

From: [Monteith, Emily](#)
To: [Travis Stills](#); [Paul Nickens](#); ostnrranrd@gwtc.net; rst.thpo@rst-nsn.gov; brhodd1@yahoo.com
Cc: [Diaz Toro, Diana](#); [Jamerson, Kellee](#); [Baer, Lorraine](#); [Abe Zeitoun](#); wmap@igc.org; [Richard Stoffle](#); [Cylkowski, David](#); [Roman-Cuevas, Cinthya](#); [Jeff Parsons](#); [Reuben Weston](#); [Lance Rom](#)
Subject: RE: Re: Summaries of Previous Work at Dewey-Burdock
Date: Monday, June 11, 2018 10:01:43 AM

Hi Travis,

I feel I need to clarify that the opportunity for a field survey the NRC staff is trying to provide the Oglala Sioux Tribe isn't "joint research," like a university project may be, or the NRC staff engaging the Oglala Sioux Tribe in a contractual sense for services, but rather a chance for the Oglala Sioux Tribe and other invited Tribes to comment under NEPA on how the proposed action will affect the Tribes' cultural resources. While the survey effort will hopefully provide information that should be useful to both the agency and the Tribes, the agency and the Tribes are not parties in joint research in a contractual or university research-project sense. The NRC staff must abide by governing federal law, such as I described in my previous email, and an agreement cannot elude or supersede those responsibilities. However, in conformance with governing federal law and its regulations, the NRC staff must protect sensitive cultural information associated with the tribal field surveys, and would work with the Tribes to do so.

Since it appears that we're working from a different understanding of the nature of this endeavor, I suggest that you and Jeff give me a call this morning so we can resolve this concern. I am free after 12pm ET and my contact information is below. In the meantime, I also suggest that the Oglala Sioux Tribe consider whether it could take part in the field survey effort and first determine whether it has any information it may like to provide the NRC staff that may be sensitive in nature. If so, we can then work together from a specific understanding of the nature of the sensitive information to determine how best to protect it.

Emily

Emily Monteith
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From: Travis Stills [mailto:stills@frontier.net]
Sent: Friday, June 08, 2018 7:50 PM
To: Monteith, Emily <Emily.Monteith@nrc.gov>; Paul Nickens <pnickens@scainc.com>; ostnrranrd@gwtc.net; rst.thpo@rst-nsn.gov; brhodd1@yahoo.com
Cc: Diaz Toro, Diana <Diana.Diaz-Toro@nrc.gov>; Jamerson, Kellee <Kellee.Jamerson@nrc.gov>; Baer, Lorraine <Lorraine.Baer@nrc.gov>; Abe Zeitoun <zeitoun@scainc.com>; wmap@igc.org; Richard Stoffle <rstoffle@email.arizona.edu>; Cylkowski, David <David.Cylkowski@nrc.gov>; Roman-Cuevas, Cinthya <Cinthya.Roman-Cuevas@nrc.gov>; Jeff Parsons <wmap@igc.org>; Reuben Weston <rweston@qualityservices.us.com>; Lance Rom <lrom@qualityservices.us.com>

Subject: [External_Sender] Re: Summaries of Previous Work at Dewey-Burdock

Emily,

Your late Friday afternoon email does not address the important nuances of context and cultural information that come with cultural resources surveys. As discussed Monday and Tuesday, data gathering during the field surveys will necessarily involve confidential individual and Tribal information, which is consistent with excluding that information from the reports the Tribes will create later in the process and the public documents NRC will create for the NEPA process. There was simply no problem to identify until we saw NRC's skeletal survey methodology proposal, which was basically another open site survey.

There is no basis for NRC to suggest these serious concerns, and provisions of federal and Tribes' laws, could somehow be waived. When reading the NRC letters, it was assumed that NRC's survey methodologies, forms, and protocols would include adequate protections during the gathering of cultural resource information during the surveys. These types of provisions are well-established and followed by federal agencies and universities that regularly engage this type of work. The University of Arizona provided me with their protocols (attached), which include a key provision that informs any such survey:

c. Universities and tribes will collaborate in the design of research in which they jointly choose to participate. Each party to the joint research will consult with all other parties regarding confidentiality, ownership of data and results, use of land or other resources, ownership and disposition of any biological materials collected in the course of research, proposed changes in the research, and proposed publications or presentations relating to the research. Each party will strive to communicate in a manner that is reasonably understandable by all parties.

Now that this omission has been identified, and a plan set out to address these matters next week, I anticipate that our proposed agreements will better inform NRC of the serious concerns over confidentiality and ownership issues integral to an effective cultural resources survey.

Travis

On 6/8/2018 4:50 PM, Monteith, Emily wrote:

Hi Travis,

Regarding your question about the laws applicable to the NRC, Section 304 of the National Historic Preservation Act of 1966, as amended through 2006 [16 U.S.C. 470w-3(a)] concerns the confidentiality of the location of sensitive historic resources:

(a) The head of a Federal agency or other public official receiving grant assistance pursuant to this Act, after consultation with the Secretary, shall withhold from disclosure to the public, information about the location, character, or ownership of a historic resource if the Secretary

and the agency determine that disclosure may (1) cause a significant invasion of privacy; (2) risk harm to the historic resources; or (3) impede the use of a traditional religious site by practitioners.

The ACHP's regulations, specifically 36 CFR 800.6(a)(5) and 800.11, also apply to the confidentiality of sensitive information provided by Tribes to a federal agency, including the NRC. These responsibilities are not unique to the NRC among federal agencies.

In addition, the release of records pertaining to the location of archaeological sites is restricted under South Dakota Codified Laws (SDCL), specifically, SDCL § 1-20-21.2, Confidentiality of records pertaining to location of archaeological site—Exceptions, which states, "Any records maintained pursuant to § 1-20-21 pertaining to the location of an archaeological site shall remain confidential to protect the integrity of the archaeological site." This provision would guard against the disclosure of certain cultural resources information by entities other than the NRC.

Consistent with its responsibilities, the Staff treats as confidential, appropriately marks, and (unless required by law or court order) withholds from release to the public any information provided by the Tribes to the NRC that may risk harm to a historic site or property. In the case of laws such as FOIA, the NRC staff would work to establish whether a FOIA exemption applies to information sought, and if applicable, would follow the process prescribed under Section 304 of the NHPA and its implementing regulations to ensure that sensitive information is appropriately withheld.

I am not sure how to respond to your concerns over ownership of information – information provided to a government agency by a Tribe is in the possession of that agency and subject to the aforementioned laws and regulations. The NRC, as any federal agency, would seek to use the information the Tribe is willing to share with the NRC staff to inform its decisionmaking process under NEPA. If additional protections (e.g., copyright protections) apply to any information the Tribe submits, the NRC would, of course, recognize those protections.

I would also note that in the NRC staff's December 6, 2017 and March 16, 2018 letters to the Oglala Sioux Tribe and other invited Tribes describing the NRC staff's selected approach, the Staff provided the following assurances regarding the confidentiality of information sensitive to the Tribes:

Site descriptions in the report need not include interpretive information that the Tribes may consider confidential. Information concerning the location of any identified sites of historic, cultural, or religious significance to the Tribes may be reported separately and directly to the NRC as a confidential appendix to the survey report so that this information would not be disclosed to the public.

It's unfortunate that the staff did not receive any concerns from the Oglala Sioux Tribe regarding the NRC staff's provisions for confidentiality until this week. However, I understand that you will be sending further information for our

consideration, and I look forward to a productive discussion on how to move forward on this issue.

Regards,
Emily

From: Travis Stills [<mailto:stills@frontier.net>]
Sent: Thursday, June 07, 2018 7:02 PM
To: Monteith, Emily <Emily.Monteith@nrc.gov>; Paul Nickens <pnickens@scainc.com>; ostnrranrd@gwtc.net; rst.thpo@rst-nsn.gov; brhodd1@yahoo.com
Cc: Diaz Toro, Diana <Diana.Diaz-Toro@nrc.gov>; Jamerson, Kellee <Kellee.Jamerson@nrc.gov>; Baer, Lorraine <Lorraine.Baer@nrc.gov>; Abe Zeitoun <azeitoun@scainc.com>; wmap@igc.org; Richard Stoffle <rstoffle@email.arizona.edu>; Cylkowski, David <David.Cylkowski@nrc.gov>; Roman-Cuevas, Cinthya <Cinthya.Roman-Cuevas@nrc.gov>
Subject: [External_Sender] Re: Summaries of Previous Work at Dewey-Burdock

Hi Emily,
We continue to work on these concerns and should have something over for your review tomorrow.

A generic statement of "in accordance with federal laws and regulations" is not particularly helpful. Can you provide specific laws and regulations that: 1) confirm each Tribe's ownership of all information and work product; and, 2) afford the confidentiality protections under discussion? The Tribes' concerns are similar to, but also distinctly different from, the NRC's duty to protect information regarding reactors and nuclear fuel cycle.

These matters are normally taken care of by the contractor or academic institution responsible for carrying out a study, well ahead of the survey and with prior consultation and informed consent of the participating Tribe(s). After Tuesday's call, I was quite surprised to learn that the University of Arizona disavowed any involvement in the survey, but it also helped explain why these agreements and protections are not in place.

To aid our preparation of the necessary agreements and protections, please provide the name, official title, contact information, and a short biography of the NRC personnel that plan to take conduct or participate in the cultural resources survey, whether on site or remotely.

Thank you,
Travis

On 6/7/2018 4:11 PM, Monteith, Emily wrote:

Hi Travis,

I appreciate that the Oglala Sioux Tribe is concerned with the

protection of sensitive information that may result from the Tribe's participation in the tribal field survey, and I hope that we can work to resolve the Tribe's concerns so we have a productive and fruitful field survey with the Tribe.

As I communicated previously, the NRC staff is committed to – in fact, bound to – protect all such information in accordance with federal laws and regulations. The NRC staff also defers to the Tribe as to information the Tribe wishes to share with us. Of course, our hope is to obtain information that we can assess as part of our environmental review in order to respond to the concerns about the FSEIS raised by the Oglala Sioux Tribe in this proceeding, but it is ultimately within the judgment of the Tribe as to the information they wish to share with the NRC staff. The NRC staff is dedicated to working with the Tribe to ensure that any sensitive information that the Tribe shares with the NRC is adequately protected, including on a case-by-case basis as questions or concerns arise during the course of the survey effort.

The NRC staff is not currently aware of having any agreements with Tribes relating to other cultural resources field surveys, including previous efforts with the Oglala Sioux Tribe, so I'm afraid I don't have any examples of such agreements to offer you. I also don't have a clear understanding of the Oglala Sioux Tribe's specific concerns regarding human subject research or intellectual property. At this point, since the Oglala Sioux Tribe has the clearest understanding of these concerns and how it prefers to navigate them with federal agencies in the context of tribal field surveys, I think it would be most expeditious for the Tribe to provide the NRC staff with the agreement it typically employs with federal agencies in these circumstances, or to otherwise propose the language that it believes would be necessary to ensure the confidentiality of this information beyond the protections provided by governing law.

Finally, while it remains the NRC staff's determination that sharing SUNSI information held by the NRC staff with the Tribes that is necessary to support the field survey effort does not require an amendment to the protective order in this proceeding, I continue to remain happy to work with you toward an agreement among the parties on that matter.

Best wishes,
Emily

From: Travis Stills [<mailto:stills@frontier.net>]

Sent: Thursday, June 07, 2018 12:49 PM

To: Monteith, Emily <Emily.Monteith@nrc.gov>; Paul Nickens <pnickens@scainc.com>; ostnrranrd@gwtc.net; rst.thpo@rst-nsn.gov; brhodd1@yahoo.com

Cc: Diaz Toro, Diana <Diana.Diaz-Toro@nrc.gov>; Jamerson, Kellee <Kellee.Jamerson@nrc.gov>; Baer, Lorraine <Lorraine.Baer@nrc.gov>; Abe Zeitoun <azeitoun@scainc.com>; wmap@igc.org; Richard Stoffle <rstoffle@email.arizona.edu>; Cylkowski, David <David.Cylkowski@nrc.gov>; Roman-Cuevas, Cinthya <Cinthya.Roman-Cuevas@nrc.gov>; Jeff Parsons <wmap@igc.org>

Subject: [External_Sender] Re: Summaries of Previous Work at Dewey-Burdock

Emily,

Thank you for the response, but I think you misunderstand this situation.

First, I think we do agree that the current protective order is inadequate to NRC's survey efforts, and I appreciate your suggested updates. I will review your suggestions, and get back with you. To put it in context, Powertech required updates and changes when OST contractors reviewed previously undisclosed bore hole information. Similarly, the current protective order, and the list of persons who have executed SUNSI affidavits, is inadequate to the cultural survey approaches discussed to date.

Second, the survey presents serious issues with confidentiality and protection of sensitive information about culture and religion, much of which also has human subject research and intellectual property implications. The suggested updates to SUNSI, which is designed for sensitive information about the nuclear fuel cycle, do not address the concerns of the Federally Recognized Native American Tribal Governments, members, and non-members, and the United States' special duties to protect the Tribes' interests in this situation.

If NRC has example agreements from other cultural resources field surveys, perhaps sharing examples acceptable to NRC (scrubbed of identifying/sensitive information) could help move us forward. I understand that you may be out of the office today, and will look for a response tomorrow.

Travis

On 6/7/2018 9:43 AM, Monteith, Emily wrote:

Hi Travis,

I can respond to your concerns about confidentiality related to the development and sharing of information of a sensitive nature. Per your email, you have concerns that SUNSI provisions are not in place for the field survey effort, and in the webinar you expressed concern that the NRC's contractor is not subject to the

SUNSI order in effect in this proceeding.

Regarding the latter point, you correctly observed in the webinar that the protective order states that the Staff and its contractor are not subject to the provisions of that order. However, as the order explains, the Staff's and its contractors' use of SUNSI is governed by NRC regulations and policies. NRC employees, consultants, contractors and subcontractors are responsible for protecting SUNSI according to the procedures specified in NRC Policy and Procedures for Handling, Marking, and Protecting Sensitive Unclassified Non-Safeguards Information.

Regarding the provisions for sharing and protecting SUNSI more generally, any SUNSI information the NRC may share with the tribes participating in the field survey is authorized as a sharing of information between the NRC and another governmental entity and its authorized representatives, including the Tribes' contractors. The NRC staff has determined that the Tribes have a need to know such information in order to carry out a tribal field survey. Furthermore, Powertech can independently authorize the sharing of its proprietary information with any person, for any reason. Accordingly, the NRC staff finds that it does not believe it is necessary to amend the protective order or institute a new agreement for the purposes of this effort. Nevertheless, to assuage any further concerns the Tribe may have about receiving such information, I will follow up with you shortly with proposed language that may form the basis of an amendment to the protective order in case you still wish to pursue that for the purposes of conducting the field survey.

Any information newly developed in the course of the field survey effort would be protected by the Staff and its contractor in accordance with applicable laws and regulations, including Section 304 of the NHPA. Such information does not become SUNSI until provided to the NRC by the Tribes, and the Tribes control the information they wish to provide to the agency. Consistent with its usual practices, the Staff would treat as confidential, appropriately mark, and (unless required by law or court order) withhold from release to the public – including the licensee – any information provided by the Tribes to the NRC that may risk harm to a historic site or property.

In your email, you also requested a copy of the NRC's statement of work for the SC&A contract and "any agreements addressing confidentiality/work product so we can know what tasks NRC has (and has not) authorized SC&A to carry out and any TCP protections NRC Staff has already included in SC&A's contract," for the purpose of expediting the Tribe's use of SC&A's proposed methodology to develop an alternate fieldwork approach. It is not clear to me why this information is necessary to that effort, as there is nothing in the terms of the statement of work or contract with SC&A that bears on the specifics of a fieldwork approach for the tribal field survey. As I stated above, any sensitive information received by the Staff and its contractors will be protected consistent with applicable laws and regulations.

The Staff looks forward to working with the Tribe on the upcoming field survey effort, as well as the promised input from the Tribe on the fieldwork approach.

Regards,
Emily

From: Travis Stills [<mailto:stills@frontier.net>]

Sent: Wednesday, June 06, 2018 1:29 PM

To: Paul Nickens <pnickens@scainc.com>;
ostnrranrd@gwtc.net; rst.thpo@rst-nsn.gov;
brhodd1@yahoo.com

Cc: Diaz Toro, Diana <Diana.Diaz-Toro@nrc.gov>; Jamerson, Kellee <Kellee.Jamerson@nrc.gov>; Monteith, Emily <Emily.Monteith@nrc.gov>; Baer, Lorraine <Lorraine.Baer@nrc.gov>; Abe Zeitoun <azeitoun@scainc.com>; wmap@igc.org; Richard Stoffle <rstoffle@email.arizona.edu>

Subject: [External_Sender] Re: Summaries of Previous Work at Dewey-Burdock

Thanks Paul,

I appreciate your effort to address a large volume of information in a short time, particularly in light of restraints imposed by NRC Staff's denial of the OST request to move the survey back by one week, to be conducted June 18- June 29.

Please allow me to reiterate that one prerequisite that requires immediate attention is an update to the NRC's

SUNSI Order/Affidavit and OST (and other Tribe's) confidentiality agreements, intellectual property agreements, and similar protections afforded when addressing the locations and cultural/spiritual context of Traditional Cultural Properties. Confidentiality is a key aspect of the survey. NRC's existing SUNSI order and affidavit are attached, but needs to be updated. We look forward to NRC Staff providing proposed updates to conform with federal law and the current circumstances. The OST has similar requirements, which will be provided separately, in due course. Please circulate any other forms, releases, affidavits, etc. that NRC, Powertech or SC&A plan to use during the cultural resources survey, especially the field survey.

As discussed on the call yesterday, the work plan looks like NRC Staff's previous use of an open site survey, which has been rejected by the Sioux Tribes and orders of the ASLB, and the Commission. I appreciate the acknowledgement of Dr. Stoffle and yourself that an open site approach is not an accepted methodology, and efforts under time constraints to pull together a sound methodology. Per your request, we will use SC&A's suggested work plan to provide an alternate approach that establishes a sound, yet flexible, methodology before going into the field. To expedite this process, it would be helpful for NRC Staff to provide a copy of SC&A's scope of work and any agreements addressing confidentiality/work product so we can know what tasks NRC has (and has not) authorized SC&A to carry out and any TCP protections NRC Staff has already included in SC&A's contract.

We look forward to SC&A's summary and review of the available information (which goes beyond the information in Powertech's application materials, as amended in 2013), maps discussed on the call, and SC&A's literature review report that NRC is currently reviewing.

We expect to send a proposed schedule around either today or tomorrow.

Travis

cc: Emily Monteith, NRC Staff Counsel

On 6/5/2018 8:49 PM, Paul Nickens wrote:

Kyle and Ben,

As promised during the teleconference call this afternoon, I am attaching two summary documents from the Dewey-Burdock Programmatic Agreement document; the PA itself is not included. Together, these summary documents offer a concise compilation of the previous archaeological efforts (2007-2008) and the 2013 Tribal field surveys. If you find that you have questions on the information presented therein, please let me know.

A third attachment is a summary of a proposed (for consideration by the participating Tribes) initial work plan.

Kyle, I did not receive Mr. Rom's email address. If you could forward these documents to his office, I would appreciate it.

Thanks again for the good conversations of the past few days. I look forward to further discussion of these important issues.

Paul Nickens
SC&A, Inc.
(520) 404-6186

This email may contain privileged and confidential information intended only for the use of the specific entity named herein.

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