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Subject: [External_Sender] Comments re: Draft PA Dewey-Burdock
Attachments: Petitioners May 18 2026 PA Comments FINAL.pdf

Dear Ms. Diaz-Toro, please accept the attached comments on behalf of Oglala Sioux Tribe, NDN Collective, and Black Hills Clean Water Alliance regarding NRC Staff's proposed Programmatic Agreement.

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Diana Diaz-Toro, Project Manager
Environmental Project Management Branch 2
Division of Rulemaking, Environmental, and Financial Support
Office of Nuclear Material Safety and Safeguards
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001

Re: Joint Comments of the Oglala Sioux Tribe, NDN Collective, and Black Hills Clean Water Alliance on the U.S. Nuclear Regulatory Commission Draft Final Section 106 Programmatic Agreement for the License Renewal Application of Powertech (USA) Inc.’s Dewey-Burdock Uranium Recovery Project in Custer and Fall River Counties, South Dakota (Docket No. 40-9075)

Dear Ms. Diaz-Toro:

Please accept these comments on behalf of the Oglala Sioux Tribe, NDN Collective, and Black Hills Clean Water Alliance (collectively, “Petitioners”) regarding the U.S. Nuclear Regulatory Commission (NRC) Draft Final Programmatic Agreement (PA) transmitted on April 17, 2026 (ADAMS No. ML26107A123). For the reasons set forth below, the Draft Final PA is legally deficient, contrary to procedural requirements, structurally inadequate, and cannot serve as a valid basis for NRC’s compliance with the National Historic Preservation Act (NHPA), 54 U.S.C. § 306108. Petitioners respectfully request that NRC: (1) conduct government-to-government consultation with the Oglala Sioux Tribal Council in accordance with OST Consultation Ordinance 11-10 prior to finalizing any PA; (2) complete an adequate tribal cultural resources survey before any final licensing decision; and (3) refrain from executing the PA or issuing a renewed license until those obligations have been fully and lawfully satisfied.

I. IDENTITY AND INTERESTS OF THE PETITIONERS

A. Oglala Sioux Tribe

The Oglala Sioux Tribe (“OST” or the “Tribe”) is a federally recognized Indian Tribe located on the Pine Ridge Reservation, with a governing body duly recognized by the Secretary of the Interior. The Tribe is the successor in interest to the Oglala Band of the Teton Division of the Sioux Nation and comprises approximately 41,000 citizens, with a territory of over 4,700 square miles in the southwestern portion of South Dakota.

The project lands are within the traditional aboriginal territory of the Oglala Sioux Tribe, having been included within both the 1851 Fort Laramie Treaty and the 1868 Fort Laramie Treaty, 15 Stat. 635. Notably, in prior proceedings regarding this project, Powertech’s own counsel was compelled to acknowledge that the project area is Aboriginal land, regardless of current deed or title. The Tribe accordingly has profound treaty, cultural, religious, and environmental interests in this proceeding and submits these comments in its capacity as a consulting party under Section 106 of the NHPA and pursuant to the government-to-government relationship established by its treaties with the United States.

B. NDN Collective

NDN Collective is an organization staffed almost entirely by members of federally recognized Tribal nations, with a heavy majority of those employees also being individual holders of legal rights conferred by treaties with the United States government. NDN Collective employs citizen rights holders from multiple tribes within the Great Sioux Nation, all of whom stand to suffer irreparable harm to their land access, religious liberty, cultural artifacts, hunting and fishing rights, and Constitutionally affirmed sovereignty as a result of the Dewey-Burdock project. NDN Collective participated as a consulting party in the Section 106 process, having been invited by NRC staff on March 14, 2025, in accordance with 36 C.F.R. § 800.2(c)(5).

C. Black Hills Clean Water Alliance

Black Hills Clean Water Alliance (BHCWA) is an organization whose members use and enjoy the lands proposed for mining and associated industrial development. BHCWA members use these lands to view and photograph scenery and wild plant life, appreciate and value the cultural and historical resources at the site, and for recreational, cultural, historical, conservation, aesthetic, and other purposes. BHCWA members have concrete, particularized interests in ensuring that the cultural, historical, and environmental integrity of these lands is protected through a lawful and adequate Section 106 process.

D. Joint Statement of Interest

Petitioners jointly adopt and incorporate the analyses submitted on behalf of other Lakota Tribes in response to the Draft Final PA. The legal deficiencies described below are not merely serious procedural deficiencies—they represent the continued failure of the federal government to honor its treaty obligations and statutory duties to the Indigenous peoples whose ancestral lands would be directly affected by the Dewey-Burdock project.

II. CULTURAL RESOURCES ARE UNLAWFULLY ELIMINATED FROM ANALYSIS WITHOUT GOVERNMENT-TO-GOVERNMENT CONSULTATION

Of great concern is NRC Staff’s continued abdication of its duties under the NHPA and related statutes protecting the cultural resources and historic properties of the Lakota Tribes. Despite previously committing to conduct new surveys as part of the license renewal process, NRC Staff has again retreated to reliance on archaeological surveys conducted in 2008, 2009, and 2012, and on Tribal surveys completed in 2013 by non-Lakota Tribes. This reliance is legally and factually erroneous and unsupportable. The NRC’s Atomic Safety and Licensing Board (ASLB) has already adjudicated and found these surveys inadequate. *In The Matter of Powertech (USA), Inc.* (Dewey-Burdock ISR Project), LBP-15-16, 81 NRC 618 (2015). BLM’s reliance on the same surveys that an NRC adjudicatory tribunal found inadequate is arbitrary and capricious.

Significant developments since 2014 confirm that these issues cannot be swept aside in NRC Staff’s license renewal analysis. As discussed in detail below, neither the PA nor the administrative record supports the conclusion that NRC has satisfied its pre-decisional Section 106 obligations. The procedural and structural defects identified below are pervasive: they infect not only the threshold question of whether a PA is legally permissible, but also specific stipulations that would govern the entire 20-year life of the agreement.

III. THE PROGRAMMATIC AGREEMENT DOES NOT SATISFY NHPA SECTION 106 OBLIGATIONS

A. The PA Relies on Surveys Adjudicated as Inadequate

NRC Staff's proposed PA reneges on its prior commitment to conduct a competent cultural resources survey and instead perpetuates reliance on the discredited surveys that have undermined the adoption of NHPA-compliant procedures/protections and the PA since the initial license issuance in 2014. Draft PA, Appendix B at 3. The ASLB subsequently found that NRC Staff had objectively failed to conduct "surveys to identify properties of religious and cultural significance." LBP-15-16, 81 NRC at 618. The post-decision activities in the PA cannot serve as a lawful basis for NHPA compliance in the absence of the necessary surveys.

NRC Staff proposes to execute the PA before surveys are complete and before meaningful tribal consultation has occurred regarding identification, evaluation, and mitigation of impacts to cultural resources. A PA signed before the completion of surveys and consultation does not satisfy NRC Staff's independent NHPA obligations and cannot substitute for the required pre-decisional Section 106 process.

B. NRC Staff Has Refused to Engage in Government-to-Government Consultation

NRC Staff has refused to engage in government-to-government consultation with the Oglala Sioux Tribe as required by the NHPA and the Tribe's Consultation Ordinance (OST 11-10). The Tribe submitted a formal request for government-to-government consultation with the Oglala Sioux Tribal Council as early as March 12, 2025 (ML25085A421). NRC Staff acknowledged that request and, by letter dated April 23, 2025, expressly "welcomed the opportunity" to meet with the Tribal Council (ML25101A288). Despite that acknowledgment, NRC Staff never scheduled or conducted the required meeting. This failure is not a minor omission—it is documented in NRC's own administrative record.

As the Oglala Sioux Tribe's enrolled members hold individual legal rights conferred by the 1868 Treaty of Fort Laramie, the failure to conduct this consultation is not merely a procedural deficiency—it is a breach of the United States' treaty obligations to the Tribe. Without a competent cultural resources survey and meaningful pre-decisional consultation, NRC Staff cannot meaningfully consult with the Oglala Sioux Tribe—or any other Tribe—as to the identification, evaluation, or mitigation of impacts to cultural resources.

NRC Staff must fulfill its consultation duties before it can finalize any PA. 36 C.F.R. § 800.2(c)(2)(ii)(C). NRC Staff also has a duty to honor the substance of the Tribe's consultation request. *Id.* ("The agency official shall consult with representatives designated or identified by the tribal government..."). NRC Staff has not met with the Tribal Council as required by OST Ordinance 11-10 and thus has not met its consultation duties.

C. The Legal Requirements of NHPA Section 106 Have Not Been Met

Under the NHPA, a federal agency must: make a reasonable and good faith effort to identify historic properties, 36 C.F.R. § 800.4(b); determine eligibility under 36 C.F.R. § 60.4; assess effects, 36 C.F.R. §§ 800.4(c), 800.5, 800.9(a); determine whether those effects are adverse, 36 C.F.R. §§ 800.5(c), 800.9(b); and avoid or mitigate adverse effects, 36 C.F.R. §§ 800.8(c), 800.9(c). The agency must confer with the SHPO and afford the ACHP an opportunity to

comment. *Muckleshoot Indian Tribe v. U.S. Forest Service*, 177 F.3d 800, 805 (9th Cir. 1999). The NHPA requires that each federal agency consult with any Indian tribe that attaches religious and cultural significance to affected sites. 54 U.S.C. § 302706(b). Consultation must provide a reasonable opportunity to identify concerns, advise on identification and evaluation of historic properties, articulate views on effects, and participate in the resolution of adverse effects. 36 C.F.R. § 800.2(c)(2)(ii).

The NHPA further requires that “[t]he agency official shall ensure that the section 106 process is initiated early in the undertaking’s planning, so that a broad range of alternatives may be considered.” 36 C.F.R. § 800.1(c) (emphasis added). ACHP guidance reiterates that consultation must begin at the earliest possible stage, framing early tribal engagement as a matter of respect for tribal sovereignty. ACHP, *Consultation with Indian Tribes in the Section 106 Review Process: A Handbook* (Nov. 2008) at 3, 7, 12, 29.

NHPA Section 110 also imposes independent obligations on BLM to ensure proper identification and evaluation of cultural resources. 54 U.S.C. § 306101. BLM has made no serious effort to fulfill its Section 110 obligations, rendering BLM’s cultural resources analysis legally deficient.

Only a competent cultural resources survey can provide for the necessary identification and evaluation of, determination of effects to, and mitigation of impacts to the cultural resources at the site. Petitioners support the commitment to conduct a survey prior to any ground disturbing activities, but the survey design must be developed through genuine tribal consultation and must occur ***before any final licensing decision***—not merely before construction begins.

D. The Use of a Programmatic Agreement Is Not Authorized Under the Applicable Regulations

The use of a PA in this instance is not in compliance with the NHPA and its implementing regulations. The categories for which a PA is authorized under 36 C.F.R. § 800.14(b)(1) do not apply here. The regulations restrict the use of a PA to circumstances where:

- (i) Effects on historic properties are similar and repetitive or are multi-State or regional in scope;
- (ii) Effects on historic properties cannot be fully determined prior to approval of an undertaking;
- (iii) Nonfederal parties are delegated major decisionmaking responsibilities;
- (iv) Routine management activities are undertaken at Federal installations, facilities, or other land-management units; or
- (v) Other circumstances warrant a departure from the normal Section 106 process.

36 C.F.R. § 800.14(b)(1). Because this is a mine site confined to a distinct geographic boundary with well-defined features and pre-determined ground disturbing activities, the existing administrative record does not support a determination that any of these categories permits deferral of Section 106 duties. Only once consultation and survey are completed - the results taken into account to avoid or mitigate adverse effects - can the final project design be lawfully authorized. *See* 36 C.F.R. §§ 800.

E. A New and Adequate Survey Protocol Already Exists and Must Be Used

In September 2021, NRC staff jointly developed with the Oglala Sioux Tribe a cultural resources survey protocol for an in situ leach uranium mine site: “Survey Methodology to Identify Sites of Historic, Cultural, and Religious Significance to the Oglala Sioux Tribe for the Crow Butte Resources Inc. In Situ Uranium Recovery Facility in Dawes County, Nebraska, September 2021.” This protocol demonstrates that the necessary tools exist to conduct an adequate survey. Notably, NRC Staff itself proposed using this kind of framework for the Dewey-Burdock project as recently as September 2025, before retreating from that commitment in the Draft Final PA. That reversal is unexplained and internally inconsistent with NRC Staff’s own prior position. Any prior finding that a pre-decisional survey is impractical is no longer valid.

The survey cannot be deemed complete without formal consultation with the Tribe and other interested tribes of the Great Sioux Nation. NRC Staff must halt all further licensing action until this survey is completed and government-to-government consultation is conducted with all affected Tribes. The need for new surveys is further evident from the passage of nearly two decades since field data was gathered: cultural sites are subject to erosion, new sites may have been exposed, and existing sites may have changed in ways that make their significance more apparent. Reliance on such stale data cannot meet the “reasonable and good faith” identification standard required by 36 C.F.R. § 800.4(b).

F. Religious Freedom Protections Are Implicated

The proposed Dewey-Burdock project, and any Programmatic Agreement premised upon it, presents grave conflicts with the American Indian Religious Freedom Act (AIRFA) and the Religious Freedom Restoration Act (RFRA). The rights of Indigenous peoples would be substantially burdened by the disturbances to ground, air, wildlife, water quality, noise levels, and the natural character of the landscape that industrial operations in this area would cause, all of which would profoundly interfere with the religious practices of Tribal members who have held the area sacred since time immemorial. Ceremonial religious practice continues in the Dewey-Burdock area to this day.

Because it is outside the norms of traditional Indigenous spirituality to document ceremonial activity through photographs or recordings for submission to government agencies, NRC and BLM should not treat the absence of such documentation as evidence that ceremonies are not occurring. A search of published academic literature is similarly inadequate to meet NRC’s duties. Indigenous spirituality should not be required to prove its own existence under a standard not imposed on other faiths. It is beyond dispute that the project area contains identified habitation and burial sites of Aboriginal provenance—all of which must be surveyed by qualified Oceti Sakowin cultural experts, in accordance with the September 2021 survey methodology, before any permitting decision is made.

IV. SPECIFIC DEFICIENCIES IN THE DRAFT FINAL PA’S STIPULATIONS

A. Powertech—Not Tribes—Proposes Avoidance Buffers (Stipulation 5(a))

The Draft Final PA’s central structural mechanism is that Powertech itself will propose the avoidance buffer zones around each cultural resource site that is revealed during construction, with Tribes receiving only a 30-day comment period, after which Powertech “considers” those

comments before “finalizing” the buffers. Draft PA, Stipulation 5(a). This arrangement inverts the consultation framework the NHPA requires.

The party with the strongest economic interest in minimizing buffer sizes is the one defining them. The regulations require that the agency—in consultation with Tribes—make determinations about the scope of protection for culturally significant sites. 36 C.F.R. § 800.4(b). Having Powertech identify cultural resources and set buffer boundaries with only advisory tribal comment does not constitute reasonable and good faith identification under 36 C.F.R. § 800.4(b), nor does it satisfy the meaningful consultation requirements of 36 C.F.R. § 800.2(c)(2)(ii). At a minimum, buffer sizes for tribally-identified cultural resources and significant historic sites should be established by NRC in genuine consultation with the relevant Tribes, with Powertech’s proposals treated as one input among many rather than the controlling baseline.

This concern is particularly acute for the dozens of sites in Appendix B, Table 3 where Tribes have recommended Criterion C eligibility (integrity and associative significance) but SHPO has not yet concurred, noting it “requires further documentation.” These sites carry contested eligibility that has never been resolved through the consultation process. The PA proceeds as if avoidance buffers alone can substitute for that unresolved determination—they cannot. Criterion C eligibility disputes must be resolved through consultation with the relevant Tribes, not deferred indefinitely while Powertech sets the protective perimeter.

B. Tribes Are Designated as Concurring Parties, Not Signatories (Stipulations 1 and 13)

The PA invites Tribes to sign only as “Concurring Parties” rather than as signatories. Under 36 C.F.R. § 800.6(c)(1)-(2), only signatories have the right to formally object and trigger the dispute resolution process under Stipulation 13. Concurring parties receive notice of proposed amendments and may comment, but they have no enforceable rights under the PA’s own terms.

The Oglala Sioux Tribe and other directly affected Tribes should be signatories to any PA that might address matters not resolved in connection with the survey, not merely concurring parties. The regulatory standard permits—and the circumstances here require—signatory status for parties that have “a legal or economic interest in the effects on historic properties” and are “authorized to represent” such interests. 36 C.F.R. § 800.6(c)(1). OST plainly satisfies this standard: its treaty rights, Aboriginal land interests, and active ceremonial use of the project area give it a direct legal stake in the outcome that is at least as substantial as Powertech’s interests in producing uranium from federal and private mineral estates. There is no explanation for listing Powertech as an invited signatory. Designating OST as a mere concurring party while giving Powertech full signatory status is inconsistent with the NHPA’s tribal consultation mandate and the government-to-government relationship the United States owes the Tribe.

C. Dispute Resolution Is Illusory for Tribes (Stipulation 13)

As a direct consequence of their concurring-party-only status, Tribes have no right to invoke the dispute resolution mechanism in Stipulation 13. The practical result is that if Powertech proposes avoidance buffers that Tribes consider inadequate, or if NRC approves a treatment plan Tribes find unacceptable, Tribes have no enforceable recourse within the PA framework itself. The dispute resolution process is available only to signatories.

This structural exclusion effectively nullifies the NHPA’s requirement that Tribes have a “reasonable opportunity” to “participate in the resolution of adverse effects.” 36 C.F.R. §

800.2(c)(2)(ii). A consultation framework that affords Tribes no enforceable avenue to challenge agency or licensee decisions does not satisfy that standard. A lawful PA must either extend signatory status to directly affected Tribes or to create an independent, enforceable Tribal objection mechanism with timelines adequate for Tribal governance processes.

D. The Five-Day Objection Window Is Incompatible with Tribal Governance (Stipulations 2(c)(ii) and 5(k))

Stipulation 2(c)(ii) and Stipulation 5(k) give parties only five days from when an issue is raised to provide a written objection. For Tribal governments that must follow internal consultation and governance processes—including the OST’s own Ordinance 11-10, which requires direction from the Tribal Council before the THPO may act—a five-day window is functionally no window at all. Tribal councils do not convene on five days’ notice, and requiring written objections within that timeframe effectively forecloses meaningful Tribal participation in real-time disputes.

This provision is facially inconsistent with the government-to-government consultation requirements the PA purports to satisfy. NRC’s own Tribal Policy Statement recognizes that the agency must “conduct its Tribal interactions in a manner consistent with its trust responsibilities and government-to-government relationship.” 82 FR 2402. The objection windows in Stipulations 2(c)(ii) and 5(k) should be extended to no fewer than 30 days for Tribal parties, consistent with the standard review periods used throughout the remainder of the PA.

E. Unanticipated Discovery Timelines and Resumption of Work Exclude Tribal Role (Stipulation 8)

Under Stipulation 8(c), after an unanticipated discovery NRC provides evaluation results to Tribes for only five business days of review and comment—at which point the process moves immediately to SHPO concurrence and potential resumption of work. Five business days is wholly inadequate for a Tribal government to convene, assess, and respond to a discovery of potentially sacred remains or artifacts. By comparison, NAGPRA’s inadvertent discovery provisions require 30 days for Tribal response. 43 C.F.R. § 10.4. The PA’s five-business-day window for Tribal review of unanticipated discoveries should be extended to at least 30 days.

More critically, Stipulation 8(i) authorizes NRC, BLM, and EPA alone to issue a “written notice to proceed” after a discovery, with no Tribal concurrence required before ground disturbance resumes near a culturally significant site. This is inadequate and unlawfully eliminates the role of Tribes altogether. At minimum, where a discovery occurs within or adjacent to a site of previously identified religious or cultural significance to a Tribe, that Tribe’s concurrence should be required—or at minimum its written objection should be required to be addressed—before work resumes in that area. The current provision allows agencies to proceed over Tribal objection with no process to resolve that objection, which is inconsistent with 36 C.F.R. § 800.2(c)(2)(ii).

F. Criterion C Eligibility Disputes Remain Unresolved (Appendix B, Table 3)

Appendix B, Table 3 lists dozens of sites where consulting Tribes have recommended eligibility under NRHP Criterion C—significance through integrity of location, design, setting, materials, workmanship, feeling, or association—but SHPO responded that it “requires further documentation to concur with this recommendation.” Rather than treating this as an open

eligibility question requiring resolution, the PA proceeds with those sites listed as eligible only under Criterion A, effectively accepting a more limited eligibility basis than Tribes have argued is appropriate.

The PA contains no mechanism to resolve these outstanding Criterion C disputes before avoidance buffers are set, before adverse effects determinations are made, or before ground disturbing activities commence. This omission is significant: a site eligible under Criterion C commands a different scope of protection—particularly regarding setting, feeling, and association—than one evaluated only under Criterion D for research data potential. Proceeding without resolving these disputes perpetuates the inadequacy of the underlying eligibility record that the ASLB identified in LBP-15-16. The PA should be amended to require that all outstanding Criterion C eligibility disputes be resolved through tribal consultation before any avoidance buffers for those sites are finalized and before any ground disturbance in their vicinity is permitted.

G. The Whereas Clauses Mischaracterize the Scope of Consultation

The PA’s recitals state that NRC “invited” 25 Tribes and NDN Collective to participate and “considered” their comments. These characterizations materially misrepresent the consultation record. The recitals do not acknowledge that the Oglala Sioux Tribe made specific, repeated, formally documented requests for government-to-government consultation with the Tribal Council—requests NRC acknowledged in writing but never fulfilled. Nor do the recitals reflect that OST’s Consultation Ordinance 11-10 governs the form of required consultation, or that NRC’s failure to comply with that ordinance means the required consultation has not occurred.

The NRC’s disregard of consultation requirements and reliance on a perfunctory invitation letter matters beyond symbolism. Courts reviewing agency action under the Administrative Procedure Act look to the administrative record. A PA that misrepresents the scope of consultation will not insulate unlawful agency action from judicial review, but will create a reason for the Court to set aside the PA and license based on a PA that creates an inaccurate record of compliance. Petitioners object to the recitals as written and request that any PA that ultimately issues accurately describe what consultation did and did not occur, including the Tribe’s outstanding requests and NRC’s failure to fulfill its commitment to schedule a Tribal Council meeting.

H. The 20-Year Duration Is Inappropriate Given the Inadequacy of the Underlying Record (Stipulation 16)

The PA would remain in effect for 20 years from execution—the full term of the renewed license. Given that the underlying surveys are nearly two decades old, that OST consultation has not been completed, that 31 percent of identified sites remain unevaluated, and that dozens of Criterion C eligibility disputes are unresolved, locking in a 20-year compliance framework on this inadequate foundation creates an unacceptable and irreversible risk of harm to cultural and religious resources of the Lakota people. Notably, this provision creates a vehicle for further violation of the regulations that forbid use of the stale data that the proposed PA is built upon. 36 CFR 800.4(c)(1). The PA cannot override regulations recognizing that “[t]he passage of time, changing perceptions of significance, or incomplete prior evaluations may require the agency official to reevaluate properties previously determined eligible or ineligible.” This prohibition on stale data and cultural significance reinforces the requirement that [t]he agency official shall acknowledge that Indian tribes and Native Hawaiian organizations possess special expertise in

assessing the eligibility of historic properties that may possess religious and cultural significance to them.” *Id.*

If any PA is to be executed, it should have a shorter initial term—no more than five years—with a mandatory comprehensive review and renewal process that requires: completion of the tribal cultural resources survey; resolution of outstanding eligibility disputes; and a finding by NRC, in genuine consultation with affected Tribes, that the PA’s terms remain adequate to protect identified resources. A 20-year agreement executed over Tribal objection and without adequate consultation should not be permitted to run unchallenged for two decades.

I. The Severability Clause Could Immunize Unlawful Provisions (Stipulation 19)

Stipulation 19 provides that if any portion of the PA is found illegal or unenforceable, the remainder continues in full force and effect. In many statutes and agreements, this severability clause is unremarkable boilerplate. Here, however, it is problematic: the lawfulness of the tribal consultation process is the foundational legal question in dispute. If a reviewing court were to find that the PA’s consultation provisions are inadequate, severability would allow the remainder of the PA—including Powertech’s license conditions—to continue operating, potentially leaving the cultural resource protections unenforceable while Powertech proceeds with construction. Allowing the PA and License to continue in full force, even in the face of an administrative or judicial order, would be contrary to the NHPA’s purpose and to the Tribe’s treaty rights. Petitioners object to the severability clause as applied to the consultation and Tribal rights provisions of this PA and request that it be removed or limited so that a finding of inadequate tribal consultation voids the PA in its entirety. Any severability clause must at least suspend the offending license provisions to ensure the physical and cultural status quo at the site is protected pending NHPA compliance.

J. Artifact Disposition on Private Land Fails to Prioritize Tribal Custody (Stipulation 10(b))

Stipulation 10(b) provides that artifacts recovered from private land remain the property of the landowner, with Powertech merely “encouraging” donation to the SD Archaeological Research Center “or a Tribal entity.” This permissive framing is inadequate. The project area is Aboriginal land; the sites from which artifacts would be recovered are of direct cultural and religious significance to the Tribes; and the cultural heritage embodied in those artifacts belongs to the Lakota people by right of ancestry and treaty.

The PA should require—not merely encourage—that recovered artifacts be offered first to the relevant consulting Tribes before curation at any non-Tribal state facility. If a landowner declines to transfer custody and artifacts are curated elsewhere, the PA should at minimum require that consulting Tribes be notified and given the opportunity to assert any applicable repatriation rights under NAGPRA before curation is finalized. The current provision is inconsistent with the spirit of NAGPRA and with the Tribe’s interest in the integrity of its cultural patrimony.

V. CONCLUSION AND REQUESTED RELIEF

For the foregoing reasons, the Draft Final PA is legally deficient, structurally and procedurally inadequate to protect the cultural and religious resources of the Lakota people, and cannot serve as a valid means of NHPA compliance. On behalf of Petitioners, I respectfully request that NRC:

1. **Decline to execute the Draft Final PA** until a competent tribal cultural resources survey has been completed and its results have been taken into account in the licensing decision;
2. **Conduct government-to-government consultation** with the Oglala Sioux Tribal Council in accordance with OST Consultation Ordinance 11-10, as NRC Staff committed to do by letter dated April 23, 2025 (ML25101A288) and has not yet fulfilled;
3. **Commission and complete an adequate tribal cultural resources survey** using the September 2021 Crow Butte survey protocol as a framework, developed through genuine consultation with the Tribe and other Great Sioux Nation Tribes, prior to any final licensing decision;
4. **If a PA is to be executed, amend it to:** (a) grant signatory status to directly affected Tribes; (b) give Tribes an enforceable dispute resolution right; (c) extend the five-day objection windows to at least 30 days; (d) require Tribal concurrence before resumption of work after an unanticipated discovery near tribally significant sites; (e) resolve all outstanding Criterion C eligibility disputes through tribal consultation before avoidance buffers are finalized; (f) require artifacts recovered on private land to be offered first to relevant Tribes; (g) reduce the initial term to five years with a mandatory comprehensive review; and (h) remove or limit the severability clause with respect to the consultation and Tribal rights provisions;
5. **Correct the Whereas clauses** to accurately reflect the scope and limitations of the consultation record, including OST's outstanding requests and NRC's unmet commitment to schedule a Tribal Council meeting; and
6. **Refrain from issuing a renewed license** to Powertech (USA), Inc. until NHPA Section 106 obligations have been fully and lawfully satisfied.

My clients remain willing to engage in meaningful government-to-government consultation consistent with their treaty rights and applicable law, and look forward to working with NRC, BLM, and EPA to ensure the cultural, religious, and environmental interests of the people these lands sustain are accorded the full protection the law demands. I am available to discuss these comments at your convenience.

Respectfully submitted,

Jeffrey C. Parsons
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Attorney at Law
Counsel for Oglala Sioux Tribe, NDN Collective,
and Black Hills Clean Water Alliance

cc:

Frank Star Comes Out, President, Oglala Sioux Tribe
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