impacts to groundwater.

Given the lack of additional data, the Supplemental Declaration of Dr. Robert E. Moran (attached as Exhibit 2 to the Tribe's DSEIS contention pleading) and the extensive discussion of the issue contained in the DSEIS contention pleadings on this contention continue to provide adequate support for this contention.

The only possible exception to the lack of new information related to this contention is a 2012 report referenced in the FSEIS from Petrotek regarding modeling of the hydrogeology. The FSEIS appears to rely heavily on this report throughout its discussion of confinement issues, as well as geology and water usage impacts. See FSEIS 3-17 to 18; 4-57, 4-59, 4-61 to 62, 4-64, 4-68, 4-71, 4-73, 4-75, 5-25. Disturbingly, this report appears to have been submitted to NRC Staff in February of 2012, months before the DSEIS was published. Yet, despite this fact, the DSEIS makes no reference, citation, nor any discussion of the document.

As such, to the extent any argument can be made that the Petrotek report affects the migration of this contention, Dr. Moran's analysis suffices to explain why the report does not resolve the issues raised in Contention 3. Based on this demonstration (including the information incorporated by reference), the FSEIS continues to fail to provide an adequate geology and hydrogeology analysis and as a result fails to adequately analyze the impacts associated with the proposed mine, particularly on groundwater resources.

Contention 4: Failure to Adequately Analyze Ground Water Quantity Impacts

The FSEIS violates the National Environmental Policy Act in its failure to provide an adequate analysis of the ground water quantity impacts of the project. Further, the FSEIS presents conflicting information on ground water consumption such that the water consumption impacts of the project cannot be accurately evaluated. These failings violate 10 C.F.R. §§ 51.10, 51.70 and 51.71, and the National Environmental Policy Act, and implementing regulations.

As with the prior contentions, this contention migrates forward from the contentions admitted on the application materials and the DSEIS. Additionally, the discussions of the basis for this contention presented in the DSEIS contention pleadings are incorporated herein.

The FSEIS does include one additional piece of information that was not present in the DSEIS claiming to be a "water balance" for the project. The lack of a "water balance" formed a part of the basis for Contention 4 based on the application materials and the DSEIS. However, as discussed in Dr. Moran's Second Supplemental Declaration, the "water balance" contained in the FSEIS is not adequate in providing sufficient information to adequately analyze the groundwater quantity impacts.

As such, despite the inclusion of the additional information in the FSEIS, the contention with respect to the lack of adequate analysis of ground water impacts remains. The foregoing demonstrates that the FSEIS fails to adequately and clearly describe the quantity of water to be used, in violation of the above-referenced regulations and laws.

IV. CONCLUSION

For the foregoing reasons, the Consolidated Intervenors have demonstrated that their FSEIS contentions are admissible, including under the migration tenet and as contentions of both omission and adequacy. Therefore, the Consolidated Intervenors are entitled to a hearing on each of these contentions.

Dated this 17th day of March, 2014.

Respectfully submitted,

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POWERTECH (USA) INC.,	)	Docket No. 40-9075-MLA
	)	
(Dewey-Burdock In Situ Uranium Recovery Facility)	)	
	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing CONSOLIDATED INTERVENORS' STATEMENT OF CONTENTIONS in the captioned proceeding were served via email on the 17th day of March 2014, which to the best of my knowledge resulted in transmittal of same to those on the EIE Service List for the captioned proceeding.

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