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

In re:	)
Powertech (USA) Inc.	)
Dewey-Burdock Uranium In-Situ	)
Recovery Project,	)
Class III Area Permit No.	)
SD31231-00000; AND	)
Class V Area Permit No.	)
SD52173-00000	)

OGLALA SIOUX TRIBE'S RESPONSE TO MOTION TO STRIKE AND ALTERNATIVE MOTION FOR LEAVE TO FILE A SURREPLY

Petitioner Oglala Sioux Tribe ("Petitioner" or "Tribe") hereby responds to EPA Region 8's Motion to Strike and Alternative Motion for Leave to File a Surreply ("Motion"). EPA Region 8 ("Region") asserts that the Tribe has raised a number of new arguments in its Reply justifying this Board striking them from the Tribe's filings. To the contrary, as discussed herein, the Tribe's Reply did not raise any new issues warranting action from this Board and the Region's Motion should be denied in full.

EPA argues that the Tribe raised a new argument about the regulations requiring "strict controls" of underground injection control wells. Motion at 2. This "strict controls" language emanates from the ruling in *W. Neb. Res. Council v. Envtl. Prot. Agency*, 793 F.2d 194, 196 (8th Cir. 1986). The reference to this case does not represent a new argument, but rather simply additional legal authority to support the argument raised in the Petition that the Region's decisionmaking violates the Safe Drinking Water Act ("SDWA") and its implementing

regulations in failing to ensure proper containment of mining fluids within the aquifer, regardless of the aquifer exemption. The Region presents no authority to support an assertion that a reply brief may not cite new authority that supports an argument presented in the Petition. Indeed, in other cases where this Board has excluded new issues or arguments on reply, those new issues are substantively novel, not merely citations to new authority to rebut the agency's arguments on Response. *See e.g.*, *In re Oceana Era, Inc.*, 18 E.A.D. 678, 698-99 (EAB 2022) (disallowing wholly new argument "that the CWA exemption from NEPA does not apply to the Permit").

The Petition here dealt extensively with this same issue of the Region's failure to ensure the containment of mining fluid based on inadequate baseline groundwater information (Petition at 35-38) and inadequate hydrogeological analysis (Petition at 38-45). Further, contrary to the Region's argument that these failures to ensure proper containment of mining fluid as required by 40 C.F.R. § 144.12 were not raised previously, the Tribe's 2017 comments discuss these same fluid movement issues in painstaking detail. *See* Petition Attachment 1 (Tribe's June 19, 207 Comments at pdf pages 22-30). The fact that the arguments addressing containment and movement of mining fluid pertain directly to 40 C.F.R. § 144.12 was manifest, as evidenced by the Region's Responses to Comments which repeatedly recognize that containment and control on mining fluid movement is required by 40 C.F.R. § 144.12. Thus, there is no legitimate argument that the comments left the Region unaware of these important issues, the relevant and applicable regulatory requirements, or that it did not consider these issues when issuing the permits.

The Region next argues that the Tribe raised new arguments with respect to baseline groundwater information. Motion at 4-6. The Region mischaracterizes the Tribe's arguments. The Petition contains a detailed discussion of the substantial gaps in the baseline groundwater

information submitted to EPA for the permitting exercise – such that it renders the Region's analysis scientifically indefensible. Petition at 35-45. When the Tribe asserts that the EPA failed to include "available" information, it asserts that there was no barrier to obtaining this information and that a scientifically competent analysis of the groundwater quality and the hydrogeological conditions required that it be submitted to the Region in order to satisfy the Region's permitting obligations to ensure protect underground sources of drinking water. Indeed, the Tribe's point is that the EPA agrees that this this information is necessary, it is simply deferring its collection until after permitting when the Tribe (and member of the public) will be deprived of any opportunity to provide any input. *See* Petition at 36 ("Thus, while the existing administrative record contains data from 2007-2009, the background water quality for use in the actual regulatory process for the facility will be established at a future date, outside of any public process, and without the benefit of the public's review and comment.").

The Tribe argues that this is necessary information and is "available":

> any assertions that this additional data cannot be obtained without full construction of final well-fields is unsupported and contradicted by the expert testimony of Dr. Moran. Dr. Moran opined that adequate baseline data can be gathered "without constructing the ultimate wellfield monitoring network." Attachment 22 at 2. Dr. Moran pointed to previous studies undertaken by TVA and Knight Piesold that conducted pump tests to gather baseline data prior to permit approval. *Id*. Dr. Moran stated that Powertech's consultant Mr. Demuth "confuses hydrological testing that is needed to establish, analyze, and disclose the hydrogeological setting as part of the NEPA-based NRC permit-approval with the more specialized production tests Powertech will conduct on constructed wellfields." *Id*. In short, there is no legal, technical, or practical basis to forgo gathering this needed data as part of the UIC application process.

Petition at 37. Thus, contrary to the Region's Motion, these arguments are not new – obtainable (e.g. "available") data was excluded from the application and in granting permits without this data – only to require that it be submitted and analyzed at a future date in a clandestine fashion – the Region lacked necessary information to meet its statutory obligations under the SWDA.

Next, the Region argues that the Tribe has raised a new argument in asserting noncompliance with the National Historic Preservation Act ("NHPA") Section 110. Motion at 7-10. However, there is no dispute that the Tribe's Petition raises the failure of the Region to comply with NHPA Section 110. Petition at 22 (referencing Attachment 2 (Tribe's 2019 comments)).

The Region asserts that the Petition does not provide any specific information as to the lack of compliance with Section 110. Motion at 8. However, the Region ignores in the Petition the paragraphs immediately following the Tribe's assertion of violations of Section 110 that provide the requisite specificity. The Tribe specifically argued that the Section 110 violation stemmed from the Region's failure to "ensure[] proper identification and evaluation of cultural resources" and the Region's resulting unlawful reliance on the Programmatic Agreement as a consequence of the lack of a cultural resources survey. Petition at 22.

In support of this argument, the Petition asserts that the Region failed to address the legally deficient cultural resources analysis in violation of the NHPA and the National Environmental Policy Act ("NEPA"), including the failure to accomplish any competent cultural resources survey. *Id*. The Tribe's Reply centers on this precise issue – unambiguously centering on the "undisputed fact that there has *never* been a competent Lakota cultural resources survey conducted on the Dewey-Burdock site" resulting in a violation of Section 110. Reply at 9. Thus, there is no "new" issue presented on Reply. This Board should reject the Region's transparent attempts to evade its NHPA Section 110 duty through the use of procedural devices – particularly where the Region has no substantive answer for its inexcusable failure to ensure protections for the significant and sacred Lakota cultural resources at the site. *See* Petition at 9-10, 13 (referencing significant cultural resources, including burials, at the site).

At best, the Region is heard to complain that the Tribe cited to additional authority related to Section 110 (*see* Reply at 7), but the gravamen of the challenge was not new. The Region provides no basis to exclude an issue based on the recitation of additional caselaw on Reply to support its positions articulated in the Petition.

Lastly, in one short paragraph, the Region argues that the Tribe raised a new argument that EPA is subject to NEPA's statutory commandments. However, the Petition unambiguously argues this precise point that the only purported exemption from any NEPA requirements is contained in EPA *regulations*, which do not have the authority to override the statutory mandates of NEPA:

> The SDWA does not exempt EPA's UIC program from any NEPA mandate. Rather, in anticipation that permitting would be implemented consistent this judicially created doctrine, EPA's UIC *regulations* provide that "all [UIC] permits are not subject to the environmental impact statement provisions of … [NEPA]." 40 C.F.R. § 129.9(b)(6).

Petition at 25 (emphasis in original). *See also* Petition at 25 (discussing EPA's statutory obligations under NEPA to address cumulative impacts, regardless of any regulatory exemption based on "functional equivalence"); Petition at 32-33 (discussing EPA's statutory requirements under NEPA that are not negated by EPA's regulations applying the "functional equivalence" doctrine). Thus, contrary to the Region's undeveloped argument, the Petition squarely raised the agency's inability to exempt itself from the entirety of the NEPA statute through a regulation.

Overall, when analyzed closely, the Region's objections to the Tribe's Reply fail to identify any actual "new" arguments or issues. To the contrary, the Region has been aware of each of the Tribe's issues and arguments since the public comment periods, and the Reply did not raise any issues not specifically identified and discussed in the Petition. This Board should reject the Region's attempt to evade these important issues at this late date – simply because the

Region may now realize that its Response lacked the necessary substance to effectively defend its permitting decision.

The Tribe requests that the Board deny the Motion.

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Date: February 22, 2024

STATEMENT OF COMPLIANCE WITH WORD LIMITATION

This petition for review complies with the requirement that replies on petitions for review not exceed 7,000 words.

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Response to Motion to Strike and Alternative Motion for Leave to File Surreply in the matter of Powertech (USA) Inc., Dewey-Burdock Uranium In-Situ Recovery Project, Permit No.: Class III Area Permit No. SD31231-00000, And

Class V Area Permit No. SD52173-00000, was served, by email in accordance with the Environmental Appeals Board's September 21, 2020 Revised Order Authorizing Electronic Service of Documents in Permit and Enforcement Appeals, on the following persons, this 22nd Day of February, 2024:

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