



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

In the Matter of

POWERTECH USA, INC.

(Dewey-Burdock
In Situ Uranium Recovery Facility)

Docket No. 40-9075-MLA

ASLBP No. 10-898-02-MLA-BD01

Hearing Exhibit

Exhibit Number:

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UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555-0001

March 1, 2019

Mr. Tom Brings
and Mr. Kyle White
Tribal Historic Preservation Office
Oglala Sioux Tribe
PO Box 320
Pine Ridge, SD 57770

SUBJECT: NEGOTIATIONS REGARDING DEVELOPMENT OF A METHODOLOGY FOR A TRIBAL SITE SURVEY TO IDENTIFY HISTORIC, CULTURAL, AND RELIGIOUS SITES AT THE DEWEY-BURDOCK *IN SITU* URANIUM RECOVERY PROJECT IN FALL RIVER AND CUSTER COUNTIES, SOUTH DAKOTA (DOCKET NUMBER: 40-9075)

Dear Mr. Brings and Mr. White:

The U.S. Nuclear Regulatory Commission (NRC) staff appreciates the opportunity to have met with the Oglala Sioux Tribe, members of its Tribal Historic Preservation Advisory Council, and Tribal Historic Preservation Officers (THPOs) from the Standing Rock Sioux Tribe, Rosebud Sioux Tribe, and Cheyenne River Sioux Tribe on February 22, 2019, in Pine Ridge, South Dakota regarding the Dewey-Burdock *in situ* uranium recovery (ISR) project in Fall River and Custer Counties, South Dakota. During the meeting, the Tribes raised several concerns and objections regarding aspects of the proposed site survey methodology (Agencywide Documents Access and Management System [ADAMS] Accession Number ML19058A142), as well as the NRC staff's March 16, 2018, approach (the March 2018 Approach [ADAMS Accession Number ML18074A393]) to identify sites of historic, cultural, and religious significance that could be affected by the Dewey-Burdock ISR project. At the conclusion of the meeting, counsel for the Oglala Sioux Tribe requested that the NRC staff and contractor redraft the methodology, taking into consideration the Tribes' concerns and objections raised during the meeting. After considering those concerns and objections, instead of redrafting the methodology, the NRC staff is taking the opportunity to provide additional information to explain the design of the draft methodology.

March 2018 Approach and Site Survey Parameters

During the February 22, 2019, meeting, the Tribes shared their concerns and objections regarding the parameters of the site survey methodology, as defined by the March 2018 Approach and the Atomic Safety and Licensing Board's (Board's) October 30, 2018, Order (LBP-18-05 [ADAMS Accession Number ML18303A233]). The Tribes expressed that two two-week periods were insufficient to carry out a site survey, and that the timeline for carrying out the March 2018 Approach as set forth in the NRC staff's November 21, 2018 letter (ADAMS Accession Number ML18325A029) did not provide the Tribes sufficient time to account for, for example, seasonal variations or other cultural ceremonies that need to take place in order for the Tribes to identify cultural resources. Additionally, the Tribes expressed concerns about the

amount of the reimbursement and honoraria to be provided to the participating Tribes by Powertech (USA) Inc.

The two non-contiguous two-week periods and reimbursement and honoraria amounts were agreed upon by the parties to the adjudicatory proceeding for the Dewey-Burdock ISR project (the Oglala Sioux Tribe, Consolidated Intervenors, and Powertech) after several months of discussions.

In December 2017, the NRC staff first transmitted its proposed approach to the Oglala Sioux Tribe and other invited Tribes. The NRC staff proposed an approach which included two non-contiguous two-week periods to carry out the site survey and identified specific amounts of reimbursement anticipated for participating Tribes, including for lodging, meals and incidentals, and mileage, as well as a \$10,000 honorarium to each participating Tribe (ADAMS Accession Number ML17340B365). After several months of discussions with the parties and taking into consideration the concerns of the Oglala Sioux Tribe, the NRC staff selected the March 2018 Approach to resolve the remaining National Environmental Policy Act (NEPA) contention in the adjudicatory proceeding for the Dewey-Burdock ISR project. The March 2018 Approach provided for two iterative two-week opportunities to survey the site, a timeline to carry out the survey, and the reimbursement amount that was described in the December 2017 proposed approach and subsequently confirmed by Powertech (ADAMS Accession Number ML18101A223). Counsel for the Oglala Sioux Tribe subsequently indicated during the April 6, 2018 teleconference call with the Board and parties (ADAMS Accession Number ML18100A912) that the Tribe was "...comfortable with, as we stated multiple times, the approach that the NRC staff has laid out," that "...we maintain the position that the March 2018 approach is a reasonable one," and that "...the Tribe can support the approach."

Specifically, regarding the timeline for carrying out the March 2018 Approach, counsel for the Oglala Sioux Tribe indicated that "The Tribe has, I think, been consistent with these dates. Although somewhat tight, I think are achievable. And so the Tribe is, at this point, comfortable with those. We do note that there are some significant components that have not been fully vetted or fully described in terms of the methodology. But at this point, based on what we have in hand, the Tribe is comfortable with that time line." In addition, on the question of an appropriate amount for reimbursement and honoraria for the participating Tribes, the Oglala Sioux Tribe's counsel indicated in its response dated February 15, 2018 (ADAMS Accession Number ML18046A171), that "[t]he Tribe would anticipate that an amount on the order of what was proposed previously would be appropriate." As such, the NRC staff incorporated this same amount – which Powertech committed to provide – into the March 2018 Approach (and ultimately into the proposed methodology transmitted on February 15, 2019).

The Board's October 30, 2018, Order further reiterated that "[t]he Oglala Sioux Tribe accepted the March 2018 Approach as reasonable to resolve Contention 1A and does not challenge the reasonableness of the March 2018 Approach as written." The Board elaborated that:

...the only aspect of the Approach that is open for discussion is the site survey methodology. That is, any tribal negotiating position or proposal should only encompass the specific scientific method that would fit into the two-week periods set out in the March 2018 Approach for visiting the physical site, i.e., how the contractor and the Tribe members will walk the site and mark or record located Tribal resources. While we understand the need to be sensitive to the cultural tenets and needs of the Oglala Sioux Tribe, given that the time period for the site survey phases was agreed to by the Oglala Sioux Tribe, and that it is the Oglala

Sioux Tribe that has continually pushed for a scientific methodology, negotiations and proposals must remain within these constraints.

Therefore, based on representations by the Oglala Sioux Tribe's counsel regarding the reasonableness of the March 2018 Approach and the Board's decision in its October 30, 2018, Order, the NRC staff and contractor developed the February 15, 2019, draft site survey methodology. That draft methodology replicated the March 2018 Approach's two non-contiguous two-week periods to carry out the site survey, and it proposed amounts for Tribal reimbursement and honoraria identical to those in the March 2018 Approach. Additionally, based on representations from the Oglala Sioux Tribe's counsel during the April 6, 2018, teleconference call with the Board and parties that the Tribe was "comfortable" with the timeline outlined in the March 2018 Approach, the NRC staff created a revised timeline. The revised timeline made corresponding adjustments to the March 2018 Approach schedule, taking into consideration the time that had passed between the 2018 discussions and negotiations on the site survey and the November 21, 2018, letter, as well as weather conditions at the site and Sun Dance ceremonies.

Given the extensive discussions amongst the parties in 2017 and 2018 that led to the parameters set forth in the March 2018 Approach, and the importance of those parameters to the ability to carry out a survey at the site this year, the NRC staff does not plan to renegotiate those parameters.

Section 106 of the National Historic Preservation Act

During the meeting on February 22, 2019, the Tribes also shared their concerns regarding the scope of the NRC staff's efforts being solely focused on NEPA. The Tribes requested that the NRC staff reopen the National Historic Preservation Act (NHPA) Section 106 process for the Dewey-Burdock project. On April 7, 2014, the Advisory Council on Historic Preservation determined that the staff had satisfied its responsibilities under Section 106 of the NHPA, and on October 19, 2017 (ADAMS Accession Number ML17292B298), the Board resolved the outstanding NHPA-related contention (Contention 1B) in the adjudicatory proceeding, concluding that the NRC staff had satisfied the NHPA requirements to consult with the Oglala Sioux Tribe.

Accordingly, because this matter has been adjudicated, the NRC staff will not reopen the Section 106 process and will continue to focus its efforts on resolving the remaining NEPA contention.

Use of a Scientifically Based Site Survey Methodology

Based on statements made by members of the Tribes and counsel for the Oglala Sioux Tribe at the February 22, 2019 meeting, it is the NRC staff's understanding that the Tribes are opposed to a scientifically based methodology. As the staff understands the Tribes' concerns, because the western concept of the scientific method does not align with the Tribes' views of the world, the Tribes are concerned that their viewpoints will be disregarded because they do not fit within the rigid definition of the term "scientific."

The February 15, 2019, draft site survey methodology was specifically designed to address the Oglala Sioux Tribe's concern that previous methodologies lacked scientific integrity (May 19, 2016, meeting summary [ADAMS Accession Number ML16182A0690]), the Tribe's position that "...the first step toward NEPA compliance involves the design of a scientifically sound cultural

resources survey at the proposed mine site[,]" (Oglala Sioux Tribe's response to NRC staff's March 16, 2018 Approach [ADAMS Accession Number ML18089A655]), and the Tribe's rejection of the NRC staff's June 2018 initial work plan, which the Tribe said "...contained no identifiable scientific methodology for a cultural resources survey" (Oglala Sioux Tribe's response to NRC's staff's motion for summary disposition [ADAMS Accession Number ML18264A346]). The draft site survey methodology also is designed to meet the Board's October 30, 2018, Order, which states that proposals "should encompass the specific *scientific method* that would fit into the two-week periods" (emphasis added), and given "that it is the Oglala Sioux Tribe that has continually pushed for a scientific methodology, negotiations and proposals must remain within these constraints." Accordingly, the proposed methodology not only acknowledges the challenge of developing a scientifically sound cultural resources survey methodology that describes Tribes' sacred sites within the context of the all-encompassing sacredness of everything (*wakān*), but lays the foundation for reconciling traditional Tribal perspectives and values with a scientifically based methodology.

The NRC staff also understands that the Tribes in attendance at the February 22, 2019, meeting have concerns about the NRC staff's reliance on Dr. Sebastian LeBeau's methodology. During the February 22 meeting, the Cheyenne River Sioux Tribe's THPO indicated that he does not endorse Dr. LeBeau's methodology and that Dr. LeBeau does not represent the Cheyenne River Sioux Tribe. However, in developing the draft methodology, the NRC staff and contractor took into consideration the Oglala Sioux Tribe's request in its January 11, 2019 letter (ADAMS Accession Number ML19011A459) to the NRC staff indicating that "[t]he 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."

Level of Tribal Involvement in the Methodology Development

The Tribes also made statements at the February 22 meeting indicating that the draft methodology should have been developed in collaboration with the Tribes. The NRC staff, however, stated at the February 22 meeting, in the e-mail transmitting the draft methodology, and in the draft methodology itself, that the draft methodology was a working document intended to facilitate discussion with the Tribes. The NRC staff's goal is to collaborate with the Tribes on the working document to elicit, encourage, and understand the Tribes' input in order to discuss and finalize a site survey methodology. In developing this draft site survey methodology, the NRC staff and contractor considered previous concerns raised by the Oglala Sioux Tribe, including in its response to the NRC staff's August 2018 motion for summary disposition, which stated that the NRC Staff "...provided only a basic outline of a work plan limited to a 'windshield tour' and [a] revisit [to] the poorly documented sites identified by the 2013 survey – without providing for having any survey methodology in place"; and an e-mail from the Oglala Sioux Tribe's counsel describing the NRC staff and contractor's site survey proposal in June 2018 as a "skeletal survey methodology proposal" (ADAMS Accession Number ML18159A624).¹ Accordingly, the NRC staff and contractor developed the February 15, 2019,

¹ The NRC staff and contractor developed the June 2018 proposal taking into consideration concerns that the Tribes had previously expressed about the NRC staff proposing methodologies so detailed that there was no room for discussion and negotiation. Therefore, at that time, the NRC contractor developed a proposal at a level of detail that provided ample room for discussion and negotiation with Tribal experts.

draft methodology with sufficient depth and substance, but with ample room to further discuss, develop, and build upon with the Tribes in a collaborative manner.

Additionally, the Oglala Sioux Tribe has reiterated that the expertise of the Tribes is essential in the development and implementation of a meaningful and comprehensive Tribal cultural survey (May 31, 2017, letter [ADAMS Accession Number ML17152A109]). The proposed methodology is therefore focused on the identification of Tribal cultural resources using the Tribe's traditional knowledge and expertise and specifically incorporates Tribal self-determination and participation.

In sum, the NRC staff has proposed a site survey methodology that remains aligned with the previously agreed-upon parameters of the March 2018 Approach. Consistent with the Board's October 30, 2018, Order, the scope of the negotiations at this point is focused on a methodology compatible with those criteria. However, the nature and extent of the concerns expressed by the Tribes on February 19 and February 22 indicate to the NRC staff that the Oglala Sioux Tribe has broader, more fundamental differences with these parameters. The NRC staff is concerned that, given the progress of the discussions regarding a methodology and the concerns and objections raised by the Tribes, the parties do not appear to be close to reaching a mutually agreeable arrangement. For the remaining milestones of the March 2018 Approach to be viable, it is essential to reach near-term alignment with the Oglala Sioux Tribe on the site survey methodology.

For these reasons, the NRC staff does not plan to renegotiate the parameters of the March 2018 Approach. However, the NRC staff remains willing to further discuss the draft methodology transmitted to the Tribes on February 15, 2019, which incorporates the previously negotiated parameters. Accordingly, the NRC staff kindly requests that the Oglala Sioux Tribe confirm by March 8, 2019, whether the Tribe is willing to proceed with finalizing the proposed methodology within the previously negotiated parameters. In the upcoming teleconference with the Tribes on March 5, 2019, we look forward to better understanding the Oglala Sioux Tribe's position on the draft methodology and the content of this letter.

In accordance with 10 CFR 2.390, a copy of this letter will be available electronically for public inspection in the NRC Public Document Room or from the Publicly Available Records component of NRC's ADAMS. ADAMS is accessible from the NRC website at <http://www.nrc.gov/reading-rm/adams.html>.

If you have any questions or concerns, please contact Ms. Diana Diaz-Toro of my staff. Ms. Diaz-Toro can be reached at (301) 415-0930 or via e-mail at Diana.Diaz-Toro@nrc.gov.

Sincerely,

/RA/

Cintha I. Román, Chief
Environmental Review Branch
Division of Fuel Cycle Safety, Safeguards,
and Environmental Review
Office of Nuclear Material Safety
and Safeguards

Docket No. 40-9075
License No. SUA-1600

cc:

Mr. Julian Bear Runner, President
Oglala Sioux Tribe
Mr. Jeff C. Parsons, Counsel
for the Oglala Sioux Tribe
Mr. Travis E. Stills, Counsel
for the Oglala Sioux Tribe
Mr. Steve Vance, Tribal Historic Preservation Office
Cheyenne River Sioux Tribe
Mr. Garrie Kills A Hundred, Tribal Historic Preservation Officer
Flandreau-Santee Sioux Tribe
Mr. Ben Rhodd, Tribal Historic Preservation Officer
Rosebud Sioux Tribe of Indians
Mr. Jon Eagle, Tribal Historic Preservation Officer
Standing Rock Sioux Tribe
Ms. Clair Green, Cultural Resources Office
Lower Brule Sioux Tribe
Mr. Kip Spotted Eagle, Director
Tribal Historic Preservation Office
Yankton Sioux Tribe
Mr. Merle Marks, Tribal Historic Preservation Office
Crow Creek Sioux Tribe

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DATED: March 1, 2019

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