

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
BEFORE THE COMMISSION**

In the Matter of:)
) Docket No.: 40-9075-MLA
POWERTECH (USA), INC.)
) Date: July 2, 2015
(Dewey-Burdock In Situ Uranium Recovery)
Facility))
_____)

**REPLY TO THE OGLALA SIOUX TRIBE’S RESPONSE TO
POWERTECH (USA), INC.’S PETITION FOR REVIEW OF LBP-15-16**

I. INTRODUCTION

Powertech (USA), Inc. (Powertech) hereby submits this Reply to the Oglala Sioux Tribe’s (hereinafter the “Tribe”) Response to its Petition for Review of LBP-15-16. For purposes of this Reply, Powertech hereby incorporates Sections I-III of its Petition for Review by reference. For the reasons discussed below, Powertech respectfully requests that the Commission reverse the Atomic Safety and Licensing Board’s (Licensing Board) decision in LBP-15-16 for Contentions 1A and 1B in accord with Powertech’s May 26, 2015, Petition for Review.

II. ARGUMENT

A. The Tribe’s Arguments on NHPA and NEPA Compliance Are Legally Flawed

Initially, the Tribe’s Response to Powertech’s and NRC Staff’s Petitions for Review of LBP-15-16 is fundamentally flawed from a legal perspective and does not contradict the legal arguments raised by the two parties.¹ The Tribe alleges that Powertech conceded the point that NRC has the ability to determine compliance with the National Historic Preservation Act (NHPA) and that the Licensing Board “had substantial basis in the record in support of its finding of a lack of NHPA compliance....” Tribe Response at 23-24. However, this allegation completely ignores the fact that the Licensing Board is not

¹ The Tribe concedes that “the Board has made concrete legal rulings with respect to both Contention 1A and 1B.” Tribe Response at 25. This concession essentially endorses Powertech’s and NRC Staff’s argument that a final determination was made by the Licensing Board on these contentions and that a direct Petition for Review under 10 CFR § 2.341 is permissible.

empowered to substitute its judgment on NHPA compliance for that of the Advisory Council on Historic Preservation (ACHP), which is the expert federal agency on NHPA compliance.² As stated by Powertech in its Petition, compliance with the entirety of the NHPA Section 106 process is contingent on making a reasonable and good faith effort for each of the four (4) NHPA Section 106 steps. The final step in Powertech's process, or the execution of the Programmatic Agreement (PA)³, was completed with the ACHP's execution of the PA.⁴ This demonstrates that the ACHP has approved NRC Staff's conduct of the Section 106 process, including Tribal consultation.⁵ Upholding the Tribe's allegation and the Licensing Board's conclusion in LBP-15-16 directly contravenes the ACHP's determination that NRC complied with the NHPA.

The Tribe also does not even attempt to address Powertech's argument that the Licensing Board's determination on Contention 1B mandates that the only way to satisfy its concerns on government-to-government consultation would be to afford the Tribe special treatment as a consulting party and a litigant and have a cultural resources survey performed by the Tribe. Under the NHPA, all consulting parties are entitled to an equal opportunity to consult on historic and cultural resources and to participate in the development of a Step 4 decision document such as a PA. The Tribe was afforded ample opportunity to participate in the open site surveys of the entire 10,580-acre Project site and, in some cases such as the PA's development, did indeed participate.⁶ The Tribe also stated initially that it would accept the offer to participate in the open site surveys;⁷ however, it later changed its mind and declined to participate.⁸ NRC

² Intervenors' witnesses acknowledged that the ACHP has exclusive authority to determine the methods for compliance with the NHPA's requirements. *See* NRC Staff Proposed Findings of Fact at 20, ¶ 5.28, *citing* August 19-21, 2014 Evidentiary Hearing Transcript at 860-861.

³ *See* NRC Staff Exhibits NRC-018-A-(18-H).

⁴ The PA also was executed by the NRC, South Dakota State Historic Preservation Office (SHPO), the United States Bureau of Land Management (BLM) and Powertech.

⁵ The Tribe asserts that "the ACHP could not conclude that NRC Staff had violated the NHPA" due to "limited information available at the time." Tribe Petition at 23. However, this completely misrepresents the ACHP's conclusion, after participating fully in consultations for years, that NRC Staff met the "content and spirit of the Section 106 process." *See* NRC Staff Exhibit NRC-031 at 3.

⁶ *See* Powertech's Proposed Findings of Fact at 49, ¶¶ 10.41-10.42.

⁷ *See* NRC Staff Exhibit NRC-001 at 12, ¶ A1.11, *citing* NRC Staff Exhibits NRC-146-147.

⁸ The Tribe's claim that field surveys lacked a "scientifically-defensible protocol and methodology" is meaningless, since identification of TCPs or places of religious or cultural significance depends on traditional cultural knowledge and has nothing to do with Western science. *See* Tribe Response at 5. The same is true for the allegation that NRC

Staff cannot force a tribe to participate in the consultation process, let alone conduct a site survey of a proposed project site. Further, the PA affords the Tribe the opportunity to participate in future cultural resource assessments and mitigation measure development for such identified cultural resources. Thus, if the Commission upholds the Licensing Board's findings and the Tribe's allegations on this matter, then it would be endorsing a *de-facto* discriminatory practice against other Native American tribes that are consulting parties *but not litigants* and would be misinterpreting the NHPA to require forced cultural resource assessments to complete the NHPA process.

The same holds true for the Licensing Board's National Environmental Policy Act (NEPA) findings under Contention 1A. In LBP-15-16, the Licensing Board essentially confirms that the only way the Final Supplemental Environmental Impact Statement (FSEIS) can be adequate is if the Tribe performs a cultural resource survey and submits a report for documentation in the FSEIS.⁹ Again, neither NRC Staff nor Powertech can force the Tribe to conduct a cultural resource survey of the Project site and nothing under the NHPA mandates that every consulting party provide a documented report of cultural resources in the Project area. Further, the Licensing Board's determination that the Tribe has stronger historical ties to the Project site due to its reservation being approximately fifty (50) miles away bears no meaning to this proceeding as the Northern Plains, including the Project area, were inhabited over thousands of years by multiple Native American tribes, hence the some twenty-three (23) consulting tribes.¹⁰ Singling out one tribe based on its reservation's current proximity would essentially be a discriminatory action against all other tribes that previously inhabited the area.¹¹ The Licensing Board's

Staff made "no provision for any methodologies or scope" for the field surveys. *See id.* at 9. NRC Staff recognized that each tribe should be allowed to carry out its identification efforts in a manner appropriate to that tribe. *See* Powertech Proposed Findings of Fact at 42, ¶ 10.22.

⁹ As stated in Powertech's Petition, the Licensing Board states that, "[b]ecause the cultural, historical, and religious sites of the Oglala Sioux Tribe have not been adequately catalogued, the FSEIS does not include mitigation measures sufficient to protect this Native American tribe's cultural, historical, and religious sites that may be affected by the Powertech project." LBP-15-16 at 40.

¹⁰ *See* August 19-21, 2014, Evidentiary Hearing Transcript at 775 (Yilma), explaining that NRC Staff was informed by the South Dakota SHPO that they needed to consult with all of the tribes that wished to be consulting parties because at one time they had inhabited that area; *see also* NRC Staff Exhibit NRC-008-A-1 at 76-84.

¹¹ The Tribe curiously challenges the competency of the tribes that conducted the field surveys when they allege that the other tribes did not perform a "competent review or survey the area...." *See* Tribe Response at 10, 18.

conclusions and the Tribe's allegations that NRC Staff's FSEIS is inadequate based on a lack of cultural resource documentation from the Tribe has no basis in law and should be overturned.

B. The Tribe's Arguments on Findings of Fact Are Wholly Inaccurate or Misconstrue the Administrative Record

The Tribe's Response also grossly mischaracterizes the factual aspects of the administrative record. Initially, the Tribe levies a number of allegations regarding NRC Staff's use of the Augustana Report for identification and impact assessment of *historic* resources. *See* Tribe Response at 5-8. The crux of the Tribe's claim is that NRC Staff impermissibly relied on the Report to assess cultural resources. *Id.* at 5. However, it is plain from the administrative record and LBP-15-16 that NRC Staff only relied upon the Report to assess *archaeological sites and historic structures* and not traditional cultural properties (TCP).¹² *See* LBP-15-16 at 37-38. Indeed, to identify and assess TCPs and places of religious and cultural significance, NRC Staff used the site field surveys in order to satisfy NEPA and NHPA requirements.¹³ Thus, the Tribe's allegations regarding the Augustana Report and its relationship to TCP evaluation are without merit.

Next, the Tribe appears to intimate that the consulting party tribes desired an "ethnographic study" and that NRC Staff did not seek to perform such a study. *See* Tribe Response at 8-9. As noted in Powertech's Petition, the consulting tribes indicated that they did not wish to pursue ethnographic studies, as they wanted to engage in field surveys to find and document/record anticipated but currently unknown places of religious and cultural significance.¹⁴ Thus, the Tribe cannot claim that NRC Staff refused to

¹² The Tribe's claim in its Response at 5 that the Augustana Report "left a significant number of archeological, historical, and *traditional cultural resources* on site unevaluated" is misleading, since the scope of Augustana Report was limited to archeological sites and historic structures; further, under the provisions of the PA, there will be no impacts to unevaluated properties identified by the Augustana archeological survey. *See* NRC Staff Exhibit NRC-151 at 11-12, ¶¶ A1.11-A1.12, *citing* NRC Staff Exhibit NRC-018-A at 5-6 (Stipulation 3).

¹³ The Tribe cites to NRC Staff's testimony that there is "no written cultural resources analysis prepared during part of the NEPA analysis" by any Sioux tribes. Tribe Response at 8. This fails to acknowledge that two Sioux tribes participated in the field surveys with funding provided by Powertech; that they chose not to submit written reports is not within NRC Staff's control. *See* Powertech Proposed Findings of Fact at 43-44, ¶¶ 10.24-10.25.

¹⁴ *See* Powertech Proposed Findings of Fact at 40-41, ¶¶ 10.16-10.17. In addition, NRC Staff also included in its FSEIS analyses a summary ethnographic study prepared by SRI Foundation and testified that they relied on this as part of their comprehensive environmental review of cultural, archeological and tribal resources. *See* NRC Staff Exhibit NRC-151 at 5-7, ¶ A1.4.

conduct an ethnographic and that the FSEIS did not include at least some evaluation of cultural resources through available ethnographic studies.

The Tribe alleges that the process of developing a scope of work (SOW) for site field surveys and, later, opening the Project site for such surveys was inadequate. The Tribe initially claims NRC Staff directed Powertech to provide additional survey information, “which resulted in the hiring...of Dr. S[e]bastian and her firm....” Tribe Response at 10. This is inaccurate, because Dr. Sebastian was hired to facilitate initial discussions and meetings with consulting tribes about site identification and not to identify properties. The Tribe also misconstrues Dr. Sebastian’s role in developing the draft SOW. When the consulting tribes failed to produce a draft SOW after indicating months earlier that they would do so, NRC Staff asked Dr. Sebastian’s firm to produce a draft SOW based on input received from the tribes.¹⁵ The Tribe also claims that “NRC Staff and Powertech repeatedly blame the Tribe for the problems with NRC Staff’s compliance, asserting that the Tribe made unreasonable demands as to the scope and scale of a cultural resources study....” Tribe Response at 19. This claim completely ignores the fact that the Licensing Board also found the Tribe’s demands of almost \$1,000,000 for a site field survey that would only cover about one-quarter of the total project area “patently unreasonable.”¹⁶ See LBP-15-16 at 42.

Respectfully Submitted,

**/Executed (electronically) by and in accord
with 10 C.F.R. § 2.304(d)/
Christopher S. Pugsley, Esq.**

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Dated: July 2, 2015

¹⁵ Contrary to the Tribe’s allegation that Dr. Sebastian lacked any relevant expertise to draft the SOW, it was prepared based on a description of what such a field survey would entail that was provided by consulting tribes; essentially it would be conducted by tribal representatives using similar methods as an archeological survey.

¹⁶ It is important to reiterate that the cost proposal from the tribes was approximately five (5) to fifteen (15) times greater than costs reported for similar survey efforts for federal projects in the Northern Plains region, despite the fact that the scope of such efforts was essentially the same. See NRC Staff Exhibit NRC-018-B at 19.

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **“REPLY TO THE OGLAL SIOUX TRIBE’S RESPONSE TO POWERTECH (USA), INC.’S PETITION FOR REVIEW OF LBP-15 16”** in the above captioned proceeding have been served via the Electronic Information Exchange (EIE) this 2nd day of July 2015, which to the best of my knowledge resulted in transmittal of the foregoing to those on the EIE Service List for the above captioned proceeding.

Respectfully Submitted,

**/Executed (electronically) by and in
accord with 10 C.F.R. § 2.304(d)/
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