BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON D.C.

In re:	)	
	)	
Powertech (USA) Inc.	)	Docket No. UIC 20-01
Dewey-Burdock Uranium In-Situ	)	
Recovery Project,	)	
Class III Area Permit No.	)	
SD31231-00000 and Class V Area	)	
Permit No. SD52173-00000	)	

BRIEF AMICUS CURIAE OF THE GREAT PLAINS TRIBAL WATER ALLIANCE, INC. IN SUPPORT OF THE PETITION FOR REVIEW OF THE OGLALA SIOUX TRIBE

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STATEMENT OF INTEREST OF AMICUS CURIAE

Pursuant to 40 CFR §124.19(e), the Great Plains Tribal Water Alliance, Inc. respectfully files this Brief Amicus Curiae in support of the Petition for Review of the Oglala Sioux Tribe.

The Great Plains Tribal Water Alliance, Inc., a non-profit corporation, is an inter-Tribal organization chartered for the purpose of assisting the Indian Nations of the Great Plains Region in the protection of water that was reserved in Treaties with the United States. Its members include the Standing Rock Sioux Tribe, Rosebud Sioux Tribe, Flandreau Santee Sioux Tribe and the Oglala Sioux Tribe, the petitioner in this appeal. The Great Plains Tribal Water Alliance, Inc. is authorized by the Great Plains Tribal Chairman's Association to advise on matters affecting the water resources of the region's Tribes, and to act as an advocate on policies and projects affecting those resources.

The permits for the underground injection wells that are subject to the Oglala Sioux Tribe's petition in this matter, and which were issued under the Safe Drinking Water Act, 42 U.S.C. §§300h *et seq.*, could impact the water resources of the Great Plains Tribes and are within the scope of the Tribal Water Alliance's mission. The Treaty and consultation rights of the Petitioner also inure to the other members of the Tribal Water Alliance, none of whom were properly consulted by EPA. Tribal citizens of the Great Plains Water Alliance Tribes use the area impacted by the Dewey-Burdock project for hunting, fishing, gathering of traditional foods and medicines, and for pilgrimage and religious ceremonies, some of which involve the use of water in its natural state.

Accordingly, the Tribal Water Alliance is an "interested person" within the meaning of 40 CFR §124.19(e).

QUESTION PRESENTED

Did the Environmental Protection Agency comply with the applicable government-to-government consultation requirements with Petitioner Oglala Sioux Tribe and other Indian Tribes affected by Class V Area Permit No. SD52173-00000 and Class III Area Permit No. SD31231-00000?

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ARGUMENT

I. Overview of Tribal Consultation Requirements

There are at least two types of Tribal consultations that government agencies such as the Environmental Protection Agency (EPA) must carry out prior to taking actions affecting Indian Tribes:

(1) government-to-government consultation on potential impacts to Tribal rights, under Executive Order 13175 and the Tribal consultation policies of the respective agency; and

(2) consultation with Tribal Historic Preservation officers on potential impacts to cultural resources, under section 106 of the National Historic Preservation Act. 54 U.S.C. §306108.

As is shown below, EPA's failure to comply with the over-arching government-to-government consultation requirements of E.O. 13175 and the EPA and Region 8 Indian Policies renders EPA's approval of the UIC permits to be "arbitrary, capricious, (and) an abuse of discretion" within the meaning of the Administrative Procedures Act. 5 U.S.C. §706(2)(A). The Regional Administrator should withdraw the permits pursuant to 40 CFR §124.19(j), and if she fails to do so, this Board should reverse EPA's decision and vacate the permits.

An overview of the Tribal government-to-government consultation requirements demonstrates that EPA failed to properly consult with or engage in dispute resolution with the Oglala Sioux Tribe. Executive Order 13175 is entitled *Consultation and Coordination with Indian Tribal Governments*. 65 Fed. Reg. 67249 (Nov. 6, 2000). Section 2(a) of E.O. 13175 establishes that the Tribal consultation requirement is based upon "the unique legal relationship with Indian tribal governments as set forth in the Constitution of the United States, treaties, statutes, Executive Orders and court decisions." *Id.*

Thus, it is recognized that consultation is more than an administrative imperative – it is a Treaty right. Indeed, the Fort Laramie Treaty of April 29, 1868, to which the Oglala Sioux and the Great Plains Water Alliance members are signatories, explicitly sets out consultation as a Treaty right:

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> The United States agrees that the agent for said Indians shall in the future… keep an office open at all times for the prompt and diligent inquiry into such matters of complaint by and against the Indians as may be presented for investigation under the provisions of their treaty stipulations.

15 Stat. 636.

In negotiating the 1868 Fort Laramie Treaty, the ancestors of the Oglala Sioux and other Tribes of the Great Sioux Nation clearly contemplated that future actions on the part of the United States would cause concern. They had the wisdom to ensure that their descendants would have the right of consultation to address these concerns. That right is delineated today in Executive Order 13175. Under section 2(b) of E.O. 13175:

> The United States continues to work with Indian tribes on a government-to-government basis to address issues concerning Indian tribal self-government, tribal trust resources, and Indian treaty and other rights.

65 Fed. Reg. 67249.

Section 3 prescribes *Policymaking Criteria* for the executive branch:

> **Agencies shall** respect Indian tribal self-government and sovereignty, **honor treaty rights** and other rights, and strive to meet the responsibilities that arise from the unique legal relationship between the Federal government and Indian tribal governments…

Id. at 67250 (emphasis added).

Agencies are required to respect Treaty rights through a consultative process: "Each agency shall have an accountable process for meaningful and timely input by tribal officials in the development of regulatory policies that have Tribal implications." *Id.* That is the gravamen of E.O. 13175 – consultation with Tribal governments on regulatory actions that implicate Tribal rights.

Although section 10 of E.O. 13175 states that it does not create a judicial cause of action, an agency's conduct with respect to the Tribal consultation requirements implicates the "arbitrary and capricious" standard in the APA, as well as the proper exercise of agency discretion. *See Yankton Sioux Tribe v. Kempthorne*, 442 F.Supp.2d

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774, 781-782, 785 (D.S.D. 2006). The consultation requirement is enforceable under the APA.

Section 3 of E.O 13175 requires all agencies to develop their own Tribal consultation policies, and in 2011 EPA announced its *EPA Policy on Consultation and Coordination with Indian Tribes*. https://www.epa.gov/sites/production/files/ 2013-08/documents/cons-and-coord-with-indian-tribes-policy.pdf. The opening sections explain:

> EPA's policy is to consult on a government-to-government basis with federally-recognized tribal governments when EPA actions and decisions may affect tribal interests... This policy establishes national guidelines and institutional controls for consultations across EPA.... This policy is intended to utilize existing EPA stricture to the extent possible.

Id. at 1-2.

Section V. of the EPA policy is entitled *Consultation*, and it outlines the substantive consultation requirement. Subsection B. provides a non-exhaustive list of activities that trigger the Tribal government-to-government consultation requirement, and it includes permits such as the UIC permits subject to the Oglala Sioux Tribe's petition:

> The following non-exhaustive list of EPA activity categories are normally appropriate for consultation if they may affect a tribe(s):

- Regulations or rules
- Policies, guidance documents, directives
- Budget and priority planning development
- Legislative comments
- **Permits**

Id. at 5 (emphasis added).

The EPA Policy establishes as a *Guiding Principle*: "EPA ensures the close involvement of tribal governments and gives special consideration to their interests whenever EPA's actions may affect Indian country or other tribal interests." *Id.* at 4. It further instructs that "[c]onsultation should occur early enough to allow tribes the opportunity to provide meaningful input that can be considered prior to EPA deciding whether, how, or when to act on the matter under consideration." *Id.* at 7.

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Prior to EPA's issuance of the *EPA Policy on Consultation and Coordination with Indian Tribes,* the Region 8 office established its own *EPA Region 8 Policy for Environmental Protection in Indian Country* (March 14, 1996). https://epa.gov/sites/production/files/201804/documents/1996_r8_indian_country_environmental_protection_policy.pdf. The Region 8 Policy prescribes consultation requirements consistent with the later-issued EPA Policy, and it contains one important additional provision. Under the Region 8 policy, which applies to the UIC permits subject to this docket, if a Tribal consultation fails to resolve a Tribe's concerns with a proposed action, the Tribe is entitled to a formal dispute resolution process:

> Region 8 will seek tribal government agreement before making decisions on environmental matters... affecting Tribal natural resources. If no agreement can be reached, then a formal dispute resolution process can be invoked by the tribal government.

Id. at 2.

Additionally, there are international law requirements for consultation with the governing bodies of indigenous Tribes, for projects or policies affecting traditional or aboriginal lands. Article 19 of the United Nations *Declaration of the Rights of Indigenous Peoples,* provides that:

> States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting or implementing legislative or administrative measures that may affect them.

G.A. Res. 61-295 (Sept. 13, 2007).

International law prescribes more stringent requirements for Tribal consultation and requires the consent of affected indigenous nations for projects such as Dewey-Burdock. EPA's failure to obtain the consent of petitioner Oglala Sioux Tribe and the members of the Tribal Water Alliance prior to issuing the UIC permits to Powertech implicates international law, as well.

Ultimately, the EPA must demonstrate compliance with the consultation requirements of E.O. 13175, the *EPA Policy on Consultation and Coordination with Indian Tribes* and *EPA Region 8 Policy for Environmental Protection in Indian Country.* EPA cannot do so, with respect to petitioner Oglala Sioux Tribe, or any of the other

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member Tribes of the Great Plains Tribal Water Alliance, Inc. Accordingly, the permits should be withdrawn by the Regional Administrator pursuant to 40 CFR §124.19(j), and, if she does not do so, they should be vacated by this Board.

II. EPA Violated Executive Order 13175 and Agency Consultation Policies

The Oglala Sioux Tribe's *Petition for Review* demonstrates that EPA failed to engage in the requisite government-to-government consultation with the Oglala Sioux Tribe. The petition describes a tangled process by which EPA confused the cultural resources consultation requirements under National Historic Preservation Act section 106, 54 U.S.C. §306108, with its more general obligation to consult with the Tribal government under E.O. 13175 and agency consultation policies. EPA relied upon inadequate cultural resources surveys for National Historic Preservation Act (NHPA) section 106 compliance, and then, in response to the concerns expressed by the Oglala Sioux Tribe, made uneven efforts to remedy its non-compliance with NHPA through belated efforts to consult with the Tribal government.

The EPA's efforts to finally engage the Oglala Sioux Tribal government in 2019-2020 on the UIC permits was untimely and ineffective. It appears to have been limited to:

- efforts to schedule a meeting in June 2020, which were undermined by COVID travel restrictions;
- one virtual technical presentation by EPA staff to Tribal staff on August 28, 2020; and
- efforts to schedule a multi-agency meeting with the Tribe, EPA, and the Bureau of Land Management, scheduled for October 2, 2020, but postponed due to the quarantine of Tribal officials resulting from COVID.

Oglala Sioux Tribe, *Petition for Review*, at 16-18 and Attachments 4, 5 & 10.

Then, EPA arbitrarily cancelled the consultation effort, *id.* at Attachment 10, and shortly thereafter approved the UIC permits. The COVID crisis may justify slowing down the administrative process to enable EPA to problem-solve on the logistics for Tribal consultations, but is it not an excuse to arbitrarily terminate consultation and simply approve the permits.

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Unquestionably, the requirements of E.O. 13175 and the EPA consultation policies issued pursuant to E.O. 13175 apply to the UIC permits. Under EPA's policy, the Tribal consultation obligations are triggered by "Permits" that affect "tribal interests." *EPA Policy on Consultation and Coordination with Indian Tribes*, *supra* at 1, 5. The EPA Policy was issued pursuant to E.O. 13175, which is triggered by regulatory actions affecting Treaty rights or trust resources. 65 Fed. Reg. 67249-67250.

In the present case, the location of the proposed injection wells is within the boundaries of the "Sioux or Dacotah territory" as described in the Fort Laramie Treaty of September 17, 1851 and the boundaries of the original Sioux Reservation as described in the Fort Laramie Treaty of April 29, 1868. 11 Stat. 749; 15 Stat. 635. The Oglala Sioux, and the other member Tribes of the Great Plains Tribal Water Alliance possess Treaty rights and claims in this area, even though it is outside of the boundaries of the present-day Reservations. *E.g. Herrera v. Wyoming,* 139 S. Ct. 1686, 1694 (2019) (upholding off-Reservation hunting rights under 1868 Fort Laramie Treaty with the Crow Tribe); COHEN'S HANDBOOK OF FEDERAL INDIAN LAW (2005 Ed.) §19.03[2][a] (Indian water rights extend to off-Reservation points of diversion); 25 U.S.C. §3002(a)(2)(C) (Tribal right of ownership and control over certain human remains and cultural objects discovered within Treaty-adjudicated lands). This land is sacred to the Sioux – it is central to their creation stories. *See* S. Hrg. 99-844, *Hearing Before the Select Comm. on Indian Aff.: Sioux Nation Black Hills Act* (1986); *see also John P. LaVelle*, *Rescuing Paha Sapa: Achieving Environmental Justice by Restoring the Great Grasslands and Returning the Sacred Black Hills to the Great Sioux Nation*, 5 GREAT PLAINS NAT. RESOURCES J. 40 (2001).

The consultation requirements clearly apply, and EPA acknowledged this and made cursory efforts to engage petitioner Oglala Sioux Tribe. Those efforts did not comply with the requirements of E.O. 13175 that consultation be "Timely" and "meaningful." The Powertech applications were filed at least five or six years before EPA approached the Oglala Sioux Tribe. *See* Oglala Sioux Tribe, *Petition for Review* at 47. There was no "close involvement of tribal governments (or) special consideration to their interests" in the UIC permit process, as required by EPA's Consultation Policy. *EPA Policy on Consultation and Coordination with Indian Tribes, supra* at 4.

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The Policy further provides the Tribe the right to have input into deciding "**when** to act on the matter under consideration." *Id.* at 7 (emphasis added). If a consultation concludes and a dispute remains unresolved, under the Region 8 Policy, the Oglala Sioux Tribe has the right to engage in a dispute resolution process prior to agency action. *EPA Region 8 Policy for Environmental Protection in Indian Country, supra* at 2.

EPA's undated letter received by the Tribe on October 21, 2020 and included in the Petition for Review as Attachment 10 is a proverbial smoking gun. The letter fails to inform the Tribe of its right to a consultative dispute resolution prior to issuance of the UIC permits, pursuant to the Region 8 Policy. This right was never afforded, in violation of the Policy. By unilaterally and arbitrarily setting a timeline to terminate any pre-decisional consultation, the agency violated the requirement in the EPA Tribal Consultation Policy conferring upon the Tribe the right to consult on *when* the action should occur. *EPA Policy on Consultation and Coordination with Indian Tribes, supra* at 7.

For these reasons, approval of the UIC permits was arbitrary, capricious and an abuse of discretion under the Administrative Procedures Act, and should be withdrawn by the Regional Administrator or vacated by this Board.

III. Failure to Comply with Agency Policies on Tribal Consultation Violates the APA

As stated above, for the Sioux Nation, consultation is Treaty right under the 1868 Fort Laramie Treaty. 15 Stat. 636. The Sioux Tribes have guarded and protected that right.

In *Yankton Sioux Tribe v. Kempthorne*, 442 F.Supp.2d at 781-783, the district court enjoined the re-programming of education funds for Bureau of Indian Affairs' schools in the Great Plains Region, for violating the BIA Consultation Policy issued pursuant to E.O. 13175. The court held that "An agency must comply with its own internal policies, even if those policies are more rigorous than the APA." *Id.* at 784 *citing Oglala Sioux Tribe v. Andrus*, 603 F.2d 707, 713 (8th Cir 1979). With respect to Tribal consultations, "failure to comply with (the agency's) own consultation policy violates general principles governing administrative decisionmaking." *Id.* at 785.

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In *Yankton Sioux Tribe v. Kempthorne*, the agency had sent out two letters to the Tribes soliciting comment, and held up to three meetings shortly before announcing the proposed action. *Id.* at 779-781. That is greater than EPA's weak efforts for the UIC permits at issue in the present case – emails and letters were exchanged, and there was a staff-level virtual meeting, but no genuine government-to-government deliberation. As in *Kempthorne*, the Oglala Sioux Tribe questioned the information presented by the agency – and its concerns were ignored.

Similarly, in *Lower Brule Sioux Tribe v. Deer*, 911 F.Supp. 395, 402 (D.S.D. 1995), the district court vacated Bureau of Indian Affairs' personnel notices at the Lower Brule Reservation offices, "due to the BIA's failure to follow its own guidelines and policies, including affording the tribe meaningful prior consultation regarding these staffing decisions." This case preceded the issuance of E.O. 13175, relying exclusively on the agency's consultation policy and the principles of the APA.

Ultimately, government-to-government consultation is a cornerstone of federal Indian policy. It has been aptly described as "a critical ingredient of a sound and productive Federal-tribal relationship." President Barack Obama, *Memorandum to the Heads of Executive Departments and Agencies* (Nov. 5, 2009), https://obamawhitehouse.archives.gov/the-press-office/memorandum-tribal-consultation-signed-president. Government-to-government consultation with Indian Tribes such as Petitioner Oglala Sioux Tribe and the other members of the Tribal Water Alliance is not gratuitous for the Indians, it is necessary for sound policy – the United States benefits as much or more than the Tribes.

Other courts have reached similar conclusions, in a variety of contexts. In *Nez Perce Tribe v. U.S. Forest Service*, 2013 WL 5212317, the district court for Idaho granted an injunction against the Forest Service permitting transport of a mega-load shipment on a state highway on the Reservation, that could affect the Wild and Scenic Lochsa River. The court acknowledged, "Although the Nez Perce ceded the lands… 'they did not relinquish rights to hunt, fish, and gather or to practice traditional religious and cultural ceremonies on these ancestral homelands'... All of this triggered a duty on the part of the Forest Service to consult with the Tribe." *Id.* at 5-6. Accordingly, the court invoked the trust responsibility to the Tribe (which is cited in E.O. 13175), to

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require Tribal consultation before allowing any further mega-loads. *Id.*; *accord Klamath Tribes v. United States*, 1996 WL 924509 at 8 (D. Or. 1996) ("a procedural duty has arisen from the trust relationship such that the federal government must consult with an Indian Tribe in the decision-making process to avoid adverse effects on treaty resources").

As explained in *Oglala Sioux Tribe v. Andrus*, "where the (agency) had established a policy requiring prior consultation with a tribe, and thereby has created a justified expectation on the part of the Indian people that they will be given a meaningful opportunity before… policy is made, that opportunity must be afforded." 603 F.2d at 721 *citations omitted.* The flip side of enlightened consultation policy unfolds when agencies give short shrift to Tribal consultation, as EPA did here. *See* Derek C. Haskew, *Federal Consultation with Indian Tribes: The Foundation of Enlightened Policy Decisions, or Another Badge of Shame*, 24 AM. INDIAN L. REV. 21 (2000). That conduct reinforces longstanding mistrust stemming from the historical chicanery suffered by the Indian people. *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2462 (2020) ("… it is equally clear that Congress has since broken more than a few of its promises").

The Regional Administrator has the authority under 40 CFR §124.19(j) to withdraw the permits, and reconsider their provisions in consultation with Petitioner and the member Tribes of the Great Plains Tribal Water Alliance. If she does not do so, this Board should reverse the decision of the EPA and vacate Class V Area Permit No. SD52173-00000 and Class III Area Permit No. SD31231-00000, for violations of Executive Order 13175, the *EPA Policy on Consultation and Coordination with Indian Tribes*, and the *EPA Region 8 Policy for Environmental Protection in Indian Country.*

RESPECTFULLY SUBMITTED this 14th day of January 2021

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on this date, the afore Brief Amicus Curiae was served via electronic mail, in accordance with the Environmental Appeals Board's September 21, 2020 Revised Order Authorizing Electronic Service of Documents in Permit and Enforcement Appeals, to the following:

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