**UNITED STATES OF AMERICA**
**NUCLEAR REGULATORY COMMISSION**

**BEFORE THE ATOMIC SAFETY AND LICENSING BOARD**

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| In the Matter of: | ) | |
| | ) | Docket No.: 40-9075-MLA |
| POWERTECH (USA), INC. | ) | Date: April 24, 2014 |
| (Dewey-Burdock In Situ Uranium Recovery Facility) | ) | |

**POWERTECH (USA) INC'S RESPONSE TO CONSOLIDATED INTERVENORS AND THE OGLALA SIOUX TRIBE MOTIONS FOR STAY OF THE EFFECTIVENESS OF NRC LICENSE NO. SUA-1600**

## I. INTRODUCTION

Pursuant to 10 C.F.R. § 2.1213, 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") Motions for a Stay of the Effectiveness of Powertech's recently issued NRC License No. SUA-1600 (the "Motions") 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 satisfy NRC requirements for a stay of the effectiveness of an NRC license at 10 C.F.R. § 2.1213, because they fail to demonstrate irreparable harm or to provide a strong showing of a likelihood of success on the merits in this proceeding. Accordingly, both CI's and the Tribe's Motions 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 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 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 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. On November 26, 2012, NRC Staff issued the DSEIS for the proposed Dewey-Burdock ISR 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

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

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. On April 8, 2014, NRC issued Powertech's requested license (NRC License No. SUA-1600) and, on April 14, 2014, both CI and the Tribe filed their Motions. By this response, Powertech respectfully requests that the Licensing Board deny CI's and the Tribe's Motions for failure to satisfy NRC regulations for a stay of the effectiveness of an NRC license.

## III. STATEMENT OF LAW

NRC regulations at 10 CFR § 2.1213 set forth the appropriate standard for determining whether a stay of the effectiveness of an NRC license or licensing action should be granted or denied. More specifically, 10 CFR § 2.1213(d) sets forth the standard for a stay to be considered by the Licensing Board:

> "(1) Whether the requestor will be irreparably injured unless a stay is granted;
> (2) Whether the requestor has made a strong showing that it is likely to prevail on the merits;
> (3) Whether the granting of a stay would harm other participants; and
> (4) Where the public interest lies."

10 CFR § 2.1213(d) (2014).

Since no one of these four (4) factors is dispositive, a greater showing on one of the factors may lead to the need for less of a showing on the others. *See Cleveland Electric Illuminating Company* (Perry Nuclear Power Plant, Units 1 and 2), ALAB-820, 22 NRC 743, 746 n. 8 (1985).

But, while this is the case, certain stay factors are considered to be more important, the most important of which is irreparable injury. *See Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), CLI-90-3, 31 NRC 219, 258 (1990). It is the established rule that a party is not ordinarily granted a stay of an administrative order without an appropriate showing of irreparable harm. *Permian Basin Area Rate Cases*, 390 U.S. 747, 773 (1968). A party must reasonably demonstrate, and not merely allege, irreparable harm. *Philadelphia Electric Co.* (Limerick Generating Station, Units 1 and 2), ALAB-814, 22 NRC 191, 196 (1985), *citing Duke Power Co.* (Catawba Nuclear Station, Units 1 & 2), ALAB-794, 20 NRC 1630, 1633-35 (1984).

The second critical factor, a strong showing of a likelihood of success on the merits, requires more than a mere listing of the possible grounds for reversal. *Toledo Edison Co.* (Davis-Besse Nuclear Power Station, Units 1, 2, and 3), ALAB-385, 5 NRC 621 (1977). A party's expression of confidence or expectation of success on the merits is too speculative and is also insufficient. *Philadelphia Electric Co.* (Limerick Generating Station, Units 1 and 2), 22 NRC 191, 196 (1985), *citing Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit 1), CLI-84-17, 20 NRC 801, 804-805 (1984) (finding that confidence or expectation of success on the merits of an appeal was too speculative). If an intervenor fails to properly demonstrate irreparable harm, then it must show that a reversal of NRC Staff's licensing decision is "not merely likely, but a *virtual certainty*." *Cleveland Electric Illuminating Co.* ALAB-820, 22 NRC at 746 n. 8 (emphasis added). In past cases, the Licensing Board has found that the Intervenor must show that it will be able to identify a safety deficiency that would result in at least the conditioning, if not the revocation, of Powertech's recently issued license. *See CFC Logistics, Inc.*, LBP-03-16, 58 NRC 136, 144 (2003).

## IV. ARGUMENT

Given that there have been two separate motions for a stay filed, one by CI and one by the Tribe, the arguments offered by each entity will be addressed in turn. As stated in 10 CFR § 2.1213(c), parties seeking to answer motions for a stay are permitted no more than ten (10) pages in which to offer such an answer. However, in the interests of providing a single pleading, Powertech will address both CI's and the Tribe's arguments in this Response. As such, Powertech will utilize no more than twenty (20) pages in which to offer its Response.[2]

### A. CONSOLIDATED INTERVENORS HAVE FAILED TO SATISFY THE REQUIREMENTS FOR A STAY OF POWERTECH'S NRC LICENSE

The first Motion that will be addressed will be the Motion submitted by CI. Initially, prior to addressing the substance of CI's Motion and how that substance relates to the four required stay factors, Powertech will address a preliminary allegation levied by CI in the first section of its Motion. CI alleges that NRC Staff's issuance of its Notice of License Issuance on April 8 and the subsequent issuance of NRC License No SUA-1600 that same day was "premature and defective." CI Brief at 1. CI offers as support for this allegation statements that the Notice and the License should not have been issued "more than four (4) months before the scheduled hearing on the admitted contentions…" and is "depriving the Consolidated Intervenors from an opportunity to be heard and violating their due process," as well as alleged violation of trust responsibilities to "indigenous members" of CI. *Id.* CI also alleges that the Record of Decision (ROD), License No. SUA-1600, and the final Programmatic Agreement (PA) were not publicly available on April 8, 2014. *Id.* at 1-2.

CI's allegation that NRC Staff's Notice was issued prematurely is without merit. The timeline for a stay request is based on Commission-approved regulations, developed through

[2] Page 21 of this pleading is the certificate of service and should not be counted towards the page limit.

rulemaking and public comment, which is set at five (5) days from issuance of the license sought to be stayed. *See* 10 CFR § 2.1213 (2014). This regulation, as well as all 10 CFR Part 2 regulations pertaining to the conduct of Commission adjudicatory proceedings, was subject to Commission-approved rulemaking proceedings with ample opportunity for public comment and cannot be collaterally attacked within the scope of this proceeding. *See* 10 CFR § 2.335. Further, NRC Staff is free to issue a license despite the pendency of a hearing. If this were not true, it would make no sense to have regulations for stays because without license issuance, there would be no licensing action to stay. Thus, CI cannot claim they are being deprived of a right to a hearing or their due process, because CI is indeed being provided with the administrative tools to raise their concerns and offer evidence in support (i.e., opportunity to request a stay and full administrative hearing rights with admitted contentions). Indeed, pursuant to 10 CFR § 2.1202(a) states that NRC Staff is expected to issue a license notwithstanding a hearing and, thus, CI is not being deprived of any hearing rights here.

Additionally, with respect to CI's allegation that their ADAMS searches were unable to locate Powertech's final licensing documents, Powertech was able to obtain all its relevant licensing documents on April 8, 2014, including the ROD, the final Safety Evaluation Report (SER), and the final PA. Accordingly, there appear to be no issues associated with the proper, timely posting of these documents to ADAMS and believes that CI's allegation on this matter should be dismissed.

**1. Consolidated Intervenors Have Failed to Demonstrate Irreparable Harm from the Issuance of Powertech's NRC License**

CI's Motion centers entirely upon its Contentions related to historic and cultural resources (Contention 1A) and an alleged failure to consult with appropriate parties during the

National Historic Preservation Act of 1966 (NHPA) Section 106 Tribal consultation process. *See* CI Brief at 3-7. CI alleges that a showing of irreparable harm has been demonstrated due to the fact that, after issuance of its NRC License, Powertech will be free to move forward with activities under its license such as construction of its proposed Dewey-Burdock ISR facilities including a central processing plant, associated administrative buildings, wellfields, and other ancillary facilities. *Id.* at 6. CI then goes on to cite to several Declarations offered by Dr. Redmond, Wilmer Mesteth on behalf of the Tribe, and Debra White Plume. *Id.* at 6-7. Then, CI concludes its showing on alleged irreparable harm by citing to violations of trust responsibilities and the requirement for "meaningful consultation" under the NHPA. CI supports this allegation by offering correspondence from the Tribe's President and the Standing Rock Sioux Tribe's Tribal Historic Preservation Officer (THPO) on NRC Staff's alleged failure to properly consult Tribes. *Id.* at 7. None of these allegations are sufficient for a showing of irreparable harm.

First, CI's entire showing of irreparable harm focuses on its assumed damage to or destruction of historic or cultural resources. The thrust of their argument appears to be focused on two (2) specific claims: (1) the stay is necessary to prevent damage to or destruction of historic and cultural resources as supported by Dr. Redmond's Declaration and (2) the stay is required due to NRC Staff's alleged failure to properly consult Tribes during the NHPA Section 106 Tribal consultation process. *See* CI Brief at 6-7. Both of these claims are insufficient to show irreparable harm.

CI's attempt to demonstrate irreparable harm fails, because it is based on nothing more than conclusory statements and unsupported conjecture that historic and cultural resources *will be damaged or destroyed* within the scope of Powertech's Dewey-Burdock NRC licensed activities. CI's Declarations provide a number of these types of statements, none of which

directly address any of the Powertech License Conditions and Commitments.[3] None of these conclusory statements, whether in CI's Brief or the attached Declarations, demonstrate that there *will be* irreparable harm to any of CI's admitted parties to this proceeding. Further, as a traditional Oglala Sioux person, neither Ms. Plume (nor CI) has attempted to explain why the Tribe failed to participate in the tribal survey opportunity afforded to all potential Section 106 consulting parties that sought to identify historic or cultural resources or the NRC Staff's subsequent analysis, including consultation with the State of South Dakota's Historic Preservation Officer (SHPO) and BLM. Thus, as stated in *Babcock and Wilcox*, "conclusory statements of potentially litigable issues clearly are insufficient to establish any kind of irreparable injury." 36 NRC 255, *13 (November 12, 1992). These statements do not serve as an adequate proof of irreparable harm and should be rejected.

Several other points with respect to statements in CI's Brief warrant discussion in this Section. First, as a general matter, CI consistently refers to the need to prevent construction activities from damaging or destroying historic and cultural resources. Indeed, CI's entire argument on this stay factor focuses on the fact that site earthwork and other construction activities will result in "disturbance and destruction of unknown burial sites and ceremonial sites within the Project Area." CI Brief at 6. But, the NHPA and Section 106 speak of accommodating the needs of federal undertakings and historic preservation concerns, which means that its intent is to balance development and preservation and not to stop development. CI's claims appear to contradict the NHPA's intent as they appear to suggest no development whatsoever should be allowed at the site. *Compare* CI Brief at 6. Second, the PA signed by NRC, Powertech, BLM, the SHPO, and the Advisory Council on Historic Preservation (ACHP)

[3] It is important to note that, as a cooperating agency on the FSEIS and the Section 106 process, the United States Bureau of Land Management (BLM) also has concurred with and has signed the PA.

prohibits disturbance of National Register-eligible or unevaluated historic properties until evaluation and/or treatment plans have been prepared and reviewed by NRC, SHPO, BLM, and relevant Tribes and then carried out. The PA, as well as NRC License Condition 9.8, mandating that historic and cultural resource evaluations be conducted where none has been conducted and to address resources if identified during licensed operations, are more than adequate to prevent the damage CI alleges[4] will happen and have been used in many NRC-approved federal undertakings. *See e.g.,* HRI NRC License No. SUA-1508 & Uranerz Energy Corp. NRC License No. SUA-1597.

Lastly, with respect to CI's alleged violation of the NHPA for failure to properly consult Tribes during the Section 106 process, the Commission has addressed the alleged violation of statutes such as the NHPA by stating "[n]umerous other [circuit court] cases hold[ing] that a plaintiff seeking injunctive relief must prove irreparable harm, and that a mere violation of NEPA or other environmental statutes is insufficient to merit an injunction." *Hydro Resources, Inc.*, CLI-98-8, 47 NRC 314, 323 n. 13 (1998). To simply state that NRC Staff has violated the NHPA without properly demonstrating irreparable harm results in rejection of such a claim. Here, CI has not shown irreparable harm in its initial claim regarding damage to or destruction of historic and cultural resources as there is a complete failure to show how such "irreparable harm" will happen in light of the numerous stringent license conditions and commitments within the scope of Powertech's Dewey-Burdock ROD, based on analyses in the FSEIS, the PA, and the detailed review and oversight performed by NRC Staff during its execution of the Section 106 process. Further, mere statements by CI with respect to the Tribe refusing to take part in a "sham

[4] It is important to emphasize that the aforementioned PA is intended to avoid, minimize or mitigate the potential adverse effects to historic and cultural resources. This further supports the safeguards that are currently imposed through Powertech's license and its associated ROD.

Section 106 process" do not excuse the Tribe's decision not to participate in the tribal survey/field identification offered by Powertech and NRC Staff, in cooperation with BLM, in which other potentially affected Tribes did participate. Basic administrative law concepts suggest that if one fails to participate in a process (e.g., rulemaking), then one loses its ability to challenge the final results of the process. In fact, the administrative record shows that NRC consulted numerous times with the Tribes identified by the SHPO as having potential historical interest in the proposed Dewey-Burdock ISR project area. Further, the times chosen for the tribal survey/field identification were early spring and after snow cover so potential historic or cultural resources could be identified readily. Powertech voluntarily made the Dewey-Burdock lands available to all interested Tribes and paid significant remuneration to Tribes that participated. Again, NRC extended the time for these efforts in an attempt to include all interested Tribes, including the Tribe and the Standing Rock Tribe. Without more, CI's claims of irreparable harm should be rejected.

**2. Consolidated Intervenors Have Failed to Demonstrate a Likelihood of Success on the Merits in This Proceeding**

CI's Motion also cannot demonstrate a likelihood of success on the merits. Initially, given that CI has failed to make an adequate showing of irreparable harm as discussed above, in accord with *Cleveland Electric Illuminating C*o., CI's showing on this second stay factor must be show that revocation or conditioning of Powertech's license would be a "virtual certainty." ALAB-820, 22 NRC 743, 746 (1985). CI has not carried the burden on this stay factor.

Overall, CI's argument on this stay factor again relies on the same claims levied in support of irreparable harm. The crux of these claims is that NRC Staff somehow violated the NHPA (CI Brief at 7), did not properly complete the Section 106 process (CI Brief at 7), and did

not properly consult Tribes during such process, including conducting ethnographic studies (CI Brief at 7-9. None of these claims rise to the level of a likelihood of success on the merits. First, NRC Staff and Powertech did not violate the NHPA through its conduct of the Section 106 process. NRC Staff has produced a seventeen (17) page chronology of activities conducted under this process which is publicly available. *See* ML14099A010. NRC Staff also provided the Tribe with an opportunity to participate in the tribal survey/field identification opportunity, which it declined. After receiving Tribal reports, evaluating potential adverse effects and consulting with the SHPO and BLM, NRC Staff prepared and issued a PA for review by *all* potential consulting parties. After this review, NRC, Powertech, BLM, SHPO, and the ACHP (the expert agency that promulgates and implements regulations under the NHPA) signed the PA, signifying the completion of the Section 106 process in a manner consistent with the NHPA's implementing regulations at 36 CFR § 800. With respect to ethnographic studies, it is Powertech's position that there were no requests submitted by Tribes for ethnographic studies; but rather, Powertech's third party consultants contacted Tribes on the appropriate methods for identifying places of religious and cultural significance and the response received was that field surveys would be the most appropriate method. Moreover, CI has made no attempt to show how the current License Conditions and Commitments, including commitments in the PA, will be deemed inadequate to protect historic and cultural resources by this Licensing Board. Thus, CI has not satisfied the burden of showing a likelihood of success on the merits, much less that revocation or conditioning of Powertech's NRC License is a "virtual certainty."

Powertech also disputes the claims made by CI in the Declaration of Debra White Plume that a Powertech executive has engaged in human rights violations in Mongolia. These allegations are not factually supported by any evidence offered by CI and are nothing more than

inflammatory statements. Azarga Resources has no corporate relationship with SouthGobi Resources Limited, and no information offered in this Declaration or CI's brief link any environmental or human rights violations to Mr. Alexander Molyneux. Further, while this Declaration identified press articles that discuss environmental and human rights abuses in Mongolia and, to some extent the South Gobi Province, none of these allegations address the fact that while Mr. Molyneux was a senior officer of SouthGobi Resources Limited, there were no environmental breaches and no human rights violations. The Licensing Board should discount these allegations as factually untrue and irrelevant to a determination of a likelihood of success on the merits.[5]

## B. THE TRIBE HAS FAILED TO SATISFY THE REQUIREMENTS FOR A STAY OF POWERTECH'S NRC LICENSE

Similar to CI's claims discussed above, the Tribe likewise has failed to adequately demonstrate that a stay of the effectiveness of Powertech's license is warranted under the four Part 2.1213 stay factors. Given that many of the claims levied by the Tribe are substantially similar, if not identical to those offered by CI, this Section of Powertech's Answer will incorporate some arguments by reference.

### 1. The Tribe Has Failed to Demonstrate Irreparable Harm from the Issuance of Powertech's License

On the first stay factor, irreparable harm, the Tribe relies solely on the Declarations of Michael Catches Enemy and Wilmer Mesteth, in which they essentially claim that *any* site construction will "cause irreparable harm to the Tribe's ability to protect its cultural resources, and its procedural rights in the NEPA and NHPA processes to have those cultural resources

[5] In this portion of CI's Brief, they also allege that there are concerned about potential impacts to a bald eagle nest in the Project area. However, other than mere unsupported statements, CI makes no attempt to refute the entire suite of NRC Staff analyses of threatened and endangered species in the FSEIS and the entire ROD. Thus, this alone cannot constitute grounds for issuance of a stay.

competently identified and ensure proper and effective mitigation is employed." Tribe Brief at 3-4; Tribe Exhibits 1 and 2. The remainder of the Tribe's irreparable harm argument uses essentially the same arguments as those raised by CI. *See* Tribe Brief at 4-5.

Second, the Tribe's statements regarding irreparable harm from site construction activities[6] to historic or cultural resources mimic those offered by CI. As stated above, the Tribe has made no effort to question the License Conditions and Commitments in Powertech's NRC License, or the commitments in the PA, and has not demonstrated how the Section 106 process has resulted in conditions that will result in damage to or destruction of historic of cultural resources. The Tribe's statement "these harms are confirmed," is conclusory and inaccurate because NRC has identified potential adverse effects on historic properties and, accordingly, the PA specifically addresses measures that will be taken to avoid, minimize or mitigate any adverse effects. More importantly, the statement that failure to issue a stay will result in damage to the Tribe's ability to protect its cultural resources and the alleged failure to "meaningfully involve the Tribe" flies in the face of the Tribe unwillingness to participate in the tribal survey/field identification opportunity, which was made available to all consulting parties and in which seven (7) Tribes participated and some Tribes (4) submitted oral and/or written reports. The remainder of this portion of the Tribe's argument is nothing more a collection of than conclusory statements that represent potentially litigable issues. Thus, as stated in *Babcock and Wilcox,* "conclusory statements of potentially litigable issues clearly are insufficient to establish any kind of irreparable injury." 36 NRC 255, *13 (November 12, 1992).

[6] It is also important here to reference the existing Memorandum of Agreement (MOA) between the State of South Dakota and Powertech that also protects undiscovered historic and cultural resources when and if they are discovered.

Further, the Tribe's reference to procedural rights within the scope of the NHPA and NEPA are equally without merit. With respect to NHPA, no procedural rights have been violated because the Tribe was offered the opportunity to be a consulting party pursuant to applicable NHPA regulations, was afforded an opportunity to participate in the tribal survey/field identification session and a site visit with the Licensing Board panel in this proceeding, the latter two of which were declined. Moreover, the fact that the ACHP has signed the PA provides expert concurrence that NRC made a "reasonable and good faith effort" to complete the Section 106 Tribal consultation process for the proposed Dewey-Burdock ISR project under 36 CFR § 800 regulations. The Tribe's statement that the PA was not accepted by the Tribe is irrelevant, because 36 CFR Part 800 does not mandate Tribal "acceptance" of a Section 106 agreement document, such as a PA, unless the federal undertaking takes place on Tribal land, which the proposed Dewey-Burdock ISR project does not. The only "required" signatories for a Section 106 agreement document are the federal agency(ies) (here NRC and BLM), the SHPO, and the ACHP (if participating). All of these parties have signed and "accepted" the PA.

With respect to potential procedural violations of NEPA, the Tribe mistakenly assumes that the NHPA and the Section 106 process are somehow part of NEPA. This assumption is inaccurate as 36 CFR § 800.8 regulations discuss the potential inclusion of the NHPA Section 106 process within the ambit of a lead agency's NEPA process (in this case, NRC's FSEIS). However, this regulatory provision does not mandate that the NHPA process be included in the NEPA process, nor does it indicate that it is within the statutory purview of NEPA. This is evidenced by the fact that an agency, such as NRC for Dewey-Burdock, legally "de-coupled" the Section 106 process from its 10 CFR Part 51 NEPA process. As such, the PA and associated Section 106 documentation were finalized after issuance of the FSEIS but, as required by NHPA

regulations, prior to issuance of Powertech's NRC License. Since the Tribe's interpretation of the legal requirements of combining NHPA and NEPA regulations in one environmental review document is totally without merit, this inaccurate assumption certainly cannot form the basis for an irreparable harm demonstration. Therefore, based on the discussion above, the Tribe's arguments on the first stay factor are insufficient to demonstrate irreparable harm.

**2. The Tribe Has Failed to Demonstrate a Likelihood of Success on the Merits in This Proceeding**

With respect to the second stay factor, a likelihood of success on the merits, the same *Cleveland Electric Illuminating Co*. standard applies in that the Tribe's failure to make an adequate showing of irreparable harm thereby warrants a showing that revocation or conditioning of Powertech's NRC License is a "virtual certainty." In its Motion, the Tribe has failed to make such a showing.

Initially, a significant portion of the Tribe's argument on this second stay factor is devoted to alleged violations of NEPA from the creation of the PA and its finalization post-FSEIS issuance. *See* Tribe Brief at 6-7. Again, this claim fails to account for the fact that the Section 106 process and its associated agreement documents are not, by law, part of the NEPA process; but rather, they can be incorporated into a lead agency's NEPA process under 36 CFR § 800.8. Further, this regulation also allows a lead agency to "de-couple" the Section 106 process from the agency's NEPA process (e.g., NRC's 10 CFR Part 51 process). While coupling of these processes sometimes can be more efficient, it is not legally mandated. Further, as stated above, the PA itself contains the measures needed to mitigate the potential adverse effects during all phases of the Project's lifecycle. To state that there are no mitigation measures identified in the FSEIS or as part of the NEPA process is nothing more than a failure to account for the PA.

Given that the time period for filing a stay motion did not commence until the PA was finalized and the NRC License was issued, the Tribe cannot claim they did not have an opportunity to weigh in on its provisions.

For the remainder of the Tribe's argument regarding the second stay factor or its summary disposition motion dated April 11, 2014, and its identification of irreparable harm, Powertech defers to its arguments set forth in Section IV(A)(2) above and argues that this is insufficient for a showing of a likelihood of success on the merits, much less a "virtual certainty" that Powertech's NRC License will be revoked or conditioned.

## C. POWERTECH WILL BE UNFAIRLY PREJUDICED BY THE ISSUANCE OF A STAY OF ITS NRC LICENSE

Both CI and the Tribe have not adequately demonstrated that Powertech will not incur harm as a result of the issuance of a stay of its NRC license. CI asserts that Powertech has stated publicly that it intends to construct its proposed Dewey-Burdock ISR project in 2015 and that a delay in the effectiveness of its NRC License will not cause Powertech any economic harm. CI Brief at 9. The Tribe supports this allegation with its claim that any economic impact due to a delay has not been held by courts to be *irreparable*. Tribe Brief at 7 *citing Sampson v. Murray,* 415 U.S. 61, 90 (1974). CI also clings to their conclusory argument on irreparable harm stating that any harm to Powertech would "pale in comparison" to harm to historic and cultural resources at the Dewey-Burdock site. CI Brief at 9. The Tribe also claims that additional delay will not cause harm to Powertech as it is required to obtain additional permits and authorizations from the State of South Dakota, the United States Environmental Protection Agency (EPA), and the BLM. Tribe Brief at 7-8. None of these allegations demonstrates that no harm will befall Powertech if a stay of its NRC License is issued.

It is well-understood that in the instance where a stay applicant that fails to show either irreparable injury or a likelihood of success on the merits, "it is unnecessary to 'dwell long on whether a stay would cause serious injury to the applicant' or to 'delve deeply into public interest considerations.'" *Long Island Lighting Co.*, ALAB-810, 21 NRC at 1620, *citing Duke Power Co.*, ALAB-794, 20 NRC at 1635. As shown above, CI's and the Tribe's allegations are nothing more than mere speculation and conclusory statements that Powertech's Dewey-Burdock site construction activities will cause damage to or destruction of historic and cultural resources at the site. CI and the Tribe do not address the accepted policy of "phased identification" as set forth in 36 CFR § 800.4(b)(2) and as endorsed by the Commission in two separate decision it rendered in the *Hydro Resources, Inc.* proceedings. Further, CI and the Tribe make no attempt to show that all of the license conditions and commitments, either initiated by Powertech or imposed by NRC Staff, including conditions and commitments in the PA signed by NRC, Powertech, BLM, the SHPO, and the ACHP, will not adequately protect historic or cultural resources not yet identified from damage or destruction. Their attempts to show success on the merits are strictly limited to allegations in Declarations that also do not account for the numerous stringent safeguards imposed in Powertech's NRC License for the protection of historic and cultural resources. Further, as stated above, CI and the Tribe do not even attempt to discuss the fact that the Oglala Sioux Tribe failed to participate in the Dewey-Burdock site survey offered by Powertech and NRC Staff; but rather, choose to rest on unsupported statements that cannot be corroborated by the Tribe, because it failed to avail itself of this opportunity.

On the other hand, Powertech will suffer harm if a stay of its NRC license is issued. Currently, Powertech's State of South Dakota hearings are being held in abeyance pending issuance of final permits from federal agencies including NRC. Based on the position of the

State hearing boards to date, it is unclear whether a stay of the effectiveness of Powertech's NRC license will result in further delays in the issuance of State permits and authorizations, but there is that potential. BLM is a cooperating agency on the FSEIS and, given that many of CI's and the Tribe's claims relate to "environmental contentions," it is also unclear whether BLM will be forced to delay drafting its supplement to the FSEIS, thus, further delaying issuance of its Plan of Operations for the proposed Dewey-Burdock ISR project. In addition, EPA also has delayed issuance of its draft underground injection control (UIC) permits pending issuance of Powertech's NRC License. EPA also may further delay these permits if a stay is issued. Thus, since the final hearing schedule shows a Licensing Board initial decision in late 2014, Powertech would experience significant delays in the face of a stay.

## D. THE PUBLIC INTEREST DOES NOT FAVOR THE ISSUANCE OF A STAY OF POWERTECH'S NRC LICENSE

Initially, as stated above, a major portion of both CI's and the Tribe's reasons for seeking a stay is that NRC Staff failed to properly consult interested Tribes in the NHPA Section 106 Tribal Consultation and allegedly violated trust responsibilities and international law in addition to violating the NHPA. *See e.g.*, Tribe Brief at 8-9. These allegations are conclusory and irrelevant, since NRC's licensing program proceeded under its jurisdictional statute (the AEA and relevant regulations promulgated thereunder such as 10 CFR Part 40, Appendix A), its regulations addressing NEPA (10 CFR Part 51), and the NHPA and its relevant regulations (36 CFR § 800 *et seq.*). These allegations have all the force of a similar allegation made in the *CFC Logistics* case where the Intervenors claimed it was in the public interest to have "public officials act in accordance with the law." LBP-03-16, 58 NRC 136, 147 (2003). However, in that case, the Licensing Board noted that this public interest claim assumes that Intervenors will prevail on the merits and, thus, is subsumed within the Intervenor's other arguments. *Id.* Therefore,

Powertech rests primarily on its arguments above on the first two stay factors in demonstrating that both CI's and the Tribe's public interest arguments should be rejected but also noted that the relevant federal laws take precedence.

However, CI's and the Tribe's claims on public interest in preserving historic and cultural resources also fall short on other grounds. Powertech does not dispute the value in protecting historic and cultural resources within the scope of the law. As such, Powertech has voluntarily accepted license conditions, mitigation measures, and the terms of "phased identification" partially implemented through the aforementioned PA to ensure that over the entire Dewey-Burdock Project lifecycle, historic and cultural resources are protected adequately. Again, as discussed above, CI and the Tribe are unable to demonstrate that historic and cultural resources likely *will be* destroyed during the Project's lifecycle in the face of the aforementioned safeguards within Powertech's NRC License Conditions and the PA. Without more, CI's and the Tribe's allegations should be rejected.

CI also claims that it is undisputed that graves or ceremonial sites beneath the Dewey-Burdock site must be "protected and preserved as a matter of law and that the License may not be issued until such protection and preservation is ensured." CI Brief at 10. While this claim is extremely ambiguous as to its legal foundation, Powertech questions the validity of CI's statement as the Dewey-Burdock site involves private land and State law governs respectful removal and reburial—a process which is committed to in the PA. "Ceremonial sites," in as much as they are eligible for inclusion on the National Registry, are covered by the Section 106 process which is addressed by the PA going forward during all phases of the proposed Project and only requires that federal agencies take into account potential adverse effects on such sites. Thus, this statement does not support CI's Motion.

Finally, NRC Staff has stated publicly in a request for an extension of standby status for a Wyoming-based, NRC-licensed uranium recovery facility that *it is in the public interest* to have a viable domestic uranium recovery industry, to which Powertech's proposed Dewey-Burdock ISR site will contribute.[7] *See* United States Nuclear Regulatory Commission, Letter from Melvyn Leach to Oscar Paulson, *Re: Sweetwater Uranium Mill (SUA-1350)—Five (5) Year Postponement of Initiation of Decommissioning,* (July 17, 2001) (ML011980484). Thus, in light of the above, Powertech concludes that the public interest lies with the licensee and both CI's and the Tribe's argument on this stay factor should be rejected.

## V. CONCLUSION

For the reasons set forth above, Powertech respectfully requests that the Licensing Board reject both CI's and the Tribe's Motions for a stay of the effectiveness of Powertech's NRC License No. SUA-1600.

Respectfully submitted,

**/Signed (electronically) by/**
**Christopher S. Pugsley, Esq.**

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Dated: April 24, 2014

[7] In addition, public interest will be adversely affected by a stay since the potential benefits from an employment, tax base, and economic development basis would not be realized in a timely manner. *See* FSEIS at Chapter 7.

**UNITED STATES OF AMERICA**
**NUCLEAR REGULATORY COMMISSION**

**BEFORE THE ATOMIC SAFETY AND LICENSING BOARD**

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|---|---|---|
| In the Matter of: | ) | |
| | ) | Docket No.: 40-9075-MLA |
| POWERTECH (USA), INC. | ) | Date: April 24, 2014 |
| (Dewey-Burdock In Situ Uranium Recovery Facility) | ) | |

**CERTIFICATE OF SERVICE**

I hereby certify that copies of the foregoing **"POWERTECH (USA), INC.'S RESPONSE TO CONSOLIDATED INTERVENORS AND THE OGLALA SIOUX TRIBE MOTIONS FOR A STAY OF NRC LICENSE NO. SUA-1600"** in the above captioned proceeding have been served via the Electronic Information Exchange (EIE) this 24th 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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