

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

Before the Chief Administrative Judge:

In the Matter of)	
)	
POWERTECH (USA) INC.,)	Docket No. 40-9075-MLA
)	
(Dewey-Burdock In Situ Uranium Recovery)	
Facility))	

ANSWER OF THE OGLALA SIOUX TRIBE TO
MOTION FOR ENTRY OF A PROTECTIVE ORDER

The Oglala Sioux Tribe hereby submits this Answer to the Motion for Entry of a Protective Order (“Motion”) submitted by the NRC Staff on February 16, 2010. Through the Motion, NRC Staff seeks approval of its proposed protective order defining the terms of access to and use of protected information designated by Powertech (USA) Inc. (“Powertech”) in its Application as Sensitive Unclassified Non-Safeguards Information (SUNSI) under 10 C.F.R. § 2.390.

While a protective order is appropriate in this case, the terms and scope proposed by the NRC Staff are not reasonable. Primarily, the NRC Staff’s proposed order does not appear to account for the National Historic Preservation Act’s (“NHPA”) controlling authority defining the scope of public access to historical and archaeological information held by federal agencies. Further, as proposed, the protective order expressly limits the use and dissemination of the protected information only by the Tribe, but does not recognize any similar restriction on Powertech’s or NRC staff’s use of the information. Given that state and federal laws also restrict the use and dissemination by the NRC Staff and Powertech, any protective order entered in this

matter should encompass all parties. Lastly, the proposed order should be revised to expressly provide for the filing of a redacted set of the confidential documents in the public record, and to account for two recent events: 1) the notice of appearance of new attorneys for the Tribe, and 2) the recent request filed in this matter regarding an extension of time for the submittal of any Request for Hearing.

Applicability of the National Historic Preservation Act

The National Historic Preservation Act (NHPA), 16 U.S.C. §§ 470, et seq., is the primary federal statute which imposes procedural and substantive requirements aimed at protecting cultural and historic information. Section 304 of the NHPA protects certain information about historic resources from public disclosure. Specifically, it requires federal agencies to “withhold from disclosure to the public, information about the location, character, or ownership of a historic resource if the agency and the Secretary of the Interior agree that disclosure may (1) cause a significant invasion of privacy, (2) risk harm to the historic resource, or (3) impede the use of a traditional religious site by practitioners.” 16 U.S.C. § 470w-3. The NHPA defines “historic property” or “historic resource” broadly to include “any prehistoric or historic district, site, building, structure, or object included in, or eligible for inclusion on the National Register, including artifacts, records, and material remains related to such a property or resource.” 16 U.S.C. §470w(5). The term “Secretary” means “the Secretary of the Interior acting through the Director of the National Park Service except where otherwise specified.” 16 U.S.C. §470-w(11).

Once a determination to withhold information from the public has been made by an agency, in consultation with the Interior Department, the agency is to determine who (if anyone) may have access to the information for NHPA purposes. *See* 16 U.S.C. §§ 470hh, 470w-3(b); 36 C.F.R. § 800.11. If the information was developed in order to comply with NHPA Section

106 or Section 110(f), the National Park Service must consult with the Advisory Council on Historic Preservation (the Advisory Council) in making the determinations regarding withholding the information from the public and restricting access to the site. 16 U.S.C. §470w-3(c). Once information on the nature of the historic resources has been identified, NHPA Section 106 requires federal agencies to “take into account” the effect of its “undertakings” on historical and archaeological resources and to give affected Indian Tribes and the Advisory Council the opportunity to comment on such effects. 16 U.S.C. § 470(f).

NRC caselaw makes clear that the NHPA applies to the NRC. *See In the Matter of USEC Inc. (American Centrifuge Plant)*, LBP-05-28, 62 N.R.C. 585, at *4 (October 7, 2005); *In the Matter of Crow Butte Resources, Inc. (License Renewal for In Situ Leach Facility, Crawford, Nebraska)*, Nuclear Reg. Rep. P 31589, at *3 (May 18, 2009). In the case at hand, however, there is no indication that a review and consultation with the Department of the Interior under NHPA section 304 (16 U.S.C. §470w-3) has been conducted. As a result, the scope of information subject to the NRC Staff’s proposed protective order may well extend beyond that protected by federal statute. Indeed, the proposed protective order appears to recognize this fact at paragraphs 12 and 14, which state that “[n]othing shall preclude any person from seeking public disclosure of SUNSI...” (para. 12) and that “[t]his Protective Order does not apply to information that the NRC Staff, Atomic Safety and Licensing Board Panel or Commission determines to not be SUNSI.” (para. 14). The result is to place the Tribe and its counsel in the position of being subject to sanctions for any release of information, even for such information which federal law requires to be made public.

Given the foregoing, any proposed protective order should be confined such that it mirrors the scope of the documents subject to protections under the NHPA. Asking the Tribe to

enter into a restrictive protective order that expands beyond the scope of the protections in the NHPA or for documents and information that may not be subject to the protections in the NHPA, and available to the public, is not reasonable. Thus, prior to the entry of a protective order in this case, the NRC Staff must discharge its duties under the NHPA or demonstrate that the agency has in fact discharged this duty, and the protective order should reflect the outcome of this required process.

This principle of coordinating the scope of a protective order with the scope of the protections for historic and cultural information available at federal law is well supported in the federal courts. See *Diné CARE v. Klein*, 2009 WL 2407653 (D.Colo. 2009); *Jicarilla Apache Nation v. U.S.*, 60 Fed.Cl. 413 (2004). In the *Diné CARE* case (Order attached), the federal district court directly addressed the issue regarding a protective order for confidential cultural and historic information submitted as part of an application for a federal permit. In that case, the court recognized that the scope of a protective order should coincide with the scope of protections for the same information contained in federal law. 2009 WL 2407653 at *2-4. The court also expressly recognized the propriety of incorporating language into such a protective order to reflect confidentiality protections mandated by federal law. *Id.* at *4-5. See also *Jicarilla Apache Nation*, 60 Fed.Cl. at 414 (recognizing NHPA section 304 (16 U.S.C. § 470w-3) as controlling federal law defining the scope of a protective order).

The Tribe recognizes that the South Dakota State Historical Society Archaeological Research Center, acting through the State Archaeologist, has been consulted and to some extent involved in the process of determining which information should be designated as SUNSI. However, and despite the expertise brought to the matter by the State of South Dakota, the NHPA requires that the NRC make its own determination under a specified federal law process

as to confidentiality of information pertaining to historic resources. Further, the NRC Staff must be mindful of the role of the Oglala Sioux Tribe Tribal Historic Preservation Officer as part of the process of determining the scope of the information subject to protections under the NHPA. See *Diné CARE v. Klein*, 2009 WL 2407653 at * 2 (recognizing the propriety of involving the Tribal Historic Preservation Officer in determinations of information subject to confidentiality). Thus, the Tribe requests that the protective order be entered only as to those documents and pieces of information subject to confidentiality from the public under the NHPA.

Applicability of the Protective Order to NRC Staff and Powertech

As currently proposed, the protective order establishes restrictions on the use and dissemination of relevant documents and information only by the Sioux Tribe and its representatives, but purports to place no such restrictions on the use and distribution of the information by the other parties to this proceeding, namely Powertech and the NRC Staff. *See* NRC Staff's proposed protective order at paragraph 4. The Tribe requests that all parties to the proceeding with access to the protected information be made subject to the protective order. At minimum, the Tribe requests that the Order be revised to recognize that state and federal law apply to the use and dissemination of the protected information by all parties. Specifically, the order should be amended to specifically limit the parties' distribution of confidential information about the locations and nature of inventoried historic properties as provided by the National Historic Preservation Act (NHPA) and implementing regulations and South Dakota Codified Laws §1-20-21.2 (confidentiality of records pertaining to location of archaeological site).

The concept of incorporating into a protective order the confidentiality restrictions that exist in federal law was also recognized in *Diné CARE*. There, while the court declined to expressly subject the project applicant who had developed the relevant information to the terms

of the full protective order, the court did incorporate language recognizing the need for the applicant and federal agency to comply with state and federal law regarding the use of any protected information. 2009 WL 2407653 at *4-5. The Tribe believes this is a reasonable request that would ensure clarity on the use of the information by all parties. Further, inclusion of such language would not work any prejudice on any party, as the agreement would only be recognizing existing federal and state law mandates.

Redacted Versions of any Protected Documents Should be Entered into the Public File

Counsel for the Tribe has conferred with NRC Staff and Powertech, and the parties have all agreed that a redacted version of the relevant documents would be filed in the public record for this matter. These redacted versions should minimize the need to file future documents (or portions thereof) under seal, except in those circumstances where confidentiality requires. While certain information should be kept confidential as a matter of federal law, any information not so kept should be made available to members of the Tribe and the public in the public record. Such a process is accepted practice in the federal courts. *See S. Utah Wilderness Alliance v. United States BLM*, 402 F. Supp. 2d 82, 91 (D.D.C. 2005)(recognizing the need for protected information to be redacted, but public information to be included in the public record).

Changes Needed to Reflect Recent Events

Lastly, the protective order should reflect two recent events that warrant minor changes to the proposed order submitted by NRC Staff. The first event is the recent filing of Notice of Appearance in this case for additional counsel for the Tribe. In so far as the protective order identifies specific attorneys for whom access to the SUNSI will be allowed, the order should identify each attorney for whom a notice of appearance has been filed. The second event is the recent request submitted by the Tribe regarding an extension of time for filing of any request for

hearing. The protective order should account for the potential for an extension by adjusting specific language in paragraph 16 relating to deadlines to file contentions.

Conclusion

A protective order is appropriate in this case to maintain prudent confidentiality protections related to sensitive cultural and historical information. However, the scope of the protective order should be no broader than that mandated by the National Historic Protection Act (16 U.S.C. §470w-3), as determined by the agency in consultation with the Secretary of the Interior. Further, the protective order should reflect existing federal and state laws to the extent they are applicable to NRC Staff and Powertech. A proposed protective order containing these changes to the NRC Staff's proposed protective order is attached. The Tribe's proposed changes are reflected in paragraphs 3, 4, 7, 12, 14, and 16.

Respectfully Submitted,

/s/ Jeffrey C. Parsons

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Dated at Lyons, Colorado
this 2nd day of March, 2010

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Answer of the Oglala Sioux Tribe to Motion for Entry of Protective Order in the captioned proceeding were served via the Electronic Information Exchange (“EIE”) on the 21st day of February 2010, which to the best of my knowledge resulted in transmittal of same to those on the EIE Service List for the captioned proceeding.

/s/ Jeffrey C. Parsons
Jeffrey C. Parsons