CONSOLIDATED INTERVENORS’ CONSOLIDATED REPLY RE: DSEIS

Consolidated Intervenors' hereby timely submit this consolidated reply to the Response of Applicant POWERTECH (USA), INC.. (“Applicant”) (the “Applicant Response”), and to the Response of the NRC Staff (the “NRC Staff Response”) (collectively, the “Responses”).

1. Reply to Arguments Concerning So-Called “Late-Filed Contentions.”

Applicant and the Staff are attempting to squelch public participation in this proceeding by raising specious arguments that undermine and conflict with the Board’s Scheduling Orders dated November 2, 2010, October 16, 2012, and December 18, 2012 (the “Scheduling Orders”). The Scheduling Orders reflect an understanding among the parties as to the filing of contentions based on the DSEIS and, specifically, the timing thereof. The NRC Staff Response alludes to this understanding when it states at page 7:

In this particular hearing, the Board has issued two scheduling orders addressing the timeliness of contentions. Under these orders, the Intervenors must submit contentions within 30 days after relevant information becomes available to them. The exception is the DSEIS, which the Intervenors were given until January 25, 2013 to challenge.

(Emphasis added; footnotes omitted.)

1 Susan Henderson, Dayton Hyde and Aligning for Responsible Mining (“ARM”).
In reliance on that understanding, the Consolidated Intervenors’ filed all DSEIS contentions it had, all four of them, based on the final DSEIS. Such was the agreed upon exception for the DSEIS based contentions in accordance with the Scheduling Orders.

Clearly the Board has the authority to manage the proceeding in order to maximize efficiency and it did so by issuing the Scheduling Orders. In this way, Consolidated Intervenors’ understanding in this proceeding is that, as a result of the Scheduling Orders, NONE of the parties or the Board would be required to “sift through the docket in a licensing proceeding to determine what information, if any, is new and how it is materially different from information previously available.” NRC Staff Response at 10; Applicant Response at 5. Because of the exception for the DSEIS contentions in the Scheduling Orders, the usual rules concerning ‘late-filed contentions’ do not apply to the DSEIS contentions filed on January 25, 2013.

Accordingly, all of the arguments in the Responses are misplaced to the extent that the characterize the DSEIS Contentions filed under the Scheduling Orders as ‘late-filed contentions’ and seek to have the harsher, strict rules for late contentions applied to the DSEIS Contentions. If such arguments were accepted, what would be the point of the Scheduling Orders?

Further, if such arguments were accepted, then the Staff issued final DSEIS would be treated as being identical to documents created and submitted by the Applicant, as well as non-final documents that were created and publicized by the Staff. Such identical treatment however ignores the real world facts and legalities that the Applicant created
documents, nor Staff created non-final draft documents, are not the same as the final DSEIS.

As a Staff created document that has been finalized under NEPA and the AEA and NRC Regulations, the DSEIS creates a ‘line in the sand’ legally and factually and is an appropriate time in this proceeding to file new contentions or hold your peace. As a Staff created and finalized document, it is ‘materially different’ than the prior forms of information that were publicly available in the ADAMS system due to various regular and supplemental filings made by Applicant and the Staff.

The point of the proceeding is for public participation in the licensing process. The participation of the public would be thwarted if the arguments of Applicant and the NRC Staff concerning lateness of the DSEIS contentions were accepted.

2. **Contentions Are Admissible.** Contentions must give notice of facts which Consolidated Intervenors desire to litigate and must be specific enough to satisfy the requirements of 10 CFR §2.309(f)(1). Consolidated Intervenors have done this. Contrary to the assertions of Applicant at its Response, page 8, ‘Ripeness’ is not specifically required under 10 CFR §2.309(f).

3. **Specific Replies to Applicant and NRC Staff re: DSEIS Contention A.** Both Responses argue that DSEIS Contention A should not be admitted. NRC Staff argues that admitting the contention is premature because a field study is planned concerning cultural resources and because NRC Staff is already consulting with ‘numerous Indian tribes’. NRC Staff Response at 12-13. Applicant similarly argues that
the process is ongoing and so is not ‘ripe.’ Applicant Response at 8.

Both of the Responses miss the mark. DSEIS Contention A states that there are at least three tribes (Omaha, Skidi, and Southern Cheyenne tribes) that were not consulted and refers to other inadequacies of the cultural resources part of the DSEIS. The only way to ascertain this was for Consolidated Intervenors to wait until the DSEIS was issued, send it to our expert and have him compare it to the available research and scholarship and provide his expert opinion. His opinion states that three tribes that have an interest in the area and should have been consulted are not on the DSEIS list of tribes consulted, as well as the other matters referred to in that contention.

If the NRC Staff and Applicant seek to moot this DSEIS Contention A by inviting the Omaha, Skidi and Southern Cheyenne tribes to consultation on these issues and correcting the deficiencies identified by Dr. Redmond in the final SEIS, then the Staff can move to dismiss DSEIS Contention A. Until then, the Board should admit DSEIS

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Contention A because it is supported by the Redmond Opinion and has complied with Section 3.09(f).

CONCLUSION

For the foregoing reasons, Consolidated Intervenors have demonstrated that the new DSEIS contentions are admissible. Therefore, Consolidated Intervenors are entitled to a hearing on these contentions.

Dated this 25th day of March, 2013.

Respectfully submitted,

/s/ - electronically signed by

David Frankel, Counsel for Consolidated Intervenors
POB 3014
Pine Ridge, SD 57770
Tel: 605-515-0956
E-mail: arm.legal@gmail.com
CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing CONSOLIDATED INTERVENORS’ CONSOLIDATED REPLY RE: DSEIS in the captioned proceeding were served via the Electronic Information Exchange (“EIE”) on the 25th day of March, 2013, which to the best of my knowledge resulted in transmittal of same to those on the EIE Service List for the captioned proceeding.

/s/ signed electronically by 

David Frankel
Attorney for Consolidated Intervenors
P. O. Box 3014
Pine Ridge, SD 57770
605-515-0956
E-mail: arm.legal@gmail.com