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In the Matter of: POWERTECH USA, INC. (Dewey-Burdock In Situ Uranium Recovery Facility)	
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APP-053

June 20, 2014

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

William J. Froehlich, Chairman
Dr. Richard F. Cole, Special Assistant
Dr. Mark O. Barnett, Special Assistant

In the Matter of:)	
POWERTECH USA, Inc.)	
(Dewey-Burdock Project)	Docket No. 40-9075-MLA
In Situ Uranium Recovery Facility))	ASLBP No. 10-898-02-MLA-BD01
)	
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WRITTEN TESTIMONY OF GWYN MCKEE

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1. WITNESS BACKGROUND INFORMATION

Q.1. Please state your name, position and employer, including duration of employment.

A.1. Gwyn McKee. I am the President of and Principal Biologist for Thunderbird Wildlife Consulting, Inc. (TWC) based in Gillette, Wyoming. I have been employed by the company since 1994, and took over its operation in 2000. My detailed resume is included as Exhibit APP-054.

Q.2. Please state your education, years of experience, professional qualifications and memberships.

A.2. I hold an M.S. in Wildlife Management/Ecology and a B.S. in Wildlife Management from the University of Missouri-Columbia. I have been a professional biologist for 27 years, with additional biological experience as a volunteer and graduate student for a total of 34 years. I have conducted wildlife clearance, baseline, and annual monitoring surveys in Wyoming, South Dakota, and Montana for the last 20 years. Much of my work over the years has focused on various aspects of raptor ecology and mitigation.

I am considered a qualified wildlife biologist by the U.S. Fish and Wildlife Service (Service), U.S. Forest Service (Forest Service), Bureau of Land Management (BLM), Wyoming Game and Fish Department, South Dakota Department of Game, Fish and Parks (Game, Fish and Parks), and Montana Department of Fish, Wildlife and Parks. I am also certified to conduct black-footed ferret surveys by the Service and am considered qualified to conduct surveys for other sensitive wildlife species by those same Federal and State agencies. I am currently a member of professional organizations such as The Wildlife Society and the Raptor Research Foundation, as well natural resource organizations such as the Wyoming Wildlife Federation, and I sit on the Board of Directors for the Wyoming Wildlife and Natural Resource Trust, which is a citizen board appointed by the Governor of Wyoming.

Q.3. What ISR projects have you worked on while with TWC and other entities?

A.3. I have worked on 11 ISR projects over a span of more than 10 years. Most of those projects were in central or northeastern Wyoming, with the Dewey-Burdock Project occurring in southwestern South Dakota. In addition to Dewey-Burdock, other ISR projects I have worked on include: North Butte, Irigaray, Christensen Ranch, Moore Ranch, Green Mountain, Sweetwater, REB, Antelope and JAB, Ludeman, and Twin Buttes.

Q.4. What types of work did you do for these ISR projects?

A.4. I conducted and/or supervised terrestrial wildlife surveys associated with exploratory drilling, baseline inventories, or annual monitoring, depending on the project. Field surveys typically focused on a wide variety of birds and mammals, with occasional targeted surveys for amphibians and reptiles. All surveys were conducted according to current agency protocols. Along with conducting field surveys, I prepared various summary reports and technical documents ranging from memorandums to impact analyses for environmental impact statements

(EISs), depending on the project. I have done similar work for surface coal, bentonite, and gold operations in the three-state region since 1994.

Q.5. What has been your role in the Dewey-Burdock Project?

A.5. Initially, I conducted and supervised baseline wildlife field surveys and prepared the baseline wildlife report for the State permitting effort. I also arranged for other qualified personnel to conduct baseline surveys for fisheries and macro-invertebrate sampling, and stream characterizations. I helped coordinate those efforts and reviewed the summary reports for general content and format, but I did not participate in any aquatics work. In addition to the State baseline report, I prepared and/or reviewed wildlife resource text and analysis of potential impacts in the Environmental and Technical Reports for the NRC licensing effort, and have occasionally assisted with preparing responses to contentions regarding those efforts. I also served as an expert witness in a February 2009 public hearing before the South Dakota Board of Minerals and Environment regarding the determination by the South Dakota Department of Environment and Natural Resources (SDDENR) that the lands within the project area do not constitute "Special, Exceptional, Critical and Unique Lands" as defined in State regulations.

Since December 2012, TWC has been conducting pre-construction annual wildlife monitoring for the Dewey-Burdock Project, including enhanced observation sessions of a bald eagle nest within the permit area. I have also been working with Powertech and various State and Federal agencies to develop an Avian Monitoring and Mitigation Plan (Avian Plan) for the Dewey-Burdock Project. Unlike the baseline inventory, these more recent efforts focus on nesting and wintering raptors, and their terrestrial prey sources (prairie dogs and rabbits).

Q.6. What other experience do you have in assessing potential impacts to wildlife and/or assisting in developing mitigation options or specialized plans for energy projects?

A.6. I have been the Third Party Contractor and/or project manager for five environmental assessments (EAs) and two EISs related to surface coal projects since 2009. In addition to preparing wildlife impact analyses for those projects, I have provided wildlife resource text and impact analyses for six other BLM coal EISs and one additional BLM coal EA, and reviewed wildlife text and analyses prepared by a different contractor for two BLM coal EISs since 2000. Most of these projects occurred in northeast Wyoming, with one in southeast Montana.

As for mitigation planning and implementation, I have prepared numerous Avian Monitoring and Raptor Mitigation Plans for multiple surface coal mines in northeast Wyoming over the years, all of which must be approved by the Service. In addition, I currently review the mitigation plans prepared by my colleagues with another firm, help with mitigation planning and impact avoidance for numerous projects, and implement mitigation measures as needed to minimize impacts while maintaining viable wildlife resources.

Through these mitigation efforts, I have earned a reputation with both the Wyoming and Regional Service offices for my raptor expertise and successful mitigation efforts, and those offices have occasionally asked me for input on other contractors' mitigation proposals to help

the Service determine if they are feasible. The Regional Service biologist recently asked me to help him put together a technical bulletin on raptor mitigation techniques for the agency. That biologist also granted an exception for me to monitor the active eagle nest in the Dewey-Burdock permit area from inside the current 0.5-mile buffer this year due to his confidence in my experience and expertise with nesting eagles, and my ability to monitor them from a closer distance to improve data accuracy without impacting their nesting efforts.

2. CONTENTION 6

Q.7. What is the nature of your testimony regarding this contention?

A.7. My testimony describes the locations of mitigation discussions in the FSEIS related to wildlife and addresses what I consider to be the primary wildlife-specific allegation posed by the OST with respect to Contention 6.

2.1 The FSEIS Adequately Describes Proposed Mitigation Measures for Protecting Wildlife

Q.8. Where are mitigation measures specific to wildlife protection found in the FSEIS?

A.8. Mitigation measures are described throughout the FSEIS (Exhibit NRC-008-A and 008-B), particularly in the Chapter 2 description of the Proposed Action, Chapter 4 description of potential impacts, and Chapter 6 summary of mitigation measures, especially summary Tables 6.2-1 and 6.3-1. Examples of proposed wildlife mitigation measures described in the FSEIS include, but are not limited to, Powertech's commitments to:

- Adhere to timing and distance restrictions determined by appropriate regulatory agencies to protect active raptor nests during breeding seasons (FSEIS at 4-88 through 89).
- Limit noise and vehicular traffic (FSEIS at 4-89) and to enforce speed limits to reduce wildlife conflicts (FSEIS at 4-85).
- Engage with the Service regarding the potential for take of protected avian species (FSEIS at 4-89).
- Minimize vehicular access to specific roads and re-vegetate disturbed areas with approved seed mixtures to restore habitat to native species (FSEIS at 4-100).
- Implement wastewater treatment for land application and monitor post-treatment water quality to ensure compliance with Federal and State requirements (FSEIS at 4-101 and 4-109).
- Limit wildlife access to wastewater ponds (FSEIS at 4-101).
- Respond in a timely manner to SDDENR's authority to require additional treatment to lower wastewater constituent concentrations or additional access controls for ponds if needed to protect wildlife (FSEIS at 4-101 and 4-110).
- Adhere to established land application monitoring requirements, action threshold levels, and required corrective actions if threshold levels are exceeded for trace metal

concentrations in soils, vegetation, surface water, and groundwater that are protective of the environment in the SDDENR mine permit (FSEIS at 4-110 through 4-111).

Q.9. What is your opinion on the effectiveness of these mitigation measures?

A.9. Many of these measures, and others outlined in the FSEIS and Avian Plan, are in keeping with current recommendations by regional experts for avian protection. For example, as noted in both the FSEIS (at 3-57 through 3-60, 3-70 through 3-71, 4-87, and 5-37) and the current sage-grouse management plan for South Dakota (Exhibit APP-055 at 3, 7, 9, 19, and 20), sage-grouse do not currently use the Dewey-Burdock permit area or surrounding 4- to 5-mile perimeter, and no historical records of their occurrence are available for that vicinity; no leks have ever been documented in Custer County (Exhibit APP-055 at 21). Nevertheless, some of the general mitigation measures proposed in the FSEIS and summarized in Table 6.2-1 (FSEIS at 6-2) match recommendations by the Sage-grouse National Technical Team (Exhibit APP-056 at 11, 24, 28, 61, and 68-69) and the Service's Greater Sage-grouse Conservation Objectives (Exhibit APP-057 at 42-44 and 51). The incorporation of such measures in the planning process is also in keeping with the NRC's recommendation to reference resources such as the Service's conservation objectives (FSEIS at 4-87). Proposals for raptor protection are also comparable to current recommendations by the Service for other projects in the region, including the development of an Avian Plan.

2.2 The Avian Plan is Being Developed at the Appropriate Phase of the Permitting Process

Q.10. Please respond to the allegation that the applicant is still in the process of actively working on an avian monitoring and mitigation plan (OST 2014a at 25).

A.10. This allegation fails to acknowledge that the Avian Plan is a State requirement, not a requirement of the NRC license. Although NUREG-1569 Section 2.8 (ecology) specifies that a description of mitigation measures the applicant plans to use (such as those outlined in Table 6.2-1 [FSEIS at 6-2]) should be provided in the license application, it does not require a specific mitigation plan such as the Avian Plan to be prepared as part of the licensing process. This is illustrated in NUREG-1569 acceptance criterion 2.8.3(4) (Exhibit NRC-0013 at 2-30 through 2-31), which indicates that "the application should provide information regarding steps that will be taken to minimize the effect of operating the facility on the species-environment relationship" but does not indicate the need to develop a specific plan. Mitigation measures for raptors and other avian species are described in the license application and FSEIS (see A.8 of this written testimony) in conformance with this acceptance criterion. Therefore, whether or not the Avian Plan is complete prior to NRC licensing or issuance of the FSEIS is immaterial.

Q.11. Please indicate when the Avian Plan will be completed.

A.11. Powertech will be required to complete the Avian Plan and have it approved by both Game, Fish and Parks and SDDENR prior to initiating construction activities under its SDDENR

Large Scale Mine Permit. The Large Scale Mine Permit has been recommended for approval by SDDENR but is pending a hearing before the Board of Minerals and Environment.

Q.12. Please explain the purpose of the Avian Plan and describe how it is being developed.

A.12. The requirement to prepare the Avian Plan was triggered by the need to protect bald eagles that nest within the permit area (note that the Large Scale Mine permit area is the same as the NRC license area). Bald eagles are no longer a federally listed species, but they are still considered threatened at the State level in South Dakota. The primary purpose of the plan is to outline strategies for preventing or minimizing the potential for impacts to avian species protected by State and Federal laws. In addition, the plan describes special monitoring and reporting procedures for bald eagles throughout the year, including enhanced observation sessions during the breeding season. It also outlines survey methods and timing for other nesting raptors in the area, as well as for their primary terrestrial prey sources (prairie dogs and rabbits). Those surveys include the permit area and up to a 1.0-mile perimeter, depending on the species. The species targeted by the Avian Plan were determined jointly by State and Federal agencies based on results from the baseline inventory and current agency data for species known or likely to occur in the survey area.

It is also important to note that the Avian Plan is being developed in collaboration with State and Federal agencies, including reviews of draft documents to ensure that it meets agency needs for resource protection. In addition to development of the Avian Plan, Powertech has also applied for a Federal Eagle Take permit which will authorize activities to occur near the bald eagle nest, though the nest itself will not be physically removed by the proposed project. The permit application is being reviewed by the Service's permitting office, which is a lengthy process.

As I described above, once the Avian Plan is approved by Game, Fish and Parks and SDDENR, it will become part of Powertech's Large Scale Mine Permit. Again, the plan must be completed prior to initiating construction activities under the Large Scale Mine Permit. While the plan is being finalized, Powertech has voluntarily been implementing the monitoring procedures for bald eagles and other targeted species in the project area; these efforts have also been occurring prior to completion of the licensing and permitting processes.

Q.13. Please describe the basis for the specific mitigation measures contained in the Avian Plan.

A.13. The recommendations and proposals described in the Avian Plan to eliminate or minimize impacts are based on successful, long-term (since 1980) monitoring and mitigation activities used at surface coal mines in northeast Wyoming (near the Dewey-Burdock Project); those coal operations result in levels of disturbance that are much greater than those associated with the proposed activities in the project area. The content of the Avian Plan is further supported by my own raptor expertise garnered over nearly 35 years, including more than 20 years of intensive field observations of bald and/or golden eagle nests, as well as several years

supervising both the incubation of bald eagle eggs (among other raptor species) and the rearing, hacking (gradual release), and radio-tracking of juvenile bald eagles.

3. CONTENTION 14A

Q.14. What is the nature of your testimony regarding this contention?

A.14. My testimony (1) describes the locations in the FSEIS of the Service's confirmation that the consultation process under Section 7 of the Endangered Species Act (ESA) was conducted properly for all threatened and endangered (T&E) species identified by the Service for the Dewey-Burdock Project; (2) corrects misinterpretations and misstatements made by the OST regarding the "consultation" process; and (3) summarizes information in the FSEIS and more recent project data regarding Federal T&E species within the Dewey-Burdock license area.

3.1 Consultation Pursuant to the Endangered Species Act and Implementing Regulations Is Not Required

Q.15. Please respond to the allegation that Endangered Species Act Section 7 consultation was not completed, and impacts to imperiled species were not analyzed and reviewed by USFWS as required by NEPA, NRC regulations, and the Endangered Species Act (OST 2013 at 53).

A.15. This is not supported, as evidenced by the following.

The FSEIS documented that consultation with the Service was not required under Section 7 of the ESA because:

- Federal T&E species have not been documented within the project area (FSEIS at 1-15, 3-44, 3-55, 3-70, 4-84, 4-95, 4-147 and A-10), nor were any expected to occur in that area (FSEIS at 4-108).
- The NRC therefore determined that the proposed action will not affect those T&E species (FSEIS at 1-15 and 4-95).

The Service confirmed the NRC's conclusion that consultation was not required, as documented by the following text references:

- "As discussed in SEIS Section 4.6.1.1.1.4, the FWS determined that no additional consultation under Section 7 is required (FWS, 2013)." (FSEIS at 1-15).
- "The FWS determination is that the NRC is not required to initiate consultations with FWS under Section 7 of the ESA (FWS, 2013)." (FSEIS at 4-95).
- "I can confirm that no formal or informal Section 7 consultation is required based upon your [NRC's] determination [of no adverse effects to T&E species] and we [Service] have no records of any federally listed species in the area of the project." (FSEIS at A-157).
- The Service could not have provided their September 2013 confirmation that no Section 7 consultation was required unless they concurred with the NRC's determination of no adverse effects to T&E species, and they could only have reached that conclusion by

reviewing and analyzing the potential impacts to T&E (i.e., imperiled) species.

Q.16. Please elaborate on the September 2013 confirmation by the USFWS that Section 7 consultation is not required.

A.16. In an email dated September 9, 2013, the Service provided the required written confirmation to the NRC 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” (FSEIS at A-157). The FSEIS at 1-15 and 4-95 documents the Service’s written confirmation that the NRC was not required to initiate consultation with the Service under Section 7 of the ESA for the Dewey-Burdock Project.

Q.17. Please summarize your testimony on ESA consultation.

A.17. To summarize, the entire process was completed correctly:

- The NRC “conferred” (i.e., initiated informal discussions) with the Service early in the project to identify potential impacts to T&E species and their critical habitats.
- Based on the lack of T&E species in the analysis area (recent and historical), the NRC concluded that the Dewey-Burdock Project would have no adverse effects on those species.
- The NRC provided this determination to the Service, along with supporting information, and asked about the need to pursue Section 7 consultation.
- The Service reviewed and analyzed the information, confirmed the NRC’s determination regarding no adverse impacts to T&E species, and provided written confirmation that no Section 7 consultation was required for the project.

3.2 50 CFR Section 402.10(a) Has Been Misinterpreted with Respect to this Contention

Q.18. Please respond to the allegation an agency must “conference” with USFWS according to 50 CFR Section 402.10(a) (OST 2013 at 51).

A.18. I would respectfully point out that the OST has incorrectly cited 50 CFR 402.10(a) as support for its allegation that appropriate ESA consultation was not conducted. Their allegation has not provided a full or accurate picture of the Section 7 consultation process. The Section 7 consultation process under the ESA is limited to Federal T&E species (i.e., already listed as threatened or endangered), and designated critical habitats for those listed species.

OST cites 50 CFR 402.10(a) as support that agencies must “confer” with the Service. However, OST appears to have misinterpreted the meaning of the word “confer,” the process described in 50 CFR 402.10, and the progression of events in the “conference” and “consultation” processes. In this situation, “confer” appears to incorrectly be interpreted as a synonym for “consult.”

As described in subsection (a) and the remaining subsections of 50 CFR 402.10, this entire discussion deals with conferences (i.e., discussions) with the Service regarding species not yet listed (i.e., proposed species) as T&E and habitats not yet designated as critical for listed

species. It does not describe the Section 7 consultation process. The purpose of this section is to outline ways in which a Federal agency and the Service may identify and resolve potential conflicts between an action and species' conservation early in the planning process and before listing occurs. Additional explanations of the "conference" process vs. the "consultation" process are provided in the ESA Section 7 Handbook (Exhibit APP-058 at xi, xiv-xvi, xviii, 2-6, 3-1, 3-3, and 4-1 through 4-2).

Subsection (c) of 50 CFR 402.10 describes the conference (informal discussions) process with the Service in more detail, including next steps for species if they become listed and the role of conference and biological opinions (also noted in the full OST contention). Documentation of the NRC's efforts to confer with the Service on the Dewey-Burdock Project, as required, is provided in the FSEIS at 3-55 and 4-95; the actual correspondence between the Service and NRC is provided in Appendix A of the FSEIS at A-5 through A-6, A-9 through A-11, A-91 through A-92, and A-157 through A-160.

50 CFR 402.13(a) provides additional guidance regarding the "consultation" process that was not identified by the OST, but is vital to their contention. This section clearly states that, "If during informal consultation (i.e., discussions, correspondence, etc.), it is determined by the Federal agency, with the written concurrence of the Service, that the action is not likely to adversely affect listed species or critical habitat, the consultation process is terminated, and no further action is necessary."

As noted, this progression for the consultation process is also clearly described in the ESA Section 7 Handbook (Exhibit APP-058 at xiv, xv, 2-6, 3-1, 3-3 and 4-1 through 4-2), as well as on the Service's website for Frequently Asked Questions regarding the process (Exhibit APP-059 at 1-4). A review of the subtopics in Exhibit APP-059 (especially bullets # 2, 7, and 8) demonstrates very clearly that the NRC followed the proper procedure in the conference and consultation processes, as does a thorough review of the correspondence between the NRC and the Service (FSEIS Appendix A as described above).

3.3 No Federal T&E Plant or Wildlife Species Have Been Documented in the Project Area

Q.19. Please summarize information on the presence (or lack thereof) of T&E species in the project area.

A.19. As mentioned, no Federal T&E plant or wildlife species were documented in or within 1.0 mile of the Dewey-Burdock project area during baseline inventories conducted during 2007 and 2008 (FSEIS at 3-44, 3-55, 3-70, 4-84, 4-95, 4-147), nor were any expected to occur in that area (FSEIS at 4-108).

Furthermore, no T&E species have been documented in the survey area since annual monitoring was initiated in December 2012. Due to the enhanced monitoring of bald eagles that has occurred since then, a biologist has been on site approximately every 2 to 3 weeks during the majority of the last 18 months. Under the current monitoring schedule, the longest potential gap that could ever occur without a site visit would be limited to the time from early December

through mid-January each year (i.e., 6 weeks in winter), when most Federal T&E species would be absent from the area, thus reducing the risk of not being detected, if present. Although the entire survey area is not covered during every site visit, the frequent presence in the area enhances the opportunity for sightings of T&E species, should they occur in the project area.

3.4 Consultation on Black-footed Ferrets and Whooping Cranes Is Not Required

Q.20. Please respond to the allegation that the DSEIS does not document any attempt to seek USFWS concurrence or consultation regarding black-footed ferrets or whooping cranes (OST 2013 at 54-55).

A.20. This allegation is fully addressed under A.14 through A.19, and in an NRC response to comment in the FSEIS at E-156. Information specific to black-footed ferrets and whooping cranes is summarized as follows:

- During the informal “conferencing” for this project in March 2010, the Service identified the black-footed ferret and whooping crane as the only T&E species that may occur in the Dewey-Burdock area, though neither species has ever been documented in that portion of Custer or Fall River counties (FSEIS at A-10). Therefore, as T&E species, both were included in the conferencing process.
- In response to comment, the FSEIS at E-156 notes that:

“SEIS Section 1.7.1 describes the correspondence between NRC staff and FWS as recently as September 9, 2013, confirming that the whooping crane and black-footed ferret are the only federally threatened or endangered species that may occur in Custer and Fall River Counties, but are not known to be present at the project site (FWS, 2013). A copy of the correspondence between NRC staff and FWS is provided in SEIS Appendix A. As discussed in SEIS Section 4.6.1.1.1.4, cranes and ferrets were not observed during the baseline wildlife surveys conducted for the project. Because these species are not present and NRC concluded that the proposed project will not affect or result in a direct effect to these species, NRC is not required to initiate formal consultations with FWS under Section 7 of the ESA.”

4. CONTENTION 14B

Q.21. What is the nature of your testimony regarding this contention?

A.21. My testimony addresses various allegations that were used to support this contention and provides supporting documentation where appropriate.

4.1 Greater Sage-grouse Have Not Been Documented in the Project Area

Q.22. Please respond to the allegation that the DSEIS fails to analyze conservation objectives that could be adopted to protect the Greater sage-grouse and its habitat despite saying in

Sec. 3.6.1.2.2 that Greater sage-grouse could potentially occur in the proposed project area (OST 2013 at 53).

A.22. The Service's sage-grouse conservation objectives were still in draft form when the DSEIS was published in November 2012. Nevertheless, lines 29-32 on p. 4-84 of the DSEIS (Exhibit NRC-009-A and 009-B) specifically refer to those conservation objectives and note that such recommendations could be implemented at the Dewey-Burdock Project when they are finalized and become available. Analyzing draft recommendations in detail would not have been appropriate due to their incomplete status at the time. The DSEIS did analyze potential impacts to sage-grouse and sage-grouse habitat in general, and outlined Powertech's commitments to address those potential impacts (DSEIS at 4-84 and 4-87 and FSEIS at 4-86 through 4-88 [Section 4.6.1.1.1.2 under Upland Game Birds]).

As noted under A.9, sage-grouse have not been documented in the Dewey-Burdock Project area. Despite their confirmed absence, Powertech has committed to numerous mitigation measures that will also apply to potential sage-grouse habitat (i.e., sagebrush-grasslands) (FSEIS Table 6.2-1, at 6-2 through 6-12). Many of those mitigation measures, and others outlined in the FSEIS, match recommendations by the Sage-grouse National Technical Team (Exhibit APP-056) and the Service's final Greater Sage-grouse Conservation Objectives (Exhibit APP-057), as described above.

4.2 Whooping Cranes Are Not Likely to Occur in the Project Area

Q.23. Please respond to the allegation that the DSEIS inappropriately concludes that whooping cranes will not likely occur at the proposed site despite USFWS' finding that they are expected to be found there and that when an agency's conclusions are different from USFWS, the agency must clearly articulate its reasons for disagreement (OST 2013 at 54-55).

A.23. This allegation does not accurately reflect the Service's representation of its position regarding the likelihood for whooping cranes to be present in the project area, which is the area under analysis. Examples of text from the DSEIS, FSEIS, and Service correspondence directly contradicting this allegation are provided below, along with the most recent Service data regarding the historic and current ranges of the whooping crane in South Dakota.

- DSEIS at 1-14, lines 5-7 state that the Service "determined that the whooping crane (*Grus americana*) and black-footed ferret (*Mustela nigripes*) are federally listed species that may occur within Custer County" (emphasis added). Lines 7-10 further clarify that (emphasis added) "The whooping crane generally migrates through the eastern portion of Custer County, and the black-footed ferret is currently only found in the Wind Cave National Park. FWS had no information to indicate that these species are located within the project boundaries. No federally listed endangered species occur in Fall River County." The FSEIS at 1-15 contains the same conclusions.
- DSEIS at 3-59, lines 3-10 state that "FWS correspondence indicates that the agency does not have information to confirm that whooping cranes are present within the proposed project boundaries, but the potential exists for whooping crane disturbances from

proposed mining activities during spring and fall migrations (FWS, 2010)” (emphasis added). This text also appears in the FSEIS at 3-58. FSEIS at 4-95 reiterates that whooping cranes “currently do not breed in South Dakota” and that the Dewey-Burdock Project area “is located west of the migration path between Texas and Canada.” Furthermore, cranes were not documented in the project area during the baseline wildlife surveys, as repeatedly stated in the DSEIS and FSEIS, nor have any been observed there during site visits conducted at approximately 2-3 week intervals since annual monitoring was initiated in December 2012; that monitoring schedule is ongoing.

- The actual correspondence between the Service and the NRC showing the quotes referenced above is available in FSEIS Appendix A at A-10. The Service confirmed the absence of Federal T&E species (i.e., whooping cranes and black-footed ferrets) in the Dewey-Burdock Project area in its September 2013 correspondence to the NRC (FSEIS at A-157).
- A 5-year review of the whooping crane’s status conducted by the Service in 2012 reinforces the lack of observations in the Dewey-Burdock Project area (Exhibit APP-060 at 14). Additionally, the Service has no record of whooping cranes occurring in the project area since monitoring of the species began in 1943 (Exhibit APP-061).

4.3 Black-footed Ferrets Are Not Present in the Project Area

Q.24. Please respond to the allegation that no USFWS concurrence is provided for the statements that black-footed ferrets are not present in the site vicinity; that the prairie dog colony on the site is likely too small to support and sustain a breeding population of black-footed ferrets; or there is no evidence that NRC’s “no jeopardy” determination is based on the necessary expertise and investigation (OST 2013 at 55).

A.24. This allegation is fully addressed under A.14 through A.20, and in an NRC response to comment in the FSEIS at E-156, where numerous references are provided documenting the Service’s statement that they have no information to indicate that the black-footed ferret is present within the project area. Therefore, I will not repeat that information for this allegation.

By confirming that the black-footed ferret will not be affected by the proposed project, the Service indirectly confirmed that the prairie dog colony in the project area is likely too small to support and sustain a breeding population of black-footed ferrets, even though they did not directly comment on that aspect of the species’ likelihood to be present.

The FSEIS at 3-61 states that a prairie dog colony of approximately 795 acres was within the Dewey-Burdock project area (potential area of disturbance) during the baseline wildlife surveys. Based on results from Powertech’s annual monitoring conducted in 2013, approximately 995 non-contiguous acres of prairie dog colonies were present in or within 1.0 mile of the license area that year.

According to the Service’s current recovery plan for the black-footed ferret (Exhibit APP-062 at 6), downlisting criteria for this species includes maintaining approximately 247,000 acres of occupied prairie dog habitat at reintroduction sites (the Dewey-Burdock Project

is not in a reintroduction site). Therefore, it is logical to assume that the current acreage of prairie dog colonies is insufficient to support black-footed ferrets. Figure 4 in that recovery plan (Exhibit APP-062 at 75) shows that several thousand acres are required to support adult black-footed ferrets. Both numbers are significantly greater than the total combined acreage of prairie dog colonies currently in the Dewey-Burdock Project area.

Although black-footed ferrets have never been documented in the project area and are not likely to ever occur there, the prairie dog colonies in the Dewey-Burdock Project area are important prey sources for other wildlife species known to be present. Therefore, Powertech has committed to a variety of monitoring measures to track prairie dog populations in the project area. For example, colonies are mapped each year during annual monitoring to determine their size and activity levels, including the establishment of new colonies.

5. REFERENCES

- OST (Oglala Sioux Tribe), 2014a, Statement of Contentions Following Issuance of Final Supplemental Environmental Impact Statement, ADAMS Accession No. ML14077A004, March 17, 2014.
- _____, 2013, List of Contentions Based on the Draft Supplemental Environmental Impact Statement, ADAMS Accession No. ML13026A004, January 25, 2013.

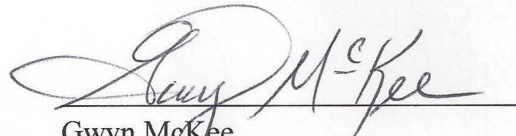
**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

AFFIDAVIT OF GWYN MCKEE

I declare under penalty of perjury that my statements in prefiled Exhibits APP-053 (Gwyn McKee Initial Testimony) and APP-054 (Gwyn McKee CV) are true and correct to the best of my knowledge and belief.


Gwyn McKee

Executed in Sheridan, WY
this 19th day of June, 2014