

Official Transcript of Proceedings
NUCLEAR REGULATORY COMMISSION

Title: Powertech USA, Inc.: Dewey-Burdock
in Situ Uranium Recovery Facility

Docket Number: 40-9075-ML

ASLBP Number: 10-898-02-MLA-BD01

Location: Rapid City, South Dakota

Date: Tuesday, August 19, 2014

Work Order No.: NRC-1008

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UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

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ATOMIC SAFETY AND LICENSING BOARD PANEL

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HEARING

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

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Tuesday, August 19, 2014

Hotel Alex Johnson
 Ballroom
 523 6th Street
 Rapid City, South Dakota

BEFORE:

WILLIAM J. FROEHLICH, Chairman

DR. RICHARD F. COLE, Administrative Judge

DR. MARK O. BARNETT, Administrative Judge

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TABLE OF CONTENTS

Introductory Remarks by Chairman 697

Opening Statements

NRC Staff 718

Powertech 721

Oglala Sioux Tribe 727

Consolidated Intervenors 731

Cross-Examination of Panels:

 Panel 1 756

P-R-O-C-E-E-D-I-N-G-S

(8:59 a.m.)

CHAIRMAN FROEHLICH: Good morning. We'll come to order.

My name is William Froehlich, Chairman of this Atomic Safety and Licensing Board, which has been designated to hear this matter and to decide the issues related to the application of Powertech for a license application and an NRC combined source and byproduct materials license to construct and operate a proposed in situ uranium recovery operation called the Dewey-Burdock In Situ Leach Recovery, or ISR project, in South Dakota. The proposed site is approximately 13 miles north-northwest of Edgemont, South Dakota.

We are here today to conduct the evidentiary hearing in this proceeding. The matter has been docketed by the Nuclear Regulatory Commission as Docket Number 40-9075-MLA. The MLA stands for Materials License Application. This ASLBP Number is 10-898-02-MLA.

Today's proceeding was publicly noticed by order issue of the Board on July 16th, and also published in the Federal Register.

For the record, today is Tuesday,

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1 August 19th, 9:00 a.m., Mountain Daylight Time. And
2 we are present in the Hotel Alex Johnson in Rapid
3 City, South Dakota.

4 This hearing is scheduled to continue
5 through Thursday of this week.

6 First, let me introduce the Atomic Safety
7 and Licensing Board. To my right is Judge Richard
8 Cole. Judge Cole is a full-time technical judge and
9 has been a member of the panel since 1973. He holds
10 a Bachelor's of Science degree from Drexel, a Master's
11 from MIT, and his Ph.D. is from the University of
12 North Carolina. He is a diplomat in the American
13 Academy of Environmental Engineers.

14 To my left is judge Mark Barnett. Judge
15 Barnett holds a Bachelor of Science and a Master of
16 Science from the University of Tennessee, and his
17 Ph.D. is from the University of North Carolina. He is
18 currently the Malcolm Pirnie Professor of Civil
19 Engineering at Auburn University, and he is a part-
20 time technical judge with the panel.

21 As I mentioned earlier, my name is William
22 Froehlich. I have been designated Chairman of this
23 ASLB Panel, ASLBP panel. I am a lawyer by training,
24 and I have had about 40 years of federal
25 administrative and regulatory law experience. Because

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1 I'm a lawyer and one of the judges on the panel, I
2 serve as Chairman for this Board for all procedural
3 matters.

4 I would also like to introduce a few other
5 people to you at this point. To my far right is the
6 Board's Law Clerk, an attorney, Nicholas Sciretta.
7 The parties have been receiving emails from him for
8 the past few weeks as we prepare for this hearing.

9 Also joining us in the room is our
10 administrative and logistical support member, Ms.
11 Twana Ellis. Thank you. And our Clerk of record and
12 the master of everything electronic, Mr. Andrew
13 Welkie. He will make sure that the screens, the
14 computers, the microphones, and all of these things
15 are working properly for our hearing.

16 We also have with us in the audience the
17 Director of NRC's Office of Public Affairs, Eliot
18 Brenner. Feel free to contact Mr. Brenner if there's
19 questions about the proceeding, i.e. background or
20 anything relating to procedures at the NRC. He is
21 also the contact for the press and anyone from the
22 public who has questions about our proceeding.

23 I would also like to note just for the
24 record that one of -- another ASLBP Judge, a Judge
25 from the Strata case, is in our audience, Dr. Craig

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1 White. Judge White, okay, is in the back.

2 Okay. Our Court Reporter today is Matt
3 Miller. There will be an electronic transcript made
4 of this proceeding. Copies of that transcript will be
5 available in about a week. It will also be posted on
6 the NRC website at that time.

7 I would like now to ask the parties to
8 introduce themselves. For each party I'd like lead
9 counsel to introduce him or herself, stating your
10 name, the name of your client, the name of any counsel
11 who might be with you today to participate in the
12 evidentiary hearing.

13 Let's start with the Applicant, for
14 Powertech?

15 MR. PUGSLEY: Good morning, Your Honor.
16 Christopher Pugsley for Powertech USA, Incorporated.
17 I'm joined at counsel's table by my co-counsel,
18 Anthony J. Thompson, also counsel for Powertech.

19 CHAIRMAN FROEHLICH: Thank you.

20 And for the Oglala Sioux Tribe?

21 MR. PARSONS: Thank you, Your Honor. Jeff
22 Parsons representing the Oglala Sioux Tribe. With me
23 at counsel table is Travis Stills.

24 CHAIRMAN FROEHLICH: Thank you.

25 For the NRC Staff?

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1 MR. CLARK: Good morning. For the NRC
2 Staff, my name is Michael Clark. My co-counsel is
3 Patricia Jehle, and also with us is Sabrina Allen, a
4 paralegal in our division.

5 CHAIRMAN FROEHLICH: Thank you.

6 And for the Consolidated Intervenors?

7 MR. ELLISON: Bruce Ellison on behalf of
8 Consolidated Intervenors. Co-counsel, Mr. Tom
9 Ballanco and Mr. David Frankel.

10 CHAIRMAN FROEHLICH: Thank you.

11 I should note that, as you may have
12 discovered, the microphones are always live. So if
13 you are conferring among your co-counsel or other
14 parties, you have to hold the pause button, which is
15 directly in front of the microphone, to block it out
16 from the sound system in the room.

17 All right. At this point, I'd ask
18 everyone to please turn off their cell phones and turn
19 them to vibrate. Also, if you need to have a
20 conversation, or whatever, unrelated, please take it
21 out in the hall.

22 Members of the public are free and welcome
23 to observe our proceedings today, as well as all NRC
24 proceedings. But only counsel for the parties and the
25 witnesses who will be testifying will be heard by the

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1 Board today. Questioning will be primarily by the
2 Board, with a limited amount of followup questions
3 that the parties' counsel will submit to us at the
4 conclusion of our inquiry.

5 Let's give a little background on this
6 case, and we'll get started with a few preliminary
7 matters before we hear from our witnesses.

8 On February 25th, 2009, Powertech
9 submitted a license application for a combined source
10 11(e)2 byproduct materials license to construct and
11 operate the proposed Dewey-Burdock ISR project in
12 South Dakota. After completing the 90-day acceptance
13 review, the NRC determined that the application
14 required additional data. The application was refiled
15 on August 10th, 2009.

16 After completion of that second 90-day
17 acceptance review period, the Staff determined that
18 the license application, as supplemented, was
19 acceptable for detailed technical and environmental
20 review, and it was docketed by the agency.

21 On January 5th, 2010, the NRC issued a
22 Federal Register notice providing interested parties
23 and stakeholders, interested members of the public,
24 with an opportunity to request a hearing on the
25 application. A number of groups and individuals

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1 petitioned to intervene, to participate in the
2 process, among them the Consolidated Intervenors and
3 the Oglala Sioux Tribe.

4 This Board was created to hear the case,
5 and after an oral argument in Custer, South Dakota, in
6 June of 2010, the Board granted the hearing request of
7 Consolidated Intervenors and the Oglala Sioux Tribe
8 and admitted them as parties to the proceeding.

9 Three of the Consolidated Intervenors' 10
10 proposed contentions were accepted by the Board at
11 that time, and four of the Oglala Sioux Tribe's 10
12 proposed contentions were accepted.

13 In November -- on November 15th, 2012, the
14 Staff notified the Board of the public availability of
15 its Draft Supplemental Environmental Impact Statement,
16 the DEIS, prepared pursuant to the Environmental
17 Policy Act and the agency's implementing regulations.

18 The environmental review contains analysis
19 that considers and weighs the environmental effects of
20 the proposed action, the environmental impacts of
21 alternatives to the proposed action, and mitigation
22 measures to either reduce or avoid adverse effects.

23 The Oglala Sioux Tribe and Consolidated
24 Intervenors both filed -- both filed additional
25 proposed contentions related to the DEIS, which

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1 Powertech and the NRC Staff opposed. In addition to
2 the original seven contentions, three additional new
3 contentions were admitted at that stage.

4 On January 29th, 2014, the NRC Staff
5 issued its Final Supplemental Environmental Impact
6 Statement, the FSEIS. This final statement
7 memorialized the Staff's environmental impact review
8 and contained a recommendation that the license be
9 issued to Powertech.

10 After another round of proposed
11 contentions by the Intervenors, the existing
12 contentions were found to apply to the FSEIS, and no
13 new contentions were added at this stage.

14 April 8th, 2014, the NRC Staff issued NRC
15 source materials license SUA-1600 to Powertech. This
16 license allows Powertech to possess and use source and
17 byproduct material in connection with the Dewey-
18 Burdock Project. Both the Oglala Sioux Tribe and
19 Consolidated Intervenors moved for a stay of that
20 license pending outcome of the evidentiary hearing.

21 The Board granted a temporary stay on
22 April 30th, which was lifted on May 20th, finding that
23 the continued stay would have a very limited,
24 incomplete effect on preventing any of the specific
25 injuries which the Intervenors' contentions claimed

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1 the ISR mining might cause.

2 The Board can still invalidate or put
3 conditions on the license, though its decision --
4 though its decision, which will be considered and
5 released after -- this decision will be considered and
6 released after the evidentiary hearing.

7 Most recently, the parties have continued
8 to build the record in this case by submitting all of
9 their position statements, witness testimony and
10 exhibits to the Board. Contentions 14A and 14B, which
11 had previously been admitted by the Board, were
12 withdrawn by the Intervenors. Those contentions
13 concerned whether an appropriate Endangered Species
14 Act consultation was conducted and whether the FSEIS
15 impact analysis on the greater sage grouse, the
16 whooping crane, and the black-footed ferret were
17 sufficient.

18 Today, seven contentions are active before
19 the Board. We will question witnesses on these
20 contentions in three separate panels. The first panel
21 of witnesses will cover Contentions 1A and 1B, which
22 discuss the claim that there has been a failure to
23 meet applicable legal requirements regarding the
24 protection of historical and cultural resources, and
25 a failure to consult all interested tribes as required

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1 by law.

2 The second panel will be questioned on
3 Contentions 2, 3, and 4. These contentions allege
4 that the FSEIS prepared by the NRC Staff fails to
5 include information regarding an adequate
6 determination of baseline groundwater quality, fluid
7 migration, and impacts to groundwater and groundwater
8 quantity impacts.

9 The third panel of witnesses will address
10 Contentions 6 and 9, and claims that the FSEIS fails
11 to adequately describe or analyze proposed mitigation
12 measures and connected actions.

13 We will begin with Panel 1. And depending
14 on the timing, and so on, we will move to Panel 2, and
15 then Panel 3.

16 MR. ELLISON: Judge Froehlich, if I may --

17 CHAIRMAN FROEHLICH: Yes.

18 MR. ELLISON: -- just for purposes of the
19 record. The Court stated that the Contention 14 was
20 withdrawn by Intervenors, and I just wanted the record
21 to reflect it was withdrawn by the Oglala Sioux Tribe
22 over the objection of Consolidated Intervenors.

23 CHAIRMAN FROEHLICH: Thank you. So noted
24 for the record.

25 Among the preliminary matters we have

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1 pending is the matter of the electric logs or the
2 additional quality data. At this point, it is
3 uncertain as to the relevance and whether they will be
4 helpful one way or the other. The existence of this
5 additional data will not delay the evidentiary hearing
6 or our proceedings today.

7 Before the Board is able to decide on
8 these additional quality data, and I believe some
9 other data that have been requested in a motion that
10 was filed by the Intervenors on Saturday, we are going
11 to wait until we have Panel 2 seated -- Panel 2 who
12 will be addressing Contentions 2, 3, and 4 -- and
13 before we begin the questioning of those witnesses, we
14 will take up and have argument on the -- what to do
15 with that additional quality data.

16 But the Board believes it will need an
17 opportunity to hear from both the lawyers on that
18 issue, as well as the experts and the expert witnesses
19 who will be testifying on Contentions 2, 3, and 4, in
20 order to decide what we are going to do with that
21 data.

22 Second procedural matter. There has been
23 an exhibit list which was circulated by the Board's
24 Law Clerk up to and including a compilation that was
25 sent by email to all parties on August 11th, 2014.

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1 It's a document entitled Powertech USA Dewey-Burdock
2 In Situ -- In Situ Project. It is 34 pages long -- 34
3 pages long.

4 And this list that was circulated had a
5 number of questions that were outstanding as to -- as
6 to the identification and ultimate admission of
7 certain of the exhibits that had been proposed. I
8 would like to poll each of the parties and hear from
9 them whether the 34-page list that was circulated on
10 the 11th of August contains -- is accurate and
11 contains all of the exhibits that they wish to be
12 included in the record of this proceeding.

13 I will begin with Powertech. Have you had
14 an opportunity to review that 34-page document and the
15 exhibits that are listed thereon?

16 MR. PUGSLEY: Yes, Your Honor. We have
17 reviewed it. We submitted a response to your inquiry
18 on August 12th in our pleading regarding the electric
19 logs.

20 To answer the question here for the
21 record, the exhibits highlighted in yellow on the
22 document we have -- we would like Powertech Exhibit
23 APP-053, which is the testimony of Gwyn McKee, and
24 APP-054, her CV, admitted into the record, because
25 while the document stated this was applicable to

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1 Contentions 14A and 14B, the table of contents of that
2 testimony shows that her testimony is also applicable
3 to Contention 6.

4 Other than that, the other items
5 highlighted in yellow do not need to be part of the
6 record.

7 CHAIRMAN FROEHLICH: Okay. So with the
8 addition of APP-053 and APP-054, the list of exhibits
9 that Powertech has sponsored and proposed is correct.

10 MR. PUGSLEY: Yes, sir.

11 CHAIRMAN FROEHLICH: Okay. The same
12 question now to Staff. Has the NRC Staff had an
13 opportunity to review the list of exhibits that was
14 circulated on August 11th, and do you have any changes
15 or corrections?

16 MR. CLARK: We have, Your Honor. It is
17 complete and accurate with one exception. We
18 submitted a revised exhibit last week. It is a minor
19 revision to Exhibit NRC-2, so it would be NRC-002-R.
20 We filed it by motion, and we received no opposition
21 to that motion.

22 CHAIRMAN FROEHLICH: That was Exhibit NRC?

23 MR. CLARK: Dash 002. The revised exhibit
24 would be NRC-002-R.

25 CHAIRMAN FROEHLICH: Okay.

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1 MR. CLARK: It's the revised resume for
2 Dr. Kevin Hsueh.

3 CHAIRMAN FROEHLICH: Okay.

4 MR. CLARK: Other than that, the list is
5 complete and accurate.

6 CHAIRMAN FROEHLICH: Okay. So we will add
7 to the list of admitted exhibits NRC-002-R.

8 Moving now to the Intervenors, the
9 prepared exhibits from the Oglala Sioux Tribe?

10 MR. PARSONS: Thank you, Your Honor. Jeff
11 Parsons for the Oglala Sioux Tribe. The list is
12 accurate for what is contained in it. In my response
13 to the question about completeness, I indicated that
14 Exhibit OST-020 had not been included. That is -- was
15 attached to our response to the August 8th order filed
16 on August 12th. That is an email motion from
17 Powertech dated August 7th that was never, as far as
18 I can tell, included on the electronic information
19 exchange. And so we attached that to that filing.

20 In addition, Exhibit OST-021, which is a
21 Powertech quarterly management discussion and analysis
22 dated August 11th, that was attached to the motion to
23 enforce the disclosure requirements that you
24 referenced a moment ago filed this preceding Saturday.

25 So with those two exceptions, the Tribe

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1 sees the list as complete.

2 CHAIRMAN FROEHLICH: Okay. Is there any
3 objection to the admission of OST-020 or OST-021?

4 MR. PUGSLEY: No objection from Powertech,
5 Your Honor.

6 MR. CLARK: The Staff has no objection.

7 CHAIRMAN FROEHLICH: Okay. Moving now to
8 the Consolidated Intervenors.

9 MR. ELLISON: We believe that the list is
10 accurate as far as what it contains. I would renew
11 offering Exhibits Intervenors 010 and 010A through Q
12 by way of a proffer with regard to Contention 14. And
13 we would submit that that evidence should be admitted
14 and that contention should be heard.

15 CHAIRMAN FROEHLICH: It'll be admitted as
16 a proffer, but not as one of the exhibits that is
17 admitted into the record of the proceedings, since
18 Contentions 14A and 14B are no longer before us.

19 I would like to take up one additional
20 matter with you, counsel, and that deals with the
21 testimony and affidavit of Dr. Kelley. That is
22 INT-008A and INT-008.

23 Inasmuch as Dr. Kelley participated in the
24 limited appearance statement sessions held yesterday
25 in Hot Springs, he cannot appear again as a witness in

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1 the evidentiary portion of the hearing. So I will not
2 admit Exhibits INT-008 or 008A.

3 I also would note that the affidavit
4 supporting the testimony of Linsey McLean, INT-014B,
5 will be included in the record and will be admitted as
6 part of the list of exhibits admitted in this
7 proceeding.

8 MR. ELLISON: Thank you, Judge Froehlich.

9 CHAIRMAN FROEHLICH: Okay. All right.
10 Does any party at this point have any objection to the
11 admission of the exhibits we have just described, the
12 exhibits that were included in the 34-page document
13 circulated by the Law Clerk and the corrections or
14 additions that were stated this morning on the record?
15 Is there any objection from Powertech?

16 MR. PUGSLEY: No objection, Your Honor.

17 CHAIRMAN FROEHLICH: From the Commission
18 Staff?

19 MR. CLARK: None for the Staff.

20 CHAIRMAN FROEHLICH: From the Consolidated
21 Intervenors?

22 (Pause)

23 MR. ELLISON: I'm sorry. I was visiting
24 counsel. Excuse me, sir.

25 CHAIRMAN FROEHLICH: Is there any

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1 objection to the admission of the exhibits that are
2 contained in the 34-page document listing the
3 exhibits, with the corrections and additions that were
4 stated this morning on the record?

5 MR. ELLISON: Other than previously
6 raised, no, Your Honor.

7 CHAIRMAN FROEHLICH: Okay. And, finally,
8 for the Oglala Sioux Tribe?

9 MR. PARSONS: No objection, Your Honor.

10 CHAIRMAN FROEHLICH: The exhibits on the
11 list are now admitted into evidence, and the Court
12 Reporter is instructed to bind this exhibit list into
13 the transcript of these proceedings.

14 (Whereupon, the above-referred to exhibits were
15 received into evidence.)

16 Okay. At this point, I'd ask counsel if
17 all of their witnesses who are scheduled to appear in
18 our evidentiary hearing are present in the hearing
19 room this morning.

20 MR. PUGSLEY: Your Honor, all of our
21 witnesses are present in the hearing room this
22 morning.

23 CHAIRMAN FROEHLICH: Okay. And for the
24 Commission Staff?

25 MR. CLARK: For the Staff, Your Honor, I

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1 would need to call out to one witness, if I may.

2 CHAIRMAN FROEHLICH: I mean, is --

3 MR. CLARK: This witness isn't testifying
4 on Contention 1, so --

5 CHAIRMAN FROEHLICH: All right. Whether
6 we're going to swear in all the witnesses at once in
7 the beginning or we'll do it panel by panel.

8 MR. PUGSLEY: If I could --

9 CHAIRMAN FROEHLICH: Sure. Chris?

10 MR. PUGSLEY: Your Honor, I apologize.
11 One of our witnesses, Ms. Gwyn McKee, is not currently
12 here at this time but will be available for the panel,
13 Panel 3.

14 CHAIRMAN FROEHLICH: Panel 3.

15 MR. PUGSLEY: Yes. Yes, sir.

16 MR. CLARK: Judge Froehlich, an update,
17 all of the Staff's witnesses are here.

18 CHAIRMAN FROEHLICH: Okay. And for the
19 Consolidated Intervenors?

20 MR. ELLISON: We are still waiting for the
21 arrival of Wilmer Mesteth, and I'm just addressing
22 this particular panel in terms of witnesses. But Dr.
23 Redmond is here.

24 CHAIRMAN FROEHLICH: Okay. For the Oglala
25 Sioux Tribe?

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1 MR. PARSONS: Thank you, Your Honor. Same
2 -- same answer. Mr. CatchesEnemy is here. Mr.
3 Mesteth is en route.

4 CHAIRMAN FROEHLICH: Okay. At this point,
5 I would I guess -- Mr. Mesteth is the only witness
6 missing from the first panel, is that correct?

7 MR. PARSONS: That is correct, Your Honor.
8 We are in process of reaching him by telephone to
9 determine his location.

10 CHAIRMAN FROEHLICH: Okay. That being the
11 case, I think the more prudent approach to take is to
12 swear in our witnesses panel by panel. At this point,
13 I would ask that the witnesses for all of the parties
14 who are scheduled to testify on Panel 1 please stand
15 and raise your right hand. Do you solemnly swear or
16 affirm that the statements you are making in this
17 hearing before the ASLBP will be true and correct to
18 the best of your knowledge and belief?

19 (Responses in the affirmative.)

20 Please stay standing. The record will
21 reflect that each witness responded in the
22 affirmative.

23 Do you adopt your prefiled testimony in
24 this -- your prefiled testimony as your sworn
25 testimony in this proceeding?

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1 (Responses in the affirmative.)

2 The record will reflect that each witness
3 responded in the affirmative.

4 Thank you. You may be seated.

5 At this point, I would ask if there is any
6 procedural matters, any matters that counsel wishes to
7 raise before we move to opening statements? Do you
8 want to --

9 MR. FRANKEL: Your Honor?

10 CHAIRMAN FROEHLICH: Yes.

11 MR. FRANKEL: David Frankel for
12 Consolidated Intervenors. We had filed a motion
13 concerning a motion to strike what we felt were legal
14 opinions offered by non-lawyers, and that that was
15 irrelevant and confusing and a waste of time, Your
16 Honor. You held that open in abeyance pending this
17 moment. So if you could respond to that motion, we
18 would appreciate it.

19 Thank you.

20 CHAIRMAN FROEHLICH: At this point, the
21 Board will not strike any of the witnesses which have
22 been alleged to be opinion of counsel or rendering a
23 legal opinion. As we move through the cross-
24 examination of the witnesses, you are free to renew
25 your objection as to legal conclusion. However, the

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1 Board will take the statements as the understanding of
2 the expert witness of how the law applies, and the
3 Board is aware that many of the people who your
4 pleading alleges are making legal statements are not
5 lawyers.

6 Are there any other procedural matters or
7 concerns that anyone cares to raise before we go to
8 opening statements?

9 MR. PUGSLEY: None from Powertech, Your
10 Honor.

11 CHAIRMAN FROEHLICH: From the Commission
12 Staff?

13 MR. CLARK: None for the Staff.

14 CHAIRMAN FROEHLICH: From the Consolidated
15 Intervenors?

16 MR. ELLISON: None, Your Honor.

17 CHAIRMAN FROEHLICH: Okay. And from the
18 Oglala Sioux Tribe?

19 MR. PARSONS: None at this time. Thank
20 you.

21 CHAIRMAN FROEHLICH: Okay. Counsel for
22 each party will be allowed five minutes to make a
23 brief opening statement before we hear from each
24 panel. These opening statements should introduce the
25 issue or issues to be addressed by the witnesses and

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1 provide an overview of the controversy.

2 The panel has already been seated, with
3 the exception of Wilmer Mesteth, and we will begin
4 with opening statements.

5 Let us hear first from the NRC Staff.

6 MR. CLARK: For the Staff, Ms. Jehle will
7 be giving the opening statement.

8 CHAIRMAN FROEHLICH: Please proceed, Ms.
9 Jehle.

10 MS. JEHLER: Good morning. First, I would
11 like to say that the Staff looks forward to answering
12 the Board's questions during this oral portion of the
13 evidentiary hearing. The Staff is confident that it
14 can provide the Board and the public attending the
15 hearing with information showing how the Staff
16 carefully considered the environmental issues raised
17 by the admitted contentions.

18 Turning, first, to Contention 1A, as the
19 Staff has explained in its written testimony, it
20 thoroughly reviewed how the Dewey-Burdock Project may
21 affect cultural resources. The Staff's witnesses are
22 Dr. Kevin Hsueh, Haimanot Yilma, Kellee Jamerson, and
23 Dr. Hope Luhman.

24 I will sum up the key evidence that
25 supports the Staff's protection of cultural resources,

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1 and this evidence has already been admitted as Staff
2 exhibits in this hearing.

3 The Augustana Class 3 archaeological
4 survey of the Dewey-Burdock site was important in the
5 Staff's review. Also, the Augustana College report on
6 the evaluative testing of sites within the Dewey-
7 Burdock site area.

8 The Staff also relied upon the
9 ethnohistorical study of the SRI Foundation, and,
10 importantly, the Staff conducted tribal field surveys
11 of the Dewey-Burdock site with the participation of
12 seven American Indian tribes.

13 The Staff also prepared and conducted
14 auditory and visual impact assessments, and, most
15 importantly, the Staff prepared and executed a
16 programmatic agreement for the protection of --
17 specifically for the protection of cultural resources
18 that had not yet been identified or have not yet been
19 evaluated at the Dewey-Burdock site.

20 The programmatic agreement was executed on
21 April 7th, 2014, with the signatures of the Advisory
22 Council on Historic Preservation, and the South Dakota
23 Historic Preservation Office. In answering the
24 question of whether the NRC Staff has adequately
25 protected the cultural resources at issue, the answer

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1 is yes.

2 In turning to Contention 1B, the Staff's
3 prefiled testimony, written testimony, indicates that
4 the Staff consulted extensively with American Indian
5 tribes when considering impacts to cultural resources.
6 Again, the Staff presented extensive written
7 testimony, which demonstrates the consideration of
8 these resources.

9 The extensive exhibits will be discussed
10 as part of the tribal consultation on the tribal
11 consultation issues. The key evidence on which the
12 Staff has -- relies is its tribal outreach summary.
13 This 17-page document lists the important tribal
14 consultation activities the Staff undertook beginning
15 in October of 2009 through April of 2014, with the
16 execution of the programmatic agreement.

17 The programmatic agreement was signed, as
18 I stated earlier, by the Advisory Council and the
19 South Dakota Historic Preservation Office.

20 We also look to an exhibit, NRC-031, and
21 that exhibit is a letter from the Advisory Council to
22 the Standing Rock Sioux Tribe. In this letter, the
23 Advisory Council concluded that the Staff's
24 consultation efforts met both the content and the
25 spirit of Section 106.

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1 And, finally, in NRC-018D, the Advisory
2 Council stated to the NRC that the Advisory Council's
3 signature on the programmatic agreement completes the
4 NRC's Section 106 requirements.

5 Staff is prepared to answer the Board's
6 questions.

7 Thank you.

8 CHAIRMAN FROEHLICH: Ms. Jehle, one
9 question, please. The tribal outreach summary, is
10 that a separate exhibit? Or where is that found, just
11 so we --

12 MS. JEHLE: Yes. That's Exhibit 015.

13 CHAIRMAN FROEHLICH: Thank you.

14 MS. JEHLE: And the --

15 JUDGE COLE: You should probably preface
16 that with "NRC Exhibit."

17 MS. JEHLE: NRC Exhibit-015.

18 CHAIRMAN FROEHLICH: Could I hear next
19 from Powertech? Mr. Pugsley?

20 MR. PUGSLEY: Yes. Good morning, Your
21 Honor, members of the Board. May it please the Court,
22 my name is Christopher Pugsley, and I am here
23 representing the licensee, Powertech USA,
24 Incorporated.

25 I would like, first, to thank the Board

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1 and the city of Rapid City for hosting this hearing.
2 And for purposes of Panel 1, dealing with
3 Contentions 1A, dealing with allegations regarding
4 failure to meet legal requirements for the protection
5 of -- assessment and protection of historical and
6 cultural resources, and Contention 1B, alleged failure
7 to consult all interested tribes as required by law.

8 I would like to say, as a general matter,
9 Powertech's approach to the assessment of historic and
10 cultural resources is typical of the development of in
11 situ recovery sites and reflects Commission legal
12 precedent, common sense, accepted science, and
13 regulatory compliance.

14 For purposes of Contention 1A, Powertech's
15 license application included what is called a Level 3
16 pedestrian archaeological survey that was conducted
17 pursuant to the State of South Dakota's standards and
18 guidelines using competent personnel from the
19 archaeology laboratory of Augustana College, all of
20 whom have significant experience in this field.

21 The Level 3 survey is properly
22 characterized here as a 100 percent survey that
23 included appropriate subsurface testing and other
24 commonly accepted investigative techniques to properly
25 identify historical and cultural resources at the

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1 Dewey-Burdock Project site.

2 It is important in the context of
3 Contention 1A to know that a Level 3 survey,
4 archaeological survey, is different from what you
5 would call a traditional cultural property survey, in
6 that the former is considered to be a full report with
7 appropriate confidentiality and protective measures
8 for identified sites conducted pursuant to state-
9 mandated standards, whereas the latter is based solely
10 on confidential and protected tribal traditional
11 knowledge, drawing from a tribe-specific approach to
12 site or resource identification.

13 The witnesses currently representing
14 Powertech on the panel before you are Dr. Adrian
15 Hannus of Augustana College, Dr. Lynne Sebastian, and
16 Mr. Mike Fosha, who currently serves as the Assistant
17 State Archaeologist for the State of South Dakota.

18 For purposes of Contention 1B, after the
19 submission of the survey and its license application,
20 Powertech actively participated in NRC Staff's
21 National Historic Preservation Act Section 106 tribal
22 consultation process.

23 Powertech participated in a number of 106
24 meetings, assisted in the development of the scope of
25 work for field surveys, and the programmatic agreement

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1 previously referenced by NRC Staff counsel, and agreed
2 to be subject to the provisions of the programmatic
3 agreement, including the continued involvement of
4 tribes in the phased development of the Dewey-Burdock
5 Project.

6 During this process, the Oglala Sioux
7 Tribe was asked to participate as a consulting party
8 for multiple avenues by NRC and was invited to
9 participate in the NRC- and Powertech-sponsored
10 meetings and site field surveys. However, while
11 initially agreeing to participate in the field
12 surveys, they subsequently withdrew.

13 Participating tribes in the field surveys,
14 however, were permitted to survey the entire 10,000-
15 plus-acre Dewey-Burdock site using their specific
16 traditional approaches to identifying cultural or
17 historical sites rather than what has been argued by
18 counsel as a scientifically defensible standard
19 methodology.

20 Powertech's contribution to the
21 Section 106 process primarily was active participation
22 in the development of a 36 CFR Section 800.14(b)
23 programmatic agreement, which was agreed to by all
24 parties required to execute such a document, including
25 Powertech, NRC Staff, the United States Bureau of Land

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1 Management, who served as a cooperating agency on the
2 finalization of the Supplemental Environmental Impact
3 Statement, and the State of South Dakota Historic
4 Preservation Officer, who concurred on the eligibility
5 determinations offered by NRC Staff after completion
6 of the identification phase of the Section 106
7 process.

8 In addition, NRC determined in a letter
9 dated April 24, 2013, that they formally requested
10 consultation with the Advisory Council on Historic
11 Preservation, the expert federal agency on
12 promulgation and implementation of National Historic
13 Preservation Act-based regulations at 36 CFR Part 800,
14 et sequens, and their interpretation, which was
15 accepted in October of 2013.

16 As a result, the Advisory Council also
17 participated in the development of, and executed, the
18 aforementioned programmatic agreement, which
19 demonstrates that NRC Staff had completed its
20 responsibilities for the Section 106 process which
21 requires that the lead agency exercise a reasonable
22 and good faith effort to complete the process and
23 consult.

24 Opposing counsel have argued that NRC
25 Staff impermissibly severed the National Environmental

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1 Policy Act process, i.e. the development of the Final
2 Supplemental Environmental Impact Statement from the
3 Section 106 process. By regulation, conduct of the
4 NEPA process, with -- in conjunction with the Section
5 106 process, is not mandatory. Thus, severance of
6 that process from the NEPA process is indeed legally
7 permissible.

8 Lastly, Powertech and NRC Staff's conduct
9 of the review of historic and cultural resources is
10 consistent with current Commission legal precedent for
11 what is termed in 36 CFR Section 800.4(b)(2) as
12 "phased identification."

13 Commission precedent in the Hydro
14 Resources, Incorporated Subpart L proceeding, denoted
15 by LBP-05-26 and CLI-06-11, hearing expressly approves
16 the use of phased identification for ISR processes,
17 ISR projects, due to the inherently phased nature of
18 the development of these project sites.

19 Provisions for identification and
20 eligibility determinations, as well as consultation
21 with tribes of potential sites, as the Dewey-Burdock
22 Project is developed are explicitly addressed in the
23 aforementioned programmatic agreement, as well as an
24 NRC license condition, which is typically termed as an
25 unanticipated discovery condition of previously

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1 unidentified sites, in addition to a current standing
2 memorandum of agreement with the State of South
3 Dakota.

4 Issues associated with this contention
5 will be addressed by Dr. Sebastian during your cross-
6 examination period.

7 In conclusion, members of the Board, I
8 would say Powertech's position is that the evaluation
9 -- the comprehensive evaluation of historic and
10 cultural resources in the entire Record of Decision
11 adequately satisfies NRC requirements at 10 CFR
12 Part 51 and Advisory Council Regulations at 36 CFR
13 Part 800, and respectfully ask that the Board find
14 that neither Contention 1A nor Contention 1B should
15 result in any modification of any aspect of the Record
16 of Decision for NRC's issuance of NRC License Number
17 SUA-1600 to Powertech.

18 Thank you.

19 CHAIRMAN FROEHLICH: Thank you, Mr.
20 Pugsley.

21 From the Oglala Sioux Tribe, please?

22 MR. PARSONS: Thank you, Your Honor. Jeff
23 Parsons on behalf of the Oglala Sioux Tribe.

24 Contention 1A deals primarily with the
25 NEPA requirement that cultural resources at the site

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1 be surveyed, their impacts analyzed, and mitigation
2 measures developed and also analyzed and measured for
3 effectiveness in that document.

4 We contend that that has not happened in
5 this case. The controversy surrounds and the
6 testimony you'll hear today is that the Final
7 Environmental Impact Analysis does not include any
8 survey data collected or analyzed with participation
9 by any Sioux Tribe or representatives.

10 This is despite the Tribe's attempts to
11 engage in a very meaningful way throughout this
12 process, consistent with accepted methodology, and
13 alongside other Sioux tribes, as is their cultural
14 practice. But these proposals were rejected by NRC,
15 despite these efforts. Powertech and NRC Staff
16 rejected the Tribe's survey proposals, as the record
17 shows, primarily due to cost.

18 We heard from representatives of NRC and
19 Powertech about the thoroughly reviewed site, the
20 Augustana study primarily being the source of that
21 review, but the record shows that that study failed to
22 identify sites, cultural sites relevant to the Sioux
23 tribes, particularly the Oglala Sioux Tribe.

24 In fact, the testimony and the evidence
25 presented in this hearing show that Powertech's

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1 witnesses admit that they were not equipped to
2 identify cultural resources with priority to the Sioux
3 tribes. And so to say that that survey included a
4 full, thorough review is belied by that record.

5 Powertech says that they used a typical
6 approach of ISL sites. I think what the record also
7 shows, and what --the testimony you will hear, is that
8 this site is not a typical site. Even the Augustana
9 study indicates the unusually high number of cultural
10 resources in this area. And so given that unique
11 status of this site, it deserved better attention to
12 detail than may be in a typical ISL, particularly with
13 the Tribe attempting to engage submitting their own
14 statements of work and methodologies that were
15 subsequently rejected by the NRC Staff.

16 With regard to Contention 1B, 106
17 consultation under the National Historic Preservation
18 Act requires a reasonable good faith effort. The 106
19 process in this matter was not conducted in a
20 meaningful way, so as to result in a competent
21 cultural resources review. As mentioned, the NRC
22 Staff and Powertech rejected the Tribe's survey
23 proposals.

24 NRC Staff and Powertech rely heavily on
25 the programmatic agreement to solve the inadequacies

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1 of the 106 process. But what the record shows is when
2 the tribes submitted extensive comments on the
3 programmatic agreement, those comments were not
4 incorporated; they were rejected.

5 And I think it speaks volumes that the
6 information that NRC Staff and Powertech state as far
7 as the signatures on the programmatic agreement, I
8 think it's notable that none of the Native American
9 tribes involved in this process signed that
10 programmatic agreement.

11 I think that undercuts an assertion that
12 this process was conducted in a meaningful and good
13 faith manner.

14 NRC Staff cites to their Exhibit 015,
15 which is the list of contacts with the Tribe. What
16 that appears to be is a preference of quantity over
17 quality. You can have a lot of discussions with --
18 involved in the 106 process, but if they aren't of the
19 quality necessary to ensure meaningful participation,
20 then the number of discussions and contacts is not the
21 determinative factor.

22 The PA does not -- programmatic agreement
23 does not specify how any future identification or
24 mitigation will occur, leaving all of these details to
25 the future, despite the failures of these attempts in

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1 the past. And so essentially the PA perpetuates a
2 system that had failed previously and now relies on
3 that same system to solve all the problems in the
4 future.

5 We submit that that's not meaningful and
6 not in good faith. The result is the public and the
7 decisionmakers were denied the benefit of a competent
8 cultural resources analysis before the NRC made
9 decisions.

10 Thank you.

11 CHAIRMAN FROEHLICH: Thank you, Mr.
12 Parsons.

13 And now for the Consolidated Intervenors?

14 MR. ELLISON: Thank you, Judge Froehlich.

15 CHAIRMAN FROEHLICH: Mr. Ellison, it
16 probably would be best if you sat, although I
17 appreciate your standing, so that the microphone will
18 pick up what you have to say.

19 MR. ELLISON: Courtroom style experience.

20 It is the position of the Consolidated
21 Intervenors under Contention 1A that what has been
22 done so far has failed to meet applicable legal
23 requirements regarding the protection of historical
24 and cultural resources. The National Historic
25 Preservation Act is not a meaningless piece of paper.

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1 It is designed to protect cultural resources,
2 historical, ancestral resources.

3 It is not meant to simply show, well, we
4 have done this step and this step, and so it must be
5 okay. It is not designed to pretend to go through
6 certain procedures, which we submit were totally
7 inadequate up to this date. We also feel that it is
8 an impermissible separation of the Section 106 studies
9 from the FSEIS, which we feel was in error.

10 We have two witnesses who are prepared to
11 answer the Board's questions in these regards, Dr. Lou
12 Redmond and Wilmer Mesteth.

13 The Clean Water Alliance and the
14 Consolidated Intervenors include members of the Oglala
15 Sioux Tribe as well as other local tribes. These
16 tribes have historical and ancestral connections to
17 the Dewey-Burdock area.

18 There was a survey that was conducted by
19 the State Historic Preservation Officer from
20 Augustana. The supervisor is here. However, in their
21 report, there were many sites that were identified
22 that were not even examined. So the report itself, we
23 would submit respectfully, is essentially inadequate
24 on its face.

25 The tribes which did do field surveys we

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1 would submit are those least connected historically
2 and geographically from the area. The tribes most
3 affected, the Oglala Sioux Tribe, the Rosebud Sioux
4 Tribe, Cheyenne River Sioux Tribe, Standing Rock Sioux
5 Tribe, raised serious questions as to methodology and
6 raised serious questions as to what needed to be done.

7 The Tribal Historic Preservation Officers
8 stated that there was a lack of meaningful
9 consultation and input. We submit that the evidence
10 will show that sending letters is not the same thing
11 as listening, that it is an example of form over
12 substance, and that the people, the professionally
13 trained Tribal Historic Preservation Officers who know
14 best how to conduct a survey of their own people's
15 historical artifacts, if you will, was simply ignored.
16 This is not a good faith effort.

17 This is an area that is full of cultural
18 resources -- burial grounds, medicine gathering areas,
19 ceremonial sites, tool-making area, food-gathering
20 area. People go there to collect tinsala, roots, game
21 area. Dayton Hyde, who is -- as you know, is the
22 owner of the Wild Horse Sanctuary some 15 miles from
23 the site, has found thousands of artifacts dating back
24 from the earliest times of Lakota history back to the
25 hunting of mammoths. So we said before, there are

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1 insufficient resources done to do a proper survey.

2 As Mr. Parsons pointed out, the tribes did
3 not sign the programmatic agreement. This is
4 basically one side saying, "Well, we agree to do the
5 right thing," and the other side saying, "You haven't
6 even started to, and we're not going to sign this
7 agreement."

8 The fact that none of the tribes who are
9 potentially affected and recognized as being
10 potentially affected by the letters that were sent out
11 signed this agreement, that should say something about
12 its insufficiency of not only that agreement, to
13 protect cultural resources and the process.

14 We would submit that this shows a clear
15 lack of understanding, if not lack of respect, for
16 traditional Indian indigenous culture in this area
17 which will be dramatically affected by any aspect of
18 this project. And we would submit that it is all too
19 typical of an approach that has been taken by the
20 United States, by the dominant culture, with disregard
21 for the original inhabitants.

22 The idea of a phased survey would require
23 that you have competent people available on the site
24 to identify cultural sites before they are destroyed.
25 There is nothing in the programmatic agreement, there

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1 is nothing as a license condition, that requires
2 Tribal Historic Preservation Officers from the Oglala
3 Sioux Tribe, from the Rosebud Sioux Tribe, from the
4 Cheyenne River Sioux Tribe, from the Standing Rock
5 Sioux Tribe, to all have Tribal Historic Preservation
6 Officers present to make such an identification.

7 So not only is the surveys that have been
8 done to date been inadequate, because these folks who
9 have said, "We need to do this in a certain way for it
10 to be done right," and the response by Powertech and
11 NRC Staff has been, "Well, we want to do it our way.
12 We don't care what you think is the right way to do
13 it. We know best." How could that possibly be?

14 The idea of a first phased survey with
15 this programmatic agreement does nothing more than
16 guarantee further destruction of cultural resources in
17 that area.

18 We would submit that what has been done so
19 far, what is proposed in the programmatic agreement,
20 does not offer real protection as required under the
21 Historic Preservation Act of cultural resources. We
22 would ask that this matter be remanded back to the
23 prehearing stage for a proper survey to be conducted.

24 Thank you.

25 CHAIRMAN FROEHLICH: Thank you, Mr.

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1 Ellison.

2 Contention 1A in particular involves legal
3 requirements. So before we begin with the questioning
4 of our witnesses, and also the swearing in of our
5 late-arriving witness, I would like to ask counsel for
6 the parties to explain the differences, if any, of
7 responsibilities towards protection of historical and
8 cultural resources between the National Historic
9 Preservation Act and NEPA. Is it the same? Is it one
10 study that satisfies both statutes, or are there
11 different requirements between the two generic
12 statutes that deal with or seek to have cultural and
13 historic protections?

14 Could I begin with Staff?

15 MR. CLARK: Your Honor, the overall answer
16 is there are slightly different requirements. NEPA
17 requires the Staff to assess the impacts to the
18 affected environment, and by "impacts" they mean the
19 reasonably foreseeable impacts, not impacts that are
20 speculative.

21 The National Historic Preservation Act
22 describes a process by which agencies consult with
23 other parties and attempt to identify, assess impacts
24 to, and, if appropriate, mitigate impacts to
25 resources. The main difference is that while NEPA

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1 requires the Staff to directly assess impacts, the
2 NHPA describes a process under which impacts are
3 assessed as a result of consultation with interested
4 American Indian tribes, if appropriate, and other
5 agencies, including, in addition to agencies, the
6 Applicant.

7 The processes can be -- they can be joined
8 together, as Mr. Pugsley stated previously, and they
9 can also be separated, so they can be -- an agency can
10 use its NEPA process, including the comment process,
11 to invite comments under the National Historic
12 Preservation Act. However, it can also use separate
13 processes.

14 I'm not sure if you want more information
15 on any specific area?

16 CHAIRMAN FROEHLICH: Let me ask you, then.
17 The programmatic agreement is the Staff's response to
18 the requirements of the National Historic Preservation
19 Act. Is that correct?

20 MR. CLARK: It's the culmination of the
21 Staff's response to the requirements of the process.

22 CHAIRMAN FROEHLICH: And Section 3.9, et
23 seq., is -- in the FSEIS is the Staff's response to
24 their responsibilities under the National Historic
25 Preservation Act. Is that correct?

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1 MR. CLARK: That is a partial response --

2 CHAIRMAN FROEHLICH: I'm sorry. Okay.

3 MR. CLARK: -- to the National Historic
4 Preservation Act.

5 CHAIRMAN FROEHLICH: I'm sorry. I meant
6 the National Environmental Policy Act. Excuse me.
7 Section 3.9 of the FSEIS is the Staff's response to
8 their obligations under NEPA.

9 MR. CLARK: No.

10 CHAIRMAN FROEHLICH: No. Okay. Please --

11 MR. CLARK: And my answer is, the Record
12 of Decision is the answer to the Staff's requirements
13 under NEPA. The Record of Decision includes the Final
14 Supplemental Environmental Impact Statement. It also
15 incorporates the programmatic agreement. So the
16 Record of Decision and all the documents referred to
17 in the Record of Decision is the Staff's answer to its
18 NEPA requirements.

19 JUDGE COLE: So, in that situation, the
20 programmatic agreement works towards satisfying the
21 NEPA requirement --

22 MR. CLARK: Correct.

23 JUDGE COLE: -- in the Record of Decision.

24 MR. CLARK: Correct, Your Honor. And this
25 is consistent with the NRC's Commission precedent in

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1 Hydro Resources. I don't want to miscite the case.
2 I can find it. It's one of the Commission decisions
3 where the Staff obtained additional information on
4 cultural resources after it completed its NEPA
5 document, the environmental impact statement in that
6 case or the environmental assessment. I forget what
7 document they used.

8 The Commission found there was no fault in
9 the Staff's review, because although it received
10 information after it issued its NEPA document, it
11 considered the information before it reached a
12 licensing decision. As the Board knows, the Staff
13 cannot reach a licensing decision until it issues the
14 Record of Decision.

15 So this approach is consistent with
16 Commission precedent, and not just Commission
17 precedent but precedent -- the guidance -- one of the
18 Staff's exhibits -- I believe it's Exhibit NRC-35, but
19 I'd have to verify -- is joint guidance published by
20 the Advisory Council on Historic Preservation and the
21 Council on Environmental Quality. ACHP issues the
22 regulations under the NHPA. CEQ issues the
23 regulations under NEPA. In that joint document, they
24 prescribe how agencies can comply with both statutes.
25 The Staff followed that guidance in this case.

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1 CHAIRMAN FROEHLICH: Mr. Pugsley?

2 MR. PUGSLEY: Your Honor, Powertech would
3 agree with NRC Staff's assessment of the situation
4 with the following additions. That for purposes of
5 the National Historic Preservation Act regulations as
6 implemented by the Advisory Council, there are
7 prescriptive requirements there for process, including
8 a four-step process, which I'm going to paraphrase
9 here.

10 Basically, step one, identification and
11 contacting/consulting parties; two, identification --
12 resource identification, site identification; three,
13 identification of potential adverse effects; and then
14 the fourth is resolution of adverse effects. That is
15 a prescriptive process that must be followed and has
16 been in this case.

17 Once again, let me be specific that those
18 regulations at 36 CFR Part 800 specifically allow for
19 phased identification. Now, while we have said --
20 both the Staff and the licensee have said it is
21 consistent with Commission precedent, the Commission
22 precedent is consistent with the regulations. So,
23 thus, the use of phased identification for this is
24 appropriate.

25 In addition, there are prescriptive

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1 requirements for agreement documents, such as a
2 programmatic agreement, which has been used here. So
3 that -- as well as consistent with those regs, but the
4 difference between that and NEPA is exactly what Mr.
5 Clark said, that the NHPA prescribes a certain process
6 that needs to be followed.

7 For NEPA, under Part 10 CFR Part 51, the
8 triggering requirement is what type of NEPA document
9 needs to be produced pursuant to NUREG-1748 guidance
10 for environmental -- for NEPA documents. In this
11 case, according to 10 CFR 51.20(b)(8), an initial
12 operating license for a source material milling
13 facility requires an EIS level document -- in this
14 case, the combination of a programmatic, or in NRC's
15 case a generic environmental impact statement at
16 NUREG-1910, coupled with a tiered Final Supplemental
17 Environmental Impact Statement, NUREG-1910
18 Supplement 4.

19 With those additions, we concur with the
20 Staff's position.

21 MR. CLARK: Judge Froehlich, could I
22 correct that reference? The joint guidance from the
23 ACHP and CEQ is Exhibit NRC-048.

24 CHAIRMAN FROEHLICH: Thank you, counsel.

25 MR. PUGSLEY: Oh. And, Your Honor, if --

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1 I apologize. May I just add one more thing? That
2 when Mr. Clark refers to the Record of Decision, I'd
3 like to add that it doesn't just include the Final
4 Environmental Impact Statement or Supplemental EIS,
5 there also is an extensive response to comments from
6 the public in the back of that document. Those are
7 also the Staff's opinions and findings with respect to
8 the site-specific assessment of the Dewey-Burdock
9 Project. That is also a part of the Record of
10 Decision and part of the NEPA process.

11 CHAIRMAN FROEHLICH: And that set of
12 response to comments are comments made to the
13 environmental document or the National Historic
14 Preservation concerns, the I guess edits or
15 suggestions that were requested by the Intervenors to
16 the programmatic agreement.

17 MR. PUGSLEY: Well, as a matter of
18 process, response to comments are done to the Part 51
19 NEPA document, which is the Draft Supplemental
20 Environmental Impact Statement, which was put out for
21 45 days' public comment.

22 However, that does not preclude an
23 interested stakeholder from offering comments on
24 National Historic Preservation Act related issues. It
25 is impossible to separate the analyses offered in the

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1 FSEIS from what is conducted in the National Historic
2 Preservation Act process. It is prudent to do so, but
3 it doesn't preclude stakeholders from commenting on
4 it.

5 CHAIRMAN FROEHLICH: I think I heard you
6 say, Mr. Pugsley, that those comments that were a part
7 of the Record of Decision were comments that were
8 submitted to the FSEIS, although they could include,
9 at that stage, comments responsive to the programmatic
10 agreement or documents drafted to comply with the
11 National Historic Preservation Act. They would have
12 the ability to do it, but that isn't the purpose of
13 that set of comments. And, indeed, that set of
14 comments were responsive to NEPA concerns. Am I
15 correct?

16 MR. PUGSLEY: It's their response to the
17 Draft Supplemental Environmental Impact Statement and
18 included in the FSEIS.

19 CHAIRMAN FROEHLICH: Okay. All right.
20 Back to the original question for Intervenors. Mr.
21 Parsons?

22 MR. PARSONS: Thank you, Your Honor. This
23 issue was briefed rather extensively in the opening
24 and rebuttal statements. We have a pretty serious
25 issue I think with what we see as NRC Staff and

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1 Powertech conflating the requirements in the National
2 Historic Preservation Act and the National
3 Environmental Policy Act.

4 Federal case law makes it very clear -- I
5 believe I cited this case to you on a conference --
6 oral argument on the motion for a stay of the permit,
7 but the case law clearly states that compliance with
8 the National Historic Preservation Act does not
9 relieve a federal agency of the duty of complying with
10 the environmental -- with the National Environmental
11 Policy Act, and the language in the case laws say "to
12 the fullest extent possible."

13 And so -- and that cite is Lemon v.
14 McHugh. It's a District of D.C. case from 2009,
15 668 F. Supp. 2d 133 at 144. And I think that gets to
16 the heart of this issue, that from our perspective NRC
17 Staff had published a Final Environmental -- a
18 Supplemental Environmental Impact Statement, and then
19 subsequently attempted to shore up the lack of a
20 competent cultural resources analysis, and relying in
21 large part on the programmatic agreement.

22 Contrary to what you just heard, a Record
23 of Decision is not a NEPA document. The purpose of
24 NEPA is to provide information to the public and allow
25 them to digest the information and participate in the

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1 process, as well as the decisionmaker. And so by
2 attempting to provide any analysis at the Record of
3 Decision stage explicitly denies the public the
4 ability to review and comment and participate in that
5 analysis.

6 You have CEQ regulations that specify that
7 environmental analysis, including a cultural resource
8 analysis, must be contained in an environmental
9 document. An environmental document is defined in the
10 CEQ regulations as being an environmental assessment,
11 an environmental impact statement, or a finding of no
12 significant impact.

13 Those do not include a Record of Decision,
14 and that's, again, for that very good reason that NEPA
15 requires involvement of the public and interested
16 parties to inform the decision and allow them to
17 participate.

18 The requirements of the National Historic
19 Preservation Act are not quite so prescriptive. The
20 overriding standard is a reasonable and good faith
21 effort. That is distinct from the NEPA requirements
22 that are, I would argue, more prescriptive. That is,
23 that they require the agency to include in an
24 environmental document their full analysis of cultural
25 resources.

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1 And what we've got in this case is
2 essentially the agency saying, "We know there's more
3 resources out there we haven't looked at, but what
4 we've done is good enough." I think that's sort of a
5 theme running through this entire hearing and a basis
6 of many of our contentions is NRC Staff saying, "Well,
7 what we have is good enough. We'll do the rest at
8 some point later without the involvement of the
9 public, without disclosure of this information as
10 required under the National Environmental Policy Act."

11 I think the programmatic agreement is an
12 NHPA document. It is not a NEPA document. And I
13 think that's evidenced by the programmatic agreement
14 itself. In the programmatic agreement, which is
15 NRC-018A, at page 6 it talks about the programmatic
16 agreement.

17 It states, "If the NRC, BLM, and South
18 Dakota SHPO, in consultation with the tribes" -- now,
19 we have already discussed it, and you'll hear more
20 about how the consultation has not exactly been what
21 we would consider meaningful and good faith -- in
22 consultation with the tribes, if they make the
23 determination that identified cultural resources are
24 not NRHP eligible -- that is, the National Register of
25 Historic Places -- no further review or consideration

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1 of the properties will be required under this PA.

2 And so what that means is the PA applies
3 only to resources that rise to the level, in NRC, BLM,
4 and the South Dakota State Historic Preservation
5 Office's opinion, as being eligible for listing on the
6 National Register, NEPA requires a full review of the
7 cultural resources, not just those that rise to the
8 level, according to these agencies, of the National
9 Registry of Historic Places.

10 And so there is a big difference between
11 what is required under NEPA, which requires a more
12 comprehensive review of the resources, and not just
13 those, which is essentially the substantive focus on
14 the National Historic Preservation Act, is to -- is on
15 those that are eligible for the National Registry of
16 Historic Places.

17 And so in our brief we go through a whole
18 section in our opening statement on the requirement --
19 the NEPA requirements, which require all this
20 information to be up front and involved with the
21 public to say that the NRC Staff can comply with NEPA
22 in a relatively narrowed hearing procedure, without
23 involvement of the public, no opportunity for the
24 public to comment, to review, to critique those
25 studies and that analysis, is contrary to NEPA.

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1 Now, the NHPA, as was pointed out, allows
2 for a more phased approach, but NEPA does not. To the
3 extent that you have information out there that was
4 not gathered and not included in the NEPA document,
5 you can't just push that out to later as they are
6 trying to do in the programmatic agreement.

7 So I think we see it as very much distinct
8 in terms of those legal standards between the National
9 Environmental Policy Act and the National Historic
10 Preservation Act, neither of which we would say were
11 complied with in this case.

12 CHAIRMAN FROEHLICH: Okay. Finally, from
13 the Consolidated Intervenors?

14 MR. ELLISON: We would defer to Mr.
15 Parsons' analysis of the law. I would just note the
16 case that was discussed by NRC Staff about how
17 information was received after NEPA analysis was
18 completed and before the license was issued. Here we
19 have known information which is out there which was
20 not included in NEPA.

21 So it wasn't that some additional
22 information that was unavailable or could not be
23 obtained was not included in the original NEPA
24 document that was then supplemented, here we have
25 known information which was not included in NEPA and

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1 the license has already been issued. So that case is
2 clearly distinguishable.

3 We have a fairly unique situation here by
4 the way this has been approached. You know, and I
5 would submit that, you know, there was a decision that
6 was made to try and do something more than perhaps has
7 previously been done in terms of examining what
8 cultural resources are there. But, again, the people
9 who know best what they are and can find where they
10 are were left out of the process. So no good faith
11 effort.

12 CHAIRMAN FROEHLICH: Thank you, Mr.
13 Ellison.

14 Go ahead.

15 JUDGE COLE: I thought the Record of
16 Decision included all of the environmental documents
17 that the Staff had produced, and you could not issue
18 the license until the -- all of the environmental
19 documents were completed. Is that your understanding,
20 or is it not true?

21 MR. ELLISON: Who is that addressed to?
22 Judge Cole, are you addressing that to me or to --

23 JUDGE COLE: Well, no, I was going to ask
24 you, but we can also ask the Staff.

25 MR. ELLISON: Yes. I would think the

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1 Staff should have to explain first, please.

2 JUDGE COLE: Okay. We'll let the Staff do
3 that.

4 MR. CLARK: The Staff answer is yes, the
5 Record of Decision incorporates all of the
6 environmental documents that the Staff developed and
7 relied on in its review.

8 JUDGE COLE: All the documents that are
9 necessary for license issuance.

10 MR. CLARK: Correct. That includes the
11 Safety Evaluation Report as well.

12 JUDGE COLE: And the FSEIS and --

13 MR. CLARK: Correct. And it --

14 JUDGE COLE: Okay.

15 MR. CLARK: Under Exhibit NRC-048, which
16 I previously referred to, it explains at page 28 that
17 an EIS is not a NEPA decision document. A Record of
18 Decision is a decision document. They are both NEPA
19 documents. One is analysis and one is the actual
20 decision. The decision, as Judge Cole said,
21 incorporates all of the environmental and safety
22 documents needed for the Staff to complete its review.

23 JUDGE COLE: So the Staff review, as far
24 as the NRC Staff is concerned, were complete before
25 the Record of Decision was issued.

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1 MR. CLARK: Correct. Not much before the
2 Staff finalized the programmatic agreement on
3 April 7th, and the Staff issued the Record of Decision
4 on April 8th, 2014. But the Staff waited precisely so
5 that it could include a programmatic agreement and all
6 of the findings in that agreement as part of its
7 Record of Decision.

8 JUDGE COLE: Thank you.

9 MR. PARSONS: Your Honor, if I might just
10 address that briefly. Thank you. What we just heard
11 was that the environmental analysis document was
12 completed, and it referenced a PA that would at some
13 point be developed. And I think that's where we're
14 getting at the crux. The decision document, yes,
15 comes later sometimes. Oftentimes, they issue a Final
16 Environmental Impact Statement and a decision document
17 at the same time, or some agencies do.

18 But the key fact here is that the analysis
19 -- that the FSEIS is a stand-alone document in terms
20 of requiring the complete analysis under the National
21 Environmental Policy Act. And that is when I say that
22 that's -- that the ROD is not an environmental
23 document because, as we just heard, there is no
24 analysis to be done, additional analysis of the
25 impacts on the environment or cultural resources in

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1 this case to be done at the Record of Decision stage.

2 NEPA requires that that entire analysis be
3 stand-alone and be complete as of the publication of
4 the Final -- in this case Supplemental Environmental
5 Impact Statement. And so I just wanted to make sure
6 that that distinction was presented.

7 MR. CLARK: If I could make a brief point
8 to the Board in response to that. Under that theory,
9 an agency can never use a programmatic agreement
10 because they would have to do all of the analysis
11 specified in the agreement before finalizing an EIS.
12 However, again, Exhibit NRC-048, the joint guidance of
13 the ACHP and CEQ, clearly envisions the agencies will
14 use programmatic agreements that comply not with just
15 the NHPA but NEPA.

16 MR. PARSONS: And I disagree with that
17 analysis. NEPA requires that competent -- all
18 information be included in the NEPA process. I
19 understand that the NHPA allows for a tiered system.

20 Now, if evidence comes to light as they
21 are disturbing ground, and they find new resources, I
22 can understand how that could result in the agency
23 going back and reviewing that information for whether
24 it is significant or not. But in this case, what we
25 have is an admittedly -- well, we argue that it's

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1 admitted; we certainly think it is -- an insufficient
2 cultural resources analysis that was included in the
3 Final Environmental Impact Statement, in an attempt to
4 repair that analysis using the programmatic agreement.

5 I think that's a distinct -- distinct from
6 the situation that Mr. Clark is referring to. Here we
7 have a cultural resources analysis that was not
8 completed, not sufficient, in the final -- admittedly
9 not done in the Final Supplemental Impact Statement.
10 And so that's a distinction that I think carries
11 significant legal weight.

12 JUDGE COLE: But hasn't the programmatic
13 agreement been designed or allegedly designed to
14 eliminate those kind of problems as they follow
15 through with completing the programmatic agreement,
16 with all of the special conditions contained therein?

17 MR. PARSONS: I think it's -- a
18 programmatic agreement, for it to work properly,
19 presumes that a complete cultural resources analysis
20 had preceded in the Final Supplemental Environmental
21 Impact Statement. Here what we have essentially is an
22 attempt to use the programmatic agreement to shore up
23 known flaws in the Final Supplemental Environmental
24 Impact Statement.

25 So where you have a complete study being

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1 done, and you don't -- and there is no evidence that
2 things were missed or not analyzed in the NEPA
3 document, then the programmatic agreement in terms of
4 the phased approach that is allowed under the National
5 Historic Preservation Act carries that forward. And
6 to the extent they discover new significant
7 information that was not obtainable previously, it can
8 sort of bring NEPA back to life, but it presumes that
9 prior to that you have a complete analysis in the
10 final.

11 JUDGE COLE: Yes. But isn't that covered
12 in the programmatic agreement, that that would happen
13 if they uncovered significant new information?

14 MR. PARSONS: If they uncover significant
15 -- what I'm saying is that they have in their Final
16 Supplemental Environmental Impact Statement not
17 reviewed -- not finished their cultural resources
18 survey. And, remember, the programmatic agreement, by
19 its own terms, said if we find -- the agencies
20 determine that the resources they find are not
21 eligible for the National Registry of Historic Places,
22 the programmatic agreement doesn't apply at all.

23 And so that is I think a clear indication
24 that it's -- a programmatic agreement in itself, and
25 those measures, are not a substitute for an inadequate

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1 NEPA process preceding it.

2 JUDGE COLE: So under NEPA you might have
3 to do something else, but under the other law you
4 wouldn't have to. You could stop at that point.

5 MR. PARSONS: I think that's -- that's
6 accurate. But, again, the whole system is premised on
7 a complete analysis in the National Historic -- in the
8 National Environmental Policy Act document. And in
9 this case, we I think have made a very strong case
10 that the Final Supplemental Environmental Impact
11 Statement did not include a complete or, we argue,
12 competent cultural resources analysis.

13 JUDGE COLE: Thank you.

14 CHAIRMAN FROEHLICH: Okay. What I would
15 propose we do at this point is I'd like to swear in
16 our late-arriving witness, then we'll take a very --
17 a 10-minute break, and then we will begin the cross-
18 examination of the first panel.

19 Wilmer Mesteth, would you please stand?
20 Raise your right hand. Do you solemnly swear or
21 affirm that the statements you will make in this
22 hearing before the ASLBP will be true and correct to
23 the best of your knowledge and belief?

24 MR. MESTETH: Yes.

25 CHAIRMAN FROEHLICH: Do you adopt your

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1 prefiled testimony as your sworn testimony in this
2 proceeding?

3 MR. MESTETH: Yes.

4 CHAIRMAN FROEHLICH: The record will
5 reflect that the witness answered in the affirmative
6 on both counts. You may be seated.

7 All right. Let's take a 10-minute break,
8 and then we will begin with the cross-examination of
9 Panel 1.

10 (Whereupon, the above-entitled matter went
11 off the record at 10:19 a.m. and resumed at 10:37
12 a.m.)

13 CHAIRMAN FROEHLICH: Back on the record.
14 I'd like to direct the questions now to our empaneled
15 witnesses. Let me begin with a single question to the
16 Ph.D. anthropologists on our panel. I'd like to have
17 an explanation of the difference between a Level 3
18 survey, as it's used by the professionals in the
19 field, and a TCP survey, a traditional cultural
20 property survey, that's also mentioned in the
21 testimony.

22 I guess my first question maybe is from
23 the staff. Dr. Luhman?

24 DR. LUHMAN: If I understand your question
25 correctly, you're asking me to identify the Level 3

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1 survey and distinguish it with a TCP survey.

2 CHAIRMAN FROEHLICH: Exactly.

3 DR. LUHMAN: A Level 3 survey in
4 accordance with the South Dakota SHPO guidelines is
5 essentially a 100 percent survey of the area potential
6 effects. It's a pedestrian survey. There are other
7 guidances that are provided in their documentation
8 with regard to background research that needs to be
9 conducted, the kind of field reconnaissance and how
10 you might go about that, and then reporting.

11 A TCP survey is a traditional cultural
12 property survey. A traditional cultural property
13 survey essentially would look at those resources that
14 are of traditional importance to particular groups.
15 It may not necessarily be Native Americans. It could
16 be other groups that attach some degree of
17 significance to a particular location.

18 CHAIRMAN FROEHLICH: Dr. Sebastian,
19 anything to add?

20 DR. SEBASTIAN: Yes. When archaeologists
21 talk about a Class 3 survey, they're talking about
22 archeology. They're talking about a scientific
23 archaeology. They're talking about looking for places
24 on the landscape that have evidence of past human life
25 that might have information to yield about --

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1 scientific information about life in the past. So
2 it's a narrower focus on the places where people have
3 lived. It really is about whether we can secure
4 scientific information or not.

5 Traditional cultural properties are
6 identified in many different ways. And in many parts
7 of the United States they're done strictly through
8 ethnographic studies by interviewing the elders, by
9 interviewing the knowledgeable practitioners, by
10 gathering that information because the information
11 about traditional cultural properties is held in the
12 traditional knowledge of the community. And as Dr.
13 Luhman says, it can be other than Native Americans or
14 Native Hawaiians. It can be ethnic groups. It can be
15 any kind of a community.

16 The process of identifying those is not
17 specified in the same way that archaeological surveys
18 are pretty much done the same way everywhere in the
19 country. Identifying traditional properties depends
20 on the views of the community about how that should
21 happen. As it happens here in the Northern Plains,
22 we've learned that people want to go out and actually
23 walk the ground and identify things that way. That's
24 not necessarily the way it's done in other places.
25 Does that help?

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1 CHAIRMAN FROEHLICH: It helps. Dr.
2 Redmond?

3 DR. REDMOND: It can also be defined as
4 very specific intervals in your surveying across the
5 landscape, whereas an inventory may be a survey of
6 intervals dealing with a hundred meters between your
7 survey intervals. A Level 3 inventory is primarily,
8 in most areas, 15 meters between survey personnel.
9 It's a very intense survey and it deals with looking
10 very intensely and it also deals with once materials
11 are located, a more intense analysis and in many
12 cases, it also combines subsurface testing with the
13 surface analysis. It may also involve offsite
14 analysis to include analysis by other scientific means
15 which can include things like C-14 or other processes,
16 if that helps.

17 CHAIRMAN FROEHLICH: Dr. Hannus, the
18 Augustana College conducted a Level 3 survey, as I
19 understand it.

20 DR. HANNUS: Correct. And that survey was
21 to respond to the requirements of the National
22 Historic Preservation Act. Is that what a Level 3
23 survey is geared to satisfy?

24 DR. HANNUS: Correct. I guess, you know,
25 to distinguish the two, the Level 3 survey is

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1 absolutely a structured set of procedures that we are
2 required to go through, both from the nature of it
3 being initially a pedestrian survey. In this case, we
4 did a 100 percent, defined by the regulations,
5 pedestrian survey. That would mean that the maximum
6 distance between people would be 30 meters. But in
7 conducting this, I think it would be important to call
8 to everyone's attention to the fact that as you begin
9 to go across, and these are linear transects, so
10 you're lining up across the landscape. But within
11 that framework, you then as you identify sites, you
12 then begin to close this interval.

13 And so within this particular project,
14 there are instances in which we were probably within
15 fingertip-to-fingertip relationship to each other
16 because as you identify a zone where you're looking at
17 a site, you then bring everyone together to clearly
18 try to establish the horizontal extent of that site.

19 Now as far as subsurface testing goes,
20 within a Level 3 process, you're doing subsurface
21 testing depending on a number of factors, but largely
22 how clearly you can see the landscape surface. During
23 the process of our Class 3 work at the Dewey-Burdock
24 project, the conditions had been under a fairly
25 lengthy drought circumstance. So you had a surface

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1 visibility that was really quite conducive to seeing
2 the sites without having to go across the landscape
3 doing intermediate shovel tests.

4 In any case, what we were conducting then
5 was a process by which -- and the other thing I should
6 note, too, is that when you look at particular
7 features on the landscape that would either be
8 elevated areas and/or either fossil or active water
9 sources, you would certainly intensify the closeness
10 of proximity of people conducting the survey because
11 there are indicators that we, as archaeologists, are
12 trained to look for. There are indicators telling us
13 about the logical areas on a landscape that people
14 either would have settled on or would not have settled
15 on.

16 So as part of this scientific process,
17 it's incumbent on whatever archeological group is
18 conducting the work to be aware of those set of
19 parameters. In other words, you're looking at the
20 climatic parameters that are either present currently
21 and/or are known from the past as well as -- so this
22 and it should be separated though clearly from a
23 traditional cultural property survey because there is
24 not a set of specific type guidelines. And those are
25 outside the parameters of what we, as archaeologists,

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1 would be privy to that information. That information
2 is held in the deep knowledge of the tribal elders and
3 so on. And that's something that the way in which
4 those surveys would be conducted I say is different
5 and it doesn't have the same set of strictures drawn
6 in a legal sense that those that we are working under
7 have drawn.

8 CHAIRMAN FROEHLICH: Dr. Luhman, is that
9 because the National Historic Preservation Act is
10 focused on properties' eligibility to be added to the
11 National Register of Historic Places? Is that the
12 reason why the Level 3 surveys are used?

13 DR. LUHMAN: Level 3 surveys are used in
14 particular circumstances when they're appropriate to
15 the project. But yes, it's all part and parcel of the
16 process by which evaluating whether or not any
17 identified resources would, in fact, be eligible to
18 the National Register of Historic Places.

19 CHAIRMAN FROEHLICH: Now from that answer,
20 are Native American cultural and religious places the
21 types of things that a Level 3 survey picks up and are
22 those the type of things that are looked for in a
23 traditional Level 3 survey?

24 DR. LUHMAN: A traditional Level 3 survey
25 may, in fact, encounter some resources that would be

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1 associated with Native American Groups or which they
2 would identify. But they wouldn't necessarily
3 identify all of the resources primarily because some
4 of the knowledge is not available to those conducting
5 a Level 3 survey. That would be provided by the
6 Native American groups themselves.

7 CHAIRMAN FROEHLICH: Do any of the other
8 expert archaeologists care to respond or add to Dr.
9 Luhman's answer?

10 Dr. Sebastian?

11 DR. SEBASTIAN: There's an overlap because
12 many archeological sites are of importance to native
13 people. It's their ancestors who lived there. So
14 there's an overlap, but it's not exact.

15 Archaeologists can identify archeological
16 sites that are likely to yield information about the
17 past and some of those would also be traditional
18 cultural places that would be important. But there
19 are lots of other kinds of traditional cultural
20 places, Mountain Top Springs, lots of things that have
21 that importance and that would be eligible to the
22 National Register that archaeologists don't have the
23 skills or the knowledge to identify.

24 CHAIRMAN FROEHLICH: Okay, Mr.
25 CatchesEnemy or Mr. Mesteth, can you tell me some of

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1 the things that would be picked up or recognized in
2 the traditional cultural TCP survey that would not
3 show up in a Level 3 survey that was just described by
4 the previous witnesses?

5 MR. MESTETH: Well, before I talk, I'd
6 like to greet everybody in my Lakota language.

7 (Native language spoken)

8 What I am saying is I'm from the Ogala
9 Lakota Nation. And when I was growing up, you know,
10 I grew up in my language. That's my first language is
11 Lakota language. And I want that clearly understood
12 here today in these proceedings here.

13 We are the ones that had rejection and
14 we're the ones that are the experts, not the
15 archaeologists. They make assumptions and hypotheses
16 about our cultural ways and it's not accurate. Some
17 of the information is not accurate. And that's why we
18 object in certain situations. But I'm a Lakota
19 spiritual leader all my life. I grew up in my
20 traditional ways and the history of my people. I am
21 well versed in the history of my people. And Khe
22 Sapa, the Black Hills, I was born here in the Khe
23 Sapa. I was born at (Native language spoken). That's
24 "Where the Thunder Beings Perch." It's Harney Peak.
25 That's where I was born. In 1957, I was born there at

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1 the man-made lake of Sylvan Lake. That's where I was
2 born and I'm proud of my place of birth because it's
3 my ancestral land that I was born in. And I grew up
4 with the history of our people in and around the
5 sacred Black Hills.

6 We are one of the largest indigenous
7 nations in this country on this continent, the Lakota,
8 Dakota, and Nakota people. And our land base,
9 aboriginal land base was vast. You have to clearly
10 understand that this land base is a vast territory,
11 where our people roamed and ventured and coexisted
12 with other tribes before it became the United States
13 of America.

14 This Turtle Island, and we have respect
15 among each other, our tribes and our cultural ways and
16 our burial grounds, as well understood between tribes
17 and we have effigies, stone features. We have sacred
18 places here in this country and we are the only ones
19 that can determine those things. And sometimes we are
20 reluctant to share this information with
21 archaeologists because the nature of the information,
22 sacred places. Your understanding of a sacred place
23 is different from mine. And I want those things
24 clearly understood here today in these proceedings.

25 We are the ones, and the only ones, that

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1 are qualified. When we're talking about tribes in and
2 around the Black Hills, the Lakota Nation, the Kiowa
3 Nation, the Crow Nation, Arapaho, Northern Arapaho,
4 Northern Cheyenne Nations, Hidatsa, Mandan and
5 Arikara, the Ponca and Pawnee. These tribes are
6 historical tribes. When we're looking at features and
7 artifacts and you're talking about history of this
8 Black Hills, then we are the experts. I want that
9 clearly understood.

10 And as far as this Level 3 survey, the way
11 I understand it, these have to be included in that and
12 it should be included. And it should be stated to
13 that effect. And include the Native American tribes
14 that are in question here. That's my understanding of
15 that. And the cultural TCP surveys, cultural TCP
16 surveys, that's where we are the ones that determine
17 what is clearly Lakota, a stone feature, a plinth
18 artifact, arrowpoint. Those things, because we still
19 practice our culture and we can trace it back. And
20 what kind of stones are used on this land?. What kind
21 of medicines that we utilize? We still use -- I'm a
22 medicine man. I use in my practice with these
23 medicines on this country and I go into the Black
24 Hills and I harvest these medicines yet today.

25 The knowledge of our people, you know,

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1 their existence here, you know, in the Black Hills
2 area, some experts in the archeologist's field say
3 that we're newcomers here. But no, in my ohunka, it
4 states in there that we came forth upon creation here,
5 not where Adam and Eve came in the Garden of Eden,
6 wherever that is, you know. But here in (native
7 language spoken) we call it, that's where our
8 tradition states that we came forth upon this island
9 here, the sacred Black Hills and we crossed over this
10 land towards the east and then made our journey back
11 here. That's our story and it's just as valid as this
12 Holy Bible, you know. That's my understanding.

13 CHAIRMAN FROEHLICH: Thank you. I would
14 ask that at the next break you write out the Lakota
15 language that you spoke early on for the court
16 reporter, so he can insert it properly and it will be
17 there clearly.

18 Ms. Yilma, to address the EIS, you're
19 required to have a section that includes places of
20 religious and cultural significance. And I guess to
21 do that, you're going to need to have input from
22 people to whom the area has religious and cultural
23 significance.

24 Can you tell me how you began the process
25 to address the requirement that places of religious

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1 and cultural significance were included in the Draft
2 Environmental Impact Statement initially?

3 MS. YILMA: When we first initially got
4 the application, we reviewed it. We accepted it. We
5 noticed -- we included a Notice of Intent to prepare
6 a statement -- to prepare an Environmental Impact
7 Statement. And as part of that process, we also sent
8 out invitation letters to all the consulted tribes.
9 Initially, we got a list of tribes that we believe had
10 ancestral ties to that area from the State Historic
11 Preservation Officer and for those tribes we --

12 CHAIRMAN FROEHLICH: Let me interrupt you
13 there. You received that initial list from a State
14 Preservation Historic Officer?

15 MS. YILMA: Yes.

16 CHAIRMAN FROEHLICH: Is that Mr. Fosha?

17 MS. YILMA: No.

18 CHAIRMAN FROEHLICH: No? Explain.

19 MS. YILMA: Although Mike Fosha is
20 associated with the State --

21 MR. FOSHA: Historical Society.

22 MS. YILMA: Society. That's correct. It
23 was Paige Olson at the SHPO's office in Pierre, his
24 colleague.

25 CHAIRMAN FROEHLICH: His colleague.

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1 MS. YILMA: Yes.

2 CHAIRMAN FROEHLICH: Okay. Can I ask Mr.
3 Fosha at this point and interrupt your chronology?
4 We'll come back to that.

5 MS. YILMA: Okay.

6 CHAIRMAN FROEHLICH: Evidently, the office
7 sent a list of potentially affected tribes and native
8 peoples who would be potentially interested in
9 development in this area. Is that correct?

10 MR. FOSHA: That's standardly what we do,
11 yes.

12 CHAIRMAN FROEHLICH: And that list
13 contained --

14 MS. YILMA: It initially contained 17
15 tribes based on historical ties that could have used
16 that area in the past.

17 CHAIRMAN FROEHLICH: And was that list
18 -- I remember the list and it included the names of
19 the tribes followed by a state. South Dakota for
20 some, North Dakota -- that's the list we're talking
21 about?

22 MS. YILMA: That's correct.

23 CHAIRMAN FROEHLICH: Was that list in
24 order of most connected with the area to least or
25 possibly traversed the area at some in the past

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1 thousand years? What was the nature of that list?

2 MR. FOSHA: I believe it's based upon maps
3 that were generated by the U.S. Government at a
4 certain point in time when they started establishing
5 ancestral lands for each tribe.

6 MS. YILMA: The list, Your Honor, didn't
7 have any priorities. If I recollect, I can reference
8 the SEIS and confirm. It was just alphabetically
9 listed.

10 CHAIRMAN FROEHLICH: Alphabetically.

11 MS. YILMA: So it was not areas of
12 importance. But like Mr. Fosha has stated, the list
13 was developed based on the maps that was generated by
14 the State Historic Preservation Officer.

15 CHAIRMAN FROEHLICH: Back to your
16 chronology, but ask after having received the list of
17 potentially interested parties, any attempt was made
18 to prioritize from most impacted to least impacted on
19 that list?

20 MS. YILMA: It is my understanding that if
21 a tribe has historical ties to that area, they are
22 entitled to be a consulting party. And so therefore,
23 we did not prioritize who has the most concern versus
24 not because they all should have a similar type of
25 concern. That was my understanding. Just to preface

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1 that though, Your Honor, when we went out, we had a
2 site visit in December 2009 and when we went out
3 there, recognizing that the Ogala Sioux Tribe is the
4 closest proximity-wise, we did try to meet with the
5 Ogala Sioux Tribe at which time we weren't able to
6 because they didn't have the availabilities while we
7 were out there to meet with them.

8 JUDGE COLE: But you did not attempt to
9 prioritize at all?

10 MS. YILMA: Because our understanding is
11 any tribe that had historical ties has the same
12 importance, if you know what I mean.

13 CHAIRMAN FROEHLICH: From an
14 archeological? Is that correct? Is that how you
15 understand it, Dr. Hannus?

16 DR. HANNUS: My understanding would be
17 that you are not prioritizing this at all. You're
18 saying that there's evidence both in the ethnographic
19 data and so on to suggest presence of certain groups
20 who are in a region and we're not really talking about
21 a time dimension to this. We're talking about the
22 fact that there are various ways of defining those
23 presences, but that you're not trying to give one
24 group a greater role or a lesser role. What you're
25 really trying to understand is there's a vast

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1 continent here across which people were using
2 resources, interacting with each other and so the
3 attempt of these lists of identification is really to
4 try to be as broad as possible, a net which you throw
5 out, to bring in those groups who would legitimately
6 have some concern.

7 A good example, I suppose, would be the
8 Southern Cheyenne, for instance, aren't physically
9 located in the Dakota today, but Bear Butte is a
10 crucial traditional, cultural site for the Southern
11 Cheyenne because it's where they would have their
12 arrow renewal ceremony. So it doesn't have anything
13 to do with contemporary proximity. And again, my
14 understanding it's not supposed to have anything to do
15 with ranking the level of importance. It would be
16 that those who feel a connection either immediately or
17 in the distant past would have the correct input to a
18 process like this. And it becomes very complicated
19 because you're not trying to exclude anyone.

20 CHAIRMAN FROEHLICH: Dr. Sebastian?

21 DR. SEBASTIAN: Yes. Under the
22 requirement that's placed on the federal agency in
23 terms of how they comply with Section 106 is any tribe
24 that expresses a wish to be consulted about places of
25 religious and cultural significance is consulted.

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1 I was working on a project in Ohio and we
2 thought we had contacted all of the potentially
3 interested tribes, but the Seneca from New York heard
4 about the project, contacted us and said they would
5 like to do that. We said certainly, that you can do
6 that.

7 CHAIRMAN FROEHLICH: Okay. Dr. Luhman,
8 does the perspective change when you're attempting to
9 comply with NEPA and the sections there that require
10 analysis of discussion of the religious and cultural
11 resources? Does that change where you have to look to
12 those tribes or those peoples who have had more
13 contact with the area than such like other tribes who
14 may have had at some point had contact? Is there an
15 effort in the NEPA compliance?

16 I understood the answers from Dr. Hannus
17 and Dr. Sebastian, but as you focus on the Historic
18 Preservation Act, it doesn't matter as much. But when
19 you're complying with NEPA, and assessing the impacts,
20 is there a difference? Is there a change in focus, at
21 least on the staff to address those tribes, those
22 peoples who have greater connection, greater links to
23 a particular area?

24 DR. LUHMAN: I would have to say no. It
25 is self-identified by the tribes. And so therefore

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1 any group that expresses an interest or has a concern
2 is considered equally.

3 CHAIRMAN FROEHLICH: Okay, Dr. Sebastian.

4 DR. SEBASTIAN: I could be wrong, but as
5 far as I'm aware there isn't a specific requirement in
6 NEPA for tribal consultation.

7 CHAIRMAN FROEHLICH: No, there's not.

8 DR. SEBASTIAN: Okay.

9 CHAIRMAN FROEHLICH: There is a
10 requirement, however, that I guess that's what I was
11 going with with Dr. Luhman, there is the necessity to
12 take a hard look.

13 DR. SEBASTIAN: Oh, yes.

14 CHAIRMAN FROEHLICH: And I'm wondering as
15 part of that hard look, the focus changes on those
16 peoples or those tribes that may have been there
17 longer, in there more, or more of them, whatever the
18 criteria are. How does that hard look requirement
19 change when you're doing your NEPA analysis?

20 Ms. Yilma, you can continue.

21 MS. YILMA: Yes, I guess I should have
22 just started off chronologically. Because of the hard
23 look requirement for NEPA, we recognize Ogala Sioux
24 being the closest to the project. And initially, our
25 efforts were geared towards the Ogala Sioux and

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1 consulting with the Ogala Sioux Tribe, until we met
2 with the South Dakota State Historic Presentation
3 Office and was informed of the broader view that we
4 needed to take into consideration and consult with all
5 the rest of the tribes that wish to be consulting
6 parties because at one time they had inhabited that
7 area as their historical ties.

8 For that reason, as I mentioned earlier,
9 when we went out for our initial site visit in
10 November 2009, we did try to contact the Ogala Sioux
11 Tribe to get any information we could gather of
12 anything of importance to them for us to consider in
13 our NEPA review at which time, like I mentioned, they
14 weren't able to meet with us because of scheduling
15 conflicts.

16 So when we came back to the office, our
17 communication continued with the Ogala Sioux Tribe in
18 addition to sending the letters, the invitation
19 letters officially to get interest from all the
20 tribes. We also communicated with them when we issued
21 the notice for a hearing, for instance. And so I
22 guess as part of the hard look, we did consider Ogala
23 being the closest tribes.

24 CHAIRMAN FROEHLICH: So then, does it
25 follow that since the Ogala were the closest that that

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1 would be the focus of the hard look for the FEIS? Now
2 separate your mind for a moment, the consultation
3 requirements and the National Historic Preservation
4 requirements, but for the purpose of preparing the
5 EIS?

6 MS. YILMA: Your Honor, I do want to say
7 one more thing before we continue down that road.
8 What I want to say is that initially when we started
9 doing the NEPA document, we did coordinate the NEPA
10 and NHPA together. Because of that, we needed to take
11 a broader look than just focus our efforts on to the
12 Ogala Sioux Tribe. And for that reason, all of our
13 consultation effort has always included the other
14 consulting tribe, not just the Ogala Sioux.

15 CHAIRMAN FROEHLICH: Okay. Continue with
16 your efforts and your work.

17 MS. YILMA: Okay, so we contacted them
18 initially with letters and followed up with phone
19 calls and contacted them again with letters and
20 followed up with the phone calls until we had our
21 initial face-to-face meeting in 2011.

22 In 2011, when we had our initial face-to-
23 face meeting, there were a number of tribes including
24 the Ogala Sioux present there and during that effort
25 we were told that in order for us to -- in order for

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1 the tribes to identify properties, they would need to
2 conduct a tribal field survey which we refer to as TCP
3 surveys.

4 CHAIRMAN FROEHLICH: Let me interrupt you
5 again.

6 MS. YILMA: Sure.

7 CHAIRMAN FROEHLICH: My apologies, but now
8 this meeting, this was a face-to-face meeting you
9 referred to?

10 MS. YILMA: That's correct.

11 CHAIRMAN FROEHLICH: Is that the same or
12 different as a government-to-government meeting? Is
13 there any difference?

14 MS. YILMA: Your Honor, the way we look at
15 it is we are -- we consider all contacts we have with
16 the tribes, government to government, in a sense that
17 we are speaking with elected representative or
18 representatives of each respective tribe, so therefore
19 by that virtue we consider it a government-to-
20 government consultation.

21 CHAIRMAN FROEHLICH: So all the meetings,
22 all the emails, all the correspondence, those are all
23 government-to-government communications in your
24 perspective?

25 MS. YILMA: In my perspective, yes, that's

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1 correct. And again, it's because we are communicating
2 with those representatives that the tribes deemed
3 appropriate for us to contact for cultural resources
4 type information.

5 CHAIRMAN FROEHLICH: Okay. I ask because
6 I notice as I went through the chronology at some
7 point the tribes in their responses wanted to, at
8 least I think from their perspective, escalate it from
9 these face-to-face meetings to a government-to-
10 government meeting and I just wondered if there was
11 any difference?

12 MS. YILMA: In my perspective, again, we
13 considered all contacts government to government. I
14 believe some of the tribes did request for us to meet
15 with the tribal leaders and considered a meeting with
16 the tribal leaders as a government to government.

17 With that respect, any communications we
18 had with the representatives, if we, for instance,
19 followed up with a letter or an email, we tried to
20 copy the leaders to keep them informed of all the
21 decisions that was being conducted through the
22 consultations that we were having with the Tribal
23 Historic Preservation officers.

24 Additionally, I'm going to fast forward to
25 almost the future and say that we did try to attempt

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1 the government to government as defined by the tribes,
2 I believe it's March or May of 2013 where we invited
3 over 30 tribal leaders to meet with us so we could
4 discuss all sorts of matters under the NHPA at which
5 point there was only one representative that showed up
6 stating that they were representing the tribal elders,
7 but the others that showed up said they were just
8 representing the tribes, but not the elders.

9 JUDGE COLE: Representing the what?

10 MS. YILMA: The tribes, but not the
11 leaders.

12 JUDGE COLE: Thank you.

13 CHAIRMAN FROEHLICH: Interrupt you again.

14 MR. SHEEHAN: Yes.

15 CHAIRMAN FROEHLICH: Mr. CatchesEnemy, can
16 you tell me from your perspective the difference, if
17 any, between the face-to-face meetings that are in
18 that chronology and the requests, I guess, from the
19 tribes for government-to-government consultation?

20 MR. CATCHESENEMY: Indulge me a little bit
21 to allow me to introduce myself as well.

22 (Native language spoken)

23 I say greetings to all my relatives, to
24 all of you here. I greet you with a good heart and
25 good handshake, your time and diligence in having this

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1 hearing.

2 My Lakota name is Sacred Thunder Buffalo,
3 given to me by my elders. I am Lakota and I am the
4 land. That's what I said in Lakota. There's a lot of
5 things that are running through my mind as we're
6 listening to the different testimony and this is one
7 of the items that is of concern for the tribes.

8 The distinction between NHPA, Section 106
9 Consultation, which normally involves staff people and
10 attorneys of federal agencies, in this case, the NRC
11 staff and the Tribal Historic Preservation officers.
12 Typically, you're not going to find elected tribal
13 leadership at these Section 106 consultation meetings
14 because typically we're talking about strictly
15 archeological and cultural resource-related items.

16 When it gets elevated to a government-to-
17 government status, that is when you have folks that
18 are both elected officials on the federal government
19 side and the tribal government side sitting at the
20 table. So I would disagree with the point being made
21 that these were considered government-to-government
22 consultations because I do not represent as an elected
23 official. I am not a government-elected person. I am
24 an employee of the tribe to do a job related to
25 historic preservation and cultural resource issues.

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1 But when our councilmen and council women,
2 our executive officers such as our tribal chairman,
3 tribal president are at the table, we then view that
4 as a government to government only if the federal
5 government is sending their decision makers to the
6 table to discuss certain matters. So I would at this
7 point disagree with the government to government
8 versus Section 106 consultation.

9 CHAIRMAN FROEHLICH: As I understood your
10 answer, sir, that when you hear government to
11 government, you think of the elected leaders of the
12 tribe speaking with someone other than the staff
13 members you've been working before. Who is it that
14 you would have expected at the other end of the table
15 from the NRC?

16 MR. CATCHESENEY: Well, maybe it may
17 sound, you know, profound or unrealistic, but if we
18 have a sovereign nation such as we carry ourselves,
19 regardless of our status in most Americans' minds, we
20 still see ourselves as a sovereign nation with treaty
21 rights that were signed between the tribal president,
22 forgive me, the treaty signers and the president of
23 the United States or Congress. And so when we talk
24 about government to government, if our tribal
25 president is at the table, then so should President

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1 Obama.

2 That's why I'm saying it's probably
3 profound for most people to consider that that level
4 of leadership, but for our folks, I just see myself as
5 a staff person. And if I'm going to be sitting in a
6 consultation, I want to be sitting with a staff person
7 and that's the Section 106 consultation.

8 CHAIRMAN FROEHLICH: In the staff
9 testimony, the staff states it conducted its own
10 independent analysis to determine eligibility
11 determinations of archeological and tribal sites and
12 uses this analysis when making its cultural resources
13 impact determination. That's in NRC Exhibit 151 at
14 page 6.

15 Can you tell me, please, the extent of the
16 nature of the independent analysis that staff
17 conducted?

18 MS. YILMA: Sure. Of course, we started
19 off with the cultural resource survey that the
20 applicant provided as our initial starting point. We
21 reviewed the Level 3 class survey.

22 CHAIRMAN FROEHLICH: That original survey
23 was the Augustana College survey?

24 MS. YILMA: Augustana College, as part of
25 the application, yes.

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1 CHAIRMAN FROEHLICH: Okay.

2 MS. YILMA: Yes, and so we reviewed the
3 survey and determined there was additional testing
4 that needed to be done on some of the unevaluated
5 sites that could potentially be disturbed by the
6 ground disturbing activities of proposed Powertech's
7 license. And because of that, we asked for additional
8 information from Powertech to be provided on those
9 sites we deemed might potentially be impacted and were
10 not included extensively in the Augustana initial
11 survey.

12 Powertech then went ahead and did
13 additional survey on those sites and provided
14 additional information on those sites for us to
15 consider during our eligibility determination. So
16 archeological survey, the initial survey, plus the
17 additional survey we took into consideration when we
18 were making our eligibility determination. In
19 addition to that, we looked at the tribal survey that
20 was provided to us. In addition to that, we looked at
21 the noise and auditory impact assessment that we had
22 done. In addition to that, we took into consideration
23 all information we were provided through the various
24 consultations that we had with the tribes, the SHPO,
25 BLM, and so forth.

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1 We also did background research
2 information just to identify the type of properties
3 that could be found in that area and we -- for that,
4 we looked at the SRIF, SRI's report that was provided
5 on historical background on what type of information
6 that could be found in the Great Plains. And went
7 into the South Dakota Archeological Research Center to
8 validate all the lists of eligible sites that are
9 currently in existence and that could also be
10 potentially available on that project's property when
11 coming up with our eligibility determination.

12 CHAIRMAN FROEHLICH: Okay, and in your
13 answer, you made reference to the SRI Foundation and
14 that's Dr. Sebastian's organization. At what point
15 did SRI or you become involved in the analysis for
16 this project?

17 DR. SEBASTIAN: Are you asking me?

18 CHAIRMAN FROEHLICH: Yes, please, Dr.
19 Sebastian.

20 DR. SEBASTIAN: In the summer of 2011, I
21 believe the NRC asked Powertech to provide information
22 about potential properties of religious and cultural
23 significance. And they hired us to assist them in
24 providing the NRC with the information that they asked
25 for.

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1 CHAIRMAN FROEHLICH: And again, in your
2 mind, or I guess in your work order instructions or
3 requests from the staff, was that to satisfy National
4 Historic Preservation Act issues or to what extent did
5 it include NEPA type questions?

6 DR. SEBASTIAN: Because they asked for
7 information on properties of religious and cultural
8 significance which is the Section 106 term of art, I
9 made the assumption that that's what they wanted, yes.

10 CHAIRMAN FROEHLICH: Okay.

11 MS. YILMA: Your Honor, may I preface
12 that?

13 CHAIRMAN FROEHLICH: Absolutely.

14 MS. YILMA: Under NEPA, we're supposed to
15 be looking at cultural resources. Historical property
16 is a subset of cultural resources and so therefore any
17 information that are provided under the NHPA
18 historical properties are a subset of NEPA review. So
19 we have to consider them under the NEPA review.

20 CHAIRMAN FROEHLICH: Okay. Point taken.
21 Thank you.

22 Dr. Redmond, did you want to respond?

23 DR. REDMOND: Yes, one of the problems
24 that I had had with the way the inventory was
25 conducted was not with any of the qualifications of

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1 any of the people that Dr. Hannus had or the way that
2 Dr. Hannus did anything or his qualifications, was
3 that I had done several surveys in an area about 20
4 miles south of the Dewey-Burdock site. And it was in
5 an area that looked very similar. It was as
6 desiccated as the Dewey-Burdock area was, the same
7 thing. And had I simply done a Level 3 survey by
8 looking at the surface, I would have missed a lot of
9 archeology. But instead, I did subsurface testing and
10 what I found was in a 300-acre parcel, I found 22
11 intact hearths on 22 sites. That is significant.

12 And part of what I said in my letter was
13 that in surveys that I had done in South Dakota up to
14 2005, it had been my experience that had I found sites
15 similar to what Dr. Hannus had found, had I not done
16 subsurface testing on materials that were found there
17 and described them as he had found them, my reports
18 would have been turned back to me, both as a federal
19 employee for the National Forest when I worked as an
20 archeologist for them or as a private contractor when
21 I ran my own company doing private contracts. My
22 reports would have been turned back to me for not
23 doing subsurface investigations when I found material
24 such as he found. And that was my contention in the
25 letter that I put forth earlier.

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1 CHAIRMAN FROEHLICH: Dr. Redmond, could I
2 interrupt you and just ask when you speak to
3 subsurface tests, is that more than shovel tests or
4 soil cores?

5 DR. REDMOND: Yes. What I was told to do
6 was to put into -- put down 50 by 50 centimeter or 1
7 by 1 meter test pits, in 10 centimeter levels, down to
8 sterile levels from surface down to a sterile level to
9 make sure that I was not missing anything. Totally
10 immaterial of what I found on the surface. And that
11 was what I was told to do by the South Dakota
12 Archeological Research Center every time that I did
13 some type of a survey in South Dakota.

14 CHAIRMAN FROEHLICH: To what extent were
15 subsurface tests conducted after you had received the
16 Augustana College study and the other items that you
17 listed in your last answer, Ms. Yilma?

18 MS. YILMA: The Augustana College did have
19 some subsurface testing in the original results. And
20 then as I mentioned, after we did our review and
21 requested for additional information they did go back
22 out and do some more testing.

23 CHAIRMAN FROEHLICH: And I guess, Dr.
24 Luhman, can you tell me what the additional testing
25 was, especially as it might relate to subsurface

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1 testing?

2 DR. LUHMAN: Well, if I am correct, the
3 request regarding the additional subsurface testing
4 would have been at those sites where there was the
5 potential for impact as a result of the proposed
6 project activities. From an archeological standpoint,
7 if an identified site is not going to be impacted, in
8 the interest of preservation and protection, further
9 studies are not warranted.

10 However, if it is believed that an area
11 is, in fact, going to be impacted by the proposed
12 project, there would need to be additional
13 investigation subsurface, for example, to determine
14 whether or not those properties possess the aspects
15 that one would see in a site that would be determined
16 eligible for the National Register of Historic Places.

17 JUDGE COLE: The area of concern, are we
18 restricting this to roughly 16 square miles of the
19 Dewey-Burdock project? Or are we outside of that
20 area?

21 DR. LUHMAN: Well, here, I believe we're
22 referring to what I would consider to be the
23 archeological APE which would be that portion of the
24 project which would be impacted by ground-disturbing
25 activities. So if there is going to be no impact to

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1 an area, it would not be of an archeological concern.

2 JUDGE COLE: Is that occasioned by the
3 project?

4 DR. LUHMAN: Yes.

5 JUDGE COLE: Okay. So it could be outside
6 the Dewey-Burdock 16 square miles? Or is it entirely
7 within?

8 DR. LUHMAN: It's determined by the
9 project, where the project will impact, where there
10 will be ground disturbance as a result of the project.

11 JUDGE COLE: But you're talking about
12 within the 10,000 acres, the 16 square miles.

13 DR. LUHMAN: Yes, that is correct.

14 JUDGE COLE: Would there be any occasion
15 when you're conducting a study like this where you go
16 outside that range?

17 DR. LUHMAN: No, not unless warranted by
18 the project being expanded in some way, no.

19 JUDGE COLE: Thank you.

20 CHAIRMAN FROEHLICH: I think we're going
21 to get back to your chronology and I guess at some
22 point in time, the staff endeavored to meet with the
23 tribes' listing and address the necessity for further
24 surveys or a survey of the area. Take me through that
25 chronology if you would.

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1 MS. YILMA: Okay, so in 2011, during the
2 first face-to-face meeting, the tribes requested to
3 have a tribal survey done at which point we asked
4 Powertech to provide us with that information,
5 communicated that the tribes requested for a tribal
6 survey.

7 CHAIRMAN FROEHLICH: And when you refer to
8 the tribes, you're referring to one tribe, two tribes,
9 all tribes?

10 MS. YILMA: The invitation went out to all
11 the consulting tribes. There were -- I'm going to
12 have to check my records, but there were I want to say
13 six or seven tribes in attendance at that face-to-face
14 meeting. Ogala Sioux was one. Yankton was another.
15 Standing Rock was another. Cheyenne River, I believe,
16 was another. I'd have to check my records and let you
17 know.

18 CHAIRMAN FROEHLICH: Staff counsel, if you
19 want to give her the chronology that's an exhibit,
20 that may help.

21 MS. YILMA: The timeline is Exhibit NRC
22 15.

23 CHAIRMAN FROEHLICH: Yes.

24 MR. CLARK: Judge Froehlich, I don't
25 believe that chronology will provide the information,

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1 the specific tribes that were at that meeting. We'd
2 be happy to get that information and provide it later.

3 MS. YILMA: I can definitely check my
4 notes and provide the number of tribes and who were
5 there.

6 CHAIRMAN FROEHLICH: But your testimony
7 was that they were all invited.

8 MS. YILMA: They were all invited.

9 CHAIRMAN FROEHLICH: And you ended up
10 having six or seven tribes and that included members
11 of the Ogala Sioux Tribe.

12 MS. YILMA: That is correct. And so after
13 that we requested Powertech to provide us with
14 additional information and communicated that the
15 tribes had an interest in the tribal survey to be
16 done, at which point Powertech then went out and hired
17 SRI to be their consulting party and assist them in
18 identifying and satisfying the tribes' request.

19 And as part of the continued consultation
20 with the various tribes, it was determined that a
21 statement of work was necessary to document the
22 requirements and by which the tribes would go out and
23 do the tribal survey. And we started working on the
24 statement of work development.

25 CHAIRMAN FROEHLICH: Okay.

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1 MS. YILMA: So then we had a draft
2 statement of work from the applicant and then another
3 draft statement of work from the tribes. And we
4 reviewed those two statements of work to see whether
5 they were appropriate and they satisfied our
6 requirements to meet the NHPA and also NEPA. And --

7 CHAIRMAN FROEHLICH: I'm going to just
8 stop at that point and that statement of work went out
9 and Powertech came back with a proposal for the
10 additional work. Was that response, or whatever, that
11 SRI would conduct further studies? Can you tell me
12 whether that's part of it?

13 DR. SEBASTIAN: Once we came on board in
14 the fall of 2011, we began with the NRC introducing us
15 to the tribes and asking the tribes to work with us.
16 We began contacting all the tribes. We added
17 additional tribes at that time. Some of the existing
18 consulting tribes had pointed out other tribes that
19 might want to be part. We had consulted the National
20 -- one of those awful acronyms, the NAGPRA, N-A-G-P-R-
21 A, which is the Native American Graves Protection and
22 Repatriation Act, database. It's a big database of
23 tribes that might have an interest in a particular
24 physical area.

25 So we contacted additional tribes beyond

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1 the ones that they had started with. They asked for
2 a big face-to-face meeting which we organized here in
3 Rapid City. It was in February of 2012. The company
4 brought in all the tribes who wanted to come.

5 We had a two-day meeting and it was out of
6 that that initially the tribes said they would provide
7 a scope of work, but NRC was anxious to sort to move
8 the process along because the scope of work didn't
9 come after several months, so they asked us to come up
10 with a draft scope. We did the best we could and said
11 okay, here's the draft document. Clearly, we're not
12 the experts on how to do this. But here it is for the
13 tribes to have something to work against or to have a
14 structure to begin saying we don't like this, we do
15 like that.

16 The tribes would not respond to that scope of
17 work. They said it was completely inadequate, but we
18 didn't really get much comment.

19 We tried again. One of the few things
20 that -- we did get a few things that we learned. We
21 tried with a second draft which they also said was
22 completely not acceptable, but we didn't get comments
23 on. I think Haimanot needs to pick up at that point.

24 CHAIRMAN FROEHLICH: Actually, before we
25 get to that, I'd like to hear from the tribes and

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1 their response to the Powertech proposal or whatever,
2 and what they submitted as a counter from their
3 perspective.

4 Mr. CatchesEnemy.

5 MR. CATCHESEENEMY: Well, based on what I
6 can recall from what was submitted by -- I guess more
7 the Lakota Sioux Tribes was a scope of work that was
8 more or less culturally relevant. I think it was
9 going to have some strong representation from each of
10 the bands of the Lakota, Dakota, Nakota in order to
11 provide some kind of culturally competent consensus.
12 They weren't looking too much at a democracy of it, as
13 long as a majority of us or a part of us were okay
14 with it. A lot of our culture dictates that we do
15 things in consensus. That way things can move along
16 better and there's not any recourse to an action
17 that's taken where maybe the minority is left out.

18 So we supported the scope of work that was
19 submitted in hopes that NRC would continue to try to
20 work out the kinks with that proposal and not this
21 counter proposal.

22 CHAIRMAN FROEHLICH: Ms. Yilma, can you
23 describe maybe in a little more detail the differences
24 between the two proposals that you received?

25 MS. YILMA: In general terms, the proposal

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1 that we received, the initial proposal that we
2 received from the tribes didn't actually have
3 specifics in it. And so we had to go back out and ask
4 for specifics to be included in the statement of work
5 because we weren't able to determine how long the
6 survey would take or what type of survey --
7 methodologies of the survey and also the cost and the
8 duration. That was not included in the original, the
9 tribes' statement of work.

10 CHAIRMAN FROEHLICH: It was included in
11 the SRI and Powertech?

12 MS. YILMA: While in the SRIF, it had all
13 those information in it and SRIF's -- Powertech's
14 statement of work actually a phased approach. The
15 initial statement of work had a phased approached
16 where they initially would go out and do a
17 reconnaissance of what's out there and based on what
18 is found during the reconnaissance survey, they would
19 then increase the level of effort. Those types of
20 specifics was included Powertech's statement of work.
21 But the tribes' statement of work was in general
22 terms. But we did hear that the amount of
23 compensation and the duration that was included in the
24 Powertech statement of work was not appropriate.

25 An additional effort needed to be done and

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1 we also heard that the tribes wanted to do the entire
2 10,000 acres, survey of the 10,000 acres as opposed to
3 what we defined as the areas of potential effect in
4 accordance with the National Historic Preservation
5 Act.

6 So there were differences in those two
7 statements of work and we were trying to work through
8 those differences and had many telephone calls, face-
9 to-face meetings, trying to work out those
10 differences. Over a month of negotiations between the
11 two parties, we recognized that we weren't going to be
12 able to come to consensus to what was deemed as
13 appropriate using the statement of work approach.

14 JUDGE COLE: You mentioned the area of
15 potential effect versus the 10,000 acres.

16 MS. YILMA: Yes.

17 JUDGE COLE: I assume that the area of
18 potential effect is larger than the project area, is
19 that correct?

20 MS. YILMA: That is -- yes and no. Yes
21 and no. There are two areas of potential effect. The
22 direct areas of potential effect is actually smaller
23 than the 10,500 acres. The indirect areas of
24 potential effect is a little bit larger than 10,500
25 acres.

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1 JUDGE COLE: How much larger?

2 MS. YILMA: We go out three miles from the
3 tallest building in this situation, would have been
4 the Central Processing Unit and/or the satellite
5 facility. So --

6 JUDGE COLE: Okay, thank you.

7 MS. YILMA: Not that much farther, but a
8 little bit outside of the 10,000.

9 JUDGE COLE: Okay.

10 CHAIRMAN FROEHLICH: Let me go back to the
11 Powertech proposal at that point in time. And could
12 either you or Dr. Sebastian tell me a little bit more
13 about the scope of that reconnaissance or whatever,
14 compared to the earlier Augustana subsurface study,
15 the one that you had started with. How did it differ?

16 MS. YILMA: It was not a subsurface study.
17 The methodology was left up to the tribes to come up
18 with how they would like to do the survey, recognizing
19 that you heard this morning this is a difference
20 between a TCP survey and an archeological survey,
21 recognizing the special expertise of the tribes. We
22 didn't actually specify a methodology. It was more
23 general guidance that Powertech provided in the
24 statement of work and asked feedback from the tribes.

25 CHAIRMAN FROEHLICH: What elements were in

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1 the SRI proposal, Dr. Sebastian, that relied on or
2 drew upon the special expertise of the tribes?

3 DR. SEBASTIAN: One of the things that we
4 heard in the February 2012 meetings where we really
5 tried to get a sense from the tribes of what would be
6 needed to identify these religious and cultural
7 properties was that it needed to be a field
8 identification process and that the archeological
9 methods were not fine-grained enough, that what Dr.
10 Hannus referred to as the survey intervals were too
11 wide. So that was one kind of hint that we had. And
12 then based on that and sort of our knowledge of the
13 fact that this requires expertise and the knowledge of
14 elders and things like that, we put together a
15 proposal that basically assumed a survey interval half
16 as big as the archeological survey interval and taking
17 the number of acres and then the number of person
18 days, it's a story problem that archaeologists do a
19 lot because we have a sense of how much ground you can
20 cover in a day. And so we put together a proposal
21 that was for time. So this many -- we assumed they
22 would need a bigger survey crew maybe because they
23 would have to have representatives from different
24 bands as Mr. CatchesEnemy said.

25 So we increased the size of the crew. We

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1 decreased the survey interval and then we figured out
2 from that what it would take. We also put in money
3 and time to bring elders out to the field because we
4 thought maybe the actual people who are doing the
5 survey might need the advice of their elders or
6 special practitioners. So we brought in some money
7 and time for that. And then it was just basically the
8 way you would request a statement of work. We put in
9 money for per diem, money for travel time and travel
10 expenses, those kinds of things. So we started out
11 with an archeological survey because we were talking
12 field survey and then we tried to put in additional
13 time and additional personnel.

14 CHAIRMAN FROEHLICH: Mr. CatchesEnemy,
15 would you respond, please, to the intervals and the
16 personnel that the SRI proposal had and why the tribes
17 or at least your tribe and like tribes disagreed or
18 felt that it would be inadequate?

19 MR. CATCHESENEMY: It's already been
20 stated as far as the differences between the Level 3
21 and TCP survey, it was pretty evident based on
22 cultural knowledge under the TCP. But the tribes are
23 going to provide a statement of work that has that
24 specific component, then if we're just going to go
25 with an SRI proposal or statement of work, that

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1 basically follows almost like a secondary
2 archeological review with just a little bit of
3 changes. That's not to the liking of the tribes. But
4 the intervals, you're getting into methodology there.
5 And that's where the tribes are not wanting to follow
6 exact intervals that are set typically by
7 archeological studies.

8 CHAIRMAN FROEHLICH: As I understood it,
9 Dr. Sebastian just explained that there were avenues
10 for input from tribal elders and to be sensitive to
11 the cultural aspects. What part of that proposal was
12 unacceptable?

13 MR. CATCHESENEMY: It's not led by the
14 tribes. It's still led by a consulting group with
15 tribal participation. There's a difference there.

16 CHAIRMAN FROEHLICH: Tell me more about
17 the difference if you could.

18 MR. CATCHESENEMY: It comes back to what
19 I was explaining about the consensus portion, where
20 you're bringing tribes together to come to a place
21 that they've been displaced from for so long, maybe
22 100, 150 years. As Uncle Wilmer stated, him and other
23 folks that from our tribe have openly and consistently
24 revisited these places, but on the most part, we've
25 been displaced from these.

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1 So here we are being asked to come and
2 produce evidence outside of what the archeological
3 report already identified. But at the same time,
4 we're having to bring tribes as different takes on it
5 within set deadlines, set cost parameters. That's a
6 pretty harsh timeline to follow to bring tribes back
7 together to ask them to set all these methodologies
8 within a very short timeline.

9 These methodologies may have a little bit
10 of differences or intricacies when we get out into the
11 field. We would rely, ourselves as Ogalas, on a lot
12 of our elders, our traditional medicine people,
13 spiritual leaders, historians, but all of them would
14 be available to come up. And maybe another tribe
15 historically tied with us may have a different take on
16 it. So we'd have to try to work out all those
17 intricacies of how we're going to conduct our
18 methodology because this isn't something that is
19 typical.

20 TCP surveys on the most part are fairly
21 new or at least being willing to be looked at. I know
22 part of the evidence doesn't really include National
23 Park Service guidance, but that's where it's in the
24 literature about Bulletin 38, the identification of
25 traditional cultural properties.

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1 I call the state of the TCPs, that can go
2 with any ethno group. It's not specific to Lakotas.
3 It could be towards Asian-Americans, Hispanic-
4 Americans. It's open when you consider it a TCP. But
5 I think the big difference is the culture and how it's
6 conducted. That's the biggest difference.

7 CHAIRMAN FROEHLICH: Did the Sioux Tribe
8 or Lakota come back with a counter proposal to say the
9 SRI proposal doesn't capture our concerns. To do it
10 properly, it would take tribal elders, X number, so
11 many weeks, at such an interval, or a different
12 approach? Did the tribes come back with a proposal
13 saying here is what it would take to do it to our
14 satisfaction and to be a meaningful TCP study?

15 MR. CATCHESENEMY: From what I recall
16 during that time, and I want to make the record clear,
17 that my employment with the tribe as a natural
18 resource director at the time ended in March of 2012.
19 So from that point until February of this year, 2014,
20 I was not an employee. So I'm not privy to a lot of
21 the intricacies that occurred probably via emails or
22 teleconferences amongst the tribes on the specifics of
23 the scope of works being resubmitted.

24 CHAIRMAN FROEHLICH: And just so I'm
25 clear, Mr. Mesteth preceded you as the tribal officer

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1 and then someone who succeeded you after this point in
2 time when the proposals were sought as an alternative
3 or as an enhancement to what had already been done?

4 MR. CATCHESENEMY: We have always, since
5 our establishment in September of 2009, that's when we
6 got our Tribal Historic Preservation Office
7 designation. So we're a fairly new office as far as
8 NHPA functions that we assume from the state.

9 Mr. Mesteth has been the Tribal Historical
10 Preservation officer, if I recall, since late 2010
11 until just recently and then I came in in February.
12 However, he's not a full-time employee. But we did
13 have one staff person in the office which is titled
14 project review officer and that person is no longer
15 employed there, but she had the ins on the email
16 communications with the scopes of work.

17 CHAIRMAN FROEHLICH: Okay. To the extent
18 you remember, the response to the solicitation for
19 statements of work from the tribes was what? Would
20 you describe that?

21 MS. YILMA: Yes, so they did come up with
22 a proposal. The proposal was to have a contractor of
23 their choice to do the survey and specified the number
24 of days that it would take them to do it, how much it
25 would cost, and how long it would take to develop the

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1 report afterwards.

2 CHAIRMAN FROEHLICH: Is that the Kadrmas
3 Lee Jackson proposal?

4 MS. YILMA: No.

5 CHAIRMAN FROEHLICH: No, okay.

6 MS. YILMA: It was a proposal by the Sioux
7 Tribe and they recommended Tim Mentz's company. I
8 don't remember the name of the company, another
9 tribal entity who does field survey to conduct a field
10 survey for them. Makoche -- how do you say it?

11 MS. JAMERSON: Makoche Wowapi/Mentz-Wilson
12 Consultants.

13 MS. YILMA: That was the consultant's name
14 that they had provided for them to do the TCP survey
15 on their behalf.

16 CHAIRMAN FROEHLICH: So the tribe did
17 submit a proposal, whatever, to have a tribal company,
18 entity, whatever, conduct the kind of survey that they
19 believed would adequately address the cultural and
20 historical issues in the area?

21 MS. YILMA: That is correct and I just
22 want to again clarify that this is the Sioux Tribes
23 that provided the statement of work. Remember, we had
24 more than the Sioux Tribes that we were consulting
25 with. And in the proposal, the proposal that came

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1 back, if I remember correctly, had a significant
2 amount of time between when they conducted the field
3 survey and provided us with the information that we
4 needed for our NEPA and Section 106 compliance.

5 So looking through those statements of
6 work, our schedule, because by this time we had
7 already been consulting with the tribes for close to
8 two years and we haven't agreed on an approach to do
9 the TCP survey to gather the information we needed for
10 us to comply with the cultural resources section of
11 the NEPA and NHPA.

12 And so we looked through the proposal and
13 compared this with other proposals that other federal
14 agencies have done for similar type of activities and
15 determined that the proposal that was submitted by the
16 tribes' contractor was significantly larger in dollar
17 amount and also duration than others that we have
18 seen. And for that reason we -- and significantly
19 varied from what Powertech provided. For that reason,
20 we felt it was prudent for us to find another way of
21 conducting the tribal survey that we needed in order
22 to make impact assessment.

23 JUDGE COLE: Do you remember the time
24 involved in their proposal?

25 MS. YILMA: It was over a couple of months

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1 to do the identification and I want to say close to
2 six months to do the reporting afterwards. I can
3 check that again and provide that information as well.

4 CHAIRMAN FROEHLICH: Okay, and what we're
5 comparing here is the proposal from SRI on behalf of
6 Powertech to the Makoche Wowapi studies. Is that
7 correct, Ms. Jamerson?

8 MS. YILMA: That's correct.

9 MS. JAMERSON: Yes.

10 CHAIRMAN FROEHLICH: Okay, so that's what
11 you were looking at. And just so I have the order of
12 magnitude, the time interval to follow up on Judge
13 Cole's question for the SRI proposal was how much --
14 what was the time interval from when the work would
15 start until you had the reports that you needed for
16 your NEPA and historic preservation. What was the
17 time interval for --

18 MS. YILMA: Lynne, do you remember those
19 specific dates? I don't remember, but it was
20 significantly larger. It was about six months, if I
21 recall. By the end of six months, we would have
22 gotten a report, whereas, we were looking at magnitude
23 of a month that we would identify historic properties
24 and do our assessment.

25 CHAIRMAN FROEHLICH: All right, another

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1 parameter, I guess, that goes into this is the cost of
2 the two proposals.

3 MS. YILMA: That's correct.

4 CHAIRMAN FROEHLICH: Can you compare,
5 please, for me the cost of the Makoche Wowapi proposal
6 to the SRI proposal?

7 DR. SEBASTIAN: It was a factor of ten
8 higher. It was ten times ours.

9 MS. YILMA: The tribes' proposal was close
10 to \$1 million.

11 CHAIRMAN FROEHLICH: Which one?

12 DR. SEBASTIAN: That was just for the
13 small part.

14 MS. YILMA: The tribes' proposal was close
15 to \$1 million. And Powertech's proposal was close to
16 \$110,000 or \$120,000.

17 CHAIRMAN FROEHLICH: Just to keep this in
18 perspective for me, the Augustana report, what was
19 cost and the duration of that study?

20 MS. YILMA: Can I just -- I don't know
21 those answers. Powertech would have to answer to that
22 because the Augustana College survey was done before
23 the application was submitted. But before I go there,
24 I want to clarify that the statement of work that we
25 were developing between the tribes, ourselves and SRI

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1 and Powertech was only supposed to be for the areas of
2 direct impact which is the 250,000 acres as opposed to
3 the 10,000 acres.

4 CHAIRMAN FROEHLICH: At this stage, you
5 were talking about the smaller area --

6 MS. YILMA: The smaller area.

7 CHAIRMAN FROEHLICH: And then
8 subsequently, as I recall, the proposal was to expand
9 the survey area.

10 MS. YILMA: That's correct. So for the
11 Augustana College it was 100 percent full survey that
12 was conducted. So the whole entire 10,000 acres. So
13 that is also another variation between the two.

14 CHAIRMAN FROEHLICH: Okay. Dr. Hannus, do
15 you have that information?

16 DR. HANNUS: I knew you were going to ask
17 that question. I do not. In other words, what
18 happens here is that we did the Level 3 and then there
19 were two more years of work that was done. This
20 exhibit behind me is the 13 volumes that we produced
21 on the work that we did. So I can get those figures
22 for you, but I just don't have them. I mean this is
23 a mixed bag because we were doing subsurface testing
24 in the intervening years.

25 DR. REDMOND: Judge?

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1 CHAIRMAN FROEHLICH: Yes, Dr. Redmond?

2 DR. REDMOND: Can I clear up something on
3 the TCP? It's an analogy.

4 CHAIRMAN FROEHLICH: Okay, sure.

5 DR. REDMOND: When I was doing TCPs for
6 the Forest Service, I was working with some elders and
7 one of them I had taken up to a site and his comment
8 was very simple. He said, "Okay, fine. You've got a
9 site. Where is the rest of it?" And his meaning was
10 you've got where the people lived. Now where did they
11 do their living? Where did they get -- where did the
12 women collect their food? Where did the men collect
13 their materials that they lived with? Where did they
14 process their food? Where did they do their
15 ceremonies? Where did they do these things? Those
16 are the TCPs.

17 JUDGE COLE: Where did they bury them?

18 DR. REDMOND: Where did they bury them?

19 CHAIRMAN FROEHLICH: Dr. Redmond, you have
20 conducted these TCP studies for other agencies?

21 DR. REDMOND: Yes.

22 CHAIRMAN FROEHLICH: You have.

23 DR. REDMOND: And that is a vast area
24 around a simple site.

25 CHAIRMAN FROEHLICH: And your cost to

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1 prepare such a study, would that be closer to the SRI
2 proposal or to the --

3 DR. REDMOND: Closer to the tribes'.

4 CHAIRMAN FROEHLICH: To the tribes'
5 proposal.

6 DR. REDMOND: Yes. And that's the
7 problem. It's an order of magnitude over looking a
8 simple site. And that's the problem. It balloons
9 because you're not simply looking at a spot. You're
10 looking at a living. You're looking at a living
11 environment.

12 Like my brother Wilmer said, "This is a
13 living environment. It's across the hills."

14 CHAIRMAN FROEHLICH: Thank you. Ms.
15 Yilma, did you want --

16 MS. YILMA: Yes, I wanted to -- first of
17 all, I wanted to clarify what we had said originally.
18 There were six tribes at the initial face-to-face
19 meeting and I do have the names of those tribes. It's
20 Ogala Sioux, Standing Rock Sioux, Flandreau Santee
21 Sioux, Sisseton Wahpeton, Cheyenne River Sioux and
22 Rosebud Sioux.

23 CHAIRMAN FROEHLICH: And this was the
24 meeting where the discussion was held about an
25 expanded or subsequent survey that would take into

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1 consideration TCP type of issues?

2 MS. YILMA: That's correct. And then to
3 follow up with the costs analogies, we do have NRC
4 Exhibit NRC-071 which is a letter from State
5 Department Keystone Pipeline Project and where they
6 provided various tribal entities to come out and
7 identify a TCP survey as an open site approach without
8 specifically doing a restrictive methodology for about
9 \$100,000.

10 CHAIRMAN FROEHLICH: Thank you. I know
11 it's slightly after noon. Dr. Cole also reminded me
12 of the time. So I think this might be a convenient
13 time for us to take a lunch, our luncheon break after
14 which we will resume with Panel 1. May I suggest we
15 take about an hour and 10 minutes and resume here at
16 1:15. We'll pick it up from there.

17 MR. PARSONS: Your Honor, if I may
18 briefly, Jeff Parsons over here. Just so the parties
19 can plan a little bit, would the Board have an idea of
20 whether we're likely to get into the next panel today?
21 I don't want to put you on the spot, but it might help
22 for the parties to do some planning in that regard.

23 CHAIRMAN FROEHLICH: I think we'll have
24 questions for most of the afternoon for Panel 1, I
25 believe, if I factor in time for any follow up from

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1 counsel to the questions that were asked. It's very
2 hard to gauge these things, especially with a large
3 number of witnesses and I would think it's more likely
4 than not that we'll have Panel 1 here for the balance
5 of the day. And if things work out, we will probably
6 start tomorrow with argument on the additional data
7 and Panel 2.

8 MR. PARSONS: Thank you. I won't hold you
9 to it, but I appreciate that.

10 CHAIRMAN FROEHLICH: All right, we'll
11 stand in recess until 1:15.

12 (Whereupon, the above-entitled matter went
13 off the record at 12:05 p.m. and resumed at 1:17 p.m.)

14 CHAIRMAN FROEHLICH: I think we'll resume.
15 We'll be back on the record. Let me just remind you,
16 please, to shut off your cell phones or turn them to
17 silence. And for those people who wanted to take
18 pictures, that's perfectly all right, however, please
19 don't use the flash or a strobe since that will be
20 distracting to the Board and to the witnesses.

21 Mr. CatchesEnemy, I'd like just to follow
22 up with you on a few points. Are you currently the
23 tribal historic preservation officer, or did I
24 understand you that your term has ended and that
25 someone has succeeded you?

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1 MR. CATCHESENEMY: I am the current tribal
2 historic preservation officer as of February of 2014.

3 CHAIRMAN FROEHLICH: How does one become
4 the tribal historic preservation officer? What's the
5 process or the requirements? How is that organized?

6 MR. CATCHESENEMY: To date since our first
7 initial establishment it's been by the president of
8 our Oglala Sioux Tribe that appoints the THPO officer.

9 CHAIRMAN FROEHLICH: And you succeeded Mr.
10 Mesteth. Is that because there's a term associated
11 with the position, or how does that --

12 MR. CATCHESENEMY: No, Mr. Mesteth is a
13 full-time faculty at Oglala Lakota College.

14 CHAIRMAN FROEHLICH: Yes.

15 MR. CATCHESENEMY: And he could speak more
16 to his own résumé. but he was initially -- we have a
17 three-member advisory council for our office and Mr.
18 Mesteth was one of three founding members of our
19 office and took that role. Initially it was supposed
20 to be a temporary appointment and just until we got
21 more funding. The fact remains we didn't have any
22 subsequent funding that came to the office of our
23 National Park Service annual funding, so Mr. Mesteth
24 was acting in a part-time capacity. And so the
25 changeover came with some additional funding that

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1 we're just receiving. And I do more of the
2 administrative responsibilities day-to-day in the
3 office now --

4 CHAIRMAN FROEHLICH: Okay.

5 MR. CATCHESENEY: -- as a full-time
6 employee.

7 CHAIRMAN FROEHLICH: Thank you. And in
8 the Programmatic Agreement it provides for the
9 development ultimately of mitigation plans prior to
10 construction or disturbance of sensitive areas. Is it
11 your office or your position that would be dealing or
12 advising under the terms of the Programmatic
13 Agreement?

14 MR. CATCHESENEY: Yes, that is part of
15 our function as a tribal historic preservation office.

16 CHAIRMAN FROEHLICH: Okay. Let's see, Dr.
17 Redmond has not rejoined us? All right. I'll proceed
18 with you then in his absence.

19 In the FSEIS, page 81 of NRC-008-A, it
20 stats that the tribes maintain that the only level of
21 effort sufficient for identifying historic properties
22 would be an on-the-ground 100-percent survey of the
23 entire licensed boundary by tribal personnel from
24 participating tribes. Is this an accurate recitation
25 of the position of the Sioux Tribe?

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1 MR. CATCHESENEMY: Yes.

2 CHAIRMAN FROEHLICH: In order to have an
3 appropriate survey, would that be -- the tribal
4 personnel that's referred there from participating
5 tribes, would that mean that each Sioux Tribe or each
6 tribe that was originally listed would have to
7 participate?

8 MR. CATCHESENEMY: Culturally we have a
9 relation; and Wilmer could probably speak to this a
10 lot better, but at least amongst the Dakota and Nakota
11 and Lakota -- and then everybody's calling us Sioux.
12 We always usually refer to ourselves -- even though
13 our tribe is called the Sioux Tribe, we usually
14 identify as Lakota or Dakota or Nakota. We would
15 probably have more cultural affiliation or
16 similarities than we would with some of the other
17 tribes that Wilmer had mentioned that have historical
18 ties to the Black Hills.

19 CHAIRMAN FROEHLICH: Among the various
20 Lakota tribes would representation by one tribe
21 suffice to protect the cultural interests of the other
22 Lakota tribes?

23 MR. MESTETH: No, I don't believe so.

24 CHAIRMAN FROEHLICH: So the participating
25 tribes when we're referring to -- would require

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1 participation from each tribe --

2 MR. CATCHESENEMY: Yes.

3 CHAIRMAN FROEHLICH: -- to have a survey
4 that would satisfy the criteria that you believe are
5 necessary?

6 MR. CATCHESENEMY: Yes.

7 CHAIRMAN FROEHLICH: Okay.

8 MR. CATCHESENEMY: I wanted to, if I
9 could, add another clarification for Mr. Mesteth here
10 is he's currently reverted back to being an advisory
11 council member for our office. So he's one of our
12 three members, and that's why we still have a
13 connection to the office.

14 CHAIRMAN FROEHLICH: Okay. Dr. Redmond,
15 in your testimony, Exhibit INT-019, you refer to the
16 guidelines for cultural resource surveys and survey
17 reports in South Dakota. And in there you make
18 reference to the document, and indeed you quote from
19 it. I noticed that in your answer you highlighted in
20 embolded portions of that answer where you referred to
21 actions necessary upon encountering any type of
22 archaeological or historic materials, what constitutes
23 archaeological historic sites, proper recording
24 procedures for archaeological and historical materials
25 of sites, proper reporting procedures for

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1 archaeological historic matters of sites.

2 Okay. Is it your position that the staff
3 violated any or the parts here that are highlighted?
4 Is that the gist of what we're advocating in your
5 testimony? Yes, the italics.

6 DR. REDMOND: Oh, okay. Can you move it?
7 Okay. What I meant by this is that at times it's
8 ambiguous, that for some entities, for instance, for
9 mine, I had to do subsurface testing whenever I
10 encountered materials that I identified as a site. If
11 I identified it as a site, I had to do subsurface
12 testing, period.

13 CHAIRMAN FROEHLICH: Okay. Did not the
14 follow-up surveys or studies that the staff had called
15 for subsequent to the Augustina study include
16 subsurface testing, Dr. Redmond?

17 DR. REDMOND: Only on some. Only on some
18 of the sites. Augustana.

19 CHAIRMAN FROEHLICH: Augustana.

20 DR. REDMOND: I'm sorry.

21 CHAIRMAN FROEHLICH: All right. Dr.
22 Lyman?

23 MR. LUHMAN: Luhman.

24 CHAIRMAN FROEHLICH: Luhman. I'm sorry.
25 I'm not doing very well the names today.

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1 DR. LUHMAN: That's okay.

2 CHAIRMAN FROEHLICH: I apologize.

3 (Laughter)

4 CHAIRMAN FROEHLICH: Dr. Luhman, what was
5 the extent of the subsurface testing in the follow-on
6 survey that was called for and requested by the staff?

7 DR. LUHMAN: You're referring to the
8 subsurface testing phase?

9 CHAIRMAN FROEHLICH: Yes.

10 DR. LUHMAN: It is my understanding that
11 that survey work was done in response to the
12 identification of those archaeological sites that had
13 been identified and that were going to be impacted by
14 the proposed project activities. Because of that,
15 those would have been the only sites that would have
16 been subjected to follow-on surveys. Because the
17 remaining sites would be avoided, they would not be
18 impacted by project activities.

19 CHAIRMAN FROEHLICH: And who conducted
20 this survey for you, or this additional work?

21 DR. LUHMAN: Augustana.

22 CHAIRMAN FROEHLICH: Oh, Augustana? Ah.

23 DR. HANNUS: That's what these 13 volumes
24 contain --

25 CHAIRMAN FROEHLICH: That was the follow-

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1 on to that.

2 DR. HANNUS: -- in its entirety is those
3 additional two seasons of work.

4 CHAIRMAN FROEHLICH: Okay.

5 DR. HANNUS: And so, in the process of a
6 level 3 survey, like I had indicated earlier today,
7 you would do some shovel tests in areas where you did
8 not have -- in other words, your ground cover would be
9 too dense to give you clear vision of the sites, but
10 you really during a class 3 survey would not be doing,
11 you know, extensive subsurface testing. That would
12 come in a later phase.

13 And it's also the case that in this
14 particular environment; and of course this is our
15 evaluation of it, but the -- as I had initially stated
16 earlier this morning, this is an incredibly degraded,
17 eroded, desiccated set of land surfaces. And many of
18 the sites are literally on the bedrock, so you would
19 not be excavating into the bedrock because it would
20 take you to an era geologically that wouldn't have
21 anything to do with human occupation. And also you
22 would not be out testing sites before you knew that
23 there was a chance that they would be impacted by the
24 project, because our charge, at least within the
25 strictures of the guidelines that we work under in the

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1 106 process, would be that you're trying to protect
2 the sites, not do further damage to the sites.

3 So you're trying to identify them for the
4 idea that then you'll move to a phase hopefully of
5 avoidance rather than any other type of activity. But
6 if you're then -- and we were then provided with --
7 you know, as this project proceeded, then we were
8 given the zones that were going to most likely impact
9 sites. And so we were then asked to go forth and do
10 further evaluation for potential National Register
11 eligibility.

12 CHAIRMAN FROEHLICH: The staff published
13 the supplemental cultural resource report. That's
14 Exhibit 151. And that report, I take it, took into
15 account or included the comments or reports that you
16 received from various tribes?

17 MS. YILMA: That's correct, Your Honor.

18 CHAIRMAN FROEHLICH: And which tribes were
19 it that provided additional comments or reports?

20 MS. YILMA: The Cheyenne and Arapaho, the
21 Northern Cheyenne and -- there's one more. There are
22 three out of the seven that -- there were seven tribes
23 that participated in the field survey. Three out of
24 the seven provided the field survey report, and those
25 comments we received and eligibility recommendations

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1 we received we included in our eligibility
2 determination.

3 CHAIRMAN FROEHLICH: And just to be clear,
4 there weren't any comments or reports received from
5 Lakota tribes?

6 MS. YILMA: No Sioux tribes, that's
7 correct. We did have two Sioux tribes that
8 participated in the field survey, but they didn't
9 provide written recommendation on what they found.

10 CHAIRMAN FROEHLICH: Okay. All right.
11 Also in the staff testimony NRC 151 at 9, they
12 testified that staff incorporated comments received on
13 the FSEIS and the cultural resources supplement in its
14 revisions to the Programmatic Agreement. Did the
15 staff make any changes to the Programmatic Agreement
16 based on written comment letters submitted by the
17 Oglala Sioux Tribe or the Standing Rock Sioux Tribe?

18 MS. YILMA: We did, Your Honor. The
19 Standing Rock Sioux Tribe gave us comments and the
20 Oglala Sioux Tribe concurred with the Standing Rock
21 Sioux' comments. So we incorporated the concerns of
22 the Standing Rock Sioux and the Oglala Sioux in that
23 they wanted to be a participant member, active
24 participant member for ongoing identification,
25 evaluation, anything else that is going to occur in

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1 the future. And for those activities within the
2 Programmatic Agreement we went in and made sure that
3 the tribes are an active participant when we're
4 evaluating and evaluated sites when we're doing
5 development of mitigation measures and when we are
6 partaking in future identification for power line that
7 was proposed to occur in the future.

8 CHAIRMAN FROEHLICH: The staff -- in its
9 bidding to the Board in March of 2013, staff answered
10 to contentions on the Draft Supplement Impact
11 Statement at page 13. Stated that they would
12 supplement its analysis to the DSEIS and circulate any
13 new analysis for public comment. If the interveners
14 disagreed with the staff analysis, they would be able
15 to submit comments or contentions based on that
16 supplement.

17 At that point in time, or shortly
18 thereafter, I suppose, the staff made a decision to
19 proceed with a Programmatic Agreement approach
20 instead. Am I sort of correlating the timeline
21 properly at this point?

22 MS. YILMA: I'm sorry, Your Honor, can you
23 repeat? I don't know if I understand the question.

24 CHAIRMAN FROEHLICH: Up until about March
25 of 2013 the Board; and I presume the interveners,

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1 would have expected to be able to file comments to the
2 DSEIS if they disagreed with the staff analysis or
3 anything contained in the DSEIS. But instead of sort
4 of proceeding along that route, at about that time or
5 shortly thereafter I believe the staff decided to
6 undertake the Programmatic Agreement approach. Is
7 that the timing? The approach that the staff was
8 planning to take with the documents required on the
9 case changed I guess in the first quarter of 2013 or
10 so?

11 MS. YILMA: The Programmatic Agreement
12 discussion actually occurred prior to that, because we
13 knew that there was going to be phase identification
14 occurring. So we knew all along that there will be
15 Programmatic Agreement development. So by March 2013
16 we knew there would be a Programmatic Agreement
17 developed, but we hadn't started working on it.

18 CHAIRMAN FROEHLICH: All right. And if
19 comments are submitted in response to a DSEIS, staff
20 has an obligation to respond to those comments in the
21 FSEIS. That's correct?

22 MS. YILMA: Yes, that's correct.

23 CHAIRMAN FROEHLICH: Now, in the
24 Programmatic Agreement if you receive comments on the
25 Programmatic Agreement, is there any obligation for

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1 the staff to make them, even to address them?

2 MS. YILMA: Well, the regulation says when
3 you're doing a Programmatic Agreement you're actively
4 consulting with all parties. And the understanding
5 then is that if there are comments received during
6 your consultation, you will address it appropriately
7 before you finalize the Programmatic Agreement.

8 CHAIRMAN FROEHLICH: And I guess in the
9 course of the preparation of the Programmatic
10 Agreement, did you receive comments from the various
11 Sioux Tribes as to the language and the direction the
12 Programmatic Agreement was taking?

13 MS. YILMA: We received comments from
14 Standing Rock Sioux Tribe, Oglala Sioux Tribe,
15 Cheyenne River Sioux and Northern Cheyenne on the
16 various aspects of the Programmatic Agreement.

17 What we did was we held a specific
18 teleconference to discuss those comments and how we
19 would go about addressing them in the Programmatic
20 Agreement. Then we followed up with making those
21 changes and sent it out again for review.

22 CHAIRMAN FROEHLICH: Your testimony is
23 that you adjusted or adopted or changed the
24 Programmatic Agreement in response to comments
25 received --

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1 MS. YILMA: That's correct.

2 CHAIRMAN FROEHLICH: -- from the Sioux
3 Tribes?

4 MS. YILMA: That's correct.

5 CHAIRMAN FROEHLICH: Okay.

6 MS. YILMA: Sioux, and Northern Cheyenne
7 as well.

8 CHAIRMAN FROEHLICH: Northern Cheyenne.
9 All right.

10 Mr. CatchesEnemy, do you agree with the
11 answer you just heard from Witness Yilma?

12 MR. CATCHESENEMY: No.

13 CHAIRMAN FROEHLICH: Explain the comments
14 or suggestions that were conveyed from the tribe to
15 the staff that in your view were not addressed.

16 MR. CATCHESENEMY: I think when you're
17 talking about the simultaneous things occurring at the
18 same time when this Programmatic Agreement was being
19 initiated, a lot of the tribes were still trying to
20 revamp the scope of work. That seemed like the PA was
21 coming irregardless if we were happy about the
22 proposal that we had submitted in the years before.
23 So it was kind of hard to be trying to address
24 something that the federal agency, the NRC was just
25 going force through anyway. They were going to just

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1 promote this PA irregardless of our participation in
2 identification of historic properties.

3 CHAIRMAN FROEHLICH: But as I understand
4 it, the staff circulated the Programmatic Agreement
5 and sought comments or input; consultation, if you
6 would, I believe you used in your answer, from all the
7 various tribes. And then Ms. Yilma just testified
8 that those concerns that were received were addressed.

9 MR. CATCHESENEMY: I would say that there
10 were probably -- it's still at the NRC's discretion to
11 take what they felt was necessary to incorporate into
12 that PA, but it still wasn't everything that we had
13 provided.

14 CHAIRMAN FROEHLICH: It wasn't everything
15 that you had requested. I understand that. Your
16 definition then perhaps of "consultation" may differ
17 from that of the staff. To you, what does
18 "consultation" mean as in 106 procedures.

19 MR. CATCHESENEMY: Throughout the whole
20 process I can say that the tribes, especially the
21 Oglala Sioux Tribe, have always advocated for the
22 face-to-face. A lot of things can happen or not
23 happen behind a teleconference call. There's not the
24 same interaction that you and I are having right now
25 as if we were on the phone with each other, so we

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1 would always be advocating for the face-to-face.

2 CHAIRMAN FROEHLICH: You're referring to
3 I guess a session where there was a video conference
4 among staff and various tribes, is that correct?

5 MS. YILMA: It's actually a
6 teleconference.

7 CHAIRMAN FROEHLICH: Teleconference.

8 MS. YILMA: Yes.

9 CHAIRMAN FROEHLICH: Excuse me.

10 MS. YILMA: Due to the limitation of our
11 budgets we couldn't really travel to do the face-to-
12 face interactions for every single meeting we had. We
13 did have three face-to-face interactions with the
14 tribes to come up with methodologies and survey
15 approaches and consider inputs from the tribes in our
16 cultural resources, but we started developing the
17 Programmatic Agreement. We did use alternative means
18 to come to consensus of what needs to be included in
19 the Programmatic Agreement. And we used a
20 teleconference for that where we had a Webinar set and
21 displayed the Programmatic Agreement on a computer.
22 And we also had a line set up where we can discuss
23 each step of the Programmatic Agreement that we had
24 displayed on the Webinar and made appropriate changes
25 that we were hearing from the tribes, the SHPO, the

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1 state historic preservation officer, and also the
2 ACHP, Advisory Council on Historic Preservation. They
3 were all on the teleconferences when we were
4 developing the Programmatic Agreement.

5 CHAIRMAN FROEHLICH: I guess a simple
6 question would be does Webinar and teleconference
7 constitute consultation under 106 in your experience,
8 Dr. --

9 DR. LUHMAN: Luhman.

10 CHAIRMAN FROEHLICH: -- Luhman. Thank
11 you.

12 DR. LUHMAN: That's okay.

13 CHAIRMAN FROEHLICH: I apologize again.

14 DR. LUHMAN: I believe so. I mean, it is
15 an interaction among the parties discussing the issues
16 at hand. The Webinars, I facilitated the Webinars for
17 the development of the Programmatic Agreement. We
18 went through every aspect of the document including
19 all the comments that have been received. The
20 Programmatic Agreement itself was distributed as a
21 Word document so that everybody could insert their
22 comments and track changes. So it was possible to go
23 through and address everyone's comments.

24 Ms. Yilma is correct, the advisory council
25 was on the calls. The BLM was on the calls. The

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1 South Dakota SHPO was on the calls. The tribes that
2 chose to participate were on the calls. Powertech was
3 on the calls. They were very, very active and vibrant
4 conversations relating to the issues that were at
5 hand.

6 CHAIRMAN FROEHLICH: I would ask the same
7 of Dr. Hannus.

8 DR. HANNUS: We were not involved in that
9 set of interviews, so we were not part of the
10 Programmatic Agreement.

11 CHAIRMAN FROEHLICH: And the definition
12 that you would use for "consultation," does that
13 include Webinars or teleconferences or whatever, or is
14 that --

15 DR. HANNUS: Are you asking me?

16 CHAIRMAN FROEHLICH: Yes.

17 DR. HANNUS: Well, I mean in the current
18 parlance of what seems to be happening in the world of
19 technology, I guess that that is a very common
20 practice. I guess whether everyone that was involved
21 would fully agree and embrace that practice is a
22 different question, but it is certainly a common
23 practice.

24 CHAIRMAN FROEHLICH: Dr. Sebastian, in
25 your experience?

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1 DR. SEBASTIAN: In my experience
2 "consultation" is defined as seeking, discussing and
3 considering the views of others and, where possible,
4 seeking agreement with them. And that's the
5 definition that we're giving for what "consultation"
6 is. And I also would add, if I may, that in a lot of
7 cases these kinds of electronic media are the only way
8 to deal with them. If you think about folks working
9 in Pennsylvania who all their tribes are in Oklahoma
10 and so there's really no way for them to be able to
11 have very many face-to-face meetings -- so they
12 routinely do all of their consultation in electronic
13 media or the exchange of drafts and comments.

14 CHAIRMAN FROEHLICH: Dr. Redmond, in your
15 testimony, INT-003, you make reference to certain
16 heritage research studies. Can you explain to me what
17 a heritage research study is?

18 DR. REDMOND: I'm not sure I understand
19 what you're referring to there.

20 CHAIRMAN FROEHLICH: Okay. I believe in
21 your testimony I saw a reference to heritage research
22 studies listed in Exhibit INT-003.

23 Can you call that, Andy?

24 DR. REDMOND: That's part of my data.

25 CHAIRMAN FROEHLICH: Yes. Do a search,

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1 Andy, for heritage research studies.

2 Oh, there is it. Heritage resource
3 survey. You see it, in reference 2007?

4 DR. REDMOND: 2007. Heritage --

5 CHAIRMAN FROEHLICH: Heritage resource
6 survey.

7 DR. REDMOND: -- source. Which one?

8 CHAIRMAN FROEHLICH: Okay. Well, my
9 question actually comes down to what is a heritage
10 resource survey and how does that differ, if it does
11 differ, from a level 3 study?

12 DR. REDMOND: It doesn't. That was the
13 way they wanted it listed. It was a matter of
14 semantics.

15 JUDGE COLE: So it's the same thing as a
16 level 3 study?

17 DR. REDMOND: It was the same thing.

18 CHAIRMAN FROEHLICH: And it's not a
19 cultural survey, a TCP, like they talked about this
20 morning?

21 DR. REDMOND: No, it's the same as a
22 cultural resource study, but they wanted it listed as
23 a heritage resource study.

24 CHAIRMAN FROEHLICH: Cultural resource.

25 DR. REDMOND: It was a semantic thing for

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1 the Custer National Forest.

2 CHAIRMAN FROEHLICH: And it was then a
3 level 3 --

4 DR. REDMOND: Yes.

5 CHAIRMAN FROEHLICH: -- survey, the kind
6 of surveys we've been talking about?

7 DR. REDMOND: Yes.

8 CHAIRMAN FROEHLICH: Okay. And did any of
9 these heritage resource surveys include the kind of
10 surveys or studies that the Oglala Sioux Tribe has
11 advocated are necessary in this case?

12 DR. REDMOND: There were some that I did
13 that were TCP studies, but I don't think any of these
14 were those type of studies.

15 CHAIRMAN FROEHLICH: Are your TCP studies
16 included in your vitae or in the materials you've pre-
17 filed in this case?

18 DR. REDMOND: I'm sorry, I'm not hearing
19 well.

20 CHAIRMAN FROEHLICH: The TCP studies --

21 DR. REDMOND: Yes.

22 CHAIRMAN FROEHLICH: -- that you have
23 undertaken, are they included in your vitae or in the
24 materials filed in this case?

25 DR. REDMOND: They -- I did put some of

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1 them in there, but I would have listed them as TCPs.
2 They're not listed there, no.

3 CHAIRMAN FROEHLICH: Okay. Then I'd like
4 to ask among the other anthropologists, in what cases
5 that you have worked on have the types of TCP studies
6 advocated by the tribes been utilized and what is the
7 outcome? Which types of cases or cases that you've
8 worked in your profession have these type surveys been
9 required or have been done in cases, especially if it
10 involves a major federal action?

11 DR. REDMOND: In what cases?

12 CHAIRMAN FROEHLICH: Well, you may start
13 off. Start with you, Dr. Redmond. In what cases?

14 DR. REDMOND: The one that comes to mind
15 immediately was a logging permit on the southern Black
16 Hills down near Deadwood.

17 CHAIRMAN FROEHLICH: Is that listed among
18 your materials?

19 DR. REDMOND: It should be. Do you
20 remember, Mike?

21 MR. FOSHA: Near Deadwood?

22 DR. REDMOND: Yes, it was down near
23 Cheyenne Crossing.

24 MR. FOSHA: I'm not familiar with that
25 one.

1 DR. REDMOND: It was about 2002 or 2003.
2 Can you run it down a little bit? Oh, yes, sure, it's
3 not there. Naturally. Oh, it may be. There's Elk
4 Bug's power analysis. That was the one. Level 3
5 resource for the power analysis for the Spearfish
6 District. We did some -- it was a combined level 3
7 and a TCP simply because we ran into a series of TCPs
8 on the higher elevations. And we also ran into a
9 Sundance ground. It's the last one that's listed
10 there.

11 CHAIRMAN FROEHLICH: At the bottom of the
12 screen, Andy, could you highlight 2001?

13 DR. REDMOND: It was 2001.

14 CHAIRMAN FROEHLICH: At the bottom of the
15 screen.

16 DR. REDMOND: 2001 the power analysis
17 area. Yes, that was the one. It was almost an
18 accident that we ended up combining that one because
19 of what we ran into. And it ended up a level 3 and a
20 TCP analysis for the Spearfish simply because of what
21 we ran into.

22 CHAIRMAN FROEHLICH: Okay. Mr. Fosha,
23 among the I guess reports that are received which ones
24 or how many include the type of studies both the
25 traditional, I guess, level 3 and the TCP enhancement

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1 additions received by your office and what
2 distinguishes where they -- which types of cases or
3 when they are required?

4 MR. FOSHA: We don't get traditional
5 cultural property reports submitted to our office.
6 The state does not keep those. We don't receive them
7 and we don't review them. Now that doesn't mean to
8 say we haven't conducted traditional cultural property
9 surveys in synchronization with our archaeological
10 surveys, because we have done that in the past,
11 especially when we're dealing with highway projects
12 within the Black Hills, for instance.

13 CHAIRMAN FROEHLICH: Are there guidelines
14 for when a TCP would be required?

15 MR. FOSHA: There are no guidelines.
16 They're essentially project-dependent.

17 CHAIRMAN FROEHLICH: All right. I guess
18 then explain to me what you mean by "project-
19 dependent" and how we know whether a project depends
20 on having one of these or not.

21 MR. FOSHA: Well, what I would call
22 project-dependent, one, is it a major project within
23 the Black Hills National Forest. That's federal land
24 and quite often that would be the venue where the
25 tribes would request a traditional cultural property

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1 survey in conjunction with an archaeological survey.
2 If it's a project of the magnitude such as Powertech
3 USA is trying to do, then during the consultation
4 process the tribes may ask for or demand a traditional
5 cultural survey as well. So typically if it's a much
6 smaller project not related to lands such as the Black
7 Hills, these don't occur.

8 CHAIRMAN FROEHLICH: Right. Dr. Luhman,
9 can you help me to understand when these types of
10 surveys are required or done routinely and when
11 they're not required?

12 DR. LUHMAN: When you are dealing with a
13 federal undertaking, consultation is a major part of
14 the process, and it is through the process of
15 consultation and interacting with the tribes and
16 finding out their interests and concerns that
17 participation in the survey processes usually comes
18 out of that. And in those projects in which I have
19 been involved it is typically that they are working
20 alongside with the archaeological survey teams as they
21 are going about doing the survey. It could be in the
22 preliminary stages of doing the generalized
23 recognizance of the project area. Oftentimes the
24 federal agency and other parties will be along that
25 process so that there can be discussions while out in

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1 the field, and these are for sometimes some very large
2 projects. But in my experience it typically is at the
3 same time when there is an ongoing consultative and
4 survey process.

5 I will say that I am participating in a
6 current project for the NRC at which there has been a
7 tribal survey, field survey that has recently been
8 concluded.

9 DR. HSUEH: Your Honor, if I may, I'd like
10 to add something.

11 CHAIRMAN FROEHLICH: Oh, yes.

12 DR. HSUEH: Kevin Hsueh. I'd just like to
13 maybe share with you how -- for the Dewey-Burdock how
14 this tribal survey started. It was in 2011 during the
15 meeting with the tribes that Ms. Yilma mentioned, and
16 during that meeting there were requests from tribes to
17 conduct the TCP surveys. And at that time the TCP
18 surveys in 2011, that's relative new. It's an
19 emerging issues. So and these surveys is not -- is
20 emerging issues and many federal agencies that NRC
21 also facing with this kind of request.

22 So one of the things that we have done is
23 to consult with the advisory council because they are
24 the -- agency they are charged with administering
25 Section 106 and that work all the federal agencies.

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1 And they have seen all that request. So since then we
2 interact with the advisory council and to seek their
3 feedback and also the input we had throughout the
4 meetings with them and to seek feedback and advice as
5 to how to address this TCP survey request.

6 And one thing that I would also like to
7 add, staff mentioned about on the meetings and also
8 emails, phone calls. One thing that is also very
9 important to highlight is that we had many, many
10 opportunities working with tribal officials, tribal
11 members during the tribal consultation meetings or
12 during the site visits or for Ms. Yilma and Ms.
13 Jamerson. They participate in the field surveys
14 working side-by-side with tribal members, and so they
15 tell a lot of feedback information from the tribes.

16 But going back to these TCP surveys, it's
17 very changing -- also emerging issues. So NRC staff,
18 we recognize the importance of these TCP surveys for
19 the tribes, because over the years we have working
20 relationships with the tribes. We know the tribal
21 officials, tribal members. So we recognize the
22 importance of the TCP survey. So that's why we find
23 ways to the extent we can. There are regulatory
24 requirements. There are regulatory framework to
25 accommodate these surveys.

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1 And so I think in the end we -- as been
2 mentioned, is that we have this open-side approach
3 that seven tribes participate. And many, many tribal
4 members participated these surveys. So I think that's
5 a lot of effort put into these surveys. And in the
6 end, there were so many interactions.

7 So one other thing that I would also like
8 to mention is that any member of the public or many
9 member of the tribes can contact the advisory council
10 if they have any questions, any concern with the
11 agencies or in Section 106. They can contact them.
12 And sometimes the advisory council will contact the
13 agency and ask for additional information. And in the
14 past we have done that and we have provided
15 information.

16 So I think it's very important to also
17 point that out after almost more than four years I
18 think in the end this letter that mention this
19 morning, I think that's a letter from ACHP to me dated
20 April 7. I think it's the NRC Exhibit 08018-D. The
21 advisory council recognize that there were a range of
22 issues over the course of this project that NRC need
23 to address, and NRC need to address these issues
24 balancing a range of the concerns and also the project
25 scope.

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1 And so I think in the end, ACHP concluded
2 that NRC has completed the requirements of the Section
3 106 and also recognize that the Programmatic Agreement
4 is the right approach for the next steps because they
5 are all the processes to implement the additional
6 Section 106 work. So I'd just like to add that point
7 to kind of hopefully address one of your question as
8 to how these TCP surveys started.

9 CHAIRMAN FROEHLICH: Thank you, Dr. Hsueh.
10 You addressed a concern of mine, but also raised
11 another question in my mind. Did the NRC I guess in
12 its conversations with the ACHP tell them we have a
13 request from a number of tribes that wish to have a
14 TCP study as part of the 106 process, and indeed the
15 TCP study requested is one that would be in great
16 deal, one that would be very expensive, as I
17 understand it from this morning's testimony, and would
18 also be primarily conducted by members of those tribes
19 who had requested that additional TCP study? Was that
20 conveyed to the ACHP and what kind of a response did
21 you receive from them?

22 DR. HSUEH: Yes, as I indicated, ACHP was
23 fully informed of our interactions with tribes. And
24 when there are issues and questions that we have, we
25 always interact with the advisory council. And I

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1 think that the bottom line is this: The agency -- in
2 this case the NRC is the agency for Section 106
3 consultation. They need to consider that request and
4 then base on the scope of the project and then also
5 the level of effort. And so the agencies made the
6 final decision. However, the agency in the end -- if
7 the advisory council -- after the agency made that
8 decision, if the advisory council have questions, they
9 can always send a letter to the agency to challenge
10 that decision. But the agency is the one need to base
11 a number of factors in to determine the level of
12 efforts to proceed with these TCP survey.

13 CHAIRMAN FROELICH: The ACHP has no
14 specific guidelines that tells you the level of detail
15 or the level of effort, the types of surveys that
16 would satisfy a TCP-type survey? Is that correct?

17 DR. HSUEH: I would say that they have a
18 general guidance, but not specific. One of the things
19 -- well, personally I would hope that there were step-
20 by-step procedures that is available to the agencies
21 as to how to address the TCP survey requests. And at
22 this point my understanding is that there is no
23 specific step-by-step procedures for the agency to
24 follow, but each agencies need to address this
25 specific issue base on the level effort and then the

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1 number of considerations and make its own decision.
2 But I think in the end the agency need to be able to
3 -- if the advisory council has issues or challenges,
4 the agency's decision -- I mean, the agency should be
5 able to defend why the agencies proceed with that
6 approach.

7 CHAIRMAN FROEHLICH: Dr. Hannus, in your
8 experience can you help me understand when a
9 comprehensive TCP study, the type requested by the
10 Oglala Sioux Tribe in this case, is or isn't required

11 DR. HANNUS: Oh, in the first place our
12 office has not been involved in any other projects in
13 which a TCP survey has been required, although we've
14 worked on some huge projects, but there is a situation
15 here that is evolving. So that is in part -- but the
16 rules promulgated for the 106 process include Bulletin
17 38, which is the bulletin that refers specifically to
18 the guidelines for TCP projects. And that's probably
19 more familiar to Dr. Sebastian. He can probably quote
20 it verse-by-verse.

21 (Laughter)

22 JUDGE BARNETT: I'm sorry, I can't hear
23 the answers, at least of the last witness. I'm sorry,
24 sir. I couldn't hear you, sir.

25 CHAIRMAN FROEHLICH: Dr. Hannus, could you

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1 repeat --

2 (Simultaneous speaking)

3 DR. HANNUS: Well, I mean, what I was
4 saying basically is (A) that our office -- I mean, the
5 question in part was have we ever been working with
6 other projects that came in to requiring TCP things.
7 And I just said our office has not. But I also said
8 that the regulations that were promulgated for dealing
9 with TCPs are contained in Bulletin 38, which I
10 understand is under revision, but it is one of those
11 moving targets, I think, at the present time.

12 JUDGE BARNETT: Thank you, sir.

13 CHAIRMAN FROEHLICH: Okay. Dr. Sebastian?

14 JUDGE COLE: Could you hear that?

15 JUDGE BARNETT: At that time I did hear
16 it, yes, sir.

17 JUDGE COLE: Yes, he doesn't have a
18 microphone in front of him. Maybe we could --

19 DR. HANNUS: Yes, I'm sorry.

20 JUDGE COLE: It hasn't been lighting up.

21 That may be --

22 DR. HANNUS: Yes, okay. Sorry.

23 JUDGE BARNETT: Okay. Thank you.

24 CHAIRMAN FROEHLICH: All right. Dr.
25 Sebastian, can you shed some light on this?

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1 DR. SEBASTIAN: Well, I've kind of lost
2 track of what this is, but let me try. One of the
3 questions that you asked Dr. Hsueh was whether the
4 advisory council has standards for identification
5 efforts for TCPs. The advisory council doesn't have
6 standards for the identification of any kind of
7 historic properties. They say that agencies have to
8 make a -- in their regulation they say that agencies
9 have to make a reasonable and good faith effort, but
10 the agencies set their own standards for archaeology,
11 for historic buildings, for traditional cultural
12 properties.

13 The only real published guidance, as Dr.
14 Hannus said; and I never leave home without it --

15 (Laughter)

16 DR. SEBASTIAN: -- is National Register
17 Bulletin 38. The National Register of Historic Places
18 puts out bulletins about identifying and registering
19 all kinds of historic properties. Landscapes. Mining
20 districts. You know name it, they have a bulletin for
21 it. And they do have this one for traditional
22 cultural properties.

23 I think the other part of your question
24 was about my experience --

25 CHAIRMAN FROEHLICH: Yes.

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1 DR. SEBASTIAN: -- with projects and
2 when --

3 CHAIRMAN FROEHLICH: When it's been
4 required.

5 MR. HSUEH: -- things are required? I've
6 been working with projects that identify traditional
7 cultural properties since 1991, and the National
8 Register Bulletin 38 came out in 1990. So it was the
9 first time that people had begun to think about how to
10 incorporate these kinds of places into a process that
11 was originally created for historic buildings. It had
12 been expanded over time to include things like
13 archaeological sites, both pre-contact archaeological
14 sites and Euro-American archaeological sites, other
15 kind of properties.

16 And the agencies are supposed to consider
17 all kinds of historic properties for every project,
18 but sometimes the consideration is, you know, we're
19 out in the middle of nowhere in the Great Plains. I
20 don't think we have to make a big effort for building
21 surveys, because there isn't a building for about 200
22 miles in any direction. And so the agency has to
23 consider the effects on historic properties, but then
24 they make a reasoned decision about how much effort to
25 put into identifying different kinds of historic

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1 properties. So some places there's really a heavy
2 focus on archaeology because there's a very high
3 probability it's out there. Sometimes there isn't,
4 You know, if we know that the landscape has been
5 changed by cities or whatever. And so there's no
6 identification effort, only a provision for
7 discoveries. So it's an agency-based decision on when
8 it's appropriate and how much it's appropriate.

9 In terms of the actual physical on-the-
10 ground TCP survey-kind of thing that we're talking
11 about, I have never been involved with one of those
12 before. As I said, other parts of the country people
13 identify traditional cultural properties usually
14 mostly through ethnographic research. And then there
15 are maybe field visits with the elders who want to go
16 see a particular area, or they've looked at an
17 archaeological report and they say this site right
18 here, we want to go to see that site. So there's a
19 field component, but I've never actually been involved
20 in one that had this kind of extremely intensive
21 effort proposed.

22 CHAIRMAN FROEHLICH: Okay. I'll go back
23 to Ms. Yilma. Did the staff investigate or review
24 ethnographic reports or suggest at any point in this
25 process visits with tribal elders to try to collect

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1 the type of data necessary to respond to the cultural
2 and historic resources?

3 MS. YILMA: We did not conduct an
4 ethnographic study, but we did have a discussion about
5 them during our face-to-face interactions with the
6 tribes. And the ultimate decision was instead of an
7 ethnographic study a field survey was necessary, so we
8 focused our attention on the field survey approach.

9 CHAIRMAN FROEHLICH: Was there any thought
10 given to utilizing the tribal elders in a field survey
11 approach?

12 MS. YILMA: Yes. So after we decided the
13 statement of work wasn't going to work, we did seek
14 out for alternative approach. And one of the approach
15 was the open-side approach that we ended up deciding
16 on, and that open-side approach, the idea was that
17 each tribal representative would select an elder or
18 anyone that's knowledgeable of the tribe's culture to
19 come out and identify sites within the Dewey-Burdock
20 projects that are important to that tribe.

21 CHAIRMAN FROEHLICH: And of the tribes
22 that took you up on that offer --

23 MS. YILMA: Yes.

24 CHAIRMAN FROEHLICH: -- how many people
25 did they bring? I mean, how much of an undertaking

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1 was that?

2 MS. YILMA: There were three
3 representatives. They were allowed to have three
4 representatives from each site. Some had three.
5 Others had a couple. And for some of them they did
6 have tribal elders out with the tribal monitors doing
7 a site survey and provided input on what was found and
8 what was the interpretation of what was found.

9 CHAIRMAN FROEHLICH: Just trying to decide
10 what's reasonable. They were allowed three? Why were
11 they --

12 MS. YILMA: I should clarify. For
13 purposes of reimbursements, because Powertech was
14 covering the expenses, the expense allotment was for
15 three representatives. But of course tribal entities
16 could have brought more than three. But if they had
17 brought more than three, the per diem and such were
18 not going to be covered.

19 CHAIRMAN FROEHLICH: I see. Dr.
20 Sebastian?

21 DR. SEBASTIAN: But in addition to
22 covering travel and per diem, there was a \$10,000
23 grant to each participating tribe, and they could use
24 that money in any way they wanted to to further this.
25 So some of them I believe used it to pay wages for the

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1 people who came. They used it to produce reports.
2 However they wanted to. So they could have used some
3 of that money to fund the travel and per diem for
4 additional members if that's how they wanted to spend
5 it.

6 MS. YILMA: And I also want to point out
7 that there were -- Powertech had some flexibilities in
8 that some of the tribal representative had three
9 representatives on board doing the field survey and
10 also invited their THPO to join afterwards to consult
11 with what they have found. And that THPO
12 representative that attended afterwards, that per diem
13 was covered by Powertech, although as a gesture of --
14 to show flexibility, I guess.

15 CHAIRMAN FROEHLICH: Dr. Redmond, what's
16 your opinion of this approach to attempt to capture
17 the tribal perspective as to cultural resources?

18 DR. REDMOND: Let me clarify something
19 first. It's something I didn't bring up earlier. I'm
20 also an American Indian. I'm not a Lakota. I'm a
21 Mohawk. But there are some things that are being
22 bypassed here. Mr. CatchesEnemy brought up earlier
23 that one of the things that's being bypassed here is
24 this idea of government-to-government on a specific
25 scale. And I believe that idea of the scale is being

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1 ignored. His position would be essentially the same
2 as possibly a Senate staff or a Congressional staff,
3 and he's being forced to meet with people that are way
4 below his level, first of all.

5 Second of all, you're talking about having
6 elders come out in this specific area to describe
7 TCPs. Each family has different ideas of where TCPs
8 occur within the geography of the Black Hills. Each
9 family has different areas that they hold sacred.
10 Each family. Each tiospaye. Each extended family.
11 That's more than three per tribe.

12 Okay. That's a financial burden on
13 Powertech. They stand to make money on this. This is
14 a financial enterprise that they're embarking on. If
15 it's worth it to them to continue this, then it must
16 be worth it to invest in this thing. If they're not
17 willing to invest in it, why are they involved in this
18 thing? They're paying lip service to this thing of
19 wanting to consult in a meaningful manner with the
20 tribal people, but only with three per tribe. That
21 doesn't sound meaningful. There's more than three
22 tiospaye per tribe, more than three extended families
23 per tribe. Okay. There's this amount of money that's
24 been given to the tribe for this amount of people.
25 Okay. Fine. It still doesn't add up. It's coming

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1 back to the amount of money, money, money, money.

2 Well, we're talking about money on one
3 side and we're talking about spiritual concerns on the
4 other. That's apples and oranges. You know, it
5 doesn't really jive. You know, I know I'm supposed to
6 be a scientist. I know I'm supposed to give some type
7 of scientific answer here, but the Indian side of me
8 says that all I'm hearing is a lot of money. And
9 people are saying that they want to do meaningful
10 consultation. And the consultation on the Native side
11 is saying, hey, look, we're talking about our
12 spirituality and you folks are talking about your
13 money.

14 CHAIRMAN FROEHLICH: I understand your
15 answer, and please appreciate my position. I'm trying
16 to determine what's reasonable under the
17 circumstances. As to consultation, in the government-
18 to-government definition I understood you and Mr.
19 CatchesEnemy to say that the tribes had desired either
20 the president or, in your last answer, members of
21 Senate staff to be conducting these discussions. Is
22 that correct?

23 DR. REDMOND: Well, at least let's do it
24 face-to-face.

25 CHAIRMAN FROEHLICH: Face to face? Here's

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1 another question: I understand face-to-face and the
2 role it places, but you raised in your most recent
3 answer the Senate staff.

4 DR. REDMOND: No, I understand that's not
5 possible, but --

6 CHAIRMAN FROEHLICH: That wouldn't be
7 reasonable, would it?

8 DR. REDMOND: -- at least with -- no, it's
9 not reasonable.

10 CHAIRMAN FROEHLICH: But that wouldn't be
11 reasonable.

12 DR. REDMOND: But at least let's do it
13 with respect. And today's world everything seems to
14 be through media. It's not face-to-face, eyeball-to-
15 eyeball. And in our culture it's a handshake and
16 face-to-face. I look in your eye and see if you're
17 telling me the truth. Because if I can't see your
18 face, I don't know what you're telling me.

19 CHAIRMAN FROEHLICH: I appreciate and
20 understand your point on face-to-face. As to the
21 number of people that would be reasonable, okay, you
22 speak about extended families. What number of
23 extended families would be inclusive or reasonable
24 from the perspective of the Sioux Tribe or in your
25 professional opinion?

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1 DR. REDMOND: That I don't know. That
2 would be -- Mr. CatchesEnemy and Mr. Mesteth could
3 answer that better than me. Some families really have
4 -- they don't really care anymore about the TCPs.
5 Some care deeply. The families that I deal with;
6 there's five of them, they would want to send a
7 representative. They're on the eastern side of Pine
8 Ridge. That's just the eastern side, and there's five
9 of those. So I don't know. I know Mr. Mesteth is
10 involved with several others and they would probably
11 want to send at least one representative. I don't
12 know.

13 CHAIRMAN FROEHLICH: I'd welcome an answer
14 from either Mr. CatchesEnemy or Mr. Mesteth on what is
15 the number of participants that would be reasonable to
16 conduct a TCP-type study that would be satisfactory to
17 the tribes.

18 MR. CATCHESENEMY: I don't believe there
19 is a reasonable -- you know, and when we're
20 correlating it with cost. It's just a dynamic to
21 consider how many of our knowledgeable wise people
22 back home that could have a interest, could have a
23 stake in having some input into these types of
24 discussions, these type of field surveys. Our tribal
25 membership is 45,000. Half of those are under 18. So

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1 if you look at how many adults are there -- I don't
2 know, that's what I'm saying. It's a pretty large
3 number. But when they're using the word "reasonable"
4 -- and I want to come back to the consultations.

5 CHAIRMAN FROEHLICH: Okay.

6 MR. CATCHESENEY: If true consultation
7 was to occur and the tribes asserted this, the NRC
8 would have had to make separate visits to all 17 or
9 more tribes individually to truly uphold that
10 standard. But the tribes were reasonable in coming to
11 one table one time with NRC. But if the tribes so
12 choose to do so, they could have did so individually.
13 And imagine what the cost would have been associated
14 for NRC to conduct consultation with each tribe
15 individually. So to me, I want to go back to that
16 before we start moving forward and talking about how
17 many would be reasonable on a survey.

18 Initially the consultation -- I think
19 tribes have been taking the higher road all along.
20 And while it doesn't seem like maybe the NRC staff is
21 meeting us in a good ethical way and they're going to
22 bypass a few things, it causes this to occur. We
23 probably wouldn't even have to be here right now if it
24 wasn't for maybe some of the things that happened or
25 didn't happen and if there was more reasonable actions

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1 taken.

2 CHAIRMAN FROEHLICH: Okay. All right.
3 I'm not certain which is the correct witness to
4 respond to this for me, but the Powertech
5 environmental report that I guess started us off, that
6 would be perhaps the Augustana study that Dr. Hannus
7 is responsible for. And that study found that the
8 sheer volume of sites documented in the areas was
9 noteworthy. The area proposed for mining was found to
10 have a high density of cultural resources. Is that
11 correct, Dr. Hannus?

12 DR. HANNUS: The density of sites was
13 certainly -- it wasn't exceptional, but it would be
14 what you would expect -- I mean, it was within the
15 structure of what we have been seeing in that region
16 through a number of other studies. We worked in the
17 Badlands National Monument and conducted surveys for
18 a five-year period. We also worked with GCC Dacotah.
19 And actually some of that land is contiguous to the
20 Powertech study. So we're finding about the same
21 number of site density in those areas as we found in
22 the specific Powertech project.

23 CHAIRMAN FROEHLICH: Okay. Can that high
24 density and the statement you made be reconciled with
25 the environmental report, page 2-9, table 2.11-1, that

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1 ultimately impacts to cultural resources will be none?
2 Is this correct? Am I missing something in reading
3 these two portions of the environmental report
4 together?

5 DR. HANNUS: That's not our report.

6 CHAIRMAN FROEHLICH: Yes.

7 DR. HANNUS: And I'm not sure.

8 CHAIRMAN FROEHLICH: You're not sure?
9 Perhaps, Mr. Pugsley -- I realize your not a witness,
10 but I had trouble reconciling two portions of the
11 environmental report that was submitted, one
12 concluding that based on the Augustana study that
13 there was a high density of cultural resources, but
14 then in the environmental report I believe I read that
15 the impacts to cultural resources -- and it was marked
16 none. Am I missing something?

17 MR. PUGSLEY: One moment, Your Honor.

18 CHAIRMAN FROEHLICH: Thank you.

19 MR. PUGSLEY: I apologize, Your Honor.
20 Thank you for the moment.

21 At the time the environmental report was
22 finalized and accepted by NRC staff, Powertech had
23 already executed the memorandum of agreement that I
24 noted earlier in our opening statement with the State
25 of South Dakota to mitigate and wherever possible

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1 avoid impacts to historic cultural resources.

2 That being said, the assessment performed
3 by Powertech in its environmental report was as
4 consistent as possible with Dr. Hannus' level 3
5 survey, but by no means should that be considered by
6 the Board as the entirety of the assessment performed
7 on historic and cultural resources. I would strongly
8 encourage the Board to look to the entirety of the
9 record of decision to see NRC staff's evaluation of
10 it, including but not limited to any and all field
11 surveys that were conducted, assessments of
12 eligibility, concurrence by the state historic
13 preservation officer, etcetera.

14 CHAIRMAN FROEHLICH: Thank you. Dr.
15 Hannus, at page 16 of your testimony you state that
16 the mitigation measures in the Programmatic Agreement
17 seem acceptable for addressing adverse impacts to
18 eligible archaeological sites. ALC doesn't know when
19 it is applicable for addressing impacts to tribal
20 sites that are not also archaeological sites. Can you
21 explain this statement, please?

22 DR. HANNUS: Well, I guess in the first
23 place it strikes me that there's a certain tone that
24 is in all of our discussions today that isn't exactly
25 clearly separating level 3 surveys and then the

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1 attached evaluations that follow those; in other
2 words, what we conducted, with TCPs. The two really
3 are, at least in my understanding of it at this point,
4 on separate lines, because we're not in any way
5 qualified to be conducting TCP surveys, and then under
6 the same scientific framework, if you want to say
7 that, that the 106 process is defining for the work
8 that we did.

9 So I guess that there are arrangements, as
10 I understand it, in the Programmatic Agreement to take
11 into account that there will be consultation going on
12 as this process goes on. And both when additional
13 information is provided after -- I mean, if the
14 license here is granted and as they proceed with the
15 project, there will be sites that will need to be
16 addressed archaeologically and there will be probably
17 sites that need to be addressed as traditional
18 cultural properties. But like I say, we're not really
19 qualified in the work we do to address traditional
20 cultural properties.

21 And the other thing that becomes important
22 perhaps to note for the record is that the discipline
23 of archaeology rarely has the good fortune to be able
24 to connect actual tribal entities to archaeological
25 sites. It is not part of the framework of our

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1 profession because you've got -- in other words, the
2 things that we consider to be diagnostics of
3 activities that were going on are not labeled in such
4 a way as it were for us to recognize specific tribal
5 entities. So at least in my long career, which is
6 spanning more than 40 years now, I have not really
7 seen more than about three sites that could be
8 conclusively scientifically linked to a specific
9 tribal entity.

10 So it's a complicated question for
11 archaeology itself. This is not a complicated
12 question for me. It's a complicated question for our
13 discipline in that the data sets that we work with can
14 answer numerous questions about time, space, climates,
15 types of sites as far as what was going on at the
16 site, but we can't really attach historically
17 identified tribal entities to those levels of
18 evaluation. And again, that really should clearly, I
19 think, show us that for us to then be able to make
20 some kind of in roads ourselves, being not of Native
21 background, to identification of sites that are
22 traditional cultural properties that have a tie to
23 spirituality and so on, it is not in our purview to do
24 that.

25 CHAIRMAN FROEHLICH: Then I take it you

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1 would wholeheartedly agree with Dr. Sebastian and her
2 testimony, APP-63, where she says identification of
3 such places depends on the knowledge of traditional
4 culture practitioners, not on the exercise of some
5 scientific discipline or method?

6 DR. HANNUS: Yes, I mean, I absolutely
7 would have to, because there isn't any other way the
8 framework that I work within functions.

9 CHAIRMAN FROEHLICH: Okay.

10 JUDGE BARNETT: I have a question for Mr.
11 Fosha. Are you testifying as a representative of the
12 State of South Dakota or as a private consultant for
13 Powertech?

14 MR. FOSHA: I guess I am here because I am
15 an archaeologist that is employed by the State of
16 South Dakota. Did that answer your question? I'm not
17 here on behalf of Powertech.

18 JUDGE BARNETT: Okay. So the testimony
19 that you're making today is in your role as an
20 assistant state archaeologist, is that correct?

21 MR. FOSHA: And mining archaeologist for
22 the state.

23 JUDGE BARNETT: Okay. Thank you.

24 JUDGE COLE: Just a couple of questions.
25 This is for Mr. CatchesEnemy. Do you acknowledge that

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1 the Advisory Council on Historic Preservation is the
2 principal agency charged with administering the
3 National Historic Preservation Act and in making
4 determinations on whether an agency has properly
5 consulted under Section 106?

6 MR. CATCHESENEMY: I acknowledge that is
7 their role.

8 JUDGE COLE: Do you acknowledge that the
9 Advisory Council on Historic Preservation signed the
10 Programmatic Agreement for the Dewey-Burdock project
11 because it found that the staff has consulted as
12 required under the National Historic Preservation Act?
13 The reason why they signed it?

14 MR. CATCHESENEMY: I believe that there's
15 statutes and regulations that hold them to comply with
16 agreeing to such a Programmatic Agreement, however, by
17 agreeing to it and signing off on it does not
18 constitute like a true trust responsibility over
19 tribes agreeing or not agreeing to that same PA.

20 JUDGE COLE: I understand your position,
21 sir. In your pre-file testimony you state that you
22 are concerned tribes will not be involved in future
23 efforts to resolve adverse impacts on evaluated sites
24 and identifying new sites. Do you acknowledge that
25 the staff prepared the Programmatic Agreement just to

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1 resolve those kind of problems? Isn't that what they
2 tried to do by developing the programmatic impact, to
3 eliminate or minimize those kind of problems?

4 MR. CATCHESENEMY: As soon as -- the
5 project, if allowed to proceed, will have irreparable
6 harm to the cultural resources there no matter what
7 the avoidance, minimizing or mitigation acts that are
8 proposed. It will still have irreparable harm to
9 those cultural resources no matter what. So a
10 Programmatic Agreement and the stipulations that are
11 provided in there does not safeguard/protect cultural
12 resources, in my opinion.

13 JUDGE COLE: So you're saying it's not
14 adequate?

15 MR. CATCHESENEMY: Inadequate, yes. I
16 would like to add to that.

17 JUDGE COLE: Sure.

18 MR. CATCHESENEMY: A lot of what we're
19 discussing right now between archaeology, the
20 discipline of archaeology, the standards that are set
21 for quite some time now and then the culmination of
22 how TCPs came to be, there's a lot of things that
23 occurred. Dr. Sebastian brought up Bulletin 38 in
24 1990. She brought up NAGPRA, which was also passed by
25 Congress in 1990. And then two years after that

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1 that's when the amendments to the National Historic
2 Preservation Act came to be to allow THPOs to be
3 created. So there's a lot of changes that have
4 occurred since that to come up to where we're at now.

5 And as we're seeing now, there's not a lot
6 of standards set or, as Mr. Kevin Hsueh has said,
7 guidance for how these TCPs are created. A lot of
8 guidance nationally is kind of a one-size-fits-all.
9 And for tribes, I know we will always assert that
10 there's not such a thing. That's why I bring up the
11 fact that if consultation was going to be reasonable
12 they would have been consulted with individuals. So
13 guidance such as this, we won't be able to agree to a
14 one-size-fits-all as tribes.

15 JUDGE COLE: Any of the other panel
16 members want to comment on that?

17 DR. SEBASTIAN: Actually, I would, sir.
18 On the question of whether the group tribal meeting
19 that was held here in February of 2012 was a
20 compromise rather than having individual meetings with
21 the tribes, the SRI Foundation was in charge of
22 setting it up and organizing everybody's travel and
23 finding out what people wanted. And we were told
24 consistently that the tribes did not want individual
25 meetings, that they preferred to have a complete group

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1 meeting. And in fact one of the THPOs said to us that
2 holding individual meetings would be an attempt to
3 divide and conquer. So I want to make that clear in
4 the record.

5 CHAIRMAN FROEHLICH: Is that your opinion
6 also, Mr. CatchesEnemy?

7 MR. CATCHESENEMY: I don't share that same
8 sentiment. I'm merely bring up a point that the
9 tribes could assert that they be consulted
10 individually. They could have. And I was trying to
11 make a point in regards to being reasonable knowing
12 that these meetings -- it would be unreasonable to ask
13 them to do such a thing. But like Dr. Sebastian is
14 saying, there is a benefit to having us together. A
15 lot of times at some of these federal agency
16 consultations that we have, we have tribal caucuses
17 where we're able to get together and discuss a few
18 items. So that's a benefit. My only point was being
19 the reasonable portion. It wasn't reasonable to ask
20 the NRC to consult with us individually.

21 JUDGE COLE: Thank you, sir.

22 CHAIRMAN FROEHLICH: I had one question
23 that I forgot to ask of Mr. Fosha. Your testimony
24 concludes that this office has no further reservations
25 concerning the granting of a large-scale mine permit

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1 for the project. What were the initial reservations
2 that that refers to?

3 MR. FOSHA: Okay. I was involved from the
4 very start in the project, so the bulk of this
5 material is a result of myself reviewing what
6 Augustana College had been doing in the field. So can
7 you repeat that, because I don't want to get in
8 teacher mode and wander off the question.

9 CHAIRMAN FROEHLICH: Well, I notice in
10 APP-010 your testimony concludes that this office,
11 your office, has no further reservations concerning
12 the granting of a large-scale mine permit for this
13 project. My question was merely what were your
14 initial concerns? What does that refer to?

15 MR. FOSHA: Okay. These mining projects
16 start out with what's called a scenic, unique and
17 critical review. That is, what do I know that I need
18 to tell the applicant about what you can and can't do
19 within certain areas of that property? In this case
20 we knew nothing about the sites that were located here
21 except for what I knew of adjacent areas. So I knew
22 there would be sites there.

23 So I met with Powertech USA and we
24 discussed methods of identification of archaeological
25 sites and the methods and the steps we would take

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1 throughout this process. And again, this was all for
2 a state permit. This had nothing to do with the NRC
3 permit or anything like that. So up until the point
4 where Augustana was nearly finished I was the only
5 review agency on this project.

6 So as such, I worked very closely with
7 Augustana College in the field. I met with their
8 staff periodically to see if they were having any
9 issues or problems that -- or things they couldn't
10 recognize, let's say wrap their arms around
11 archaeologically. And we did that because I had a lot
12 more background in some of this than the people that
13 were doing the survey in this region of the state at
14 this point in time.

15 Also, I consider it my job to help
16 agencies like Augustana College, or whoever is
17 performing this work, to do the very best job they
18 can. Therefore, I do a lot of site visits. I work
19 closely with them. And throughout the course of this
20 I think we identified once the initial was conducted;
21 now we had met with Powertech, what areas are you
22 going to directly impact? My questions then were I
23 don't know the significance of these sites, so I still
24 can't sign off on this until I understand what may or
25 may not be disturbed. That's when Powertech initiated

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1 archaeological testing of these sites.

2 Once that was done; and at least to the
3 point where we knew what was going to take place in
4 the near future, at that point in time I could say,
5 yes, this is not going to affect any historic
6 properties based upon what we know right now. And
7 it's also at that point in time that Powertech and my
8 office had an MOA that would give me quarterly updates
9 on events that are taking place, what they're planning
10 to do so that I can keep abreast on we're ready to
11 move into a new area. What do you think we should be
12 taking into consideration? What steps would you
13 recommend we do on these particular sites?

14 CHAIRMAN FROEHLICH: Those reservations
15 then were all archaeologically-focused, not --

16 MR. FOSHA: Correct.

17 CHAIRMAN FROEHLICH: -- culturally or
18 religiously as to the concerns of the tribes?

19 MR. FOSHA: No, it's just the field of
20 archaeology and our science.

21 CHAIRMAN FROEHLICH: Okay. This concludes
22 the questions that I had and prepared for Panel 1.
23 What I would suggest we do is take a break. There may
24 be some questions that the counsel would prepare that
25 they would submit to us to ask as follow-on cross-

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1 examination for this panel. And then depending on how
2 many questions there are, how many the Board elects to
3 ask from the parties, since I would like to make the
4 best use of our time, we'll move to argument on the
5 additional data questions that is pending, if that
6 meets with the approval of counsel.

7 MR. PARSONS: Your Honor, I have one
8 clarifying question for you.

9 CHAIRMAN FROEHLICH: Sure.

10 MR. PARSONS: Are you anticipating there
11 would be argument surrounding the issues identified in
12 the subsequent motion filed, or are you just referring
13 to the sort of August 6th order followed by the August
14 8th order data issues?

15 CHAIRMAN FROEHLICH: Because we were
16 traveling, I haven't reviewed in great detail the
17 motion that was filed Saturday. I did read it over
18 electronically. And it would probably make sense for
19 us to address those items which the intervenors have
20 requested, that the tribe has requested, in addition
21 to the data that was specified or related to the data
22 in the Powertech press release.

23 Okay. How long would the counsel request
24 or seek to prepare any follow-on cross of Panel 1?

25 MR. PUGSLEY: Your Honor, I would say at

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1 least 20 minutes.

2 CHAIRMAN FROEHLICH: Staff, your
3 perspective?

4 MR. CLARK: Twenty minutes is fine with
5 the staff.

6 CHAIRMAN FROEHLICH: And from our
7 intervenors?

8 MR. ELLISON: We would concur.

9 CHAIRMAN FROEHLICH: All right. Why don't
10 we take 20 minutes so you can compile the questions
11 that you would like asked of Panel 1 by the Board. I
12 would ask that you do them on a sheet of paper. Write
13 or print neatly.

14 (Laughter)

15 CHAIRMAN FROEHLICH: What will happen is
16 questions that have been submitted, whether they're
17 asked or not asked, are made part of the record
18 afterwards. So your handwriting will be preserved.
19 So I'd ask, one, that we can read it and, two, when it
20 gets copied in the record at the end of the proceeding
21 people will know what you wanted asked that wasn't
22 asked.

23 Okay. Why don't we take 20 minutes to
24 prepare those questions? We'll go through with any
25 follow-on cross of Panel 1 and then we will hear

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1 argument on the additional data that's been requested
2 by the Consolidated Intervenors. That will get us
3 back here about 3:15.

4 (Whereupon, the above-entitled matter went
5 off the record at 2:53 p.m. and resumed at 3:19 p.m.)

6 CHAIRMAN FROEHLICH: We'll be back on the
7 record. I have received questions from each of the
8 parties to the case, and since there is a modest
9 amount of questions I'm going to go ahead and ask all
10 of them. Begin with those.

11 Dr. Sebastian, what is the purpose of the
12 execution statement in the Programmatic Agreement
13 that's Exhibit NRC-018-A at 14.

14 DR. SEBASTIAN: Is that going to go up?

15 CHAIRMAN FROEHLICH: Could we display 18-A,
16 please.

17 (Off the record comments)

18 JUDGE COLE: Your Honor, it's probably 1.
19 18-A1.

20 CHAIRMAN FROEHLICH: That's 8.

21 DR. SEBASTIAN: It's on page 14, if that
22 helps. Right at the bottom here. Great, right at the
23 bottom of the page.

24 Okay. At the end of Programmatic
25 Agreements or Memoranda of Agreement, any kind of a

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1 Section 106 agreement document, the last thing after
2 all the stipulations is something like this that says
3 that the execution of that document by the federal
4 agencies and the other required signatories, and
5 invited signatories, and the implementation of it is
6 the evidence that a federal agency has done the two
7 things that you have to do in the 106 process; take
8 into account the effects of the undertaking on
9 historic properties and give the Advisory Council an
10 opportunity to comment. So, once all of the parties
11 that are culled out in this execution or signing
12 statement have executed the document, then that's the
13 evidence that the federal agency has that it has met
14 the requirements.

15 CHAIRMAN FROEHLICH: Dr. Sebastian, does
16 the use of Section 106 Programmatic Agreement assume
17 that identification of all historic properties has
18 been completed?

19 DR. SEBASTIAN: No. Usually with a
20 Memorandum of Agreement, which is the other kind of
21 106 document, pretty much all of the 106 activity is
22 done at that point. Everything has been identified
23 with minor exceptions, all the property have been
24 evaluated, everybody knows what the effects are, and
25 there's been the discussion about how to resolve the

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1 effects, so in an MOA all of those standard steps of
2 the 106 process are done.

3 With a Programmatic Agreement, the idea is
4 that it sets out a process for completing the 106
5 process, and it can pick up anywhere. Sometimes it
6 picks up after all the properties have been identified
7 and the effects are known, but the discussion about
8 mitigation hasn't happened. Sometimes it picks up
9 before any identification is done. I've written any
10 number of large Programmatic Agreements and any amount
11 of the 106 process can be provided for in the
12 agreement including all of the identification in some
13 cases.

14 CHAIRMAN FROEHLICH: What is the definition
15 of the Area of Potential Effect, APE?

16 DR. SEBASTIAN: APE, as it says, the Area
17 of Potential Effect is the area within which a federal
18 undertaking could affect historic properties if there
19 are any. It's phrased that way because you define the
20 APE really early in the process. It's one of the first
21 things that you do when you're doing 106. And people
22 sometimes talk about the direct effects APE, and the
23 indirect effects APE, so there are -- but there's
24 really only one, the largest one. So, in the case of
25 Dewey-Burdock, for example, the APE is nearly as large

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1 as the full project area. And, in fact, as Ms. Yilma
2 testified earlier because of the visual effect efforts
3 that were done to determine if there were going to be
4 any visual effects, it actually goes a bit outside of
5 the license area.

6 The direct effects area is a much smaller
7 part of the greater APE, so the indirect effects
8 happen in the larger area. The direct effects has been
9 defined as a smaller area within which Powertech has
10 indicated given the current level of planning; and, of
11 course, things do change because ISR development is
12 phased. But given what we currently know these are the
13 direct effect areas, and we also designed a buffer
14 around those to make sure that we understood which
15 properties were going to be in or very close to the
16 direct effects part of the APE. I think that answers
17 it.

18 CHAIRMAN FROEHLICH: For Ms. Yilma, would
19 you please elaborate on the specific way the field
20 surveys were carried out to identify TCPs?

21 MS. YILMA: Sure. I'm guessing you're
22 asking me how the tribes conducted the tribal survey?

23 CHAIRMAN FROEHLICH: How much time was
24 actually spent in the field, and was the entire 10,000
25 plus acre site evaluated, or only the approximately

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1 2,500 area of potential effect, which we just had
2 defined?

3 MS. YILMA: The tribes were out there from
4 -- for about a month in total. They did have access to
5 100 percent of the project boundary, the 10,500 acres.
6 When they decided the identification efforts they came
7 up with priorities to do the field survey, and those
8 priorities ranged in importance to the tribes where
9 they want to go first, look at burial sites, look at
10 sites of importance to them, and also archeological
11 sites that had also TCP contents to them, and they did
12 a -- a survey was done in such a way that they were
13 similar to archeological survey lined up, and walked
14 the fields, basically. And they covered about 95
15 percent of the field.

16 They didn't do the entire 100 percent
17 because they recognize that some of the sites within
18 the project boundary were highly disturbed, and are
19 places where they didn't necessarily think they had
20 tribal sites to be found on those areas. Like the open
21 pit mine areas that is highly disturbed, they didn't
22 think they would find a tribal survey. So, in
23 essence, they covered almost 100 percent of the
24 property, although they had access to the entire
25 project area.

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1 CHAIRMAN FROEHLICH: Thank you. Mr. Fosha,
2 did the Level 3 archeological survey meet or exceed
3 the state standards for these types of surveys?

4 MR. FOSHA: It exceeded the state standards
5 for these types of surveys.

6 CHAIRMAN FROEHLICH: I believe, Ms. Yilma.
7 Did the FSEIS incorporate written reports or survey
8 results from any Sioux tribe?

9 MS. YILMA: No. Although there were two
10 Sioux tribes that attended that field survey, they did
11 not provide a written identification.

12 CHAIRMAN FROEHLICH: Is it true that over
13 30 percent of the sites within the Area of Potential
14 Effect are unevaluated?

15 MS. YILMA: There are a large number of
16 unevaluated sites. However, Your Honor, we do have a
17 Programmatic Agreement which captures how those
18 unevaluated sites will be identified and evaluated in
19 the future should the need arise before any ground
20 disturbing activities occur.

21 CHAIRMAN FROEHLICH: The Programmatic
22 Agreement defers additional consultation for the
23 future. What makes the NRC Staff believe that future
24 consultation efforts will be any more effective than
25 past?

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1 MS. YILMA: Well, Your Honor, we developed
2 the Programmatic Agreement in consultation with those
3 consulting parties, including the tribes I mentioned
4 earlier. Considering we altered the Programmatic
5 Agreement based on the Standing Rock Sioux, the Oglala
6 Sioux, the Cheyenne River Sioux tribes interest to be
7 part of future identification evaluation or
8 development of mitigation measures, we believe it will
9 be successful.

10 CHAIRMAN FROEHLICH: Thank you. Dr.
11 Redmond, the ACHP has published a guidance document
12 titled "Meeting the Reasonable and Good Faith
13 Identification Standards in Section 106 Review."
14 That's Exhibit NRC-047. Page 3 of this document states
15 that, "A reasonable and good faith identification
16 effort does not require; one, the approval of the THPO
17 or other consulting party; two, identification of
18 every property within the APE, Area of Potential
19 Effects; three, investigations outside of or below a
20 properly documented APE; four, ground verification of
21 the entire APE.

22 Do you agree that an agency need not take
23 these steps in order to comply with Section 106?

24 DR. REDMOND: Do I agree with this?

25 CHAIRMAN FROEHLICH: Do you agree that an

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1 agency need not take these steps in order to comply
2 with Section 106?

3 DR. REDMOND: Section 106 simply says that
4 they need to consider the effects, and they are not
5 required to do these things. It's not up to me to
6 agree or disagree with what 106 says.

7 CHAIRMAN FROEHLICH: But in your testimony
8 today, aren't you arguing that the NRC Staff had to
9 take some of these steps that the ACHP said are not
10 required?

11 DR. REDMOND: I don't think I -- I wasn't
12 saying that they -- I don't think I said that they
13 did. I was -- I believe what I said was that the State
14 of South Dakota in their guidelines said that they had
15 to go by these things. And I think that's what I was
16 stating, not this. Okay? I mean, is that clear with
17 what I'm -- with what you're asking?

18 I've never agreed with this. No, I don't
19 agree with this. Okay?

20 CHAIRMAN FROEHLICH: Okay.

21 DR. REDMOND: I never have agreed with it.
22 When I saw this in the case law, I didn't agree with
23 it initially when I was in graduate school. So, do I
24 agree with it? No. Is that clear?

25 CHAIRMAN FROEHLICH: Well, you don't agree

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1 with, I guess, what the ACHP has published, but area
2 you advocating in this case that the NRC Staff had to
3 take some of these steps -- had to take these steps?

4 DR. REDMOND: What I was quoting was what
5 the guidelines were that the -- I was following as far
6 as the State of South Dakota guidelines were. Okay?
7 And what my experience was as far as the State of
8 South Dakota. Is that clear?

9 CHAIRMAN FROEHLICH: It'll have to do.

10 DR. REDMOND: No, I mean, I want to be
11 absolutely clear in what I was stating. I wasn't going
12 by the ACHP, I was going by what I had had to follow
13 as far as the State of South Dakota and the guidelines
14 that I followed according to the State of South Dakota
15 up to their guidelines between 1992 and 2005. And they
16 were changed what, about every two years. Right?

17 MR. FOSHA: The guidelines, essentially,
18 have not been changed.

19 DR. REDMOND: No, they changed every two
20 years. They would come out every two years.

21 MR. FOSHA: With a draft.

22 DR. REDMOND: Yes.

23 MR. FOSHA: That would never be accept --
24 never be implemented.

25 DR. REDMOND: Yes. Yes, but they came out

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1 every two years, and that's what we went by.

2 MR. FOSHA: It's now about every 10, but
3 correct.

4 DR. REDMOND: From 1992 to 2005, those were
5 the guidelines that we went by in the State of South
6 Dakota. And that's what I was referring to when I
7 found exception to the Augustana survey. And that was
8 what -- in a letter that I gave to Mr. Frankel. Is
9 that clear?

10 CHAIRMAN FROEHLICH: Yes, thank you.

11 DR. REDMOND: I know, I get verbose.

12 CHAIRMAN FROEHLICH: NRC Staff, the final
13 question. The Intervenors' witnesses claim that the
14 Staff did not include information from the April to
15 May 2013 tribal field surveys in the FSEIS. Did you,
16 indeed?

17 MS. YILMA: We did. It is in Chapter 4 of
18 the Cultural Resources section, and also in our
19 appendix.

20 CHAIRMAN FROEHLICH: Okay. At this point,
21 I'd ask counsel if there's any other questions that
22 they believe need to be asked of members of Panel 1?

23 MR. PUGSLEY: None from Powertech, Your
24 Honor.

25 CHAIRMAN FROEHLICH: Staff?

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1 MR. CLARK: Nothing for the Staff.

2 CHAIRMAN FROEHLICH: Consolidated
3 Intervenors?

4 MR. ELLISON: Within the limited context
5 within which this proceeding is proceeding, no.

6 CHAIRMAN FROEHLICH: Subpart L is Subpart
7 L.

8 MR. PARSONS: Apart from maintaining our
9 objections that we filed prior to this hearing,
10 nothing further.

11 CHAIRMAN FROEHLICH: Okay. All right. Panel
12 1 is excused. You can stay there if you're
13 comfortable, or you can retreat to the audience. The
14 next portion will be your counsel at work.

15 MR. PUGSLEY: Your Honor, can I ask a
16 question?

17 CHAIRMAN FROEHLICH: Yes.

18 MR. PUGSLEY: I just -- it's typical for us
19 to ask whether our witnesses can be discharged at this
20 time?

21 CHAIRMAN FROEHLICH: I don't believe we
22 have any further questions for any of the witnesses on
23 Panel 1.

24 MR. PUGSLEY: Thank you.

25 CHAIRMAN FROEHLICH: Mr. Parsons, could you

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1 just to start off the discussion restate the substance
2 of your first motion having to do with the newly
3 acquired data that was filed August 14th.

4 MR. PARSONS: If I may, Your Honor.

5 CHAIRMAN FROEHLICH: Yes, please.

6 MR. PARSONS: I think the sequence of
7 events was along the lines that after the rebuttal
8 statements were due in this case, we became aware of
9 a press release issued by Powertech.

10 CHAIRMAN FROEHLICH: Okay.

11 MR. PARSONS: We asked to cross-examine on
12 that issue. The Board had denied that motion for
13 cross-examination, but during the April 5th pre-
14 hearing conference the Board requested some argument
15 on the relevance of that data. Based on that April 5th
16 argument, on April 6th the Board issued an order
17 finding that document, excuse me, that data relevant
18 and posing a question to Powertech to respond as to
19 when they would disclose that data.

20 On August 7th, Powertech submitted an
21 email that essentially asked the Board to reconsider
22 and for legal briefing on the matter. And then on
23 August 8th the Board asked the parties to submit
24 briefing. And then on August 12th all the parties
25 submitted briefing. Certainly, if any of the other

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1 counsel thinks that that's not an accurate timeline,
2 but I -- so, it wasn't necessarily that we raised a
3 motion that gave rise to this particular dispute other
4 than the motion for cross-examination. But, obviously,
5 the question that was posed to me on August 5th in the
6 hearing conference dealt with the relevance of this
7 data, so just to kind of set the stage there.

8 CHAIRMAN FROEHLICH: Right. Then just take
9 a moment to reassert your argument as to the
10 relevance, and then we'll go to Powertech and the
11 affidavit from Mr. Clement in response.

12 MR. PARSONS: Sure. So, you know, in our
13 response on August 12th to the August 8th order, we
14 were a bit concerned about the process that gave rise
15 to the August 8th order, because the August 6th order
16 had been in our mind very clear with a finding of
17 relevancy, and an order for Powertech to disclose that
18 data.

19 As I made clear in the August 12th filing,
20 what we consider some pretty serious irregularities
21 associated with an email to the Board, not filed as a
22 motion, not certified, no conferral, in our mind
23 because the Board -- because the NRC regulations
24 require conferral and, in fact, say that a motion will
25 be denied -- must be denied if conferral doesn't

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1 occur, we continue to assert those objections on the
2 process. And we're not sure how the Board saw that as
3 an appropriate form to go about making a motion, an
4 email that, in fact, as we look at it didn't even
5 serve all counsel. Mr. Ballanco here was not included
6 on that email, so was kept out of that discussion. I
7 think those are some serious issues.

8 I think the Board made a well-reasoned
9 decision in their August 6th ruling. I think the Board
10 looked at the testimony of Powertech's witnesses, NRC
11 Staff, and Dr. Moran, and properly recognized that the
12 issue of these TVA data has been live in this case for
13 some time. It's presented, I think, pointedly in the
14 testimony that's been submitted with respect --
15 especially with respect to the model that Powertech
16 relies on that was incorporated and relied on in the
17 Final Supplemental Environmental Impact Statement that
18 assumes that there's no faults, no fractures, no gaps
19 at all in the hydrogeology out there. And this data
20 was one of the pieces of data that we had been
21 claiming all along needed to be fully incorporated
22 into this analysis, into this discussion, into the
23 scientific review to look at that.

24 Now, the problem -- one of the problems we
25 have in this situation is that we haven't seen this

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1 data. We're expected to argue relevancy based on a
2 guess, essentially, as to what's in there. Powertech
3 has testified or submitted an affidavit, anyway, that
4 they're reviewed it, but we have not been given that
5 opportunity, so it puts us, I think, at a distinct
6 disadvantage. And I'm not sure that's an equitable way
7 to approach this.

8 I will note that the relevancy standard
9 is, as I recited in my brief on August 12th, a wide-
10 reaching standard, so when you have data that comes to
11 light that is the precise data that -- or at least in
12 part some of the data that we have been arguing must
13 be incorporated into the analysis in order to insure
14 the hydrogeological integrity at the site, and that
15 data comes to light, I think it's a fairly
16 straightforward question that it is, indeed, relevant.
17 That doesn't mean it's admissible, that's not the
18 standard, but rather an even looser standard, so to
19 speak, greater flexibility, I guess, is how the NRC
20 presents it as we cited in our case law, than the
21 Federal Rules of Evidence. So, we think that based on
22 that standard it should be an extraordinarily high
23 showing for Powertech to overcome to show that it's
24 not relevant in any -- not even likely to lead to any
25 discoverable evidence, as is the standard in the

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1 federal rules.

2 The NRC Staff has said that they haven't
3 seen the data and, essentially, don't -- you know,
4 their position where they don't necessarily have to
5 make an argument or not because they haven't seen the
6 data. And I think their response, essentially, went to
7 that effect, we haven't seen it. We don't know what it
8 is. But I think for what we do know, that it is what
9 they refer to as -- and I want to make sure I get this
10 correct, if you'll give me just a moment. I apologize.

11 "That the data being acquired consists of
12 historical drill hole logs and maps prepared by the
13 Tennessee Valley Authority in the '70s and '80s, as
14 well as digitized data generated from this work. It's
15 expected to assist Powertech's planning of wellfields
16 for the property by providing additional quality data
17 to supplement or complement, rather, their existing
18 database."

19 I think what we've seen in the affidavit
20 from Mr. Clement is that this is similar to data
21 they've submitted and relied on in creating their
22 hydrogeologic study, so that, I think, would be strong
23 evidence of relevance. In addition, we understand
24 again from the affidavit, and I think it's enough to
25 overcome an objection on relevancy, is that it's to be

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1 used in preparation of the hydrogeologic wellfield
2 packages.

3 I understand that Powertech sees the
4 primary purpose of this data as bolstering their
5 review of the economic reserves essentially at the
6 project, but the fact that they intend to use it
7 primarily for that purpose certainly does not mean
8 that it's not useful in other ways. And I think the
9 fact that they intend to include it in their
10 hydrogeologic data goes to the point of relevance, as
11 well as in the August 5th transcript at that hearing,
12 you have NRC Staff asserting that this is the type of
13 data that they would look at and review, and intend to
14 review at some point in the future.

15 So, given that it's going to be submitted
16 in the future, and it is currently in Powertech's
17 possession, at least a portion of it as we understand,
18 we think it falls squarely into the disclosure
19 requirements in 10 CFR 2.336 which essentially says
20 any relevant -- any data relevant to the contentions.

21 I'll note that Mr. Clement is not a
22 hydrologist. I understand he's a geologist, and he has
23 experience in the uranium industry, but what his
24 affidavit does not do is talk about the
25 hydrogeological and how this data could or could not

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1 be used. So, given the wide ranging relevance
2 standard, I think that that's enough to get over this
3 hurdle.

4 Mr. Clement says the electric logs by
5 themselves do not demonstrate the ability to contain
6 fluid migration. And that's sort of, it seems to me,
7 a very well carefully crafted sentence that in and of
8 itself do not demonstrate the ability to contain
9 migration, but it certainly isn't evidence that in no
10 way could this data be relevant to those
11 determinations. Given the premium I think that this
12 process ought to put on scientific integrity where you
13 have data of the same kind and like that is already
14 being used to perform the analysis, that additional
15 data ought to be also disclosed.

16 There was some concern from Powertech
17 about the cost of producing that data. I'm not sure
18 that that's entirely relevant to this discussion. I
19 don't see a test in the relevant standard that if the
20 company thinks it will cost too much, then they don't
21 have to produce it. It's a pretty encompassing
22 standard in terms of producing relevant data.

23 I will note that it does say that at least
24 the data that they have now includes digitized data.
25 It's not clear to me how digitized data is not at

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1 least more easily transmitted than some of the other
2 data for which the sort of practical concerns have
3 been raised.

4 And to the extent that Powertech asserts
5 that it should come in only under a protective order,
6 we would like to assert an objection to that process
7 to go forward under a protective order without the
8 ability to -- potentially, even to brief that. The
9 fact that they've paid for it does not automatically
10 make it confidential business information, so to
11 speak. If it's information that they're planning on at
12 some point submitting to the NRC, and will be required
13 to submit to the NRC, I think that that undermines
14 their argument that it need be subject to a
15 confidential or a protective order.

16 I think that their proffer has not gone
17 far enough to establish that at this point, so I think
18 further -- once we resolve the issue of relevance, I
19 think we ought to take up the issue of a protective
20 order.

21 I'm more than happy, also, at this point
22 to go into the motion for the yet additional data and
23 information that we've become aware of recently that
24 was included in our motion to enforce the disclosure
25 requirements, but that may be useful to bifurcate

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1 those, if the Board finds that useful.

2 CHAIRMAN FROEHLICH: Thank you. I think it
3 would be useful to bifurcate it. I'd like to hear now
4 from Mr. Pugsley in response as to the relevance and
5 the nature of this data, and perhaps elaborate on the
6 affidavit from Mr. Clement.

7 MR. PUGSLEY: Thank you, Your Honor. Just
8 to keep our answer specific to your questions because
9 we do have some issues with Mr. Parsons' claim that
10 the Board should not have ordered legal argument on
11 this due to an email, but we -- since you haven't
12 asked about that, we won't get to that.

13 Essentially, what we have provided to the
14 Board on August 12th of 2014 is a showing, we believe,
15 that this data acquired from Energy Fuels, as noted in
16 that press release referenced OST-19, I believe it is,
17 that it does not meet the standard articulated for
18 relevance. Essentially, we cite in our pleading filed
19 on the 12th at page 3 that the Federal Rules of
20 Evidence state that, "The standard for relevance is --
21 - relevant evidence has the tendency -- any tendency
22 to make a fact more or less probable than it would be
23 without the evidence."

24 As far as Powertech is concerned, none of
25 the information identified and discussed here today

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1 has any tendency to support or negate the issues
2 associated with Contention 3 in this proceeding, which
3 was the subject of the Board's order asking for legal
4 argument.

5 I will note that despite the fact that the
6 Board specifically directed the parties to address its
7 relevancy to Contention 3, the other parties did
8 attempt to link this to Contention 2. If I may address
9 that briefly? There is no water quality data in terms
10 of what is in the water in any of this information;
11 so, thus, it cannot be relevant to Contention 2.

12 With respect to Contention 3, as detailed
13 in Mr. Clement's affidavit at paragraph 6, he states,
14 "I can see no reason why additional electric logs are
15 relevant to the adequacy of the hydrogeologic
16 information in the FSEIS regarding fluid migration."

17 Well, let me -- while we have provided you
18 a pleading that provides you the information you ask
19 in your question, Your Honor, let me summarize it for
20 you very quickly.

21 These electric logs are used purposefully
22 for economic reasons, and as is the case in any
23 mineral recovery operation, the idea is to recover the
24 ore as efficiently as possible. Because of the nature
25 of NRC regulations, and it's detailed in Chapter 2 of

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1 the Standard Review Plan in NUREG-1569, we are
2 required to engage in what's called site
3 characterization. That is a limited study of where an
4 operation would take place. However, logs like this
5 are relevant to the following three questions, none of
6 which can be completely answered until a full
7 wellfield is put in. Where is the ore? What is the
8 grade, and where do the wells go? That's it. No
9 information in these electric logs can answer either
10 in favor of Powertech's application, in support of NRC
11 Staff's licensing determination, or in support of the
12 Intervenors's claims. None of this information can act
13 to address any of the issues associated with
14 Contention 3, including but not limited to the
15 location of previously unplugged boreholes, historic
16 boreholes, the identification of subsurface features
17 such as faults, fractures, or breccia pipes. None of
18 the allegations offered by the parties in their
19 initial position statements, rebuttal position
20 statements, or the pleadings filed August 12th,
21 nothing in there is relevant -- these logs are not
22 relevant to any of those issues.

23 In fact, acquisition of this data is
24 typical of ISR operations for economic purposes. And
25 because Powertech is a publicly traded company, it has

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1 a responsibility to its shareholders to provide
2 economic resource updates on a particular time table.
3 And acquisition of this data is for that very purpose.

4 The fact that these things might be
5 included in future hydrologic wellfield packages, as
6 alleged by Mr. Parsons, is not relevant to the
7 licensing decision before the Board at this time,
8 which is whether or not the record of decision can be
9 supported -- the decision to issue the license can be
10 supported by the record of decision.

11 Lastly, I would note that, excuse me, I'm
12 sorry. Pardon me. With respect to the issues regarding
13 a protective order, Powertech -- in the event that
14 this is necessary, Powertech can satisfy NRC
15 regulations at 10 CFR 2.390(a)(4), demonstrating that
16 this satisfies the requirements for confidential
17 business information because it is of the information
18 typically kept in confidence by a licensee or an
19 applicant. If you'll give me one moment.

20 And as we said before, part of the reason
21 Mr. Clement's affidavit talks about this being part of
22 wellfield hydrologic packages post-license issuance is
23 because it saves from having to conduct additional
24 borehole drilling post-license issuance which
25 minimizes impacts to a proposed project site because

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1 you know, again, where is the ore? What's the grade,
2 and where do we put the wells? And that's really all
3 this information is required for.

4 JUDGE BARNETT: If you had done what you
5 just said, if you had not bought this data, you went
6 out later and did this yourself, and you found
7 something in the data that made you question whether
8 or not you could contain the fluids, do you have any
9 duty to disclose that data at all to anyone?

10 MR. PUGSLEY: Well, let me say one thing
11 before I answer your question, sir. If we're talking
12 about the type of data here that we're talking about
13 today, that type of data even post-licensing when we
14 develop the wellfield packages won't tell us anything
15 about fluid migration.

16 JUDGE BARNETT: e-Logs are not relevant to
17 fluid migration?

18 MR. PUGSLEY: What is relevant to fluid
19 migration is things like pump testing, water quality
20 differentiation analysis within the wellfield. It
21 tells you where to put monitor wells, et cetera, but
22 this e-Logs themselves are not relevant to fluid
23 migration. It's the pump tests that need to be done
24 when the full wellfield is in will actually give you
25 information associated with some of these issues.

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1 And do we have a duty to disclose that to
2 anybody? To NRC, because according to the Commission's
3 ISR regulatory program, and if you read the license
4 conditions associated with the Dewey-Burdock project,
5 there are license conditions that set requirements for
6 wellfield packages to be at the very least reviewed by
7 NRC Staff during its pre-operational inspection prior
8 to commencement of operations. And, in fact, there is
9 license conditions in there, as well, that require
10 additional review by NRC Staff in language they use as
11 review and approve, which means -- and there's certain
12 identified areas of the site where that needs to be
13 done. So, in terms of -- and I apologize for taking a
14 long time to answer that, but the answer is yes, we
15 have to disclose that to NRC, if we find an issue.

16 MR. ELLISON: Excuse me. May we also be
17 heard, too?

18 CHAIRMAN FROEHLICH: Yes, at this point --

19 MR. ELLISON: Thank you.

20 CHAIRMAN FROEHLICH: -- let me ask a few
21 questions of Powertech at this point.

22 As I understand well logs, especially
23 electric well logs, they are potentially useful to
24 ascertain qualitative hydrogeological data and strata
25 definition. As you pull the sensor up you learn as to

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1 the continuity or discontinuity nature of the
2 confining layers, and the thickness of the shale
3 layers as that probe is being pulled up. Is that
4 correct? Do I have a correct understanding of how well
5 logs are used?

6 MR. PUGSLEY: Yes, that's correct.

7 CHAIRMAN FROEHLICH: So, to the extent that
8 well log data shows whether a particular layer is
9 continuous or discontinuous, and the thickness of
10 those layers, does that not affect fluid migration or
11 potential fluid migration, and also where the wells
12 might go?

13 MR. PUGSLEY: Basically, what we're saying
14 here, Your Honor, is the log itself does not show
15 continuity or discontinuity. And in the current case,
16 they are -- what we're talking about here are
17 surrounded by existing e-logs for the purposes of site
18 characterization for the licensing action at hand and
19 what is before the Board.

20 JUDGE BARNETT: Do you have easy access to
21 Exhibit APP-017?

22 MR. PUGSLEY: Let's see.

23 CHAIRMAN FROEHLICH: Could you please
24 display.

25 JUDGE BARNETT: The second page. There you

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1 go. Are those e-logs on there?

2 MR. PUGSLEY: Yes.

3 JUDGE BARNETT: This is a figure from your
4 expert's testimony on Contention 3 that has e-logs in
5 it, but now these additional e-logs have no relevance
6 whatsoever to Contention 3?

7 MR. PUGSLEY: Basically, what we refer to
8 these logs as are infill logs which are, essentially,
9 as we said before, they're surrounded by existing e-
10 logs, and it goes nothing -- to nothing more than --
11 it doesn't add any additional information to this.

12 JUDGE BARNETT: Well, so what you would
13 have is, essentially, information from different wells
14 along that cross section, potentially. Is that
15 correct?

16 MR. PUGSLEY: I would say in a very small
17 portion of the area.

18 (Off the record comments)

19 MR. PUGSLEY: And I would wrap that answer
20 up, Your Honor, by saying that these e-logs are not
21 going to give you any additional data that supersedes
22 or is above and beyond what is currently available in
23 the record of decision because of the fact that the
24 way the sites are characterized pursuant to NRC
25 guidance, they encompass a larger area that shows you

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1 where -- that deals with these issues. And these e-
2 logs themselves don't provide any additional
3 information.

4 JUDGE BARNETT: Have you all analyzed the
5 e-logs?

6 MR. PUGSLEY: Yes.

7 JUDGE BARNETT: You've analyzed them all?

8 MR. PUGSLEY: I'm not sure if we've
9 analyzed them all. The ones we've received --

10 (Off the record comments)

11 MR. ELLISON: Could we put Mr. Clement
12 under oath, please, for these questions?

13 CHAIRMAN FROEHLICH: Indeed. Initially,
14 what the Board had intended was to swear in the
15 entirety of Panel 2, which includes all the
16 hydrogeological experts on all sides. If they are
17 present at this time, I would swear them in, and
18 perhaps they can answer directly, as opposed to
19 speaking through their counsel.

20 MR. ELLISON: But, Judge Froehlich, Mr.
21 Clement is not a witness.

22 CHAIRMAN FROEHLICH: Not a witness.

23 MR. ELLISON: And, therefore, what I would
24 like to suggest is that we're having answers through
25 counsel that are going on the record --

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1 CHAIRMAN FROEHLICH: Yes.

2 MR. ELLISON: -- that are not under oath,
3 that are very important to these proceedings. And Mr.
4 Clement should be under oath to not only answer the
5 Board's questions, but to answer our questions about
6 this data. So, I would request that, you know, Mr.
7 Pugsley started out his argument by saying well, I
8 want to supplement --

9 MR. PUGSLEY: I didn't say supplement, I
10 said summarize.

11 MR. ELLISON: Well, he gave a lot of
12 additional information in the summary.

13 MR. PUGSLEY: Well, it's because I'm being
14 asked questions. That's why.

15 MR. ELLISON: Okay. Let's put the man under
16 oath and let's get the questions from him under oath.

17 CHAIRMAN FROEHLICH: We have Mr. Clement's
18 affidavit which was supplied under oath, and to that
19 extent that is acceptable and admissible for the
20 exhibit. He will not be a witness in this case, but I
21 believe the questions that you would like to ask, that
22 Mr. Clement is answering as the President of the
23 company would be probably enhanced if we heard it from
24 the geologists and those people who use the data, or
25 what use could be made of that data. I believe it

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1 would be more relevant to the kind of questions, at
2 least, that the Board has to hear this from the
3 geologists and the hydrologists who will be witnesses
4 in the case.

5 MR. ELLISON: With one exception, if I
6 might state, Judge Froehlich.

7 CHAIRMAN FROEHLICH: Sure.

8 MR. ELLISON: And that would be questions
9 having to do with the timing and acquisition of this
10 data, because if this Board were to determine that
11 this data is relevant to these proceedings, it would
12 be very important for this Board to know whether
13 Powertech timed its acquisition of this data to have
14 it follow NRC review, the FSEIS being released, the
15 license being released, and so that basically they can
16 then argue well, it has nothing to do with these
17 proceedings.

18 CHAIRMAN FROEHLICH: Let us hold any
19 argument along that line until after we determine the
20 relevance or usefulness of well logs and enhanced
21 data. We'll take that up after we've gotten to that --

22

23 MR. ELLISON: Very well, sir.

24 MR. PUGSLEY: Your Honor, may I note for
25 the record that Mr. Ellison's statements here were

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1 part of Mr. Parsons' motions in limine and motion for
2 cross-examination regarding the path forward for
3 cross-examination on this issue, and it was ruled
4 outside the scope of the contentions.

5 CHAIRMAN FROEHLICH: And my bifurcation at
6 this point is consistent with the earlier approach of
7 the Board.

8 Are the hydrogeological witnesses who
9 would be testifying on Contentions 2, 3, and 4 present
10 at this point in time? That would include Dr. Moran,
11 Mr. Demuth, Mr. Lawrence, Mr. Lancaster, Mr. Pirko,
12 and Ms. Henderson?

13 MR. PARSONS: Your Honor, for the tribe,
14 Mr. Moran is present. I may suggest that it could be
15 useful to allow Staff to respond. They're the only
16 party that has not stated anything, and it may just
17 for the purposes of the record be helpful to have
18 Staff's take on this.

19 CHAIRMAN FROEHLICH: I believe the
20 Consolidated Intervenors also wanted to be heard.

21 MR. PARSONS: Thank you.

22 CHAIRMAN FROEHLICH: All right. Before we
23 swear any witness or see if they're present, I would
24 like to hear from the Staff.

25 MR. CLARK: I'll be brief, Your Honor, and

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1 thank you to Mr. Parsons for bringing up this point.
2 Mr. Parsons is correct, if the Staff received this
3 information we would review it. However, the Staff's
4 review obligations and disclosure obligations are
5 broader than those of Powertech, in part because the
6 Staff has to provide a hearing file, and the hearing
7 file updates to the Board and the parties in which
8 they need to disclose or log as privileged all
9 documents between the Staff and the Applicant
10 regarding the application. So, had the Staff received
11 these data, the Staff would have identified the data
12 and claimed the privilege of proprietary information
13 privilege. The Staff would not have disclosed these
14 data.

15 Regarding the relevance, I think I'll be
16 brief, and I think the Board's approach is a sound one
17 to ask questions of the witnesses who can provide more
18 insight. Given the information I've heard, I don't
19 want to misstate the position of the Staff's
20 witnesses. I believe Mr. Ellison is correct, what
21 you've been hearing is a little bit of what you might
22 be hearing from the witnesses, so I won't delay any
23 further. I don't have anything more.

24 CHAIRMAN FROEHLICH: All right. Mr.
25 Ellison.

1 MR. ELLISON: I guess I'm a little confused
2 about some of the proceedings that have happened here.
3 As Mr. Parsons pointed out, this Board in its August
4 6th order found these logs to be relevant to these
5 proceedings, and ordered them disclosed. And now we
6 have a Powertech affidavit, obviously an interested
7 party, who says well, without releasing this data we
8 want to tell you that this has nothing to do with what
9 you folks are involved with deciding.

10 I don't really understand that from a due
11 process standpoint. I guess I would object to any, and
12 I would move to strike Mr. Clement's affidavit because
13 if he is not subject to confrontation, we have no way
14 of knowing what he's talking about. He did
15 acknowledge, as I understand it through Mr. Pugsley,
16 that he hasn't even looked at all of this data, so he
17 can't -- his affidavit is incomplete, therefore,
18 because he's not looked at everything and, therefore,
19 not able even from their perspective to give a full
20 summary and evaluation of what this data consists of.

21 The whole purpose of a contested hearing
22 is that the parties get to look at the evidence and
23 get to from our respective positions make our
24 arguments, cite appropriate law, regulations as to any
25 of the issues that are involved. What Powertech

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1 proposes is that we accept their word that this is
2 irrelevant, which the Board has already found to be
3 relevant. And, Judge, I think you were asking some
4 very pointed questions. And I apologize because I
5 think that I cut you off, and I -- from further
6 inquiry of Mr. Pugsley. And I would like to encourage
7 that you continue.

8 But the central question here that has to
9 be decided here, or one of the central questions is,
10 does the hydrogeology consist -- is it such that with
11 existing technology it is reasonable for Powertech,
12 for the NRC Staff to allege that they can contain this
13 -- the mine fluids?

14 The whole question has been do we evaluate
15 this from the most general data that's available, or
16 do we look at very site-specific data that's
17 available? If this will contribute to site
18 characteristics in a very detailed manner, how could
19 that not be relevant to the issues that we're deciding
20 here? So, I guess I am really confused, because one of
21 the questions is, are these leaky aquifers, or are
22 these isolated aquifers? And I think as some of the
23 questions that the Board was asking, that is data --
24 the data that we're talking about may well include
25 this.

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1 But, you know, what we would like to do,
2 and I guess what I'd like to suggest again is, I'd
3 like to encourage the Board to put Mr. Clement on
4 there so that we can get not only -- we can get the
5 history of this. I would also like to suggest that
6 this data may well provide information as to whether
7 there are faults or fractures in there, and the
8 details in between the existing e-logs that have been
9 produced, because everybody says that there are faults
10 and fractures in this area except Powertech. So, this
11 is very, very important, and I feel totally
12 handicapped at being able to argue relevancy without
13 having our experts have a chance to look at this data
14 and tell me what it says. I'm not a geologist, I'm not
15 a hydrologist. I don't even try to pretend to be one,
16 that's why I stumble with some questions. But my
17 experts can answer those questions, and my experts
18 tell me this is important data. Thank you.

19 CHAIRMAN FROEHLICH: Mr. Ellison, I think
20 I as a lawyer suffer from the same disadvantage that
21 many of the other lawyers in this room suffer from.
22 For that reason, I'd like to ask questions regarding
23 this data and its relevance to the case, to the issues
24 in the case from the hydrologists, from the
25 geologists, and from the witnesses that will be

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1 testifying as to the issues that may or may not be
2 impacted by data from well logs.

3 MR. ELLISON: I understand, Your Honor. And
4 what I'd like to orally move is that we hear from the
5 experts then on just this question, and that we have
6 any additional argument on the issue of relevance and
7 discovery that may be appropriate. And that the Board
8 then make a decision as to relevance and
9 discoverability before we proceed any further with the
10 evidence on Contentions 2 and 3. Because if the Board
11 were to decide that it is relevant and discoverable,
12 then we might just have to do this again if the Board
13 orders disclosure, and six months or a year from now
14 we come back and have to go through the whole thing
15 again because we didn't have important data.

16 CHAIRMAN FROEHLICH: Let's not get ahead of
17 ourselves.

18 MR. ELLISON: Yes, sir.

19 CHAIRMAN FROEHLICH: Let's at this point
20 get a combined understanding of what this data does or
21 doesn't show, and whether it's relevant or irrelevant
22 to the issues that are before the Board, the issues
23 that would be addressed by Panel 2.

24 MR. ELLISON: We do suffer from a slight
25 disadvantage though, Judge, because our expert, Dr.

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1 LeGarry is not here yet.

2 CHAIRMAN FROEHLICH: He's not here yet.

3 MR. ELLISON: No, sir. And, in addition,
4 earlier the Board said that we'd probably not get to
5 the --

6 CHAIRMAN FROEHLICH: Right.

7 MR. ELLISON: -- the other contentions
8 today. So, I'm at an additional disadvantage by not
9 having my expert here to ask questions.

10 CHAIRMAN FROEHLICH: At this point, I don't
11 think there's much to be gained by hearing what the
12 lawyers think these things are or aren't, and what
13 they show or don't show. I think we're going to hold
14 the balance of this argument in abeyance until
15 tomorrow morning's session where at 9:00 we will have
16 the witnesses for Contention 2. It's the Board's
17 intention to swear them in and then to pick up this
18 argument as to the relevance, irrelevance,
19 admissibility, inadmissibility, discoverability,
20 disclosure requirements that may follow from that.
21 Once we all have a better understanding of exactly
22 what we're talking about when we're discussing well
23 logs, or digitized well logs, or the type of data this
24 -- these type of logs present.

25 MR. ELLISON: I have a question for

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1 clarification, Your Honor, if I may.

2 CHAIRMAN FROEHLICH: Yes?

3 MR. ELLISON: You just mentioned Contention
4 2, did you mean Contentions 2-4?

5 CHAIRMAN FROEHLICH: 2, 3, 4.

6 MR. ELLISON: Thank you.

7 CHAIRMAN FROEHLICH: Right. To the extent
8 that this information that comes from people who are
9 trained in geology and hydrology can learn from these
10 type of tests, then we'll be able to assess the
11 relevance, the importance, the disclosurability as
12 opposed to discoverability in NRC parlance of the data
13 that's at question.

14 MR. CLARK: Your Honor, can I make one
15 point for the Staff? It's a legal point.

16 CHAIRMAN FROEHLICH: Legal points from
17 lawyers are welcome.

18 MR. CLARK: That's for -- the Board has
19 already framed the contention, and the contention
20 includes within a claim that the Final EIS is
21 insufficient because it lacks these data.

22 CHAIRMAN FROEHLICH: Right.

23 MR. CLARK: It's not the Board's role to
24 amend the contention. That needs to come from the
25 Intervenors. Regardless of whether the Board finds

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1 these data are discoverable or not, or privileged, the
2 Board's role is not to rewrite the contention --

3 CHAIRMAN FROEHLICH: Right.

4 MR. CLARK: -- to incorporate the claim of
5 missing data. It's for the Intervenors to seek leave
6 to either amend their existing contention or file a
7 new contention based on any new data that is
8 available, or any information such as Mr. Clement's
9 affidavit. And they have to meet the standards for
10 amending or filing a new contention. Unless they meet
11 those standards, these data may be relevant to a
12 discovery violation which the Staff believes there's
13 no firm evidence right now, but they're not relevant
14 to the merits of any issue before the Board. That's to
15 be decided, and it requires action by the Intervenors,
16 not this Board.

17 CHAIRMAN FROEHLICH: Is not the merits
18 determination among the contentions the ability for
19 fluids to migrate among or between strata?

20 MR. CLARK: Correct.

21 CHAIRMAN FROEHLICH: And if that's an issue
22 in this case, this data may or may not be relevant to
23 fluid migration between strata.

24 MR. CLARK: But the contention is framed
25 against the Final EIS. It's whether the analysis in

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1 the EIS which did not include these data was
2 sufficient.

3 MR. PARSONS: I would like to chime in
4 here, Your Honor. We raised this argument at the
5 application stage. It has both safety and
6 environmental components to this. In fact, Staff
7 attempted to seek summary disposition on any safety
8 component to this contention, and that was denied by
9 the Board.

10 MR. CLARK: Your Honor, there's a long
11 precedent of cases under 10 CFR 51.92, the standard
12 that applies to the Staff, and when the Staff needs to
13 supplement an Environmental Impact Statement based on
14 new and significant information. And the Commission is
15 quite clear that the -- when the Intervenors seek to
16 amend their contention based on new information, they
17 have to meet those standards.

18 Now, I recognize, as Mr. Parsons said, the
19 existing contention includes a claim that the Staff
20 should have considered these missing data. However, to
21 the extent they seek to broaden the contention to
22 include new challenges based on any new data that the
23 Board orders disclosed, it's their obligation to seek
24 leave to amend their contention and do that. It's not
25 within the Board's role to rewrite the contention for

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1 them.

2 JUDGE BARNETT: So, if they see data that
3 is relevant to this contention, that they would have
4 to amend their contention, or could they use that
5 data?

6 MR. CLARK: They can use -- they will need
7 to amend their contention if they want to -- if the
8 new data merely confirm some element of their existing
9 contention, then possibly they don't need to amend it.
10 But if they seek to add an additional basis for the
11 contention, a new line or argument, then they would
12 need to follow the rules for amending their
13 contention.

14 JUDGE BARNETT: But not just new data.
15 Right? I mean, data in and of itself would not mean
16 that you had to amend the contention. Right? It would
17 just be support for your existing contention. Is that
18 correct?

19 MR. CLARK: It would depend what sort of
20 challenges. The importance isn't the data, but the use
21 they seek to make of the data. So, we don't know now
22 it's -- it may be premature because we don't know yet
23 whether the data is disclosable. And if so, what the
24 nature of it is. The Board and the parties may learn
25 tomorrow on that, but the Staff would just I guess

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1 caution the Board against rewriting the contention to
2 include new arguments raised for the first time either
3 during this hearing or after the hearing without the
4 Intervenors following Commission precedent on amending
5 contentions.

6 CHAIRMAN FROEHLICH: I believe you've
7 accurately framed the Commission's regulations;
8 however, to the extent that the data supports,
9 attempts to support allegations that they made in the
10 existing contentions, it would clearly be not only
11 relevant, it would be admissible if it tended to prove
12 or disprove, or to shed light on their contention as
13 to let's say things like fluid migration, or
14 connectivity between -- continuity between various
15 strata.

16 MR. CLARK: Judge Froehlich, I think it
17 would remain to be seen what use they seek to make of
18 the data, so the --

19 CHAIRMAN FROEHLICH: Right.

20 MR. CLARK: But that could be one avenue,
21 and you're correct, if that's the case.

22 CHAIRMAN FROEHLICH: If that's the case
23 they wouldn't need to amend, or enlarge, or change
24 their contention. Their contention has been that there
25 is communication between these strata, and if this is

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1 evidence that either proves or disproves that, that
2 wouldn't be an enlargement of their existing
3 contention. Would it, Mr. Clark?

4 MR. CLARK: It could potentially be. I
5 don't know. I wouldn't want to speculate right now.
6 Just the Staff will be I guess on the alert to make
7 sure the contention stays within the bounds admitted
8 by this Board.

9 CHAIRMAN FROEHLICH: Okay. Are there any
10 other issues or concerns that any of the parties wish
11 to raise before we conclude for the day with the
12 understanding that tomorrow when we reconvene at 9:00
13 a.m. we will swear in the panel, Panel 2, and we will
14 follow-up with the argument on the data, the newly
15 acquired data referenced in the Powertech OST-19.

16 MR. PARSONS: Your Honor, Jeff Parsons over
17 here. At the risk of annoying the Board, the other
18 issue that we had not quite got to was the premise or
19 the basis for the motion that we had filed seeking
20 additional discovery. I just wanted to flag that. I'm
21 certainly happy to accede to the Board's intent to
22 adjourn for the day, if that's your preference, but
23 there is that issue.

24 CHAIRMAN FROEHLICH: Just so I have that
25 clearly in mind, the additional data that you seek in

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1 the follow-on motion, one that was filed Saturday
2 includes what materials or what data beyond the new
3 acquired data that was referenced in the press
4 release?

5 MR. PARSONS: Sure, Your Honor. So, in the
6 Powertech email motion, for lack of a better
7 description of it on August 7th, Powertech referenced
8 additional drill logs that were used, apparently, by
9 their characterization, used to create maps and other
10 figures and information that supported -- purported to
11 support their application. They made reference to the
12 fact that somehow we shouldn't get this new data
13 because we never asked for that old data, which raised
14 -- certainly raised a flag in my mind that we're not
15 required to ask for data that's relevant. And if they
16 use that data for creating the maps, and isopach maps,
17 and other sorts of figures and data to support their
18 application, then that information should have also
19 been disclosed so we could verify or make use of it,
20 and determine whether it would be an exhibit, or other
21 information that would be not just relevant for
22 disclosure purposes, but relevant for admission as
23 evidence. So, that is the first category of contents.

24 The second has to do with a non-purposeful
25 take application that was submitted to the Fish and

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1 Wildlife Service. In that -- as part of that
2 application, they're required to submit essentially
3 what amounts to an avian mitigation plan. One of our
4 contentions in this case is that -- Contention 6, that
5 the mitigation has not been properly vetted in this
6 case. And, in fact, we specifically refer to the avian
7 mitigation plan as a example of the lack of analysis,
8 and the fact that this has been out there and not
9 disclosed. We think it's also relevant to our
10 contention because it is an avian mitigation plan that
11 the FSEIS did not review, as we allege, and as was
12 admitted.

13 The third piece of that motion was
14 apparently a letter from the United States Bureau of
15 Land Management to Powertech in early July asking them
16 for additional information on their plan of operations
17 to the BLM. Obviously, we haven't seen that letter, it
18 has not been disclosed. We would note that the
19 criteria that the BLM uses for reviewing plans of
20 operations do overlap considerably with NRC
21 regulations, and they include such things as
22 mitigation plans. They also deal with state and other
23 permits. And what we suspect is that at least portions
24 of that BLM letter relate to, or at least potentially
25 intercept with our contentions in this case. And what

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1 we understood from that letter is that Powertech is
2 preparing a response to BLM due in August of this
3 month. It appears from their filing, or at least I
4 won't characterize, but through conferral we
5 understand that they have not filed that. I certainly
6 would let them speak to that.

7 But to the extent that that information
8 comes up and it includes data or other information
9 that's relevant to our contentions, we think that the
10 disclosure requirements apply to that, as well. This
11 information was disclosed in an August 11th,
12 essentially a quarterly filing with the Canadian --
13 required by the Canadian Securities laws, and so it
14 was brought to our attention through that sort of
15 online filing database. And I think that is the extent
16 of the additional material.

17 (Off record comment)

18 MR. PARSONS: Sorry. And that is it. I
19 apologize.

20 CHAIRMAN FROEHLICH: Okay. Since your
21 motion was filed Saturday, the other parties have not
22 had an opportunity to respond to it. Although, it
23 might be helpful if at this point just before we take
24 up these issues, which will be after we take care of
25 the additional quality data, if you have an initial

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1 response as to whether the documents that Mr. Parsons
2 seeks are subject to the mandatory disclosure rules.

3 MR. PUGSLEY: Your Honor, we don't -- we
4 have not had an opportunity to read this motion. We've
5 been preparing for this hearing, and unfortunately we
6 don't have an initial response at this time.

7 CHAIRMAN FROEHLICH: Okay. The type of
8 documents that were described, Staff Counsel, are
9 those the type of documents to be -- to the extent you
10 understand what is being asked for, are these the type
11 of documents that are normally required to be
12 disclosed as part of the mandatory disclosure rules?

13 MR. CLARK: If the Staff -- again, if the
14 Staff received the documents because our disclosure
15 obligations are broader, we would have disclosed them.
16 As to whether Powertech needs to disclose them, I
17 guess I'd say two things. First, these are fairly
18 recent documents from July. The argument was that they
19 should have been disclosed in the August 1st updates.
20 Typically, many NRC Boards close -- set a date for the
21 final disclosure which is typically about a month
22 before the hearing, so this is kind of unusual, just
23 that there hasn't been any cutoff date.

24 CHAIRMAN FROEHLICH: Right.

25 MR. CLARK: But the argument -- I don't

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1 understand the relevance of -- I understand there are
2 additional mitigation measures and that Contention 6
3 refers to mitigation, but the claim in the Contention
4 6 is the EIS, the Final EIS didn't discuss mitigation
5 sufficiently. The existence of some later mitigation
6 measures which were actually referred to in the EIS,
7 they were referred to as being in progress, the avian
8 monitoring plan which is mentioned extensively in the
9 EIS, the Staff understood that the plan would be
10 developed. I do not see how the fact that an avian
11 monitoring plan was finalized either tends to prove or
12 disprove the completeness of the Staff's review.

13 Likewise with the plan of operations, so
14 I would agree with Mr. Parsons that there's very
15 limited information, so I won't want to take a
16 position on that. The Staff simply doesn't know enough
17 about that. But the claim in Contention 6 is the Staff
18 didn't sufficiently discuss mitigation measures, and
19 that it failed to evaluate the effectiveness of
20 mitigation measures. I don't see how the Staff could
21 have evaluated something that did not exist until
22 after -- until seven months after it finalized the
23 EIS. Thus, I don't see it as being, obviously,
24 relevant to Contention 6, and I don't see any strong
25 basis for saying that Powertech needed to disclose the

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1 information.

2 MR. PARSONS: Your Honor, point of
3 clarification. The mitigation plan that we're talking
4 about being submitted to the U.S. Fish and Wildlife
5 Service was submitted in January of 2014. There's no
6 specific date, whether it was before or after the
7 FSEIS. Well, presumably, that would have been before
8 the ROD. I'm not sure if it was before or after the
9 FSEIS, so I think it's not quite accurate to say that
10 it was seven months after. The July we understand that
11 -- but that's the BLM document, and then this previous
12 data apparently was available at the time of the
13 application, so that would seem to be well before the
14 Staff had conducted their NEPA review. Just to clarify
15 that we're not talking about documents that had all
16 been created in July of this year.

17 MR. CLARK: If I could respond briefly with
18 the Board's permission.

19 CHAIRMAN FROEHLICH: Sure.

20 MR. CLARK: To the take permit, Contention
21 14 involved the claim the Staff failed to consult with
22 the Fish and Wildlife Service. The Staff doesn't see
23 how the take permit application is relevant to that
24 contention, former Contention 14A. Former Contention
25 14B involved the Staff's assessment of impacts to the

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1 sage grouse, and whooping -- greater sage, grouse and
2 whooping crane. Unless there's some information that
3 the take permit covered those species, which seems
4 unlikely, the Staff also doesn't see how the take
5 permit application is relevant to former Contention
6 14B.

7 And I understand the claim that's relevant
8 to mitigation measures but, again, the Staff referred
9 to -- I'm confident referred to the take permit
10 application in the Final EIS, and it wasn't
11 information the Staff had available at the time. So,
12 the existence of the document wouldn't call into
13 question the scope of the Staff's analysis because the
14 Staff didn't rely on that.

15 I'm just trying to recall exactly. The EIS
16 is a large document, I can't -- I'm trying to mentally
17 recall that section right now, and at quarter of 5,
18 it's not coming to me, so I'll leave it at that. But
19 the analysis in the EIS on mitigation measures stands
20 for itself, and the existence of an application, I
21 think the Board would need more to find that to take
22 from an application which isn't obviously even --
23 doesn't obviously even go to mitigation is relevant
24 to Contention 6.

25 CHAIRMAN FROEHLICH: Okay. I think we've

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1 gone as far as we can for today. We will reconvene at
2 9:00 a.m. tomorrow. We'll proceed to swear in Panel 2.
3 The Board will proceed first to sort through the newly
4 acquired quality data referenced in the press release,
5 and then address the other discovery or disclosure
6 concerns that were raised by Mr. Parsons in his most
7 recent filing. Although, I realize the other parties
8 have not had an opportunity to file answers where they
9 can do their research and address the issues in the
10 motion that was filed Saturday.

11 MR. ELLISON: Judge Froehlich, if I may
12 orally do so, the Consolidated Intervenors would join
13 in the motion of the Oglala Sioux Tribe regarding
14 those disclosures.

15 CHAIRMAN FROEHLICH: Okay.

16 MR. ELLISON: Thank you.

17 CHAIRMAN FROEHLICH: Thank you. We'll stand
18 adjourned until 9:00 a.m. tomorrow morning. Thank you.

19 (Whereupon, the above-entitled matter went
20 off the record at 4:38 p.m.)
21
22
23
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25



Atomic Safety and Licensing Board Panel
In the Matter of:
Powertech (USA) Inc., (Dewey-Burdock In Situ Uranium Recovery Facility)

Docket No. 40-9075-MLA

ASLBP No. 10-898-02-MLA-BD01

Applicant's Exhibits

Exhibit Number	Exhibit Title (as reflected in ADAMS)	Exhibit Status
APP-001	Dr. Lynne Sebastian Initial Testimony.	Identified and Admitted
APP-002	Dr. Lynne Sebastian CV.	Identified and Admitted
APP-003	Dr. Adrien Hannus Initial Testimony.	Identified and Admitted
APP-004	Dr. Adrien Hannus CV.	Identified and Admitted
APP-005	Representative Sample of ALAC Projects.	Identified and Admitted
APP-006	ACHP Section 106 Regulations: Text of ACHP's Regulations, "Protection of Historic Properties: (36 CFR Part 800) (incorporates amendments effective Aug. 5, 2004)".	Identified and Admitted
APP-007	National Park Service, Secretary of the Interior's Standards and Guidelines for Archeology and Historic Preservation, 1983	Identified and Admitted
APP-008	South Dakota State Historic Preservation Office, Guidelines for Cultural Resource Surveys and Survey Reports in South Dakota (For Review and Compliance), 2005.	Identified and Admitted
APP-009	Level III Cultural Resources Evaluation of Powertech (USA) Inc.'s Proposed Dewey-Burdock Uranium Project (Public Version), Vol. 3 Part 6; ML100670366.	Identified and Admitted
APP-010	Michael Fosha Initial Testimony.	Identified and Admitted
APP-011	Michael Fosha CV.	Identified and Admitted
APP-012	February 11, 2013 letter from Michael Fosha to SDDENR.	Identified and Admitted
APP-013	Hal Demuth Initial Testimony.	Identified and Admitted
APP-014	Hal Demuth CV.	Identified and Admitted
APP-015-A	Revised Technical Report (TR) for the Dewey-Burdock Project; Part 1 of 22; Transmittal Letter, Change Index and Revised TR RAI Responses; ML14035A052.	Identified and Admitted
APP-015-B	Revised TR for the Dewey-Burdock Project; Part 2 of 22; Text through Sec. 2.8.5.7; ML14035A029.	Identified and Admitted



Atomic Safety and Licensing Board Panel
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Applicant's Exhibits

Exhibit Number	Exhibit Title (as reflected in ADAMS)	Exhibit Status
APP-015-C	Revised TR for the Dewey-Burdock Project; Part 3 of 22; Text Sec. 2.9 through 10.2; ML14035A030.	Identified and Admitted
APP-015-D	Revised TR for the Dewey-Burdock Project; Part 4 of 22; Plates 1.5-1 through 2.6-8; ML14035A031.	Identified and Admitted
APP-015-E	Revised TR for the Dewey-Burdock Project; Part 5 of 22; Plates 2.6-9 through 2.6-12; ML14035A032.	Identified and Admitted
APP-015-F	Revised TR for the Dewey-Burdock Project; Part 6 of 22; Plates 2.6-13 through 2.6-15; ML14035A033.	Identified and Admitted
APP-015-G	Revised TR for the Dewey-Burdock Project; Part 7 of 22; Plates 2.6-16 through 2.7-2; ML14035A034.	Identified and Admitted
APP-015-H	Revised TR for the Dewey-Burdock Project; Part 8 of 22; Plates 2.8-1 through 5.7-1; ML14035A035.	Identified and Admitted
APP-015-I	Revised TR for the Dewey-Burdock Project; Part 9 of 22; App. 2.2-A through 2.5-F; ML14035A036.	Identified and Admitted
APP-015-J	Revised TR for the Dewey-Burdock Project; Part 10 of 22; App. 2.6-A through 2.6-G; ML14035A037.	Identified and Admitted
APP-015-K	Revised TR for the Dewey-Burdock Project; Part 11 of 22; App. 2.6-H through 2.7-E; ML14035A038.	Identified and Admitted
APP-015-L	Revised TR for the Dewey-Burdock Project; Part 12 of 22; App 2.7-F through 2.7-G; ML14035A039.	Identified and Admitted
APP-015-M	Revised TR for the Dewey-Burdock Project; Part 13 of 22; App. 2.7-H 1 of 3; ML14035A040.	Identified and Admitted
APP-015-N	Revised TR for the Dewey-Burdock Project; Part 14 of 22; App. 2.7-H 2 of 3; ML14035A041.	Identified and Admitted
APP-015-O	Revised TR for the Dewey-Burdock Project; Part 15 of 22; App. 2.7-H 3 of 3; ML14035A042.	Identified and Admitted
APP-015-P	Revised TR for the Dewey-Burdock Project; Part 16 of 22; App. 2.7-J through 2.7-L 1 of 2; ML14035A043.	Identified and Admitted
APP-015-Q	Revised TR for the Dewey-Burdock Project; Part 17 of 22; App.2.7-L 2 of 2; ML14035A044	Identified and Admitted
APP-015-R	Revised TR for the Dewey-Burdock Project; Part 18 of 22; App. 2.7-M; ML14035A045.	Identified and Admitted
APP-015-S	Revised TR for the Dewey-Burdock Project; Part 19 of 22; App 2.7-N through 2.8-H; ML14035A046.	Identified and Admitted
APP-015-T	Revised TR for the Dewey-Burdock Project; Part 20 of 22; App. 2.8-I through 2.9-L; ML14035A047.	Identified and Admitted
APP-015-U	Revised TR for the Dewey-Burdock Project; Part 21 of 22; App. 2.9-M through 3.1-A; ML14035A048.	Identified and Admitted
APP-015-V	Revised TR for the Dewey-Burdock Project; Part 22 of 22; App. 3.1-B through 7.3-D; ML14035A049.	Identified and Admitted



Atomic Safety and Licensing Board Panel
In the Matter of:
Powertech (USA) Inc., (Dewey-Burdock In Situ Uranium Recovery Facility)

Docket No. 40-9075-MLA

ASLBP No. 10-898-02-MLA-BD01

Applicant's Exhibits

Exhibit Number	Exhibit Title (as reflected in ADAMS)	Exhibit Status
APP-016-A	Revised Response to the Request for Additional Information (RAI) for the Technical Report (TR) for the Dewey-Burdock Project; Cover Letter; ML11207A711.	Identified and Admitted
APP-016-B	Revised TR RAI Response; Text Part 1: ML11208B712.	Identified and Admitted
APP-016-C	Revised TR RAI response; Text Part 2; ML11208B719.	Identified and Admitted
APP-016-D	Revised TR RAI response; Text Part 3; ML11208B714.	Identified and Admitted
APP-016-E	Revised TR RAI Response; Exhibits Part 1; Exh. 2.6-1 through 2.6-4; ML11208B716.	Identified and Admitted
APP-016-F	Revised TR RAI response; Exhibits Part 2; Exh. 2.6-5; ML11208B763.	Identified and Admitted
APP-016-G	Revised TR RAI response; Exhibits Part 3; Exh. 2.6-6 through 3.1-1; ML11208B764.	Identified and Admitted
APP-016-H	Revised TR RAI Responses; Exhibits Part 4; Exh. 3.1-2 through 5.7-1; ML11208B767.	Identified and Admitted
APP-016-I	Revised TR RAI response; Appendices Part 1; App. 2.5-D through 2.6-G; ML11208B765.	Identified and Admitted
APP-016-J	Revised TR RAI response; Appendices Part 2; App. 2.6-H 1 of 3; ML11208B766.	Identified and Admitted
APP-016-K	Revised TR RAI response; Appendices Part 3; App. 2.6-H 2 of 3; ML11208B769.	Identified and Admitted
APP-016-L	Revised TR RAI response; Appendices Part 4; App. 2.6-H 3 of 3; ML11208B770.	Identified and Admitted
APP-016-M	Revised TR RAI response; Appendices Part 5; App. 2.7-B through 2.7-G; ML11208B771.	Identified and Admitted
APP-016-N	Revised TR RAI response; Appendices Part 6; App. 2.7-H 1 of 4; ML11208B777.	Identified and Admitted
APP-016-O	Revised TR RAI response; Appendices Part 7; App. 2.7-H 2 of 4; ML11208B778.	Identified and Admitted
APP-016-P	Revised TR RAI Response; Appendices Part 8; App. 2.7-H 3 of 4; ML11208B784.	Identified and Admitted
APP-016-Q	Revised TR RAI Response; Appendices Part 9; App 2.7-H 4 of 4; ML11208B827.	Identified and Admitted
APP-016-R	Revised TR RAI response; Appendices Part 10; App. 2.7-K; ML11208B832.	Identified and Admitted
APP-016-S	Revised TR RAI Response; Appendices Part 11; App. 2.7-L 1 of 4; ML112088833.	Identified and Admitted
APP-016-T	Revised TR RAI Response; Appendices Part 12; App. 2.7-L 2 of 4; ML11208B868.	Identified and Admitted



Atomic Safety and Licensing Board Panel
In the Matter of:
Powertech (USA) Inc., (Dewey-Burdock In Situ Uranium Recovery Facility)

Docket No. 40-9075-MLA

ASLBP No. 10-898-02-MLA-BD01

Applicant's Exhibits

Exhibit Number	Exhibit Title (as reflected in ADAMS)	Exhibit Status
APP-016-U	Revised TR RAI response; Appendices Part 13; App. 2.7-L 3 of 4; ML11208B864.	Identified and Admitted
APP-016-V	Revised TR RAI response; Appendices Part 14; App. 2.7-L 4 of 4; ML11208B865.	Identified and Admitted
APP-016-W	Revised TR RAI response; Appendices Part 15; App. Vol. 4 Cover; ML11208B870.	Identified and Admitted
APP-016-X	Revised TR RAI response; Appendices Part 16; App. 2.7-M; ML11208B872.	Identified and Admitted
APP-016-Y	Revised TR RAI response; Appendices Part 17; App.2.9-B through 2.9-K; ML112150229.	Identified and Admitted
APP-016-Z	Revised TR RAI response; Appendices Part 18; App. 3.1-A 1 of 2; ML11208B922.	Identified and Admitted
APP-016-AA	Revised TR RAI response; Appendices Part 19; App. 3.1-A 2 of 2; ML11208B924.	Identified and Admitted
APP-016-BB	Revised TR RAI response; Appendices Part 20; App. 6.1-A through 7.3-C; ML11208B925.	Identified and Admitted
APP-017	Figures to Accompany Demuth Initial Testimony.	Identified and Admitted
APP-018	USGS Water-Supply Paper 2220, Basic Ground-Water Hydrology, 1983.	Identified and Admitted
APP-019	National Mining Association's (NMA) Generic Environmental Report in Support of the Nuclear Regulatory Commission's Generic Environmental Impact Statement for In Situ Uranium Recovery Facilities; ML080170159	Identified and Admitted
APP-020	ISR animation (Video of ISR Operation).	Identified and Admitted
APP-021-A	Dewey-Burdock Project Technical Report (TR); re-submitted August 2009; Part 1; Text thru Sec. 2.7.1; ML092870298	Identified and Admitted
APP-021-B	Dewey-Burdock Project TR; re-submitted August 2009; Part 2; Text Sec. 2.7.2 thru 2.9; ML092870295.	Identified and Admitted
APP-021-C	Dewey Burdock Project TR; Re-submittal August 2009, Part 3; Text Sec 3 thru End; ML092870299.	Identified and Admitted
APP-021-D	Dewey-Burdock Project TR; Re-submitted August 2009; Part 4; Plate 1.5-1; ML092870313.	Identified and Admitted
APP-021-E	Dewey-Burdock Project TR; Re-submitted August 2009; Part 5; Plate 1.5-2; ML092870314.	Identified and Admitted
APP-021-F	Dewey-Burdock Project TR; Re-submittal August 2009; Part 6; Plate 2.5-1; ML092870315.	Identified and Admitted



Atomic Safety and Licensing Board Panel
In the Matter of:
Powertech (USA) Inc., (Dewey-Burdock In Situ Uranium Recovery Facility)

Docket No. 40-9075-MLA

ASLBP No. 10-898-02-MLA-BD01

Applicant's Exhibits

Exhibit Number	Exhibit Title (as reflected in ADAMS)	Exhibit Status
APP-021-G	Dewey-Burdock Project TR; re-submitted August 2009; Part 7; Plate 2.6-1; ML092870316.	Identified and Admitted
APP-021-H	Dewey-Burdock Project TR; Re-submitted August 2009; Part 8; Plate 2.6-2; ML092870317.	Identified and Admitted
APP-021-I	Dewey-Burdock Project TR; Re-submittal August 2009; Part 9; Plate 2.6-3; ML092870318.	Identified and Admitted
APP-021-J	Dewey-Burdock Project TR; Re-submittal August 2009; Part 10; Plate 2.6-4; ML092870305.	Identified and Admitted
APP-021-K	Dewey-Burdock Project TR; re-submitted August 2009; Part 11; Plate 2.6-5; ML092870306.	Identified and Admitted
APP-021-L	Dewey-Burdock Project TR; re-submitted August 2009; Part 12; Plate 2.6-6; ML092870307.	Identified and Admitted
APP-021-M	Dewey-Burdock Project TR; Re-submitted August 2009; Part 13; Plate 2.6-7; ML092870309.	Identified and Admitted
APP-021-N	Dewey-Burdock Project TR; re-submitted August 2009; Part 14; Plate 2.6-8; ML092870310.	Identified and Admitted
APP-021-O	Dewey-Burdock Project TR; Re-submitted August 2009; Part 15; Plate 2.6-9; ML092870311.	Identified and Admitted
APP-021-P	Dewey-Burdock Project TR; Re-submitted August 2009; Part 16; Plate 2.6-10; ML092870312.	Identified and Admitted
APP-021-Q	Dewey-Burdock Project TR; re-submitted August 2009; Part 17; Plate 2.6-11; ML092870320.	Identified and Admitted
APP-021-R	Dewey-Burdock Project TR; re-submitted August 2009; Part 18; Plate 2.6-12; ML092870321.	Identified and Admitted
APP-021-S	Dewey-Burdock Project TR; re-submitted August 2009; Part 19; Plate 2.6-13; ML092870322.	Identified and Admitted
APP-021-T	Dewey-Burdock Project TR; Re-submitted August 2009; Part 20; Plate 2.6-14; ML092870323.	Identified and Admitted
APP-021-U	Dewey-Burdock Project TR; re-submitted August 2009; Part 21; Plate 2.6-15; ML092870324.	Identified and Admitted
APP-021-V	Dewey-Burdock Project TR; re-submitted August 2009; Part 22; Plate 2.8-1; ML092870325.	Identified and Admitted
APP-021-W	Dewey-Burdock Project TR; re-submitted August 2009; Part 23; Plate 2.8-2; ML092870326.	Identified and Admitted
APP-021-X	Dewey-Burdock Project TR; re-submitted August 2009; Part 24; Plate 2.8-3; ML092870327.	Identified and Admitted
APP-021-Y	Dewey-Burdock Project TR; re-submitted August 2009; Part 25; Plate 3.1-1; ML092870328.	Identified and Admitted
APP-021-Z	Dewey-Burdock Project TR; re-submitted August 2009; Part 26; Plate 3.1-2; ML092870329.	Identified and Admitted



Atomic Safety and Licensing Board Panel
In the Matter of:
Powertech (USA) Inc., (Dewey-Burdock In Situ Uranium Recovery Facility)

Docket No. 40-9075-MLA

ASLBP No. 10-898-02-MLA-BD01

Applicant's Exhibits

Exhibit Number	Exhibit Title (as reflected in ADAMS)	Exhibit Status
APP-021-AA	Dewey-Burdock Project TR; Re-submitted August 2009; Part 27; App. 2.2-A thru 2.6-B; ML092870350.	Identified and Admitted
APP-021-BB	Dewey-Burdock Project TR; re-submitted August 2009; Part 28; App. 2.6-C thru 2.7-B(partial); ML092870351	Identified and Admitted
APP-021-CC	Dewey-Burdock Project TR; Re-submittal August 2009; Part 29, App. 2.7-B (Partial) thru 2.7-F; ML092870370.	Identified and Admitted
APP-021-DD	Dewey-Burdock Project TR; re-submitted August 2009; Part 30; App. 2.7-G thru 2.8-F (partial); ML092870354.	Identified and Admitted
APP-021-EE	Dewey-Burdock TR; Re-submitted August 2009; Part 31; App. 2-8.F (Partial); ML092870357.	Identified and Admitted
APP-021-FF	Dewey-Burdock Project TR; re-submitted August 2009; Part 32; App. 2.8-G thru 2.9-A; ML092870358.	Identified and Admitted
APP-021-GG	Dewey-Burdock Project TR; re-submitted August 2009; Part 33; App. 4.2-A thru 7.3-A (partial); ML092870343.	Identified and Admitted
APP-021-HH	Dewey-Burdock Project TR; re-submitted August 2009; Part 34; App. 7.3-A (partial) thru 7.3-B; ML092870344.	Identified and Admitted
APP-022	Geochemical Data from Groundwater at the Proposed Dewey Burdock Uranium In-situ Recovery Mine, Edgemont, South Dakota: U.S. Geological Survey Open-File Report 2012-1070.	Identified and Admitted
APP-023	Uranium In-Situ Recovery and the Proposed Dewey Burdock Site, Edgemont, South Dakota, Public Meeting Talk Given by Dr. Raymond Johnson, U.S. Geological Survey, in Hot Springs, SD on Feb. 7, 2013 and Custer, SD on May 22, 2013.	Identified and Admitted
APP-024	Pre-Licensing Well Construction, Lost Creek ISR Uranium Recovery Project; ML091520101.	Identified and Admitted
APP-025	Numerical Modeling of Hydrogeologic Conditions, Dewey-Burdock Project, February 2012; ML12062A096.	Identified and Admitted
APP-026	Update on USGS research at the proposed Dewey Burdock uranium in-situ recovery mine, Edgemont, South Dakota, presentation to EPA Region 8 in Denver, CO on Feb. 22, 2012, based on USGS OFR 2012-1070.	Identified and Admitted



Atomic Safety and Licensing Board Panel
In the Matter of:
Powertech (USA) Inc., (Dewey-Burdock In Situ Uranium Recovery Facility)

Docket No. 40-9075-MLA

ASLBP No. 10-898-02-MLA-BD01

Applicant's Exhibits

Exhibit Number	Exhibit Title (as reflected in ADAMS)	Exhibit Status
APP-027-A	Report to Accompany Madison Water Right Permit Application, June 2012; ML12193A239.	Identified and Admitted
APP-027-B	Report to Accompany Madison Water Right Permit Application, June 2012, Appendix A; ML12193A234.	Identified and Admitted
APP-027-C	Report to Accompany Madison Water Right Permit Application, June 2012, Appendix B; ML12193A235.	Identified and Admitted
APP-028	Report to the Chief Engineer on Water Permit Application No. 2685-2 [Madison Aquifer], ADAMS Accession No. ML13165A160, November 2, 2012.	Identified and Admitted
APP-029	Letter Agreement between Powertech and Fall River County Commission.	Identified and Admitted
APP-030	NUREG/CR-6733, A Baseline Risk-Informed, Performance-Based Approach for In Situ Leach Uranium Extraction Licensees - Final Report, July 2001; ML012840152.	Identified and Admitted
APP-031	Decision of the TCEQ Executive Director regarding Uranium Energy Corporation's Permit No. UR03075.	Identified and Admitted
APP-032	In-Situ Leach Uranium Mining in the United States of America: Past, Present and Future, by D.H. Underhill, in IAEA TECDOC-720, Uranium In Situ Leaching, Proceedings of a Technical Committee Held in Vienna, 5-8 October 1992, September 1993.	Identified and Admitted
APP-033	Safety Evaluation Report for the Moore Ranch ISR Project in Campbell County, Wyoming, Materials License No. SUA-1596; ML101310291.	Identified and Admitted
APP-034	Safety Evaluation Report for the Nichols Ranch In Situ Recovery Project in Johnson and Campbell Counties, Wyoming, Material License No. SUA-1597; ML102240206.	Identified and Admitted
APP-035	Safety Evaluation Report for the Lost Creek Project in Sweetwater County, Wyoming, Materials License No. SUA-1598; ML112231724.	Identified and Admitted
APP-036	Safety Evaluation Report for the Strata Energy, Inc. Ross ISR Project, Crook County, Wyoming, Materials License No. SUA-1601; ML14002A107.	Identified and Admitted
APP-037	Errol Lawrence Initial Testimony.	Identified and Admitted
APP-038	Errol Lawrence CV.	Identified and Admitted



Atomic Safety and Licensing Board Panel
In the Matter of:
Powertech (USA) Inc., (Dewey-Burdock In Situ Uranium Recovery Facility)

Docket No. 40-9075-MLA
ASLBP No. 10-898-02-MLA-BD01

Applicant's Exhibits

Exhibit Number	Exhibit Title (as reflected in ADAMS)	Exhibit Status
APP-039	Materials License SUA-1597 for the Nichols Ranch ISR Project, July 2011; ML111751649.	Identified and Admitted
APP-040-A	Dewey-Burdock Project Environment Report (ER); Re-submittal August 2009; Part 1; Cover thru Sec. 3.4.2.1.1; ML09270345.	Identified and Admitted
APP-040-B	Dewey-Burdock Project Environmental Report (ER); re-submitted August 2009; Part 2; Sec. 3.4.2.1.2 thru 3.12; ML092870346.	Identified and Admitted
APP-040-C	Dewey-Burdock Project Environmental Report (ER); re-submitted August 2009; Part 1; Sec. 4 thru end; ML092870360.	Identified and Admitted
APP-040-D	ER Plate 3.1-1; ML092870380.	Identified and Admitted
APP-040-E	ER Plate 3.3-1; ML0921870381.	Identified and Admitted
APP-040-F	ER Plate 3.3-1; ML092870381.	Identified and Admitted
APP-040-G	ER Plate 3.3-3; ML092870383.	Identified and Admitted
APP-040-H	ER Plate 3.3-4; ML092870591.	Identified and Admitted
APP-040-I	ER Plate 3.3-5; ML092870386.	Identified and Admitted
APP-040-J	ER Plate 3.3-6; ML092870387.	Identified and Admitted
APP-040-K	ER Plate 3.3-7; ML092870388.	Identified and Admitted
APP-040-L	ER Plate 3.3-8; ML092870389.	Identified and Admitted
APP-040-M	ER Plate 3.3-9; ML092870390.	Identified and Admitted
APP-040-N	ER Plate 3.3-10; ML092870592.	Identified and Admitted
APP-040-O	ER Plate 3.3-11; ML092870586.	Identified and Admitted
APP-040-P	ER Plate 3.3-12; ML092870588.	Identified and Admitted
APP-040-Q	ER Plate 3.3-13; ML092870589.	Identified and Admitted



Atomic Safety and Licensing Board Panel
In the Matter of:
Powertech (USA) Inc., (Dewey-Burdock In Situ Uranium Recovery Facility)

Docket No. 40-9075-MLA

ASLBP No. 10-898-02-MLA-BD01

Applicant's Exhibits

Exhibit Number	Exhibit Title (as reflected in ADAMS)	Exhibit Status
APP-040-R	ER Plate 3.3-14; ML092870590.	Identified and Admitted
APP-040-S	ER Plate 3.3-15; ML092870394.	Identified and Admitted
APP-040-T	ER Plate 3.5-1; ML092870395.	Identified and Admitted
APP-040-U	ER Plate 3.5-2; ML092870397.	Identified and Admitted
APP-040-V	ER Plate 6.1-1; ML092870593.	Identified and Admitted
APP-040-W	ER Replacement Plates; ML093370652.	Identified and Admitted
APP-040-X	ER App. 3.3-A thru 3.3-E; ML092870411.	Identified and Admitted
APP-040-Y	ER App. 3.3-F thru 3.4-A; ML092870421.	Identified and Admitted
APP-040-Z	ER App. 3.4-B thru 3.4-E; ML092870414.	Identified and Admitted
APP-040-AA	ER App.3.5-A thru 3.5-F; ML092870416.	Identified and Admitted
APP-040-BB	ER App. 3.5-F thru 3.5-I; ML092870422.	Identified and Admitted
APP-040-CC	ER App. 3.5-J thru 3.6-C; ML092870407.	Identified and Admitted
APP-040-DD	ER App. 4.6-A; ML092870409.	Identified and Admitted
APP-040-EE	ER App. 4.14-C thru 6.1-G; ML092870413.	Identified and Admitted
APP-041	Using Groundwater and Solid-phase Geochemistry for Reactive Transport Modeling at the Proposed Dewey Burdock Uranium In-situ Recovery Site, Edgemont, South Dakota, presentation given to EPA on April 11, 2012.	Identified and Admitted
APP-042-A	Dewey-Burdock Project Revised Class III Underground Injection Control Permit Application, Revised July 2012, Cover Letter; ML12244A519.	Identified and Admitted
APP-042-B	Dewey-Burdock Project Revised Class III Underground Injection Control Permit Application, Revised July 2012, Text thru Sec. 4; ML12244A522.	Identified and Admitted



Atomic Safety and Licensing Board Panel
In the Matter of:
Powertech (USA) Inc., (Dewey-Burdock In Situ Uranium Recovery Facility)

Docket No. 40-9075-MLA

ASLBP No. 10-898-02-MLA-BD01

Applicant's Exhibits

Exhibit Number	Exhibit Title (as reflected in ADAMS)	Exhibit Status
APP-042-C	Dewey-Burdock Project Revised Class III Underground Injection Control Permit Application, Revised July 2012, Text Sec. 5 thru 8; ML12244A520.	Identified and Admitted
APP-042-D	Dewey-Burdock Project Revised Class III Underground Injection Control Permit Application, Revised July 2012, Text Sec. 9 thru end; ML12244A521.	Identified and Admitted
APP-043	Revised Response to TR RAI 5.7.8-3(b), June 27, 2012, ML12179A534.	Identified and Admitted
APP-044	Results of Acceptance Review for TR RAI Responses; ML110470245.	Identified and Admitted
APP-045	Responses to Technical Review Comments for Dewey-Burdock Large Scale Mine Permit Application; ML13144A182.	Identified and Admitted
APP-046	Doyle Fritz Initial Testimony.	Identified and Admitted
APP-047	Doyle Fritz CV.	Identified and Admitted
APP-048	Report to the Chief Engineer on Water Permit Application No. 2686-2 [Inyan Kara Aquifer], ADAMS Accession No. ML13165A168, November 2, 2012.	Identified and Admitted
APP-049	Water Right Permit No. 2626-2 Application and Permit.	Identified and Admitted
APP-050	ER RAI Responses, transmittal letter and text; ML102380516.	Identified and Admitted
APP-051	Groundwater Discharge Plan (GDP) permit application, as updated with replacement pages through November 2012.	Identified and Admitted
APP-052	Dewey-Burdock BLM Site Determinations; January 10, 2014 letter from BLM to SD SHPO; ML14014A303.	Identified and Admitted
APP-053	Gwyn McKee Initial Testimony.	Identified and Admitted
APP-054	Gwyn McKee CV.	Identified and Admitted
APP-055	Greater Sage Grouse Management Plan, South Dakota, 2008-2017; ML12241A215.	Not Offered
APP-056	A Report on National Greater Sage Grouse Conservation Measures.	Not Offered
APP-057	Greater Sage grouse (Centrocercus urophasianus) Conservation Objectives: Final Report.	Not Offered



Atomic Safety and Licensing Board Panel
In the Matter of:
Powertech (USA) Inc., (Dewey-Burdock In Situ Uranium Recovery Facility)

Docket No. 40-9075-MLA

ASLBP No. 10-898-02-MLA-BD01

Applicant's Exhibits

Exhibit Number	Exhibit Title (as reflected in ADAMS)	Exhibit Status
APP-058	Endangered Species Act Consultation Handbook, Procedures for Conducting Section 7 Consultations and Conferences, U.S. Fish and Wildlife Service and National Marine Fisheries Service, 1998	Not Offered
APP-059	Frequently Asked Questions on ESA Consultations, USFWS.	Not Offered
APP-060	Whooping Crane (Grus americana) 5-Year Review: Summary and Evaluation, USFWS.	Not Offered
APP-061	Division of Migratory Bird Management, Important Information for Sandhill Hunters, Fall Whooping Crane Sightings 1943-1999.	Not Offered
APP-062	Black Footed Ferret Recovery Plan, Second Revision, Nov. 2013.	Not Offered
APP-063	Answering Testimony of Dr, Lynne Sebastian.	Identified and Admitted
APP-064	Dr. Adrien Hannus Answering Testimony.	Identified and Admitted
APP-065	Hal Demuth Answering Testimony.	Identified and Admitted
APP-066	Errol Lawrence Answering Testimony.	Identified and Admitted
APP-067	Figure to Accompany Errol Lawrence Answering Testimony.	Identified and Admitted
APP-068	Doyle Fritz Answering Testimony.	Identified and Admitted
APP-069	Figures to Accompany Doyle Fritz Answering Testimony.	Identified and Admitted
APP-070	Gwyn McKee Answering Testimony.	Identified and Admitted
APP-071	2013 Wildlife Monitoring Report for the Dewey-Burdock Project.	Identified and Admitted



Atomic Safety and Licensing Board Panel
In the Matter of:
Powertech (USA) Inc., (Dewey-Burdock In Situ Uranium Recovery Facility)

Docket No. 40-9075-MLA

ASLBP No. 10-898-02-MLA-BD01

Consolidated Intervenor's Exhibits			
ADAMS Number	Exhibit Number	Exhibit Title (as reflected in ADAMS)	Exhibit Status
INT-001		Testimony of Dr. Louis Redmond regarding Lakota Cultural Resources.	Identified and Admitted
INT-002		10/31/09 Report of Dr. Richard Abitz on Powertech Baseline Report.	Identified and Admitted
INT-003		Statement of Professional Qualifications of Dr. Louis Redmond.	Identified and Admitted
INT-004		Statement of Professional Qualifications of Dr. Hannan LaGarry	Identified and Admitted
INT-005		Statement of Professional Qualifications of Dr. Richard Abitz.	Excluded by Board Order (August 1, 2014)
INT-006		Declaration of Wilmer Mesteth regarding Lakota Cultural Resources.	Identified and Admitted
INT-007		Testimony of Susan Henderson regarding water resources issues and concerns of downflow rancher.	Identified and Admitted
INT-008		Testimony of Dr. Donald Kelley a former forensic pathologist regarding the radiological impact on humans and other animals.	Excluded by Board (At Hearing)
INT-008a		Dr. Donald Kelley Affidavit	Excluded by Board (At Hearing)
INT-009		Statement of Qualifications of Dr. Kelley.	Excluded by Board (At Hearing)
INT-010		Testimony of Peggy Detmers a Wildlife Biologist Regarding the D-B Site and Endangered Species.	Identified as Proffered
INT-010a		Statement of Qualifications of Peggy Detmers.	Identified as Proffered
INT-010b		Map - Beaver Creek Watershed.	Identified as Proffered
INT-010c		Map - Central Flyway.	Identified as Proffered
INT-010d		Map - Whooping Crane Route.	Identified as Proffered
INT-010e		Map - D-B Project Site.	Identified as Proffered
INT-010f		Google Photo - Dewey Project - close.	Identified as Proffered



Atomic Safety and Licensing Board Panel
In the Matter of:
Powertech (USA) Inc., (Dewey-Burdock In Situ Uranium Recovery Facility)

Docket No. 40-9075-MLA

ASLBP No. 10-898-02-MLA-BD01

Consolidated Intervenor's Exhibits			
ADAMS Number	Exhibit Number	Exhibit Title (as reflected in ADAMS)	Exhibit Status
INT-010g		Google Photo - Dewey Project - Medium Height.	Identified as Proffered
INT-010h		Google Photo - Dewey Project - Wide.	Identified as Proffered
INT-010i		Map - 5 state area - D-B Project.	Identified as Proffered
INT-010j		GPS Google Photo - D-B Project - Close-up.	Identified as Proffered
INT-010k		GPS Google Photo - D-B Project - Drainage.	Identified as Proffered
INT-010l		GPS Google Photo - D-B Project - wideshot.	Identified as Proffered
INT-010m		Map - D-B area.	Identified as Proffered
INT-010n		GPS Google Photo - D-B Project - triangle.	Identified as Proffered
INT-010o		Diagram - Whooping Crane Bioaccumulaton.	Identified as Proffered
INT-010p		Beaver Creek Final Fecal Coliform.	Identified as Proffered
INT-010q	PAC		NOT FILED
INT-011		Testimony of Marvin Kammera, a rancher, on potential impacts on down flow ranchers as to Inyan Kara water quantity and quality.	Identified and Admitted
INT-012		Testimony of Dayton Hyde, Owner/Operator of Black Hills Wild Horse Sanctuary, on Potential Impacts and Concerns about Proposed ISL Mine on Downflow Surface and Underground Water Resources.	Identified and Admitted
INT-013		Testimony of Dr. Hannon LaGarry a geologic stratigrapher regarding fractures, faults, and other geologic features not adequately considered by Powertech or NRC staff.	Identified and Admitted
INT-014		Testimony of Linsey McLane, a Bio-chemist Regarding Bioaccumulation of Heavy Metals in Plant and Animal Species.	Identified and Admitted
INT-014a		Powerpoint of Linsey McLane, a biochemist regarding bioaccumulation of heavy metals in plants and animal species	NOT FILED
NT-014b		Linsey McLane Affidavit	Identified and Admitted



Atomic Safety and Licensing Board Panel
In the Matter of:
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Docket No. 40-9075-MLA

ASLBP No. 10-898-02-MLA-BD01

Consolidated Intervenor's Exhibits			
ADAMS Number	Exhibit Number	Exhibit Title (as reflected in ADAMS)	Exhibit Status
INT-15	INT	Comments on DSEIS, with Exhibits	NOT FILED
INT-016		Petition to Intervene, with Exhibits.	Identified and Admitted
INT-017		Statement of Contentions on DSEIS, with Exhibits.	Identified and Admitted
INT-018		INT Statement of Contentions on FSEIS, with Exhibits.	Identified and Admitted
INT-019		Dr. Redmond Rebuttal Letter.	Identified and Admitted
INT-020		Rebuttal Written Testimony of Dr. Hannan LaGarry.	Identified and Admitted
INT-020A		Expert Opinion Regarding the Proposed Dewey-Burdock Project ISL Mine Near Edgemont, South Dakota.	Identified and Admitted
INT-021A		Violation History - Crow Butte ISL mine in Crawford, Nebraska.	Identified and Admitted
INT-021B		Violation History - Crow Butte ISL mine in Crawford, Nebraska.	Identified and Admitted
INT-021C		Violation History - Crow Butte ISL mine in Crawford, Nebraska.	Identified and Admitted
INT-022A		Violation History - Smith Highland Ranch.	Identified and Admitted
INT-022B		Violation History - Smith Highland Ranch.	Identified and Admitted
INT-022C		Violation History - Smith Highland Ranch.	Identified and Admitted
INT-023	INT	Violation History - Irigaray Christiansen Ranch	NOT FILED



Atomic Safety and Licensing Board Panel
In the Matter of:
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Docket No. 40-9075-MLA

ASLBP No. 10-898-02-MLA-BD01

NRC Staff's Exhibits

Exhibit Number	Exhibit Title (as reflected in ADAMS)	Exhibit Status
NRC-001	Initial Testimony and Affidavits from Haimanot Yilma, Kellee L. Jamerson, Thomas Lancaster, James Prikryl, and Amy Hester	Identified and Admitted
NRC-002-R	REVISED - Statement of Professional Qualifications of Po Wen (Kevin) Hsueh.	Identified and Admitted
NRC-003	Statement of Professional Qualifications of Haimanot Yilma	Identified and Admitted
NRC-004	Statement of Professional Qualifications of Kellee L. Jamerson	Identified and Admitted
NRC-005	Statement of Professional Qualifications of Thomas Lancaster	Identified and Admitted
NRC-006	Statement of Professional Qualifications of James Prikryl	Identified and Admitted
NRC-007	Statement of Professional Qualifications of Amy Hester	Identified and Admitted
NRC-008-A-1	NUREG-1910, Supplement 4, Vol. 1, Final Report, Environmental Impact Statement for the Dewey-Burdock Project in Custer and Fall River Counties, South Dakota: Supplement to the Generic Environmental Impact	Identified and Admitted
NRC-008-A-2	NUREG-1910, Supplement 4, Vol. 1, Final Report, Environmental Impact Statement for the Dewey-Burdock Project in Custer and Fall River Counties, South Dakota: Supplement to the Generic Environmental....	Identified and Admitted
NRC-008-B-1	NUREG-1910, Supplement 4, Vol. 2, Final Report, Environmental Impact Statement for the Dewey-Burdock Project in Custer and Fall River Counties, South Dakota: Supplement to the Generic Environmental	Identified and Admitted
NRC-008-B-2	NUREG-1910, Supplement 4, Vol. 2., Final Report, Environmental Impact Statement for the Dewey-Burdock Project in Custer and Fall River Counties, South Dakota: Supplement to the Generic Environmental Impact Statement for In-Situ Leach....	Identified and Admitted
NRC-009-A-1	NUREG-1910, Supplement 4, Vol. 1, Draft Report for Comment, Environmental Impact Statement for the Dewey-Burdock Project in Custer and Fall River Counties, South Dakota: Supplement to the Generic Environmental Impact Statement....	Identified and Admitted



Atomic Safety and Licensing Board Panel
In the Matter of:
Powertech (USA) Inc., (Dewey-Burdock In Situ Uranium Recovery Facility)

Docket No. 40-9075-MLA

ASLBP No. 10-898-02-MLA-BD01

NRC Staff's Exhibits

Exhibit Number	Exhibit Title (as reflected in ADAMS)	Exhibit Status
NRC-009-A-2	NUREG-1910, Supplement 4, Vol. 1, Draft Report for Comment, Environmental Impact Statement for the Dewey-Burdock Project in Custer and Fall River Counties, South Dakota: Supplement to the Generic	Identified and Admitted
NRC-009-B-1	NUREG-1910, S4, V2, DFC, EIS for the Dewey-Burdock Project in Custer and Fall River Counties, South Dakota: Suppl to the GEIS for In-Situ Leach Uranium Milling Facilities (Chapter 5 to 11 and Appendices)....	Identified and Admitted
NRC-009-B-2	NUREG-1910, Supplement 4, Vol. 2, Draft Report for Comment, Environmental Impact Statement for the Dewey-Burdock Project in Custer and Fall River Counties, South Dakota: Supplement to the Generic	Identified and Admitted
NRC-010-A-1	NUREG-1910, Vol. 1, Final Report, Generic Environmental Impact Statement for In-Situ Leach Uranium Milling Facilities (Chapters 1 through 4) (May 2009) (ADAMS Accession No.	Identified and Admitted
NRC-010-A-2	NUREG-1910, Vol. 1, Final Report, Generic Environmental Impact Statement for In-Situ Leach Uranium Milling Facilities (Chapters 1 through 4)(May 2009) (ADAMS Accession No. ML091480244 Page 153-512	Identified and Admitted
NRC-010-A-3	NUREG-1910, Vol. 1, Final Report, Generic Environmental Impact Statement for In-Situ Leach Uranium Milling Facilities (Chapters 1 through 4) (May 2009) (ADAMS Accession No. ML091480244) Pages 513-704.	Identified and Admitted
NRC-010-B-1	NUREG-1910, Vol. 2, Final Report, Generic Environmental Impact Statement for In-Situ Leach Uranium Milling Facilities (Chapters 5 through 12 and Appendices) (May 2009) (ADAMS Accession No. ML091480188). Pages 1-272.	Identified and Admitted
NRC-010-B-2	NUREG-1910, Vol. 2, Final Report, Generic Environmental Impact Statement for In-Situ Leach Uranium Milling Facilities (Chapters 5 through 12 and Appendices) (May 2009) (ADAMS Accession No. ML091480188). Pages 273-612.	Identified and Admitted
NRC-011	Dewey-Burdock Record of Decision (Apr. 8, 2014) (ADAMS Accession No. ML14066A466).	Identified and Admitted
NRC-012	Materials License SUA-1600, Powertech (USA), Inc. (Apr. 8, 2014) (ADAMS Accession No. ML14043A392).	Identified and Admitted
NRC-013	NUREG-1569, Standard Review Plan for In-Situ Leach Uranium Extraction License Applications (June 4, 2003) (ADAMS Accession No. ML031550272).	Identified and Admitted
NRC-014	NUREG-1748, Final Report, Environmental Review Guidance for Licensing Actions Associated with NMSS Programs (Aug. 2003) (ADAMS Accession No. ML032450279).	Identified and Admitted



Atomic Safety and Licensing Board Panel
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Docket No. 40-9075-MLA

ASLBP No. 10-898-02-MLA-BD01

NRC Staff's Exhibits

Exhibit Number	Exhibit Title (as reflected in ADAMS)	Exhibit Status
NRC-015	Dewey-Burdock ISR Project Summary of Tribal Outreach Timeline (Apr. 8, 2014) (ADAMS Accession No. ML14099A010).	Identified and Admitted
NRC-016	Submittal of Comments on Draft Programmatic Agreement for the Proposed Dewey-Burdock ISR Uranium Mining Project. (ADAMS Accession No. ML14077A002)	Identified and Admitted
NRC-017	Dewey-Burdock ISR Project Documents Pertaining to Section 106 of the National Historic Preservation Act (June 10, 2014), available at http://www.nrc.gov/info-finder/materials/uranium/licensed-facilities/dewey-burdock/section-106-docs.html	Identified and Admitted
NRC-018-A	Final PA for the Dewey-Burdock Project. (ADAMS Accession Nos. ML14066A347).	Identified and Admitted
NRC-018-B	Final Appendix for the Dewey-Burdock Project PA. (ADAMS Accession No. ML14066A350).	Identified and Admitted
NRC-018-C	NRC PA Signature Page. (ADAMS Accession No. ML14098A464).	Identified and Admitted
NRC-018-D	Letter from ACHP finalizing Section 106. (ADAMS Accession No. ML14099A025).	Identified and Admitted
NRC-018-E	ACHP PA Signature Page. (ADAMS Accession No. ML4098A1550).	Identified and Admitted
NRC-018-F	BLM signature on PA; (Mar. 25, 2014) (ADAMS Accession No. ML14098A102).	Identified and Admitted
NRC-018-G	South Dakota SHPO PA Signature Page. (ADAMS Accession No. ML14098A107).	Identified and Admitted
NRC-018-H	Powertech PA Signature Page. (ADAMS Accession No. ML14098A110).	Identified and Admitted
NRC-019	Summary Report Regarding the Tribal Cultural Surveys Completed for the Dewey-Burdock Uranium In Situ Recovery Project. (Dec. 16, 2013) (ADAMS Accession No. ML13343A142).	Identified and Admitted
NRC-020	NRC Letter transmitting the Applicant's Statement of Work to all consulting parties. (May 7,2012). (ADAMS Accession No. ML121250102).	Identified and Admitted
NRC-021	3/19/2010 NRC sent initial Section 106 invitation letters to 17 tribes requesting their input on the proposed action. ADAMS Accession No. ML100331999.	Identified and Admitted
NRC-022	Letter to Oglala Sioux Tribe Re: Request for Updated Tribal Council Members Consultation (Sep. 8, 2010) ADAMS Accession No. ML102450647).	Identified and Admitted



Atomic Safety and Licensing Board Panel
In the Matter of:
Powertech (USA) Inc., (Dewey-Burdock In Situ Uranium Recovery Facility)

Docket No. 40-9075-MLA

ASLBP No. 10-898-02-MLA-BD01

NRC Staff's Exhibits

Exhibit Number	Exhibit Title (as reflected in ADAMS)	Exhibit Status
NRC-023	Powertech Dewey-Burdock Draft Scope of Work and Figures - Identification of Properties of Religious and Cultural Significance (Mar.07,2012) (ADAMS Accession No. ML120870197).	Identified and Admitted
NRC-024	NRC Staff Letter Postponing fall 2012 tribal survey. (12/14/2012). ADAMS Accession No. ML12335A175.	Identified and Admitted
NRC-025-A	HDR, Engineering Inc., "Assessment of the Visual Effects of the Powder River Basin Project, New Build Segment, on Previously Identified Historic Properties in South Dakota and Wyoming"....	Identified and Admitted
NRC-025-B	HDR, Engineering Inc. "Assessment of the Visual Effects of the Powder River Basin Project, New Build Segment, on Previously Identified Historic Properties in South Dakota and Wyoming."....	Identified and Admitted
NRC-026	WY SHPO (Wyoming State Historic Preservation Office). "Dewey-Burdock Line of Sight Analysis." Email (September 4) from R. Currit, Senior Archaeologist, Wyoming State Historic Preservation Office to H. Yilma,NRC. September 4,2013....	Identified and Admitted
NRC-027	ACHP, National Register Evaluation Criteria, Advisory Council on Historic Preservation. (Mar. 11, 2008) (2012 ADAMS Accession No. ML12262A055).	Identified and Admitted
NRC-028	Email from Waste Win Young to NRC Staff re SRST Comments Final Draft PA Dewey-Burdock SRST THPO Comments (Feb. 20, 2014) (ADAMS Accession No. ML14105A367).	Identified and Admitted
NRC-029	Letter to Cheyenne River Sioux Tribe re: Response Received Regarding Tribal Survey for Dewey-Burdock (Dec. 14, 2012) (ADAMS Accession No. ML12335A175).	Identified and Admitted
NRC-030	Standing Rock Sioux Tribe Comments - Final Draft PA Dewey-Burdock SRST-THPO Comments (Feb. 05, 2014) (ADAMS Accession No. ML14055A513).	Identified and Admitted
NRC-031	04/07/2014 Letter from the Advisory Council on Historic Preservation to the Standing Rock Sioux Tribe Concerning the Dewey- Burdock ISR Project, SD. ADAMS Accession No. ML14115A448.	Identified and Admitted
NRC-032		NOT FILED
NRC-033	09/13/2012 Summary of August 30,2012 Public Meeting with Powertech Inc, to Discuss Powertech's Proposed Environmental Monitoring Program related to the proposed Dewey-Burdock Project. ADAMS Accession No. ML12255A258.	Identified and Admitted



Atomic Safety and Licensing Board Panel
In the Matter of:
Powertech (USA) Inc., (Dewey-Burdock In Situ Uranium Recovery Facility)

Docket No. 40-9075-MLA

ASLBP No. 10-898-02-MLA-BD01

NRC Staff's Exhibits

Exhibit Number	Exhibit Title (as reflected in ADAMS)	Exhibit Status
NRC-034	Letter to Ponca Tribe of Nebraska Re: Invitation for Formal Consultation Under Section 106 of the National Historic Preservation Act (Mar. 4, 2011) (ADAMS Accession No. ML110550372).	Identified and Admitted
NRC-035	Letter to Santee Sioux Tribe of Nebraska Re: Invitation for Formal Consultation Under Section 106 of the National Historic Preservation Act (Mar. 4, 2011) (ADAMS Accession No. ML110550172).	Identified and Admitted
NRC-036	Letter to Crow Tribe of Montana Re: Invitation for Formal Consultation Under Section 106 of the national Historic Preservation Act (Mar. 04,2011) (ADAMS Accession No. ML110550535).	Identified and Admitted
NRC-037	12/3/2010 Yankton Sioux tribe requests face-to-face meeting to discuss past and current project as well as request for TCP survey. Sisseton Wahpeton and Fort Peck tribes also asked for face-to-face meeting via phone....	Identified and Admitted
NRC-038-A	Invitation for Informal Information-Gathering Meeting Pertaining to the Dewey-Burdock, Crow Butte North Trend, and Crow Butte License Renewal, In-Situ Uranium Recovery Projects (May 12, 2011)(ADAMS Accession No. ML111320251).	Identified and Admitted
NRC-038-B	Informal Information Gathering Meeting - Pine Ridge, SD Invitation to Section 106 Consultation Regarding Dewey-Burdock Project (ADAMS Accession No. ML111870622) (Package).	Identified and Admitted
NRC-038-C	Memo to Kevin Hsueh Re: Transcript for the June 8, 2011 Informal Information - Gathering Meeting Held in Pine Ridge, SD (July 8, 2011) (ADAMS Accession No. ML111870623).	Identified and Admitted
NRC-038-D	Attendee List - Informal Information Gathering Meeting Held in Pine Ridge, SD (July 8, 2011) (ADAMS Accession No. ML111870624).	Identified and Admitted
NRC-038-E	Transcript Re: Informal Information-Gathering Meeting Pertaining to Crow Butte Inc. and Powertech Inc. Proposed ISR Facilities (June 8, 2011) (ADAMS Accession No. ML111721938) (Pages 1-195).	Identified and Admitted
NRC-038-F	Presentation Slides for the Section 106 Consultation Meeting Pertaining to the Proposed Dewey-Burdock, Crow Butte North Trend, and Crow Butte LR In-Situ Uranium Recovery Projects (June 8, 2011) (ADAMS Accession No. ML111661428).	Identified and Admitted



Atomic Safety and Licensing Board Panel
In the Matter of:
Powertech (USA) Inc., (Dewey-Burdock In Situ Uranium Recovery Facility)

Docket No. 40-9075-MLA

ASLBP No. 10-898-02-MLA-BD01

NRC Staff's Exhibits

Exhibit Number	Exhibit Title (as reflected in ADAMS)	Exhibit Status
NRC-039	Meeting Agenda for Informal Information Gathering Pertaining to Dewey-Burdock, Crow Butte. Accompanying NRC letter with map of the proposed project boundary and digital copies of the Class III	Identified and Admitted
NRC-040	Letter to Richard Blubaugh, Powertech, Re: NRC Information Request Relating to Section 106 and NEPA Reviews for the Proposed Dewey-Burdock Project (Aug. 12, 2011) (ADAMS Accession No. ML112170237).	Identified and Admitted
NRC-041	8/31/2011 NRC letter from Powertech letter and proposal in response to the Aug 12, 2011 request for NHPA Section 106 info. This letter enclosed a proposal which outlined a phased approach to	Identified and Admitted
NRC-042	10/20/2011 NRC provided copies of the 6/8/2011 meeting transcripts to all the Tribes. Thank you Letter to James Laysbad of Oglala Sioux Tribe Enclosing the Transcript of the Information-Gathering Meeting and Unredacted Survey Pertaining....	Identified and Admitted
NRC-043		NOT FILED
NRC-044	1/19/2012 NRC invitation letters to all THPOs for a planned Feb 2012 meeting to discuss how best to conduct the TCP survey. (ADAMS Accession No. ML12031A280).	Identified and Admitted
NRC-045	2/01/2012 (February 14-15, 2012 meeting agenda). (ADAMS Accession No. ML120320436).	Identified and Admitted
NRC-046	3/28/2012 - NRC transmitted transcripts of the NRC face-to-face meeting in Rapid City, SD to discuss how best to conduct the TCP survey. (ADAMS Accession Nos. ML120670319).	Identified and Admitted
NRC-047	Meeting the "Reasonable and Good Faith" Identification Standard in Section 106 Review (ACHP), available at http://www.achp.gov/docs/reasonable_good_faith_identification.pdf .	Identified and Admitted
NRC-048	NEPA and NHPA, A Handbook for Integrating NEPA and Section 106 (CEQ and ACHP), available at http://www.achp.gov/docs/NEPA NHPA Section 106 Handbook Mar2013.pdf .	Identified and Admitted
NRC-049	Letter to Crow Creek Sioux Tribe Re: Transmittal of Applicant's Draft Statement of Work (May 7, 2012) (ADAMS Accession No. ML 121250102).	Identified and Admitted



Atomic Safety and Licensing Board Panel
In the Matter of:
Powertech (USA) Inc., (Dewey-Burdock In Situ Uranium Recovery Facility)

Docket No. 40-9075-MLA

ASLBP No. 10-898-02-MLA-BD01

NRC Staff's Exhibits

Exhibit Number	Exhibit Title (as reflected in ADAMS)	Exhibit Status
NRC-050	Letter to Oglala Sioux Tribe Re: Transmittal of Transcript from Teleconference Conducted on April 24, 2012 (June 26, 2012) (ADAMS Accession No. ML12177A109).	Identified and Admitted
NRC-051	NRC Email Re: August 9, 2012 Teleconference Invitation and Revised Statement of Work Transmittal (Aug. 07, 2012) (ADAMS Accession No. ML12261A375).	Identified and Admitted
NRC-052	NRC Request Re: Scope of Work with Coverage Rate, Start Date, Duration, and Cost (Aug 30, 2012) (ADAMS Accession No. ML12261A470).	Identified and Admitted
NRC-053	Letter to Tribal Historic Preservation Officer Re: Transmittal of Tribes' Proposal and Cost Estimate of the Dewey-Burdock ISR Project (Oct. 12, 2012) (ADAMS Accession No. ML12286A310).	Identified and Admitted
NRC-054	Letter to James Laysbad, Oglala Sioux Tribe, Re: Information Related to Traditional Cultural Properties; Dewey-Burdock, Crow Butte North Trend, and Crow Butte LR ISP Projects (Oct. 28, 2011) (ADAMS Accession No. ML112980555)	Identified and Admitted
NRC-055	Letter to Tribal Historic Preservation Officers Re: Request for a Proposal with Cost Estimate for Dewey Burdock Project (Sep. 18, 2012) (ADAMS Accession No. ML12264A594).	Identified and Admitted
NRC-056	H. Yilma Email Re: Draft PA for Dewey-Burdock Project (Nov. 22, 2013) (ADAMS Accession No. ML13329A420).	Identified and Admitted
NRC-057	Dewey-Burdock Project Draft Programmatic Agreement (Nov. 22, 2013) (ADAMS Accession No. ML ML13329A466).	Identified and Admitted
NRC-058	Draft Appendix A for Dewey-Burdock Project PA (Nov. 22, 2013) (ADAMS Accession No. ML13329A468).	Identified and Admitted
NRC-059	Table 1.0 - NRC NRHP Determinations for Dewey-Burdock Draft PA (Nov. 22, 2013) (ADAMS Accession No. ML13329A470).	Identified and Admitted
NRC-060	STB Finance Docket No. 33407, Dakota, Minnesota & Eastern Railroad Corporation Construction into the Powder River Basin: Request for Review and Comment on 21 Archaeological Sites, Surface Transportation Board....	Identified and Admitted



Atomic Safety and Licensing Board Panel
In the Matter of:
Powertech (USA) Inc., (Dewey-Burdock In Situ Uranium Recovery Facility)

Docket No. 40-9075-MLA

ASLBP No. 10-898-02-MLA-BD01

NRC Staff's Exhibits

Exhibit Number	Exhibit Title (as reflected in ADAMS)	Exhibit Status
NRC-061	Letter to Oglala Sioux Tribe Re: Transmittal of TCP Survey Report for Dewey-Burdock Project (Dec. 23, 2013) (ADAMS Accession No. ML13357A234).	Identified and Admitted
NRC-062	NRC Overall Determinations of Eligibility and Assessments of Effects (Dec. 16, 2013) (ADAMS Accession No. ML13343A155).	Identified and Admitted
NRC-063	Draft NRC NRHP Determinations - Table 1.0 for Draft PA (Dec. 13, 2013) (ADAMS Accession No. ML13354B948).	Identified and Admitted
NRC-064	Letter from John Yellow Bird Steele, President of the Oglala Sioux Tribe Re: Refusal to Accept Dewey-Burdock In Situ Project Proposal (Nov. 5, 2012) (ADAMS Accession No. ML13026A005).	Identified and Admitted
NRC-065	Letter from Sisseton Wahpeton Oyaye Tribe Re: Refusal to Accept Dewey-Burdock In Situ Recovery Project Proposal (Nov. 6, 2012) (ADAMS Accession No. ML13036A104).	Identified and Admitted
NRC-066	Letter from Standing Rock Sioux Tribe Re: Tribal Survey Using Persons Without Sioux TCP Expertise to Identify Sioux TCP (Nov. 5, 2012) (ADAMS Accession No. ML13036A110).	Identified and Admitted
NRC-067	Email from Standing Rock Sioux Tribe Providing Comments on Final Draft PA Dewey-Burdock SRST-THPO (Feb. 20, 2014) (ADAMS Accession No. ML14059A199).	Identified and Admitted
NRC-068	Email Re: Transmittal of a Follow-up Email Pertaining to an Upcoming Field Survey for the Dewey-Burdock Project (Feb. 08, 2013) (ADAMS Accession No. ML13039A336).	Identified and Admitted
NRC-069	Letter to Oglala Sioux Tribe Re: Notification of Intention to Separate the NHPA Section 106 Process from NEPA Review for Dewey-Burdock ISR Project (Nov. 6, 2013) (ADAMS Accession No. ML13308B524).	Identified and Admitted
NRC-070	Letter to J. Fowler, ACHP, Re: Notification of Intention to Separate the NHPA Section 106 Process from NEPA Review for Dewey-Burdock IS Project (Nov. 13, 2013) (ADAMS Accession No. ML13311B184).	Identified and Admitted
NRC-071	Letter from Department of State Re: Keystone XL Pipeline Project Traditional Cultural Property (TCP) Studies (Aug. 4, 2009).	Identified and Admitted



Atomic Safety and Licensing Board Panel
In the Matter of:
Powertech (USA) Inc., (Dewey-Burdock In Situ Uranium Recovery Facility)

Docket No. 40-9075-MLA

ASLBP No. 10-898-02-MLA-BD01

NRC Staff's Exhibits

Exhibit Number	Exhibit Title (as reflected in ADAMS)	Exhibit Status
NRC-072	A Level III Cultural Resources Evaluation of Powertech (USA) Incorporated's Proposed Dewey-Burdock Uranium Project Locality within the Southern Black Hills, Custer and Fall River Counties, South Dakota, Vol. I, (Page 1.2 through Page 4.18)....	Identified and Admitted
NRC-073	A Level III Cultural Resources Evaluation of Powertech (USA) Incorporated's Proposed Dewey-Burdock Uranium Project Locality within the Southern Black Hills, Custer and Fall River Counties, South Dakota (Pages 5.53 through 5.106)....	Identified and Admitted
NRC-074	NRC (1980). Regulatory Guide 4.14, Radiological Effluent and Environmental Monitoring at Uranium Mills. ADAMS Accession No. ML003739941.	Identified and Admitted
NRC-075	NRC, 2009. Staff Assessment of Ground Water Impacts from Previously Licensed In-Situ Uranium Recovery Facilities, Memorandum from C. Miller to Chairman Jaczko , et al. Washington DC: USNRC, July 10, 2009d ADAMS Accession No. ML091770385.	Identified and Admitted
NRC-076	NUREG/CR-6705, Historical Case Analysis of Uranium Plume Attenuation.. (Feb. 28, 2001) (ADAMS Accession No. ML010460162).	Identified and Admitted
NRC-077	05/28/2010 NRC Staff Request for Additional Information for Proposed Dewey-Burdock In Situ Recovery Facility (ADAMS Accession No. ML101460286).	Identified and Admitted
NRC-078	09/13/2012 NRC Staff RAI: Summary of August 30, 2012 Public Meeting with Powertech Inc, to Discuss Powertech's Proposed Environmental Monitoring Program related to the proposed Dewey-Burdock Project. (ADAMS Accession No. ML12255A258).	Identified and Admitted
NRC-079	09/09/2013 NRC Staff RAI: Email Concerning Review of Powertech's Additional Statistical Analysis of Radium-226 Soil Sampling Data and Gamma Measurements and Request for Information. ADAMS (Accession No.	Identified and Admitted
NRC-080	12/09/2013 NRC Staff RAI: NRC Staff review of revised statistical analysis of the Radium 226 (soil) and gamma radiation correlation for screening surveys at the proposed Dewey-Burdock Project requesting additional information....	Identified and Admitted



Atomic Safety and Licensing Board Panel
In the Matter of:
Powertech (USA) Inc., (Dewey-Burdock In Situ Uranium Recovery Facility)

Docket No. 40-9075-MLA

ASLBP No. 10-898-02-MLA-BD01

NRC Staff's Exhibits

Exhibit Number	Exhibit Title (as reflected in ADAMS)	Exhibit Status
NRC-081	Gott, G.B., D.E. Wolcott, and C.G. Bowles. Stratigraphy of the Inyan Kara Group and Localization of Uranium Deposits, Southern Black Hills, South Dakota and Wyoming. ML120310042. U.S. Geological Survey Water Resources Investigation Report....	Identified and Admitted
NRC-082	Driscoll, D.G., J.M. Carter, J.E. Williamson, and L.D. Putnam. Hydrology of the Black Hills Area, South Dakota. U.S. Geological Survey Water Resources Investigation Report 02-4094. (ADAMS Accession No. ML12240A218). 2002.	Identified and Admitted
NRC-083	Braddock, W.A. Geology of the Jewel Cave SW Quadrangle Custer County, South Dakota. U.S. Geological Survey Bulletin 1063-G. (08 April 2013)....	Identified and Admitted
NRC-084-A	Butz, T.R., N.E. Dean, C.S. Bard, R.N. Helgerson, J.G. Grimes, and P.M. Pritz. Hydrogeochemical and Stream Sediment Detailed Geochemical Survey for Edgemont, South Dakota, Wyoming. National Uranium Resource Evaluation (NURE) Program....	Identified and Admitted
NRC-084-B	Butz, T.R., N.E. Dean, C.S. Bard, R.N. Helgerson, J.G. Grimes, and P.M. Pritz. Hydrogeochemical and Stream Sediment Detailed Geochemical Survey for Edgemont, South Dakota, Wyoming. National Uranium Resource Evaluation (NURE) Program,....	Identified and Admitted
NRC-084-C	Butz, T.R., N.E. Dean, C.S. Bard, R.N. Helgerson, J.G. Grimes, and P.M. Pritz. Hydrogeochemical and Stream Sediment Detailed Geochemical Survey for Edgemont, South Dakota, Wyoming. National Uranium....	Identified and Admitted
NRC-084-D	Butz, T.R., N.E. Dean, C.S. Bard, R.N. Helgerson, J.G. Grimes, and P.M. Pritz. Hydrogeochemical and Stream Sediment Detailed Geochemical Survey for Edgemont, South Dakota, Wyoming. National Uranium Resource Evaluation (NURE) Program....	Identified and Admitted
NRC-084-E	Butz, T.R., N.E. Dean, C.S. Bard, R.N. Helgerson, J.G. Grimes, and P.M. Pritz. Hydrogeochemical and Stream Sediment Detailed Geochemical Survey for Edgemont, South Dakota, Wyoming. National Uranium Resource Evaluation (NURE) Program....	Identified and Admitted
NRC-084-F	Butz, T.R., N.E. Dean, C.S. Bard, R.N. Helgerson, J.G. Grimes, and P.M. Pritz. Hydrogeochemical and Stream Sediment Detailed Geochemical Survey for Edgemont, South Dakota, Wyoming. National Uranium	Identified and Admitted



Atomic Safety and Licensing Board Panel
In the Matter of:
Powertech (USA) Inc., (Dewey-Burdock In Situ Uranium Recovery Facility)

Docket No. 40-9075-MLA

ASLBP No. 10-898-02-MLA-BD01

NRC Staff's Exhibits

Exhibit Number	Exhibit Title (as reflected in ADAMS)	Exhibit Status
NRC-085	Darton, N.H. Geology and Water Resources of the Northern Portion of the Black Hills and Adjoining Regions of South Dakota and Wyoming. U.S. Geological Survey Professional Paper 65. 1909....	Identified and Admitted
NRC-086	Epstein, J.B. "Hydrology, Hazards, and Geomorphic Development of Gypsum Karst in the Northern Black Hills, South Dakota and Wyoming." U.S. Geological Survey Water-Resource Investigation Report 01-4011....	Identified and Admitted
NRC-087	NUREG-1910, Final Report, Supplement 1, Environmental Impact Statement for the Moore Ranch ISR Project in Campbell County, Wyoming, Supplement to the Generic Environmental Impact Statement for In-Situ Leach Uranium Milling Facilities....	Identified and Admitted
NRC-088	NUREG-1910, Final Report, Supplement 1, Environmental Impact Statement for the Moore Ranch ISR Project in Campbell County, Wyoming, Supplement to the Generic Environmental Impact Statement for In-Situ Leach Uranium Milling Facilities....	Identified and Admitted
NRC-089	NUREG-1910, Final Report, Supplement 3, Environmental Impact Statement for the Lost Creek ISR Project in Sweetwater County, Wyoming. Supplement to the Generic Environmental Impact Statement for In-Situ Leach Uranium Milling Facilities....	Identified and Admitted
NRC-090	SDDENR. "Report to the Chief Engineer on Water Permit Application No. 2686-2, Powertech (USA) Inc., November 2, 2012." November 2012a. ADAMS Accession No. ML13165A168.	Identified and Admitted
NRC-091	NRC. "Staff Assessment of Groundwater Impacts from Previously Licensed In-Situ Uranium Recovery Facilities." Memorandum to Chairman Jaczko, Commissioner Klein, and Commissioner Svinicki, NRC from C. Miller....	Identified and Admitted
NRC-092		NOT FILED
NRC-093	EPA comments on FSEIS; (ADAMS Accession No. ML14070A230).	Identified and Admitted
NRC-094	NRC Regulatory Guide 3.11, Rev. 3, Design, Construction, and Inspection of Embankment Retention Systems at Uranium Recovery Facilities, November 2008, (ADAMS Accession No. ML082380144).	Identified and Admitted



Atomic Safety and Licensing Board Panel
In the Matter of:
Powertech (USA) Inc., (Dewey-Burdock In Situ Uranium Recovery Facility)

Docket No. 40-9075-MLA

ASLBP No. 10-898-02-MLA-BD01

NRC Staff's Exhibits

Exhibit Number	Exhibit Title (as reflected in ADAMS)	Exhibit Status
NRC-095	Letter to P. Strobel Re: EPAs Response Comment to FSEIS (Mar. 25, 2014) (ADAMS Accession No. ML14078A044).	Identified and Admitted
NRC-096	Comment (14) of Robert F. Stewart on Behalf of the Dept. of the Interior, Office of Environmental Policy and Compliance on Draft Supplemental Environmental Impact Statement (DSEIS), Dewey-Burdock Project.....	Identified and Admitted
NRC-097	Request for Information Regarding Endangered or Threatened Species and Critical Habitat for the Powertech Inc. Proposed Dewey-Burdock In-Situ Recovery Facility Near Edgemont South Dakota (Mar. 15, 2010) (ADAMS Accession No. ML100331503).	Not Offered
NRC-098	FWS. Whooping Cranes and Wind Development - An Issue Paper. (Apr. 2009)....	Not Offered
NRC-099	Avian Power Line Interaction Committee. "Suggested Practices for Avian Protection on Power Lines: The State of the Art in 2006" (ADAMS Accession No. ML12243A391).	Not Offered
NRC-100	Informal Information Gathering Meetings Trip Summary (Dec. 9, 2010) (ADAMS Accession No. ML093631627).	Not Offered
NRC-101	Email from Mitchell Iverson of BLM. (June 25, 2012) & Wildlife Stipulations in the Current 1986 South Dakota Resource Management Plan. (ADAMS Accession No. ML12249A030).	Not Offered
NRC-102	USGS. "Fragile Legacy, Endangered, Threatened, and Rare Animals of South Dakota, Black-footed Ferret (Mustela nigripes)." (2006), available at http://www.npwrc.usgs.gov/resource/wildlife/sdrare/species/mustnigr.htm.	Not Offered
NRC-103	FWS. "Species Profile, Whooping Crane (Grus Americana)"	Not Offered
NRC-104	BLM. "Draft Environmental Impact Statement, Dewey Conveyor Project." DOI-BLM-MT-040-2009-002-EIS. (Jan. 2009b) (ADAMS Accession No. ML12209A089).	Not Offered
NRC-105	BLM. "Final Statewide Programmatic Biological Assessment: Black-Footed Ferret (Mustela nigripes)." August, 2005. Cheyenne, Wyoming: U.S. Bureau of Land Management, Wyoming State Office.	Not Offered



Atomic Safety and Licensing Board Panel
In the Matter of:
Powertech (USA) Inc., (Dewey-Burdock In Situ Uranium Recovery Facility)

Docket No. 40-9075-MLA

ASLBP No. 10-898-02-MLA-BD01

NRC Staff's Exhibits

Exhibit Number	Exhibit Title (as reflected in ADAMS)	Exhibit Status
NRC-106	FWS. "South Dakota Field Office, Black Footed Ferret," (Sep. 9, 2013), available at http://www.fws.gov/southdakotafieldoffice/bfferret.htm.	Not Offered
NRC-107	FWS. "Black Footed Ferret Draft Recovery Plan." Second Revision, (Feb. 2013), available at....	Not Offered
NRC-108	South Dakota State University. "South Dakota GAP Analysis Project." Brookings, South Dakota: South Dakota State University, Department of Wildlife and Fisheries Sciences (Jan. 13, 2012), available at http://www.sdstate.edu/nrm/gap/index.cfm.	Not Offered
NRC-109	South Dakota State University. "Suitable Habitat Predicted for the Black Footed Ferret in South Dakota." available at http://www.sdstate.edu/nrm/gap/mammals/upload/blfootferret-model.pdf.	Not Offered
NRC-110		NOT FILED
NRC-111	Dewey-Burdock Record of Decision (Apr. 8, 2014) (ADAMS Accession No. ML14066A466).	Not Offered
NRC-112	Travsky, A., Beauvais, G.P. "Species Assessment for the Whooping Crane (Grus Americana) in Wyoming." October 2004. Cheyenne, Wyoming: United States Department of the Interior, Bureau of Land Management,....	Not Offered
NRC-113	Endangered and Threatened Wildlife and Plants; 12-Month Findings for Petitions to List the Greater Sage-Grouse (Centrocercus urophasianus) as Threatened or Endangered. 75 Fed. Reg. 13,909-13,959....	Not Offered
NRC-114	Habitat Assessment and Conservation Strategy for Sage Grouse and Other Selected Species on Buffalo Gap National Grassland, U.S. Department of Agriculture, Forest Service (Sep. 2005) (ADAMS Accession No.	Not Offered
NRC-115	Email with Attachments from Mitchell Iverson, BLM, RE: Meeting at 11:30 EST (June 25, 2012) (ADAMS Accession No. ML12250A802).	Not Offered
NRC-116	Attachment 1, Appendix C, South Dakota Field Office Mitigation Guidelines (June 25, 2012) (ADAMS Accession No. ML12250A827).	Not Offered
NRC-117	Appendix D South Dakota Field Office Reclamation Guidelines.	Not Offered



Atomic Safety and Licensing Board Panel
In the Matter of:
Powertech (USA) Inc., (Dewey-Burdock In Situ Uranium Recovery Facility)

Docket No. 40-9075-MLA

ASLBP No. 10-898-02-MLA-BD01

NRC Staff's Exhibits

Exhibit Number	Exhibit Title (as reflected in ADAMS)	Exhibit Status
NRC 118	BLM Email Subject "Appendix E Wildlife Stipulations" and attachments. From M. Iverson, BLM, Acting Field Manager, South Dakota Field Office, to A. Hester, CNWRA, Southwest Research Institute. (June 25, 2012.)	Not Offered
NRC 119	BLM Email Subject "Wildlife and Special Status Stipulations in the 1896 South Dakota Resource Management Plan" and attachment. From M. Iverson, BLM, Acting Field Manager, South Dakota Field Office, to H. Yilma, Project Manager.	Not Offered
NRC 120	Peterson, R.A. "The South Dakota Breeding Bird Atlas." Jamestown, North Dakota: Northern Prairie Wildlife Research Center. 1995. http://www.npwrc.usgs.gov/resource/birds/sdatlas/index.htm	Not Offered
NRC 121	BLM "Newcastle Resource Management Plan." (2000) (ADAMS Accession No. ML12209A101).	Not Offered
NRC 122	Sage Grouse Working Group (Northeast Wyoming Sage Grouse Working Group). "Northeast Wyoming Sage Grouse Conservation Plan." (2006) (ADAMS Accession No. ML12240A374).	Not Offered
NRC 123	SDGFP. "Sage Grouse Population Dynamics." (Nov. 20, 2009), available at http://gfp.sd.gov/hunting/small-game/sage-grouse-population-dynamics.aspx	Not Offered
NRC 124		NOT FILED
NRC 125	U.S. Fish and Wildlife Service Press Release and Draft Report to Help Sage Grouse Conservation Objectives (August 23, 2012) (ADAMS Accession No. ML12276A248).	Not Offered
NRC 126	U.S. Fish and Wildlife Service. "Greater sage grouse (Centrocercus urophasianus) Conservation Objectives: Final Report" (Feb. 2013), available at http://www.fws.gov/mountain-prairie/ea/03252013_COT_Report.pdf	Not Offered
NRC 127	Department of Environment And Natural Resources Recommendation Powertech (USA) Inc. Large Scale Mine Permit Application. (April 15, 2013), available at http://denr.sd.gov/des/mm/documents/Powertech1/DENRRec4-15-13.pdf.	Not Offered



Atomic Safety and Licensing Board Panel
In the Matter of:
Powertech (USA) Inc., (Dewey-Burdock In Situ Uranium Recovery Facility)

Docket No. 40-9075-MLA

ASLBP No. 10-898-02-MLA-BD01

NRC Staff's Exhibits

Exhibit Number	Exhibit Title (as reflected in ADAMS)	Exhibit Status
NRC-128	SDGFP. "Colony Acreage and Distribution of the Black-Tailed Prairie Dog in South Dakota, 2008" (Aug. 2008), available at http://gfp.sd.gov/wildlife/docs/prairedog-distribution-report.pdf	Not Offered
NRC-129	S. Larson, FWS letter re Environmental Comments on Powertech Dewey-Burdock Project, Custer and Fall River County, South Dakota. (Mar. 29, 2010) (ADAMS Accession No. ML1009705560).	Not Offered
NRC-130	E-mail from Terry Quesinberry, Fish and Wildlife Biologist, U.S. Fish and Wildlife Service, to Amy Hester, Research Scientist, Center for Nuclear Waste Regulatory Analyses, Southwest Research Institute.....	Not Offered
NRC-131	E-mail from Terry Quesinberry, Fish and Wildlife Biologist, U.S. Fish and Wildlife Service, to Haimanot Yilma, Environmental Project Manager for Dewey-Burdock, Office of Federal and State Materials and Environmental.....	Not Offered
NRC-132	Improving the Process for Preparing Efficient and Timely Environmental Reviews under NEPA.	Identified and Admitted
NRC-133		NOT FILED
NRC-134	Safety Evaluation Report for the Dewey-Burdock Project Fall River and Custer Counties, South Dakota. Materials License No. SUA-1600 (April 2014) ADAMS Accession No. ML14043A347.	Identified and Admitted
NRC-135	Safety Evaluation Report for the Dewey-Burdock Project Fall River and Custer Counties, South Dakota, Materials License No. SUA-1600, Docket No. 40-9075 (March 2013), ADAMS Accession No. ML13052A182.	Identified and Admitted
NRC-136-A	A - Palmer, L. and J.M. Kruse. "Evaluative Testing of 20 Sites in the Powertech (USA) Inc. Dewey-Burdock Uranium Project Impact Areas." Black Hills Archaeological Region. Volumes I and II. Archaeological Contract Series No. 251....	Identified and Admitted
NRC-136-B	Palmer, L. and J.M. Kruse Evaluative Testing of 20 Sites in the Powertech (USA) Inc. Dewey-Burdock Uranium Project Impact Areas Black Hills Archaeological Region Volumes I and II....	Identified and Admitted
NRC-136-C	Palmer, L. and J.M. Kruse. "Evaluative Testing of 20 Sites in the Powertech (USA) Inc. Dewey-Burdock Uranium Project Impact Areas." Black Hills Archaeological Region. Volumes I and II. Archaeological	Identified and Admitted



Atomic Safety and Licensing Board Panel
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ASLBP No. 10-898-02-MLA-BD01

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NRC-137	Department of Environment and Natural Resources, Recommendation, Powertech (USA) Inc, Large Scale Mine Permit Application at 6 (April 15, 2013), available at http://denr.sd.gov/des/mm/documents/Powertech1/DENRRec4-15-13.pdf .	Identified and Admitted
NRC-138	Jack R. Keene (1973). Ground-Water Resources of the Western Half of Fall River County, South Dakota. South Dakota Department of Natural Resource Development, Geological Survey, Report of Investigations, No. 109, 90 pg....	Identified and Admitted
NRC-139	U.S. Geological Survey, 2006, Quaternary fault and fold database for the United States, accessed June 20, 2014, from USGS web site: http://earthquakes.usgs.gov/regional/qfaults/ .	Identified and Admitted
NRC-140		NOT FILED
NRC-141-A	Dewey-Burdock Project Supplement to Application for NRC Uranium Recovery License Dated February 2009, Prepared by Powertech (USA) Inc. Greenwood Village, Colorado, CO. (Aug 31, 2009) (ADAMS Accession No. ML092870155). Pages 1-42	Identified and Admitted
NRC-141-B	Dewey-Burdock Project Supplement to Application for NRC Uranium Recovery License Dated February 2009, Prepared by Powertech (USA) Inc. Greenwood Village, Colorado, CO. (Aug 31, 2009) (ADAMS Accession	Identified and Admitted
NRC-141-C	Dewey-Burdock Project Supplement to Application for NRC Uranium Recovery License Dated February 2009, Prepared by Powertech (USA) Inc. Greenwood Village, Colorado, CO. (Aug 31, 2009) (ADAMS Accession No. ML092870155). Pages 124-132	Identified and Admitted
NRC-141-D	Dewey-Burdock Project Supplement to Application for NRC Uranium Recovery License Dated February 2009, Prepared by Powertech (USA) Inc. Greenwood Village, Colorado, CO. (Aug 31, 2009) (ADAMS Accession No. ML092870155). Pages 133-143	Identified and Admitted
NRC-141-E	Dewey-Burdock Project Supplement to Application for NRC Uranium Recovery License Dated February 2009, Prepared by Powertech (USA) Inc. Greenwood Village, Colorado, CO. (Aug 31, 2009) (ADAMS Accession No. ML092870155).	Identified and Admitted



Atomic Safety and Licensing Board Panel
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Docket No. 40-9075-MLA

ASLBP No. 10-898-02-MLA-BD01

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Exhibit Number	Exhibit Title (as reflected in ADAMS)	Exhibit Status
NRC-142	Submittal of Comments on Draft Programmatic Agreement for the Proposed Dewey-Burdock ISR Uranium Mining Project. (Mar. 17, 2014) (ADAMS Accession No. ML14077A002. Pages 5-1	Identified and Admitted
NRC-143	Letter to Oglala Sioux Tribe re: Invitation for Government-to-Government Meeting Concerning Licensing Actions for Proposed Uranium Recovery Projects. (Mar. 12, 2013) (ADAMS Accession No. ML13071A653).	Identified and Admitted
NRC-144	SRI (SRI Foundation). "Overview of Places of Traditional and Cultural Significance, Cameco/Powertech Project Areas." Rio Rancho, New Mexico: SRI Foundation. (June 8, 2012) (ADAMS Accession No. ML12262A113).	Identified and Admitted
NRC-145-A	Guidelines for Evaluation and Documenting Traditional Cultural Properties. National Register Bulletin, U.S. Department of the Interior. National Park Service. (ADAMS Accession No. ML12240A371). Pages 1-14	Identified and Admitted
NRC-145-B	Guidelines for Evaluation and Documenting Traditional Cultural Properties. National Register Bulletin, U.S. Department of the Interior. National Park Service. (ADAMS Accession No. ML12240A371). Pages 15-18	Identified and Admitted
NRC-146	2013/03/13 Powertech Dewey-Burdock LA - RE: field survey in the spring of 2013. (Mar. 13, 2013) (ADAMS Accession No. ML13078A388).	Identified and Admitted
NRC-147	2013/03/13 Powertech Dewey-Burdock LA - RE: field survey for Dewey-Burdock. (Mar. 13, 2013) (ADAMS Accession No. ML13078A384).	Identified and Admitted
NRC-148	Letter from Oglala Sioux Tribe in response to February 8, 2013 letter to Tribal Historic Preservation Officer March 23, 2013 (ADAMS Accession No. ML13141A362).	Identified and Admitted
NRC-149	2013/08/30 Powertech Dewey-Burdock LA - Request for Availability to discuss development of a PA for the Dewey Burdock Project. (Aug. 30, 2013) (ADAMS Accession No. ML13267A221).	Identified and Admitted
NRC-150	2013/11/14 Powertech Dewey-Burdock LA - Reminder: Teleconference to discuss the development of the PA for the Dewey Burdock project is scheduled for Friday. (Nov. 15, 2013. (ADAMS Accession No. ML13322B658).	Identified and Admitted
NRC-151	NRC Staff Rebuttal Testimony.	Identified and Admitted
NRC-152	Statement of Professional Qualifications of Hope E. Luhman.	Identified and Admitted



Atomic Safety and Licensing Board Panel
In the Matter of:
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Docket No. 40-9075-MLA

ASLBP No. 10-898-02-MLA-BD01

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Exhibit Number	Exhibit Title (as reflected in ADAMS)	Exhibit Status
NRC-153	Excerpt from Parker, P. and T. King. Guidelines for Evaluating and Documenting Traditional Cultural Properties, National Register of Historic Places Bulletin 38. (1990) (ADAMS Accession No. ML12240A371).	Identified and Admitted
NRC-154	Excerpt from Bates, R. and J. Jackson. Dictionary of Geological Terms 3rd Edition. (1984).	Identified and Admitted
NRC-155	Letter from South Dakota Historical Society re: Dewey-Burdock Project, (Jan. 2014).	Identified and Admitted
NRC-156	Johnson, R. H. "Reactive Transport Modeling for the Proposed Dewey-Burdock Uranium In-Situ Recovery Mine, Edgemont, South Dakota, USA." International Mine Water Association, Mine Water-Managing the Challenges. 2011.	Identified and Admitted



Atomic Safety and Licensing Board Panel
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Docket No. 40-9075-MLA

ASLBP No. 10-898-02-MLA-BD01

Oglala Sioux Tribe's Exhibits		
Exhibit Number	Exhibit Title (as reflected in ADAMS)	Exhibit Status
OST-001	Opening Written Testimony of Dr. Robert E. Moran.	Identified and Admitted
OST-002	U.S. EPA, 2007, TENORM Uranium Occupational and Public Risks Associated with In- Situ Leaching; Append. III, PG 1-11.	Identified and Admitted
OST-003	US EPA, 2008, Technical Report on Technologically Enhanced Naturally Occurring Radioactive Materials from Uranium Mining, Volume 1: Mining and Reclamation Background: Previously published on-line and printed as Vol. 1 of EPA 402-R-05-007....	Identified and Admitted
OST-004	U.S. EPA, 2011 (June), CONSIDERATIONS RELATED TO POST-CLOSURE MONITORING OF URANIUM IN-SITU LEACH/IN-SITU RECOVERY (ISL/ISR) SITES, Draft Technical Report; [Includes Attachment A: Development of the Groundwater Baseline for Burdock ISL Site....	Identified and Admitted
OST-005	Powerpoint presentation prepared by Dr. Robert E. Moran.	Identified and Admitted
OST-006	Boggs, Jenkins, ?Analysis of Aquifer Tests Conducted at the Proposed Burdock Uranium Mine Site, Burdock, South Dakota,? Tennessee Valley Authority, Report No. WR28-1-520-109, May 1980.	Identified and Admitted
OST-007	Boggs, Hydrogeologic Investigations at Proposed Uranium Mine Near Dewey, South Dakota (1983).	Identified and Admitted
OST-008	Keene, Ground-water Resources of the Western Half of Fall River County, S.D., Dept. of Natural Resource Development Geological Survey, Univ. S.D., Report of Investigations No. 109 (1973).	Identified and Admitted
OST-009	TVA, Draft Environmental Statement, Edgemont Uranium Mine.	Identified and Admitted
OST-010	OST Petition to Intervene, with Exhibits.	Identified and Admitted
OST-011	OST Statement of Contentions on DSEIS, with Exhibits.	Identified and Admitted
OST-012	OST Statement of Contentions on FSEIS, with Exhibits.	Identified and Admitted
OST-013	OST Statement of Undisputed Facts submitted with OST Motion for Summary Disposition.	Identified and Admitted
OST-014	Declaration of Michael CatchesEnemy.	Identified and Admitted
OST-015	Declaration of Wilmer Mesteth.	Identified and Admitted



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ASLBP No. 10-898-02-MLA-BD01

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OST-016	February 20, 2013 letter from Standing Rock Sioux to NRC Staff.	Identified and Admitted
OST-017	March 22, 2013 letter from Oglala Sioux Tribe to NRC Staff.	Identified and Admitted
OST-018	Rebuttal Testimony of Dr. Robert E. Moran.	Identified and Admitted
OST-019	Powertech Press Release.	Identified and Admitted
OST-020	E-Mail from Chris Pugsley, Powertech, re NRC Proceeding.	Identified and Admitted
OST-021	Powertech Quarterly Management Discussion and Analysis.	Identified and Admitted