

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the matter of)
)
)
POWERTECH (USA) INC.) Docket No. 40-9075-MLA
) ASLBP No. 10-898-02-MLA-BD01
(Dewey-Burdock In Situ Uranium)
Recovery Facility)

CONSOLIDATED INTERVENERS' OPENING STATEMENT

In accordance with 10 CFR §2.1207 and this Board's Order of June 2, 2014,
Consolidated Interveners hereby submit this Statement of Position on Contentions
1A, 1B, 2, 3, 4, 6, 9, and 14, as previously admitted in this proceeding.

Given that the Board has consolidated all contentions of the Oglala Sioux
Tribe (OST) and the Consolidated Interveners (CIs) for purposes of the scheduled
evidentiary hearing in this matter, the Consolidated Interveners hereby adopt and
incorporate the Opening Statement of the OST, as well as all previous pleadings
and evidence filed on behalf of CIs.

CIs originally and perhaps mistakenly thought that such consolidation would permit the
Opening Statement of the OST to suffice on behalf of the CIs. Upon receiving a request from
NRC Staff as to the filing of an Opening Statement and to ensure procedural completeness, the
CIs respectfully seek leave to submit this Opening Statement on their own behalf. Due to the

identity of contentions and the timely submission of detailed Opening Testimony of CIs' witnesses, no prejudice will have accrued to the Applicant or the NRC Staff.

CIs originally and perhaps mistakenly thought that such consolidation would permit the Opening Statement of the OST to suffice on behalf of the CIs. Upon reflection and to ensure procedural completeness, the CIs respectfully seek leave to submit this Opening Statement on their own behalf. Due to the identity of contentions and the timely submission of Opening Testimony of CIs' witnesses, no prejudice will have accrued to the Applicant or the NRC Staff.

Do to adoption of the OST's Opening Statement, its authority, its witnesses, and its argument, the CIs' Opening Statement will be brief and consist of supplemental adoption of each particular contention presented in the OST's Opening Statement with reference to CIs' witnesses for whom Opening Testimony has been submitted.

Contention 1A: Failure to Meet NEPA Requirements Regarding Protection of Historical and Cultural Resources.

The CIs adopt the evidence, authority, and argument contained in and submitted with the OST Opening Statement in support of this Contention on behalf of the Lakota members of the Clean Water Alliance who, along with their relatives, are deeply concerned about the failure of the NRC Staff in the FSEIS

and the Applicant to satisfy National Environmental Protection Act (NEPA) requirements of protection of historical and cultural resources in and adjacent to the proposed ISL project of Applicant. This includes the failure to facilitate a scientifically based cultural resources surveys and analysis involving knowledgeable persons within the seven Bands of the Lakota of the potentially impacted area and the improper separation of compliance with the Section 106 requirements of the National Historic Preservation Act (NHPA) from the deficient NEPA analysis otherwise conducted. See, Declaration of Wilmer Mesteth, former OST Tribal Historic Preservation Officer (THPO) [Exhibit OST-15, Exhibit CI-6], the Declaration of current OST THPO Michael Catches Enemy [Exhibit OST-14], the described documents referenced in the FEIS and in Appendix A to the FSEIS [Exhibit NRC-008-B], recent letters to the NRC Staff from Oglala Sioux President Brian Brewer and Standing Rock Sioux Tribe THPO [Exhibit NRC-0015], as well as omissions in the FSEIS. See, also, Opening Testimony of Dr. Louis Redmond. Exhibit CI-1. CIs are aware of Lakota who intend to make a limited appearance statement regarding the existence and current lack of protection of historic and cultural resources in the proposed Dewey-Burdock ISL mine/plant area, at the Hearing scheduled for August 17, 2014.

As described in the OST Opening Statement, these documents individually

and cumulatively demonstrate the inadequacy of the cultural resource surveys and analyses conducted at Applicant's proposed mine/plant sites as of the date of the issuance of the FSEIS. Indeed, the FSEIS concedes that the required analysis has not been completed, despite the issuance of the final NEPA document. FSEIS at 1-26. Instead, as with many of the requisite NEPA analyses not conducted, as discussed in other Contentions, the NRC Staff and Applicant promise future compliance.

Therefore, the FSEIS and the Applicant have failed to comply with the statutory requirements of NEPA, the NHPA and regulations contained 10 CFR §51.70(a), 10 CFR §51.45, 10 CFR §51.60, and 40 CFR §§1501.2, 1501.6, 1508.5.

Contention 1B: Failure to Involve or Consult All Interested Tribes as Required by Federal Law.

Although the CIs are a separate party from the OST, since members of the Clean Water Alliance are enrolled members of the Intervener OST, the CIs hereby adopt the evidence, authority, and arguments presented in the OST Opening Statement regarding this Contention.

Contention 2: Failure to Include Necessary Information for Adequate Determination of Baseline Ground Water Quality.

IS adopt the factual admissions of the NRC Staff and the Opening Testimony of Dr. Robert F. Moran (Exhibit OST-1). Dr. Moran has been Consolidated Interveners' expert on this issue before the South Dakota Department of Environment and Natural Resources Water Management Board (SD WMB) and the Board of Minerals and Environment (SD BME).

In her Opening Testimony named Consolidated Intervener and down-flow cattle rancher Susan Henderson raises concerns about the failure of the FSEIS to properly determine baseline ground water quality with consideration to the impact of prior open-pit and underground uranium mines, as well as the thousands of improperly plugged boreholes from prior uranium exploration. Exhibit CI-7 at 4-7.

As per the evidence, authority, and arguments of the OST in its Opening Statement on this contention, the CIs respectfully submit that the FSEIS fails to adequately describe the affected aquifers at the site and on adjacent lands and fails to provide the required quantitative description of the chemical and radiological characteristics of these waters necessary to assess the impacts of the operation including potential changes in water quality caused by the operations. The

deferral of this necessary information to after-license issuance and outside of the NEPA process violates 10 CFR Part 40, Appendix A, Criterion 7, 10 CRF §§51.10, 51.70, 51.71, and the National Environmental Policy Act, and implementing regulations.

Contention 3: failure to Include an Adequate Hydrological Analysis to Assess Potential Impacts to Groundwater.

IS adopt the factual admissions of the NRC Staff and the Opening Testimony of Dr. Robert F. Moran (Exhibit OST-1). Specifically, the Staff's admission that Applicant failed to conduct necessary studies to identify "significant discontinuities, fractures, and channeled deposits." Dr. Moran notes the significant and contradictory evidence to the contrary in the Application and the FSEIS. Exhibit OST-1, at 18-22. Dr. Moran further notes the overwhelming body of evidence contrary to the FSEIS conclusion that the production zone is hydraulically isolated from surrounding aquifers. *Ibid*, 18-19. CIs adopt the balance of Dr. Moran's Opening Testimony as described by the OST in its Opening Statement. Dr. Moran's concerns are further supported by the opinions of Dr. Hannon LaGarry in his Opening Testimony, a geological stratigrapher and associate professor of the Oglala Lakota College. Exhibit CI-17.

CI Susan Henderson further addressed the potential devastating impact to

her business and livelihood which would result from further depletion and contamination of the Lakota Formation and depletion of the Madison aquifer by Applicant's proposed in-situ leach (ISL) mine and processing plant. Exhibit CI-7 at 1-3. See, also, Opening Testimony of rancher Marvin Kammera (Exhibit CI-11). Named CI Dayton Hyde, whose Black Hills Wild Horse Sanctuary animals depend upon the water quality and flow of the Cheyenne River for water during many months of the year, expresses similar concerns about negative impact mine solution or waste spills into Beaver or Pass Creek, upstream tributaries of the Cheyenne River, which flow through Applicant's proposed mine/plant sites.

Exhibit CI-12.

Dr. Donald Kelley, a former forensic pathologist in the Rapid City area addresses the health risk of heavy metal contamination of water resources by the ISL mine and plant proposed by Applicant. Exhibit CI-8.

Linsey McClean, a biochemist, addresses the failure of the FSEIS to include in its assessment of potential impacts to water resources through adequate hydrological information to demonstrate an ability to contain fluid migration through excursions in the Inyan Kara aquifers, leaking wastewater holding or evaporation ponds, and spills occurring at Applicant's proposed mines and processing plants. In this regard, Ms. McClean addresses the health issues

resulting from bio-accumulation of heavy metals in plant and animal life caused by such contamination. Exhibit CI-18. See, also McLean PowerPoint, Exhibit CI-18a. Bio-accumulation of heavy metals from utilizing surface water resources in the Dewey portion of the proposed project area raises health and safety issues for endangered species, including the whooping crane. Opening Statement of Peggy Detmers, Exhibit CI-10; see diagram of bioaccumulation in whooping cranes - Exhibit CI-10o.

As per the authority and arguments of the OST in its Opening Statement on this contention, the CIs respectfully submit that the FSEIS fails to provide sufficient information regarding the hydrologic and geological setting of the area to meet the requirements of 10 CFR §40.31(f); 10 CFR §51.45; 10 CFR §51.60; 10 CFR §§51.10, 51.70 and 51.71; 10 CFR Part 40, Appendix A, Criteria 4(e) and 5G(2), and the national Environmental Policy Act, and implementing regulations. As a result, the FSEIS similarly fails to provide sufficient information to establish potential effects of the proposed mines and processing plants on the adjacent surface and ground-water resources, as required.

Contention 4: Failure to Adequately Analyze Ground Water Quantity Impacts.

The CIs adopt the Opening Testimony of Dr. Robert Moran as partial proof

in support of this contention [Exhibit OST-1] and Exhibits OST-10 and 11, as discussed and referenced in OST's Opening Statement. See, also, Opening Testimony of Susan Henderson [Exhibit CI-7], Dayton Hyde [Exhibit CI-12], and Marvin Kammera [Exhibit CI-11].

As per the authority and arguments of the OST in its Opening Statement on this contention, the FSEIS therefore violates NEPA in its failure to provide adequate analysis of the ground water quantity impacts of the project. Further, the FSEIS presents conflicting information on ground water consumption such that the water consumption impacts of the project cannot be accurately evaluated. These findings violate 10 CFR §§51.10, 51.70, and 51.71, and the NEPA, and implementing regulations.

Contention 6: Failure to Adequately Describe or Analyze Proposed Mitigation Measures.

The CIs adopt the evidence, authority, and argument contained in the OST Opening Statement regarding the failure of the FSEIS to adequately describe or analyze proposed Mitigation Measures. See, also, admission in FSEIS that the consultation process required with Tribes by NEPA was not completed and a Programmatic Agreement which is supposed to describe mitigation measures to protect cultural resources remains largely unsigned and the subject of controversy

and objection by most Tribes. See, Exhibit NRC-008-A, FSEIS at 3-94.

Additionally, the FSEIS concedes that the Applicant is still in the process of “actively working on an avian monitoring and mitigation plan.” FSEIS at E-158 to 159. In this regard, the Opening Testimony of wildlife biologist Peggy Detmers discusses the failure of the FSEIS to adequately address the existence of whooping cranes during migration and other endangered animals within the described area of the Applicant’s proposed mine and satellite processing plant.

Exhibit CI-10.

As per the authority and arguments of the OST in its Opening Statement on this contention, the FSEIS therefore violated 10 CFR §§51.10, 51.70 and 51.71, the NEPA and implementing regulations by failing to include the required discussion of mitigation measures. The cited NRC regulations require all SEIS documents to include all analyses required under NEPA, and that compliance with NEPA “be supported by evidence that the necessary environmental analysis have been made” contrary to the approach here, where the FSEIS indicates that such work would be done at some future time, after issuance of the NRC license and any opportunity for public involvement has passed.

Contention 9: Failure to Consider Connected Actions.

The CIs adopt the evidence, authority, and argument contained in the OST Opening Statement regarding the improper and inadequate deferment to the EPA and the SD DENR of NEPA's required analysis of the potential environmental impacts of the operation and associated waste disposal of Applicant's proposed mines and processing plants. These failures and inadequacies violate 10 CFR §§51.10, 51.70 and 51.71, and the NEPA and implementing regulations.

Contention 14: Endangered Species Act Consultation (14A) and Analysis of sage grouse, whooping crane, and black-footed ferret.

Contrary to the position of the OST, the IS do not withdraw its contentions and asserts that the FSEIS and the Applicant failed to or inadequately conducted the requisite consultation and analysis under the Golden Eagle Protection Act, 16 USC §§668-668c, the Migratory Bird Treaty Act, 16 USC §§703-711, and Sections 7 and 9 of the Endangered Species Act, 16 USC §1531 et seq, as required by NEPA.

Contrary to the FSEIS and the Application, Ms. Detmers generated the US Fish and Wildlife Service Information, Planning, and Conservation System (IPAC) for the Dewey Chilsen Wellfield which found that whooping cranes migrate into and through the Dewey area of the proposed ISL project and are should be the

subject of concern. Exhibit CI-10b-10n, 10p, 10q. As noted in the IPAC, the “Endangered Species List” included the whooping crane, as well as the Red Knot, the Sprague’s Pipit, the Blackfooted Ferret, and the Northern Long-eared Bat, which “should be considered in an effects analysis for your project.” *Ibid* (Exhibit CI-10q, at 3-4 of 5. The failure to do so violated the above-cited statutes.

Conclusion

For the foregoing reasons, the Consolidated Interveners have demonstrated the FSEIS and Application materials are not in compliance with requirements of applicable federal statutes and regulations and the FSEIS and the NRC Staff pre-hearing issued license to Applicant should be remanded back to the NRC Staff for it and the Applicant to conduct the necessary analyses to comply with NEPA, the NHPA, and Atomic Energy Act, and implementing regulations.

Dated this 26th day of June, 2014.

Respectfully submitted,

/s/ Bruce Ellison
BRUCE ELLISON
P.O. Box 2508
Rapid City, SD 57709

Attorney for Consolidated Interveners