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: April 4, 2014
	)	
(Dewey-Burdock In Situ Uranium Recovery Facility)	)	

APPLICANT POWERTECH (USA) INC'S RESPONSE TO CONSOLIDATED PETITIONERS' REQUEST FOR ADMISSION OF NEW OR AMENDED CONTENTIONS ON NUREG-1910, SUPPLEMENT 4

I. INTRODUCTION

Pursuant to 10 C.F.R. § 2.309(h), Powertech (USA), Inc. (hereinafter referred to as "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 NUREG-1910, Supplement 4 or the Final Supplemental Environmental Impact Statement (FSEIS) 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 otherwise 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 proposed 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 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. On March 11, 2013, Powertech and NRC Staff filed responses to the CI and Tribe pleadings. On March 25, 2014, CI and the Tribe filed replies to these pleadings. Then, on July 22, 2013, the Licensing Board issued a decision admitting certain new or amended contentions for various reasons, including the migration tenet, and denying others. *See* LBP-13-09.

On March 20, 2013, NRC Staff issued its final Safety Evaluation Report (SER) for the proposed Dewey-Burdock ISR project (ML13052A182) and found that, "issuance of the license will not be inimical to the common defense and security or to the health and safety of the public." SER at 1. On January 29, 2014, the FSEIS was issued recommending that, absent a safety-related issue to the contrary, Powertech's requested license should be issued. After issuance of the FSEIS, both CI and the Tribe submitted requests on March 17, 2014, to admit certain new and/or amended contentions based on the FSEIS. By this response, Powertech respectfully requests that the Licensing Board deny both CI's and the Tribe's new and amended contentions.

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 an FSEIS. *See* 10 CFR § 2.309(f)(2). NRC's standards for admitting new or amended contentions based upon documents such as the FSEIS 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 FSEIS, 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.").

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 FSEIS 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 an FSEIS. *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 an FSEIS; 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, an FSEIS 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 an FSEIS. *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

As was the case with CI's and the Tribe's previously filed pleadings regarding new or amended contentions on the aforementioned DSEIS, both CI and the Tribe offer several new or amended contentions on the FSEIS that resemble those submitted on the DSEIS. Powertech's response will address each proffered contention, beginning with CI. As will be shown below, each proffered contention should not be admitted based on the requirements of 10 CFR Part 2.309(c)(2)(i-iii).

A. Consolidated Intervenors New and Amended Contentions

As stated in previously filed pleadings, Powertech asserts that CI has made no attempt to identify any new or materially different information as required under 10 CFR Part 2.309(c)(2). Any references to information previously made public by either Powertech or NRC Staff prior to the issuance of the FSEIS do not constitute new or materially different information under this

regulation, because such information was available well before the issuance of the FSEIS. This statement also includes events or occurrences that took place before such issuance. Any bases referred to by CI in its new or amended contentions using such references should be deemed untimely. Thus, without a justification meeting the requirements for late-filed contentions, such contentions should be rejected.

1. Contentions 1A-B: Alleged Failure to Meet Applicable Legal Requirements Regarding Protection of Historical and Cultural Resources and Failure to Involve or Consult All Interested Tribes as Required by Federal Law

In addition to the overarching argument noted above and previously offered arguments regarding the ripeness of the contention for litigation, Contention 1A does not make any attempt to identify any new or materially different information from that offered in the DSEIS. CI's pleading merely restates similar arguments to those offered against the DSEIS and continues to reiterate CI's previous position on Powertech's previously submitted (with the license application) archaeological survey. Further, at the time of the DSEIS' release and in the several months thereafter but prior to the FSEIS' release, NRC Staff's Section 106 process, including the receipt, review, and acceptance of Powertech's Level III cultural resources survey and additional Tribal-conducted cultural resource surveys, specifically including those for traditional cultural properties (TCP), was publicly available for new and or amended contentions to be filed before this Licensing Board. Further, any remaining information on NRC Staff's conduct of its Section 106 Tribal consultation process may properly be addressed when such information is made publicly available.

The letters offered by CI to substantiate concerns on the part of some Tribes regarding NRC Staff's efforts in the Section 106 Tribal consultation process also fail to warrant admission

in this proceeding. Regardless of the opinions of these Tribal members, the National Historic Preservation Act of 1966 (NHPA) merely mandates that the lead agency, in this case NRC, make a "reasonable, good faith effort" to consult with Tribes and obtain their input for consideration when evaluating a proposed federal "undertaking" (e.g., the proposed Dewey-Burdock ISR project). CI makes no attempt to argue that NRC Staff has violated this particular responsibility under NHPA (not NEPA) in its pleading and, thus, cannot demonstrate any genuine material issue of fact with NRC Staff's FSEIS or the materials produced under the NHPA Section 106 process, whether produced in the FSEIS prior to or after the date of its issuance. Thus, for this reason as well, Contention 1A should not be admitted.

CI's Contention 1A argument also rests on faulty legal assumptions. CI continues to restate that NRC Staff has failed to satisfy its responsibilities to properly assess historic and cultural resources under *NEPA*. CI also claims that NRC Staff improperly separated the Section 106 Tribal consultation process from the NEPA process (i.e., FSEIS preparation). This allegation is legally incorrect as NEPA does not mandate that any federal agency must consult with Tribes and assess historic and cultural resources; but rather, it is the NHPA that requires a "reasonable, good faith effort" to do so. Further, NHPA regulations at 36 CFR Part 800.8 also permit federal agencies engaging in the Section 106 Tribal consultation process to conduct the review of historic and cultural resources either as part of the NEPA process or as a separate process at the commencement of an undertaking's review or as a review severed from the NEPA process midstream. There is no federal requirement that mandates that the Section 106 process be conducted within the scope of a given NEPA process. Thus, CI's Contention 1A should not be admitted, because it rests on faulty legal arguments and conclusions.

In addition, CI's expert testimony should be addressed. The arguments proposed by Mr. Redmond lack substance and legal foundation. Mr. Redmond claims that Powertech's license application and the FSEIS analyses of historic and cultural resources "primarily avoids the required analyses directed by the State of South Dakota." *See* CI Brief at 9. This allegation is faulty, because this proceeding is a federal proceeding for an Atomic Energy Act (AEA)-licensed activity over which NRC's authority preempts any form of State regulation. For purposes of this proceeding and as mentioned above, the parameters for this issue are what constitute a "reasonable, good faith effort" under the NHPA for a *federal lead agency*. Allegations regarding compliance with South Dakota State requirements are outside the scope of this proceeding. However, it is worth noting that the South Dakota department of Environment and Natural Resources (SDDENR) has concurred in the Level III Archaeological Study and has signed an agreement with Powertech to assure ongoing protection of historic and cultural resources.

Mr. Redmond's claim that subsurface testing is required for all sites at the proposed Dewey-Burdock project is also misguided. At least twenty-four (24) sites were tested subsurface at the proposed project site and others will be undergoing subsurface testing prior to construction activities. Existing professional guidance does not require subsurface testing for all sites at a proposed project location, particularly where the surface (hardpan clay) is not amenable to such testing. Powertech's March 19, 2014 draft license also contains License Condition 9.8 which specifically requires all disturbances associated with the proposed project to be completed in compliance with the NHPA and its implementing regulations in 36 CFR Part 800 and that "any work resulting in the discovery of previously unknown cultural artifacts shall cease." *See* SUA-1600, License Condition 9.8. Thus, Contention 1A should be rejected.

With respect to Contention 1B or the alleged failure to consult all interested Tribes, CI's allegations fall short of what is required to admit this contention. First, as stated in previous pleadings, the list of Tribes contacted by NRC Staff to be included as consulting parties and their responses to that inquiry, as well as their level of participation in this process was well-known prior to the issuance of the FSEIS. CI makes no attempt to identify any new or materially different information in the FSEIS that would warrant admission of this contention. Thus, absent a showing of satisfying the requirements for late-filed contentions, Contention 1B should be rejected.

CI also reiterates the allegation that NRC Staff's publication of the FSEIS without completing its Section 106 process and historic and cultural resource evaluation is in contravention of federal law (i.e., NHPA). As stated above, CI's allegation is incorrect from both a legal and factual basis. From a legal perspective, NRC and other federal agencies pursuant to 36 CFR Part 800.8 are entitled to conduct the Section 106 Tribal consultation process either as part of the NEPA process or as a separate process. These regulations do not require that the Section 106 process be part of the NEPA process. From a factual perspective, CI claims no subsurface testing has been performed on sites at the project location. This is factually incorrect as testing on at least 24 sites has occurred and other such testing may occur as necessary and where appropriate during project development pursuant to NRC License Condition 9.8. The Licensing Board should not accept a contention that is rife with legal and factual inaccuracies. Thus, Contention 1B should be rejected.

2. Contention 2: Alleged Failure to Include Necessary Information for Adequate Determination of Baseline Ground Water Quality

Contention 3: Alleged Failure to Include Adequate Hydrogeological Analysis Information to Demonstrate the Ability to Contain Fluid Migration and Assess Potential Impacts to Groundwater

Contention 4: Alleged Failure to Adequately Analyze Groundwater Quantity Impacts

While Powertech incorporates its response to Contention 1 regarding failure to comply with 10 CFR Part 2.309(c)(2)(i-iii) requirements noted above to its response to Contentions 2-4, there is additional discussion warranted on several of CI's allegations on the latter three (3) contentions.

CI's initial allegation regarding Contention 2 that NRC Staff's FSEIS does not include "additional baseline water quality information…so as to undermine the migration of this contention from the DSEIS" is incorrect. Examples of changes from the DSEIS to the FSEIS include (1) adding text on FSEIS Page 3-38 indicating that Powertech followed Commission-approved guidance in NUREG-1569 and Regulatory Guide 4.14 to assess *pre-operational baseline* groundwater quality at the site; (2) adding text on FSEIS Page 3-38 to indicate that groundwater from the recovery zone is unsuitable for private domestic use without treatment, (30 adding text on FSEIS Page E-139 to describe NRC Staff's final conclusion that "[b]ased on the number of samples collected and parameters analyzed, the applicant has acquired baseline groundwater quality data to satisfy 10 CFR Part 40, Appendix A, Criterion 7;" and (4) referencing geochemical data collected by the United States Geological Survey (USGS) at the project site (FSEIS, Page E-143). Similar arguments apply to CI's Contention 3 in which they claim that the FSEIS "fails to provide sufficient information regarding the hydrologic and geologic setting of the area…." CI Brief at 22. Initially, since the Licensing Board has chosen

to ignore its previous arguments regarding what is and what is not required by NRC for ISR pre-operational baseline water quality, Powertech deems it prudent to reiterate them here. Since its initial pleading requesting a hearing, CI has consistently claimed that Powertech failed to submit adequate *baseline* groundwater quality information and, subsequently that NRC Staff has failed to request additional such information. But, over the entire course of this proceeding, all intervening parties have failed to take notice that NRC's uranium recovery-specific regulations at 10 CFR Part 40, Appendix A, Criterion 5 and its implementing Commission-approved guidance for ISR facilities (i.e., NUREG-1569, Chapter 2) specifically endorse the pre-license submission provided by Powertech (including RAI responses) and the analyses conducted and conclusions reached by NRC Staff on this issue.

As a general matter, CI's allegations ignore the overarching and consistently endorsed approach to assessing and protecting groundwater quality. This approach starts with a legal evaluation of 10 CFR Part 40, Appendix A, Criterion 5(B)(5) and the Commission-approved NUREG-1569. Taken together, it can be seen that NRC's statutory and regulatory guidance for ISR operations envisions two sets of groundwater quality data being collected, one during the pre-application and pre-licensing phase and one after an NRC license is issued but prior to commencement of licensed operations. Thus, NUREG-1569 addresses "site characterization" *pre-operational baseline* groundwater quality in Section 2.7 separately from *Commission-approved background* groundwater quality required for each wellfield in section 5.7.8. The former or what is referred to as *baseline* in the NRC ISR review process is the general regional groundwater quality data gathered by a *license applicant* prior to preparing and submitting a license application for NRC review. As discussed in NUREG-1569, *baseline* groundwater quality data is required to satisfy Commission-approved guidance for a *license application* but is

deemed to be insufficient for conducting licensed ISR operations. *See* United States Nuclear Regulatory Commission, *NUREG-1569: Standard Review Plan for In Situ Leach Uranium Extraction Facilities*, (June, 2003). It is deemed insufficient because, as NUREG-1569 states, a license application review is not based on *complete* groundwater quality data. This is because NRC's construction rule at 10 CFR Part 40.32(e) essentially prohibits the pre-license issuance drilling of a complete wellfield, including the monitor well network, which is the only way complete groundwater quality data can be obtained, analyzed, and developed into the appropriate groundwater quality parameters otherwise known as upper control limits (UCL) (i.e., parameters used to determine potential horizontal or vertical excursions at site monitor wells) and restoration target values (RTV) which are used to determine when restoration to Criterion 5(B)(5) standards is achieved post-operations or if an alternate concentration limit (ACL) is needed. For this reason, NRC regulations for *groundwater quality compliance* (10 CFR Part 40, Appendix A, Criterion 5) do not mention the term *baseline* as one of the compliance standards for ISR facilities.

However, the latter or *Commission-approved background* is identified as a groundwater quality compliance standard (one of three) under Criterion 5(B)(5). As a legal matter and as stated above, the establishment of *Commission-approved background* cannot be accomplished without potentially violating 10 CFR Part 40.32(e) and could result in the denial of a requested license. As a technical matter, it is impossible to properly determine *Commission-approved background* without drilling an entire wellfield, including all monitoring wells, extracting groundwater samples, and analyzing them to determine appropriate UCLs and RTVs. In addition, Powertech's current draft license includes language regarding NRC Staff's method of evaluating such analyses (i.e., wellfield packages). These approaches all have been endorsed in

the *Hydro Resources, Inc.* litigation in which the process of performance-based licensing and post-license development of groundwater quality data for each wellfield was found to be acceptable and not violative of the AEA's statutory provisions for hearing rights at NRC, since the criteria for developing such data were not challenged as inadequate.

These responses also apply to CI's claim that the FSEIS fails to provide adequate geologic and hydrologic data and information to properly characterize the proposed project site. In this case, CI presents conflicting allegations that "the FSEIS does not identify any new data associated with the proposal that could defeat the migration tenet with respect to this contention" and that the FSEIS relies heavily on a 2012 Petrotek groundwater modeling report for which "the DSEIS makes no reference, citation, nor any discussion." CI Brief at 23-24. Regarding the allegation that the FSEIS contains no new information on confinement, examples of information added to the FSEIS include: (1) SDDENR's conclusion based on water levels in Minnelusa and Madison observation wells in the area that these aquifers are hydraulically separated in the vicinity of the proposed project area (e.g., FSEIS Page 3-34); (2) additional description of the regional occurrence of breccia pipes and evidence supporting the conclusion that they do not occur in the proposed project area (FSEIS, Page 3-19); and (3) description of State regulation that were in place when historical exploration drilling occurred to prevent fluid migration following drill-hole plugging (FSEIS, Page 3-20). Similarly, the allegation that the 2012 Petrotek groundwater model report was not mentioned in the DSEIS is inaccurate. Specifically, DSEIS, Page 4-62 described the report's conclusions regarding the confining properties of the Fuson Shale based on numerical modeling and NRC Staff's review of the groundwater model and calibration, including the determination "that the model was appropriately developed and sufficiently calibrated." Similarly, DSEIS Page 4-65 describes NRC Staff's review of the

groundwater model. Further, based on the requirements of NUREG-1569, Powertech's license application contained sufficient groundwater data for NRC Staff to evaluate *pre-operational baseline* groundwater quality and ability to contain fluid migration at the site, as has been shown in Powertech's SER. Thus, Powertech respectfully requests that the Licensing Board take judicial notice of the aforementioned arguments and find that Contentions 2 and 3 should be excluded from this proceeding.

Further, CI's own statement that NRC Staff has not included or required any additional baseline water quality data or geologic and hydrologic data and information speaks for itself. Intervenors are required to demonstrate that there is new or materially different information under 10 CFR Part 2.309(c)(2)(i-iii) for Contentions 2 and 3 to be admitted. However, by their own admission, there is no materially different information in the FSEIS to warrant admission of Contentions 2 and 3. Thus, they should be rejected.

Lastly, with respect to Contention 4, CI commits the same errors as it did when filing its previous set of new or amended contentions. The FSEIS is rife with references, discussions, and analyses of potential groundwater quantity impacts including the quantity of water needed to maintain hydraulic wellfield control (FSEIS 2.1.1.3.3), drawdown potential (FSEIS 4.5.2.1.1.2.2), and monitoring (FSEIS 7.3.4). The FSEIS also addresses the alleged failure "to calculate an actual water balance in Sections 2.1.1.1.3.3 and 2.1.1.1.4.1.1. Further, FSEIS sections also incorporate information provided in previously referenced TR RAI answers from Powertech such as FSEIS Section 2.1.1.3.3 which utilizes technical information from the response to TR RAI P&R-14(c). The FSEIS concluded that all aspects of potential groundwater quantity impacts, including water balance, satisfied Commission-approved guidance at NUREG-

1569. Thus, without more materially different, Contention 4 should be rejected as showing no new or materially different information.

B. Oglala Sioux Tribe New and Amended Contentions

With respect to the Tribe's new or amended contentions, Powertech's response will address several of these contentions in groups similar to the sections listed above. In some cases, the Tribe's contentions essentially mirror those offered by CI. To the extent practicable and in the interest of judicial efficiency, Powertech will incorporate previously offered arguments on the same issues by reference.

1. Contentions 1 A-B: Alleged Failure to Meet Applicable Legal Requirements Regarding Protection of Historical and Cultural Resources and Failure to Involve or Consult all Interested Tribes as Required by Federal Law

After an assessment of the arguments offered by the Tribe in its Contentions 1 A and B regarding an alleged failure to meet applicable legal requirements regarding protection of historical and cultural resources and failure to properly consult all affected Tribes, it appears that the Tribe essentially repeats the arguments offered by CI. As such, Powertech hereby incorporates its arguments from Section A(1) above by reference and request that the Board reject each contention.

2. Contentions 2-4: Alleged Failure to Include Necessary Information for Adequate Determination of Baseline Groundwater Quality, Hydrological Analysis, and Groundwater Quantity Impacts

After an assessment of the arguments offered by the Tribe in its Contentions 2-4 regarding alleged inadequate determination of baseline groundwater quality, hydrological analysis, and groundwater quantity impact assessment, it appears that the Tribe essentially repeats each of CI's arguments. As such, Powertech hereby incorporates its arguments from Section A(2) above by reference and requests that the Board reject each contention.

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

The Tribe's Contention 6 regarding an alleged failure to adequately describe or analyze proposed mitigation measures should not be admitted. The Tribe claims there is no substantial change between the DSEIS and FSEIS regarding proposed mitigation measures. Tribe Brief at 21. Further, the Tribe claims that the Section 106 process and its associated programmatic agreement are not yet complete. *Id.* at 22. Additionally, the Tribe alleges that NRC Staff improperly relies on mitigation measures or plans to be implemented or developed after the requested license is issued. *Id.* at 23.

In short, the Tribe does not make any attempt to identify new information in the FSEIS regarding this issue. But, the Tribe again fails to identify new information where there is a significant amount. Throughout the FSEIS, NRC Staff has added new information on mitigation measures, including but not limited to, issues such as cultural resources, hydraulic fracturing, excursions, historical mine pits, and land application. *See e.g.*, FSEIS Sections 4.4.1.1.2, 4.9.1.1.1, 6.1. Further, the Tribe claims that groundwater restoration mitigation measures only relate to plans to restore in the future. The Tribe fails to acknowledge that Powertech, like all other ISR licensees, must comply with 10 CFR Part 40, Appendix A, Criterion 5(B)(5) for groundwater protection. This Criterion requires that an ISR licensee must restore groundwater within the recovery zone to *Commission-approved background or an MCL, whichever is higher, or an ACL*. Questions regarding the effectiveness of the rule requiring restoration in accordance with Criterion 5(B)(5) in the recovery zone are irrelevant in this proceeding and outside the scope of Powertech's proposed action. These concerns are only relevant within the scope of an ACL application that would be submitted by Powertech after cessation of active ISR operations and restoration efforts to attempt to reach the primary or secondary Criterion 5(B)(5) goals of

restoration. Thus, this part of Contention 6 is inadmissible as outside the scope of this proceeding. Therefore, Contention 6 should be rejected based on the arguments noted above.

4. Contention 9: Alleged Failure to Consider Connected Actions

In Contention 9, the Tribe alleges that NRC Staff has failed to include an analysis of "connected actions" including those associated with permit applications submitted to the United States Environmental Protection Agency (EPA) for underground injection control (UIC) permits for Class III injection wells and Class V disposal wells. Tribe Brief at 26. The Tribe also claims that NRC should have evaluated the potential environmental impacts associated with permits or other authorizations from other federal and State agencies. *Id.* at 29.

Contention 9 should not be admitted due the fact that NRC Staff has thoroughly addressed the use of Class III and V wells at the proposed Dewey-Burdock ISR site. As stated in Powertech's previous pleadings, 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. EPA also was given thirty (30) days from notice in the Federal Register by EPA to concur on the FSEIS. *See* FR Doc. 2014-02692 (February 6, 2014). Powertech's license application and the FSEIS specifically addressed the potential impacts of Class V wells (ER Section 4.6.2.4 & FSEIS Sections 4.2.1.1, 4.3.1.1, 4.4.1.1, 4.5.1.1.1, 4.5.2.1.1, 4.6.1.1, 4.7.1.1, 4.8.1.1, 4.9.1.1, 4.10.1.1, 4.11.1, 4.12.2, 4.13.1.1, & 4.14.1.1) 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, & FSEIS Chapter 4, etc. The Tribe also does not attempt to show how the FSEIS differs from the impact analyses offered by

Powertech in previously submitted documents or by NRC Staff in the DSEIS. Thus, Contention 9 should be dismissed.

5. Contention 14 & FSEIS Contention 1: Alleged Failure to Adequately Review Impacts on Wildlife

In Contention 14 and FSEIS Contention 1, the Tribe alleges that the FSEIS does not satisfy the NEPA "hard look" requirement at potential impacts to species of birds and bats in the area and that NRC Staff properly consult with the United States Fish and Wildlife Service (FWS) on specific statutes. Tribe Brief at 29-30.

The Tribe's contention is rife with inaccuracies and improper conclusions. Initially, bats are mammals and are not protected under either the Migratory Bird Treaty Act (MBTA) or the Bald and Golden Eagle Protection Act (BGEPA). The only mammals covered under the MBTA are game mammals covered under the portion of the act that applies to the Convention between the United States and Mexico. Further, as stated in previous pleadings, both the DSEIS and FSEIS contain multiple references to correspondence between FWS and NRC Staff regarding the Section 7 consultation process. *See e.g.*, FSEIS Appendix A: Pages A-5, A-6, A-9-11, A-91-92. Further, NRC Staff is not required to consult with FWS regarding application of the MBTA and/or BGEPA to the proposed Dewey-Burdock ISR project; but rather, the project proponent (Powertech) is responsible for consulting with FWS and complying with these statutes. Further, FWS had opportunities to provide input during NRC's consultation requests and during the DSEIS public comment period but did not because consultation regarding MBTSA and BGEPA is not required for agency actions while consultation with FWS on the Endangered Species Act (ESA) and Fish and Wildlife Coordination Act (FWCA) is required. *See* 40 CFR Part 1502.25; ESA Section 7(a)(2); FWCA at 16 U.S.C. § 662(a); MBTA at 16 U.S.C. §§ 703-712 & 50 CFR Part 21; BGEPA at 16 U.S.C. §§ 668-668(d) & 50 CFR Part 22. Further, *persons and*

organizations that obtain licenses, permits, grants, or other such services from government agencies are responsible for their own compliance with the Eagle Act and should individually seek permits for their actions that may take eagles." *See* FRN at Vol. 74, No. 175 (September 11, 2009). The FSEIS also contains explicit references to NRC Staff consideration of these statutory provisions. *See* FSEIS at Section 3.6.3 & 4.6.1.1.1.1.2. Powertech also is developing mitigation plans for bald eagles and other MBTA-species for each phase of the proposed project based on collaboration with South Dakota Department of Game, Fish, and Parks (SDGFP) and FWS. Additionally, the Tribe's claim that FWS confirms that NRC ESA consultations do not satisfy MBTA and BGEPA requirements is completely mischaracterized. Referring to FSEIS Appendix A, Page A-157, the FWS confirms two separate issues: (1) that "no formal or informal Section 7 consultation is required based upon your determination and we have *no records of any federally listed species in the area of the project*" and (2) "this does not apply to migratory birds or bald and golden eagles…." FSEIS at Appendix A, Page A-157. The latter statement notes that, unlike records for federally listed species (which show that such species do not occur in the project area), records for migratory birds and eagles show that these species do occur in the project area and which fact is noted repeatedly in the FSEIS. This is addressed by Powertech in its proposed mitigation measures. The Licensing Board should not admit a contention based on legal inaccuracies and misinterpreted statements regarding discussions between NRC Staff and FWS.

6. FSEIS Contention 2: Alleged Inadequate Analysis of Impacts from 11e.(2) Byproduct Material Disposal

In FSEIS Contention 2, 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 34. This contention mirrors a similar 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 FSEIS 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. The only exception is the claim that the "FSEIS, for the first time, firmly identified the White Mesa Mill as the repository for its waste." Tribe Brief at 34-35. This statement is inaccurate as the DSEIS, Page 3-105 states, "[t]he applicant has identified the White Mesa site as the disposal location for solid byproduct material, but a disposal agreement is not yet in place." This language is identical to the language presented in the FSEIS on Page 3-116\. 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 March 19, 2014, Draft License, License Conditions 9.9 and 12.6 dated March 19, 2014.[2] 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

[2] 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."

to commence operations.[3] The FSEIS 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 proffered tolled when the First Draft License, containing the same License Conditions 9.9 and 12.6, was issued and, thus, renders this contention a late-filed contention. Further, the Tribe's claims that the White Mesa Mill cannot accept 11e.(2) byproduct material from the proposed Dewey-Burdock ISR project is incorrect, as Energy Fuels (the licensee operating the White Mesa Mill) has a license condition (10.5) authorizing acceptance of such waste.[4] Since no effort was made to satisfy that deadline (First Draft License issued July 31, 2012), this Contention should be denied.

7. FSEIS Contention 3: Alleged Failure to Provide Comment Period on Air Emissions Impacts

In FSEIS Contention 3, the Tribe alleges that NRC Staff's FSEIS fails to take a "hard look" at potential impacts from air emissions at the proposed Dewey-Burdock ISR project site. Tribe Brief at 39. The Tribe claims that they were not entitled to an opportunity to comment on the data and analyses provided in final air emissions protocol until the FSEIS was issued. *Id.*

The Tribe's claim that there was significant, new information provided in the FSEIS is inaccurate. Powertech prepared and submitted an ambient air quality emission protocol in July

[3] 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.

[4] *See* State of Utah Radioactive Materials License #UT1900479, License Condition 10.5.

of 2013, and was noticed as publicly available by NRC Staff on July 19, 2013, and the Tribe did not avail itself of the opportunity to comment or file for a new or amended contention on this submission. *See* ML13196A061, ML13196A097, & ML13196A118. Further, EPA did avail itself of the opportunity to comment on the DSEIS proposal for this protocol stating, "[s]ince the complete modeling results are not presented in the Draft EIS, we cannot complete our review of the air quality impacts at this time. However, *we concur with your approach on supplying additional air quality impact results for the Final EIS*." *See* ML13036A159. This protocol also was provided to multiple federal agencies for review and comment throughout 2013.

The results of the final air emissions analyses and modelling also demonstrates that NRC Staff's DSEIS impact analysis (FSEIS Section 4.7) was essentially a bounding analysis within which the final analyses and modeling fall. Thus, regardless of the Tribe's claims, NRC Staff's analysis shows that potential impacts are less than the conclusions reached in the DSEIS. Further, the State of South Dakota has the authority to regulate non-radiological air emissions from ISR operations in the State. Thus, if the Tribe has issues with air emissions outside the scope of a review of such emission in the FSEIS, then they should be raised with the State. Therefore, FSEIS Contention 3 should not be admitted for failure to file a new/amended contention in a timely manner and for lack of jurisdiction.

V. CONCLUSION

For the reasons discussed above, Powertech respectfully submits that the Petitioners' have failed to demonstrate that they have proffered 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/
Christopher S. Pugsley, Esq.

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Dated: April 4, 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: April 4, 2014
(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 4th day of April 2014, 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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