

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

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

Hearing Exhibit

Exhibit Number: Exhibit OST-043-R

Exhibit Title: Declaration of Dr. Kelly Morgan

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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**DECLARATION OF DR. KELLY MORGAN**

1. My name is Dr. Kelly Morgan. The curriculum vitae included with this testimony is an accurate description of my professional training and cultural background, as they apply to Lakota culture.
2. I earned my Interdisciplinary Ph.D. in American Indian Studies from University of Oklahoma, Norman, OK (1997). My dissertation, *Dakotapi Women's Traditions: A Historical and Literary Critique*, places a central focus on Lakota women and the importance of their roles in the survival of Lakota culture. My doctoral work built on my Masters of English, University of North Dakota, Grand Forks, ND (1990) that also focused on Lakota culture. Similarly, I earned my Bachelor of Arts in Indian Studies, University of North Dakota, Grand Forks, ND (1989) along with a Minor in Women's Studies and English.
3. I have continued to apply and expand on my academic work while teaching courses at various universities and colleges. Each of these courses focused, in part, or entirely, on the interdisciplinary approach to cultural studies. The curriculum vitae also lists the numerous articles, books, panels, and other applications.
4. The attached curriculum vitae accurately lists my experience in developing and carrying out investigations and analysis of cultural resources using a variety of methodologies.
5. I have served as a Tribal Liaison and Field Technicon for numerous cultural resources inventories.
6. I used my interdisciplinary training to work within the field of archaeology since 2010. As a field archaeologist and tribal liaison, I have worked to protect cultural and natural resources alongside other archaeologists and environmentalists in North Dakota, Montana, South Dakota and on the island of Guam.

7. I am the former tribal archaeologist for Standing Rock Sioux Tribe. I was housed in the Tribal Historic Preservation Office a program of the Standing Rock Sioux Tribe. I have participated in numerous tribal consultations as the tribal archaeologist for Standing Rock.
8. I am from the Standing Rock Indian reservation in North and South Dakota. My academic and professional work has required and benefited from cultural membership in the Lakota Tribes.
9. My work experience encompasses all areas of cultural resources management field work and organization of data carrying forth the requirements of the contractual agreements.
10. As a Native American with experience working as an archaeologist in the context of surveying each of the sites within various project areas, I often work as a cultural liaison between governmental and company archaeologists and the tribal monitors.
11. My skills, knowledge and abilities make it possible to work on projects with both the archaeologists and tribal monitors performing the required work and identifying both historic archaeological sites and Traditional Cultural Properties (TCPs) both within and outside of reservation boundaries.
12. Although I am bound by confidentiality laws, agreements, and customs that prevent full disclosure, my work has included recording stone circles and cairns, identifying burials (both pre-historic and historic) that might be intact or exposed, Knife River flint sites, etc. I am committed, professionally and personally, to upholding the federal, tribal, and state laws and agreements in a way that protects cultural patrimony, objects of cultural patrimony, human remains, sacred objects, unassociated funerary object, stories, and other tangible and intangible aspects of the cultural resources of the relevant tribes that may have a right of possession, right of return, or other interest that requires confidentiality in carrying out my work.
13. I have served as cultural liaison working with archaeologists and tribal monitors on projects while performing Class III cultural resources inventories. My interdisciplinary doctorate and work experience has established me as a person with recognized expertise and background in cultural resources management, Section 106, NAGPRA, NEPA, ARPA and federal Indian law surrounding both archaeological sites and Traditional Cultural Properties.
14. Even when my work does not involve access to a site, oral interviews can be conducted based on existing site survey information to identify, characterize, and protect already identified sites. The best practice is to conduct oral interviews before, during, and after site surveys to provide cultural context that archeologists carrying out the surveys often lack. However, an interdisciplinary approach benefits from oral interviews of persons with relevant cultural information, even when conducted separate from the archeological site survey. These oral interviews, conducted pursuant to established ethnographic methodologies, provide necessary and important information needed to characterize and protect the cultural resources identified by site surveys conducted by persons without the

necessary cultural background. These oral interviews are considered “human subject research” and require carefully defined methods and protections of the subjects and the information gained.

15. My training and cultural background provides a set of skills that allow me to carry out an interdisciplinary analysis that involves archeology, ethnography, in context of the methods recognized by each of these scientific disciplines and Lakota culture. Often, even involving Lakota tribes, my training and cultural background still requires information from individuals and entities with specific knowledge that is created, held, and shared based on the epistemology of the relevant cultural group.
16. Archeologists without deep cultural experience or training in Lakota culture require additional input and expertise to carry out the interdisciplinary tasks that are inherent to cultural resources analysis.
17. Pedestrian surveys carried out by archeologists, still have some limited value. However, without the insights of persons with the necessary cultural information, applied in accordance with that culture’s epistemological procedures, the data is not useful to cultural resources analysis. Although archeologically viable data may be useful within the archeology discipline, the cultural data produced by the ethnographies, oral interviews, and other methods used by social sciences is required in the interdisciplinary field of cultural resource analysis.
18. My career has been dedicated to study, teaching, application, and implementation of interdisciplinary methodologies to issues involving cultural resources.
19. I am familiar with the license application submitted to the Nuclear Regulatory Commission (NRC) by Powertech (USA) Inc. (“Powertech” or “Applicant”) for the proposed Dewey-Burdock in-situ leach uranium mine in southwest South Dakota.
20. It is important to conduct a scientific and culturally competent analysis because the lands encompassed by the Powertech proposal are within the Oglala Sioux Tribe’s as well as other members of the Oceti Sakowin nation’s aboriginal lands. As a result, the cultural resources, such as burials, items of cultural patrimony, artifacts, sites, and other material culture, etc., belong to and/or could be associated with the Tribe upon proper identification, documentation, evaluation, and recordation. By enacting NEPA (42 U.S.C. §§ 4231 *et seq.*), NAGPRA, (25 U.S.C. §§ 3001 *et seq.*), NHPA (16 U.S.C.S. §§ 470 *et seq.*) and other statutes, the United States Government has assured that the cultural resources of a tribe will be protected, even when they are not within reservation boundaries.
21. Since there are cultural resources identified in the license application, and there may well be more that only the Tribe can identify and ensure that they are properly protected, the Tribe has a protected interest here. Any harm done to these cultural resources, especially to burials and artifacts, perhaps because the Applicant and NRC Staff did not properly judge the significance of certain artifacts or other resources, will be an irreparable injury to the very

identity of the Tribe, caused by the actions of the Applicant, and condoned by the NRC Staff, the Tribe's trustee.

22. I am not aware of any interdisciplinary analysis of the cultural resources already identified that would be impacted by the Applicant's proposal.
23. In any case, the discovery of significant cultural resources and prehistoric artifacts in the Oglala Sioux Tribe's and other Oceti Sakowin nation's treaty and aboriginal territory implicates important tribal interests such that all member Tribe's rights are threatened by the Applicant's proposed construction and mining activity in its aboriginal territory.
24. My testimony seeks to ensure that the NRC does not take action that would harm the Oglala Sioux Tribe's as well as other members of the Oceti Sakowin nation's interests in ensuring the protection of its cultural, historic, and natural resources.
25. During the evidentiary hearings held in August of 2014, the Oglala Sioux Tribe witnesses Mr. Mesteth ([Exhibit OST-015](#)) and Mr. Catches Enemy ([Exhibit OST-014](#)) testified in detail as to the ongoing harm to the Tribe's substantive and procedural interests as a result of the lack of analysis as to the cultural and water impacts associated with the proposed project. I agree with that testimony. ([Exhibit OST-054, pp. 763-767; 779-782; 794; 799-803; 812-816; 825-827; 853-855; 861-864](#)).
26. Included within the territory the Powertech proposal would impact are current or extinct water resources. Such resources are known to have been favored camping sites of indigenous peoples, both historically and prehistorically, and the likelihood that cultural artifacts and evidence of burial grounds exist in these areas is strong.
27. While the Powertech application includes some evidence that could be used to prepare an interdisciplinary and culturally informed cultural resource study, no comprehensive study identifying, characterizing and seeking to protect those resources has been identified or incorporated in the FSEIS. No such study has been conducted by the Oglala Sioux Tribe.
28. While some other tribes have reviewed the site, these surveys are not sufficient to identify cultural and historic resources significant to the Oglala Sioux Tribe or other Oceti Sakowin nations. The FSEIS does not describe any uniform or scientifically-verified methodology employed by these surveys, nor explains any methodology or scientific basis for the selection of certain cultural resources as significant or eligible for listing on the National Register of Historic Places (NRHP), while others are not granted such status or protections.
29. Powertech's Environmental Report accompanying the license application indicates that personnel from the Archaeology Laboratory at Augustana College ("Augustana"), Sioux Falls, South Dakota, conducted on-the-ground field investigations between April 17 and August 3, 2007. ([Exhibit APP-040-B at 3-178](#)). To my knowledge, the Oglala Sioux Tribe, nor any other member of the Oceti Sakowin, was not involved in this study, and no surveys have been made by any persons with relevant, specific, specialized tribal cultural expertise.
30. The Augustana study remains the primary basis for the NRC Staff's analysis of cultural resources in its FSEIS. ([Exhibit NRC-008-A at 3-76](#)). I agree with the rulings that confirm the Augustana study and FSEIS

lack the interdisciplinary, culturally informed analysis required to address and protect cultural resources of various tribes. The Augustana study provides a starting point to conduct further surveys and analysis of the mine project area that would provide a basis for a culturally informed interdisciplinary analysis and public comment, as required by NEPA. Some examples of the archeological data that would be supplemented by further surveys and ethnographic investigation flow.

31. As stated in the Powertech Environmental Report, at 3-179, (Exhibit APP-040-B) the Augustana study found that “the sheer volume of sites documented in the area [was] noteworthy,” and the area proposed for mining was found to have a “high density” of cultural resources. As also recognized in the environmental report, this indicates that use of the area by indigenous populations was, and continues to be, extensive. Oral interviews and other methodologies are needed to put this information into a cultural resources context.
32. The Powertech Environmental Report also states, at 3-178, (Exhibit APP-040-B) Augustana documented 161 previously unrecorded archaeological sites and revisited 29 previously recorded sites during the current investigation. Among these were some 200 hearths within 24 separate sites. Significantly, however, twenty-eight previously recorded sites were not relocated during a subsequent investigation. Oral interviews and other methodologies are needed to put this information into a cultural resources context.
33. The Memorandum of Agreement (with amendments) entered into between Powertech and the Archaeological Research Center (ARC), a program of the South Dakota State Historical Society, reproduced in the Environmental Report at Appendix 4.10-B (Exhibit APP-021-AA), specifically recognizes that “Powertech has determined that the Project may have an effect on archaeological or historic sites that contain or are likely to contain information significant to the state or local history or prehistory....”. In fact, the proposed project would have a significant impact on sacred sites that are directly connected to the archaeological, historic, cultural, as well as traditional cultural properties associated with numerous tribes from the northern plains. Oral interviews and other methodologies are needed to put this information into a cultural resources context.
34. The NRC Staff’s Final Supplemental Environmental Impact Statement (FSEIS) relies heavily on the Augustana study (Exhibit NRC-008-A-1 at 3-76) and a “Programmatic Agreement” (PA) developed outside of the NRC Staff’s National Environmental Policy Act (NEPA) review. (Exhibit NRC-008-B-1 at 6-17). As a result, the FSEIS defers its analysis of the impacts of the project construction, and development of mitigation plans and protocols to a later time. Additional site surveys are needed, but do not preclude the use of oral interviews and other methodologies to inform an interdisciplinary analysis of the current information within a cultural resources context.
35. I agree with the February of 2014 letter sent by then Oglala Sioux President Brian V. Brewer setting forth significant problems with the NRC Staff’s approach to both compliance with NEPA and the National Historic Preservation Act (NHPA). (Exhibit OST-012 at 132). The issues identified in that letter have not been resolved, and the significant historic and cultural resources remain at risk from the proposed mine project as a result.

36. The Oglala Sioux Tribe submitted declarations in the NRC administrative process in 2010 signed by then-THPO Wilmer Mesteth and Director of the Oglala Sioux Tribal Land Office Denise Mesteth, and in 2014 signed by then-THPO Michael Catches Enemy. (Exhibits OST-014, OST-015). Because no culturally relevant nor scientifically-defensible site-wide cultural resources study or inventory has been conducted for the project area since the filing of those declarations, the criticisms and critiques of the cultural resources studies conducted with respect to the mine project area remain valid and current.
37. Using the NEPA process ensures Tribal members, professionals, and other persons are able to engage the cultural resources decisions being made by NRC Staff and work to ensure that cultural and natural resources are protected from desecration and destruction.
38. I am aware that on July 20, 2018, the United States Court of Appeals for the District of Columbia Circuit issued a decision in a case brought by the Oglala Sioux Tribe against the Nuclear Regulatory Commission alleging violations of federal law, including NEPA, for leaving the Powertech license in place despite the lack of a NEPA-compliant cultural resources impact and mitigation analysis. It is my understanding that no such analysis has been conducted.
39. It is my opinion that there are a wide range of persons with the necessary cultural background and training to carry out the analysis in accordance with the NEPA requirements articulated by the Court of Appeals. Specific methodologies and an implementation plan are required to provide an estimated cost of such an analysis. I am not aware of any NRC-proposed methodology that would support a reliable cost estimate.
40. I have reviewed the draft methodology prepared by Mr. Spangler. (Exhibit NRC-214). The document describes a generic approach that is used widely by archeologists. The document does not contain the interdisciplinary methods or epistemologically competent data gathering and analysis I've described. Mr. Spangler's draft methodology lacks the specific information required to support a reliable cost estimate for the cultural resources analysis.
41. The approach that I have described, and used extensively, would support NEPA analysis and a plan to mitigate the impacts to sites and their setting, opportunities to implement mitigation options such as moving facility features and prohibiting disturbance of sensitive areas would be destroyed losing irreplaceable resources.
42. As detailed in Mr. Mesteth's and Mr. Catches Enemy's Declarations (Exhibits OST-014, OST-015), the numbers and density of cultural resources at the site proposed for mining demonstrate that any mining activity, including ground-disturbing construction activity, is likely to irreparably adversely impact the cultural resources of the Oglala Sioux Tribe. The failure to meaningfully involve the Tribe in the analysis of these sites, or to conduct any ethnographic studies in concert with a field study designed with credible scientific methodology as part of the NEPA or NHPA processes further exacerbate the impacts on the Tribe's interests as a procedural matter causing irreparable harm by negatively affecting the Tribe's ability to protect its cultural resources. If the project were not to go forward as planned, the interests of the Oglala Sioux

Tribe would be protected as the potential for impact to the Tribe's cultural resources would be diminished or outright eliminated.

43. Confidentiality is critical to Oglala Sioux Tribe, and is the subject of tribal codes and ordinances. I would expect that the confidentiality requirements of all applicable laws would be applicable to all participants in the survey with access to sensitive cultural information, including NRC Staff and contractors.
44. Before conducting any survey or ethnographic work, the agreements must be in place to address the Tribe's concerns over ownership of the information collected, protection of the physical sites, and the human subjects involved, whether information is obtained through the survey and the oral interviews.
45. On June 5, 2018, NRC Staff contractor Dr. Nickens provided a proposed "initial work plan" to the Tribe. (**Exhibit OST-052**). The June 5, 2018 initial work plan lacked any identifiable scientific methodology for a cultural resources survey. In fact, it constituted an open site survey proposal that failed to respond to the Tribe's longstanding objections. The proposal called for:
  - a. "windshield survey" provided by Powertech driver;
  - b. Field visits to 3-5 previously identified sites per day;
  - c. Prioritize sites based on some unstated criteria;
  - d. Contractor-prepared "daily package" of information explaining why sites to be visited that day were chosen.
46. Mr. Nickens' work plan contains no methodology. Mr. Nickens may be a competent archeologist, but he lacks the qualifications to design and implement a culturally and scientifically sound cultural resources survey methodology.
47. The Oglala Sioux Tribe was justified in refusing to go into the field based on Mr. Nickens' work plan. Given the lack of any scientific survey methodologies presented by NRC Staff or contractors, apart from the one-page summary work plan provided on June 5, 2018.
48. The Tribe was correct to propose the set of methodologies were discussed at the June 13, 2018 emergency meeting of the Oglala Sioux Tribe Cultural Affairs and Historic Preservation Advisory Council Meeting. Dr. Nickens and NRC Staff attended the meeting. During the meeting, the Advisory Council discussed the methodologies and gave input on Oglala Lakota cultural principles. This is the process that I would expect the federal government to follow through on by providing proposal informed by a person with the necessary training and background.



49. I reviewed the materials provided in late 2018 and early 2019 that purported to be cultural resource methodologies. My review is summarized the attached document I prepared: “A Compilation of Source Materials and an Evaluation of Report By Paul R. Nickens Titled: Compilation and Evaluation of Existing Information for The National Environmental Policy Act Review Of Lakota Historic, Cultural, And Religious Resources for The Dewey-Burdock In Situ Uranium Recovery Project Fall River And Custer Counties, South Dakota (Exhibit NRC-224). My report is incorporated by reference into my declaration. However, none of the documents cited by Mr. Spangler or Mr. Nickens, provide the necessary methodologies to identify and analyze cultural resources already identified.
50. My review of the documents confirm that Mr. Nickens’ and Mr. Spangler’s work are fatally flawed.
51. It is my expert opinion that the NRC could have, but did not, prepare the methodologies necessary to obtain and analyze existing information in accordance with the interdisciplinary physical and social sciences and culturally informed methods used in the field of cultural resources.
52. It is my expert opinion that NRC could have, but did not, hire qualified contractors with the specialized tribal, cultural, and scientific expertise to design a cost-effective approach to cultural resources surveys, ethnographies, and other culturally appropriate analyses required to prepare an interdisciplinary NEPA analysis.

I declare under penalty of perjury that the foregoing is true and correct.

This document was executed on June 28, 2019 at Albuquerque, New Mexico.

*s/Dr. Kelly Morgan*  
Kelly Morgan, PhD.

A COMPILATION OF SOURCE MATERIALS AND AN EVALUATION OF A  
REPORT BY PAUL R. NICKENS TITLED:

COMPILATION AND EVALUATION OF EXISTING INFORMATION FOR THE  
NATIONAL ENVIRONMENTAL POLICY ACT REVIEW OF LAKOTA HISTORIC,  
CULTURAL, AND RELIGIOUS RESOURCES FOR THE DEWEY-BURDOCK IN  
SITU URANIUM RECOVERY PROJECT

FALL RIVER AND CUSTER COUNTIES, SOUTH DAKOTA

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Prepared for  
**OGLALA SIOUX TRIBE**

Prepared by  
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Lakota Consulting, LLC  
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June 26, 2019

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## ABSTRACT

This review of source materials and a report by Paul R. Nickens, titled: *Compilation and Evaluation of Existing Information for the National Environmental Policy Act Review of Lakota Historic, Cultural, and Religious Resources for the Dewey-Burdock In Situ Uranium Recovery Project in Fall River and Custer Counties, South Dakota* (Nickens, June 2018).

(Exhibit NRC-224). Nickens was asked to evaluate the “**existing information**” and the archaeological reports associated with the Dewey-Burdock In Situ Uranium Recovery (ISR) Project included in *A Level III Cultural Resources Evaluation of Powertech (USA) Incorporated’s Proposed Dewey-Burdock Uranium Project Locality within the Southern Black Hills, Custer and Fall River Counties, South Dakota, Part I* (Kruse, et al., 2008).

(Exhibits NRC-072, 073; NRC-136-A, 136-B, 136-C; APP-009).

The Dewey-Burdock In Situ Uranium Recovery (ISR) Project (Dewey-Burdock) in southwestern South Dakota originated when Powertech (USA), Inc. (Powertech), in February 2009 submitted an application to the U.S. Nuclear Regulatory Commission (NRC) to develop and operate the Dewey-Burdock ISR Project by using in situ leach (ISL) methods. The general location of the proposed project is located north of the town of Edgemont, SD. The license application submitted by Powertech included an Environmental Report (ER) and Technical Report (TR). As the potential licensee, Powertech requested the license from the NRC under Title 10 of the Code of Federal Regulations (10 CFR) Part 40, “Domestic Licensing of Source Material.” Also applicable, Powertech sought the NRC guidance, as well as the provisions of the National Environmental Policy Act (NEPA), National Historic Preservation Act (NHPA), and the NRC’s NEPA-implementing regulations in 10 CFR Part 51, “Environmental Protection Regulations for Domestic Licensing and Related Regulatory Functions.” This application included the full reporting of a Class III

intensive cultural resources survey previously conducted for the proposed project area acreage (Powertech, 2009; submitted as Appendix 2.4-A to the TR and as Appendix 4.10-A to the ER).

This report concludes that the Nuclear Regulatory Commission and Powertech (USA) have not used the accepted interdisciplinary and culturally informed methods to address cultural resource requirements set forth in the provisions of the 1970 National Environmental Policy Act (NEPA), and the National Historic Preservation Act (NHPA) of 1966 (Amended, 1992). The Nicken's Report bears all the hallmarks of a standard archaeological report. The Nicken's Report disregards and lacks the complete assessment of specific tribal concerns, expertise, and involvement in the project and cannot be characterized nor used as a substitute for an interdisciplinary cultural resource analysis.

## **BACKGROUND RESEARCH**

### **The Nuclear Regulatory Commission (NRC)**

Powertech sent a letter on February 25, 2009 to the United States Nuclear Regulatory Commission (NRC). The NRC staff reviewed the letter from Powertech for a new Source Materials License for in situ leach recovery (ISR) uranium mining under the provisions of 10 CFR Part 40. The new request for the proposed mining and subsequent uranium extraction at the Dewey-Burdock project location in Fall River and Custer Counties, in South Dakota would include 1) construction of surface and subsurface infrastructures, 2) operation of multiple well fields in order to recover the uranium from injected solutions, 3) eventual aquifer restoration to restore the groundwater quality in the production zone, and 4) eventual decommissioning of surface and subsurface infrastructures and 5) finally, reclaiming the surface after uranium production activities (NRC 2013).

### **The Southwest Research Institute (SWRI)**

NRC hired the Southwest Research Institute<sup>1</sup> (SWRI) to provide technical assistance and other task orders to provide NRC with assistance for the contract. SWRI was originally created by NRC. The contract was awarded July 12, 2012. The part of the contract relevant to Section 106 Tribal Consultation is important enough to provide the full context within the text of this document. I have included it as Appendix A to this document.<sup>2</sup>

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<sup>1</sup> <https://www.swri.org/>

<sup>2</sup> See Appendix A to this document.

## Sanford Cohen & Associates (SC&A)

NRC hired Sanford Cohen & Associates (SC&A) out of Vienna, Virginia<sup>3</sup> to provide technical assistance on the Dewey-Burdock ISR Project. SC&A is an employee-owned small business providing environmental and energy consulting services since our founding in 1981. They are headquartered in Arlington, VA, with satellite offices in Germantown, MD, and Chapel Hill, NC. <https://www.scainc.com/>

According to Bloomberg.com:

SC&A, Inc. provides energy and environmental, health, and safety services. It offers services in the areas of radiation sciences, environmental remediation, NEPA and environmental regulatory compliance and management, advanced technology assessment and development, permitting and licensing, environmental management, emergency management, nuclear licensing and engineering support, and human health and ecological risk assessment. The company was founded in 1981 and is headquartered in Arlington, Virginia. ([https://www.bloomberg.com/research/stocks/private/snaps\\_hot.asp?privcapId=51819544](https://www.bloomberg.com/research/stocks/private/snaps_hot.asp?privcapId=51819544))

The contractor [SC&A] was to provide NRC with technical information “**as necessary to allow the NRC to carry out consultations**” as required under the Endangered Species Act (ESA, Section 7) and Section 106 of the NHPA, as amended in 1992. The NRC was required to make available documentation regarding consultations under ESA, Section 7 and Section 106 of the NHPA.

SC&A was presumably hired because NRC Staff lacks persons with the knowledge or expertise necessary to carry forth the requirements under federal laws. Neither the

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<sup>3</sup> Listed in the NRC contract appears to be the mailing address for SC&A. Nickens lists the physical address on the Cover Page to his report. He performed the project review for SC&A, 2200 Wilson Boulevard, Suite 300, Arlington, VA 22201-3324. This is the organizational address for SC&A. <https://www.scainc.com/>

contractors nor NRC were capable of carrying out the NEPA and NHPA requirements due to the lack of technical expertise and cultural background. Neither of these entities possessed specialized expertise where it specifically applies to the traditional cultural properties (TCPs), ceremonial sites, sacred sites, and/or other cultural resources of historic, cultural, and religious significance to the Lakota tribes asking to be included in on the process from the beginning. Had Powertech relied upon qualified persons from the beginning to add a cultural resources dimension to their archaeological investigations, they may have been able to avoid the costs associated with the now eleven year old proposed project. Nickens (June 2018) discusses this concept at length in his report. One particular excerpt is useful in this context:

Traditionally, archaeologists are generally called upon initially to identify, document, and evaluate such resources in a given setting, or project area. In the past few decades, it has become apparent that while archaeologists may or may not be adept at identifying all Tribal places on the landscape, they seldom, if ever, have an adequate cultural background to be able ascribe Native American context to the resource site or place as a potential place of traditional cultural or religious significance (Nickens, June 2018, p. 28)([Exhibit NRC-224](#)).

Again, this is another reason why qualified persons and tribes must play an important role in ensuring an interdisciplinary cultural resources perspective is represented from the beginning of the scoping period. In late 2018, NRC relied on SC&A's replacement archeologist, Mr. Paul Spangler, who also lacks the interdisciplinary expertise and cultural background described by Nickens.



## Powertech (USA), Inc.

Powertech filed the first application on February 28, 2009. Additional requests from the NRC were filed in an updated second application on August 10, 2009. The application was reviewed and the Record of Decision (ROD) as well as Source Materials License for Dewey-Burdock was issued on April 8, 2014.<sup>4</sup> The Source Materials License issuance by the Nuclear Regulatory Commission to Powertech was recorded in the federal ROD published in volume 79 (no. 72) Notices of the Federal Register on Tuesday, April 15, 2014 [Docket No. 40-09075; NRC-2012-0277]. According to The Capital Journal:

The company that wants to mine for uranium in southwestern South Dakota has taken a step ahead in the regulatory approval process and identified a potential satellite mine across the border in Wyoming.

The company is Powertech USA, which is part of Azarga Uranium, of Canada. Powertech was awarded a license for the South Dakota project by the U.S. Nuclear Regulatory Commission in 2014, but the Oglala Sioux Tribe and other project opponents filed a number of contentions.

All but two of the contentions were dismissed by the U.S. Atomic Safety Licensing Board in 2015. Last month, the board dismissed one of the two remaining contentions, leaving one yet to be resolved (The Capital Journal 2017).

[https://www.capjournal.com/news/uranium-project-inches-ahead-as-company-eyes-satellite-mine/article\\_a2d2736e-c450-11e7-b79d-37de1a535102.html](https://www.capjournal.com/news/uranium-project-inches-ahead-as-company-eyes-satellite-mine/article_a2d2736e-c450-11e7-b79d-37de1a535102.html)

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<sup>4</sup> NRC [Docket No. 40-09075; NRC-2012-0277] Issuance of Materials License and Record of Decision for Powertech (USA) Inc., Dewey-Burdock Facility, FR Doc. 2014-08546 Filed 04/14/2014 at 8:45 am; Publication Date: 04/15/2014. (Exhibits NRC-011, NRC-012).

## THE PROJECT

According to Azarga (2015), “The project is divided into two Resource Areas, Dewey and Burdock, as shown in Figure 4.2. The Burdock Resource Area consists of approximately 93 surface acres and 11 well fields where mineral extraction will occur. The central processing facility for the Project will be located at the Burdock Resource Area along with four constructed impoundments or “ponds” as shown in Figure 4.2. A satellite facility will be constructed in the Dewey Resource Area. The Dewey Resource Area consists of approximately 73 surface acres and five well fields where mineral extraction will occur” (Azarga, April 21, 2015, p.29).

## Legal Locations

The Dewey-Burdock Project is located in the northwestern addition of the Edgemont Uranium Mining District located in southwestern most areas of South Dakota. The proposed project area surveyed is situated in T6S and T7S, R1, in multiple Sections of the Black Hills Prime Meridian. The project areas are in Custer and Fall River Counties in South Dakota. The legal locations of the project area of potential effect (APE) are depicted in Table 1 below.

Table 1. Legal Locations of Surveyed Areas within the Dewey-Burdock APE

Legal Locations Surveyed within the APE			
USGS 7.5-minute Quadrangle	Township	Range	Sections
Burdock (1950 [photo inspected 1976])	T6S	R1E	27, 33-35
	T7S	R1E	1-4, 9-16

Legal Locations Surveyed within the APE			
USGS 7.5-minute Quadrangle	Township	Range	Sections
Dewey (1951)	T6S	R1E	28-30
Twenty-one Divide (1951)	T6S	R1E	28-33
	T7S	R1E	4, 9, 16

### Access

According to Azarga (2015):

The nearest population center to the Dewey-Burdock Project is Edgemont, South Dakota (population 900) located on US Highway 18, 14mi east from the Wyoming-South Dakota state line. Fall River County Road 6463 extends northwestward from Edgemont to the abandoned community of Burdock located in the southern portion of the Dewey-Burdock project, about 16mi from Edgemont. This road is a two lane, all weather gravel road. Fall River County Road 6463 continues north from Burdock to the Fall River-Custer county line where it becomes Custer County Road 769 and continues on to the hamlet of Dewey, a total distance of about 23mi from Edgemont. This county road closely follows the tracks of the BNSF (Burlington Northern Santa Fe) railroad between Edgemont and Newcastle, Wyoming. Dewey is about 2mi from the northwest corner of the Dewey- Burdock project. An unnamed unimproved public access road into the Black Hills National Forest intersects Fall River County Road 6463 4.3mi southeast of Burdock and extends northward about 4mi, allowing access to the east side of the Dewey-Burdock project. About 0.9mi northwest from Burdock, an unimproved public access road to the west from Fall River County Road

6463 allows access to the western portion of the Dewey-Burdock project. Private ranch roads intersecting Fall River County Road 6463 and Custer County Road 769 allow access to all other portions of the Dewey-Burdock Project (Azarga, April 21, 2015, p.29).

## Permits, Requests, and Documents

There is a long list of filings in respect to the permits, requests for further documentation from the NRC, and other documents associated with Dewey-Burdock. Itemized below is an abbreviated list of some of those documents.<sup>5</sup>

### NRC Documents

- 1) Applicant's Application (February 28, 2009, ML091200014);
- 2) Generic Environmental Impact Statement for In-Situ Leach Uranium Milling Facilities (May 2009 ML091530075);
- 3) Resubmission of Application (August 10, 2009; ML092870160);
- 4) Response to Request for Additional Information (August 12, 2010; ML102380530);
- 5) Response to Request for Additional Information (June 28, 2011; ML112071064);
- 6) Ground Water Model (February 27, 2012; ML120620195);
- 7) Clarification of Oxidation-Reduction Potential Measurement (April 11, 2012; ML121030013);
- 8) Clarification of Regional Meteorological Data (June 13, 2012; ML12173A038);

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<sup>5</sup> NRC [Docket No. 40-09075; NRC-2012-0277] Issuance of Materials License and Record of Decision for Powertech (USA) Inc., Dewey-Burdock Facility, FR Doc. 2014-08546 Filed 04/14/2014 at 8:45 am; Publication Date: 04/15/2014.

- 9) Clarification of Response to Request for Additional Information (June 27, 2012; ML12179A534);
- 10) Supplemental Sampling Plan and Responses to Comments Regarding Draft License (October 19, 2012; ML12305A056);
- 11) Comments on Draft Supplemental Environment Impact Statement (January 8, 2013; ML13022A386);
- 12) Supplemental Environmental Impact Statement for the Dewey-Burdock ISR Facility in Fall River and Custer Counties, South Dakota (January 31, 2014; ML14024A477, ML14024A478);
- 13 Programmatic Agreement for Protection of Cultural Resources (Executed April 7, 2014; ML14066A344).

## Licenses

According to Azarga (April 2015), the most important licenses are:

The three most significant permits/licenses are (1) the Source and Byproduct Materials License, which was issued by the U.S. Nuclear Regulatory Agency NRC April of 2014; (2) the Large Scale Mine Permit (LSMP), to be issued by the South Dakota Department of Environment (DENR); and (3) UIC Class III and V wells (ISR injection and/or deep disposal), which require permits from the U.S. Environmental Protection Agency Region 8 (EPA). Permit requirements and status are discussed in Sections 4 and 20 (Azarga April 21, 2015, p.2).

## ARCHEAOLOGICAL REPORTS

NRC hired the Archaeology Laboratory, Augustana College (ALAC) to perform the Class III cultural resource investigations and evaluative testing. The report title: *A Level III Cultural Resources Evaluation of Powertech (USA) Incorporated's Proposed Dewey-Burdock Uranium Project Locality within the Southern Black Hills, Custer and Fall River Counties, South Dakota, Part I (Kruse, et al., 2008)*. It consists of a multi-volume set of documents. ALAC also prepared subsequent reports on behalf of the Powertech (USA) for the proposed Dewey-Burdock ISR Project (Kruse, et al., 2008; Palmer 2008, 2009; Palmer and Kruse,

2008, 2012). (Exhibits NRC-072, 073; NRC-136-A, 136-B, 136-C; APP-009). At no point in the archaeological documents is their inclusion of ethnographic materials or assessment of historic, cultural, and religious information relevant to any tribal groups association with the Black Hills or surrounding areas. In only a few places does it even mention or discuss the pre-history and known inhabitants from Paleoindian cultures to the present day communities. It certainly does not provide a tribal point of view or context.

These archaeological reports are comprised of five separate volumes: Volumes I, II, and III contain the cultural resources report. Volumes IV and V contain the Appendices (Kruse, et al., 2008). Volumes I, II, and III contain Chapters 1-8. Chapter 1 is a general study overview written by Austin A. Buhta. Chapter Two contains the project area environmental setting, regional climate and ecology; and the paleo-environment written by Austin A. Buhta. Chapter Three provides the cultural context of the project region discussing the pre-history and known inhabitants from Paleoindian cultures to the present day residents. It is also written by Austin A. Buhta. Chapter Four is the research design and methodology and overview of previous cultural resources work. This chapter is written by Austin A. Buhta and John R. Bozell. Chapters Five and Six are representative of the cultural resources recorded during field investigations performed by field crews. Site forms, survey results, and artifact descriptions are described as well as the National Register of Historic Properties *eligibility* and recommendations. Site locations including maps and overview photographs, artifacts, material type, inventories and analysis, and photographs recorded by field personnel (Austin A. Buhta, John R. Bozell, Timothy V. Gillen, Jason M. Kruse, and Linda Palmer). Chapter Seven is the research results and management recommendations from Austin A. Buhta and John R. Bozell. Chapter Eight is the references

cited in the report. The Appendices (Volumes IV and V) contain information on maps and site forms. They are included in six appendices A -F: Appendix A-Archeological Site Forms, Appendix B- Historic Structure Survey Forms, Appendix C- National Archaeological Database (NADB) Form, Appendix D- Topographic Site Location Maps, Appendix E- Artifact Catalog and Lithic Tool Measurement Data, Appendix F- Project Scope-of-Work (Kruse, et al., 2008, p.3).

### **Personnel and Procedures**

The Augustana survey used personnel that were not qualified to create or implement cultural resources survey. Mr. Hannus's stated, in reference to his team, that "we're not in any way qualified to be conducting TCP surveys." Transcript at 858. **(Exhibit OST-054)**. Mr. Hannus's testimony also explains why Mr. Spangler and Mr. Nickens, both of whom are archeologists by discipline and training, are similarly unqualified to develop and conduct cultural resource surveys.

It's a complicated question for our discipline [archeology] in that the data sets that we work with can answer numerous questions about time, space, climates, types of sites as far as what was going on at the site, but we can't really attach historically identified tribal entities to those levels of evaluation. And again, that really should clearly, I think, show us that for us to then be able to make some kind of in roads ourselves, being not of Native background, to identification of sites that are traditional cultural properties that have a tie to spirituality and so on, it is not in our purview to do that.

Transcript at 859. **(Exhibit OST-054)**. An excerpt from the Nickens report confirms the need for cultural resources survey methodologies was known to NRC early in the process, but was never carried out. :

Powertech additionally requested that ALAC conduct Level III cultural resource evaluations of all remaining portions of the APE. The Level III investigation results will be incorporated in Powertech's request to the South Dakota Department of Environment and Natural Resources, Minerals and Mining Program, for a determination with regard to Special, Exceptional, Critical or Unique Lands. This project is also a federal 'undertaking' that falls under the Section 106 process of the National Historic Preservation Act (NHPA) of 1966, as amended (36 CFR PART 800) (Advisory Council on Historic Preservation [ACHP] 2006).

The lead federal agency is the Nuclear Regulatory Commission (NRC). This report is intended to satisfy requirements for documenting cultural resources in a manner pursuant to both 36 CFR PART 800 and the established specifications for review and compliance within South Dakota (South Dakota State Historic Preservation Office [SHPO] 2005).

The primary objectives of this investigation were the identification and documentation of all cultural resources within the APE, and the preliminary evaluation of the eligibility status of each property for listing on the National Register of Historic Places (NRHP). Documented cultural properties were also evaluated in terms of the effect of such an undertaking on the resources, and management recommendations have been provided accordingly. ALAC documented 161 previously unrecorded archeological sites and revisited 29 previously recorded sites during the current investigation. In addition, six previously unrecorded historic structures were documented during the current investigation (Nickens, June 2018) (Exhibit NRC-224).

#### **Area of Potential Effect (APE)**

The Area of Potential Effect (APE) is defined as all potential work areas, including proposed drill sites, access roads, and additional facility sites, comprising the Dewey-Burdock Uranium Project. The APE is located in the westernmost portions of Custer and Fall River counties (Figure 1.2) within the confines of the Black Hills Archaeological Region as defined by the South Dakota State Plan for Archaeological Resources (Winham and Hannus 1991). Of the 10,310.97 ac (4,172.70 ha) of land examined during the current



investigation, approximately 5,105.32 ac (2,066.05 ha) are located in Custer County, and 5,205.65 ac (2,106.65 ha) are located in Fall River County. The United States Department of the Interior, Bureau of Land Management (BLM) owns 242 ac (97.93 ha) of the land investigated (see Appendix D, Figure D-3). These federal lands were investigated under Archaeological Resources Protection Act (ARPA) permit number M 94566. All remaining land parcels investigated during this survey are privately owned. In all instances, Powertech personnel were responsible for obtaining landowner access permission for ALAC prior to field investigations.

## Determinations

The cultural resource controversies involve identification, evaluation, and the subsequent determinations. Each is considered important to Tribal Historic Preservation Offices (THPO) departments and those who are experts in the area of Traditional Cultural Properties identification for the protection of historic, cultural, and religious properties of significance to native Nations. There are contentious scientific controversy both in and between the professional archaeologists as to the degree to which archaeologists have the relevant tribal knowledge and training to identify cultural sites of significance to tribal practitioners. Nickens' observation that most archeologists lack the cultural background is widely shared across those who work with tribal governments and THPO programs. None of the archeologists hired by NRC or Powertech have the professional and cultural background necessary to carry out a cultural resource analysis. Possibly one of the most controversial topics involves sites that are listed as Unevaluated in archaeological report determination lists. Most remain unevaluated largely because the archeological discipline,

standing alone, lacks the social science methods and traditional cultural knowledge required to provide a cultural resource evaluation.

## THE NICKENS REPORT

### Paul R. Nickens

Paul R. Nickens, an archaeologist, was hired to do the assessment and produce a report on the “**existing information**” that is applicable and relevant to the historic, cultural, and religious belief systems and practices of the Lakota peoples<sup>6</sup>. (Exhibit NRC-224). Mr. Nickens lacks the interdisciplinary scientific training and cultural knowledge to conduct the assessment of the existing information. It is unclear as to why an ethnographer or even more specifically someone with inherent knowledge of the cultural life ways of these peoples was not considered important to achieving the task at hand. This assessment, if carried out by qualified persons and with the support of oral interviews, would provide useful information that could ultimately avoid or minimize impacts to the cultural resources that have already been identified.

In his report, Paul R. Nickens (June 2018) puts forward an anthropologically-minded “*Compilation and Evaluation of Existing Information for the National Environmental Policy Act Review of Lakota Historic, Cultural, and Religious Resources for the Dewey-Burdock In Situ Uranium Recovery Project, Fall River and Custer Counties, South Dakota*” assessment of the “**existing**” scientific data, tribal knowledge, and documentation from that scientific point of view to establish that the federally recognized tribes that participated in the tribal

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<sup>6</sup> The Lakota Oyate and their descendants have lived in the Black Hills and the Northern Great Plains region practicing their spiritual and linguistic life ways since time immemorial. The land in question is at the center of all that is, the very cosmology of the people developed around the very area in question in the ongoing lawsuit.

consultation process as “designed” by the U.S. Nuclear Regulatory Commission, Office of Nuclear Material Safety and Safeguards, Division of Fuel Cycle Safety, Safeguards, and Environmental Review Environmental Review Branch. As prepared by Paul R. Nickens this document was produced from his “outsider” archeological research and documentation of Lakota historic, cultural, and religious resources that were available to him as an academically-minded scientist. He is a contract archaeologist assigned to work on the Dewey-Burdock In-Situ Uranium Recovery Project for SC&A, Inc., Under Provisions of Contract Number NRC-HQ-25-14-E-0003<sup>7</sup>, NMSS-18-0033-EWC-SB-17<sup>8</sup>, and June 2018.<sup>9</sup> Outsider archeology has been rejected for decades, in favor of the interdisciplinary methods of the physical and social sciences and culturally specific epistemologies.

In his report, Nickens (p.5) “briefly summarize[s] these activities to provide some historical context for the present undertaking. Previous and ongoing activities fall into the following categories: (1) Class III archaeological investigations, (2) Tribal consultation, (3) Tribal cultural surveys, and (4) NHPA Section 106 process, (5) development and implementation of the Dewey-Burdock ISR PA.” (Nickens, June 2018, p.5)

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<sup>7</sup> This is the NRC contract number referencing a contract awarded to SC&A, Inc. <https://www.nrc.gov/docs/ML1802/ML18026A931.pdf>

<sup>8</sup> Nickens report can be found at <https://www.nrc.gov/docs/ML1815/ML18159A192.pdf>

<sup>9</sup> 5/2018 - Technical Assistance for the NEPA Review of Historical, Cultural, and Religious Resources for the Dewey-Burdock In Situ Uranium Recovery Project. SC&A has been awarded a task order to help the NRC staff review and evaluate information gathered on sites of historical, cultural, and religious significance to the Lakota Sioux Tribes that could be impacted by the Dewey-Burdock ISR project in Custer and Fall River Counties, South Dakota. SC&A will provide technical assistance in identifying significant sites and determining whether they are eligible for listing in the National Register of Historic Places. We will help evaluate the impact of project construction and operation on the sites and identify measures to avoid, minimize, or mitigate impacts. SC&A will also help the NRC staff incorporate this information into the final SEIS. (From the SC&A website at <https://www.scainc.com/>)

An excerpt from the Nickens report (Nickens, June 2018, p. 5) follows:

## 1.2 Historic and Cultural Resources

Various activities falling under the general categories of cultural resource identification, documentation, and evaluation efforts for the Dewey-Burdock ISR Project have been completed. Some of these activities were completed under the National Historic Preservation Act (NHPA) and its implementing regulations, specifically for Section 106 process (36 CFR Part 800, “Protection of Historic Properties”). The results of these investigations and efforts have been extensively documented and summarized elsewhere (e.g., NRC, 2014a, 2014b, 2014c, and 2014d) and need not be repeated in detail here. It will be useful, however, to briefly summarize these activities to provide some historical context for the present undertaking. Previous and ongoing activities fall into the following categories: (1) Class III archaeological investigations, (2) Tribal consultation, (3) Tribal cultural surveys, and (4) NHPA Section 106 process, (5) development and implementation of the Dewey-Burdock ISR PA.

1. Class III Archaeological Investigations—The NRC staff reviewed the Class III cultural resource investigations and evaluative testing reports prepared by the Archaeology Laboratory, Augustana College (ALAC), on behalf of the licensee for the proposed Dewey-Burdock ISR Project (Kruse, et al., 2008; Palmer 2008, 2009; Palmer and Kruse, 2008, 2012). The investigations included an archival and historic review of available sources, a search of SD Archaeological Research Center-maintained records and collections, and review of published field reports. A review of available data indicates that six surveys have been conducted within the boundaries of the Dewey-Burdock ISR Project site, with a total of 57 archaeological sites previously recorded identified within the project area (Kruse, et al., 2008). Field investigations of the proposed project area were conducted by pedestrian surveys of 4,173 ha (10,311 ac) between April and August 2007 and an additional 526 ha (1,300 ac) between July and September 2008. These efforts yielded site data for 190 newly recorded sites and archaeological sites within the proposed project area. In addition, the 2007 field effort relocated/revisited 26 previously recorded sites. The total number of recorded archaeological from the ALAC work totals 216, including isolated finds. The 2007 and 2008 field investigations included evaluative testing

at 43 sites. In 2011, additional evaluative testing at 20 unevaluated sites located within the project boundary provided data for recommendations for National Register of Historic Places (NRHP) eligibility (Palmer and Kruse, 2012).

2. Tribal consultation—Throughout the NHPA process, the NRC consulted with those Tribes that have heritage interest in the proposed Dewey-Burdock ISR Project area. The consultation activities included 23 individual Tribes (see Section 3.9.4 of NRC, 2014a for a complete listing of consulted Tribes and a summary of those consultations).

3. Tribal cultural surveys—Seven Tribes participated in a 2013 field survey at the proposed Dewey-Burdock site. These Tribes were the Northern Arapaho Tribe, Northern Cheyenne Tribe, Turtle Mountain Band of Chippewa Indians, Crow Creek Sioux Tribe, Cheyenne and Arapaho Tribes of Oklahoma, Crow Nation, and Santee Sioux Tribe. Of particular note, although invited, none of the Lakota Tribes participated in the Tribal cultural field surveys. The NRC staff received detailed written reports with NRHP eligibility recommendations from three of the seven Tribes that participated in the Tribal cultural survey (Northern Arapaho Tribe, Northern Cheyenne Tribe, Cheyenne and Arapaho Tribes of Oklahoma). The Crow Nation provided NRC staff with a copy of field notes identifying several sites of interest to that Tribe. (Nickens, June 2018, p.5)

In an additional excerpt important to the discussion from the Nickens report (Nickens, June 2018, p.6) is:

A total of 47 new discoveries was recorded in the project area as a result of the Tribal cultural survey, although 12 of these cultural features were subsequently identified as lying outside the Dewey-Burdock ISR Project area boundary. Tribal experts further visited 24 of the previously recorded archaeological sites, recording 81 cultural features within the boundaries. Some of the cultural features recorded by Tribal survey teams correspond to features identified in the archaeological surveys; however, many represent new discoveries. A number of the new discoveries identified by Tribes are situated near the boundaries of known archaeological sites and could reasonably be considered part of those sites if the current archaeological

site boundaries were expanded to include them. Other new discoveries are located in close proximity to one another and may be culturally related (NRC, 2014d).

4. NHPA Section 106 process—Following the field surveys, the NRC conducted determinations of NRHP eligibility and an associated impact analysis for the previously recorded Dewey-Burdock ISR Project archaeological sites and Tribal sites (NRC, 2013b) and requested NHPA Section 106 concurrence from the SD SHPO (NRC, 2013a). NRHP evaluations yielded the following distribution: eligible—34, not eligible—161, and unevaluated—95. The “unevaluated” category generally reflected incomplete or missing documentation or a need for further field investigation, such as subsurface testing. The overall number of cultural resources evaluated (N=290) includes isolated finds and sites recorded outside the project boundaries. The SD SHPO concurred with the NRC determinations of eligibility (SD SHPO, 2014), while moving one of the eligible sites, an historic homestead (36CU3619), from “potentially eligible” to unevaluated.”

5. Development of the NRC PA—As noted above, the Dewey-Burdock ISR PA was executed in March 2014 by the consulting Federal and State agencies (NRC, 2014b). The 23 consulting Tribes were invited to sign the PA as concurring parties; however, none signed the document. Four summarizing appendices and one enclosure are attached to the PA (NRC, 2014c and 2014d):

- Appendix A, “Federal Actions, Undertaking, and Area of Potential Effects” (Figure 1.4 in this report)
- Appendix B, “Cultural Resource Identification and Consultation Efforts”
- Appendix C, “Reporting Criteria for the Monitoring Plan”
- Appendix D, “Treatment of Human Remains on State, Private, and BLM Land”
- Enclosure 1, “Summary Report Regarding the Tribal Cultural Surveys Completed for the Dewey-Burdock Uranium In-Situ Recovery Project”

1.3 National Environmental Policy Act Activities (Nickens, June 2018, p.6)

“The Tribal assessment included a limited literature review, Tribal cultural surveys, and consultation with the potentially affected Tribes” (Nickens, June 2018, p.8).

On page 8 of the Nickens Report it states:

The adequacy of the analysis in the Dewey-Burdock ISR FSEIS is the subject of an adjudicatory proceeding before the Atomic Safety and Licensing Board Panel (ASLBP). The ASLBP found that the NRC staff had satisfied the requirements of NHPA but had failed to meet the “hard look” standard of the NEPA in assessing the impacts of the Dewey-Burdock ISR project on the cultural, historical, and religious sites of significance to Lakota Sioux Tribes in its FSEIS (LBP-15-16, April 30, 2015, and LBP-17-09, October 19, 2017) (Nickens, June 2018, p.8).

This rebuke by the Atomic Safety and Licensing Board Panel (ASLBP) should have alerted NRC to the importance of the fuller context of the Dewey-Burdock story as a cultural resource question that must be fully documented from the an interdisciplinary and tribal perspective (See ASLBP Summary, October 19, 2017). To my knowledge the documentation has been scant and the media coverage minimal since the first rounds of fights back in 2007/2008. I am of the professional opinion that Mr. Nickens is pointing this glaring fact out not out of concern necessarily for the Lakota people but for the fact that it is necessary to demark the points in time when the NRC and Powertech either neglected or refused to follow to the letter of the law the critical factors involved in NEPA and NHPA evaluations of the proposed Dewey-Burdock In Situ Uranium Recovery Project.

Possibly the most important material located in the Nickens report (June 2018) is section 1.5 summaries of the “**existing information**” and materials on the Lakota Oyate. It is quoted below:

1.5 Review of Existing Information about Historic, Cultural, and Religious Resources of Significance to Lakota Sioux Tribe.

To provide baseline information in support of the NRC’s selected approach, as outlined above, the staff identified a need to review extant information and literature regarding historic,

cultural, religious resources of significance to Lakota Sioux Tribes related to the Dewey-Burdock ISR Project. Accordingly, this report documents actions undertaken to identify, evaluate, and summarize existing information, with special to the relevance of that information to the Dewey-Burdock ISR Project area. Appendix A includes a bibliography of sources consulted in the course of the review. To accommodate all aspects associated with the NRC's selected approach, the literature review is subdivided into the following categories:

1. Relevant Lakota ethnographic sources
2. Relevant non-Lakota ethnographic sources (includes the following Dakota Tribes: Crow  
Creek Sioux; Flandreau Santee Sioux; and Yankton Sioux)
3. The Black Hills as sacred geography
4. Individual places of Tribal significance in the region
5. Physical and other evidence for Lakota traditional places of occupation and religious use of the cultural landscape
6. Dewey-Burdock ISR Project sources and applicable NRC guidelines
7. Black Hills region Federal agency cultural resource management documents
8. Regional NEPA documents, including Lakota consultation
9. Useful Web sites

In a cautionary note, sources for these topics are vast and voluminous in scope. In one typifying example, the ethnographic and ethnohistorical study prepared for Wind Cave National Park, located about 48 kilometers (km) (30 miles (mi)) slightly northeast of the Dewey-Burdock ISR

Project, comprises about 1,000 pages (Albers, 2003). Being constrained by scope, schedule, and budgetary considerations, the analysis of published and unpublished literature and other sources reviewed as part of the present study is selective. Moreover, the numerous bibliographic entries in Appendix A call for judicious summarization, being focused to provide



specific support to the elements of the NRC's selected approach. Most of the sources in

Appendix A are available in digitized format, with the URL links being provided for readers seeking more detailed information on a given source or subject (Nickens, June 2018, p.9-10).

Approaches to looking at the landscape, along with its constituent places of significance and biotic and abiotic resources, have been offered, by both culturally aware non-Indian experts and Native Americans themselves. Two examples of such approaches, one of which comes from a Lakota source, are briefly outlined the following paragraphs. Considered together, these conceptual frameworks offer ways to look at, and perhaps to better understand, Lakota perceptions and places of significance at the Dewey-Burdock ISR Project area. The first of these examples comes from the extensive body of work completed by Dr. Richard Stoffle and his colleagues at the University of Arizona, while the second one derives from the noteworthy efforts of Dr. Sebastian LeBeau, a member of the Lakota Cheyenne River Sioux Tribe, to employ Lakota traditional wisdom and rituals to identify and categorize TCP-situated sites on the cultural landscape (Nickens, June 2018, p.11-12).

## **ATOMIC SAFETY AND LICENSING BOARD PANEL (ASLBP)**

The Atomic Safety Licensing Board Panel (ASLBP 2017) concluded in reference to the NEPA and NHPA requirements that:

The NRC Staff now moves for summary disposition on both contentions. We grant the motion as to Contention 1B, concluding that over the past two years the combination of multiple attempts at direct correspondence, a May 19, 2016 face-to-face meeting, and a January 31, 2017 teleconference between the Oglala Sioux Tribe and the NRC Staff satisfies, at a bare minimum, the NHPA's requirement that the NRC Staff consult with the Oglala Sioux Tribe. However, we deny the NRC Staff's motion as to Contention 1A, concluding that the NRC Staff has failed to establish that there are no material facts in dispute relative to the NRC Staff's NEPA burden to adequately address the impact of the Dewey-Burdock project on tribal cultural resources. More specifically, the NRC Staff has failed to

demonstrate that there is no material factual dispute regarding the reasonableness of its method for assessing impacts from the Dewey-Burdock project on Sioux tribal cultural resources. Finally, given this ruling, as steps toward resolving Contention 1A, we establish a schedule for this proceeding that provides the NRC Staff and the other parties an additional opportunity to establish a methodology for assessing such cultural resource impacts, as well as, if necessary, an evidentiary hearing and a subsequent Board decision on the reasonableness of the NRC Staff's methodology (ASLBP October 19, 2017).

## CONCLUSIONS

This review of both source materials and a report by Paul R. Nickens, titled: *Compilation and Evaluation of Existing Information for the National Environmental Policy Act Review of Lakota Historic, Cultural, and Religious Resources for the Dewey-Burdock In Situ Uranium Recovery Project in Fall River and Custer Counties, South Dakota* (Nickens, June 2018). Paul R. Nickens was contracted to evaluate the “**existing information**” and the archaeological reports associated with the Dewey-Burdock In Situ Uranium Recovery (ISR) Project. This comprised a full review of *A Level III Cultural Resources Evaluation of Powertech (USA) Incorporated's Proposed Dewey-Burdock Uranium Project Locality within the Southern Black Hills, Custer and Fall River Counties, South Dakota, Part I* (Kruse, et al., 2008).

The Dewey-Burdock In Situ Uranium Recovery (ISR) Project (Dewey-Burdock) is located in southwestern South Dakota. The project originated when Powertech (USA), Inc. in February of 2009 submitted a Source Materials license application to the U.S. Nuclear Regulatory Commission (NRC). The project's aim is to develop and operate the Dewey-Burdock ISR Project by using in situ leach (ISL) methods. The general location of the proposed project is located north of Edgemont, SD. The license application included an Environmental Report (ER) and Technical Report (TR). Powertech requested the license

from the NRC under Title 10 of the Code of Federal Regulations (10 CFR) Part 40, “Domestic Licensing of Source Material.” Powertech sought NRC guidance on NEPA, NHPA, and the NRC’s NEPA-implementing regulations in 10 CFR Part 51, “Environmental Protection Regulations for Domestic Licensing and Related Regulatory Functions.” The full report of a Class III intensive cultural resources survey was conducted (Powertech, 2009; submitted as Appendix 2.4-A to the TR and as Appendix 4.10-A to the ER).

This report conclusion is that the Nuclear Regulatory Commission neglected to do a good faith effort to complete Section 106 Consultation and allowed Powertech (USA) to neglect the requirements set forth in the provisions of the 1978 National Environmental Policy Act (NEPA), and the National Historic Preservation Act (NHPA) of 1966. The Class III report and assessment by Nickens bear all the hallmarks of a standard archaeological report. Yet neither performs a complete assessment of tribal concerns and involvement in the Dewey-Burdock by the Lakota tribal groups asking for compliance since they first learned of the project.

In the list of site determinations provided in the NRC document “Enclosure 2: NRC’S Overall Determinations of Eligibility and Assessments of Effects” (NRC-062, Submitted June 20, 2014; <https://www.nrc.gov/docs/ML1417/ML14172A065.pdf>) (Exhibit NRC-062), there must be a full disclosure of all information regarding these documents and allow for a tribally-focused identification, evaluation, and mitigation of isolated finds and/or sites associated with the Dewey-Burdock ISR project. This must be initiated by NRC and supported by the licensee (Powertech) and the associated subcontractors.

The numbers just don’t add up. Not when the sites are tallied or ***Unevaluated*** sites or ***Not Eligible*** sites are being overlooked or deemed to not meet the requirements for

definitive “cultural affiliation” to any tribal group or *Eligible* for the National Register of Historic Places (NRHP). The archaeological documents lack inclusion of ethnographic materials and assessment of historic, cultural, and religious information relevant to any tribal groups associated with the Black Hills or surrounding areas. In only a few places does it even mention or discuss the pre-history and known inhabitants from Paleoindian cultures to the present day communities. It certainly does not provide a tribal point of view or context. This does not mean that the “**existing information**” is not extant. Quite to the contrary, the information still survives in the traditional practitioners and elders of the Lakota peoples. Had NRC and/or Powertech (USA) fully engaged the Lakota Oyate through a full and consistent tribal consultation process from the beginning of the scoping of the Dewey-Burdock project there could have been a much better outcome. There may possibly be a way to achieve this end if all parties are willing to work together and find an amicable resolution. Indeed there is a need for another hard look at all the documents and a tribally driven traditional cultural properties survey of the Dewey-Burdock proposed project area.

As Mr. Nickens states in his report: “It is inherent in Lakota spiritual and cultural understanding that the Black Hills (Paha Sapa) hold infinite significance for the Lakota, the region’s sacredness being expressed through ritual and ceremony. For the Lakota and other Sioux Tribes comprising Great Sioux Nation (Oceti Sakowin), the Black Hills are “The Heart of Everything That Is” (Wamaka Ognaka e’cante) (Nickens, June 2018, p. 11). Yet, none of the NRC documents rely on oral interview of living persons to identify or inform the significance of any cultural resources. Whether it is the Stoffle, LeBeau, or Sprague approach to recording traditional cultural knowledge there is always a need to be careful how we are assessing the extant information existing on living peoples who still practice

their cultural lifeways. Nickens compiled and assessed the documents from a non-Native archeologist's perspective. Nickens, like Spangler, did not go out to the land with the persons who gain and transmit information through ritual and ceremony. Nickes did not address such matters as star knowledge or the controversy over the location of critical landscape level features. Nickens stated that it is necessary to be careful to draw too much from his summaries of each of the publications as it applies to the fuller context of land use and ceremonial practices amongst Lakota traditional practitioners.

We should all heed the words of lala Wilmer Mesteth and his 2014 testimony, and remember to be cognizant of the land and water which breathes that we cherish so much. As Mr. Nickens (June 2018) notes: "The variety of stone feature places identified by the 2013 Tribal surveys of the Dewey-Burdock ISR Project area fits well within the LeBeau framework of potentially significant Lakota traditional places. The Lakota Tribes' view of these cultural places and the project landscape in general will continue to accrue from field visits to the Dewey-Burdock site, anticipated to occur during the summer of 2018, and subsequent interviews with Lakota Elders" (Nickens, June 2018, p.42). NRC has not gone on the land with such persons and has not conducted culturally informed oral interviews with those who could imbue the archeological reports Mr. Nickens and Mr. Spangler assembled with the culturally relevant information that is fundamental to a cultural resource analysis.

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ENCLOSURE 1: SUMMARY REPORT REGARDING THE TRIBAL CULTURAL SURVEYS COMPLETED FOR THE DEWEY-BURDOCK URANIUM IN-SITU RECOVERY PROJECT

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THE CAPITAL JOURNAL

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**APPENDIX A:**

### **SUBTASK 3-C - SECTION 106 TRIBAL CONSULTATION SUPPORT:**

The contractor's Project Manager along with 1-2 key contractor staff members (i.e. Section 106 and Cultural Resources experts) shall support the NRC TPM in planning, coordinating, and conducting activities relating to the Section 106 review, as needed for the duration of Task 3 and 4. These activities may include" conducting research, sharing expertise, and providing guidance to the NRC TPM;

- \* participating in and helping to coordinate local meetings, teleconferences, and/or webinars with Tribal representatives and other stakeholders;

- \* participating in discussions with NRC experts as well as ACHP and Powertech's consultants to resolve conflicts and to help move the Section 106 process along; and

- \* Supporting documentation of the Section 106 activities as well as conducting an ethnographic study (if one is needed). Besides providing documentation of coordination efforts, there are no formal deliverables associated with this subtask (unless an ethnographic study is requested). More specifically, the contractor shall:

Develop and populate database with Tribal leaders, meeting details, and other supporting information for the Administrative Record for the Dewey-Burdock Site in situ uranium-recovery (ISR) project.

Participate in discussions with NRC, BLM, ACHP, and Powertech to facilitate the Section 106 consultation process.

Interact with all Tribes involved, as established by the NRC, and ensure a steady and robust flow of information and of mutual, sound communication.

Prepare for, attend, and follow-up for upto 3 in-person, multi-Tribe meetings in South Dakota, including:

- \* Prepare notification

- \* Contact Tribes (including confirmation and response to questions)

Coordinate approval for meeting materials

- Provide logistics for meeting (select meeting location)

- Support NRC TPM in all activities for the meeting

- Facilitate the meeting

- Prepare notes for the meeting, and

Follow-up with any action items. And,

Prepare for, attend and follow-up for a teleconference (at least 2 calls), including:

- Prepare notification

- Contact Tribes, including confirmation and response to questions

Coordinate approval for meeting materials

- Support NRC TPM in all activities for the meeting

Facilitate the meeting

Prepare notes for the meeting, and

Follow-up with any action items.

Provide TCP survey assistant to tribes if requested. More specifically,

Provide Tribes with record keeping (if requested),

Work with Tribes with TCP Identification and documentation efforts (this might be required for the contractor to be out in the field with Tribes for the duration of the study

Assist Tribes in developing the TCP study summary report

Provide overall Project management tasks such that track project progress and deadline and communicate issues to the NRC as well as Applicant.

If needed, conduct an ethnographic study, the scope of the study could be, Assembly and review of existing cultural resource records and other primary and secondary sources. Such as General environmental data sources (e.g., plant, animal, water, mineral) that may provide information regarding traditional cultural uses of the landscape;

Existing historic, ethnohistoric, and ethnographic studies for the landscape available from regional studies and academic libraries;

Tribal historical resources, local libraries, historical societies, and other repositories; and

Archaeological site reports and records for the landscape and its environs

Tribal representatives (THPO) as well as Tribal elder interviews (interview questions should also be part of the record keeping) and

Any other resources that would contain useful historical context regarding historical properties that might have cultural and religious significance to Interested Tribes near the proposed project

### **Subtask 3-C-2: (Optional) National Historic Preservation Act, Section 106 Support: TCP Survey Assistance**

If requested by the Native American Tribes, and approved by NRC, the CNWRA P1 will oversee assistance that the CNWRA subcontractor will give to the Native American Tribes for conducting the TCP survey. Depending on the Native American Tribes' request, assistance could involve activities, from record keeping to field surveys. The CNWRA PI will keep the NRC TPM informed about the status of the TCP survey and any associated issues that need to be resolved. Assistance to the TCP survey may include" Providing Tribes with record keeping for the TCP survey, if requested" Assisting Tribes with TCP identification and documentation efforts, which may require travel to the proposed Dewey-Burdock ISR project for the duration of the survey" Assisting Tribes in developing the TCP survey summary

report which will be placed into the SEIS administrative record" Providing frequent updates to NRC and Powertech representatives of the TCP survey status and results.

Depending on the Native American Tribes' request and the approval of NRC, travel to Rapid City, South Dakota, may be required to assist in the survey. Potential travel associated with assisting the TCP survey is listed in Table 4.1-2 (NRC 2013).

**APPENDIX B:**



## THE CAPITAL JOURNAL

“Uranium project inches ahead as company eyes satellite mine” Associated Press Nov 8, 2017.

The company is Powertech USA, which is part of Azarga Uranium, of Canada. Powertech was awarded a license for the South Dakota project by the U.S. Nuclear Regulatory Commission in 2014, but the Oglala Sioux Tribe and other project opponents filed a number of contentions.

All but two of the contentions were dismissed by the U.S. Atomic Safety Licensing Board in 2015. Last month, the board dismissed one of the two remaining contentions, leaving one yet to be resolved.

The remaining contention is about the lack of a survey of Sioux Native American cultural, religious and historic resources in the proposed mining area. That area — known by the name Dewey-Burdock — is in a sparsely populated region 13 miles northwest of Edgemont, near the old Dewey and Burdock town sites along the southwestern edge of the Black Hills.

The proposed mining area is not on the Oglala Sioux Tribe’s Pine Ridge Reservation, but the area was formerly part of the Great Sioux Reservation, and the Black Hills are spiritually significant to the Sioux and other tribes.

The recent Atomic Safety Licensing Board ruling blames the lack of the survey on disputes and poor communication between the tribe and the Nuclear Regulatory Commission over survey methodologies and costs.

“Throughout the consultation process, both the NRC Staff and the Oglala Sioux Tribe have appeared unwilling and/or unable to step away from their original negotiating position and move toward compromise,” said the Atomic Safety Licensing Board’s Oct. 19 written memorandum and order.

The document lays out a schedule to resolve the dispute by October 2018. That could add another year to a process that dates to 2009, when Powertech applied to the Nuclear Regulatory Commission for a license.

Nevertheless, Azarga Uranium issued a statement saying that the recent ruling “moves the company closer to having the final NRC license contentions resolved.”

Bruce Ellison, a Rapid City attorney who represents some of the project opponents who have intervened in the regulatory process, characterized Azarga’s reaction as overly optimistic.