

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

**BEFORE THE ATOMIC SAFETY AND LICENSING BOARD**

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

**OGLALA SIOUX TRIBE'S RESPONSE TO NRC STAFF'S NOVEMBER 21, 2018 LETTER**

The Tribe, through counsel, submits this response to the November 21, 2018 NRC Staff letter setting out a general approach to a cultural resources survey methodology (“November 21 Letter”). On December 5, 2018, the Tribe’s counsel sent an email inviting further discussions to establish a suitable methodology and ensure the involvement of the Tribe in the selection of a qualified contractor, but NRC Staff chose not to provide the Tribe any opportunity for input. It bears repeating that in the Tribe’s view, developing a suitable methodology requires: 1) prompt involvement of an NRC Staff contractor that has the necessary experience and training, particularly experience in Oceti Sakowin culture; and 2) a protocol for effective, fair, and good faith communications between the NRC Staff (including the contractor) and the Tribe’s personnel and contractors. NRC Staff has in past largely ignored both these requests, resulting in the existing generic NRC Staff outline that contains no methodology.

The lack of detail in NRC Staff’s letter has to date been compounded by decisions to rely on federal personnel and a contractor without the necessary experience and training in carrying out cultural resource investigations involving Oceti Sakowin culture. An email was received from NRC Staff on January 7, 2019 that announced another new NRC lead project manager had been assigned. The email also announced that SC&A had either subcontracted or hired an archeologist (Mr. Jerry Spangler) whose online qualifications appear limited to the “prehistoric” peoples of the Desert Southwest. <http://www.cparch.org/Uinta%20Research/web/26.html>. No further information regarding qualifications for this project was provided, and the Tribe looks forward to a more complete description of NRC Staff’s efforts to ensure the engagement of persons with the necessary qualifications to carry out the interviews and field work required for the cultural resource survey. The email from NRC Staff (sent January 4, 2019 after close of business) makes no mention of NRC Staff’s efforts, if any, to engage NRC’s Tribal Liaison. Lastly, the Tribe has repeatedly requested a copy of the scope of work NRC Staff has used to select and describe the work to be conducted by the contractor. This information is critical to the Tribe’s ability to fully frame its methodological approach – and the Tribe hereby again requests a copy of the documents used to communicate the scope of work to its unilaterally chosen contractor.

## **NRC Staff Has Provided No Cultural Resource Survey Methodology or Response**

Importantly, despite claims to the contrary in the November 21 Letter, NRC Staff has not provided any description of a cultural resources survey methodology, precluding the Tribe from providing a detailed response. As the Tribe has repeatedly communicated, simply having “elders” walk the site after conducting a “windshield tour,” as the letter proposes, is not an accepted methodology.

NRC Staff, without the benefit of any qualified persons, simply asserts in the November 21 Letter that the discussion is “reasonable and scientific.” Letter at 3. However, the description appears to be nothing more than a restatement of the one-page summary of a work-plan prepared by Dr. Nickens in June of 2018. The Tribe responded on June 15, 2018, at significant cost to the Tribe, with a detailed description of potential components for NRC Staff and its contractor to review to provide the basis for a negotiation over methodology. Neither NRC Staff nor any contractor has to date provided any substantive response. Until NRC Staff secures the necessary expertise, either by private contractor or retaining the services of the Tribe, and employs that expertise to provide some substantive responsive information to the Tribe as to the Tribe’s prior discussion draft proposals, it is difficult and unreasonable for NRC Staff to expect the Tribe to continue to spend its resources developing additional methodologies.

The publicly available information on Mr. Spangler’s website does not identify any published methodology or experience relevant to Oceti Sakowin cultural resources. Instead, Mr. Spangler’s curriculum vitae lists cultural and work experiences based on a narrow but distinguished specialization of archeological interpretations of artifacts from the northern Colorado Plateau created in the 1000c.e - 1300c.e era. This initial apparent lack of relevant experience is of concern to the Tribe.

NRC Staff’s November 21 Letter lacks even the basic information that a qualified contractor would include to identify and support a cultural resources methodology. The letter effectively tasks the Tribe with carrying out NRC Staff’s duties, without providing any compensation for tasks normally subject to NRC’s full cost recovery provisions. Once a qualified contractor produces a response to the Tribe aimed at a scientifically and traditionally supported methodology, with the necessary protections of the information obtained, the Tribe anticipates that it, NRC Staff, and NRC Staff’s contractors can resume detailed negotiations over the methodology.

Importantly, the November 21 Letter relies on a series of erroneous assertions about what happened in June 2018. At no time did NRC Staff or the contractors propose a recognized methodology endorsed by qualified persons. Dr. Nickens, who was removed for unexplained reasons, confirmed over meetings with the Tribe during the June 2018 efforts that he did not agree with NRC Staff’s ad hoc open site survey. Dr. Nickens’ preferred methodology was never disclosed to the Tribe. NRC Staff’s erroneous account of what might have been done in June 2018 does not warrant a response here, but is thoroughly rebutted in the Summary Disposition briefing and attachments, which are incorporated by reference.

Throughout the proceeding, Powertech and NRC Staff have repeatedly suggested that no methodology exists and that only the Tribe can carry out the necessary surveys. This is incorrect. The June 2018 Literature Review Report produced by Dr. Nickens identifies two methodologies associated with the work of Dr. Richard Stoffle and Dr. Sebastian LeBeau. While both methods have shortcomings, and there are other scientific and traditional methods of gathering and interpreting the necessary information, these methodologies should be considered in the upcoming discussions. In any case, the elements of these approaches do confirm that there are methods for “identifying particular places of traditional cultural and religious significance on a given parcel of land [that] takes into account the Lakota views for the individual places and the larger landscape setting.” June 2018 Literature Review Report at 16.

Again, it is NRC Staff’s duty to hire a contractor with the qualifications to work with the Tribe prepare an acceptable methodology. The Tribe remains willing to engage a discussion of qualified contractors that NRC Staff could hire to do this work.

### **The Previously Provided Literature Review Report is Based on Erroneous Information**

In June 2018, SC&A hurriedly prepared a Literature Review Report for NRC Staff based on controversial and discredited accounts of the Lakota’s current and historic relationship to the Black Hills region. The errors are too numerous and significant to detail in this letter, and the Tribe has expertise to provide to NRC Staff a detailed critique, but three are provided by way of example. First, several recent books and key publications are not recognized that are more in line with the Lakota world view. Second, the location of the culturally-significant Race Track, as depicted on page 22 of the Review, is inaccurate and taken from an outdated map that was prepared by Dr. Craig Howe for purposes that did not involve location/protection of specific cultural sites or sacred landscapes. Third, the Lakota histories set out on pages 16-18 rely on uncited and erroneous statements based on a profound misunderstanding of the legal, cultural, and spiritual accounts of the Lakota. Instead, SC&A provided a culturally uninformed and therefore biased account based on “opening unallotted lands for white homesteading.” Literature Review at 16. The Lakota are deeply offended by the perpetuation of an erroneous history based on uncited and erroneous references to a series of treaties, wars, and unilateral statutory pronouncements by the United States of America. By ignoring the body of literature that reflects the Lakota world view, using Dr. Howe’s map for an unintended purpose, and misstating the history the Lakota Tribes, the SC&A’s Literature Review Report as it stands is of little to no value to the cultural resource survey or the NEPA process.

The Tribe asks NRC Staff to formally disavow the Literature Review Report and direct a qualified NRC Tribal Liaison to work with NRC Staff, contractor and Tribes’ representatives to prepare a Literature Review Report that accurately provides a culturally supported interdisciplinary account of the Lakota Tribe’s physical, cultural, and spiritual history.

Correcting the erroneous information, and properly representing the available literature in an interdisciplinary NEPA process involves sensitive information. For any qualified person to prepare a Literature Review Report informed by necessary cultural background, NRC Staff must first agree to the required confidentiality agreements, review by the appropriate Institutional Review Boards for consistency with Tribes’ customs and relevant ordinances.

Notably, in June 2018, when the Tribe asked the University of Arizona to confirm Dr. Stoffle's representations regarding these accepted practices, Dr. Stoffle's involvement with the project suddenly and inexplicably ceased and the University of Arizona disavowed any involvement with the SC&A contract. The Literature Review Report is a direct consequence of NRC Staff's reliance on ad hoc methods deployed by unqualified contractors. The Tribe looks forward to NRC Staff's use of qualified persons to prepare a Literature Review Report within the normal protections required of cultural resource analysis.

### **Project Proposal and Site Maps are Outdated**

The maps provided in June 2018 appear no longer sufficient to conduct the cultural resource surveys. The project proponent has confirmed that the project has expanded since June 2018. On December 21, 2018, Powertech announced it had published a report stating that the project area had expanded, and that it expected to mine three times more uranium than had been previously considered. <http://azargauranium.com/azarga-uranium-files-ni-43-101-technical-report-for-increased-resource-at-dewey-burdock/>. This report has been attached for NRC Staff's consideration of NRC's NEPA and other statutory duties to analyze and disclose this new information.

Importantly, the Resource Estimate contains a map on page 60, that when compared with the FEIS map at 2-12, confirms that the expected extent of the proposed wellfields has changed, thereby altering the area likely to be impacted by Powertech's proposal. The Tribe's review of this newly discovered, but not yet formally disclosed, information is ongoing, but it appears that significant new information and changes to Powertech's project proposal require additional scrutiny under a range of federal laws, including NEPA and the National Historic Preservation Act. Importantly, Powertech has developed a new "reasonable production alternative" that is still under review, with completion expected in 2019. Report at 81-82.

Based on the Tribe's initial review, it appears that NRC Staff's review may require a hold on further work on a cultural resources survey until the new area of potential effects is delineated based on this significant and new information and ongoing Powertech alterations to the Dewey-Burdock project.

### **Remaining Budget - Cooperating Agency Funding**

NRC Staff asks for comment on the budget (November 21 Letter at 3) but does not provide any information on the budget NRC Staff has allocated. Despite repeated requests, NRC Staff has declined to provide routine agency records such as contacts and scope of work. Powertech has stated in its filings that it wishes NRC Staff to deduct any amounts already spent and to cap the costs of the project. The Tribe asks that NRC Staff produce all relevant documents, disavow Powertech's "cost-capping" approach, and confirm that completion of the necessary survey in a competent fashion will drive the cost analysis instead of arbitrary limits based Powertech's undocumented assertions of dire financial condition.

NRC Staff has agreed to Powertech's proposal to allocate ten thousand dollars from the cost recovery budget for the Tribe's use during the cultural resource survey. The Tribe has chosen to

allocate the bulk of the remainder of this inadequate amount to defray expenses of Elders and other traditional persons who may participate in the survey and to provide feedback to NRC Staff's detailed survey methodology proposal, once it is presented for review.

It now appears that NRC Staff expects the Tribe to voluntarily provide uncompensated contractor services by proposing, preparing, and implementing the survey methodology on the ground. It is important to note that this approach by NRC Staff puts the Tribe in an unreasonable position – essentially requiring the Tribe to “volunteer” its services to fulfill NRC’s NEPA duties. To be clear, the Tribe is not willing to voluntarily provide NRC Staff with services normally obtained through federal contract. However, the Tribe is willing to discuss compensation that federal law requires in order to provide expertise and services that NRC Staff and its contractor may lack. 31 U.S.C. § 1342 (federal “government may not accept voluntary services for either government or employ personal services exceeding that authorized by law”). Similarly, Executive Order 13175 ensures that the federal agencies “reduce the imposition of unfunded mandates upon Indian tribes.”

Although federal laws guard against imposing NRC Staff’s NEPA compliance costs on the Tribe, NEPA does provide mechanisms by which NRC Staff can marshal funds for the Tribe to participate as a NEPA cooperating agency. 40 C.F.R. § 1501.6 & § 1508.5. The Tribe invites NRC Staff to discuss cooperating agency status for the Bureau of Indian Affairs and the Tribe, which provides a recognized mechanism to involve the Tribe in the manner NRC Staff has proposed for the ongoing NEPA analysis. One potential mechanism for providing this funding is through the a “self-determination” grant or cooperative agreement pursuant to the Indian Self-Determination Act. 25 U.S.C. §§ 5304(j), 5308. NRC Staff’s continuing dispute with Powertech over full cost recovery can take place outside of this mechanism. “Self-determination” funding for the Tribe as a cooperating agency respects and furthers the government-to-government relationship that must exist between the Tribe and NRC throughout this proceeding. The Tribe looks forward to NRC Staff’s response.

### **Arbitrary Timeline are not Based on Accepted Methodology**

As was discussed in confidential meetings held in June 2018, and referenced in the Literature Review Report at 20, celestial knowledge and observations are required to locate certain cultural resources. Once the necessary confidentiality agreements are in place, the survey schedule should be reconfigured to ensure the survey methodology integrates the necessary celestial, and other, conditions required to conduct the survey. The need to reconsider the project timeline in the context of the proposed timeline was specifically addressed and acknowledged during the December 6, 2018 conference call with the Board and parties. December 6, 2018 Transcript at 1478-1479.

### **Confidentiality and Ownership of Cultural Resources Information**

NRC Staff is neither qualified nor authorized to obtain, receive, or possess all of the sensitive cultural resource information at issue in this endeavor. As the Tribe has communicated to NRC Staff, any such information, if not covered by protective order, is vulnerable to release to unauthorized persons within NRC, to Powertech, or to the general public via the Freedom of

Information Act. Moreover, Powertech has no need to review sensitive cultural information. From the Tribe's perspective, NRC Staff has shown a general lack of understanding of federal trust responsibilities and role of Tribal Ordinances dealing with confidentiality. Therefore, the Tribe seeks to spell out these responsibilities and obligations in an agreement. The Tribe provided NRC Staff with the Tribal Ordinances and other relevant information in June of 2018.

The Tribe asserts that the next step in this process is for Mr. Spangler to review the information provided to NRC Staff by the Tribe and produce (redacted if necessary) agreements he routinely uses when working as a contractor for the Department of the Interior. Once these documents are assembled, the Tribe will provide draft agreements for consideration of NRC Staff, S&CA, and Mr. Spangler. Once the necessary agreements are formalized, a draft motion to update the protective order, and a draft protocol for adding "authorized persons" will be provided for NRC Staff's consideration.

### **NEPA Path Forward to Develop and Implement Cultural Resources Survey Methodology**

Because these activities take place within the NEPA process, several key NEPA procedures must be addressed at the earliest stages to ensure the preparers have the necessary qualifications to carry out the interdisciplinary analysis of cultural resource impacts, alternatives that avoid impacts, and mitigation measures. *See e.g.* 40 C.F.R. §, 1502.6. These are normally carried out in accordance with NEPA's scoping procedures. 40 C.F.R. § 1501.7. The Tribe renews its request for NRC Staff to follow NEPA's scoping process in light of these new circumstances, including Powertech's expanded mining project. For example, qualified preparers must be engaged and other agencies with expertise and jurisdiction must be invited to participate in the NEPA process. The entities that work on the federal level include the National Trust on Historic Perseveration, Advisory Council on Historic Preservation, Bureau of Indian Affairs, Bureau of Land Management, U.S. Fish and Wildlife Service, and Environmental Protection Agency.

A few key points have arisen to help guide NRC Staff's preparation of a detailed methodology for conducting the cultural resource survey:

#### **Elder Interviews**

Elders must be comfortable – interviews must be conducted in conformance with the principles of Free and Prior Informed Consent. Audio recording can be a problem, and tribal members often communicate in Lakota language instead of English. The Tribe needs access to the scope of work being used by NRC Staff and its selected contractor in order to understand the goal of the interviews and to better understand the proposed methodology for conducting elder interviews before, during, and after field visits. The Tribe had previously provided NRC Staff the information related to the Tribe's research and review board policies, including review by the Tribe's review board. These policies must be complied with for any elder interviews.

## **Literature Review Document**

As discussed, the Tribe has expertise to provide a review and critique of S&CA's Literature Review Report. In any case, the Tribe's review of the Literature Review and Report must be incorporated into the NEPA analysis. The Tribe's initial review of this document has identified significant errors that the Tribe anticipates submitting its review to NRC Staff and into the administrative record.

## **Elements of a Cultural Resources Survey Methodology**

Some key elements must be included, regardless of the methodology or qualifications of such persons employed by NRC Staff. Most of these elements were discussed in June 2018, both in the June 15, 2018 letter and in person. Now that NRC Staff has employed a contractor who will presumably provide a response in a detailed methodological proposal, the Tribe looks forward to reviewing a detailed proposal to address the elements that must be present.

## **Report - Preparation and Handling**

It is important that the Tribe have a significant role in drafting the final cultural resource survey report. A second version, with sensitive information withheld, should be prepared by NRC Staff, with review and approval by Tribe, for use in the NEPA process.

This approach allows the detailed and sensitive information and work product to reside in one full document for use by authorized Tribes' and NRC Staff personnel only. This is a common way for cooperating agencies to interact with the NEPA lead agency. The second report would also be a meaningful document but would be presented in a way that does not reveal key sensitive information. The second document would be prepared according to the interdisciplinary mandates of NEPA for use by Consolidated Intervenors, Powertech, Tribal Members, unauthorized government officials, and the general public. The second report would be used by the interdisciplinary team and others charged with preparing of the Draft and Final NEPA document.

## **National Historic Preservation Act**

While the Tribe understands the Board has found in favor of NRC Staff regarding the Tribe's previously raised National Historic Preservation Act contention dealing with adequacy of government-to-government consultation, the Act still bears relevance in the identification, evaluation, eligibility review for the National Register of, and mitigation of impacts to, cultural resources. The Tribe expects these relevant portions of NHPA will continue to inform NRC Staff's interdisciplinary duties in gathering information and carrying out the NEPA analysis.

## **Conclusion**

The Tribe looks forward to working with NRC Staff to ensure proper review of the impacts of the Powertech project to the significant cultural resources at the Dewey-Burdock site. While no doubt the effort will require significant effort, the Tribe is prepared and willing to engage with NRC Staff to work toward a successful result. As stated above, the Tribe remains concerned that Mr. Spangler's publicly available information does not contain the types of cultural and professional experience and training one would expect for a person qualified to develop and implement a cultural resources survey outside the Northern Colorado Plateau. Even if Mr. Spangler does not bring the necessary qualifications, the Tribe expects that he can assist NRC Staff understand and address the shortcomings of the November 21 Letter. Nevertheless, the Tribe looks forward to further discussions with NRC Staff on the cultural resources survey methodology, informed by the participation of Mr. Spangler and NRC's Tribal Liaison.

Respectfully Submitted this 11th day of January 2019.

/s/ Jeffrey C. Parsons

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**CERTIFICATE OF SERVICE**

I hereby certify that copies of the foregoing Oglala Sioux Tribe's Response to NRC Staff's November 21, 2018 Letter in the above-captioned proceeding were served via the Electronic Information Exchange ("EIE") on the 11<sup>th</sup> day of January 2019, which to the best of my knowledge resulted in transmittal of same to those on the EIE Service List for the captioned proceeding.

/s/ signed electronically by \_\_\_\_\_

Jeffrey C. Parsons  
Western Mining Action Project