UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of:	)	
	)	Docket No.: 40-9075-MLA
POWERTECH (USA), INC.	)	Date: March 11, 2013
(Dewey-Burdock In Situ Uranium Recovery Facility)	)	

APPLICANT POWERTECH (USA) URANIUM CORPORATION'S RESPONSE TO CONSOLIDATED PETITIONERS' REQUEST FOR A HEARING/PETITION FOR INTERVENTION

I. INTRODUCTION

Pursuant to 10 C.F.R. § 2.309(h), Powertech (USA) Uranium Corporation (hereinafter "Powertech" or the "Applicant") hereby submits this response to Consolidated Intervenors' (CI) and the Oglala Sioux Tribe's (hereinafter the "Tribe") request for admission of certain new and/or amended contentions (the "Request") based on the recently released Draft Supplemental Environmental Impact Statement (DSEIS) for Powertech's proposed Dewey-Burdock in situ leach uranium recovery (ISR) project. For the reasons discussed below, Powertech respectfully submits that both CI and the Tribe have failed to proffer any new or amended contentions satisfying NRC requirements at 10 C.F.R. § 2.309. Accordingly, Petitioners' Request should be denied.

II. BACKGROUND AND PROCEDURAL HISTORY

On February 25, 2009, Powertech submitted a license application for an Atomic Energy Act of 1954, as amended (hereinafter the "AEA"), combined source and 11e.(2) byproduct

material license to construct and operate its proposed Dewey-Burdock ISR project in South Dakota. After completing its ninety day acceptance review, the United States Nuclear Regulatory Commission (NRC) Staff determined that Powertech's Dewey-Burdock license application required additional data and information prior to docketing it for detailed technical and environmental review. As a result, on June 19, 2009, Powertech voluntarily withdrew its license application pending re-submission of the required additional data and information. On August 10, 2009, Powertech re-submitted its Dewey-Burdock license application with the additional data and information requested by NRC Staff. Powertech's resubmission of its license application provided additional data and information on some specific items such as breccia pipes, the Morrison Formation, the deep-disposal well option, and existing wells in the proposed Dewey-Burdock ISR site area, but was not materially different from its initial license application submittal. After completion of a second acceptance review, NRC Staff determined that Powertech's Dewey-Burdock license application was acceptable for detailed technical and environmental review and it was docketed on October 2, 2009.

After the Dewey-Burdock license application was made publicly available, on January 5, 2010, NRC Staff issued a Federal Register notice providing interested stakeholders and other members of the public with an opportunity to request a hearing on the application and to request access to sensitive unclassified non-safeguards information (SUNSI) associated with such application.[1] On January 15, 2010, counsel for Petitioners submitted a request for access to SUNSI documentation. After reviewing this request, NRC Staff determined that Petitioners were not entitled to access to the SUNSI documentation. On February 26, 2010, Petitioners submitted a motion for a ninety (90) day extension of time to file their Request based on a number of factors including a lack of time to review the Dewey-Burdock license application. On March 3,

[1] *See* 75 Fed. Reg. 467 (January 5, 2010).

2010, both Powertech and NRC Staff filed responses in opposition to Petitioners' motion and, on March 5, 2010, the Commission determined that Petitioners were not entitled to an extension of time.

On March 12, 2010, the Commission established an Atomic Safety and Licensing Board Panel (Licensing Board). On March 8th and 9th, 2010, and April 6, 2010, CI and the Tribe respectively submitted requests for a hearing including propose contentions for admission to such a hearing. On April 12 and May 3, 2010, Powertech and NRC Staff respectively submitted responses to CI's and the Tribe's requests respectively and argued that most, if not all, of the proffered contentions were not admissible under NRC regulations at 10 CFR Part 2.309. On June 8 and 9, 2010, the Licensing Board conducted oral argument in Custer County, South Dakota, where all parties arguments on standing and admissible contentions were heard.

On August 5, 2010, the Licensing Board issued LBP-10-16 in which CI and the Tribe each were granted standing to intervene and several contentions for both parties were admitted. Since that time, all parties have submitted regularly scheduled mandatory disclosures in accordance with 10 CFR Part 2 requirements. On June 28, 2011 and August 12, 2010 respectively, Powertech submitted final responses to NRC Staff's requests for additional information (RAI) regarding the ongoing safety and environmental reviews. These documents were made publicly available on NRC's ADAMS database on August 29, 2011 (ML112071064) and September 9, 2010 (ML102380516) respectively.

On November 26, 2012, NRC Staff issued the DSEIS for the proposed Dewey-Burdock project. By rule, CI and the Tribe were entitled to thirty days to file new or amended contentions. In compliance with this opportunity and after receiving an extension from December 31, 2012 to January 25, 2013, both CI and the Tribe filed requests to admit several

new or amended contentions. After being granted two separate extensions of time, by this Response, Powertech hereby argues that neither CI nor the Tribe has proffered any admissible new or amended contentions and, as such, their requests should be denied.

III. STATEMENT OF LAW

Typically, NRC 10 CFR Part 2 regulations at Part 2.309(f)(1) delineate requirements for admissible contentions. However, a petitioner may file new or amended contentions based on documents admitted to the administrative record after submission of an applicant's license/license amendment/license renewal application such as a DSEIS. *See* 10 CFR § 2.309(f)(2). NRC's standards for admitting new or amended contentions based upon documents such as the DSEIS are found at 10 CFR Part 2.309(f)(2) which, in turn, refers back to 10 CFR Part 2.309(c)(2)(i-iii) standards for admission. Part 2.309(c) entitled *Filings after the deadline; submission of hearing request, intervention petition, or motion for leave to file new or amended contentions* states that a request to admit new or amended contentions must satisfy three specific requirements: "(1) the information upon which the filing is based was not previously available; (2) the information upon which the filing is based is materially different from information previously available; and (3) the filing has been submitted in a timely fashion based on the availability of the subsequent information." 10 CFR § 2.309(c)(2)(i-iii) (2013). Each of these requirements must be satisfied for a new or amended contention to be admitted. Further, the Licensing Board has decided that, notwithstanding that an intervenor's contentions are based on NRC Staff's DEIS (or DSEIS), the intervenor still bears the responsibility of demonstrating that the contentions merit admission. *Private Fuel Storage* (Independent Spent Fuel Storage Installation), LBP-00-28, 52 NRC 226 (2000). The intervenors carry the burden of showing that any late-filed contentions are admissible. *See Amergen Energy Company, LLC,* (Oyster Creek

Nuclear Generating Station), CLI-09-7, 69 NRC 235, 260-61 (2009). A Licensing Board should not need to sift through the administrative docket to determine if information is new and how it is materially different from information previously available. *Cf Hydro Resources, Inc.* (P.O. Box 15910, Rio Rancho, NM 87174), CLI-01-04, 53 NRC 31, 46 (2001) ("The Commission should not be expected to sift unaided through large swaths of earlier briefs filed before the Presiding Officer in order to piece together and discern the intervenors' particular concerns or the grounds for their claims.").

For a DSEIS, contentions cannot be admitted unless the information upon which it is based "differ[s] significantly" from those in the applicant's ER. *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2, Catawba Nuclear Station, Units 1 and 2), CLI-02-28, 56 NRC 373, 385 (2002). A new NEPA contention is not an occasion to raise additional arguments that could have been raised regarding the ER. *Private Fuel Storage,* (Independent Spent Fuel Storage Installation), LBP-00-27, 52 NRC 216, 223 (2000).

An intervenor's time to submit contentions tolls when the information upon which a contention is based first becomes available and not later when NRC Staff issues its DSEIS. *See Private Fuel Storage, LLC* (Independent Spent Fuel Storage Facility), LBP-00-27, 52 NRC 216 (2000). An intervenor must submit a new contention "in a timely fashion based on the availability of the subsequent information." 10 CFR § 2.309(c)(2)(ii). Generally, a "good cause" finding based on "new information" can be resolved by a straightforward inquiry into when the information at issue was available to the petitioner. *See Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), LBP-96-15, 44 NRC 8 26 (1996). The finding of good cause for the late filing of contentions is related to the total previous unavailability of information.

Philadelphia Electric Co. (Limerick Generating Station, Units 1 & 2), LBP-83-39, 18 NRC 67, 69 (1983). A contention based on a DSEIS which contains no new information relevant to the contention, lacks good cause for filing. *See Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Units 1 & 2), LBP-82-79, 16 NRC 1116, 1118 (1982). A submitted document, while perhaps incomplete, may be enough to require that a contention related to it be filed promptly. *Philadelphia Electric Co.* (Limerick Generating Station, Units 1 & 2), LBP-83-39, 18 NRC at 69 (1983).

An intervenor must also offer a contention that is not based on an incomplete or inaccurate reading of a DSEIS. *Cf Georgia Institute of Technology*, (Georgia Tech Research Reactor), LBP-95-6, 41 NRC 281, 300 (1995) (rejecting a contention based on a mistaken reading of the Safety Analysis Report). An intervenor also cannot proffer an admissible contention that merely alleges deficiencies in a DSEIS; but rather, it must identify the specific analysis in the document and explain how it is incorrect. *See USEC, Inc.* (American Centrifuge Plant), CLI-06-10, 63 NRC 451, 472 (2006) (internal citations omitted) ("An expert opinion that merely states a conclusion (*e.g.*, the application is 'deficient,' 'inadequate,' or 'wrong') without providing a reasoned basis or explanation for that conclusion is inadequate[.]").

With respect to NEPA's "hard look" requirement, a DSEIS represents a "hard look" at potential impacts by NRC Staff. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989). But, this "hard look" standard does not require an assessment of every conceivable potential environmental impact in a DSEIS. *Ground Zero Ctr. For Non-Violent Action v. U.S. Dept. of the Navy*, 383 F.3d 1082, 1089-90 (9th Cir. 2004) (*citing NoGWEN Alliance of Lane County, Inc. v. Aldridge*, 855 F.2d 1380, 1385 (9th Cir. 1988). The "hard look" requirement

requires only that NRC Staff provide "[a] reasonable thorough discussion of the significant aspects of the probable environmental consequences." *Trout Unlimited v. Morton*, 509 F.2d 1276, 1283 (1974).

IV. ARGUMENT

Given that both CI and the Tribe filed a large number of new or amended contentions, the following argument will address each proffered contention by party, beginning with CI. As will be shown below, the proffered contentions should not be admitted based on the requirements of 10 CFR Part 2.309(c)(2)(i-iii).

Prior to engaging in any contention-specific analysis, it is important to note that neither CI nor the Tribe makes any attempt to demonstrate compliance with any of the 10 CFR Part 2.309(c)(2)(i-iii) factors for new or amended contentions filed in their pleadings on the DSEIS. Both parties offer their pleadings in a manner that resembles their previous pleadings,[2] but they do not make any showing of how their proffered contentions fit within the scope of the three mandatory factors. While Powertech plans to demonstrate this below on a contention-specific basis, it is important to note that an overriding theme of this Response is that neither Intervenor has complied with the express, mandatory requirements of 10 CFR Part 2.309(c)(2)(i-iii).

A. <u>Consolidated Intervenors' Contentions</u>

As a general matter and as is the case with CI's contentions below, none of these contentions satisfy 10 CFR Part 2.309(c)(2)(i-ii) requirements for new or amended contentions. CI fails to offer any explanation as to what information allegedly is new or

[2] Indeed, CI's four contentions and the first four Tribe contentions essentially are identical to the contentions raised in their initial requests for a hearing.

materially/significantly different and to how such information satisfies the above requirements. Items such as references to Powertech's RAI responses do not constitute new information, because these documents were issued and made publicly available well before the issuance of the DSEIS. As a result, CI would have been required to file new or amended contentions on any such information well before the date of their January 25, 2013 pleading. Thus, based on *Oyster Creek*, CI's Contentions A-D should not be admitted.[3] CLI-09-07, 69 NRC at 260-61.

1. Contention A: Alleged Failure to Meet Applicable Legal Requirements Regarding Protection of Cultural Resources and Failure to Involve or Consult All Interested Tribes

In addition to the argument noted above and with respect to Contention A regarding historic and cultural resources and Section 106 Tribal Consultation, CI's allegations also should be dismissed as not ripe for admission or adjudication because the Section 106 process and its evaluations of National Register eligibility and potential mitigation are not yet complete. As is the case with all ISR projects, the Section 106 process and all its requirements typically are resolved finally either as part of the Part 51/NEPA process in the FSEIS or independent of the Part 51/NEPA process in the form of a Memorandum of Agreement (MOA) or a Programmatic Agreement (PA). *See e.g.*, 36 CFR § 800.6. The Tribe will have ample opportunity to file new or amended contentions on the final documentation for the Section 106 process, whether in the FSEIS or in an independent package, when such documentation is completed. Thus, Contention A should be rejected as not ripe for admission or adjudication.

[3] It is also important to note that, to the extent that they merely reiterate previously rejected contentions, these contentions should be dismissed because NRC's rules of practice do not provide intervenors with a second opportunity to offer arguments that were made or could have been made previously. *McGuire*, CLI-02-28, 56 NRC at 385-86.

Contention A's allegation that there are other Tribes (Omaha, Skidi, and Southern Cheyenne tribes) that were not consulted but that may have interest in the proposed Dewey-Burdock project warrants discussion. The list of Tribes identified during Step 1 of the Section 106 process (i.e., identification of potentially interested consulting parties) has been available since at least August 12, 2011. Thus, the allegation A(3) should have been filed as a new or amended contention well before the CI pleading date of January 25, 2013. Therefore, since the allegation makes no attempt to comply with late-filed contentions requirements, it should be rejected.

2. Contention B: Alleged Failure of DSEIS to Include All Necessary Information for Adequate Determination of Baseline Groundwater Quality

3. Contention C: Alleged Failure to Include an Adequate Hydrogeological Analysis to Assess Adequate Confinement and Potential Impacts to Groundwater

4. Contention D: Alleged Failure of DSEIS to Adequately Analyze Groundwater Quantity Impacts

While Powertech incorporates its response to Contention A regarding failure to comply with Part 2.309(c)(2)(i-ii) requirements noted above to Contentions B-D, there is additional discussion warranted on several of CI's allegations respecting Contentions B-D.

Contention B makes a variety of allegations regarding deficiencies in the DSEIS ranging from the need for a detailed inventory of well yields, water levels, and water quality of all present users within 2 miles of the proposed project (B(1)), the lack of water quality data prior to Powertech's involvement with the proposed project (B(2)), detailed data on subsurface borings

(B(3)), spring and seep surveys (B)(4)), and past impacts to water from previous mining operations (B(5)).[4] CI Brief at 7-12.

Each of the sixteen allegations in Contention B not only fails to satisfy Part 2.309(c)(2)(i-ii) requirements for new or amended contentions; but also is untimely because each allegation should have been filed within thirty days of when previously submitted documents containing the relevant information were made publicly available. With respect to (B)(1)) on detailed inventories of well yields, water levels, and water quality, CI fails to note that these issues were addressed directly in Powertech's draft license (e.g., first draft license, License Condition 12.4 & 12.28), TR RAI responses (e.g., TR RAI P&R-10), and the license application (e.g., TR Section 5.7.8.2) and CI fails to proffer any evidence of new or materially/significantly different information. (B(2)) is addressed in TR Section 2.7.3.2.3, which includes a detailed comparison between historical groundwater quality data collected between 1979 and 1984 and more recent Powertech-generated groundwater quality data collected in support of its license application. (B(3)) is addressed in TR Appendix 2.6-A and the response to TR RAI P&R-9, (B(4)) is addressed in the TR RAI 2.7-9 response, and (B(5)) is addressed in the responses to TR RAI P&R-2, P&R-5, and 5.7.8-17, etc. The same is true for each of the allegations, because the record is rife with information on their substance and such allegations should have been filed well before CI's pleading date of January 25, 2013. Thus, Contention B should be denied in its entirety.

The same can be said about Contention C. For example, (C(1)) regarding unsubstantiated assumptions on the isolation of aquifers is addressed in great detail by TR RAI responses P&R-

[4] In total, there are approximately sixteen separate allegations in Contention B. *See* CI Brief at 7-19. The allegations noted above are intended to serve as representative examples in support of Powertech's legal position.

1-2, P&R-2, P&R-12(a), as well as 2.7-9, all of which were submitted and made publicly available well before the issuance of the DSEIS. (C(2)) regarding failure to account for natural and man-made hydraulic conductivity through natural breccia pipes and historic exploration hole drilling was addressed previously in TR RAI responses P&R-9 and P&R-12(a), as well as TR Appendix 2.6-A. (C(3)) regarding the acquisition of wellfield-specific hydrogeologic data after license issuance is specifically addressed in TR RAI responses 5.7.8-9 and 5.7.8-14 and License Conditions 10.10(A) and 11.3 of the first draft license. This analysis applies to each of the seven separate allegations offered in Contention C.

Contention D also has the same defects. (D(1)) regarding alleged imprecise, conflicting information on water volumes to be used and (D(2)) regarding the alleged lack of data on groundwater consumption for ISR operations are directly addressed in TR RAI Response P&R-14(c). (D(3)) regarding updated groundwater consumption estimates from those previously provided in Powertech's ER not only is addressed by the aforementioned TR RAI response, but also by Powertech's February, 2012 numerical model report (ML12062A096). (D(4)) regarding the allegation that no water balance has been provided is addressed in the aforementioned TR RAI response P&R-14(c). Lastly, (D(5)) regarding potential impacts to local/regional groundwater levels and well yields is directly addressed by Powertech's water rights applications (ML12192A039 & ML12193A239), which have been publicly available since July 11-12, 2012. Each of these responses and documents were submitted well before the DSEIS was issued and, without any attempt by CI to identify new or materially/significantly different information from that in those documents, Contention D also must fail.

B. Oglala Sioux Tribe Contentions

1. Contention 1: Alleged Failure to Meet Applicable Legal Requirements for Protection of Historic and Cultural Resources and Failure to Consult With Oglala Sioux Tribe

2. Contention 2: Alleged Failure of DSEIS to Include All Necessary Information for Adequate Determination of Baseline Groundwater Quality

3. Contention 3: Alleged Failure to Include an Adequate Hydrogeological Analysis to Assess Potential Impacts to Groundwater

4. Contention 4: Alleged Failure of DSEIS to Adequately Analyze Groundwater Quantity Impacts

In Contentions 1-4, the Tribe alleges a multitude of claims regarding NRC Staff's failure to address historic and cultural resources and Tribal consultation in an adequate manner. Tribe Brief at 4-10. The claims extend in Contention 2 to inadequate information on baseline water quality, in Contention 3 to inadequate hydrogeological assessments regarding potential impacts to groundwater, and in Contention 4 to potential impacts to groundwater quantity. *Id.* at 10-20.

As a general matter and as is the case with CI's contentions above, none of these first four contentions satisfies 10 CFR Part 2.309(c)(2)(i-ii) requirements for new or amended contentions. The Tribe fails to offer any direct explanation as to what information is alleged to be new or materially/significantly different and how such information satisfies the above requirements. Items such as references to Powertech's RAI responses do not constitute new information, because these documents were issued and made publicly available well before the issuance of the DSEIS. As a result, the Tribe would have had to file new or amended contentions on that information well before the date of their January 25, 2013 pleading. Thus, based on *Oyster Creek,* the Tribes Contentions 1-4 should not be admitted. CLI-09-07, 69 NRC at 260-61.

With respect to Contention 1, the Tribe's allegations also should be dismissed as not ripe for admission or adjudication because the Section 106 process and its evaluations of National Register eligibility and potential mitigation are not yet complete. As is the case with all ISR projects, the Section 106 process and all its requirements typically are resolved either as part of the Part 51/NEPA process in the FSEIS or independent of the Part 51/NEPA process in the form of a Memorandum of Agreement (MOA) or a Programmatic Agreement (PA). *See e.g.,* 36 CFR § 800.6. The Tribe will have ample opportunity to file new or amended contentions on the final documentation for the Section 106 process, whether in the FSEIS or in an independent package, when such documentation is completed. Plus, the Tribe has failed to offer any legal precedent demonstrating that the Section 106 process must be completed before the DSEIS is issued. In fact, completion of the process prior to DSEIS issuance is not required. *See Hydro Resources, Inc.* (2929 Coors Road, Suite 101, Albuquerque, NM 87120), CLI-99-22, 50 NRC 3, 13-14 (1999). Thus, Contention 1 should be rejected as not ripe for admission or adjudication.

Contentions 2-4 have the same defects described previously for CI's Contentions B-D as they fail due to the fact that their allegations were addressed in Powertech's first draft license (issued July 31, 2012), TR RAI responses (submitted June 28, 2011), and elsewhere in the administrative record (e.g., TR) made publicly available well before the issuance of the DSEIS. Thus, the Tribe's failure to offer any evidence of new or materially/significantly different information should result in the denial of these Contentions.

5. Contention 5: Alleged Failure to Demonstrate Adequate Technical Sufficiency and Failure to Present DSEIS in a "Clear, Concise" Manner for Public Review

In Contention 5, the Tribe argues that the DSEIS is not presented in a "clear, concise" manner to enable effective public review. The Tribe specifically cites to references to Powertech's TR RAI responses as "Powertech 2011" in the DSEIS, as well as noting that the draft license referred to in the DSEIS was issued "mere days" before the close of the DSEIS public comment period. Tribe Brief at 22. Contention 5 is essentially identical to a contention proffered by the Tribe with respect to the alleged "failure to present information to enable effective public review. *See* Tribe April 6, 2010 Brief at Contention 6, p. 28 (ML100960645).

Contention 5 does not point to any reference that demonstrates that any new or materially/significantly different information in the DSEIS that would warrant admission of this contention. The Tribe does nothing more than register a complaint with the Licensing Board that the process used by NRC for the publication and opportunity to comment on licensing documentation is inadequate. Further, the Tribe ignores the fact that the publication of the draft license(s) could constitute potential grounds for the submission of additional new or amended contentions; however, the Tribe failed to avail itself of that opportunity. Moreover, the draft license(s) have very little, if anything, to do with the format and content of the DSEIS as the draft license typically pertains to the safety review, which is the subject of a Safety Evaluation Report (SER) and which itself can present grounds for submission of new or amended contentions. Thus, without any demonstration that new or materially/significantly different information is available in the DSEIS, Contention 5 should be denied.

Additionally, it is the Tribe's burden to review the DSEIS and find the references that are required to present admissible contentions. Powertech and NRC Staff are not responsible for providing the Tribe with a "roadmap" for formulating admissible contentions. Powertech also submitted its license application in conformance with standard NRC guidance documents such as NUREG-1569 (ISR standard review plan) and NUREG-1748 for environmental reports (ER) and its RAI answers were filed in accordance with NRC RAI instructions. Thus, the Tribe cannot allege that they cannot locate references and, accordingly, this contention fails the "material information" requirement in 10 CFR § 2.309(c)(2)(i-ii) and should not be admitted.

The Tribe's allegation that the DSEIS would have to be re-published for comment due to the issuance of a new draft license similarly fails. The availability of new information after issuance of a DSEIS for comment is not enough to warrant re-publication for comment on a DSEIS. *Hydro Resources, Inc.* (P.O. Box 15910, Rio Rancho, NM 87174), CLI-04-39, 60 NRC 657, 659 (2004). The Tribe makes no effort to show how the issuance of the new draft license would create a "seriously different picture of the environmental impact[s]" and, thus, this portion of Contention 5 should be rejected. *See id.* (internal quotation marks omitted).

6. Contention 6: Alleged Failure to Adequately Describe or Analyze Proposed Mitigation Measures

In Contention 6, the Tribe claims that the DSEIS violates NRC regulations and NEPA by not including an assessment of mitigation measures for the proposed project. Tribe Brief at 23-25. The Tribe claims that the DSEIS has to prove that groundwater can be restored to baseline/background concentrations. *Id.* at 26. Lastly, the Tribe claims that any mitigation measures require a detailed analysis including "specific description, supporting data, and analysis of process and effectiveness…." *Id.* at 27.

Contention 6 does not present any grounds for determining that proposed mitigation measures in the DSEIS are different from those proposed in Powertech's entire licensing docket, including RAI responses, draft licenses, and other correspondence. The Tribe's Contention is nothing more than an allegation that the DSEIS is deficient without any attempt to distinguish any information as new or materially/significantly different. Also, as noted above in *Hydro Resources,* a DSEIS need not contain "a complete mitigation plan" or "a detailed explanation of specific [mitigation] measures which will be employed." 64 NRC at 427. Accordingly, Contention 6 fails because it does not satisfy Part 2.309(c)(1)(ii) requirements. *See also Oyster Creek,* CLI-09-07, 69 NRC at 260-61.

Further, the DSEIS also accounts for mitigation measures, including preparation of standard operating procedures (SOP) and work plans that must be prepared prior to operation of the facility and must be "signed-off on" by NRC Staff during its pre-operational inspection. *See e.g.*,DSEIS Table 6.2-1 and First Draft License, License Condition 10.4. This approach is consistent with standard NRC practice across the board and does not result in the need for a re-evaluation of the mitigation measures and re-issuance of the DSEIS. A DSEIS need not contain a "complete mitigation plan," and it does not need to include "a detailed explanation of specific [mitigation] measures which will be employed."[5] *Hydro Resources, Inc.* (P.O. Box 777, Crownpoint, NM 87313), CLI-06-29, 64 NRC 417, 426-27 (2006).

Also, Powertech's June 2011 TR RAI response (ML112071064) provide sufficient information regarding a reasonable estimate for groundwater restoration, including the

[5] Since the DSEIS describes mitigation measures relied upon by NRC Staff and how they will limit potential environmental impacts, its analysis of such mitigation measures is adequate. *Compare Hydro Resources, Inc.*, 64 NRC at 427; *see also Nuclear Innovation North America LLC* (South Texas Project Units 3 and 4), LBP-11-07, 73 NRC 254, 265 (2011).

requirement that best practicable technology be used. TR RAI 6.1-10 response also addresses a twelve month *minimum* stabilization monitoring period for groundwater restoration and Draft License Condition 10.6 (Second Draft License, January 4, 2013) envisions that stabilization monitoring must continue until there are four consecutive quarters without any statistically increasing trends in constituents of concern. These statements, along with NUREG-1910 statements regarding the requirement to restore groundwater to Criterion 5(B)(5) standards of 10 CFR Part 40, Appendix A and not solely to baseline/background levels, demonstrate that the Tribe's statements regarding ISR groundwater restoration are erroneous and, implicitly, are an impermissible collateral attack on NRC regulations. NUREG-1910, G-194;[6] *see also* 10 CFR § 2.335. Additionally, a July 10, 2009 Memorandum from NRC Staff to the Commission (ML091770187) states that restoration was conducted and approved at levels that are protective of public health and the environment in eleven instances at 3 ISR facilities. Thus, Contention 6 should be dismissed.

7. Contention 7: Alleged Failure to Include a Reviewable Plan for Disposal of 11e.(2) Byproduct Material

In Contention 7, the Tribe offers a contention aimed at the unavailability of a plan for Powertech to dispose of 11e.(2) byproduct material at an NRC (or Agreement State) licensed 11e.(2) disposal facility. More specifically, the Tribe argues that, "[i]t is not sufficient…for a DSEIS to avoid a meaningful review of impacts by merely stating that permanent disposal will occur in conformance with applicable laws." Tribe Brief at 27. This contention mirrors a similar

[6] In addition, the Tribe does not challenge the information in the GEIS directly relevant to the issue it raises, this allegation must be rejected. *Dominion Nuclear Connecticut, Inc.* (Millstone Nulcear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349, 358 (2001), *pet. For reconsideration denied,* CLI-02-01, 55 NRC 1 (2002)

contention proffered by the Tribe in its initial hearing request that was denied by the Licensing Board. *See* LBP-10-16, slip op. at 75.

This contention is inadmissible for a number of reasons. First, as required under Part 2.309(c)(1)(i), the Tribe is required to demonstrate that the contention is based on new or materially or significantly different information. The Tribe does not attempt to make this showing as its argument does not identify where the DSEIS differs in any way from either Powertech's initial license application or subsequently filed documents identified by NRC Staff in its monthly hearing file updates. As stated previously by Powertech in its license application, it has committed to satisfy NRC's requirements for 11e.(2) byproduct material disposal by having a disposal contract in place prior to the commencement of operations. This requirement is further reflected in Powertech's First Draft License, License Conditions 9.9 and 12.6 dated July 31, 2012.[7] Thus, as argued previously by Powertech regarding the Tribe's initial hearing request, if no 11e.(2) byproduct material disposal contract is in place, then Powertech will not be permitted to commence operations.[8] The DSEIS does not, in any way, change this requirement and, therefore, the Tribe has failed to demonstrate that new or materially/significantly different information is present to warrant admission of this contention.

Second, even if the Licensing Board could determine that new or materially/significantly different information is present, the time period within which this contention should have been

[7] The process by which NRC Staff addresses 11e.(2) byproduct material is nothing new to the public at large. For example, in the response to comments for Uranium One's Moore Ranch ISR project, Response to Comments MR018-048 and MR018-081 specifically state that "[t]he NRC requires an ISR facility to have an agreement in place with a licensed disposal facility to accept byproduct material before ISR operations begin."

[8] As discussed in LBP-10-16, this Board held that "Commission precedent makes clear that 10 CFR § 40.31(h) applies to uranium mills, and not to ISL facilities." LBP-10-16, 72 NRC 434. Thus, the Tribe's allegation that 10 CFR §40.31(h) and 10 CFR Part 40, Appendix A, Criterion 1 requires further analysis of this issue should be dismissed.

proffered tolled when the First Draft License was issued and, thus, renders this contention a late-filed contention. Since no effort was made to satisfy that deadline (First Draft License issued July 31, 2012, this Contention should be denied.

8. Contention 8: Legal Contention Based on Requiring Tribe to File Contentions Before a Final SEIS is Released and Failing to Follow Scoping Process

In Contention 8, the Tribe claims that it has been deprived of "the benefit of a final NEPA analysis" by the requirement that they file contentions on the DSEIS prior to the issuance of the FSEIS. Tribe Brief at 31. More specifically, the Tribe alleges that the DSEIS was issued "without the benefit of a required scoping process." *Id.* at 32. This contention should be denied on several grounds.

Initially, the Tribe was not *required* to file new or amended contentions on the DSEIS. Indeed, during the course of this proceeding, the matter of establishing a briefing schedule was discussed amongst the parties and the Licensing Board and it was agreed to follow the Commission's regulations in existence at that time. This decision then offered the Tribe a choice: either (1) file new or amended contentions on the DSEIS and file public comments on same or (2) await issuance of the FSEIS to file new or amended contentions and while also registering public comments on the DSEIS. Nowhere in the Commission's regulations is there a requirement that an intervening party file new or amended contentions on a DSEIS, let alone the DSEIS for Powertech's proposed Dewey-Burdock project. Thus, the Tribe fails to offer a legal basis for Contention 8 and, effectively offers a collateral attack on NRC regulations associated with administrative hearings. *See generally* 10 CFR 2.335; *see also Progress Energy Carolinas, Inc.* (Shearon Harris Nuclear Power Plant), CLI-10-09, 71 NRC 245, 255 (2010). Therefore, Contention 8 should be denied.

Further, the Tribe ignores the fact that NUREG-1910 (or the ISR GEIS) was prepared by NRC assuming an additional site-specific SEIS level analysis for all potential environmental impacts associated with new ISR operations/licenses. Section 1.4.1 of the DSEIS describes the GEIS from which this DSEIS is tiered and notes, "[t]he NRC staff consider the GEIS scoping process to be sufficient for the purposes of defining the scope of this SEIS." The Tribe ignores the fact that 10 CFR Part 51 does not require a scoping process for SEIS level analyses; but rather, 10 CFR § 51.26(d) and §51.92(d) references the need for scoping for EIS level documents but that SEIS level documents are not subject to mandatory scoping requirements. 10 CFR §§ 51.26(d) and 51.92(d). Additionally, the Tribe ignores the fact that, while it was not required to do so, NRC Staff announced and participated in three public scoping meetings (including one in Casper, Wyoming) and eight public meetings to solicit comments on the draft GEIS, including one in Spearfish, South Dakota in the region identified in the GEIS as being home to the proposed Dewey-Burdock project), and received and considered hundreds of public comments on the GEIS. Thus, to argue that NRC should have had a scoping process for a DSEIS constitutes an impermissible attack on NRC's 10 CFR Part 51 regulations and, thus, should be rejected. *See* 10 CFR § 2.335; *see also generally Commonwealth Edison Co.* (Byron Nuclear Power Station, Units 1 & 2), LBP-80-30, 12 NRC 683, 692-93 (1980).

9. Contention 9: Alleged Failure to Consider Connected Actions

In Contention 9, the Tribe alleges that NRC Staff violated NEPA in the DSEIS by not engaging other regulatory agencies in the preparation of the DSEIS such as EPA for Class III and Class V UIC wells. Tribe Brief at 34. The Tribe asserts that NRC Staff should have done a complete analysis of the proposal for these UIC wells and that it improperly "defers" analysis to EPA's and South Dakota's evaluation of such proposals. *Id.* at 34-35

Contention 9 should fail for the same reasons articulated in Powertech's response to Contention 8. NRC Staff engaged BLM as an official "cooperating agency" due to the need for Powertech to obtain a plan of operations for a small portion of the proposed project. Further, the DSEIS was issued for public comment and agencies such as South Dakota DENR and EPA filed official public comments addressing a variety of issues including groundwater protection. *See* ML13017A010 and ML13036A159. Powertech's license application and the DSEIS specifically addressed the potential impacts of Class V wells (ER Section 4.6.2.4 & DSEIS Section 4.5.2.1.1.2.3) and throughout the application, Class III injection wells. *See* Powertech ER Sections 4.6.2, the February 2012 numerical model report (ML12062A096) and TR RAI responses P&R-1, P&R-2, P&R-5, P&R-9, P&R-10, etc. The Tribe also does not attempt to show how the DSEIS differs from the impact analyses offered by Powertech in previously submitted documents. Thus, Contention 9 should be dismissed.

10. Contention 10: Alleged Failure of NRC NEPA Process to Consider Actions, Alternatives, Impacts, and Agencies

In Contention 10, the Tribe alleges that NRC Staff failed to include other agencies with jurisdiction over activities associated with the proposed Dewey-Burdock project. Tribe Brief at 36-39. The Tribe specifically alleges that NEPA requires that NRC Staff should have invited the Environmental Protection Agency (EPA) to "participate" in the NEPA process (preparation of the DSEIS) due to the fact that EPA has jurisdiction under the Safe Drinking Water Act (SDWA) for permitting Class III injection wells and Class V disposal wells. *Id.* at 38. They also claim that NRC Staff's DSEIS process omits analyses of potential impacts associated with a variety of topics including but not limited to "safety, cultural resources, endangered species…and solid

11e.(2) byproduct disposal." *Id.* The Tribe concludes that NRC Staff's DSEIS is "unlawfully narrow." *Id.*

Contention 10 is misguided on a number of fronts. First, the Tribe's claim that EPA has not been involved in NRC Staff's NEPA process is incorrect. NRC Staff informed Powertech that part of their DSEIS preparation involved routine discussions and consultation with EPA to ensure that its comments on the draft would be considered prior to its issuance. Further, NRC Staff received extensive comments from EPA on previous DSEISs prepared for previous new ISR operating license applications. *See* NUREG-1910, Supplements 1-3. This was done to ensure that EPA's comments were addressed to the maximum extent practicable. In addition, while EPA was not a "consulting party" for the DSEIS (unlike BLM which served as a formal "consulting party"), EPA was given an opportunity to file comments on the DSEIS and did avail itself of that opportunity. *See* ML13036A159. NRC Staff is not required to formally consult with any party on the preparation of a 10 CFR Part 51 DSEIS; but rather, it makes the document available for public comment from all interested stakeholders, including EPA. In addition, the Tribe was well-aware of the fact that BLM would be a formal "consulting party" and that EPA had not been invited to be such a party as no such correspondence between NRC and EPA was ever made publicly available. Thus, the Tribe cannot show that there is new or materially/significantly different information available in the DSEIS that would support grounds for Contention 10.

Additionally, the Tribe's allegation that the DSEIS omits discussions/analyses on a number of issues is incorrect. The Table of Contents for the DSEIS includes discussions of each of these issues and can, if necessary, be supplemented based on received public comments and,

to the extent applicable, proposed contentions. However, the Tribe's claim that these analyses are missing is incorrect. The Tribe also is not harmed by any such omission because the FSEIS still must be completed and, at that time, the Tribe can proffer new or amended contentions based on the FSEIS' content. Thus, the Tribe's contention lacks merit and should be denied.

11. Contention 11: Alleged Failure to Adequately Analyze Cumulative Impacts

In Contention 11, the Tribe alleges that the DSEIS does not adequately address cumulative impacts associated with past uranium mining, Powertech's plan to have the central processing plant (CPP) serve as a long-term processing site, other regional mining and ISR facilities, and potential impacts associated with the Black Hills Ordinance Depot. Tribe Brief at 40-42. Based on this, the Tribe alleges that the DSEIS violates NRC regulations and NEPA.

Contention 11 serves as another example of a failure by the Tribe to satisfy the Part 2.309 requirements for new or amended contentions. The allegation regarding past uranium mining should have been filed thirty days after Powertech's TR RAI responses were submitted to NRC and noticed by NRC Staff in the hearing file. Specifically, TR RAI responses P&R-2 & 9 and 3.1-2 address potential impacts for the project from historical mining and exploration drilling for ISR operations. The Tribe's allegation is also factually incorrect as the DSEIS specifically addresses the Edgemont mill and associated historical mining in the Edgemont Uranium District in its discussion of cumulative impacts. *See* DSEIS at Section 5.1.1.1.

Contention 11's allegation regarding Powertech's plans to be some sort of "regional processing center" is directly addressed in the DSEIS and shown to be factually incorrect where it states, "the applicant has no specific information that the applicant plans to go forward with these projects [Dewey Terrace and Aladdin…It is also uncertain whether, if either project went

forward, the applicant would seek to operate these projects as satellite facilities and ship loaded resins…to the proposed Dewey-Burdock site for processing into yellowcake." DSEIS at 5-2. This statement has been true since Powertech filed its license application and has not changed; thus, there is no new information upon which a new or amended contention can be based. The DSEIS also addresses regional ISR development at the Cameco Crow Butte facility in its cumulative impact analysis. *See* DSEIS at 5.1.1.1. This renders the Tribe allegation on regional ISR development factually incorrect as well.

Cumulative impacts associated with the Bear Lodge rare earths minerals mine or the Black Hills Ordnance Depot are also not shown to be based on new or materially/significantly different information from the license application or RAI responses. There is no information in the current record that Powertech is aware of that would demonstrate that this information should have been in the DSEIS or that it is materially/significantly different from information offered in either Powertech's license application, including RAI responses, or the DSEIS. Further, the Depot is approximately eighteen miles away from the project site and the Tribe has offered no explanation of how this even relates to cumulative impacts for the DSEIS. Without more, this Contention should be dismissed.

12. Contention 12: Alleged Failure to Consider All Reasonable Alternatives

In Contention 12, the Tribe alleges that the DSEIS does not contain an assessment of all reasonable alternatives. More specifically, while the Contention generally is vague and ambiguous about the types of alternatives they envision for evaluation (by stating "[n]umerous unexplored and unreviewed alternatives exist in violation of NEPA"), it does recommend some alternatives for evaluation such as preclusion of ACLs and prohibition of operations unless it can

be demonstrated that no excursions will occur. Tribe Brief at 44. These alternatives focus on importing regulatory requirements that are currently part of legislation in the State of Colorado, which obviously are not relevant to the State of South Dakota. *Id.*

Initially, the Tribe's contention is premature because the DSEIS is not NRC Staff's final environmental analysis under 10 CFR Part 51. NRC Staff continues to evaluate public comments on the DSEIS, including those submitted by the Tribe, and will respond to them in turn. In the event that the Tribe is dissatisfied with NRC's *final analyses*, then they can avail themselves of the opportunity to challenge them when the FSEIS is issued. Thus, Contention 12 is not ripe for adjudication.

Generally, under NEPA, NRC Staff need not evaluate every single alternative to the proposed action; but rather, NRC Staff should evaluate alternatives that are reasonable. For example, an alternative may be rejected if it fails to meet the project's purpose and need. *Exelon Generation Co.*, (Early Site Permit for Clinton ESP Site), CLI-05-29, 62 NRC 801, 806 (2005), *aff'd Environmental Law and Policy Center v. U.S. Nuclear Regulatory Commission,* 470 F.3d 676 (7th Cir. 2006). The Tribe has made no attempt to distinguish alternatives that are reasonable versus unreasonable here and, thus, the Contention should not be admitted.

Also, the Tribe cannot proffer a contention to evaluate an alternative that would prohibit ACLs for ISR operations because they are a *legal right* under the mandatory requirements of 10 CFR Part 40, Appendix A, Criterion 5(B)(5). Criterion 5(B)(5) specifically prescribes three standards for groundwater restoration at ISR facilities: (1) background/baseline *or* a maximum contaminant level (MCL, *whichever is higher, or* an ACL. The Tribes recommendation of an

alternative that would contravene a Commission regulation constitutes an impermissible collateral attack on such regulation. Thus, this Contention cannot rest on these grounds.

Lastly, the DSEIS offers a full range of alternatives including alternatives actually considered and reasonable but rejected alternatives that include various waste disposal options. The Tribe offers no references to new or materially/significantly different information available from Powertech's ER and the alternatives that it considered. Without this information, the Tribe does not satisfy the 10 CFR Part 2.309(c)(2)(ii) requirements for new or materially/significantly different information on this Contention.

13. Contention 13: Alleged Failure to Take a Hard Look at Potential Air Emissions and Liquid Waste Impacts

In Contention 13, the Tribe alleges that "the DSEIS lacks current and confirmed information on air emissions and their impacts on various 'receptors' in the region." Tribe Brief at 46. The Tribe claims that Powertech submitted a revised air emissions inventory and approach from its 2010 submissions versus its 2012 submissions and that the DSEIS should be delayed until this is completed and the DSEIS is re-issued for public comment. *Id.* This allegation also includes allegations regarding failure to assess potential impacts from wind direction on air emissions and potential receptors. *Id.* at 47. This allegation also extends to liquid waste disposal, the use of reverse osmosis (RO) to treat liquid waste water and the use of Class V disposal wells permitted by EPA for disposition of such waste water. *Id.* at 48-49.

With respect to the Tribe's allegation regarding submission of a corrected emissions inventory and detailed modeling, including a comprehensive PM2.5 emission inventory and delaying the DSEIS, the Tribe makes no effort to demonstrate that the DSEIS' statement

regarding this item is new or materially/significantly different information. Further, Powertech supplied NRC Staff with a revised air emissions inventory and approach and a commitment to submit a final corrected inventory prior to the FSEIS issuance date on July 31, 2012. *See* ML12216A220. If the Tribe had an issue with this approach, it should have submitted a new contention on this issue prior to its current January 25, 2013 submission date. Thus, on both grounds, Contention 13 cannot be sustained.

With respect to the Tribe's allegation regarding the inadequacy of using the annual wind rose data to account for seasonal differences in wind direction and velocity, the allegation is factually incorrect as the FSEIS will include dispersion modeling based on wind speed, wind direction, and upper atmospheric conditions for every hour over a three-year period and not on the annual wind rose. Further, the Tribe does not indicate how this information differs from Powertech's license application, RAI responses, or other parts of the record. Thus, due to incorrect information and a failure to comply with Part 2.309 requirements, this allegation cannot sustain Contention 13.

The Tribe's allegation regarding varying particulate and radon emission rates from ponds is both factually incorrect and also does not satisfy Part 2.309(c)(2) requirements. The allegation is factually incorrect, because Powertech did not propose any evaporation ponds for the Dewey-Burdock project. Further particulate emissions are to be included in the revised air emissions inventory to be submitted prior to FSEIS issuance which, as stated above, has not been shown to be a new or materially/significantly different piece of information. Further, should the Tribe have an issue with the completed air emissions inventory in the FSEIS, then a new or amended

contention can be submitted at that time. Thus, this allegation is not sufficient to sustain Contention 13.

The Tribe also alleges that the DSEIS makes no mention of foreseeable impacts due to major wind storms. However, the Tribe fails to note that Section 2.5 of Powertech's TR discusses regional weather patterns, including major storms. They have not shown that there is any new or materially/significantly different information in the DSEIS. Further, the dispersion modeling previously referenced for the FSEIS will account for peak hourly wind conditions, which will also account for potential severe storms and high wind events. If the analysis in the FSEIS proves to be new or materially/significantly different, then the Tribe can submit a new Contention at that time.

With respect to allegations regarding liquid waste disposition, the Tribe offers no argument showing that there is some new or materially/significantly different information. The GEIS, off of which the DSEIS is tiered, specifically states that "[t]he reverse osmosis process yields two fluids: clean water (permeate: about 70 percent) that can be reinjected into the aquifer…" NUREG-1910 at Section 2.5.3. Not only does this statement serve as support, it also has been an established part of NRC Staff's programmatic review of ISR projects since the GEIS was finalized. This does not constitute new information and cannot sustain this Contention.

With respect to land application, the Tribe alleges that the DSEIS does not address expected water quality, anticipated effectiveness of water treatment, potential impacts to wildlife, and federal and state endangered species. Powertech's TR RAI response P&R-14(d) addresses the expected water quality and treatment methods for land-applied water and there is no indication from the Tribe that there is any new or materially/significantly different information

on this issue. Powertech's South Dakota groundwater discharge permit application also directly addresses potential impacts from land application, including mitigation measures regarding selenium concentrations in soil (*see* ML121950041, publicly available on ADAMS since July 16, 2012). Powertech also is working directly with South Dakota DENR and USFWS to develop a plan regarding federal and state endangered species if any, including bald eagles, other raptors, and migratory birds, as well as potential indirect impacts to threatened and endangered species through prairie dogs. When this plan is completed, the Tribe can address this in the proper forum, whether it be in the FSEIS or in a State-based proceeding.

14. Contention 14: Alleged Failure to Comply With NEPA Regarding Potential Wildlife Impacts, the Endangered Species Act and Migratory Bird Treaty Act

In Contention 14, the Tribe argues that NRC Staff failed to assess adequately potential impacts to wildlife and failed to consult with the United States Fish and Wildlife Service (USFWS) in compliance with Section 7 of the Endangered Species Act. Tribe Brief at 50-57. Further, the Tribe states that the DSEIS did not describe completed Section 7 consultation and, thus, is inadequate.

Contention 14 fails to account for all of the information contained in the DSEIS accounting for the Section 7 consultation process with the USFWS, consultation with other federal, State, Tribal and local agencies and description of the absence of federal threatened and endangered species in the project area at the time the document was prepared. *See e.g.*, DSEIS Section 1.7.1. NRC Staff and USFWS conducted "informal consultation" as described on the USFWS Section 7 consultation website.[9] USFWS concluded that there are no federally threatened or endangered species within 1.0 mile of the proposed Dewey-Burdock project area,

[9] *See* http://www.fws.gov/midwest/endangered/section7/section7.html.

which typically does not require further analysis. USFWS indicated on March 29, 2010 and August 27, 2012 letters to NRC Staff that it had no evidence to indicate that threatened or endangered species are located within the proposed project boundaries. *See e.g.,* ML100970556 and ML 12240A317. The March 29, 2010 letter from USFWS states:

> "[i]f the Nuclear Regulatory Agency or their designated representative determines that the project 'may adversely affect' listed species in South Dakota, it should request formal consultation from this office. If a 'may affect-not likely to adversely affect' determination is made for this project, it should be submitted to this office for concurrence. If a 'no effect' determination is made, further consideration may not be necessary. However, a copy of the determination should be sent to this office."[10]

An August 27, 2012 letter from NRC to USFWS states:

> "[b]ased on our initial assessment, NRC Staff determines that a biological assessment or Section 7 consultation under the Endangered Species Act are not warranted for this proposed project because no adverse effects to federally threatened, endangered, or candidate species are expected. The bases for our determination will be provided in the draft SEIS."[11]

Further, the USFWS has been afforded an opportunity to offer public comments on the DSEIS and, to the extent that such comments are offered and relevant, NRC Staff will respond to such comments in turn. Thus, the Tribe's contention should have been submitted earlier than its January 25, 2013 submission date and should be rejected as untimely for failure to satisfy Part 2.309(c) requirements for late-filed contentions.

The DSEIS also contains a significant amount of analysis regarding threatened or endangered species. *See e.g.,* DSEIS at 3-42 (lines 17-20), 3-54 (lines 17-24 and Table 3.6-6), 3-69 (lines 8-9), 4-81 (lines 9-17), 4-91 (lines 36-40), 4-93 (lines 12-17), and 4-104 (lines 8-11).

[10] *See* ML100331503.
[11] *See* ML1224A0317.

For example, the DSEIS discusses conservation objectives to protect the Greater sage grouse[12] by evaluating baseline studies and inventories in the proposed Dewey-Burdock project area that found no sage grouse presence in the area during such baseline studies or in subsequent years. This information was produced by Powertech in its license application (ER Section 3.5.5.3.5) and could have been the subject of earlier contentions. But, in any event, the DSEIS still discusses potential impacts to this species at the DSEIS pages noted above. None of the information offered in the DSEIS is new or materially/significantly different information from Powertech's license application or its ER-RAI responses. Thus, since the Tribe makes no attempt to show that their pleading satisfies the requirements in 10 CFR § 2.309(c)(2)(ii), their allegations based on Greater sage grouse should be dismissed.

The Tribe also makes allegations regarding potential indirect impacts to the endangered whooping crane at the proposed Dewey-Burdock project site. This allegation is misguided because the DSEIS provides analysis that such indirect effects will not occur (DSEIS at 4-92, lines 13-18) at the project site, because whooping cranes have never been recorded in the project area from 1943 to at least 1999 and the Tribe has not attempted to identify any references in the DSEIS or anywhere else in the record showing otherwise. There is no showing by the Tribe that there is any new or materially/significantly different information offered in the DSEIS that would satisfy this requirement for an admissible new or amended contention. Thus, this allegation in Contention 14 cannot sustain its admission to this proceeding.

The Tribe alleges that USFWS concurrence was not obtained for the statement that the prairie dog colony is likely too small to support breeding areas for black-footed ferrets. Tribe

[12] It is worth noting that the Greater sage grouse is not included on the current list of Rare, Threatened or Endangered animals tracked by the South Dakota Natural Heritage Program. *See* http://gfp.sd.gov/wildlife/threatened-endangered/rare-animal.aspx#BIRDS (Accessed 2/18/2013).

Brief at 55. Again, the Tribe offers nothing but mere allegation about the requirements for NRC Staff's level of analysis, but they make no attempt to comply with Part 2.309(c)(1) requirements. Further, the Tribe's allegation is contrary to existing practice, because South Dakota USFWS does not require surveys for this species since the entire State is considered to be "block-cleared. *See* DSEIS at 3-60. The proposed Dewey-Burdock project is not considered to be a potential re-introduction area. Thus, this allegation cannot sustain Contention 14.

The Tribe also claims that consultation with USFWS should have occurred regarding potential impacts to migratory birds under the Migratory Bird Treaty Act. Tribe Brief at 56. As stated above, NRC Staff determined that it is not required to have formal consultation with USFWS under Section 7 of the Endangered Species Act; but rather, conducted "informal consultation" with USFWS to make appropriate determinations in the DSEIS. The DSEIS commits several lines of discussion to potential impacts to migratory birds (DSEIS at 4-85-86 & 4-89) and such analysis is subject to additional public comment should USFWS deem it appropriate. As above, there is no effort by the Tribe to address the Part 2.309(c)(1) factors in its analysis and, thus, Contention 14 cannot be sustained.

V. CONCLUSION

For the reasons discussed above, Powertech respectfully submits that the Petitioners' have failed to demonstrate that they have failed to proffer any admissible new or amended contentions pursuant to 10 C.F.R. § 2.309(c)(2)(i-iii). Accordingly, Petitioners' request should be denied.

Respectfully submitted,

/Signed (electronically) by/
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Dated: March 11, 2013

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of:	Docket No.: 40-9075-MLA
POWERTECH (USA), INC.	Date: March 11, 2013
(Dewey-Burdock In Situ Uranium Recovery Facility)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "APPLICANT POWERTECH (USA) URANIUM CORPORATION'S RESPONSE TO CONSOLIDATED PETITIONERS' REQUEST FOR A HEARING/PETITION FOR INTERVENTION" in the above-captioned proceeding have been served via the Electronic Information Exchange (EIE) this 11th day of March 2013, which to the best of my knowledge resulted in transmittal of the foregoing to those on the EIE Service List for the above captioned proceeding.

Respectfully Submitted,

/Executed (electronically) by and in accord with 10 C.F.R. § 2.304(d)/
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