

Draft Scope of Work
Powertech (USA), Inc., Dewey-Burdock Project

Purpose: Identification of Properties of Religious and Cultural Significance

Background:

The purpose of the activities described in this scope of work is to assist the U.S. Nuclear Regulatory Commission (NRC) and the USDI Bureau of Land Management (BLM) in meeting their obligations under Section 106 of the National Historic Preservation Act and the implementing regulation 36 CFR part 800. Federal agencies are required to take into account the effects of activities that they license or authorize on historic properties, including properties of religious and/or of traditional cultural significance to Federally recognized Indian Tribes.

The regulation describes a process through which the Federal agency, in consultation with Federally recognized Indian Tribes and other consulting parties, identifies historic properties including properties of traditional and cultural significance to Tribes and evaluates their potential for eligibility to the National Register of Historic Places (NRHP), then determines whether the proposed Federal undertaking will have an effect on the historical integrity of any eligible historic properties. Tribes evaluate the significance of properties of traditional and cultural significance and their potential for eligibility to the National Register of Historic Places (NRHP) per 36CFR800.4 (c) (1). The Federal agency is then informed of the results of the evaluation as determined from Tribal knowledge and whether the proposed Federal undertaking will have an effect on the historical integrity of all evaluated and eligible historic properties. The Federal agency is required to acknowledge that Indian Tribes possess special expertise in assessing the eligibility of historic properties that may possess religious and cultural significance to them per 36CFR800.4 (c) (1). If the effects of the undertaking would diminish the historical integrity of eligible historic properties or properties of traditional and cultural significance, the agency must identify measures that it will take to resolve those effects through avoidance, minimization, or mitigation strategies in consultation with consulting parties including Indian Tribes.

Guidelines for Development of the Scope of Work:

The standard for compliance with Section 106 is that the agency must make a “reasonable and good faith effort” to identify potentially affected historic properties (36 CFR 800.4(b)(1)). The Section 106 regulation provides for phased approaches to identification of historic properties (36 CFR 800.4(b)(2)). However, a phased approach is not conducive to the cultural interest and the overarching integrity Tribes attach to landscape use and value of those sites attributable and contributing to the historical integrity of Tribal peoples. The license boundary for the Dewey-Burdock Project includes several areas that will be directly and unequivocally subject to ground disturbance as part of the licensed undertaking. Historic properties exist within the broad thematic of cultural use of the area of the mining endeavor as a whole. The entire area will be affected by the undertaking via view shed, auditory disturbance, location, setting, feeling and association; therefore all areas within the license description will be included in the identification efforts described in this scope of work.

This scope of work was developed by consulting Tribes, at the request of the Nuclear Regulatory Commission staff. At a February 14-15, 2012, consultation meeting regarding the Dewey-Burdock and Crow Butte projects, the consulting Tribes expressed their preference not to work directly with the applicants or with consultants for the applicants. Tribal review of a separate scope of work as prepared by Powertech (USA) and their third party consultants has

occurred in June and August of 2012 and this scope of work incorporates the Tribal revisions of that content to meet the need, reason, and purpose for a TCP survey of the entire license area by qualified and sanctioned Tribal surveyors/monitors.

The Federally recognized Indian Tribes (consulting Tribes) that have participated in consultations with the NRC and BLM about this project have indicated that the appropriate method for identifying places of religious and cultural significance to them is through an examination of the ground surface by knowledgeable representatives from the consulting Tribes. The consulting Tribes have indicated, in consultations with the NRC and BLM, 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. The interval spacing will vary dependent upon density of historic properties and ground surface visibility primarily. The greater the ground surface visibility coupled with a low density of historic properties will result in more acreage being covered on a given day. The inverse is also true.

Statement of Work for the Dewey-Burdock License Area and Indirect and Direct Effects:

The Dewey-Burdock Project is a proposed new in situ uranium recovery facility. The proposed Federal undertaking is an NRC license for this facility and a BLM approval for a plan of operations. Map 2 (attached and provided by Powertech (USA)) shows the license area with the proposed processing facilities, well fields, existing land disturbance, and identified archaeological sites. The overall area within the license boundary for the Dewey-Burdock Project is approximately 10,580 acres. Of these 10,580 acres, all but 240 acres are privately owned. Extenuating use of the area by Native cultural interest over millennium is not contained within a defined corridor of operation or disturbance. Cultural utility of the area is recognized by Tribes under a broad pattern of landscape use for food acquisition/processing, spiritual applications, celestially associated earth landforms, and socio-political agreements. While the color-coded areas shown on Map 3 (attached and provided by Powertech (USA)) graphically represent contiguous, well-buffered areas surrounding the actual proposed ground disturbance areas for the Dewey-Burdock Project; these well-buffered bounded areas will not provide sufficient protections to those sites as identified by Tribal personnel in particular as they relate to the indirect effects.

Information garnered from the complete examination of the license area (10,580 acres) will result in a completed report designed to assist the applicant in its capacity to place operations in those areas where no sites of significance to Tribes will be impacted either directly or indirectly. A phased approach, while noteworthy, will result in on-going multiple investigations over ensuing multiple years and will ultimately result in delays in the proposed Dewey-Burdock project timelines. A completed and comprehensive survey of the entire area of the license boundary will negate the need for further and future investigations should plans change or areas to be affected are revised within the current license boundary. The results of a comprehensive identification approach will provide NRC and BLM with information that can be used to *fully* characterize the affected environment for the purposes of the National Environmental Policy Act (NEPA). This information will also serve as the basis for NRC and BLM decisions about the need for and parameters of any future changes in operations.

Indirect Effects:

36 CFR 800 requires that a Federal agency consider the effects, both direct and indirect, that a proposed undertaking will have upon historic properties including properties of cultural and religious significance to Tribes. An adverse effect is defined as (36 CFR 800.5):

(a) *Apply criteria of adverse effect.* In consultation with the SHPO/THPO and any Indian Tribe or Native Hawaiian organization that attaches religious and cultural significance to identified historic properties, the agency official shall apply the criteria of adverse effect to historic properties within the area of potential effects. The agency official shall consider any views concerning such effects which have been provided by consulting parties and the public.

(1) *Criteria of adverse effect.* An adverse effect is found when an undertaking may alter, directly or indirectly, any of the characteristics of a historic property that qualify the property for inclusion in the National Register in a manner that would diminish the integrity of the property's location, design, setting, materials, workmanship, feeling, or association. Consideration shall be given to all qualifying characteristics of a historic property, including those that may have been identified subsequent to the original evaluation of the property's eligibility for the National Register. Adverse effects may include reasonably foreseeable effects caused by the undertaking that may occur later in time, be farther removed in distance or be cumulative.

The first sentence of 36 CFR 800.5 (a) (1) is the key point that must be understood. It is not just the noise and visual effects that must be taken into consideration but all effects that directly or indirectly affect an historic property. Of particular importance to the Tribes in determining adverse effects are the historic properties location, setting, feeling and association. Given that the Dewey Burdock license boundary is at least three to four times greater than the proposed ground disturbance and that the area of potential effects is defined as (36 CFR 800.16 (d)):

(d) *Area of potential effects* means the geographic area or areas within which an undertaking may directly or indirectly cause alterations in the character or use of historic properties, if any such properties exist. The area of potential effects is influenced by the scale and nature of an undertaking and may be different for different kinds of effects caused by the undertaking.

The Tribes maintain that the actual area of potential effect is not limited to the area of ground disturbance (direct effect) as proposed by Powertech (USA) and is instead the Dewey Burdock license boundary (indirect effect). Any sites within that license boundary will have their integrity of location, setting, feeling and association compromised by this proposed undertaking. The facility and in-situ mines (direct effect) themselves constitute the catalyst for adverse effects as outlined above to any sites in the license boundary area (indirect effect). The Federal agency must account for the indirect as well direct effects that this proposed undertaking will have upon historic properties.

Direct Effects:

The extent of **actual** ground disturbance within this area as a result of the proposed Federally licensed undertaking will depend upon the approach that is taken for the disposition of produced water. Powertech (USA)'s preferred approach would be a deep disposal well option, which would require an Underground Injection Control (UIC) permit from the U.S. Environmental Protection Agency (EPA). The second option is a land-application approach to water disposal, which would be permitted by the state of South Dakota. With the deep disposal well option, approximately 243 acres within the license boundary will constitute the total measurable area of operational facilities subject to **actual** ground disturbance over the course of project development and operation. With the land-application option, the number of acres of total measurable disturbance would be 1,398 acres.

The color-coded areas shown on Map 3 (attached and provided by Powertech (USA)) graphically represent the potential areas of disturbance for the Dewey-Burdock Project. The salmon-colored areas represent contiguous, well-buffered areas encompassing 2,637 acres surrounding the 243-acre actual disturbance areas for the processing plants, well fields, impoundments, roads, and other surface-disturbing facilities. The lavender-colored areas comprise an area of approximately 1,250 acres, some of which will not be disturbed, surrounding the area for the land-application option. The buffer area for the salmon-colored area includes 148 acres associated with the land application option.

The blue coding on Map 3 indicates areas outside of the buffers for both types of land disturbance areas. These lands will not be physically impacted by the currently proposed licensed activities. Any future uranium recovery development in these areas would require a license amendment from NRC. This would constitute a new Federal undertaking and would require compliance with Section 106, including additional efforts to identify properties of religious and cultural significance that could potentially be affected by the new undertaking. This last paragraph will be moot if the entire Area of Potential Effects is examined as it should be from the beginning of the project and not just concentrating on the direct effects of an undertaking as proposed by the applicant in previous scopes of work.

The only additional and currently anticipated construction activities within the license area not reflected on Maps 2 and 3 will be those required to bring utility lines into the project area. The location of these lines will not be determined for some time yet. When the proposed utility line location is identified, any needed additional historic property identification will be carried out at that time.

If the land-application option for disposal of produced water is selected, identification of historic properties for the utility lines will be combined with identification efforts within the lavender-colored areas on Map 3, if possible. This type of phased approach to identification of historic properties is consistent with the Section 106 regulation (36 CFR 800.4(b) (2)). However, given that the indirect effects on historic properties for the proposed undertaking will occur throughout the entire Dewey Burdock license area and are not restricted to the direct effects; the consulting Tribes feel that a Programmatic Agreement or Memorandum of Agreement must be signed with all consulting parties to conduct this phased approach per 36CFR800.4 (b) (2). This phased approach must not

be limited to the area of direct effect but must be consistent with the area of potential effect per 36CFR800.16 (d) incorporating both the areas of direct and indirect effects.

Compensation:

Field Work and Office Work:

- To be agreed upon between the consulting Tribes preferred contractor and the applicant (Powertech (USA)). The consulting tribes do not feel it is their right to negotiate contract pricing on behalf of a separate entity or company.
- The consulting Tribes will select their TCP survey representatives and monitors and supply that list to the preferred contractor who will create the field crew from the pool of supplied surveyors or monitors.
- Government Services Administration rates should be used to calculate lodging, meals and incidental expenses, and mileage reimbursement or a separate arrangement can be negotiated at the discretion of either the Tribal preferred contractor or applicant and agreed upon by both. A separate pay rate for travel may be negotiated for travel days at the discretion of the preferred contractor and agreed upon by the applicant (Powertech (USA)) or vice versa.

Work Products:

1. Within 14 working days after completion of field work, the point(s) of contact for the consulting Tribes will provide a brief (5 pages or less) non-confidential written summary of the fieldwork completed and the number of properties identified to NRC, BLM, and Powertech (USA). This summary will include 7.5 minute USGS maps showing specific areas where ground examination took place but should not indicate the locations of any identified properties of religious and cultural significance. This information will be disclosed to the public through NRC's NEPA compliance process; therefore, it is essential that the document contain only information that does not need to be protected from disclosure.
2. Within 120 working days after completion of field work, the point(s) of contact for the consulting Tribes will provide to NRC sufficient information about any identified properties of religious and cultural significance to permit the agency to consult with the South Dakota State Historic Preservation Officer (SHPO) and consulting Tribes about NRHP eligibility of these properties. This information will include the following:
 - a. An identifying label for the property (for example, TCP-1, TCP-2, etc).
 - b. Location of TCP sites, either as digital data or plotted on 7.5 minute USGS quad maps.
 - c. A brief description of where the site is located in relationship to areas that will be directly impacted by planned operations.

- d. A narrative indicative as to the integrity of the property that can be applicable to the NRHP eligibility criteria. The narrative should also discuss how the sites integrity will be affected directly and indirectly by the direct actions of the proposed undertaking as outlined above.

The significance assessment (“d” above) will focus on the potential for the property to meet one or more of the criteria of eligibility to the NRHP, as established in 36 CFR 60.4 and elaborated in National Register Bulletin 15 *How to Apply the National Register Criteria for Evaluation* and National Register Bulletin 38 *Guidelines for Evaluating and Documenting Traditional Cultural Properties*. While Bulletin 38 is a comprehensive document, it does not include identification parameters of those properties pertinent and significant to Northern Plains culturally distinctive unique characteristics. The integrity assessment may follow the guidance as described in National Register Bulletin 38. The consulting Tribes need not disclose specific information about the religious significance or meaning of any properties identified under this scope of work. The Section 106 process requires only information about the historical character of these properties as expressed by knowledgeable Tribal persons.

This work product should also include any recommendations that the consulting Tribes will provide concerning the potential NRHP eligibility under criteria other than criterion D for the previously identified archaeological sites within the Dewey Burdock license area.

The information described under section “d” will be provided solely to the consulting Tribes and will not be provided to the Federal Agencies, SHPO or Powertech (USA). The location of historic properties of religious and cultural significance to Tribes and their buffers will only be shared with Federal Agencies, SHPO or Powertech (USA) to support avoidance of these sites.

The information provided in this work product will be subject to protection from disclosure under the provisions of Section 304 of the National Historic Preservation Act.

3. Once NRC, BLM, and SD SHPO, in consultation with the consulting Tribes, have completed determinations of NRHP eligibility for any identified properties of religious and cultural significance to the consulting Tribes, the point(s) of contact for the consulting Tribes will provide Powertech (USA) with the information described in 2.a-c above for any eligible properties within the Dewey Burdock license area. Powertech (USA) will sign a confidentiality agreement limiting use of this information to appropriate company personnel involved in project design or operation and to facilitate land management.

Schedule:

To be determined upon acceptance of contract and accepted budget negotiated between Tribal preferred contractor and the applicant (Powertech(USA)).

Access and Safety:

Powertech (USA) will provide access to the properties, and a representative of Powertech (USA) will coordinate with Tribal preferred contractor in terms of access to land. The Powertech (USA) representative will utilize a GPS survey unit to identify all map locations selected by the Tribal preferred contractor for ground examination and will guide the Tribal personnel to the locations they select in the field. The Powertech (USA) representative will also serve as liaison with the local landowners.

Insurance:

All Tribal representatives who will be present during field work will be required to provide proof of liability insurance in the amount of \$500,000 or more, or sign an indemnification statement that will hold harmless both the landowner and Powertech (USA) from any accidents that may occur in the field.