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. 40-0975-MLA ASLBP No. 10-898-02-MLA-BD01 June 28, 2019

CONSOLIDATED INTERVENORS' RESPONSE POSITION STATEMENT

Consolidated Intervenors[1] hereby respond to NRC Staff as follows:

1) Consolidated Intervenors support the arguments and positions of the Oglala Sioux Tribe in this matter and hereby adopt the response statement and position of the Oglala Sioux Tribe being filed today, in its entirety, and incorporate the same herein by this reference. Consolidated Intervenors note that the phrase "trust responsibility" does not appear in its 71 page Initial Statement of Position which indicates: (a) how little regard the NRC Staff has for the trust responsibility owed to the Tribe and its members and all Native Americans, and (b) NRC Staff's fundamental failure to comply with clear legal requirements set forth in bedrock Federal law in this case.

[1] Susan Henderson, Dayton Hyde and Aligning for Responsible Mining. Aligning for Responsible Mining includes as members Lakota people including those related to the American Horse Tiospaye, the White Plume Tiospaye, the Afraid of Bear Tiospaye and the Red Cloud Tiospaye.

Consolidated Intervenors understand the NRC's basic position[2] which, in Consolidated Intervenors' view, can be summed up as being frustrated with the difficult work involved with consulting with Native Americans in good faith concerning their sacred cultural resources and the related cost, personnel and time resources that must be expended in order to do so competently and in good faith so as to comply with the trust responsibility. However, there is no legal defense or justification called the "Frustration Defense" that would excuse the NRC Staff's failure to abide by the trust responsibility in its consultations with the Tribe and its total failure to consult with any tribal members who are not tribal officials. See INT-023.

In a few days' time and at nominal cost, Consolidated Intervenors were able to locate 22 Lakota people who said they knew something of their own knowledge from oral family histories and/or Lakota history and tradition that are relevant to the identification of sacred cultural resources within the Area of Potential Effect (APE). Why was the NRC Staff unable to identify those people after all these years? Consolidated Intervenors submit that NRC Staff has chosen to make the process fail by intentionally choosing to not seek input from knowledgeable Lakota people and by the NRC Staff's intentional disregard for repeated Tribal request for an iterative process that involved Lakota people including tribal members and tribal officials.

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[2] "Over the course of many years, the Staff has engaged with the Oglala Sioux Tribe regarding Powertech's application for the Dewey-Burdock in situ uranium recovery (ISR) project site in order to fulfill its obligations under the National Environmental Policy Act (NEPA). In March 2018, after diligent negotiations and consideration of concerns raised by the Tribe, the Staff developed and proceeded to implement an integrated approach to conduct a Tribal cultural resources site survey. However, as with previous attempts, that effort reached an impasse when the Tribe raised an array of further concerns and demands that were fundamentally incompatible with the March 2018 Approach, in terms of both time and expense." NRC Initial Statement at 1.

2) In addition, Consolidated Intervenors respond to the NRC Staff and Powertech as follows:

A. Consolidated Intervenors were not invited to participate in any of the discussions between the NRC Staff and the Tribe. See the excerpt quoted in Footnote 2 above - to our knowledge, there was zero outreach other than to officials of the Tribe when NRC Staff attempted to implement the "March 2018 Approach".

Consolidated Intervenors include members of the American Horse Tiospaye, the White Plume Tiospaye, the Afraid of Bear Tiospaye and the Red Cloud Tiospaye. Each of these families (*tiospaye* means extended family in Lakota) possesses important oral histories that pertain to the discussion of cultural resources going on between the Tribe and the NRC Staff. None of these families was consulted in connection with the NRC Staff's efforts. *See* INT-023. Therefore, the NRC Staff's efforts were deficient and not compliant with NEPA.

B. As a constitutional republic, the United States of America is founded on principles of law - natural law and rule of law and reason. Native Americans are human beings. U*nited States ex rel. Standing Bear v. Crook*, 25 F.Cas. 695, 697 (C.C.D. Neb. 1879). The Lakota understand the fundamental principles of law - natural law and rule of law and reason.

Native Americans are equal to all other peoples. Native Americans as equal peoples have the right to life, liberty and the pursuit of happiness. For Native Americans, liberty is self-government and self-determination on Native American lands and with

respect to Native American cultural resources and what they, the Native Americans deem sacred.

At the time of the Constitution, the Framers acknowledged Native Americans as peoples with equal rights and liberty. The Northwest Ordinance of 1787, 1 Stat. 52 (July 13, 1787), enacted the year that the Constitutional Convention began and provides:

> The utmost good faith shall always be observed toward the Indians; their lands and property shall never be taken from them without their consent; and in their property, rights, and liberty they never shall be invaded or disturbed, unless in just and lawful wars authorized by Congress….

After the Constitution was ratified, the Northwest Ordinance was re-enacted with the same provision and President Washington signed it into law on August 7, 1789. 1st Cong. Sess. I, Ch. 8 (1789); 1 Stat. 50 (1789).

The Oglala Sioux Tribe is a federally recognized American Indian tribe and a signatory to the Fort Laramie Treaty of 1868 between the United States and the Great Sioux Nation. See *Treaty with the Sioux — Brulé, Oglala, Miniconjou, Yanktonai, Hunkpapa, Blackfeet, Cuthead, Two Kettle, Sans Arcs, and Santee — and Arapaho, 1868*, Art. 14, 15 Stat. 635 (Apr. 29, 1868). Indian nations reserved their original rights to self-government in their treaties.

The Supreme Court explained that the goal of United States—Sioux Nation relations was to promote "self-supporting and self-governed society." *Ex Parte Crow Dog*, 109 U.S. 556, 568-570 (1883) at 569-570. The Oglala Sioux Tribe and the Sioux Nation have consistently maintained that the 1868 Sioux Nation Treaty may only be

altered with the consent of 3/4s of their adult citizens, as required by its terms, 1868 Sioux Nation Treaty, Art. XII, and by natural law. U.S. Declaration of Independence (1776) (just powers of government derive from the consent of the governed).

The Fort Laramie Treaty of 1868 provided that the Great Sioux Reservation, including all land now within the "Licensed Area" and "Area of Potential Effect (APE)" in this matter, was "set apart for the absolute and undisturbed use and occupation" of the Sioux Indians as a "permanent home." *Treaty with the Sioux — Brulé, Oglala, Miniconjou, Yanktonai, Hunkpapa, Blackfeet, Cuthead, Two Kettle, Sans Arcs, and Santee — and Arapaho*, 1868, Arts. 2, 15, 15 Stat. 635 (Apr. 29, 1868).

The Oglala Sioux Tribe has never given up its right to self-government, and the United States does not have a right to take away that right. To the Lakota, there is no greater right that requires protection than their right to protect their own sacred cultural resources. Especially important is their right to protect their own artifacts, graves, camp sites, and battlefields. This process would deprive the Oglala and Lakota people of that right. There is no legal justification for such a deprivation. It has no place in a constitutional republic.

The Oglala Sioux Tribe has always asserted, and those of Consolidated Intervenors that are Oglala and/or Lakota hereby assert, that their treaty rights cannot be abrogated or overturned without the consent of 3/4th of adults (such vote to be counted in accordance with Lakota tradition). Treaty rights are not and have not been surrendered. The United States does not have a unilateral right to modify treaty rights. Those rights

were established by mutual consent between equal parties in a good faith bargain for valid consideration and are binding under international law.

The Tribe reserved its self-government over its own lands and cultural resources, and it is a violation of the trust responsibility to interpret NRC rules and regulations so as to avoid proper and due, good faith consultations with the Tribe and tribal members, including those who have submitted Affidavits concerning Lakota Cultural Resources, attached hereto in INT-023.

The Board should recognize this principle because it is a bedrock principal of Federal law and natural law that is enshrined in the Declaration of Independence and in international law. The United Nation Declaration on the Rights of Indigenous Peoples provides that:

> States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them. Id. at Art. 19 (emphasis added).

Even under Federal law, there can be no abrogation of Indian treaty rights without a clear statutory expression to abrogate those rights. *Herrera v. Wyoming*, 139 S. Ct. 1686, 1698 (2019).

The Supreme Court has held that a statute that is silent with respect to Native Americans does not divest a tribe of its sovereign authority. *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9, 18 (1987) (citing *Merrion v. Jicarilla Apache Tribe,* 455 U.S. 130, 149, n. 14 (1980); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 60 (1978)). Further, the courts have held that Federal regulatory schemes do not apply to tribal governments

exercising their sovereign authority absent express congressional authorization. *Dobbs v. Anthem BCBS*, 600 F.3d 1275, 1283 (10th Cir. 2010); *see also NLRB v. Pueblo of San Juan*, 276 F.3d 1186, 1196 (10th Cir. 2002).

Therefore, there is no legal justification or authorization for the NRC to avoid going through the difficult process of good faith consultations with all interested tribal members and Lakota people, in addition to Tribal officials, concerning the Tribe's and such tribal members' and Lakota people's cultural resources within the Area of Potential Effect (APE). And that is exactly what the NRC Staff attempts to do in its voluminous filings. It is not legally supportable under applicable Supreme Court prescedent and, therefore, must be rejected.

Broadly, the trust doctrine ("Trust Doctrine") requires the federal government to support and encourage tribal self-government and economic prosperity, duties that stem from the government's treaty guarantees to 'protect' Indian tribes and respect their sovereignty. "The undisputed existence of a general trust relationship between the US and the Indian people" has long dominated the government's dealings with Native Americans. *US v. Mitchell*, 463 U.S. 206, 225 (1983); *see also*, *Cobell v. Norton*, 240 F.3d 1081, 1098 (D.C. Cir. 2001) ("the government has longstanding and substantial trust obligations to Indians.")

Between 1787 and 1871, the United States entered into nearly four hundred treaties with Indian tribes. During those years, "the native nations were still relatively powerful and autonomous," and although the United States might have been able to

overpower them in warfare, victory would have been very costly. *See* M.C. Woods, "*Indian Land and the Promise of Native Sovereignty: The Trust Doctrine Revisited*," Utah L. Rev. 1471, 1497 (1994). In an effort to avoid those costs, the United States frequently entered into peace treaties, like the 1851 and 1868 Ft. Laramie Treaties, with Indian tribes. In these treaties, the United States obtained the land and other rights and accommodations it wanted from the tribes, and in return, the United States set aside other reservation lands for those tribes and guaranteed that the federal government would respect "***the sovereignty of the tribes…would 'protect' the tribes***…[and would] provide food, clothing and services to the tribes." *Id.*

The Supreme Court has held that treaties of this nature create a special relationship between Indian tribes and the federal government – a unique bond – that obligates the government to keep its end of the bargain, now that the tribes have kept theirs. The promises made in exchange for millions of acres of tribal land impose on the federal government 'moral obligations of the highest responsibility and trust." *Seminole Nation v. US*, 316 U.S. 286, 29697 (1942); *See also*, *US v. Mitchell*, *infra; Morton v. Mancari*, 417 U.S. 535, 551-552 (1974); *US v. Mason*, 412 U.S. 391, 397 (1973).

The federal government's trust duty is owed to all Indian Tribes. *Lincoln v. Vigil*, 508 US 182, 195 (1993), *quoting with approval Hoopa Valley Tribe v. Christie*, 812 F.2d 1097 (9th Cir. 1986). The Trust Doctrine includes:

(1) a clear duty to protect the native land base and the ability of tribes to continue their ways of life;

(2) Duties arising from federal control or management of tribal land and property which are fiduciary in nature.

Under Trust Doctrine, federal officials that manage, control, or supervise tribal resources are duty bound to: (1) consult with the tribe in determining how best to use those resources, (2) to carefully analyze **all relevant information** regarding how to manage them, (3) **to make their decisions based on the tribe's best interests**; and (4) to maintain and provide to the tribe an accurate accounting. *See Klamath Water Users Protective Ass'n v. Patterson*, 204 F.3d 1206, 1214 (9th Cir. 1999), *cert. den.*, 121 S.Ct. 44 (2000).

Courts have held that the Trust Doctrine is violated where federal agencies undertake or license actions off the reservation which either diminish on-reservation water supplies, or cause pollution on the reservation or to its water supplies. *Pyramid Lake Paiute Tribe of Indians v. Morton*, 354 F. Supp. 252 (D.DC. 1972), *rev'd on other grounds*, 499 F.2d 1095 (D.C. Cir.1974). There is no reason to believe that sacred cultural resources should be protected any less than water supplies. To the Lakota, such distinctions are meaningless; to the Lakota person, sacred cultural resources and water (*mni wiconi* in Lakota language) are the same thing.

Thus, federal officials, as a result of the Trust Doctrine, should interpret their responsibilities to Native Americans broadly and assist them to the maximum extent allowable under the treaties and statutes they are implementing. To the extent of disagreements of interpretations, the federal officials are required to defer to the Native

Americans' views on how the process should be interpreted. That is more true when that process, like the "March 2018 Approach" involves whether or not sacred cultural resources will be properly identified and protected, or destroyed to the irreparable harm of the Tribe, the tribal members and the Lakota people.

An Indian treaty should be viewed, the Supreme Court has explained, "not [as] a grant of rights to the Indians, but a grant of rights from them." *U.S. v. Winans*, 198 US 371 (1905). Tribes therefore have many rights, in addition to those listed in treaties. In fact, any right that a sovereign nation would normally possess that is not expressly extinguished by a treaty (or by a subsequent federal statute) is generally "reserved" to the tribe. *Menominee Tribe v. U.S.*, 391 US 404 (1968); *U.S. v. Dion*, 476 US 734, 739 (1986); *Swim v. Bergland*, 696 F.2d 712 (9th Cir. 1983). This is a fundamental principle of Federal Indian law known as the "Reserved Rights Doctrine". Under the Reserved Rights Doctrine, the Lakota people have reserved their right to protect their sacred cultural resources by any means they deem appropriate as a sovereign people.

A treaty is a contract between nations. Article VI, Section 2 of the US Constitution declares that treaties are the "supreme law of the land." Treaties are therefore superior to state constitutions, state laws, and are equal in authority to laws passed by Congress; and thus, superior to federal regulations. *See Worcester v. Georgia*, *infra.* "The unique trust relationship between the federal government and Native Americans" requires that "if an ambiguity in a statute or treaty "can reasonably be construed as the Tribe would have it construed, it must be construed that way." *Ramah Navajo Chapter v. Lujan*, 112 F.3d 1455, 1462 (10 th Cir. 1997), *quoting Muscogee*

(Creek) Nation v. Hodel, 851 F.2d 1439, 1445 (D.C. Cir. 1988), *cert. den*., 488 U.S. 1010 (1989); *See also Oneida County, NY v. Oneida Indian Nation of New York State*, 470 U.S. 226, 247 (1985); *US v. Washington*, 157 F.3d 630, 643 (9th Cir. 1998), *cert. den.*, 526 U.S. 1060 (1999); *McNabb for McNabb v. Bowen*, 829 F.2d 787, 792 (9th Cir. 1987).

The following "Canons of Indian Treaty Construction" apply:

(1) ambiguities in treaties must be resolved in favor of the Native Americans; *Carpenter v. Shaw*, 280 US 363, 367 (1930); *DeCoteau v. District County Court for 10 th Judicial District*, 420 US 425, 447 (1975); *Bryan v. Itasca County, MN*, 426 US 373, 392 (1976).

(2) treaties must be interpreted as the Native Americans would have understood them; *Herrera v. Wyoming*, 139 S. Ct. 1686, 1699 (2019) ("Indian treaties "must be interpreted in light of the parties' intentions, ***with any ambiguities resolved in favor of the Indians***," (emphasis added), *citing Mille Lacs*, 526 U.S. at 206, 119 S.Ct. 1187, and the words of a treaty must be construed " 'i***n the sense in which they would naturally be understood by the Indians***,' " *citing Fishing Vessel Assn.*, 443 U.S. at 676, 99 S.Ct. 3055; *see also Jones v. Meehan*, 175 US 1, 10 (1899); *US v. Shoshone Tribe*, 304 US 111, 116 (1938); *Choctaw Nation v. Oklahoma*, 397 US 620, 631 (1970)).

Since treaties are superior to federal regulations, it also follows that federal regulations must be reasonably interpreted as Native Americans understand them. This means that it is the Tribal view, not the NRC Staff's view, of whether there have been sufficient consultations that is dispositive. The Board should defer to the Tribe's view

and not the NRC Staff's view on how the "March 2018 Approach" should be intepreted, due to the trust responsibility. The policy, and pre-Constitutional nature of the obligations of the United States for the benefit of Native Americans supersedes any policies that require deference to the agency in this situation involving cultural resources.

The Supreme Court recently held specifically based on the fundamental principal in Federal law requiring deference to the interpretation of things as they are 'understood' by the Tribe and tribal members. *See Herrera v. Wyoming*, 139 S. Ct. 1686, 1702-1703 (2019) ("[c]onsidering the terms of the 1868 Treaty as they would have been understood by the Crow Tribe, we conclude that the creation of Bighorn National Forest did not remove the forest lands, in their entirety, from the scope of the treaty.") *Id.*

(3) Indian treaties must be construed liberally in favor of the Native Americans. *Tulee v. Washington*, 315 US 681, 684-85 (1942); *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 US 658, 690 (1979); *Oneida County, NY v. Oneida Indian Nation of the State of New York*, 470 US 226, 247 (1985).

(4) Treaty abrogation may not be inferred and neither a federal agency nor a state may abrogate an Indian treaty. *Herrera v. Wyoming*, 139 S. Ct. 1686, 1698 (2019) (if Congress seeks to abrogate treaty rights, "it must clearly express its intent to do so," *citing Mille Lacs*, 526 U.S. at 202, 119 S.Ct. 1187, ("[t]here must be 'clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty.' " *Id*., at 202–203, 119 S.Ct. 1187 (*quoting Dion*, 476 U.S. at 740, 106 S.Ct. 2216);

see Menominee Tribe, 391 U.S. at 412, 88 S.Ct. 1705); *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 US 172, 196, 194 n.5, 202 (1999); *See also Menominee Tribe v. US*, 391 US 404 (1968); *Oneida Indian Nation v. Oneida County*, 414 US 661, 670 (1974); *Arizona v. California*, 373 US 546 (1963).

It also follows that a federal agency may not avoid its consultation obligations , or the United States government's trust responsibilities, by using archane legal tactics within the agency's own regulations in the hope for deference or otherwise. The Trust Doctrine trumps the federal agency's entitlement to deference which would otherwise apply in the absence of issues related to the handling of sacred cultural resources.

In 1994, President Clinton issued a Presidential Memorandum that requires all federal agencies, including the NRC, to conduct their business with tribes on a "government-to-government" basis, respectful of tribal sovereignty. "*Government-to-Government Relations with Native American Tribal Governments,*" 59 Fed. Reg. 22951, 1994 WL 16189198 (April 24, 1994). The 1994 Executive Order states:

> The United States Government has a unique legal relationship with Native American tribal governments and tribal members, as set forth in the Constitution of the United States, treaties, statutes, and court decisions. As executive departments and agencies undertake activities affecting Native American tribal rights or trust resources, such activities should be implemented in a knowledgeable, sensitive manner respectful of tribal sovereignty….The purpose of these principles is to clarify our responsibility to ensure that the Federal Government operates within a government-to-government relationship with federally recognized Native American tribes. *Id.* at 22952.

The Executive Order further provides, in pertinent part, that in order to ensure that the rights of sovereign tribal governments are fully respected, executive branch activities,

including those of the NRC, shall be guided by the following:

> (b) Each executive department and agency shall consult, to the greatest extent practicable and to the extent permitted by law, with tribal governments prior to taking actions that affect federally recognized tribal governments. All such consultations are to be open and candid so that all interested parties may evaluate for themselves the potential impact of relevant proposals.
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> (c) Each executive department and agency shall assess the impact of Federal Government plans, projects, programs, and activities on tribal trust resources and assure that tribal government rights and concerns are considered during the development of such plans, projects, programs, and activities.
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> (d) Each executive department and agency shall take appropriate steps to remove any procedural impediments to working directly and effectively with tribal governments on activities that affect the trust property and/or governmental rights of the tribes.
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> (e) Each executive department and agency shall work cooperatively with other Federal departments and agencies to enlist their interest and support in cooperative efforts, where appropriate, to accomplish the goals of this memorandum.
>
> (f) Each executive department and agency shall apply the requirements of Executive Orders Nos. 12875 ("Enhancing the Intergovernmental Partnership") and 12866 ("Regulatory Planning and Review") to design solutions and tailor Federal programs, in appropriate circumstances, to address specific or unique needs of tribal communities. *Id.*
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In 2000, President Clinton issued Executive Order No. 13175, Consultation and Coordination With Indian Tribal Governments, 65 FR 67249, 2000 WL 1675460 (Pres.Exec.Order Nov 06, 2000).

> By the authority vested in me as President by the Constitution and the laws of the United States of America, and in order to establish regular and meaningful consultation and collaboration with tribal officials in the development of Federal policies that have tribal implications, to strengthen the United States government-to-government relationships with Indian tribes, and to reduce the imposition of unfunded mandates upon Indian tribes; it is hereby ordered as

follows:

*** Sec. 2. Fundamental Principles. ***In*** formulating or ***implementing policies that have tribal implications, agencies shall be guided by the following fundamental principles:***

(a) The United States has a unique legal relationship with Indian tribal governments as set forth in the Constitution of the United States, treaties, statutes, Executive Orders, and court decisions. Since the formation of the Union, the United States has recognized Indian tribes as domestic dependent nations under its protection. The Federal Government has enacted numerous statutes and promulgated numerous regulations that establish and define a trust relationship with Indian tribes.

(b) Our Nation, under the law of the United States, in accordance with treaties, statutes, Executive Orders, and judicial decisions, has recognized the right of Indian tribes to self-government. As domestic dependent nations, Indian tribes exercise inherent sovereign powers over their members and territory. The United States continues to work with Indian tribes on a government-to-government basis to address issues concerning Indian tribal self-government, tribal trust resources, and Indian tribal treaty and other rights.

(c) The United States recognizes the right of Indian tribes to self-government and supports tribal sovereignty and self-determination.

Sec. 3. Policymaking Criteria. In addition to adhering to the fundamental principles set forth in section 2, agencies shall adhere, to the extent permitted by law, to the following criteria when formulating and implementing policies that have tribal implications: *67250

(a) Agencies shall respect Indian tribal self-government and sovereignty, honor tribal treaty and other rights, and strive to meet the responsibilities that arise from the unique legal relationship between the Federal Government and Indian tribal governments.

(b) With respect to Federal statutes and regulations administered by Indian tribal governments, the Federal Government shall grant Indian tribal governments the maximum administrative discretion possible.

(c) When undertaking to formulate and implement policies that have tribal implications, agencies shall:

(1) encourage Indian tribes to develop their own policies to achieve program

objectives;

(2) ***where possible, defer to Indian tribes to establish standards*; and**

(3) in determining whether to establish Federal standards, consult with tribal officials as to the need for Federal standards and any alternatives that would limit the scope of Federal standards or otherwise preserve the prerogatives and authority of Indian tribes.

Sec. 4. Special Requirements for Legislative Proposals. Agencies shall not submit to the Congress legislation that would be inconsistent with the policymaking criteria in Section 3.

Sec. 5. Consultation. (a) ***Each agency shall have an accountable process to ensure meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implication***s. Within 30 days after the effective date of this order, the head of each agency shall designate an official with principal responsibility for the agency's implementation of this order. Within 60 days of the effective date of this order, the designated official shall submit to the Office of Management and Budget (OMB) a description of the agency's consultation process.

(b) To the extent practicable and permitted by law, no agency shall promulgate any regulation that has tribal implications, that imposes substantial direct compliance costs on Indian tribal governments, and that is not required by statute, unless:

(1) funds necessary to pay the direct costs incurred by the Indian tribal government or the tribe in complying with the regulation are provided by the Federal Government; or

(2) the agency, prior to the formal promulgation of the regulation,

(A) consulted with tribal officials early in the process of developing the proposed regulation;

(B) in a separately identified portion of the preamble to the regulation as it is to be issued in the Federal Register, provides to the Director of OMB a tribal summary impact statement, which consists of a description of the extent of the agency's prior consultation with tribal officials, a summary of the nature of their concerns and the agency's position supporting the need to issue the regulation, and a statement of the extent to which the concerns of tribal officials have been met; and

(C) makes available to the Director of OMB any written communications submitted to the agency by tribal officials.

(c) To the extent practicable and permitted by law, no agency shall promulgate any regulation that has tribal implications and that preempts tribal law unless the agency, prior to the formal promulgation of the regulation,

(1) consulted with tribal officials early in the process of developing the proposed regulation;

(2) in a separately identified portion of the preamble to the regulation as it is to be issued in the Federal Register, provides to the Director of OMB a tribal summary impact statement, which consists of a description of the extent of the agency's prior consultation with tribal officials, a summary of the nature of their concerns and the agency's position supporting the *67251 need to issue the regulation, and a statement of the extent to which the concerns of tribal officials have been met; and

(3) makes available to the Director of OMB any written communications submitted to the agency by tribal officials.

(d) On issues relating to tribal self-government, tribal trust resources, or Indian tribal treaty and other rights, each agency should explore and, where appropriate, use consensual mechanisms for developing regulations, including negotiated rulemaking. *Id.* (Emphasis added.)

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Neither of these Executive Orders has been rescinded, modified or revoked by Presidents Bush, Obama or Trump, and, accordingly, they remain in full force and effect and apply to the instant case.

In addition there are international human rights standards indicate that Indigenous peoples' whose lands are affected by development projects have the right to "free, prior and informed consent." In the *United Nations Declaration on the Rights of the World's Indigenous Peoples*, Article 32, ¶ 1, "Indigenous peoples have the right to determine and

develop priorities and strategies for the development or use of their lands or territories and other resources," and ¶ 2, "States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions ***in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources***, particularly in connection with the development, utilization or exploitation of mineral, water or other resources," and ¶ 3, "States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact." (*See General Assembly Resolution* A/61/L. 67 of 7 September 2007.) (Emphasis added.)

C. The Canons of Interpretation and the Trust Doctrine require the NRC Staff to transact with the Tribe and its members (including those of Consolidated Intervenors who are tribal members), and the Lakota people (and all Native Americans) with the utmost good faith and fair dealing and with honor and dignity. The trust responsibility is of the highest fiduciary nature where, as here, the United States or one of its agencies such as the NRC is taking action that impacts the cultural resources of the Tribe, its members and the Lakota people. The NRC Staff has failed to fulfill its duties imposed by the Trust Doctrine and related Federal law by excluding Consolidated Intervenors from its implementation of the so-called "March 2018 Approach." Consolidated Intervenors are not parties to any of the discussions. Nor are any tribal members who may have information but who are not on the NRC Staff's invite list.

Consolidated Intervenors also note that the NRC Staff has consistently failed to invite the Tribe and tribal members; speaking that is of the Programmatic Agreement in this matter in which among all the governmental 'Required Parties" and governmental and non-governmental 'Invited Parties', the Tribe's name is not mentioned as either a Required Party or an Invited Party to the Programmatic Agreement. The very document that purports to 'protect' the sacred cultural resources of the Tribe and its members and the Lakota people and the NRC Staff did not dignify the Tribe with even an invitation! How does that comply with the Trust Doctrine? How does that comply with the Executive Orders and bedrock Federal law and Treaty obligations?

It doesn't.

CONCLUSION

For all the foregoing reasons, the Board should deny the remedies sought by the NRC Staff and Powertech, the Licensee, and should grant the remedies sought by the Tribe and further, should find that the NRC Staff may not, consistent with Federal law, avoid the trust responsibility and treaty obligations of the United States by terminating consultations with the Tribe.

Further, Consolidated Intervenors request that the Board rule that the Tribe's tribal members and Consolidated Intervenors be included in the consultation process and that such process include good faith consultations, as the term 'good faith' is interpreted as understood by the Tribe, tribal members and Lakota people, in the context of the

proposed process to protect the Lakota people's sacred cultural resources.

Dated this 28th day of June, 2019.

Respectfully submitted,

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

CERTIFICATE OF SERVICE

Pursuant to 10 C.F.R. § 2.305 (as revised), I certify that, on this date, copies of the foregoing **CONSOLIDATED INTERVENORS RESPONSE POSITION STATEMENT** were served upon the Electronic Information Exchange (the NRC's E-Filing System), in the above-captioned proceeding.

Dated: June 28, 2019.

Signed (electronically) by David C. Frankel

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