UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

OGLALA SIOUX TRIBE,	)	
	)	
Petitioner,	)	No. 17-1059
	)	
v.	)	
	)	
UNITED STATES NUCLEAR REGULATORY COMMISSION and the UNITED STATES OF AMERICA,	)	
	)	
Respondents.	)	
	)	

OGLALA SIOUX TRIBE'S
RESPONSE TO MOTION FOR LEAVE TO INTERVENE

On March 14, 2017, Powertech (USA) Inc. ("Powertech") filed a Motion for Leave to Intervene ("Motion") in this proceeding pursuant to Federal Rule of Appellate Procedure 15(d) and D.C. Circuit Rule 15(b). On March 16, 2017, Powertech filed a "corrected" Motion for Leave to Intervene.[1] As stated in the corrected Motion, Petitioner Oglala Sioux Tribe ("Tribe") was unable to determine its position on the Motion as it had not been provided with the basis for the proposed intervention. Having reviewed the basis for intervention first provided by Powertech in its Motion, the Tribe hereby files its response and informs the

[1] According to the filings served upon the Oglala Sioux Tribe, Powertech neglected to file a Corporate Disclosure Statement as required by Federal Rule of Appellate Procedure 26.1 and D.C. Circuit Rule 26.1.

Court that while the Tribe does not oppose intervention by Powertech, it suggests that the Court impose reasonable restrictions on the intervention in order to ensure the efficient conduct of the proceedings.

According to Rule 15(d), a prospective intervenor must file a motion within 30 days after the Petition for Review was filed. FRAP 15(d). The motion "must contain a concise statement of the interest of the moving party and the grounds for intervention." Id. Because Rule 15(d) does not provide a standard for resolving intervention questions, Circuit Courts rely upon the factors and policies underlying Federal Rule of Civil Procedure 24(a)(2) ("Rule 24") to decide Rule 15(d) motions. Synovus Fin. Corp. v. Board of Governors of Federal Reserve Sys., 952 F.2d 426, 431-434 (D.C. Cir. 1991); Canadian Tarpoly Co. v. U.S. Int'l Trade Commn., 649 F.2d 855, 856-857 (C.C.P.A. 1981). The U.S. Supreme Court has endorsed this approach, instructing that the standards to evaluate intervention in a U.S. District Court proceeding can serve as guidance for a Circuit Court considering a motion to intervene. *See* Int'l Union v. Scofield, 382 U.S. 205, 217 n. 10 (1965).

Under Rule 24(a), an applicant may intervene as of right when (1) the motion is timely; (2) the applicant has a protected interest at issue; (3) that protected interest may be impaired by the litigation; and (4) existing parties do not adequately represent the interests of the applicant. *See* Fund for Animals, Inc. v. Norton, 322 F.3d 728, 731 (D.C. Cir. 2003).

The Tribe does not contest that Powertech's Motion for Leave to Intervene was timely. Nor does the Tribe challenge that the uranium mining license issued to Powertech involves a protected interest at issue in this case and that interest may be impaired by the litigation. Powertech correctly states that it was issued a Nuclear Regulatory Commission ("NRC") license that may be directly affected or invalidated by the outcome of this case. The Tribe lacks information on the current status of Powertech's interests, however, now that a company called Azarga Uranium Corporation asserts 100% ownership of the Dewey Burdock Project.[2]

The fourth requirement for intervention as of right – that other parties do not adequately represent the interests of the proposed intervenor – is not as obvious. Simply put, Powertech has made an insufficient demonstration that the NRC will not adequately represent its interests.

"Although the standard for determining inadequacy of representation is lenient, the moving party stills bears the burden of showing that representation may be inadequate." Environmental Defense Fund v. Costle, 79 F.R.D. 235 (D.D.C. 1978)("EDF"), *affirmed* 12 ERC 1255, D.C. Cir. No's. 78-1471, 78-1515, 78-1566 (unpublished per curiam order and memorandum of July 31, 1978), *cert. denied*, 439 U.S. 1071 (1979). "[T]he mere fact that there is a slight

[2] http://azargauranium.com/projects/usa/dewey-burdock// (last visited March 23, 2017).

difference in interests between the applicant and the supposed representative does not necessarily show inadequacy, if they both seek the same outcome. Interests may be different without being adverse." Nuesse v. Camp, 385 F.2d 694, 703 (D.C. Cir. 1967)(citations omitted).

> The most important factor to determine whether a proposed intervenor is adequately represented by a present party to the action is how the intervenor's interest compares with the interests of existing parties. Where the party and the proposed intervenor share the same ultimate objective, a presumption of adequacy of representation applies, and the intervenor can rebut that presumption only with a compelling showing to the contrary.

Perry v. Proposition 8 Official Proponents, 587 F.3d 947, 950-51 (9th Cir. 2009)(citations omitted).

As the basis for the argument that its interests may not be adequately represented by NRC, Powertech argues that the record below is "rife with expert technical arguments submitted by Powertech's expert employees and witnesses/consultants that can best be explained with their assistance." Powertech Motion at 4. However, Powertech fails to support this assertion with any examples or other demonstration of any technical matter that may be relevant in this proceeding. In fact, Powertech offers no indication as to any instance where NRC Staff and Powertech have diverged in any respect with regard to any technical or legal matter during the entire administrative proceeding.

Powertech also argues that NRC "does not represent the financial or policy interests of uranium recovery companies such as Powertech" (Powertech Motion

at 5), but offers no basis for this alleged fact or explanation or legal authority as to how this impacts the test for intervention. Indeed, Powertech's Motion is entirely bereft of any reference to any supporting caselaw.

Lacking any explanation beyond cursory and conclusory allegations, Powertech has not demonstrated any distinction between its ultimate objectives and NRC's, and no supported or sufficient illustration of why NRC does not adequately represent its interests.[3] However, the legal positions may diverge. For example, contrary to the NRC's pending Motion to Dismiss, Powertech rightly concedes that "this Court has jurisdiction over this matter under the Hobbs Act (28 U.S.C. §§ 2341-2351)." Powertech Motion at 2. Powertech's asserted interest confirms that "rights or obligations have been determined or legal consequences will flow from the agency action." Adenariwo v. Federal Maritime Commission, 808 F.3d 74, 78 (D.C. Cir. 2015).

Should this Court nevertheless allow Powertech to participate in this proceeding as a full party, it ought to set reasonable conditions on that participation, including the consolidation of Powertech's briefing with any other entities that may seek to join the litigation based on a similar interest. Further, should intervention be granted, Powertech should not be permitted to raise issues

[3] The lack of a Corporate Disclosure Statement further hampers the ability to determine whether Powertech's interests are adequately represented.

not germane to those identified by the Tribe in its Statement of Issues to be Raised, and should be instructed not to duplicate the legal or factual arguments presented by NRC. Potential methods for helping ensure these restrictions are staggered briefing, such that Powertech should file its briefing only after reviewing the arguments raised by NRC, or mandating coordination between NRC and Powertech such that duplication is minimized. Lastly, Powertech should not be permitted to file briefing in support of the NRC Motion to Dismiss because it has conceded jurisdiction and doing so at this stage would prejudice the Tribe in effectively foreclosing any opportunity for the Tribe to respond to any such Powertech arguments.

As held by the Supreme Court, "[a]n intervention of right under the amended Rule 24(a) may be subject to appropriate conditions or restrictions responsive among other things to the requirement of efficient conduct of proceedings." Stringfellow v. Concerned Neighbors in Action, 480 U.S. 370, 383 n.2 (1987). "The Advisory Committee Notes to the 1966 amendment to FRCP 24(a) states that intervention of right under the amended rule may be subject to appropriate conditions or restrictions responsive, among other things, to the requirements of efficient conduct of the proceedings." Federal Procedure, Lawyer's Edition, §59:442. 25 Fed. Proc., L.Ed. §59:442. *See also* Fund for Animals v. Norton, 322 F.3d at 737 n.11 (D.C. Cir. 2003) (citing the Advisory

Committee Note to support district court's authority to limit participation of intervenors).

Limiting intervention for reasons of judicial efficiency is "a firmly established principle" in the federal courts. Beauregard, Inc. v. Sword Servs., LLC, 107 F.3d 351, 352-53 (5th Cir. 1997); *see also* Stringfellow, 480 U.S. at 378 (limitations upon intervention do not constitute a denial of the right to participate); San Juan County v. U.S., 503 F.3d 1163, 1189 (10th Cir. 2007) (recognizing Rule 24 permits "limitations on the scope of intervention"); Southern v. Plumb Tools, 696 F.2d 1321, 1323 (11th Cir. 1983) ("It appears, therefore, that imposing certain conditions on either type of intervention, of right or permissive, poses no problem in the federal courts.").

In addition, while not addressed in Powertech's Motion, this Court has even broader discretion to establish such conditions for permissive intervention under Rule 24(b). "A district court's discretion to grant or deny permissive intervention is broad, and includes the discretion to limit intervention to particular issues or for limited purposes." Center for Biological Diversity v. Brennan, 571 F.Supp.2d 1105, 1130 (N.D.Cal. 2007), *citing* San Jose Mercury News v. U.S. Dist. Court—Northern Dist., 187 F.3d 1096, 1100 (9th Cir. 1999) and Van Hoomissen v. Xerox Corp., 497 F.2d 180, 181 (9th Cir. 1974). "When granting an application for permissive intervention, a federal district court is able to

impose almost any condition." Columbia-America Discovery Group v. Atlantic Mut. Ins. Co., 974 F.2d 450, 469 (4th Cir. 1992), *cert. denied*, 507 U.S. 1000 (1993). *See also* EDF v. Costle, 79 F.R.D. at 244 (limiting intervenors to the filing of briefs on a single issue).

As discussed herein, should intervention be granted, this Court should impose conditions to prevent Powertech from complicating these proceedings and making duplicative or non-germane presentations.

Respectfully submitted,

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Filed this 24th day of March, 2017.

CERTIFICATE OF COMPLIANCE

I, Jeffrey C. Parsons, hereby certify that the foregoing Response to Motion for Leave to Intervene complies with the formatting and type-volume restrictions of the rules of the U.S. Court of Appeals for the District of Columbia Circuit. The motion was prepared in 14-point, double spaced, Times New Roman font, using Microsoft Word 2016, in accordance with Fed. R. App. P. 32(a)(5) and Fed. R. App. P. 32(a)(6). The response contains 1588 words and therefore complies with Fed. R. App. P. 27(d)(2)(A).

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CERTIFICATE OF SERVICE

I, Jeffrey C. Parsons, hereby certify that the foregoing Response to Motion for Leave to Intervene was served on all counsel of record in case number 17-1059 through the electronic filing system (CM/ECF) of the U.S. Court of Appeals for the District of Columbia Circuit.

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