

July 15, 2014

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

Before Administrative Judges:

**William J. Froehlich, Chairman
Dr. Richard F. Cole, Special Assistant
Dr. Mark O. Barnett, Special Assistant**

In the Matter of:)	
POWERTECH USA, Inc.)	
(Dewey-Burdock Project)	Docket No. 40-9075-MLA
In Situ Uranium Recovery Facility))	ASLBP No. 10-898-02-MLA-BD01
)	
_____)	

ANSWERING TESTIMONY OF DR. LYNNE SEBASTIAN

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1. CONTENTION 1A

1.1 Response to April 21, 2010 Dr. Redmond Evaluation Letter

Q.1. In his evaluation letter dated 4-21-10 (as cited in Exhibit INT-17 at 6 and INT-18 at 10), Dr. Redmond notes that a number of archaeological sites in the Dewey-Burdock project area were described as unevaluated and needing further work. He states that because these sites cannot be counted as either ineligible or eligible for inclusion to the National Register of Historic Places, there is “an implication by omission that these sites or at least a majority of them, are ineligible; this finding is erroneous at best.” Why are some sites within the Dewey-Burdock project area still considered “unevaluated?”

A.1. Because the majority of the deposits in an archaeological site lie beneath the surface of the ground, it is often impossible to determine from surface remains alone whether the site has the potential to yield substantial information about the past. For this reason, the “eligibility” recommendations made by archaeological survey teams often include a substantial number of sites that are categorized as “unevaluated,” that is, they cannot be recommended as either eligible or not eligible without further, subsurface investigation.

The subsurface investigations in question involve archaeological excavation, which destroys a portion of the historic fabric of the site. For this reason, it is standard conservation archaeology and historic preservation practice to carry out subsurface testing only at sites that will be directly impacted by development activities, and to leave other sites unevaluated until or unless they may be directly affected by development activities. By carrying out subsurface testing at sites that will not be affected by development activities, we would be needlessly diminishing their historical integrity.

Q.2. Is there an erroneous “implication by omission” that most of the unevaluated sites are ineligible to the National Register of Historic Places?

A.2. Not at all. Under the terms of the programmatic agreement, all unevaluated properties will be protected from disturbance for the duration of the project. If and when it turns out that an unevaluated property will need to be disturbed, that property will be subjected to testing or other evaluation procedures and its eligibility will be determined. If such a property is found to be eligible, a treatment plan will be prepared, indicating how adverse effects to the property will be resolved. Also under the terms of the programmatic agreement, the Tribes will be consulted about protection, evaluation, and treatment plans for all unevaluated sites.

1.2 Response to April 14, 2014 Declaration of MichaelCatches Enemy

Q.3. In his declaration, Michael CatchesEnemy states that “By enacting NEPA (42 U.S.C. § 4330 *et seq.*), NAGPRA, (25 U.S.C. 3001 *et seq.*), NHPA (16 U.S.C.S. § 470 *et seq.*) and other statutes, the United States Government has assured that the cultural resources of a tribe will be

protected, even when they are not within reservation boundaries.” (Exhibit OST-14 at ¶5) In your opinion is this an accurate characterization?

A.3. None of these laws requires or ensures protection of cultural resources. NEPA and NHPA require only consideration and disclosure of effects as part of federal planning. NAGPRA requires repatriation of human remains and certain kinds of material items under specific circumstances, but only if these items are located on federal or tribal land; most of the Dewey-Burdock Project is on private land.

Q.4. In his declaration, Mr. CatchesEnemy states that no comprehensive study to identify all cultural resources was done for the Dewey-Burdock Project and notes that while some tribes carried out field identification, those surveys were not sufficient to identify cultural and historic resources significant to the Oglala Sioux Tribe (Exhibit OST-14 at ¶9). Does this represent a failure comply with the requirements of 36 CFR Part 800?

A.4. No. There is no requirement that an agency identify all possible historic properties that may be affected by an undertaking, only that the agency make a reasonable and good faith effort to identify such properties. In this case, the NRC offered the opportunity for any tribe that wished to do so to carry out field investigations within the proposed Dewey-Burdock license area over the course of a month’s time. Travel and per diem costs were paid by Powertech, which also provided logistical support for the tribal personnel and a \$10,000 grant to each participating tribe to help defray other costs of the identification effort. Some tribes chose to participate and identify places of religious and cultural significance to them; others did not. The Oglala Sioux Tribe chose not to participate.

Q.5. Please respond to the following multipart claim in Mr. CatchesEnemy’s declaration:

Q.5.a. First, that “the ‘Programmatic Agreement’ was finalized by NRC Staff without agreement, and over the official objections of, the Oglala Sioux Tribe” (Exhibit OST-14 at ¶15).

A.5.a. There is no requirement that NRC secure tribal agreement with or approval of a Section 106 agreement document unless the undertaking takes place on tribal land, which the Dewey-Burdock Project does not.

Q.5.b. Second, that “The NRC Staff has not obtained the Tribe's participation in the development of any mitigation measures or other stipulations purported to result in the diminishment of impacts to the Tribe's cultural and historic resources at the site” (Exhibit OST-14 at ¶15).

A.5.b. The Oglala Sioux Tribe was invited to participate in all discussions leading to the development of the programmatic agreement outlining how the adverse effects of the project on historic properties will be resolved, and did participate to some extent. Additionally, under the terms of the programmatic agreement, as the project moves forward all tribes will have the

opportunity to participate in the development of treatment plans identifying measures to avoid, minimize, and mitigate adverse effects on historic properties.

Q.5.c. Third, that “Powertech [has not] sought to include the Tribe in any of the "Dispute Resolution" procedures through which it purports to remedy disagreements regarding the significance of cultural resources on the site, or the impact of any mining operations on these cultural resources” (Exhibit OST-14 at ¶15).

A.5.c. The Oglala Sioux Tribe, like all of the consulting parties, had multiple opportunities to review and comment on the stipulations contained in the programmatic agreement, including the *Dispute Resolution* stipulation, and to propose alternative language. As far as I am aware, the tribe did not propose any changes to that stipulation when the PA was being developed.

Q.5.d. Fourth, that “The FSEIS and license were issued before Powertech or NRC Staff completed a Programmatic Agreement ("PA") to establish the newly segregated cultural resources analysis” (Exhibit OST-14 at ¶22).

A.5.d. The FSEIS was issued before the programmatic agreement was executed, but the Record of Decision, the actual NEPA decision document, and the license were not issued until after the programmatic agreement was fully executed by all the required signatories.

Q.5.e. Fifth, that “The Oglala Sioux Tribe is not a signatory to any PA concerning the Powertech proposal” (Exhibit OST-14 at ¶22).

A.5.e. This is true, but as noted previously, there is no requirement that the tribes be signatories to Section 106 agreement documents unless the project takes place on tribal lands. The Oglala Sioux Tribe has been invited to sign as concurring, but has not, so far, chosen to do so.

Q.6. How would you respond to the allegation in Mr. CatchesEnemy’s declaration that “NRC Staff have approved Powertech's license without first the mitigating impacts on both identified and unidentified cultural resources” (Exhibit OST-14 at ¶23)?

A.6. The Section 106 process does not require that mitigation take place prior to the issuance of a license, only that an agreement document (either a Memorandum of Agreement or a Programmatic Agreement) indicating how adverse effects will be resolved be executed before the license is issued. In this case, the Section 106 programmatic agreement was signed before the license was issued.

Q.7. Mr. CatchesEnemy concludes that the number and density of cultural resources in the project area demonstrate that construction and mining activities will adversely impact cultural resources of significance to the Oglala Sioux Tribe and that “the failure to meaningfully involve the Tribe in the analysis of these sites, or to conduct any ethnographic studies in concert with a field study designed with credible scientific methodology as part of the NEPA process further

exacerbate the impacts on the Tribe's interests” (Exhibit OST-14 at ¶25). How would you respond to this conclusion?

A.7. First, I would note that the NRC made a reasonable and good faith effort to identify historic properties that might be affected by the project, determined that there will be an adverse effect on some historic properties, and completed an agreement document indicating how those adverse effects will be resolved. The Oglala Sioux Tribe had the opportunity to participate in all these efforts; the fact that the tribe chose not to do so is unfortunate but does not negate NRC’s successful compliance with the law and the regulation as indicated by execution of the document by the Advisory Council on Historic Preservation.

Second, I am puzzled by the reference to “scientific methodology” in reference to the process for identifying places of religious and cultural significance to tribes as part of the Section 106 process. By their very nature most such places are outside of the realm of western scientific methods. The information about the location, significance, use, and meaning of these places is maintained within the traditional knowledge of the tribes; much of it esoteric and cosmological in nature.

As for ethnographic studies, such studies were proposed to the tribes when they were first contacted by the SRI Foundation as we began to gather their views about appropriate ways to identify places of religious and cultural significance to them. Both in response to those first contacts and later at the February 2012 consultation meeting in Rapid City, the consensus was that the appropriate way to identify these places was through field investigations, not through ethnographic studies.

1.3 Response to Oglala Sioux Tribe Initial Position Statement

Q.8. The Oglala Sioux Tribe’s initial position statement at 10 notes that “the Augustana College survey left a significant number of archaeological, historical, and traditional cultural resources on site unevaluated; therefore, the potential impacts to these resources have not been addressed.” How would you respond to this assertion?

A.8. Impacts to the currently unevaluated resources are, in fact, addressed in the programmatic agreement. They will be protected in place if possible; if it will not be possible to protect them in place, they will be subject to further evaluation, and if as a result of further evaluation they are found to be eligible to the National Register of Historic Places, treatment plans governing measures to minimize or mitigate the adverse effects will be developed. All tribes who choose to participate will be involved in the development of protection, evaluation, and treatment plans.

Q.9. The Oglala Sioux Tribe’s initial position statement at 11 asserts that the NRC failed to carry out a “scientifically-valid independent cultural survey of the project area” using “proper scientific expertise, proper methodology, and the participation of the Tribal representatives,” and “instead simply invited Tribes to visit the site for themselves, making no provision for methodologies or scope.” The initial position statement at 16-17 also objects to the use of “a

survey method that lacked any organized or scientifically determined methodology.” In your experience, is use of scientific expertise and imposition of a standard scientific methodology the accepted procedure for identifying properties of religious and cultural significance to tribes?

A.9. As noted previously, I am at a loss to understand the basis for these statements that scientific methods or scientific expertise should govern the identification of properties of religious and cultural significance. All of the available guidance from both the National Register of Historic Places and the Advisory Council on Historic Preservation stresses the unique nature of historic properties of religious and cultural significance, in that the information about their significance, use, meaning, and location is maintained within the traditional knowledge system of the communities that ascribe value to these properties. Identification of such places depends on the knowledge of traditional cultural practitioners, not on the exercise of some scientific discipline or method.

The guidance is also clear in stating that each tribe or other traditional community will have its own views on appropriate methods of identification and that it is important for agencies, to the extent possible, to accommodate these tribal or community-specific cultural mores. NRC did not try to impose a uniform set of methods on the identification of properties of religious and cultural significance. Instead, the agency made the assumption that each tribe would know best how to identify the properties of significance to their people and offered all of the tribes the opportunity to come to the project area, with financial and logistical support from the applicant, and carry out whatever identification activities were deemed culturally appropriate by that tribe.

Q.10. Is it true, as stated in the Oglala Sioux Tribe’s initial position statement at 16, that the Standing Rock Sioux Tribe wrote to the NRC objecting to “the geographic scope of the NRC Staff proposed surveys (only a small portion of the project area), as well as the scope of the impacts to be considered (direct impacts vs. indirect impacts)”?

A.10. Yes, they did. The original proposal to the tribes was for field identification of properties of religious and cultural significance to take place within an area comprising the footprint of all planned ground disturbance plus a surrounding buffer zone. Some of the tribes expressed concerns about indirect effects to properties of religious and cultural significance that might exist outside of the buffered disturbance areas. In response, NRC changed their proposed approach for tribal identification efforts. They expanded the coverage to include the entire license area, although the suggestion was made that tribes might want to devote special attention to the disturbance areas where direct effects to historic properties were most likely to occur. Also in response to expressed concerns from tribes and from the State Historic Preservation Officer, NRC moved forward with evaluation of potential indirect effects, particularly visual effects, on historic properties.

Q.11. In their initial position statement at 17, the Oglala Sioux Tribe states that “Instead of including the Oglala Sioux Tribe and other Tribes, NRC Staff and Powertech hurriedly finalized a 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.” What is your response to this allegation?

A.11. All of the tribes had the same opportunities to participate in the crafting of and revisions to the programmatic agreement that the other consulting parties (the applicant and the State Historic Preservation Officer) had. This process went on over many months. Some of the tribes, including the Oglala Sioux Tribe, did participate at some level.

The description in the Tribe’s position statement of what the programmatic agreement was designed to do is largely accurate, and, in fact, describes what programmatic agreements are supposed to do, as envisioned in the Section 106 regulation.

Q.12. But the Oglala Sioux Tribe initial position statement at 17 argues that “the activities identified in the PAs [sic] are required before the finalization of the FSEIS.” Is that true?

A.12. No, that is not true. Under the provisions of the Section 106 regulation, for all undertakings that will have an adverse effect on historic properties the federal agency completes its compliance with Section 106 by preparing an agreement document and securing the required signatures on that document. There are two kinds of agreement documents described in the regulation. The first is a Memorandum of Agreement, which lays out a set of agreed upon measures to resolve the known adverse effects of the undertaking on known historic properties. The second type is a Programmatic Agreement, which lays out a process for completing any additional identification or evaluation of eligibility and effect for the undertaking as well as a process for resolving the adverse effects of the undertaking. In either case, execution of the agreement document by the required signatories completes the agency’s Section 106 process. In neither case is the agency required to carry out all the provisions in the agreement document prior to finalizing an EIS or issuing a Record of Decision.

Q.13. In their initial position statement at 17, the Oglala Sioux Tribe argues, “By approving the action prior to identifying mitigation or impacts to cultural resources, this approach also severely undermines the NHPA process and reveals that NRC Staff and Powertech joined together in treating NHPA consultation as an obstacle to overcome, instead of the federal duty imposed by NHPA .” How would you respond to this allegation?

A.13. The Section 106 regulation (at 36 CFR 800.14(b)) specifically provides for agencies to be able to use programmatic agreements to complete the Section 106 process for undertakings like the Dewey-Burdock Project. Not only is there is nothing contrary to the requirements of Section 106 about using a programmatic agreement in this way, it is not even an unusual approach to compliance. Nationwide, roughly 30-40 Section 106 undertakings a year are completed through the development and execution of programmatic agreements.

Q.14. The Oglala Sioux Tribe’s initial position statement at 18 describes the use of a programmatic agreement to complete Section 106 for the Dewey-Burdock project as “NRC Staff’s post-licensing NHPA scheme,” and concludes that “NRC Staff’s scheme contravenes the

requirements of the NHPA, 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 the specific impacts from a particular project are analyzed." Would you characterize this as accurate?

A.14. No, I would not. As described previously, programmatic agreements are a commonly used tool, provided for in the Section 106 regulation, and they are designed to facilitate consultation and compliance for complex undertakings. Under the provisions of the Dewey-Burdock Project programmatic agreement, all of the tribes, whether they chose to participate in developing the programmatic agreement or not, whether they choose to sign the agreement as concurring or not, will have opportunities to participate in future consultations about identification of additional historic properties, the protection and evaluation of currently unevaluated properties, and plans for measures to avoid, minimize, and mitigate adverse effects.

Q.15. The Oglala Sioux Tribe, in their initial position statement at 18, describe the Dewey-Burdock agreement as "a Programmatic Agreement that excludes the Tribe." Is this an accurate characterization?

A.15. The process for developing this programmatic agreement did not exclude the Oglala Sioux Tribe; they had every opportunity to participate in developing it but for the most part chose not to do so. Nor will the implementation of the programmatic agreement exclude the Tribe in any way. They will have numerous opportunities to participate in designing and carrying out the activities specified in its stipulations, should they choose to do so.

Q.16. In describing the redress that they are seeking, the Oglala Sioux Tribe states in their initial position statement at 18, "Meaningful relief is available in this case by invalidation of the PA, the license and any other actions that rely on the PA for NHPA compliance." How would you respond to this statement?

A.16. There are no grounds in any of the arguments presented by the Oglala Sioux Tribe for "invalidating" this Section 106 agreement document, nor, as far as I am aware, would the Board have the authority to do so, even if there were. In their own summary of applicable case law, the Oglala Sioux Tribe states, "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" (Oglala Sioux Tribe initial position statement at 7). The execution statement of the Dewey-Burdock Project programmatic agreement reads, "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" (Exhibit NRC-018-A at 14). The ACHP signed this document, which is a clear statement by the recognized authority on compliance with Section 106 that NRC has appropriately completed the Section 106 requirements and that this agreement document is valid.

1.4 Response to NRC Staff Initial Position Statement

Q.17. The NRC Staff initial position statement argues that use of a programmatic agreement to complete the Section 106 process was appropriate in the Dewey-Burdock case because of the phased approach to development that will be used for this project. In your opinion, was the decision by NRC and BLM to develop a programmatic agreement, rather than a memorandum of agreement, for the Dewey-Burdock Project an appropriate one, and if so, why?

A.17. Yes, I believe that the decision to use a programmatic agreement to complete the Section 106 process for Dewey-Burdock was an appropriate one. The Section 106 regulation provides (at 36 CFR 800.14(b)) for use of a programmatic agreement in resolving the adverse effects of “complex project situations” and “when effects on historic properties cannot be fully determined prior to approval of an undertaking.” Both of these criteria apply here, not only because of the phasing that is standard practice in ISR projects, but because the location for the utility line corridor into and through the project area will not be determined for some time and because there are two alternatives being permitted for disposal of treated wastewater from the project. The utility corridor will require additional identification of historic properties and both the utility corridor and the wastewater disposal option selected will require additional evaluation of effects on historic properties and planning for resolution of adverse effects.

Q.18. Did you participate in the development of the programmatic agreement?

A.18. Yes. As the applicant for a federal license, Powertech is entitled to participate in the Section 106 process as a consulting party. As their consultant, I assisted them in preparing review comments on drafts of the document, and I participated with them in webinars during which the contents and language of the document were refined.

Q.19. And what other parties, besides Powertech, participated in the webinars that you participated in?

A.19. NRC, BLM, South Dakota SHPO staff, Advisory Council on Historic Preservation staff, and NRC’s cultural resource consultant were participants, I believe, on all the calls in which I participated. In addition, there was an EPA representative on one or more of the calls, and there were representatives from a few of the tribes on most of the calls.

Q.20. Did the Oglala Sioux Tribe participate in these webinars?

A.20. I remember at least one call in which Michael CatchesEnemy was on the line. I don’t remember whether the tribe participated in more than one of these calls.

Q.21. In your opinion, did NRC meet the regulatory requirements for integrating Section 106 and NEPA compliance?

A.21. The Council on Environmental Quality (CEQ) NEPA regulation (at 40 CFR 1502.25) simply states that an agency’s NEPA analyses should be carried out concurrently with and

integrated with the agency's compliance with NHPA, among other laws. The Advisory Council on Historic Preservation (ACHP) Section 106 regulation (at 36 CFR 800.8) envisions two possible approaches to compliance with Section 106 and NEPA – an approach emphasizing early and close coordination between the two processes, and an approach commonly referred to as “substitution” of the NEPA process for the Section 106 process, although the regulation itself (36 CFR 800.8(c)) does not use this term.

In 2013 CEQ and ACHP jointly published guidance for federal agencies that provides information about both coordination of NEPA and Section 106 and substitution of NEPA for Section 106. An agency is free to use either of these approaches to comply with the two laws, but in my experience, the substitution approach is rarely chosen. Most agencies, for most projects, do what NRC did – follow the “coordination” path. The heart of the “substitution” process is the use of NEPA documents to meet the requirement of Section 106, as opposed to the creation of separate Section 106 reports and other documents. In my experience, agencies who are considering adopting the substitution approach often conclude that using the NEPA documents to meet the requirements of Section 106 would delay Section 106 consultations and compliance until much later in their planning process than they would prefer. For that and other reasons most agencies choose to complete a separate Section 106 process that is coordinated with their NEPA process.

The CEQ/ACHP guidance on NEPA/Section 106 “coordination” indicates that, when there is an EIS and a Section 106 finding of adverse effect, the signed agreement document, whether it is a memorandum of agreement or a programmatic agreement, should be included in either the FEIS or in the Record of Decision. The signed programmatic agreement for Dewey-Burdock is part of the Record of Decision for the project. Thus, it is my opinion that the NRC process for Dewey-Burdock not only met the specific regulatory requirements for NEPA and Section 106 coordination, but is also consistent with the guidance provided by CEQ and ACHP.

1.5 Response to NRC Staff Initial Testimony

Q.22. The Standing Rock Sioux Tribe has argued that, if the entire Dewey-Burdock project area had been surveyed for properties of religious and cultural significance, there would have been no need to develop a programmatic agreement for Section 106 compliance. Is this true?

A.22. No. The entire license area was made available to the tribes for field identification efforts, and I was told by both NRC Staff and Powertech personnel that the whole project area was covered at some level. Locations where there had been substantial historical disturbance from mining or other activities were largely excluded from examination by the participating tribes because of the low likelihood that earlier sites and features would still be preserved, but even those areas were given a cursory look.

In any case, the decision as to whether to develop a memorandum of agreement or a programmatic agreement for the undertaking did not have to do with what had or had not been done to identify properties of religious and cultural significance. It had to do with the phased

nature of the development and with the currently unknown effects of the future utility corridor and the disposal process selected for the treated wastewater. It was necessary to provide a process for future decision-making, and that is the purpose of a Section 106 programmatic agreement.

Q.23. NRC Staff asserts that the agency has made a reasonable and good faith effort to consult with federally recognized Indian tribes concerning the Dewey-Burdock Project (e.g., Exhibit NRC-001 at A1.19). Do you agree?

A.23. Ultimately the federal agency has the authority to determine when it has made a reasonable and good faith effort to consult. I would certainly argue that NRC has a very substantial record of tribal consultation for this project, involving multiple media and venues from emails and letters and individual phone calls to conference calls and webinars to face-to-face meetings. In addition, NRC staff spent many days in the field with tribal personnel who took advantage of the opportunity to do applicant-supported field work to identify properties of religious and cultural significance within the license area.

Beyond that, it is important to remember that tribal consultation for the project did not end with the execution of the programmatic agreement and issuance of the license. Among the terms of the programmatic agreement, NRC included numerous provisions for continued consultation with the tribes about identification, evaluation, protection, and resolution of effects on historic properties on into the future as the various phases of the project are carried out.

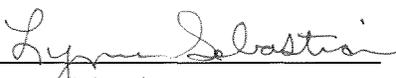
UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of:)	
)	
POWERTECH USA, Inc.)	Docket No. 40-9075-MLA
)	ASLBP No. 10-898-02-MLA-BD01
)	
(Dewey-Burdock Project)	
In Situ Uranium Recovery Facility))	

AFFIDAVIT OF LYNNE SEBASTIAN

I declare under penalty of perjury that my statements in prefiled Exhibit APP-063 (Dr. Lynne Sebastian Answering Testimony) are true and correct to the best of my knowledge and belief.



Dr. Lynne Sebastian

Executed in Rio Rancho, NM
this 14th day of July, 2014