

January 25, 2010

Joseph American Horse, Sr.
POB 941
Pine Ridge, SD 57770

David Frankel
101 Walnut Street
Buffalo Gap, SD 57722

Thomas Kanatakeniate Cook
1705 S Maple
Chadron, NE 69337

Debra White Plume
POB 71
Manderson, SD 57756

Loretta Afraid of Bear Cook
1705 S Maple
Chadron, NE 69337

Owe Aku, Bring Back the Way
Attn: Debra White Plume
P. O. Box 325
Manderson, SD 57756

Ted P. Ebert
538 Albany Avenue
Hot Springs, SD 57747

Aligning for Responsible Mining
POB 3014
Pine Ridge, SD 57770

Re: Docket No. 40-9075-MLA, Response to Request for Sensitive Unclassified Non-Safeguards Information (SUNSI) Regarding License Application Request of Powertech (USA) Inc., Dewey-Burdock In Situ Uranium Recovery Facility in Fall River and Custer Counties, S.D. (Federal Register Notice of Opportunity for Hearing, 75 Fed. Reg. 467 (January 5, 2010))

Dear Mr. Frankel:

On January 15, 2010, you requested access to Sensitive Unclassified Non-Safeguards Information (SUNSI) for six individuals, two groups of individuals, and two organizations who intend to petition to intervene in the Dewey-Burdock proceeding.¹ You also sought SUNSI access for yourself and another attorney in your capacity as representatives of these potential petitioners. Because the Nuclear Regulatory Commission (NRC) Staff has determined that none of the potential petitioners is likely to establish standing to participate in this proceeding, the Staff is denying your request for access to SUNSI.

¹ The individual petitioners you identify are Joseph American Horse, Sr.; Thomas Kanatakeniate Cook; Loretta Afraid of Bear Cook; Ted P. Ebert; and Debra White Plume. You also include yourself as a potential petitioner. The two groups of individuals you identify are American Horse Tiospaye, by Joe American Horse, Sr.; and Afraid of Bear/Cook Tiwahe, by Thomas Kanatakeniate Cook. The organizational petitioners are Owe Aku—Bring Back the Way and Aligning for Responsible Mining.

I. Basis for Your Request

You assert that the potential petitioners will each be able to demonstrate standing to intervene in this proceeding. You argue that the Indigenous petitioners will be able to demonstrate standing based on “federal Indian law, including the trust responsibility and the Winters Doctrine, the 1851 and 1868 Ft. Laramie Treaties, the UN Declaration of Indigenous Rights, the IPCCR, the NEPA, the NHPA, the AEA, and the AIRFA, and the NAGPRA[.]” Request at 1–2. With respect to the non-indigenous petitioners, you state that they “assert their rights as citizens and members of the public.” Request at 2.

To support the claims of both groups, you attach a one-page letter from Louis A. Redmond, Ph.D., of Red Feather Archeology (Exhibit A to your request). In his letter Dr. Redmond states that “in the majority of areas that are defined by either current or extinct water resources”—Dr. Redmond implies that this includes the Dewey-Burdock site—“there is a high degree of probability of encountering both historic and prehistoric cultural remains, to include human burials.” In your request, you state that the petitioners have an interest in preserving graves, bones, artifacts and related cultural resources in the vicinity of the Dewey-Burdock site. Request at 2. You argue that the NRC should disclose all SUNSI documents related to cultural resources and current or extinct water resources of the region so that the archeological value of the proposed mine site may be evaluated by the petitioners and other members of the public. Request at 2.

You also argue that certain petitioners have standing to intervene because they use water resources that may be affected by operations at the Dewey-Burdock site. Specifically, you state that several of the petitioners draw water from the Arikaree aquifer. Request at 2–5. You argue that the Arikaree aquifer could be affected by mining at the Dewey-Burdock site due to “interconnection between the mined aquifer and the Arikaree[.]” Request at 2. You state that this interconnection exists “by virtue of cracks, faults, fractures and brachian tubes that connect the region’s water resources.” Request at 2 n.1.

II. Documents Containing SUNSI

You seek access to “SUNSI documents related to cultural resources and . . . current or extinct water resources of the region” where the Dewey-Burdock site is located “so that the archeological value of the proposed mine site may be evaluated by the public and [the] potential parties.” Request at 2. The NRC Staff has identified thirty-eight documents under Docket Number 040-9075 as containing information pertaining to cultural resources or archeological sites. The attachment to this response provides a list of those documents.

Although these documents contain SUNSI,² the Staff has determined that not all portions of all documents contain SUNSI. The Staff will attempt to redact portions containing SUNSI and make the remaining portions of the documents publicly available through the NRC’s

² These documents contain SUNSI because the release of records pertaining to the location of archaeological sites is restricted under South Dakota Codified Laws, specifically, § 1-20-21.2.

Agencywide Documents Access and Management System (ADAMS). Accordingly, even though the NRC Staff finds that your request for SUNSI must be denied, the Staff expects to be able to provide you access to publicly available versions of additional documents. The Staff will notify you when these documents become publicly available in ADAMS.

The Staff further notes that the same cultural resources and archeological information submitted to the NRC by the applicant in this proceeding is presently available for review, with specific site location information redacted, at the South Dakota Historical Society, Archaeological Research Center, 2425 E. Saint Charles St., Rapid City, SD 57709-1257, telephone number (605) 394-1936.

III. NRC Staff's Position Regarding Your Request

As stated in the Federal Register notice imposing procedures for gaining access to SUNSI in this proceeding, in response to a request for SUNSI the NRC Staff shall address whether: "(1) There is a reasonable basis to believe the petitioner is likely to establish standing to participate in this proceeding; and (2) The requestor has established a legitimate need for access to SUNSI." 75 Fed. Reg. at 470. Below, the Staff explains why none of the petitioners you represent is likely to establish standing to intervene in this proceeding. Because the petitioners are unlikely to establish standing, they have also failed to establish a need for access to SUNSI.

A. Standing

In evaluating standing, the NRC considers "whether the petitioner has alleged such a personal stake in the outcome of the controversy as to demonstrate that a concrete adverseness exists which will sharpen the presentation of issues." *Sequoyah Fuels Corp. and General Atomics* (Gore, Oklahoma Site), CLI-94-12, 40 NRC 64, 71 (1994) (citations and internal quotation marks omitted). To evaluate whether a petitioner has such a "personal stake," the NRC applies judicial concepts of standing that look to whether the petitioner has shown that (1) he has suffered or will suffer a distinct and palpable harm that constitutes injury-in-fact within the zone of interests arguably protected by the governing statutes; (2) the injury is fairly traceable to the challenged action; and (3) the injury is likely to be redressed by a favorable agency decision. The requisite injury must be concrete and particularized, rather than conjectural or hypothetical.

Although the NRC recognizes a fifty-mile proximity presumption to establish standing in proceedings concerning nuclear power reactor construction and operating licenses, in other cases—including materials licensing cases such as the present proceeding—the NRC considers standing on a case-by-case basis, taking into account the nature of the proposed action and the significance of the radioactive source. Where there is no obvious potential for offsite harm, the petitioner must show a specific and plausible means of how the challenged action may affect him.

In the case of an organization, it may demonstrate standing in either an organizational or representational capacity. To demonstrate organizational standing, the organization must show immediate or threatened injury to its organizational interests. For representational standing, the organization must show that at least one of its members may be affected by the proceeding, identify that member, and show that the member has authorized the organization to represent him and request a hearing on his behalf.

i. Individual and Group Petitioners

You argue that the individual and group petitioners have standing because they have an interest in any cultural remains at the Dewey-Burdock site, and you suggest that these remains may be disturbed by operations at the site. You fail to demonstrate, however, that any individual or group of individuals has the type of interest sufficient to establish standing in this proceeding. Although you cite various federal statutes in support of your argument, including the National Historic Preservation Act, you fail to show that any of these statutes recognizes or creates a personal right of any individual that may be affected by this proceeding. Nor do you explain how any individual or group might otherwise have a personal stake in cultural remains at the Dewey-Burdock site that would be affected by the outcome of this proceeding. Accordingly, you fail to show that these petitioners would suffer an injury-in-fact within the zone of interests protected by governing statutes. The treaties, declarations, and doctrines you cite likewise fail to establish that any individual or group petitioner has a personal stake in cultural remains that may be affected by this proceeding.

You also argue that the individual and group petitioners use water from the Arikaree aquifer and that this aquifer could be affected by operations at the Dewey-Burdock site. Here also you fail to demonstrate an injury-in-fact to the petitioners that may result from this proceeding. Because the Dewey-Burdock facility would not present an obvious potential for offsite harm, the petitioners must show a specific and plausible means of how the licensing of the facility would affect them. In your SUNSI request you fail to describe any specific or plausible pathway by which radioactive contamination from the Dewey-Burdock site might enter the Arikaree aquifer and thereby injure the petitioners. You argue that there will be “interconnection between the mined aquifer and the Arikaree,” Request at 2, but fail to explain how this interconnection might occur. Although you suggest there are “cracks, faults, fractures and brachian tubes that connect the region’s water resources,” Request at 2 n.1, you do not provide expert opinion or other scientific support for this claim. Moreover, even assuming there is some degree of interconnection between the aquifers, you fail to explain how this would harm the petitioners. You allege that contamination of water wells could occur, but you do not describe the nature or extent of this contamination or explain what effect it would have on the petitioners or their interests.

ii. Organizational Petitioners

The organizational petitioners requesting SUNSI access are Owe Aku—Bring Back the Way and Aligning for Responsible Mining. Owe Aku is a “nongovernmental organization dedicated to the preservation of the Lakota Way of Life, including our territories and environment.” Request at 6. You identify Debra White Plume, one of the individuals requesting SUNSI, as the Director of Owe Aku, but you do not name any other members. With respect to Aligning for Responsible Mining, you state that it has “members who expect to gain standing in the intervention, including those individuals listed here previously.” Request at 6. You do not name any other members, however, nor do you describe the organization’s purpose or interests.

Based on the information you have submitted, the NRC Staff concludes it is unlikely the organizational petitioners will demonstrate standing to intervene in this proceeding. To establish organizational standing, an organization must show an injury-in-fact to its own interests that would result from the proceeding. Here, you have not described any distinct and

palpable harm to the organizational petitioners that would result from licensing the Dewey-Burdock facility. In the case of Owe Aku, you have described only the organization's broad purposes. In the case of Aligning for Responsible Mining, you have not provided any specific information about the organization's purposes or interests.

The NRC Staff also concludes you are unlikely to demonstrate that either organization has representational standing. The only members of each organization that you identify are individuals previously identified as individual petitioners. Because these individuals are unlikely to establish standing in their own capacity, it is also unlikely that the organizations will be able to establish standing as their representatives.

B. Need for SUNSI

Because none of the individual, group or organizational petitioners is likely to establish standing to intervene in this proceeding, the NRC Staff finds that none of the petitioners has established a legitimate need for access to SUNSI.

You also request SUNSI access for yourself as counsel for your clients and for Attorney Bruce Ellison, who also serves as counsel for the petitioners. Because none of your clients is likely to establish standing to intervene in this proceeding, the NRC Staff finds that neither you nor Mr. Ellison requires SUNSI access in order to represent your clients.

Sincerely,

*/Signed (electronically) by/
Michael J. Clark*

Michael J. Clark
Counsel for the NRC Staff
Office of the General Counsel
U.S. Nuclear Regulatory Commission
Mail Stop O 15 D-21
Washington, D.C. 20555-0001

Attachment: Docket No. 40-9075-MLA, List of Documents Containing SUNSI Pertaining to Cultural Resources or Archeological Sites

"Attachment: Docket No. 40-9075-MLA, List of Documents Containing SUNSI Pertaining to Cultural Resources or Archeological Sites, January 25, 2010."

Accession Number	Document Date	Title
ML091070678	31-Mar-2008	A Level III Cultural Resources Evaluation of Powertech (USA) Incorporated's Proposed Dewey-Burdock Uranium Project Locality within Southern Black Hills, Custer & Fall River Counties, SD, Vol. I, Chapter 5, Section 5.22 through Figure 5.213.
ML091070681	31-Mar-2008	A Level III Cultural Resources Evaluation of Powertech (USA) Incorporated's Proposed Dewey-Burdock Uranium Project Locality within Southern Black Hills, Custer & Fall River Counties, SD, Vol. II, Cover through Chapter 5, Section 5.90.
ML091070683	31-Mar-2008	A Level III Cultural Resources Evaluation of Powertech (USA) Incorporated's Proposed Dewey-Burdock Uranium Project Locality within Southern Black Hills, Custer & Fall River Counties, SD, Vol. II, Chapter 5, Section 5.91 through Figure 6.125.
ML091070685	31-Mar-2008	A Level III Cultural Resources Evaluation of Powertech (USA) Incorporated's Proposed Dewey-Burdock Uranium Project Locality within Southern Black Hills, Custer & Fall River Counties, SD, Vol. III, Cover through Chapter 6, Figure 6.235.
ML091070697	31-Mar-2008	A Level III Cultural Resources Evaluation of Powertech (USA) Incorporated's Proposed Dewey-Burdock Uranium Project Locality within Southern Black Hills, Custer & Fall River Counties, SD, Vol. I: Cultural Resources Report, Cover through Chapter 4.
ML091070699	31-Mar-2008	A Level III Cultural Resources Evaluation of Powertech (USA) Incorporated's Proposed Dewey-Burdock Uranium Project Locality within Southern Black Hills, Custer & Fall River Counties, SD, Vol. I, Chapter 5, Section 5.1 through 5.21.
ML091070700	31-Mar-2008	A Level III Cultural Resources Evaluation of Powertech (USA) Incorporated's Proposed Dewey-Burdock Uranium Project Locality within Southern Black Hills, Custer & Fall River Counties, SD, Vol. III, Chapter 6, Section 6.52.2 through Chapter 8.
ML091070717	25-Nov-2008	A Level III Cultural Resources Evaluation of Powertech (USA) Incorporated's Proposed Dewey-Burdock Uranium Project Locality within Southern Black Hills, Custer & Fall River Counties, SD, Addendum 2, Vol. 1, Additional Survey Report, Section 27, 31....
ML091070718	25-Feb-2009	A Level III Cultural Resources Evaluation of Powertech (USA) Incorporated's Proposed Dewey-Burdock Uranium Project Locality within Southern Black Hills, Custer & Fall River Counties, SD, Addendum 2, Vol. 2, Appendices.
ML091070720	31-Mar-2008	A Level III Cultural Resources Evaluation of Powertech (USA) Incorporated's Proposed Dewey-Burdock Uranium Project Locality within Southern Black Hills, Custer & Fall River Counties, SD, Vol. IV, Appendices.
ML091070721	31-Mar-2008	A Level III Cultural Resources Evaluation of Powertech (USA) Incorporated's Proposed Dewey-Burdock Uranium Project Locality within Southern Black Hills, Custer & Fall River Counties, SD, Vol. V, Appendices.
ML091070723	17-Oct-2008	A Level III Cultural Resources Evaluation of Powertech (USA) Incorporated's Proposed Dewey-Burdock Uranium Project Locality within Southern Black Hills, Custer & Fall River Counties, SD, Addendum 1, Vol. 1, Evaluative Testing Report.
ML091070725	25-Feb-2009	A Level III Cultural Resources Evaluation of Powertech (USA) Incorporated's Proposed Dewey-Burdock Uranium Project Locality within Southern Black Hills, Custer & Fall River Counties, SD, Addendum 1, Vol. 2, Appendices.
ML091070726	14-Jan-2009	Evaluative Testing of Four Sites within Powertech (USA) Incorporated's Proposed Dewey-Burdock Uranium Project Locality, Southern Black Hills, Custer and Fall River Counties, South Dakota, Volume 1, Evaluative Testing Report.
ML091070727	14-Jan-2009	Evaluative Testing of Four Sites within Powertech (USA) Incorporated's Proposed Dewey-Burdock Uranium Project Locality, Southern Black Hills, Custer and Fall River Counties, South Dakota, Volume 2: Appendices.
ML092880425	31-Mar-2008	A Level III Cultural Resources Evaluation of Powertech (USA) Incorporated's Proposed Dewey-Burdock Uranium Project Locality within the Southern Black Hills, Custer and Fall River Counties, South Dakota. Volume V: Appendices.
ML092880426	31-Mar-2008	A Level III Cultural Resources Evaluation of Powertech (USA) Incorporated's Proposed Dewey-Burdock Uranium Project Locality within the Southern Black Hills, Custer and Fall River Counties, South Dakota. Volume V: Appendices.
ML092880427	14-Jan-2009	Evaluative Testing of Four Sites within Powertech (USA) Incorporated's Proposed Dewey-Burdock Uranium Project Locality, Southern Black Hills, Custer and Fall River Counties, South Dakota - Volume 1: Evaluative Testing Report.
ML092880428	17-Oct-2008	A Level III Cultural Resources Evaluation of Powertech (USA) Incorporated's Proposed Dewey-Burdock Uranium Project Locality within the Southern Black Hills, Custer and Fall River Counties, SD - Add. 1, Vol. 1: Evaluative Testing Rept, Cover - Page 69.
ML092880430	17-Oct-2008	A Level III Cultural Resources Evaluation of Powertech (USA) Incorporated's Proposed Dewey-Burdock Uranium Project Locality within the Southern Black Hills, Custer and Fall River Counties, SD - Add. 1, Vol. 1: Evaluative Testing Rept, Page 70 - Page 162.
ML092880431	25-Nov-2008	A Level III Cultural Resources Evaluation of Powertech (USA) Inc.'s Proposed Dewey-Burdock Uranium Project Locality within the Southern Black Hills, Custer and Fall River Counties, South Dakota - Add. 2, Vol. 1: Additional Survey Report, Cover - Page 77.

"Attachment: Docket No. 40-9075-MLA, List of Documents Containing SUNSI Pertaining to Cultural Resources or Archeological Sites, January 25, 2010."

Accession Number	Document Date	Title
ML092880432	25-Nov-2008	A Level III Cultural Resources Evaluation of Powertech (USA) Inc.'s Proposed Dewey-Burdock Uranium Project Locality within the Southern Black Hills, Custer and Fall River Counties, South Dakota - Add. 2, Vol. 1: Additional Survey Report, Pages 78 - 166.
ML092880433	10-Aug-2009	A Level III Cultural Resources Evaluation of Powertech (USA) Inc.'s Proposed Dewey-Burdock Uranium Project Locality within the Southern Black Hills, Custer and Fall River Counties, South Dakota - Add. 1, Vol. 2: Appendices.
ML092880435	14-Jan-2009	Evaluation Testing of Four Sites within Powertech (USA) Inc.'s Proposed Dewey-Burdock Uranium Project Locality, Southern Black Hills, Custer and Fall River Counties, South Dakota, Vol. 2: Appendices.
ML092880438	31-Mar-2008	A Level III Cultural Resources Evaluation of Powertech (USA) Incorporated's Proposed Dewey-Burdock Uranium Project Locality within the Southern Black Hills, Custer and Fall River Counties, South Dakota, Cover through Page 4.15.
ML092880439	31-Mar-2008	A Level III Cultural Resources Evaluation of Powertech (USA) Incorporated's Proposed Dewey-Burdock Uranium Project Locality within the Southern Black Hills, Custer and Fall River Counties, South Dakota, Pages 4.16 through 5.64.
ML092880441	31-Mar-2008	A Level III Cultural Resources Evaluation of Powertech (USA) Incorporated's Proposed Dewey-Burdock Uranium Project Locality within the Southern Black Hills, Custer and Fall River Counties, South Dakota, Pages 5.65 through 5.153.
ML092880442	31-Mar-2008	A Level III Cultural Resources Evaluation of Powertech (USA) Incorporated's Proposed Dewey-Burdock Uranium Project Locality within the Southern Black Hills, Custer and Fall River Counties, South Dakota, Pages 5.154 through 5.232.
ML092880443	1-Mar-2008	A Level III Cultural Resources Evaluation of Powertech (USA) Incorporated's Proposed Dewey-Burdock Uranium Project Locality within the Southern Black Hills, Custer and Fall River Counties, South Dakota, Pages 5.233 through 5.290.
ML092880445	31-Mar-2008	A Level III Cultural Resources Evaluation of Powertech (USA) Incorporated's Proposed Dewey-Burdock Uranium Project Locality within the Southern Black Hills, Custer and Fall River Counties, South Dakota, Pages 5.291 through 5.373.
ML092880448	31-Mar-2008	A Level III Cultural Resources Evaluation of Powertech (USA) Incorporated's Proposed Dewey-Burdock Uranium Project Locality within the Southern Black Hills, Custer and Fall River Counties, South Dakota, Pages 6.83 through 6.132.
ML092880449	31-Mar-2008	A Level III Cultural Resources Evaluation of Powertech (USA) Incorporated's Proposed Dewey-Burdock Uranium Project Locality within the Southern Black Hills, Custer and Fall River Counties, South Dakota, Pages 6.133 through 6.204.
ML092880451	31-Mar-2008	A Level III Cultural Resources Evaluation of Powertech (USA) Incorporated's Proposed Dewey-Burdock Uranium Project Locality within the Southern Black Hills, Custer and Fall River Counties, South Dakota, Pages 6.205 through 6.308.
ML092880452	31-Mar-2008	A Level III Cultural Resources Evaluation of Powertech (USA) Incorporated's Proposed Dewey-Burdock Uranium Project Locality within the Southern Black Hills, Custer and Fall River Counties, South Dakota, Pages 6.309 through 8.23.
ML092880453	31-Mar-2008	A Level III Cultural Resources Evaluation of Powertech (USA) Incorporated's Proposed Dewey-Burdock Uranium Project Locality within the Southern Black Hills, Custer and Fall River Counties, South Dakota, Appendix A.
ML092880457	31-Mar-2008	A Level III Cultural Resources Evaluation of Powertech (USA) Incorporated's Proposed Dewey-Burdock Uranium Project Locality within the Southern Black Hills, Custer and Fall River Counties, South Dakota, Pages 6.1 through 6.82.
ML092880458	31-Mar-2008	A Level III Cultural Resources Evaluation of Powertech (USA) Incorporated's Proposed Dewey-Burdock Uranium Project Locality within the Southern Black Hills, Custer and Fall River Counties, South Dakota, Appendix A, Continued.
ML092880459	10-Aug-2009	A Level III Cultural Resources Evaluation of Powertech (USA) Inc.'s Proposed Dewey-Burdock Uranium Project Locality within the Southern Black Hills, Custer and Fall River Counties, South Dakota - Add. 2, Vol. 2: Appendices.