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In the Matter of: POWERTECH USA, INC. (Dewey-Burdock In Situ Uranium Recovery Facility)	
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APP-001

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 LYNNE SEBASTIAN**

## TABLE OF CONTENTS

1.	WITNESS BACKGROUND INFORMATION .....	3
2.	CONTENTION 1A .....	5
2.1	The FSEIS Is Not Required to Meet Any NHPA Requirements .....	5
2.2	There Is No Requirement That the Programmatic Agreement Must Be Analyzed in a NEPA Document .....	5
2.3	An Applicant Has No Responsibility or Authority to Enter Into Consultation with Federally Recognized Tribes .....	6
2.4	All Interested Tribes Were Offered the Opportunity to Examine the Entire Project Area in Whatever Way Is Culturally Appropriate for Each Tribe .....	7
2.5	Direct and Indirect Effects Were Evaluated for All Identified Historic Properties .....	7
2.6	The Programmatic Agreement Requires Protection in Place of All Unevaluated Properties and Provides a Process for Evaluation of Any Unevaluated Properties That Will Be Affected by Construction or Operation Activities .....	8
2.7	The Oglala Sioux Tribe Chose Not to Take Advantage of the Opportunity to Examine the License Area and Evaluate the Adequacy of the Archeological Survey .....	8
2.8	Tribal Consultation Began More Than 2 Years Prior to Issuance of the DSEIS and Continued throughout the Development and Execution of the Programmatic Agreement .....	9
2.9	The Programmatic Agreement Details How Adverse Effects Will Be Resolved .....	10
2.10	Interested Tribes Opposed Use of Ethnographic Studies .....	10
2.11	The Programmatic Agreement Provides Tribes with the Opportunity to Review and Comment on All Evaluation and Monitoring Plans .....	10
3.	CONTENTION 1B .....	11
3.1	The Omaha, Skidi and Southern Cheyenne Tribes Were Consulted .....	12
3.2	NRC Not Only Followed the Letter of the Law with Respect to Consultation with the Tribes but the Spirit of the Law as Well .....	12
3.3	The Section 106 Regulations Specify the Required Signatories for a Programmatic Agreement .....	14
4.	REFERENCES .....	15
	AFFIDAVIT .....	16

## **1. WITNESS BACKGROUND INFORMATION**

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

A.1. Lynne Sebastian. I hold an emeritus position with SRI Foundation based in Rio Rancho, New Mexico, where I was the Director of Historic Preservation Programs from 2001 to 2012. Also, since 1990, I have been an adjunct member of the Department of Anthropology at the University of New Mexico, currently holding the rank of Adjunct Professor. A copy of my curriculum vitae is included as Exhibit APP-002.

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

A.2. I hold a Ph.D. in Anthropology from the University of New Mexico and have been employed in the field of cultural resource management for 35 years: 8 years as an archaeological consultant, 10 years as the Deputy State Historic Preservation Officer for New Mexico (holding the joint title of State Archaeologist for 6 of those years), 2 years as New Mexico State Historic Preservation Officer, and 15 years as a private sector historic preservation consultant.

I am a nationally recognized expert on compliance with historic preservation laws. I teach continuing professional education workshops on Section 106 of the National Historic Preservation Act for federal and state agencies, private industry clients, and Indian tribes. I am a contract instructor for the National Highway Institute (NHI) Beyond Compliance course, a 3-day intensive workshop on integrating NEPA, Section 106, and Section 4(f). I have taught historic preservation and cultural resource management at the university level, and I advise agency and private industry clients on historic preservation issues. I have served as an expert witness on cultural resource and historic preservation issues for numerous legal proceedings. I have published widely on archaeology, historic preservation, preservation laws, Section 106, and traditional cultural properties.

I am a past president of the Society for American Archaeology and of the Register of Professional Archaeologists. I currently serve as an expert member on the federal Advisory Council on Historic Preservation.

Q.3. What is the nature of your testimony regarding the Dewey-Burdock Project?

A.3. My testimony concerns the process for federal agency compliance with Section 106 of the National Historic Preservation Act (NHPA) of 1966 (16 U.S.C. 470) in general, and the Nuclear Regulatory Commission's (NRC) compliance procedures for Section 106 for the Dewey-Burdock Project in particular.

Q.4. Would you describe the purpose of Section 106, including its statutory objectives?

A.4. The purpose of Section 106 of the NHPA is to ensure informed federal agency decision-making, insofar as agency actions may affect "historic properties," defined as places listed on or eligible for listing on the National Register of Historic Places (NRHP). Section 2(1) of the law

establishes the policy of the federal government as being “to foster conditions under which our modern society and our prehistoric and historic resources can exist in productive harmony and fulfill the social, economic, and other requirements of present and future generations.”

The regulation implementing Section 106 of the law (36 CFR part 800) further refines the notion of balancing the needs of our modern society with the importance of preserving our heritage by affirming that “The section 106 process seeks to accommodate historic preservation concerns with the needs of Federal undertakings through consultation among the agency official and other parties with an interest in the effects of the undertaking on historic properties” (§800.1(a)).

Q.5. In your opinion are Section 106 statutory requirements difficult to satisfy?

A.5. Actually, the statutory requirements of Section 106 are very straightforward: First, a federal agency must “take into account the effects” of its “undertakings,” which includes issuance of licenses and permits, on historic properties. Second, the federal agency must afford the federal Advisory Council on Historic Preservation (ACHP) a reasonable opportunity to comment on the undertaking. The process for meeting these requirements is established in the ACHP’s regulation at 36 CFR part 800.

Q.6. What does 36 CFR part 800 prescribe as the Section 106 process?

A.6. The Section 106 process consists of the following activities and decisions to be carried out by the federal agency:

- a. define an area of potential effects (the geographic area within which historic properties could be affected by the undertaking)
- b. make a reasonable and good faith effort to identify historic places within that area
- c. determine – in consultation with the State Historic Preservation Officer (SHPO) – which of the historic places identified are historic properties, that is, properties listed on or eligible for listing on the NRHP
- d. evaluate the nature of the effects of the undertaking on the identified historic properties
- e. identify measures to be taken to avoid, minimize, or mitigate any adverse effects on historic properties (that is, any effects that would diminish the integrity of a property)
- f. prepare an agreement document indicating what measures will be taken to resolve the adverse effects of an undertaking and secure the required signatures

Q.7. You indicated these were decisions to be carried out by the federal agency. Are others involved?

A.7. All of the activities and decisions I have described are undertaken by the federal agency after consultation with “consulting parties” specified in the regulation, including the SHPO, federally recognized Indian tribes, the applicant for federal authorization or funding, local

governments, and others with a demonstrated interest in the effects of the undertaking on historic properties.

Q.8. So then, do all parties make Section 106 decisions?

A.8. No. After seeking and considering the views of the other parties and the public, the federal agency has the authority to make all of the Section 106 decisions.

Q.9. You indicated your testimony would address NRC's compliance with Section 106 for the Dewey-Burdock Project.

A.9. Yes, the Dewey-Burdock Project Section 106 process completed by the NRC is in compliance with the ACHP regulations. This opinion is expanded in my responses to the Section 106 allegations below.

## **2. CONTENTION 1A**

### **2.1 The FSEIS Is Not Required to Meet Any NHPA Requirements**

Q.10. How do you respond to the allegation that FSEIS fails to meet the requirements of NEPA, the NHPA, and 40 CFR §§ 51.10, 51.70 and 51.71, along with the NRC, ACHP, and CEQ regulations, because it does not provide an adequate description of either the affected environment or the impacts of the project on archaeological, historical, and traditional cultural resources (CI 2013 at 2, CI 2014a at 6, OST 2013 at 4, OST 2014a at 5-6)?

A.10. The SEIS is not mandated to meet any NHPA requirements unless the agency has chosen to substitute the NEPA process for the Section 106 process under the provisions of 36 CFR 800.8(c), which the agency has not chosen to do.

### **2.2 There Is No Requirement That the Programmatic Agreement Must Be Analyzed in a NEPA Document**

Q.11. How do you respond to the allegation that the Programmatic Agreement (PA) wasn't analyzed in the FSEIS (CatchesEnemy 2014 at 3-4, CI 2014a at 13, OST 2014a at 7, OST 2014b at 7)?

A.11. There is no requirement that a Section 106 agreement document (either a Programmatic Agreement or a Memorandum of Agreement) be analyzed in the NEPA document. The agreement document describes the measures that will be taken to resolve adverse effects on historic properties; the NEPA record of decision should refer to the Section 106 agreement document and the measures covered therein as part of the mitigation for the federal action.

Q.12. Was the Programmatic Agreement final as of the date of the publication of the FSEIS?

A.12. Again, whether it was or not, there is no requirement either in NEPA or in NHPA that the Section 106 agreement document be final before the date of publication of the final NEPA document.

Q.13. Must the Programmatic Agreement be accepted by the Tribe?

A.13. No. There is no requirement in 36 CFR part 800 that a Section 106 document be accepted by an Indian tribe unless the undertaking involves tribal land, which the Dewey-Burdock Project does not.

Q.14. Does the Programmatic Agreement relegate development of mitigation measures to some future date, outside the scope of the NEPA process?

A.14. The Section 106 regulation provides for using a Programmatic Agreement to complete the Section 106 process in situations where “effects on historic properties cannot be fully determined prior to approval of an undertaking” (§800.14(b)(1)(ii)). For the Dewey-Burdock Project, the need to develop a future utility corridor in a currently unknown location and the uncertainty as to the disposal mechanism for produced water make use of a Programmatic Agreement appropriate in this case. The Programmatic Agreement contains provisions for consultation with all appropriate consulting parties for all future Section 106 decisions to be made under the aegis of the agreement.

### **2.3 An Applicant Has No Responsibility or Authority to Enter Into Consultation with Federally Recognized Tribes**

Q.15. How do you respond the allegation that Powertech has not entered into any Memorandum of Agreement with the Oglala Sioux Tribe, or sought the Tribe's participation in the development of any stipulations purported to result in the diminishment of impacts to the Tribe's cultural and historic resources at the site (W. Mesteth 2010 at 3)?

A.15. Under the Section 106 regulation, Powertech, as the Applicant, has no responsibility for or authority to enter into consultations with the federally recognized tribes. This is the responsibility of the NRC. Further, tribes participating in the Section 106 process indicated firmly that they were unwilling to work directly with Powertech or its third party consultants on this project. The Oglala Sioux Tribe, although given the opportunity to participate in the development of all of the provisions of the Programmatic Agreement, including the wording of the Dispute Resolution stipulation, chose not to do so.

Q.16. Does this leave cultural resources at risk?

A.16. No. The Programmatic Agreement provides for extensive consultation with the tribes about measures to avoid, minimize or mitigate adverse effects on historic properties of religious

and cultural significance to them as evaluation procedures and treatment plans are developed in the future.

#### **2.4 All Interested Tribes Were Offered the Opportunity to Examine the Entire Project Area in Whatever Way Is Culturally Appropriate for Each Tribe**

Q.17. How do you respond to the allegations that 1) rather than put together a competent survey that included proper scientific expertise, proper methodology, and the participation of the Tribal representatives, NRC Staff instead simply invited Tribes to visit the site for themselves, making no provision for methodologies or scope, and 2) several tribes rejected the terms of the survey as improper and insufficient (CI 2014a at 12, OST 2014a at 7)?

A.17. The reference to “proper scientific expertise” in this context is puzzling. Identification of properties of religious and cultural significance to Indian tribes relies entirely on traditional knowledge maintained within the tribe and on the special expertise of knowledgeable cultural practitioners.

As for “proper methodology,” this assumes that there is a “right” way for all tribes to go about identifying places of religious and cultural concern to them, which is not the case. Rather than attempting to impose a single, uniform approach to identification of traditional cultural places, NRC offered all 23 interested tribes the opportunity to examine the entire project area, in whatever way is culturally appropriate for that tribe, with funding from Powertech. The funding included travel costs, lodging, per diem, and a grant to the tribal government to be used in whatever way it was needed to support the identification and reporting efforts. As noted in the allegation, the Oglala Sioux Tribe chose not to take advantage of this opportunity.

NRC is required to make a reasonable and good faith effort to identify historic properties (36 CFR 800.4(b)(1)), including properties of religious and cultural significance to tribes. The agency determined that this offer to the tribes of access to the entire license area, funding for direct expenses, and a grant to the tribes to support additional expenses constituted a reasonable and good faith effort. It is their prerogative to make that decision.

#### **2.5 Direct and Indirect Effects Were Evaluated for All Identified Historic Properties**

Q.19. How do you respond to the allegation that the TCP survey must include both direct and indirect effects on the entire 10,000-acre area that may suffer direct or indirect effects (Brewer 2014 at 1, Yellow Bird Steele 2012 at 3)? Were tribes offered the opportunity to conduct TCP surveys across the entire project area?

A.19. Yes. As noted above, the tribes that participated in the efforts to identify properties of religious and cultural significance were encouraged to examine any areas that they wished to within the entire 10,580-acre license area.

Q.20. Were direct and indirect effects evaluated?

A.20. Yes. As Table 1 in the Programmatic Agreement (Exhibit NRC-0018-A) indicates, NRC evaluated both direct and indirect effects for all identified historic properties.

## **2.6 The Programmatic Agreement Requires Protection in Place of All Unevaluated Properties and Provides a Process for Evaluation of Any Unevaluated Properties That Will Be Affected by Construction or Operation Activities**

Q.21. How do you respond to the allegation that the proposed site has not yet been adequately surveyed with regard to its potential cultural resources and a significant number of archeological, historical, and traditional cultural resources on site have not been evaluated (CI 2013 at 3, 6, OST 2013 at 5, Redmond 2010b)?

A.21. This allegation mixes two separate steps in the Section 106 process together: first, identification of possible historic properties and second, evaluation of those properties to determine whether they are, in fact, historic properties listed on or eligible for listing on the NRHP.

The identification step has been completed, except within the utility corridor, which will not be selected until sometime in the future. The Programmatic Agreement establishes a process for identification of historic properties – including participation by any tribes wishing to do so – within the corridor once it is selected.

The allegation is correct when it notes that the NRHP eligibility of a number of the identified properties within the license boundary could not be determined based on available information, and that additional evaluation efforts will be needed. The Programmatic Agreement requires protection in place of all unevaluated properties and provides a process for evaluation of any unevaluated properties that will be affected by construction or operation activities in the future. This process includes opportunities for tribal participation in development of evaluation plans and for tribal input concerning NRHP eligibility.

## **2.7 The Oglala Sioux Tribe Chose Not to Take Advantage of the Opportunity to Examine the License Area and Evaluate the Adequacy of the Archeological Survey**

Q.22. How do you respond to the allegation that the Oglala Sioux Tribe cannot verify that a comprehensive study identifying all cultural resources has been adequately conducted, since no such study has been conducted by the Tribe (W. Mesteth 2010 at 2; OST 2013 at 9)?

A.22. The Oglala Sioux Tribe had the same opportunity as all the other tribes to examine the license area, evaluate the adequacy of the archaeological survey, provide additional information about the identified archaeological sites, and identify properties of cultural and religious significance to the tribe. The tribe chose not to take advantage of this opportunity.



## **2.8 Tribal Consultation Began More Than 2 Years Prior to Issuance of the DSEIS and Continued throughout the Development and Execution of the Programmatic Agreement**

Q.23. How do you respond to the allegation that excluding the Tribe from the NEPA/NHPA process until after a draft NEPA document is prepared contravenes the requirements of the NHPA and NEPA, and NRC and NHPA regulations; harms the Tribe's ability to participate in the initial identification of historic/cultural properties; and hampers its ability to effectively participate at the later stage when the specific impacts from a particular project are analyzed (OST 2013 at 9)?

A.23. What this allegation says would be correct if it were consistent with the facts, but insofar as it relates to NHPA, it is not. Appendix B, section 4 of the Programmatic Agreement, provides a detailed discussion and timeline of NRC's Section 106 tribal consultation for this undertaking. As noted on page 14 of that document, beginning March 19, 2010, NRC began contacting 20 tribes recommended by the South Dakota SHPO as potentially interested in the project, inviting them to participate as consulting parties in the Section 106 process and requesting their assistance in identifying properties of religious and cultural significance to them that could be affected by the project. Four additional tribes were added to the contact list in April of 2010 as NRC gathered additional information. In a letter dated January 31, 2011, the Oglala Sioux Tribe accepted NRC's invitation to participate as a consulting party.

Q.24. What attempts were made to include the tribe in the cultural surveys?

A.24. On June 8, 2011, NRC held an information gathering meeting for the interested tribes on the Pine Ridge Reservation in South Dakota. This meeting was followed the next day by an initial opportunity for the tribes to visit the project location. On February 14-15, 2012, NRC held a meeting, hosted by Powertech, in Rapid City, South Dakota, to hear from the tribes how they wanted to go about identifying properties of religious and cultural significance within the project area. From February through December of 2012, NRC attempted to negotiate a scope of work for tribal survey of at least the planned disturbance areas within the license boundary, but was unable to reach an agreement.

Q.25. Did tribal consultation begin before the DSEIS was issued?

A.25. In November of 2012, the DSEIS was issued, using existing information from the archaeological and historic structure survey of the license area and a variety of ethnographic studies to characterize the affected environment. Tribal consultation began two years and eight months prior to the issuance of that document.

Q.26. Were tribal consultations conducted at the Dewey-Burdock site and what was the outcome?

A.26. Tribal consultation continued after the issuance of the DSEIS and throughout the development and execution of the Programmatic Agreement. Under the terms of the agreement, extensive consultation will continue in the future as evaluation, treatment, and monitoring plans are developed and as reports of these efforts are prepared.

## **2.9 The Programmatic Agreement Details How Adverse Effects Will Be Resolved**

Q.27. How do you respond to the allegation that it is likely that historic properties may be affected by the mining operation due to the number and density of cultural resources at the site (W. Mesteth 2010 at 4)?

A.27. It is not only likely, NRC has already determined that the project will have an adverse effect on historic properties, and has prepared and executed a Programmatic Agreement detailing how those adverse effects will be resolved.

## **2.10 Interested Tribes Opposed Use of Ethnographic Studies**

Q.28. How do you respond to the allegation that an ethnographic study has not been performed for the site (CI 2014b at 9, W. Mesteth 2010 at 4, OST 2014b at 5)?

A.28. In response to inquiries from Powertech's third party consultant during the fall of 2011 and at the two-day consultation meeting in Rapid City, South Dakota, in February of 2012, the interested tribes expressed very strongly the view that ethnographic studies were not the appropriate way to identify properties of religious and cultural significance in the Northern Plains region. Field survey was indicated to be the appropriate approach. To my knowledge, none of the interested tribes requested an ethnographic study as an approach to identifying historic properties of religious and cultural significance.

## **2.11 The Programmatic Agreement Provides Tribes with the Opportunity to Review and Comment on All Evaluation and Monitoring Plans**

Q.29. How do you respond to the allegation that the NRC and the applicant refused to conduct sub-surface testing (CI 2014a at 12)?

A.29. There has been no refusal to conduct subsurface testing, quite the reverse. The Programmatic Agreement provides for the development of evaluation plans, including subsurface testing, to further evaluate all unevaluated properties that may be affected by construction or operation of the project. Tribes will have the opportunity to review and comment on all evaluation plans.

Q.30. Is there additional protection for historic properties?

A.30. The Programmatic Agreement also provides for the development of monitoring plans, including provisions for tribal monitors, where appropriate, to be submitted with each year's

Plan of Activities in order to ensure the protection of historic properties. Tribes will have the opportunity to review and comment on all monitoring plans.

Q.31. How do you respond to the allegation that the protection and privacy of the location of sites must be kept confidential and should not be fenced or disclosed to Powertech employees or contractors (OST 2013 at 10)?

A.31. Neither Powertech nor any of its employees, contractors, or consultants need any information about the significance, meaning, or use of any of the properties of religious and cultural significance to the tribes. In order for Powertech to meet its commitment to protect both NRHP eligible and unevaluated properties from physical impacts of construction and operation of the project, however, it is imperative that the company know the location and extent of all properties that need to be protected.

Q.32. Is fencing an appropriate protection for properties of religious and cultural significance?

A.32. As treatment and monitoring plans are developed for potentially affected sites, the company may propose temporary or even long-term fencing of eligible or unevaluated properties that are in close proximity to ground disturbing activities as a means of avoiding inadvertent damage. The tribes will have the opportunity to review all treatment and monitoring plans and may request that fencing not be used for properties of religious and cultural significance to them and to suggest alternative protective measures.

### **3. CONTENTION 1B**

Q.33. What is the requirement for identifying the potentially interested tribes for a 106 process?

A.33. Section 101(d)(6)(B) of the NHPA requires federal agencies, as part of their responsibilities under Section 106 of the act, to consult with any Indian tribe that attaches religious and cultural significance to historic properties that may be affected by an undertaking. In practice, it is not a clear-cut process to identify which tribes might be interested in a particular undertaking. There is no central database or list that agencies can consult to find this information, and because many tribes have moved and many more have been moved away from their aboriginal lands, current locations of tribes and tribal lands is not a good indicator of potential interest in consultation.

Q.34. Please describe the process used to identify potentially interested tribes.

A.34. NRC, like most federal agencies, began the process of identifying potentially interested tribes for the Dewey-Burdock Project by requesting assistance from the SHPO. Because they review all federal agency undertakings in their state, the SHPOs often have a fairly accurate idea as to which tribes will be interested in consulting about undertakings in particular parts of their state. The South Dakota SHPO provided a list of 20 tribes which was supplemented by additional resources such as the Native American Consultation Database maintained by the

National Park Service's National NAGPRA Office. Suggestions about additional tribes to contact were also provided by some of the tribes on the SHPO's list.

Q.35. Is there a regulatory standard for determining if all potentially interested tribes have been identified?

A.35. Ultimately, as the regulation notes, "It is the responsibility of the agency official to make a reasonable and good faith [emphasis added] effort to identify Indian tribes and Native Hawaiian organizations that shall be consulted" (36 CFR 800.2(c)(2)(ii)(A)).

### **3.1 The Omaha, Skidi and Southern Cheyenne Tribes Were Consulted**

Q.36. How do you respond to the allegation that the Omaha, Skidi and Southern Cheyenne tribes were not consulted (CI 2013 at 7, CI 2014a at 11, Redmond 2012)?

A.36. In February of 2013, after being informed that some additional federally recognized tribes in Nebraska and Oklahoma might be interested in consulting about the Dewey-Burdock project, NRC contacted and began consultations with the Omaha Tribe, the Pawnee Nation of Oklahoma (of which the Skidi are one of the four confederated bands), and the Cheyenne and Arapaho Tribes of Oklahoma (Southern Cheyenne). The Cheyenne and Arapaho Tribes of Oklahoma not only were consulted, but also participated in the field identification of properties of religious and cultural significance within the Dewey-Burdock project area later that spring.

Q.37. How do you respond to the allegation that if an undertaking may affect an eligible site, the agency must make a reasonable and good faith effort to seek information from consulting parties, other members of the public, and Native American tribes to identify historic properties in the area of potential effect (OST 2014a at 11)?

A.37. This is true with the minor correction that Indian tribes are a category of consulting parties and not a separate class of Section 106 participants.

### **3.2 NRC Not Only Followed the Letter of the Law with Respect to Consultation with the Tribes but the Spirit of the Law as Well**

Q. 38. How do you respond to the allegation that the NHPA requires that federal agencies consult with any "Indian tribe ... that attaches religious and cultural significance" to the sites (16 U.S.C. § 470(a)(d)(6)(B)) and must provide the tribe "a reasonable opportunity to identify its concerns about historic properties, advise on the identification and evaluation of historic properties, including those of traditional religious and cultural importance, articulate its views on the undertaking's effects on such properties, and participate in the resolution of adverse effects" (36 C.F.R. § 800.2(c)(2)(ii)) (OST 2014a at 12) ?

A.38. The statement that the NHPA requires that federal agencies consult with the tribes etc. is true, and in my professional opinion, the actions undertaken by the NRC met both the letter and the spirit of these statutory and regulatory requirements..

Q.39. What actions did the NRC take in order to identify concerns of the tribes?

A.39. Since March 2010 NRC has been engaged in discussions with the 23 tribes identified in Programmatic Agreement in an effort to identify the concerns of the tribes, seek their views on identification and evaluation of historic properties, and secure their input about effects on historic properties as a result of the undertaking. These efforts have included multiple face-to-face meetings, a field visit, multiple teleconference and webinars, and substantial correspondence, all of which is outlined in Appendix B of the Programmatic Agreement.

Q.40. Who determines that the agency has completed a reasonable and good faith effort to identify properties of traditional religious and cultural significance? What actions did the agency undertake to meet these requirements?

A.40. The NRC has determined that the agency made a reasonable and good faith effort to identify properties of traditional religious and cultural significance by offering all interested tribes the opportunity and financial support to enable them to carry out ground investigations within the license boundaries.

Q.41. What level of tribal input was considered by the agency to assist it in meeting the requirements of a Programmatic Agreement?

A.41. NRC has also sought tribal input on eligibility and effect determinations and invited the tribes to participate in all phases of development of the Section 106 Programmatic Agreement. The fact that some tribes chose to participate in these activities and opportunities and some did not, does not nullify NRC's efforts to meet the reasonable and good faith standard.

Q.42. If the project proceeds, will tribes continue to have the ability to participate in further identification of historic properties?

A.42. Under the terms of the Programmatic Agreement, the tribes will continue to have multiple opportunities to participate in identification, evaluation, and protection of historic properties within the Dewey-Burdock project area. There are provisions in the agreement for future tribal involvement in the following activities:

- a. development of evaluation, treatment, and monitoring plans
- b. review of reports
- c. input on eligibility and effect determinations
- d. design of measures to avoid, minimize, and mitigate adverse effects
- e. monitoring of ground disturbance
- f. identification of properties of religious and cultural significance in the utility corridor

Q.43. What standards have been met by the wording of the execution statement and does the signing of the Programmatic Agreement complete and satisfy the requirements under Section 106 of the NHPA?

A.43. The execution statement for the Programmatic Agreement says “Execution of this PA by the NRC, BLM, SD SHPO, ACHP, and Powertech and the implementation of its terms is evidence the NRC and BLM have taken into account the effects of this undertaking on Historic Properties and afforded the ACHP an opportunity to comment.” As noted at the beginning of this affidavit, those are the two statutory requirements of Section 106 of the NHPA. The Programmatic Agreement has been signed by all signatories and the invited signatory. Execution by the ACHP, which is authorized in law to promulgate the regulations for Section 106, also indicates that NRC has met the regulatory requirements for compliance with Section 106.

### **3.3 The Section 106 Regulations Specify the Required Signatories for a Programmatic Agreement**

Q.44. How do you respond to the allegation that the tribes are “invited” but not “required” to sign the PA and therefore the terms of the PA are being forced onto the tribes (CI 2014a at 16)?

A.44. The Section 106 regulation at 36 CFR 800.6(c)(1)(2) specifies who the signatories are for a Section 106 agreement document where the ACHP is participating in consultations: the federal agency or agencies, the ACHP, and the SHPO. The Applicant is not a ‘required’ signatory to the document.

Q.45. Are there other criteria that guide the determination of “required” versus “invited” signatories?

A.45. Section 800.6(c)(2)(i) notes that the agency may invite additional parties to be signatories, and §800.6(c)(2)(iii) states that the agency should invite any party that assumes a responsibility under the terms of the agreement to be a signatory. Because Powertech will be responsible for funding and carrying out virtually all of the protection and mitigation measures committed to in the Programmatic Agreement, the company was asked by NRC to be an Invited Signatory to the agreement.

Q.46. Are there requirements for tribal signatories, specifically?

A.46. The tribes have been invited to concur in the Programmatic Agreement, as provided in §800.6(c)(3).

Q.47. Are the terms of the Programmatic Agreement being forced upon the tribes?

A.47. The tribes had multiple opportunities to participate in the crafting of the requirements and language of the Programmatic Agreement, but most chose not to do so. If the terms of the Programmatic Agreement do not meet the needs and wishes of the tribes, it is not because they

are not signatories to the document, but because they did not take advantage of their opportunities to request changes and additions to the document.

#### **4. REFERENCES**

- Brewer, B., 2014, Submittal of Comments on Draft Programmatic Agreement for the Proposed Dewey-Burdock ISR Uranium Mining Project, ADAMS Accession No. ML14077A002, February 5, 2014, Exhibit 2 to Oglala Sioux Tribe's Statement of Contentions Following Issuance of Final Supplemental Environmental Impact Statement.
- CatchesEnemy, M., 2014, Declaration of Michael CatchesEnemy, Tribal Historic Preservation Officer for the Oglala Sioux Tribe, ADAMS Accession No. ML14105A002, April 14, 2014, attachment to Oglala Sioux Tribe's Motion for Stay of Effectiveness of License.
- CI (Consolidated Intervenors), 2014a, Statement of Contentions Based on FSEIS, ADAMS Accession No. ML14098A116, March 17, 2014.
- \_\_\_\_\_, 2014b, Application for Stay of the Issuance of License No. SUA-1600 under 10 CFR Section 2.1213, ADAMS Accession No. ML14105A336, April 14, 2014.
- \_\_\_\_\_, 2013, New Contentions Based on DSEIS, ADAMS Accession No. ML13026A010, January 25, 2013.
- Mesteth, W., 2010, Declaration of Wilmer Mesteth, Oglala Sioux Tribe THPO, ADAMS Accession No. ML100960642, Exhibit 7 to Oglala Sioux Tribe Petition to Intervene and Request for Hearing.
- OST (Oglala Sioux Tribe), 2014a, Statement of Contentions Following Issuance of Final Supplemental Environmental Impact Statement, ADAMS Accession No. ML14077A004, March 17, 2014.
- \_\_\_\_\_, 2014b, Motion for Stay of Effectiveness of License, ADAMS Accession No. ML14105A004, April 14, 2014.
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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 LYNNE SEBASTIAN

I declare under penalty of perjury that my statements in prefiled Exhibits APP-001 (Lynne Sebastian Initial Testimony) and APP-002 (Lynne Sebastian CV) are true and correct to the best of my knowledge and belief.

  
\_\_\_\_\_  
Lynne Sebastian

Executed in Rio Rancho, NM  
this 23<sup>rd</sup> day of June, 2014