

Powertech (USA), Inc. (Powertech), by its undersigned counsel of record, hereby submits this Request to Take Judicial Notice in response to an inquiry by the Atomic Safety and Licensing Board (hereinafter the “Board”) on a November 16, 2017, telephonic hearing/status call. During this telephonic hearing/status call, counsel for Powertech informed the Board of its Petition for Review of LBP-17-09 (Petition) and its request in that Petition for expedited review. As part of its justification for expedited review, Powertech’s Petition expressly noted that the company has suffered financial harm due to excessive delays in the permitting process by a number of federal and State agencies, including but not limited to, the United States Environmental Protection Agency (EPA) for Safe Drinking Water Act (SDWA) underground injection control (UIC) permits and aquifer exemptions, the United States Department of Interior, Bureau of Land Management (BLM) for a plan of operations, and the State of South Dakota for a large-scale mine permit and water rights. Counsel for Powertech stated that it believed that these agencies were waiting for the United States Nuclear Regulatory Commission (NRC) Staff, including the Board, to complete its assessment of the contentions levied by the Oglala Sioux Tribe (Tribe) and Consolidated Intervenors (CI). In response to these statements, members of

the Board requested that Powertech provide them with information supporting such statements. Powertech has searched its records and, by this submission, provides the Board with the requested information.

The attached documents to this submission were found in the public record by Powertech and support the statements that the aforementioned agencies have been awaiting resolution of the contentions under evaluation by the Board, specifically Contentions 1A and 1B associated with the National Historic Preservation Act (NHPA) and the National Environmental Policy Act (NEPA). Through a memorandum of understanding (MOU) with the United States Nuclear Regulatory Commission (NRC) Staff, BLM acted as a cooperating agency during the preparation of the Draft and Final Supplemental Environmental Impact Statement (“DSEIS” & “FSEIS”). Given that it appears the sole remaining contention in this proceeding carries with it a requirement to supplement the FSEIS, BLM has no motivation to continue with its process until such time that the FSEIS is deemed complete and it can decide whether to accept the document as complete or provide further supplementation.

One tool NRC utilized to meet Section 106 requirements and, as a tangent to the NEPA process, was development of a Programmatic Agreement (PA). BLM also participated in NHPA efforts conducted by NRC and endorsed the PA. The PA provides conditions allowing for EPA to sign on at a later date and utilize such consultation, although it currently has yet to do so. Both agencies have already invested considerable effort participating in the consultation efforts led by NRC but are apparently unable to use this for their own permit approvals, as Contention 1A was just recently resolved, and there is no indication as of this date whether EPA will proceed with its permitting process or await the Board’s complete resolution of this administrative proceeding.

Without the ability to use the processes in place, which have already taken more than eight (8) years to develop and certify, BLM and EPA could be forced to conduct their own separate consultation efforts that would create duplicative cost and years of additional efforts providing further undue burden on the applicant. Responsibilities for such consultation efforts are strictly up to these agencies, and Powertech remains helplessly burdened as long as NRC Staff and the Board continue to deliberate on a resolution, and other agencies await the results, as Powertech cannot proceed with the project until all permits are obtained.

More specifically, the following information summarizes an example of the considerable and significant delays on Powertech and the specific permits and permitting processes that have been adversely affected by the considerable delays in the NRC and Board processes:

United States Environmental Protection Agency Underground Injection Control Permits, Class III and Class V

Evidence of past considerable and significant delays in the Dewey-Burdock ISR Project permitting process and the potential future delays in other such processes arises from permit applications submitted to EPA for UIC permits. Permit applications were first submitted to EPA in December of 2008, consistent with initial submittal of applications to NRC in February, 2009. EPA published the two draft permits for public comment in March, 2017 and final permits are currently pending. It should be noted these draft permits were issued about three years following issuance of the NRC license in April, 2014. Powertech understands the considerable delay in EPA process due to the ongoing litigation before the Board. In other supporting documents of the draft permit, notes from a December, 2014 meeting with the EPA Region 8 Regional Administrator, the following statement can be found:

“Mr. Clement asked what options EPA was considering in meeting its obligations for Section 106 NHPA compliance. Callie Videtich stated that while EPA would

prefer to designate NRC as the lead agency for the DB [Dewey-Burdock] project, EPA is awaiting the ASLB's final decision before deciding how to proceed"¹

Indeed, EPA did not act until the Board dismissed most of the contentions being heard.

Renewed efforts of EPA Region 8 also substantiate this to consult with Native American tribes by issuance of a second offer for consultation in November, 2015² following the Board's Partial Initial Decision in April, 2015 (LBP-15-16) where deficiencies in the Section 106 process were found. The draft permits included a separate document associated with compliance with the NHPA.³ From that document:

"The EPA has determined that the NHPA, which requires federal agencies to take into account the effects of their undertakings on historic properties, applies to its consideration of a UIC permit for the proposed Dewey-Burdock Uranium In-Situ Recovery (ISR) Project"

"The EPA is considering whether to rely solely on the NRC's Section 106 review and consultation, which would be accomplished by adopting the NRC PA and an EPA-specific addendum, or whether to complete a separate section 106 process."

EPA coordinated with NRC Staff during years of efforts on consultation which is summarized in the document as follows:

"Although the EPA did not elect to sign the NRC PA at the time it was finalized in March 2013, the EPA participated in many of the discussions the NRC had with Tribes before and during the development of the NRC PA, including the discussions about the Tribal Survey."

EPA states that it has reviewed NRC'S SEIS on cultural and historic properties. Such information could be used by reference, as stated by EPA:

¹ Summary of Notes from Regional Administrator Dec 17, 2014 Meeting with Powertech on the Proposed Dewey Burdock Uranium Project in South Dakota. https://www.epa.gov/sites/production/files/2017-03/documents/summary_of_notes_from_regional_administrator.pdf

² The initial offer for consultation was sent in May 2013, before the NRC license was issued

³ The Environmental Protection Agency, National Historic Preservation Act, Draft Compliance and Review Document for the Proposed Dewey-Burdock In-Situ Recovery Project, January 20, 2017.

https://www.epa.gov/sites/production/files/2017-03/documents/draft_national_historic_preservation_act_.pdf

“The EPA has reviewed existing information on historic properties within the APE [area of potential effect], including information developed by the NRC during its review process. This information is included in Section 3.9.3 of the NRC Supplemental Environmental Impact Statement prepared for the Dewey-Burdock Project (SEIS) and summarized in Appendix B of the NRC PA.”

Evidence that EPA is awaiting resolution of NRC activities on historic properties also can be found with the following statement in this document:

“The NRC has recently explained that it is considering some additional activities related to the identification of historic properties, and further that assessment and resolution of adverse effects still need to be carried out. *See* Summary of Meeting With the Oglala Sioux Tribe Regarding the Dewey-Burdock In-Situ Uranium Recovery Project (May 19, 2016), <http://www.nrc.gov/docs/ML1618/ML16182A069.pdf>. The EPA is continuing to review information and to consult with all parties to determine whether additional efforts must be taken to identify historic properties within the APE.”

This statement was made more than one (1) year prior to NRC Staff filing for summary disposition with the Board and the issuance of LBP-17-09. Even though the Board has resolved Contention 1A in favor of NRC Staff and Powertech, based on the statements above, there is no clear indication at this time as to whether EPA will await the Board’s final resolution of Contention 1B to issue final UIC permits.

South Dakota Large Scale Mine Permit

South Dakota Department of Environment and Natural Resources (DENR) staff recommended this application for approval and hearings began in 2013. After a few weeks of hearings and apparent difficulties due to both the NRC license and UIC permits being outstanding at the time, the Board of Minerals and Environment (BME) in November of that year ordered a continuance. From that order,

“Therefore, the BME will continue its hearing schedule for November 11, 2013 until such time as the NRC and EPA have ruled and set the federal surety, and the Water Management Board has decided the allocation rights and issues affecting SDCL 45-6B-33(4). This will greatly affect not only the repetitiveness of evidence necessary for the BME to decide the matter, but will also significantly narrow the issues and grounds upon which the permit can be denied under SDCL 45-6B-32 and 33 if approval

is attained from the agencies and boards. This would seem most consistent with federal preemption, statutory construction and the duties of the Board, especially in setting surety.”⁴

The order is attached for the Board’s reference and further describes South Dakota’s dependence on NRC and EPA to complete its process. As South Dakota is not an NRC Agreement State and has not been granted any regulatory authority otherwise possessed by NRC, or even EPA under the SDWA, the principal of “dual regulation” would prevent the board from acting.⁵

South Dakota Water Rights Permits and Groundwater Discharge Plan

These applications received recommendation for approval of South Dakota DENR Staff, and also began a separate hearing in 2013, which was also continued in November of that year. Upon receiving the order from the BME, Powertech made a motion requesting continuance of the South Dakota Water Management Board hearing, based on the NRC license and EPA permits being outstanding at the time. The order was granted which states:

“It is hereby ORDERED, that Powertech’s Motion to Continue be granted and the administrative hearing on Powertech’s applications pending before the board is continued until resolution by the federal agencies of Powertech’s pending Applications for the Dewey-Burdock Project set forth in this Order”

These applications have been described as follows:

“Powertech seeks to continue the above captioned matter until the United States Nuclear Regulatory Commission staff has issued a Source and Byproduct material License to Powertech for the Dewey-Burdock Project, had has determined financial assurance, and the United States Environmental Protection Agency has made aquifer exemption determination and issued Underground Injection Control Class II(I) and Class V permits to Powertech for the Dewey-Burdock Project, and had determined the financial assurance.”

⁴ South Dakota Board of Minerals and Environment Order, November 5, 2013 pg.4

⁵ *Northern States Power Co. v. Minnesota*, 447 F.2d 1143, 1154 (8th Cir. 1971)

Both orders require completion of NRC license and EPA permits, which each cover a broad scope of issues related to the project, including groundwater protection issues. As a result, these permits await completion of both NRC and EPA before resuming the respective hearings.

Programmatic Agreement

The programmatic agreement for the Project (PA) demonstrates involvement of BLM and EPA in the consultation efforts of NRC and shows that these federal agencies are intent on using the Section 106 process lead by NRC for their permits. Such efforts included the Advisory Council on Historic Preservation (ACHP), which specifically endorsed the initial conduct and completion of the Section 106 process by NRC and the South Dakota State Historic Preservation Office (SDSHPO). The following clauses are evidence of this fact:

“WHEREAS, under the terms of the General Mining Act of 1872 Powertech has filed Federal Lode mining claims and secured mineral rights on 240 acres [97 ha] of public lands open to mineral entry and administered by the U.S. Department of the Interior, Bureau of Land Management (BLM), and has the right to develop the mining claims as long as this can be accomplished without causing unnecessary or undue degradation to public lands and in accordance with pertinent laws and regulations under 43 CFR Subpart 3809;” pg. 1

“WHEREAS, review and approval of a Plan of Operations for the project that meets the requirements of 43 CFR Subpart 3809 by the BLM-South Dakota Field Office makes the project an undertaking requiring compliance by BLM with Section 106 of the NHPA, 16 U.S.C. § 470 and 36 CFR Part 800;” pg. 1

“WHEREAS, the BLM, by letter dated April 7, 2011, has designated the NRC as the lead agency for compliance with requirements of Section 106 of the NHPA regarding the Dewey-Burdock Project (ADAMS Accession No. ML11116A091) pursuant to 36 CFR § 800.2(a)(2) of the Section 106 regulations;” pg. 1-2

“WHEREAS, under the terms of the Safe Drinking Water Act, Powertech has submitted to the Environmental Protection Agency (EPA) two Underground Injection Control (UIC) Permit Applications for ISR uranium recovery and the disposal of treated ISR process fluids at the Dewey-Burdock site; the EPA will issue draft permit decisions that meet the requirements of UIC regulations found at 40 CFR Parts 124, 144, 146 and 147;” pg. 2

WHEREAS, in accordance with 36 CFR § 800.6(a)(1)(i)(C), the NRC, by letter dated April 24, 2013, notified the Advisory Council on Historic Preservation (ACHP) of the potential for

adverse effects to historic properties from the undertaking and invited the ACHP to participate in Section 106 consultation and in the preparation of this PA;”

“WHEREAS, the ACHP, by letter, dated October 28, 2013, formally entered the consultation; pg 2

WHEREAS, the NRC initiated consultation with the South Dakota State Historic Preservation Officer (SD SHPO) on December 2, 2009, during a face-to-face meeting held in Pierre, South Dakota;” pg. 2

“WHEREAS, the BLM, as a federal agency with a federal action related to this undertaking has participated in the Section 106 consultation and development of this agreement and will be a signatory;” pg. 2

“WHEREAS, the EPA has participated in discussions of this agreement” pg. 2

The ability of EPA to adopt the Programmatic Agreement at later date is provided as follows:

“7) Coordination with Other Federal Reviews: Any federal agency that will provide approvals or assistance for the undertaking as presently proposed may comply with its Section 106 responsibilities for the undertaking by agreeing to the terms of this PA in writing and sending copies of such written agreement to all the signatories and consulting parties of this PA. Such agreement to the terms of this PA will not necessitate an amendment to the PA.” pg. 4

As of this date, EPA has not signed on to the PA while BLM has done so. But, despite resolution of Contention 1A by the Board, it still remains unclear what, if any, Section 106-related actions will be conducted by either of these agencies. More specifically to BLM, given that it is a cooperating agency with NRC Staff on the FSEIS, it remains even more unclear whether any additional information in the supplemented FSEIS will result in additional BLM processes and whether BLM will accept NRC’s FSEIS in full or in part and require an additional supplement, both of which BLM is entitled to do by regulation.

Due to the effort and time already expended on the such efforts not only by NRC but also the cooperation and participation by EPA and BLM for years on the FSEIS, it appears logical that they were awaiting the Board’s (or the Commission’s) resolution of Contentions 1A *and* 1B, so that the process they began in coordination with NRC can be applied to their own permit

actions as was originally intended. Additionally, given that the South Dakota authorities are not going to proceed until NRC and EPA have completed their processes, the delays in NRC's processes and the Board deliberations will effectively stretch other processes into the considerable future.

Furthermore, with respect to the additional federal and State processes required for the Project, each involves its own administrative processes for interested stakeholders as evidenced by the South Dakota LSM permit process. While it is unclear how long these administrative processes will take at each agency, the sheer length of NRC's and the Board's processes is further evidence that Powertech will continue to be required to expend investment capital without cash flow in order to finally proceed with site development and operation.

In summary, the documents discussed above are attached for the Board's reference and the explanations provided above offer substantial proof that the delays in the NRC Staff's and the Board's processes have caused substantial harm to Powertech. As stated on the November 16, 2017, telephonic hearing/status call, Powertech does not currently have an available source of cash flow other than investment capital. Powertech's initial development priority is the Dewey-Burdock ISR Project; thus, Powertech cannot generate revenues without constructing and operating the Project itself. The permitting delays noted above significantly impact the financial viability of Powertech as further investment capital needs to be sourced. NRC Staff processes to resolve Contention 1B will result in Powertech expending resources to fund legal and environmental experts, as well as pay for NRC Staff and their contractor(s)' billable time.

As stated above, the identified agencies will not allow such construction and operational activities to occur without the issuance of full, *bona fide*, permits and/or authorizations. Thus, even though Powertech has an active license with NRC for this Project, there can be no site

construction without these other permits and/or authorizations. Therefore, Powertech hereby requests that the Board take judicial notice of these documents and explanations and, additionally, commits to providing the Board with further updates on such matters if new information should arise.

Respectfully submitted,

/Signed (electronically) by/ Christopher S. Pugsley

Dated: December 11, 2017

Anthony J. Thompson, Esq.
Christopher S. Pugsley, Esq.
Thompson & Pugsley, PLLC
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Washington, DC 20036
COUNSEL TO POWERTECH (USA), INC.

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of:

POWERTECH (USA), INC.

(Dewey-Burdock In Situ Uranium Recovery
Facility)

)
)
) Docket No.: 40-9075-MLA

)
) Date: December 11, 2017
)
)
)

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing “**POWERTECH (USA), INC.’S REQUEST TO TAKE JUDICIAL NOTICE**” in the above-captioned proceeding have been served via the Electronic Information Exchange (EIE) this 11th day of December 2017, which to the best of my knowledge resulted in transmittal of the foregoing to those on the EIE Service List or electronic mail service as appropriate for the above captioned proceeding.

Respectfully Submitted,

**/Executed (electronically) by and in
accord with 10 C.F.R. § 2.304(d)/
Christopher S. Pugsley, Esq.**

Dated: December 11, 2017

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COUNSEL TO POWERTECH (USA), INC.

STATE OF SOUTH DAKOTA
DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES

BOARD OF MINERALS AND ENVIRONMENT

IN THE MATTER OF POWERTECH)	
(USA), INC. APPLICATION FOR LARGE)	ORDER
SCALE MINING PERMIT)	
(Dewey-Burdock Project))	

At the conclusion of the first week of the contested case hearing on the application of the Large Scale Mining Permit of Powertech (USA) Inc., the Board requested the parties file briefs concerning the following:

1. Whether SDCL 45-6B-32 requires compliance with “all applicable local, state, and federal laws” (i.e. permits under the jurisdiction of the NRC and EPA etc.) as a condition precedent to the granting of a state permit? and
2. If so, what are those “laws” that need to be complied with?

The hearing examiner has reviewed the briefs and considered the statutory construction of SDCL 45-6B in total to determine whether the Board of Minerals and Environment (BME) is further able to fully consider the grant or denial of the permit without waiting for the other agencies and boards of the local, state and federal government to first rule on the licenses or permits within their respective jurisdictions. The failure of any of those other agencies or boards to grant their licenses, permits or other approvals may render a predetermination of the BME on the permit moot or potentially in conflict.

The Board of Minerals and Environment is charged by statute to grant or deny a large scale mining permit in accordance with SDCL 45-6B. “The application for the permit must

comply with the requirements of this chapter and all applicable local, state and federal laws.”

SDCL 45-6B-32. Further, the permit may only be denied for the specific reasons set forth in the statute including whether “[a]ny part of the proposed mining operation, the reclamation program, or the proposed future use is contrary to the laws or regulations of this state or the United States.” Id at (3). The Board is also required to set a surety, and as part of the consideration, “shall also consider any surety... required by an agency of the federal government...” 45-6B-21.

The federal government has largely preempted the States’ ability to regulate nuclear materials. *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238,248, 104 S.Ct. 615 (1984). This authority primarily lies with the Nuclear Regulatory Commission (NRC). Further South Dakota is not an agreement state and has not been granted any regulatory authority otherwise possessed by the NRC. The Board recognizes its limited jurisdictional role in this matter especially where the principle of “dual regulation” would prevent the Board from acting. *Northern States Power Co. v Minnesota*, 447 F.2d 1143, 1154 (8th Cir. 1971).

Federal influence on the BME’s decision is also recognized in SDCL 45-6B-21 in setting the required surety. The Board “shall also consider any surety required by an agency of the federal government...” The surety must not only be set, but “posted” under 45-6B-32(1) before the permit is granted.

In addition to the NRC and Environmental Protection Agency (EPA), the South Dakota Water Management Board must determine amongst other issues whether the state will allocate its water resources to this large scale mining operation.

All of the involved agencies have commenced their processes of acting on the applications of Powertech. The parties agree that 45-6B-4 appears to be the only statute that provides express guidance on the BME conditionally approving a permit. However, the

conditional permit approval applies only to local government and is based on substantial compliance by the operator or administrative delay by the local entity. No other statute in 45-6B appears to expressly provide for a conditional approval for requirements of any state or federal agency.

The briefs of the parties also appear to agree on the law of statutory construction, but draw opposite conclusions. The Hearing Examiner concludes that had the Legislature desired conditional approval for state and federal agencies' requirements, it would have so indicated. Rather, the language of the statute read in conjunction with the Chapter compels the legal conclusion that compliance with "all applicable local, state and federal laws" are conditions precedent to granting a permit.

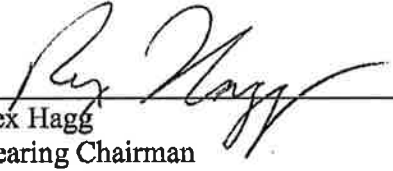
The Hearing Examiner is mindful of the apparent statutory intent to procedurally provide timely action on an application (eg. 45-6B-30). However, if the Board is substantively charged with seeing that "all applicable local, state, and federal laws" have been complied with, if the Board in setting the surety "shall also consider any surety required by an agency of the federal government (45-6B-22) and if the BME is to evaluate whether "the proposed mining operation will result in the loss or reduction of long-range productivity of aquifer[s]...."(45-6B-33(4)) before the Water Management Board rules, the BME cannot conditionally approve the permit and fulfill its statutory duties. Granted there will be post permit administrative duties that will be necessary if the permit is approved that the DENR is authorized to administer or are part of the Board's monitoring jurisdiction, however the above are not. *See* DENR Recommended Conditions.

Therefore, the BME will continue its hearing scheduled for November 11, 2013 until such time as the NRC and EPA have ruled and set the federal surety, and the Water Management

Board has decided the allocation rights and issues affecting SDCL 45-6B-33(4). This will greatly affect not only the repetitiveness of evidence necessary for the BME to decide the matter, but will also significantly narrow the issues and grounds upon which the permit can be denied under SDCL 45-6B-32 and 33 if approval is attained from the other agencies and boards. This would seem most consistent with federal preemption, statutory construction and the duties of the Board, especially in setting the surety. Powertech may expect that the BME will act timely upon receipt of such decisions.

The motion of Wild Horse Sanctuary to deny the application is denied. The motion of Clean Water Alliance to dismiss is denied, and the motion to defer is granted in part to the extent consistent with this Order.

Dated this 5th day of November, 2013.



Rex Hagg
Hearing Chairman
PO Box 8008
Rapid City, SD 57709-8008



United States Department of the Interior

BUREAU OF LAND MANAGEMENT

South Dakota Field Office

310 Roundup Street

Belle Fourche, South Dakota 57717-1698

www.blm.gov/mt



In Reply Refer To:

3809 (LLMTC040)

April 7, 2011

Larry W. Camper, Director
Division of Waste Management and Environmental Protection
Office of Federal and State Materials and Environmental Management Programs
Mail Stop T -8F5
Washington, DC 20555

Dear: Mr. Camper:

This letter is in regards to the Powertech (USA) Inc. Dewey Burdock In-Situ Recovery (ISR) Project Plan of Operations package submittal. Powertech (USA) Inc. formally submitted the Dewey Burdock ISR Project Plan of Operations to the South Dakota Field Office on October 23, 2009.

In accordance with the Nuclear Regulatory Commission-Bureau of Land Management Memorandum of Understanding, I would like to clarify the cooperating agency status between the NRC and the BLM, and how it applies to the lead agency role. In evaluating the Dewey Burdock project through the National Environmental Policy Act (NEPA) review, the NRC will be the lead agency, with the BLM submitting comments to the NRC for respective input into the NEPA approval document.

The BLM is requesting, in the spirit of cooperation, that the South Dakota Field Office individual specialists be consulted for their expertise and local area knowledge regarding the proposed Dewey Burdock Project.

Please contact me at 605-892-7001 with any concerns you may have.

Sincerely,

Marian M. Atkins
South Dakota Field Manager
Bureau of Land Management

cc: Richard Blubaugh

STATE OF SOUTH DAKOTA
DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES
WATER MANAGEMENT BOARD

IN THE MATTER OF WATER)
PERMIT APPLICATIONS 2685-2)
and 2686-2, POWERTECH (USA),)
INC.)

ORDER GRANTING POWERTECH'S
MOTION TO CONTINUE

IN THE MATTER OF THE 2012)
GROUNDWATER DISCHARGE)
PLAN APPLICATION SUBMITTED)
BY POWERTECH (USA), INC.)

Applicant Powertech (USA) Inc. filed Powertech's Motion to Continue, dated November 19th, 2013 in which Powertech seeks to continue the administrative hearing in the above captioned matter until the United States Nuclear Regulatory Commission staff has issued a Source and Byproduct material License to Powertech for the Dewey-Burdock Project, had has determined the financial assurance; and the United States Environmental Protection Agency has mad aquifer exemption determinations and issued Underground Injection Control Class II and Class V permits to Powertech for the Dewey-Burdock Project, and has determined the financial assurance. Further, all Intervenors who recently filed submissions regarding the Board's jurisdiction and authority over Powertech's pending applications have requested that the Board continue the hearing pending resolution of Powertech's pending federal applications regarding the Dewey-Burdock Project. Intervenor's postion is consistent with their previous motions to continue the hearing in this matter.

Upon consideration of Powertech's Motion to Continue, the parties' arguments and comments, and the administrative record before the Board, the

Hearing Chair that finds that Powertech's Motion to Continue is legally and factually supportable and that Intervenor's are supportive of continuing this the hearing on the applications. The Hearing Chair therefore finds good cause has been shown to continue this matter and that no party will be prejudiced by the continuance.

It is hereby ORDERED, that Powertech's Motion to Continue is granted and that the administrative hearing on Powertech's applications pending before the Board is continued until resolution by the federal agencies of Powertech's pending applications for the Dewey-Burdock Project set forth in this Order.

Dated this 25th day of November, 2013.

A handwritten signature in black ink, appearing to read 'Rodney Freeman', is written over a horizontal line.

Rodney Freeman, Hearing Chair
South Dakota Water Management Board

CERTIFICATE OF SERVICE

The undersigned hereby certifies that true and correct copies of ORDER GRANTING POWERTECH'S MOTION TO CONTINUE in the above entitled matter was served upon the following by enclosing the same in envelopes with first class postage prepaid and affixed thereto, and depositing said envelopes in the United States mail on November 25, 2013:

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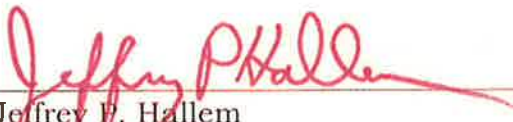
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P.O. A / 412nd
Edgemont, SD 57735

Attn: Government Documents
Rapid City Public Library
610 Quincy St.
Rapid City, SD 57701

Attn: Doris Ann Mertz
Custer County Library
447 Crooks Street, Suite 4
Custer, SD 57730

And on the same date the original was mailed interoffice to Eric Gronlund,
Joe Foss Building, 523 E. Capitol Ave, Pierre, SD 57501.



Jeffrey P. Hallem
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United States Department of the Interior

BUREAU OF LAND MANAGEMENT
South Dakota Field Office
310 Roundup Street
Belle Fourche, South Dakota 57717-1698
www.blm.gov/mt



In Reply Refer To:
3809/3715 (MTC040)
SDM 99819

CERTIFIED MAIL- RETURN RECEIPT REQUESTED
#7013-0600-0000-2331-7229



Powertech (USA) Inc.
Attn: Richard E. Blubaugh
5575 DTC Parkway, Suite 140
Greenwood Village, CO 80111

RE: Dewey Burdock Project Plan of Operations

Additional information for your Plan of Operations (SDM 99819) to conduct mining activities in Sections 10 & 11, Township 7 South, Range 1 East, BH Mer., Fall River County, South Dakota, was received in this office on November 24, 2014. Consistent with the surface management regulations at 43 CFR 3809.411(a), the BLM has reviewed the Plan and has determined that the filed Plan of Operations meets the content requirements at 43 CFR 3809.401(b) and 43 CFR 3809.401(d). Note this notification does not constitute authorization to commence operations nor is the submission of a complete Plan necessarily adequate to meet the performance requirements of the regulations and avoid unnecessary and undue degradation.

Be advised the next step in the review process is for the BLM to solicit public comment on the Plan of Operations under 43 CFR 3809.411(c), either separate from or as a part of the environmental review process required by the National Environmental Policy Act. Soliciting public comment must occur before making an approved/not approved decision on the Plan of Operations according to 43 CFR 3809.411(d). The BLM estimates we will complete our review and make an approval decision on the Plan by March 31, 2015.

Please contact Nate Arave, Solid Minerals Geologist, at 406-233-3163 if you have any further questions.

Sincerely

Chip Kimball
Field Manager

cc: Haimanot Yilma
U.S. NRC
Mailbox T8F05
11545 Rockville Pike
Rockville, MD 20852

**Summary of Notes from RA Meeting with Powertech on the Proposed Dewey Burdock Uranium Project in South Dakota
December 17, 2014**

Attendees for Powertech: Richard Clement, John Mays, Hal Demuth, and Bob Van Voorhees (by phone)
Attendees for EPA: Shaun McGrath, Callie Videtich, Joan Card, Douglas Minter, Sadie Hoskie, and Bob Ward

- After introductions, Richard Clement, CEO, provided a brief history of uranium exploration and development in/around the Dewey Burdock (DB) project site. He noted that the NRC's Atomic Safety Licensing Board (ASLB) should conclude its evidentiary hearing process by the end of January, 2015. A final decision by the ASLB is expected within 90 days thereafter.
- Mr. Clement noted that: 1) Powertech would consider in-situ recovery operations at "Dewey Terrace" in eastern Wyoming at a later date; 2) Azarga, an international company, is now the primary owner of the company but that Powertech USA is still the operating entity for purposes of regulatory permitting in the US; and 3) between 8.5 and 9.5 million pounds of recoverable uranium deposits have been identified at DB and that Powertech expects to conduct ISR operations for 20 years.
- Hal Demuth, regulatory consultant for Powertech's UIC permits, noted that while there are "some unknowns" regarding what the data show to support UIC permitting, Powertech has met the UIC requirements in its permit applications to EPA. He also asked why the UIC Class III and V permits had not been issued by EPA?
- John Mays, COO, provided a handout showing the chronology of all regulatory agency actions associated with the DB project including NRC licensing and SD DENR permitting. Referring to this handout, he claimed that EPA has taken many more months in proposing its permitting decisions than any other agency. He stated that EPA has not been clear on if/when it plans to issue its draft permits, and has not provided a satisfactory explanation as to why it has taken so long. He also said that he was "surprised" by EPA when it recently brought two issues (i.e., current use of ore-bearing aquifers and cumulative effects related to surface pond design) to his attention, months after Powertech provided the final UIC permit applications to EPA.
- Shaun McGrath acknowledged Powertech's frustration and stated the EPA "has what we need" to propose its UIC permitting decisions. He also stated that we are in the "final stages" of drafting the permits and aquifer exemption, and that EPA does intend to propose issuance of both permits and the AE for public comment.
- Mr. Clement asked what issues EPA expects to address in its public comment period and who it expects to oppose the DB project. Bob Ward responded that EPA would need to wait for the public comment period to know the answer to these questions.
- Mr. Demuth provided a handout showing that since 2008 EPA had: 1) issued a number of UIC permits; and 2) EPA had approved a number of AEs associated with State UIC permits. He stated that while EPA has made a significant investment in this work, he questioned whether EPA had made a comparable investment in drafting UIC permits for the DB project.
- Mr. Clement asked what options EPA was considering in meeting its obligations for Section 106 NHPA compliance. Callie Videtich stated that while EPA would prefer to designate NRC as the lead agency for the DB project, EPA is awaiting the ASLB's final decision before deciding how to proceed.
- At the close of the meeting, Bob Van Voorhees suggested that EPA consider holding an open public meeting to educate stakeholders on the purpose of EPA UIC permits and AE for the DB project. Shaun stated that EPA would consider this suggestion as part of its public participation process.

**The Environmental Protection Agency
National Historic Preservation Act
Draft Compliance and Review Document
for the Proposed Dewey-Burdock In-Situ Uranium Recovery Project
January 20, 2017**

Introduction

As part of the Underground Injection Control (UIC) permitting process, the Environmental Protection Agency is required to consider whether section 106 of the National Historic Preservation Act (NHPA) applies to the issuance of a UIC permit (40 CFR § 144.4). The EPA has determined that the NHPA, which requires federal agencies to take into account the effects of their undertakings on historic properties, applies to its consideration of a UIC permit for the proposed Dewey-Burdock Uranium In-Situ Recovery (ISR) Project (Project). This document describes the status of the EPA's review and consultation process under section 106 and the 36 CFR Part 800 regulations issued by the Advisory Council on Historic Preservation (ACHP), and how the EPA plans to complete that process. The EPA is coordinating its NHPA review efforts with other required federal reviews. 36 CFR § 800.3(b).

Initial Steps in the NHPA Section 106 Process

As an activity requiring federal approval, the Project is a federal undertaking. 36 CFR §§ 800.3, 800.16(y). Further, the EPA has determined that this undertaking has the potential to cause effects on historic properties. 36 CFR § 800.3(a). Because the Site is not located on tribal lands (as they are defined in the ACHP regulations at 36 CFR § 800.16(x)), the EPA is consulting with the South Dakota State Historic Preservation Office (SHPO). 36 CFR §§ 800.2(c)(1) and 800.3(c).

In coordination with the SHPO, the EPA has identified several consulting parties: the 38 federally recognized tribes listed in Table 1; the Nuclear Regulatory Commission (NRC), which has issued a Source and Byproduct Materials License for the undertaking; and the Bureau of Land Management (BLM). See 36 CFR § 800.3(f). The BLM manages 240 acres of land within the proposed Dewey-Burdock Project Area and is responsible for issuing a Plan of Operations for the project. The BLM has designated the NRC as the lead agency for the NHPA 106 process, and in connection with that designation has signed a Programmatic Agreement (PA) developed by the NRC. See

<http://www.nrc.gov/info-finder/materials/uranium/licensed-facilities/dewey-burdock/section-106-project-docs.html>.

The EPA's Options for Completing the NHPA Section 106 Consultation Process

The EPA is considering whether to rely solely on the NRC's section 106 review and consultation, which would be accomplished by adopting the NRC PA and an EPA-specific addendum, or whether to complete a separate section 106 process. Among the factors the EPA is reviewing is whether additional survey efforts need to be undertaken within the Area of Potential Effects (APE). The EPA will seek to stay apprised of any discussions of potential additional survey work. If the EPA does choose to adopt the PA, the Agency would consult with the NRC and ACHP on the terms of the addendum. Those terms could involve further coordination with the NRC and other consulting parties (including tribes and the Permittee) to assist in the NRC-led efforts to complete identification of historic properties, which includes traditional cultural properties, and the assessment and resolution of adverse effects.

If the EPA chooses to conduct its own section 106 review, the Agency would rely on the work already completed by the NRC and would also work with consulting parties to complete identification of historic properties and the assessment and resolution of adverse effects.

While the EPA is deciding which of these two approaches to take, the agency is proceeding to address its section 106 responsibilities, as described in the rest of this document.

The Area of Potential Effect (36 CFR §§ 800.4(a)(1), 800.16(d))

In coordination with the SHPO, the EPA has identified an APE for the Dewey-Burdock Project Area. As depicted in Figure 1, the APE consists of 3,887 acres within the 10,580-acre Dewey-Burdock Project Area described in Section 2.1 of the UIC Class III Area Permit Fact Sheet. The APE encompasses all areas where land-disturbing activities are expected to occur, with the area of actual disturbance depending on whether the permittee uses deep injection wells or land application as the disposal method for waste fluids. Figure 1 shows the areas that will be affected with each disposal method. If deep injection wells are used, then 243 acres of land will be disturbed. The APE includes a buffer zone of 2,394 acres around this area, for a total of 2,637 acres, which is shown in the lighter shade of purple in Figure 1. If land application is used, then an additional 1,250 acres will be disturbed, which is shown in the darker shade of purple in Figure 1. Therefore, the APE is a total of 3,887 acres.

Identification of Historic Properties (36 CFR §§ 800.4(a), (b), (c))

The EPA has reviewed existing information on historic properties within the APE, including information developed by the NRC during its review process. This information is included in Section 3.9.3 of the NRC Supplemental Environmental Impact Statement prepared for the Dewey-Burdock Project (SEIS) and summarized in Appendix B of the NRC PA. Historic properties include prehistoric and historic districts, sites, structures, and objects — including properties of traditional religious and cultural importance to Indian tribes — that meet the criteria for inclusion on the National Register of Historic Places. Information gathered to date indicates that the APE contains properties eligible for inclusion in the National Register of Historic Places. *See SEIS*, Section 3.9.3. The NRC has recently explained that it is considering some additional activities related to the identification of historic properties, and further that assessment and resolution of adverse effects still need to be carried out. *See Summary of Meeting With the Oglala Sioux Tribe Regarding the Dewey-Burdock In-Situ Uranium Recovery Project* (May 19, 2016), <http://www.nrc.gov/docs/ML1618/ML16182A069.pdf>. The EPA is continuing to review information and to consult with all parties to determine whether additional efforts must be taken to identify historic properties within the APE.

Based on the information we have reviewed to date, and subject to resolving concerns identified in the NRC administrative review process, the EPA believes that the level of work completed under the auspices of the NRC on the Class III Cultural Resources Survey appears thorough and comprehensive for the APE defined by the NRC, provided the PA stipulations are followed concerning the unexpected discovery of additional historical properties.

Assessment and Resolution of Effects on Historic Properties (36 CFR § 800.5)

If the EPA adopts the NRC PA, the EPA will coordinate with the NRC and other consulting parties to assist as appropriate in the assessment and resolution of adverse effects.

If the EPA completes its own section 106 review, the EPA intends to follow a phased process for section 106 compliance (similar to that being employed by NRC), in which the evaluation of and determinations

of effects on historic properties, and consultation concerning measures to avoid, minimize, or mitigate any adverse effects, will be carried out in phases. In those efforts the EPA will work with the SHPO, interested tribes, and other consulting parties to develop and evaluate alternatives or modifications to the undertaking that could avoid, minimize or mitigate adverse effects on historic properties.

Section 106 Consultation with Indian Tribes

The EPA acknowledges that Indian tribes possess special expertise in assessing the National Register eligibility of historic properties that possess religious and cultural significance. Further, the EPA recognizes the obligation of federal agencies to consult with tribes that may attach religious or cultural significance to historic properties that may be affected by an undertaking. A summary of the EPA section 106 tribal consultation efforts to date follows. (Many of these overlapped with the EPA consultation efforts under the EPA Policy on Consultation and Coordination with Indian Tribes (Policy), available at <https://www.epa.gov/tribal/epa-policy-consultation-and-coordination-indian-tribes>. That policy describes a separate obligation to consult with federally recognized tribes based on the federal government's trust responsibility. The efforts described below may also relate to consultation under the EPA Policy, but the focus of these discussions is the section 106 consultation process.)

Although the EPA did not elect to sign the NRC PA at the time it was finalized in March 2013, the EPA participated in many of the discussions the NRC had with tribes before and during the development of the NRC PA, including the discussions about the Tribal Survey. During that period of time, the tribes requested that the EPA provide information on (1) Cheyenne River water quality; (2) radiation sources and risks at uranium in-situ recovery (ISR) sites; (3) the geology and hydrology at the Dewey-Burdock site, and potential impacts from the ISR process; and (4) seismicity at the site. To date, the EPA has conducted web conferences presenting information on the first three topics, but has not yet conducted the web conference on seismicity.

In May 2013, the EPA sent a notification letter to 35 of the 38 federally recognized Indian tribes listed in Table 1 (see footnote for Table 1) regarding the UIC permit application for the project. The EPA's letter provided information about the project, informed the tribes about the opportunity for government-to-government consultation under section 106 of the NHPA, and provided information on one of the informational web conferences to be conducted by the EPA on a topic the tribes had previously requested.

The EPA has also engaged tribal leaders at a number of meetings to conduct "inform and educate" sessions in preparation for government-to-government consultation. These sessions include a presentation at the Rocky Mountain Tribal Leaders Council Quarterly Meeting in Billings, Montana, in August 2015; a meeting with South Dakota, North Dakota and Montana Tribal Historic Preservation Officers in Bismarck, North Dakota, in September 2015; a meeting with the Santee Sioux and Ponca Tribes of Nebraska in Lenexa, Kansas, in October 2015; and a presentation at the Great Plains Tribal Chairman's Association Meeting in Rapid City, South Dakota, in October 2015.

In November 2015, the EPA mailed a letter to the 38 federally recognized Indian tribes listed in Table 1. This letter invited tribes to participate in government-to-government consultation under the EPA's *Policy for Consultation and Coordination with Indian Tribes* and NHPA section 106. In reply to the invitation letter, the EPA received requests for consultation from the following Tribes:

- Cheyenne River Sioux Tribe
- Crow Tribe
- Gros Ventre and Assiniboine Tribes of Fort Belknap
- Oglala Sioux Tribe
- Northern Arapaho Tribe
- Santee Sioux Tribe
- Standing Rock Sioux Tribe
- Upper Sioux Community

The EPA endeavored to engage in a first round of government-to-government consultation meetings with each interested tribe before the issuance of the UIC draft permits. The EPA completed the first round of consultation meetings. However, the EPA was unable to schedule a meeting with the Cheyenne River Sioux Tribe. The EPA met with Oglala Sioux Tribal leaders, but was informed that the Tribe considered these meetings to be “inform and educate” meetings rather than government-to-government consultation. Additional attempts by the EPA to enter into government-to-government consultation with the Oglala Sioux Tribe have been unsuccessful.

The EPA has considered the concerns and input on the proposed project received from tribes to date, and has incorporated these concerns as appropriate into the UIC draft permit requirements and the cumulative effects analysis document. The EPA anticipates further consultation with tribes to complete the NHPA section 106 process.

The EPA's tribal consultation activities and related communications are summarized in the Appendix to this document.

Public Involvement in the EPA's NHPA Section 106 Process

Public participation in the EPA's NHPA review will occur through the UIC program's public involvement procedures, which allow for public notice and comment on the draft UIC permit and its supporting record. See 36 C.F.R. §§ 800.2(d), 800.3(e); 40 CFR § 124.10. Specifically, the EPA is seeking public comment on the identification of traditional cultural properties at the Dewey-Burdock Project Site APE, on the potential adverse effects of the proposed project, and on measures to avoid, minimize, or mitigate potential adverse effects on historic and traditional cultural properties pursuant to 36 CFR §800.2(d) and §800.6(a)(4).

How to Provide Comments to the EPA

Written comments must be received by email, fax or mail sent to:

Valois Shea (shea.valois@epa.gov)

Fax: 303-312-7084

U.S. EPA Region 8

Mail Code: 8WP-SUI

1595 Wynkoop Street

Denver, CO 80202-1129

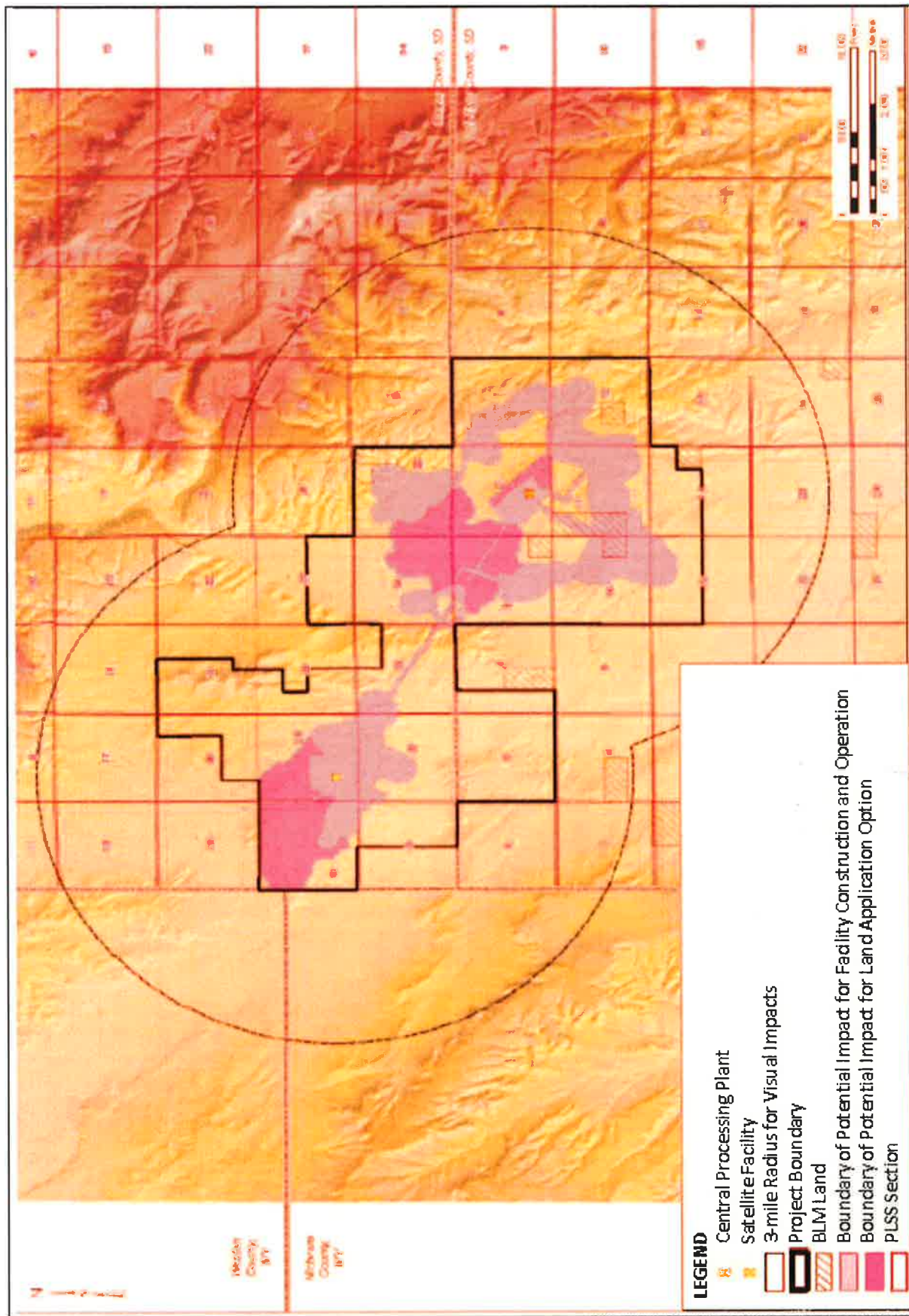


Figure 1. Map Showing Area of Potential Effect (APE) for the Proposed Dewey-Burdock ISR Project
(from Appendix A of the NRC Programmatic Agreement)

Table 1. List of Tribes Identified as Potential Consulting Parties.

1	Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation
2	Apache Tribe of Oklahoma
3	Blackfeet Tribe of Blackfeet Indian Reservation
4	Cheyenne and Arapaho Tribes of Oklahoma
5	Cheyenne River Sioux Tribe of the Cheyenne River Reservation
6	Chippewa-Cree Tribe of Rocky Boy's Reservation
7	Confederated Salish & Kootenai Tribes of the Flathead Reservation
8	Crow Creek Sioux Tribe of the Crow Creek Reservation
9	Crow Tribe of the Crow Indian Reservation
10	Eastern Shoshone Tribe of the Wind River Reservation
11	Flandreau Santee Sioux Tribe of the Flandreau Santee Sioux Reservation
12	Gros Ventre and Assiniboine Tribes of the Fort Belknap Reservation
13	Kiowa Indian Tribe of Oklahoma
14	Lower Brule Sioux Tribe of the Lower Brule Reservation
15	Lower Sioux Indian Community
16	Northern Arapahoe Tribe of the Wind River Reservation
17	Northern Cheyenne Tribe of the Northern Cheyenne Indian Reservation
18	Northwestern Band of Shoshoni Nation
19	Oglala Sioux Tribe of the Pine Ridge Reservation
20	Omaha Tribe of Nebraska ¹
21	Paiute Indian Tribe of Utah
22	Ponca Tribe of Indians of Oklahoma ¹
23	Ponca Tribe of Nebraska ¹
24	Prairie Island Indian Community
25	Rosebud Sioux Tribe of the Rosebud Indian Reservation
26	Santee Sioux Tribe of the Santee Reservation
27	Shakopee Mdewakanton Sioux Community
28	Sisseton-Wahpeton Oyate of The Lake Traverse Reservation
29	Skull Valley Band of Goshutes of the Skull Valley Reservation
30	Southern Ute Indian Tribe of the Southern Ute Reservation
31	Spirit Lake Nation Tribe of Fort Totten Reservation
32	Standing Rock Sioux Tribe of the Standing Rock Sioux Reservation
33	Three Affiliated Tribes of Fort Berthold Reservation
34	Turtle Mountain Band of Chippewas of the Turtle Mountain Reservation
35	Upper Sioux Community
36	Ute Indian Tribe of the Uintah and Ouray Reservation
37	Ute Mountain Ute Tribe of the Ute Mountain Reservation
38	Yankton Sioux Tribe of the Yankton Sioux Reservation

¹ The Omaha Tribe of Nebraska, the Ponca Tribe of Indians of Oklahoma and the Ponca Tribe of Nebraska did not receive the May 2013 letter from EPA.

APPENDIX
EPA Tribal Consultation Activities
Dewey-Burdock Uranium In-Situ Recovery Project,
Southern Black Hills, South Dakota

ACTIVITY	DATE	NOTES
An EPA representative attended the Nuclear Regulatory Commission (NRC) Tribal Consultation Meeting for Dewey Burdock and Crow Butte in Rapid City	February 2012	Tribes requested the EPA provide information on 4 topics: <ol style="list-style-type: none"> 1. Cheyenne River Water Quality 2. Radiation Sources and Risks at uranium ISR sites 3. Geology & Hydrology at the Dewey Burdock site and potential impacts from the ISR process. 4. Seismology at the site.
Web conference on Cheyenne River Water Quality	March 2013	
Web Conference on Radiation Sources and Risks at uranium ISR sites	April 2013	
Sent invitation letters to Tribal government leaders; cc'ed Environmental Directors and Tribal Historic Preservation Officers	Mailed and emailed letter May 28-30, 2013	Invitation for NHPA Section 106 consultation and provided information on the informational web conferences the EPA committed to conducting. Information about the first web conference was included in the letter.
Web conference on Geology & Hydrology at the Dewey Burdock site and potential impacts from the ISR process	June 2013	
Contacted Kelly Fanizzo, Advisory Counsel for Historic Preservation liaison to the EPA	November 15, 2013	Discussed the procedure for EPA to sign on to designate the NRC as lead agency for the NHPA 106 process and to sign on to the NRC Programmatic Agreement at a later date
Contacted SD SHPO, Paige Olsen	November 15, 2013	Discussed the EPA's option to sign on to designate the NRC as lead agency for the NHPA 106 process and to sign on to the NRC Programmatic Agreement at a later date

ACTIVITY	DATE	NOTES
Conference call with Kelly Fanizzo, Paige Olsen & John Eddins, ACHP liaison to the NRC	December 3, 2013	Topics Discussed: <ol style="list-style-type: none"> 1. Quick overview of the Dewey Burdock project 2. History of the Nuclear Regulatory Commission's 106 process for the Dewey Burdock 3. The EPA's plan to wait until a later date to designate the NRC as lead agency and adopt the NRC PA
Meeting with Oglala Sioux Tribe representatives in Hot Springs, SD	June 11, 2015	The EPA Regional Administrator requested a meeting with Oglala Sioux Tribal representatives
Presentation at the Rocky Mountain Tribal Leaders Council Quarterly Meeting Billings, MT	August 13, 2015	
Presentation at meeting with South Dakota, North Dakota and Montana Tribal Historic Preservation Officers in Bismarck, ND	September 10, 2015	In conjunction with ND DOT meeting
Presentation at meeting with Santee Sioux and Ponca Tribes of Nebraska in Kansas City	October 28, 2015	
Presentation at meeting with the Great Plains Tribal Chairman's Association Meeting in Rapid City	October 30, 2015	
Consultation invitation letters sent to Oklahoma Tribes	November 6, 2015	
Sent out letter inviting 38 tribes to participate in the NHPA 106 and the EPA consultation process	November 25, 2015	
Webinar with Environmental Director of Santee Sioux Tribes	February 19, 2016	Web conference
Webinar with THPOs from MN Sioux Tribes	February 22, 2016	Web conference
Consultation Meeting with the Crow Tribe in Billings, MT	March 1, 2016	Meeting in person at the BIA Building

ACTIVITY	DATE	NOTES
Consultation Meeting with the Northern Arapaho Tribe	March 2, 2016	Conference call and webinar
Consultation Meeting with the Assiniboine and Gros Ventre Tribes of Fort Belknap in Billings, MT	March 3, 2016	Meeting in person at the BIA Building
Consultation meeting scheduled with the Cheyenne River Sioux Tribe	March 8, 2016	Meeting was cancelled by Tribe on March 7
Web conference with Tribal Historic Preservation Officer of Standing Rock Sioux Tribe	April 22, 2016	Provided background information on the Dewey-Burdock project
Consultation meeting with the Oglala Sioux Tribe in Pine Ridge, SD	April 28, 2016	In person meeting at the Oglala Sioux Justice Center
Consultation meeting with the Standing Rock Sioux Tribe in Fort Yates, ND	May 5, 2016	In person meeting at the Standing Rock Sioux Tribe Administration Building
Meeting with Oglala Sioux Tribal leaders in Denver, CO	June 17, 2016	Presented community outreach plan. Tribal leaders requested that we present the plan to the Land and Natural Resources Committee
Presentation of the EPA community outreach plan to Land and Natural Resources Committee	July 18, 2016	