UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD

In the Matter of POWERTECH (USA), INC.,. (Dewey-Burdock In Situ Uranium Recovery Facility)	Docket No. 40-0975-MLA ASLBP No. 10-898-02-MLA-BD01 License No.: SUA-1600 April 14, 2014

CONSOLIDATED INTERVENORS' APPLICATION FOR A STAY OF THE ISSUANCE OF LICENSE NO. SUA-1600 UNDER 10 CFR SECTION 2.1213

Pursuant to 10 CFR 2.1213, Consolidated Intervenors hereby submit this Application for a Stay of the issuance of Source Materials License SUA-1600 (the "License") which was issued to POWERTECH (USA), INC. ("Licensee"), and noticed to the parties by the NRC Staff on April 8, 2014.[1] This motion is timely filed in accordance with Section 2.1213(a).

I. The NRC Staff Notice Dated April 8, 2014 Was Premature and Defective.

As a preliminary matter we note that the NRC Staff Notice of License Issuance dated April 8, 2014 (the "Notice") was premature and defective because: (1) it was issued more than four (4) months before the scheduled hearing on the admitted contentions thereby depriving the Consolidated Intervenors from an opportunity to be heard and violating their due process and, in the case of indigenous members of Consolidated Intervenors, their rights under the trust duty/responsibility doctrine owed by the federal government to them; and (2) it states in it that its Record of Decision was available on that date at ML14066A466 but in fact searches did not reveal it being posted to ADAMS until

[1] As required by 10 CFR § 2.323(b), counsel for Consolidated Intervenors consulted with counsels for the other parties; NRC Staff stated it would likely oppose the motion; Licensee stated that it would oppose the motion; counsel for Oglala Sioux Tribe stated that it would file a motion to stay on behalf of the Oglala Sioux Tribe.

today April 14, 2014, and it was not scheduled to be published in the Federal Register until April 15, 2014, the day after this Application due date; and the Notice stated that the Programmatic Agreement was already signed and posted publicly to ADAMS under Accession No. ML14066A344 but in fact searches did not reveal it being posted to ADAMS at all. Since Consolidated Intervenors have not had an opportunity to review the signed Programmatic Agreement and because the Notice contained material misstatements that such documents were already publicly available as of April 8, 2014 which was not in fact the case, the Notice is defective and should be null and void and should be re-issued, if at all, after the Record of Decision is publicly posted and after the Programmatic Agreement is signed and publicly posted. As of now the public has not seen a signed Programmatic Agreement and the License should not have been issued without one.

II. Application for a Stay.

A. Summary of Action To Be Stayed. The issuance of the License by the NRC Staff should be stayed until after the Board has conducted the hearing in this proceeding, heard the evidence presented and had an opportunity to question the experts presented and rendered a final, appealable decision that is subject to being stayed by the Commission under Section 2.342, or by a federal court having jurisdiction, if applicable.

B. Statement of Grounds for Stay.

1. Applicable Legal Standards. In determining whether to grant or deny an application for a stay of the NRC staff's action, the four (4) standard stay factors must be considered as described in Section 2.1213(d). The Commission stated that "when evaluating a motion for a stay we place the greatest weight on…irreparable injury to the moving party unless a stay is granted. *ShieldAlloy Mettalurgical Corp.* (Newfield New Jersey Site), CLI 10-08, slip. op. at 12 (2010) citing *David Geisen,* CLI-09-23, 70 NRC

__ (Nov. 17, 2009)(slip op. at 2)(citing *Entergy Nuclear Vermont Yankee, LLC* (Vermont Yankee Nuclear Power Station), CLI-06-8, 63 NRC 235, 237 (2006)); *Alabama Power Co.* (Joseph M. Farley Nuclear Plant, Units 1 and 2), CLI-81-27, 14 NRC 795, 797 (1981). Further, requestor must make a showing of a "threat of immediate and irreparable harm" that will result absent a stay. *Shieldalloy Metallurgical Corp.* (Decommissioning of the Newfield, New Jersey Site), CLI-10-8, 71 NRC (slip. op. at 12) (2010)*; AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-08-13, 67 NRC 396, 400 (2008). Specifically, [a] party seeking a stay must show it faces imminent, irreparable harm that is both **certain and great**." *Southern Nuclear Operating Co.* (Vogtle Electric Generating Plant, Units 3 and 4) CLI 12-11 (2012) – 75 NRC __ (slip. op. at 7); *Entergy Nuclear Vermont Yankee, LLC (*Vermont Yankee Nuclear Power Station), CLI-06-8, 63 NRC 235, 237 (2006) (emphasis added). This is consistent with the federal law generally, as "requests for preliminary injunction are analyzed under the four factors set forth in *Dataphase Systems, Inc. v. CL Systems, Inc.*, 640 F.2d 109 (8th Cir.1981).

To qualify as irreparable harm justifying a stay, the asserted harm must be related to the underlying claim. *Southern Nuclear Operating Co.*, slip. op. at 9 citing *United States v. Green Acres Enter, Inc.*, 86 F.3d 130, 133 (8th Cir. 1996). See also *National Football League v. McBee & Bruno's, Inc.*, 792 F.2d 726, 733 (8th Cir. 1986) (injury that had never been the focus of the lawsuit was insufficient to find irreparable harm). Unlike *Southern Nuclear Operating Co.*, where there was only one contention admitted and it was not related to the asserted harm in the stay motion, in this case, this application is directly related to Contention 1A and to the basic claims that have been made concerning cultural resources from the beginning of this proceeding.

The cultural resources claims have been framed under NHPA, Section 106. See Contention 1A. "The fundamental purpose of the NHPA is to ensure the preservation of historic resources." *Te-Moak Tribe of Western Shoshone v. U.S. Dept. of the Interior*, 608 F.3d 592, 609 (9th Cir. 2010). Section 106 of "[t]he NHPA involves a series of measures designed to encourage preservation of sites and structures of historic, architectural, or cultural significance." *San Carlos Apache Tribe v. United States*, 417 F.3d 1091, 1093-94 (9th Cir. 2005). The Section 106 Process requires "agencies to stop, look, and listen before proceeding with agency action." *Te-Moak Tribe*, 608 F.3d at 610. Timing is important because it can affect the outcome of the Section 106 Process. Id. at 609. "If consultation begins after other parties may have invested a great deal of time and money, the other parties may become entrenched and inflexible, and the government agency may be inclined to tolerate degradation it would otherwise have insisted be avoided." *Quechan Tribe*, 755 F.Supp.2d at 1121. Such has happened in this case.

Notably, the ACHP regulations give special emphasis to the agency's duty when consultation with an Indian tribe is required, when an undertaking is likely to affect a tribe's religious or cultural property. In particular, tribal consultation must be commenced "early in the planning process," and conducted "in a sensitive manner respectful of tribal sovereignty" and "in a manner sensitive to the concerns and needs of the tribe." 36 CFR §800.2(c)(2)(ii)(A) - (C). An agency's duty to comply with the Section 106 Process continues for the life of the project. 36 C.F.R. § 800.13. An agency's initial Section 106 Process is not always sufficient for a particular project, and additional NHPA compliance for the same project may be necessary. See *Okinawa Dugong v. Rumsfeld*, 2005 WL 522106, at *13 (N.D. Cal. March 2, 2005 (citing *Morris County Trust for Historic Preservation v. Pierce*, 714 F.2d 271, 280 (3rd Cir. 1983); *WATCH v. Harris*, 603 F.2d 310, 325-26 (2nd Cir. 1979)); *Vieux Carre*

Property Owners v. Brown, 948 F.2d 1436, 1445 (5th Cir. 1991). To the extent a delay results in some economic impact to a mining company, courts have held that economic harm is not irreparable. *Sampson v. Murray*, 415 U.S. 61, 90 (1974); *Los Angeles Mem'l Coliseum Comm'n v. NFL*, 634 F.2d 1197, 1202 (9th Cir. 1980). Courts have held that the public interest is served by preserving cultural resources. See e.g., *Quechan Tribe*, 755 F.Supp.2d at 1122 (finding that "Congress has adjudged the preservation of historic properties and the rights of Indian tribes to consultation to be in the public interest").

There is no doubt that the trust duty/responsibility and applicable Executive Orders require a meaningful consultation and preservation of burial sites and ceremonial sites. The Supreme Court has recognized that the United States has "moral obligations of the highest responsibility and trust" to Indians and must use "great care" in its dealings with them. See *Seminole Nation v. U.S.*, 316 US 286 (1942); *U.S. v. Mason*, 412 US 391, 398 (1973). Indian tribes have substantial rights to **meaningful consultation** under federal and international law, including the 1994 and 2000 Executive Orders ("*Government-to-Government Relations with Native American Tribal Governments*", 59 Fed. Reg. 22951, 1994 WL 16189198 (April 24, 1994) and Executive Order No. 13175, *Consultation and Coordination With Indian Tribal Governments*, 65 FR 67249, 2000 WL 1675460 (Pres.Exec.Order Nov 06, 2000); and including NAGPRA. "The unique trust relationship between the federal government and Native Americans" requires that "if an ambiguity in a statute (or, by extension, regulation or agency action) "can reasonably be construed as the Tribe would have it construed, it must be construed that way." *Ramah Navajo Chapter v. Lujan*, 112 F.3d 1455, 1462 (10th Cir. 1997), quoting *Muscogee (Creek) Nation v. Hodel*, 851 F.2d 1439, 1445 (D.C. Cir. 1988), *cert. den.,* 488 U.S. 1010 (1989); see also *Oneida County, NY v. Oneida Indian Nation of New York State*, 470 U.S. 226, 247 (1985); *US v. Washington*, 157 F.3d 630, 643 (9th Cir. 1998), *cert. den.*, 526 U.S. 1060 (1999); *McNabb for*

McNabb v. Bowen, 829 F.2d 787, 792 (9th Cir. 1987). All rights held by a tribe extend also to its tribal members, as a result, either a tribe or an individual tribal member, or both, may file suit to enforce a tribe's rights. See *Puyallup Tribe, Inc. v. Dept. of Game*, 433 US 165 (1977) (suit by tribe); *Sohappy v. Smith*, 302 F. Supp. 899 (D. Or. 1969) (suit by tribal members).

2a. Irreparable Harm. The License issuance puts cultural resources at risk of destruction by Licensee's construction activities that may include earthwork, massive ground disturbance, roadmaking, and other preparations for its facilities. Counsel for Licensee has stated on the record that:

> . This is Chris Pugsley for Powertech. Powertech believes that…upon issuance of that license, the licensee is free to move forward with operations under that license including construction, other types of activities, up and including operating a facility. HT at 562 (Feb. 12, 2014 hearing).

Consolidated Intervenors submit that Licensee has indicated its understanding that it has legal authority under the License to move forward with earthwork, construction and other activities leading up to operations – this would certainly include preliminary ground disturbance and the destruction of unknown burial sites and ceremonial sites within the Project Area. See Declaration of Debra White Plume dated April 14, 2014, attached hereto as Exhibit 1 at paragraph 4. Such would be irreparable harm under any and all applicable standards. Since according to Licensee's counsel it has the legal right to commence engineering, planning, preliminary and other construction, it is reasonable to expect that such activities can and will occur at any time with or without advance notice to Consolidated Intervenors.

This is consistent with the professional opinions of Dr. Redmond previously filed with this Board which are dated respectively, January 14, 2010, April 21, 2010 (ML 101200676), November 29, 2012, and April 11, 2014. This is also consistent with the Declaration of OST THPO Wilmer Mesteth dated April 1, 2010, previously filed by Oglala

Sioux Tribe in this matter and attached hereto as Exhibit 2. Cultural resources once destroyed can never be replaced. See White Face Declaration, Exhibit 9 hereto, at p. 8. Therefore, ample irreparable harm has been shown which is great and certain, imminent and not capable of being compensated by monetary damages.

Furthermore, each violation of the trust responsibility and each violation of the NRC's duty to provide meaningful consultation, and each of the issues complained about by the OST and SRST concerning the sham Section 106 process, constitutes an additional incident of irreparable harm. The letters previously submitted from OST President Brewer and SRST THPO W. Young are clear evidence of the failure of the Section 106 process in this proceeding and violations of the trust duty owed to the indigenous people involved in this case. These letters are attached for the Board's convenience as Exhibits 3 and 4, respectively. Further, these official tribal complaints show that the agency has failed to look and **listen** as required by NHPA. *Te-Moak Tribe*, 608 F.3d at 610.

2b. Likelihood of Prevailing on the Merits. Consolidated Intervenors have provided a showing that there is reason to believe there are burial sites and ceremonial sites in the Project Area that have not been properly investigated, evaluated and made the subject of effective and accountable preservation plans. Evidence of this includes: (1) the professional opinions of Dr. Redmond as to the use of the area in ancient times, the great likelihood that there are important cultural resources in the Project Area and the certainty of destruction of those resources if ground disturbances contemplated by Powertech are undertaken unless there has first occurred proper subsurface testing, analysis and effective and accountable mitigation designed to ensure preservation of the resources (dated January 1, 2010 (Ex 5 hereto), dated April 21, 2010 (Ex 6 hereto), dated November 29, 2012 (Ex 7 hereto), and dated April 11, 2014 (Ex 8 hereto); (2) the statement by Debra White Plume that she is aware of relatives who are buried in the Project Area and that their graves may

not be visible to anyone but the Lakota people and that the graves will be destroyed by any kind of tools, even metal shovels, as well as heavy equipment like bulldozers (at White Plume Decl., paragraph 4); and that she is aware of human rights abuses against indigenous people in Mongolia at the hands of a company formerly run by Mr. Alex Molyneux who now controls Powertech and is concerned that there will be destruction of Oglala cultural resources and related human rights abuses by Powertech now that Mr. Molyneux controls it (at White Plume Decl., paragraph 5 and Ex A1 and Ex A2 thereto); (3) the statement by Charmaine White Face in her Declaration dated April 12, 2014, attached as Exhibit 9 hereto that: (a) there is Sioux oral tradition that records use of the Project Area as burial grounds, prayers sites and dwelling sites (White Face Decl. at p. 7-8); and (b) there is a bald eagle family in the Project Area according to a Letter dated October 17, 2008 from SD Game Fish & Parks to SD DENR (attached as Exhibit 10 hereto) that advised no activity occur inside the specified part of the Project Area between February 1st and August 31st each year to avoid disruption of the bald eagle nest and a nearby red tail hawk nest (see p.6 of the White Face Decl.); and (4) the statements by then OST THPO Wilmer Mesteth dated April 1, 2010 in his Declaration, that there are cultural resources, artifacts, sites that belong to the OST (at Mesteth Decl., paragraph 5), the discovery of an Indian camp and prehistoric artifacts implicates important tribal interests (at Mesteth Decl., paragraph 6), included in the Project Area are numerous places known to be favored as camping sites and there is a strong likelihood of buried graves and cultural resources in those areas (at Mesteth Decl., paragraph 8), the OST is unable to verify that any comprehensive study has been adequately conducted that includes the OST and its members (at Mesteth Decl., paragraph 9); the sheer volume of sites documented in the Augustana study indicates extensive use by indigenous peoples over many decades if not centuries (at Mesteth Decl., paragraph 11); on February 19, 2009, OST member Garvard Good Plume testified under oath that his family relations

including his great grandfather, his mother and his father had used, dwelled and camped on lands in the Project Area (at Mesteth Decl., paragraph 16); on February 19, 2009, trained archaeologist Ben Rhodd identified major defects in the process and procedures employed by Augustana including failure to inquire or evaluate ethnographic information available for the site (at Mesteth Decl., paragraph 17); accordingly Mr. Rhodd's testimony lends support to the Dr. Redmond opinions; and that the failure to conduct ethnographic studies in concert with a field study would exacerbate the impacts to the Tribe's interests (at Mesteth Decl., paragraph 20). Since Licensee has not made any showing of evidence to directly contradict the foregoing submittals, there is a high likelihood that Consolidated Intervenors will prevail on the merits based on the evidence currently submitted to the Board.

2c. **Harm to Other Participants**. Licensee publicly has stated that it intends to commence construction in 2015 notwithstanding its counsel's position that it has legal authority to start immediately. See Powertech Press Release attached hereto as Exhibit 11. Therefore, although Powertech believes it can start ground disturbance now, for some reason it currently plans to not start construction until 2015; of course, those public relations are not legally binding and may change at any time by the whim of Powertech. Therefore, there would be no harm to Powertech if the stay were issued if it is telling the public the truth about its plans. Even if Powertech asserts any economic damages from the delay caused by the stay, such purported damages would not be sufficient or relevant after a showing of irreparable harm has been made. See *Sampson v. Murray*, 415 U.S. 61, 90 (1974); *Los Angeles Mem'l Coliseum Comm'n v. NFL*, 634 F.2d 1197, 1202 (9th Cir. 1980).

Even if Powertech is able to articulate some form of equitable harm it would pale in comparison to the harm to be suffered as a result of the destruction of burial sites and ceremonial sites that are underneath the Project Area and when balanced, the equities militate in favor of the Consolidated Intervenors who are tribal members and in favor of the

OST and against Powertech.

2d. Public Interest Favors Granting the Stay to Preserve Status Quo. It is clear that the public interest is served by preserving burial sites and ceremonial sites within the Project Area and ensuring full compliance with the trust duty and by making the Section 106 process inclusive of the tribal members and including in the Section 106 process sufficient subsurface testing and a complete investigation and analysis of buried graves, artifacts and ceremonial sites. See e.g., *Quechan Tribe*, 755 F.Supp.2d at 1122. To find otherwise would itself be a violation of the trust duty owed by the federal government to the Oglalas and other interested Tribes.

Neither the NRC Staff nor Powertech has ever asserted that burial sites and ceremonial sites, if they exist in the Project Area, do not have cultural value or that the public interest would not be served by their preservation. Rather, their arguments relate to whether the work that has already been done together with the Programmatic Agreement are sufficient to meet the applicable legal requirements. There is no dispute that if graves or ceremonial sites lie beneath the Project Area that they must be protected and preserved as a matter of law and that the License may not be issued until such protection and preservation is ensured.

For all the foregoing reasons, the Board should stay the issuance of the License as described in Section II.A above.

Dated this *14th* day of April, 2014.
Respectfully submitted,

David Frankel,
Counsel for Consolidated Intervenors
POB 143
Buffalo Gap, SD 57722
Tel: 605-515-0956
E-mail: arm.legal@gmail.com

POWERTECH (USA) INC.,	)	Docket No. 40-9075-MLA
	)	
(Dewey-Burdock In Situ Uranium Recovery Facility)	)	
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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "CONSOLIDATED INTERVENORS' APPLICATION FOR A STAY OF THE ISSUANCE OF LICENSE NO. SUA-1600 UNDER 10 CFR SECTION 2.1213" in the above captioned proceeding were served via email per the Board's order on the 14Th day of Aril 2014, which to the best of my knowledge will result in transmittal via the Electronic Information Exchange ("EIE") of same to those on the EIE Service List for the captioned proceeding.

David Frankel
Attorney for Consolidated Intervenors
P. O. Box 143
Buffalo Gap, SD 57722
605-515-0956
E-mail: arm.legal@gmail.com