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Vice President-Health, Safety
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POWERTECH (USA) Inc.

December 26, 2012

Mr. Reid Nelson, Director
Advisory Council for Historic Preservation
Old Post Office Building
1100 Pennsylvania Avenue, NW, Suite 803
Washington, DC 20004

RE: The Nuclear Regulatory Commission's Section 106 compliance for the Dewey-Burdock Project

Dear Mr. Nelson:

As an entitled Section 106 consulting party for the Dewey-Burdock Project, Powertech (USA) Inc. would like to take this opportunity to provide you with some background and information on our participation in consultations regarding this undertaking. We are aware that some of the federally recognized Indian tribes (Tribes) who have been participating in consultations for this undertaking have contacted the ACHP about their concerns. We are given to understand that the Nuclear Regulatory Commission (NRC) plans to provide the ACHP with a summary of the consultation efforts to date and to seek the Council's recommendations for successfully completing the 106 process. Presumably the NRC will request the Council's comments as to whether they have completed a reasonable and good faith effort to consult with the Tribes. We would like you to be aware of our perspective as the license applicant and a consulting party and to provide you with additional information on the Dewey-Burdock Project's Section 106 process.

On August 10, 2009, Powertech (USA) Inc. submitted an application to the NRC for a license to construct, operate and decommission the Dewey-Burdock Project, an in situ uranium recovery facility on primarily privately-owned land in Custer and Fall River Counties, South Dakota. Because 240 acres of the proposed 10,580 acre project area are managed by the Bureau of Land Management (BLM), Powertech (USA) Inc. was also required to submit a plan of operation to the BLM for its approval in accordance with 43 CFR Part 3809. A memorandum of understanding between NRC (lead agency) and BLM (cooperating agency) provides for joint review of the applications and preparation of a Supplemental Environmental Impact Statement (SEIS) under the requirements of the National Environmental Policy Act (NEPA). These federal approvals for the Dewey-Burdock Project require that NRC and BLM comply with Section 106 of the National Historic Preservation Act. As the applicant, Powertech (USA) Inc. has been participating in Section 106 consultations per 36 CFR 800.2(c)(4).

As specified by NRC licensing requirements Powertech (USA) Inc. submitted a report describing the results of an archaeological survey of the license area with our license application and has subsequently submitted reports detailing eligibility testing at 24 of the sites recorded during the survey. Although Powertech (USA) Inc. had already sited proposed ground-disturbing activities and facilities in previously disturbed areas to the extent possible, the results of the archaeological work enabled us to refine the siting of such activities for the Dewey-Burdock license area in such a way as to avoid all but six of the sites.

In August of 2011, NRC staff requested that, in addition to the archaeological and historic structure information submitted previously, Powertech (USA) Inc. provide information on properties of traditional religious and cultural significance to Indian tribes that might be affected by the Dewey-Burdock Project. Powertech (USA) Inc. hired third-party consultants (SRI Foundation) to identify and facilitate consultations with Tribes that might ascribe religious and cultural significance to properties within the proposed project area. Once NRC Staff had informed the Tribes about its request to the applicants and explained the SRI Foundation's role, the SRI Foundation began the first of many contacts with the Tribes on November 4, 2011 (see Attachment 1 for a record of tribal communications). The SRI Foundation provided information about the proposed Dewey-Burdock Project and requested tribal input as to appropriate methods for gathering the information needed by NRC Staff. The Tribes indicated that they needed to conduct an on-the-ground field investigation within the project area, and that they wished to discuss how to proceed with this identification effort in a face-to-face meeting with NRC.

In partnership with Cameco Resources (which had received the same request for information from NRC), Powertech (USA) Inc. sponsored a two-day face-to-face Section 106 consultation meeting on February 14 and 15, 2012, among NRC Staff, BLM, Environmental Protection Agency (EPA), and representatives of the following Tribes:

Cheyenne River Sioux Tribe	Crow Creek Sioux Tribe
Crow Tribe of Montana	Eastern Shoshone Tribe
Fort Peck	Northern Arapaho Tribe
Northern Cheyenne Tribe	Oglala Sioux Tribe
Rosebud Sioux Tribe	Santee Sioux Tribe of NE
Sisseton-Wahpeton Oyate	Standing Rock Sioux Tribe
Yankton Sioux Tribe	

The purpose of this meeting, as established by NRC Staff, was to enable the federal agencies to hear from the Tribes what would be required in order for the Tribes to identify potential properties of religious and cultural significance to them within the Dewey-Burdock and Crow Butte/North Trend license areas. No information about specific identification procedures was forthcoming during this meeting, but the Tribes in attendance proposed to provide NRC Staff with a scope of work (SOW) for the Dewey-Burdock and Crow Butte/North Trend field identification efforts. The Tribes also indicated during the meeting that they would not work directly with either Powertech (USA) Inc. or its consultants.

In March of 2012, NRC staff requested that Powertech (USA) Inc. prepare a draft scope of work that could be used, along with the anticipated scope of work from the Tribes, to serve as a point of departure for negotiations. In this initial scope of work, we proposed a 20% sample survey in the primary areas of ground disturbance and a 10% sample in areas of potential future ground disturbance. As stated in our draft scope of work, the purpose of the sample surveys was to provide the agencies, the Tribes, and Powertech (USA) Inc. with an understanding of the distribution and density of traditional cultural features, which could then be used by NRC and BLM in determining what additional efforts would be needed to complete the TCP identification. NRC requested comments from 20 Tribes on the Powertech (USA) Inc. scope of work, but no formal comments were ever received, and no tribal scope of work was received by NRC.

In a conference call on April 24, 2012, the Tribes noted that they were not interested in participating in a sample survey, but that they would send two representatives to the project area to do a reconnaissance that would enable them to quickly design their field effort and prepare a scope of work. Powertech (USA) Inc. facilitated this field visit on May 26, 2012. A partial tribal scope of work was received by NRC on July 13, 2012, but it did not contain any information on level of effort – that is, number of field days, number of crew members, number of travel days, etc. – so Powertech (USA) Inc. was unable to estimate the cost of the proposed field work. NRC requested clarification from the Tribes about the level of effort

that would be involved in their proposed scope of work, but did not receive a response from any of the 20 Tribes participating in the Section 106 consultations.

At the end of July, again at the request of NRC, Powertech (USA) Inc. prepared a revised draft scope of work. Because of the unwillingness of the Tribes to work with us in any way, it has been difficult to prepare these scopes. Nevertheless we have attempted to use whatever information we have been able to glean from the tribal meeting and teleconferences to develop a scope of work responsive to tribal concerns. In the near absence of direct tribal input, we attempted to make clear all the assumptions on which our scopes were based, so that these could serve as points of departure for comments and subsequent discussions and negotiations. No comments were ever received and no subsequent discussions that involved Powertech (USA) Inc., as the Section 106 party that would be paying for the identification effort, were ever held.

We believe that the assumptions that formed the basis for our revised draft scope of work and the rationales behind those assumptions should be part of the discussion as to whether NRC has made a reasonable and good faith effort to identify places of religious and cultural significance. As a Section 106 consulting party for the undertaking, Powertech (USA) Inc. requests that the Advisory Council staff take the following information into account in preparing your comments to NRC.

Assumptions:

Nature of anticipated places of traditional religious and cultural importance – Based on ethnographic material, other Section 106 undertakings in the Northern Plains, and limited information gleaned from conversations with the interested tribes, it appears that the focus of field investigations would be on rock features, arranged in patterns that are meaningful to knowledgeable Native observers. Such features are known throughout a very wide area of the Northern Plains and could be considered contributing features of an extremely extensive cultural landscape, potentially multistate in scale.

Direct effects – As currently designed, the total area of measureable disturbance for the Dewey-Burdock Project is 243 acres. In an effort to ensure that ground disturbing activities would not inadvertently directly affect sensitive features, Powertech (USA) Inc. proposed field survey within a 2637-acre area that would provide a substantial protective buffer around the 243 acres of actual planned disturbance and potentially enable the company to adjust the areas of disturbance slightly to avoid affecting identified features.

The setting within the project area has already been substantially impacted through previous activities including a road and railroad and multiple ground disturbing activities from historic period mining and ranching. Specifically the 243 acres of future direct disturbance has been thoroughly disturbed by historical drilling operations conducted by the Federal Tennessee Valley Authority and previous operators during past exploration to define the location of the ore bodies that will be produced. In fact, this entire 243 acres has had over 4000 drill holes located on a grid at a maximum density of 200 foot separation to as close as 50 feet between adjacent drill locations. In drilling each of these locations, surface disturbance included leveling for the large, 30-foot, wheeled drilling rig and 20-foot pipe trailer, plus subsurface backhoe-dug mud pits typically covering an area of 12 feet by 8 feet and 6 feet in depth.

Indirect effects – Powertech (USA) Inc. considered the possibility of indirect effects beyond the proposed 2637-acre survey area in preparing the scopes of work, but concluded that indirect effects beyond the buffered area of direct disturbance were unlikely for the following reasons:

The visual and audible effects of construction and well-drilling for the Dewey-Burdock Project will be brief and temporary. Operation of the project will not result in substantial noise effects. Given the nature of in situ recovery operations (see Attachment 2, photograph), the visual effects from operations will be largely limited to two processing buildings. These structures will be painted to

blend with the landscape and will be removed entirely at the end of the approximately 25-year life of the operation, as will the wellhead covers, pipelines and other equipment.

The undertaking will alter the setting of historic properties within the project area, but given the transitory nature of the visual and auditory effects, we do not believe that these alterations will significantly diminish the setting of historic properties outside the area proposed for field survey.

For any properties outside the actual area of ground disturbance, there will be no alterations in location, design, materials, or workmanship. All but 240 acres of the 10,580 acre license area are private land and will remain private land during and after operations. No knowledgeable observers currently have or will have access to any properties of religious and cultural significance within the license area; therefore integrity of feeling and association are a moot point for any features within the project area.

Future effects – Powertech (USA) Inc. is awaiting a decision from the U.S. Environmental Protection Agency (EPA) on our request for an Underground Injection Control (UIC) permit for the disposal of produced water. If this permit is denied, a land-application approach to water disposal, permitted by the state of South Dakota, will be adopted. The land-application approach would add an additional 1155 acres of ground disturbance to the planned project. Should the land-application option become necessary, Powertech (USA) Inc. will commit, in the programmatic agreement for the undertaking, to carrying out a second phase of identification comprising a buffered area surrounding the additional acres of disturbance.

Additionally, utility lines will need to be brought into the project area. The location of these lines will not be determined for some time yet. Powertech (USA) Inc. has indicated to NRC and BLM that the company will also commit, in the programmatic agreement for the undertaking, to carrying out any needed additional historic property identification once the proposed utility line location is identified..

Any future additions to the total area of disturbance identified in the Powertech (USA) Inc. license application would require a license amendment and new approvals from NRC and possibly BLM. Such approvals would constitute a new undertaking under Section 106, and additional consultation, compliance activities, and an amendment of the programmatic agreement would be required.

Level of effort – Having no available examples of scopes of work for field surveys to identify traditional cultural properties and almost no information from the Tribes as to what level of effort would be required for such a survey, we began with figures from the Dewey-Burdock archaeological survey and modified them to take into account whatever we were able to learn from the Tribes.

In the February 2012 meeting, the Tribes indicated that the 30-meter interval survey transects generally used by archaeologists in the northern Plains region are too widely spaced to reliably encounter the kinds of cultural features that the Tribes propose to identify. At 30-meter intervals, the archaeological surveyors within the Dewey-Burdock Project area covered approximately 22 acres per person-day, depending on the terrain, ground cover, and number of archaeological sites that had to be recorded. Given the requested closer interval between tribal field personnel, we proposed a coverage rate of 15 acres per person-day (175 person-days for the 2637 acres). We also assumed a pay rate comparable to trained archaeological survey crew members. These two assumptions, along with the use of standard GSA rates for per diem, lodging, and mileage reimbursement and some assumptions about potential crew size and the need for elders to assist in evaluation of any features that might be found, enabled us to come up with a very general estimate of the likely cost of the TCP survey.

Although none of the 20 Tribes participating in Section 106 consultations provided a formal response to our draft and revised draft scopes of work, we made every effort to incorporate any information that we did receive. For example, during the April teleconference the statement was made that the crew rates in our first draft scope of work were much too low. In response to a direct question from our consultants, a figure was named, and we adopted that figure (which was nearly twice our estimate based on archaeological crew rates) in our revised draft scope of work. We repeatedly requested that the Tribes

give us feedback on our proposed scope of work so that we could negotiate any changes that they wished to make.

In addition to field time and costs, our proposed scopes of work provided for analysis, write-up, and reporting time for the tribal survey teams. Because most of the information derived from the field inventory would be confidential, we anticipated that only brief reports would be prepared. Therefore, we estimated write-up time approximately equal to the field time.

NRC provided our July 30, 2012 revised scope of work to the 20 Tribes and requested comments. None of the Tribes ever provided formal comments. During an August 21, 2012 teleconference call in which we participated, the Tribes informed NRC that our scope of work was inadequate and unacceptable. Plans were made to hold discussions in September between NRC and the Tribes about clarifying the level of effort issues in the tribal scope of work.

At this point, it became clear to us that nothing Powertech (USA) Inc. could do would bring us any closer to securing the information on properties of religious and cultural significance that NRC had requested in a year earlier. On August 29, 2012, Powertech (USA) Inc. informed NRC that the company would be unable to provide the requested information. We offered to financially support NRC Staff efforts to complete the Section 106 identification process by providing up to \$100,000 in funding for tribal representatives to carry out fieldwork and reporting activities as agreed upon in government to government consultations among NRC, BLM, and the Tribes, provided that the fieldwork be completed in the fall of 2012. This sum represents approximately the total cost envisioned in our July 30, 2012 revised draft scope of work.

On September 5, 2012, NRC received a scope of work from a tribal enterprise to carry out field survey of the 2637 acre buffered area of direct effects at Dewey-Burdock. The level of effort was four times greater than our proposed level of effort, and the total cost was approximately nine times greater than our proposed cost. For comparison, on a per acre basis, this proposal was 12 times greater than the cost of the archaeological survey at Dewey-Burdock. We informed NRC that this proposed cost was far beyond our ability to support this effort and that we did not think it was reasonable.

Subsequently, on November 2, 2012, a second proposal from another tribal enterprise was received by NRC. This proposal was similar in scope and cost to our proposed scope of work, and it made provisions for Tribes not represented in the proposal to be involved in the fieldwork and evaluations. We informed NRC that we were willing to negotiate a contract immediately with the enterprise and further that we were willing to provide a modest amount of additional funding to enable other Tribes who wished to do so to participate in the fieldwork. This second proposal was withdrawn by the enterprise due to outside pressure on December 6, 2012.

We at Powertech (USA) Inc. feel that we have acted in good faith and done everything that we could to support and facilitate efforts to identify properties of religious and cultural significance within the Dewey-Burdock Project area so that they could be considered and if possible avoided during construction, operation, and reclamation of the project. When the Tribes refused to work directly with Powertech (USA) Inc. or its consultants, we continued to work with NRC and BLM to assist them in obtaining the desired information from the Tribes. Several of the Tribes involved in these consultations with NRC are on record, through tribal proclamations and other means, as opposing the project, and one of them is an intervener in the pending hearing before the Atomic Safety and Licensing Board (ASLB). Given the history recounted in this letter, we cannot help but feel that some of the Tribes are trying to use the Section 106 consultation process to endlessly delay and potentially kill the project. Nevertheless, we remain willing to work individually with any of the Tribes who wish to work with us to ensure that properties of significance to them are identified and protected. We are also very willing to work with the federal agencies, the ACHP, the Tribes and the South Dakota SHPO on a programmatic agreement to provide for resolution of adverse effects and completion of Section 106 compliance for any additional ground disturbance related to the project in the future.

NRC, as the lead agency under NEPA, and BLM, as the cooperating agency, established a schedule for reviewing the Dewey-Burdock application, issuing requests to Powertech (USA) Inc. for additional information, and reviewing the responses. The agencies also established a schedule for the development of two evaluation documents: 1) a safety evaluation (SER) of the proposed project that supports the license and 2) an SEIS that satisfies the requirements of NEPA and Section 106. The schedule was also intended to facilitate the hearing before the ASLB, which will not occur until after the final documents are issued. Based on this schedule for the licensing process, Powertech (USA) Inc. has made a number of important decisions, including financially significant decisions, and we have made every effort to aid NRC staff in maintaining this schedule. We would request that the ACHP staff do whatever you can to assist NRC to find a path forward that will permit them to meet their Section 106 obligations while bringing the Section 106 process to a timely conclusion.

In addition to the above information, we recommend that you review relevant sections of the draft SEIS, which was made available to the public November 23, 2012. The following sections provide information relative to the Section 106 process: Section 1.7 Consultation, Section 3.9 Historic and Cultural Resources, Section 4.9 Historic and Cultural Resources Impacts, and 5.9 Cumulative Impacts – Historic and Cultural Resources.

Respectfully yours,



Richard Blubaugh

Vice President-Health Safety and Environmental Resources

Attachment 1: Record of Tribal Communications

Attachment 2: Photograph of an In Situ Uranium Recovery Operation

cc: John Eddins, Advisory Council on Historic Preservation
Valerie Hauser, Advisory Council on Historic Preservation
Kevin Hsueh, U.S. Nuclear Regulatory Commission
Haimanot Yilma, U.S. Nuclear Regulatory Commission
Greg Fesko, Bureau of Land Management
Valois Shea, EPA Region 8
Paige Olson, South Dakota State Historic Society