

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
)
(Dewey-Burdock In Situ Uranium Recovery)
Facility))

OGLALA SIOUX TRIBE'S RESPONSE
TO NRC STAFF'S MARCH 16, 2018
CULTURAL RESOURCES SURVEY PROPOSAL

Pursuant to this Board's requests during the March 27, 2018 conference call and March 29, 2018 Board Order, counsel for Oglala Sioux Tribe ("Tribe") hereby submits the Oglala Sioux Tribe's Response to the NRC Staff's March 16, 2018 cultural resources survey proposal.

On March 16, 2018 NRC Staff submitted to the parties a proposal for fulfilling NRC Staff's National Environmental Policy Act ("NEPA") obligations with respect to a cultural resources survey for the proposed Dewey-Burdock in situ leach uranium mine. The proposal updates the outline of the plan provided by NRC Staff in December 2017. Based on the approach described, the Tribe continues to believe these efforts may provide a reasonable path toward NRC satisfying NEPA and resolving the Oglala Sioux Tribe's long-standing NEPA contention.

As has been discussed, the first step toward NEPA compliance involves the design of a scientifically sound cultural resources survey at the proposed mine site. However, the current proposal lacks two important details identified by the Tribe during the March 27, 2018 conference call with the Board and in the Tribe's previous correspondence to NRC Staff. While the Tribe has, and remains, committed to participating in the approach identified by NRC Staff,

the NRC Staff's decisions on these details could significantly affect the extent of the Tribe's participation and its ability to successfully coordinate the participation of other Tribes.

Specifically, despite requests, the proposal does not address involvement by any of the affected Tribes in the selection of a qualified contractor necessary to facilitate the survey components, or the scope of work for the contractor. The Tribe's letter to NRC Staff dated January 19, 2018 referenced this issue, the Tribe raised this issue during the parties' conference call among counsel on February 1, 2018, and the Tribe raised it again during the most recent conference call with the Board on March 27, 2018. During the conference call with the Board on March 27, 2018, the NRC Staff asserted that the Atomic Energy Act prohibits participation by the Tribes in the contractor selection process. However, during the previous efforts to resolve the cultural resources survey issues in this proceeding, contractor selection was expressly opened to the input of the Tribes. Indeed, NRC Staff specifically encouraged the Tribes to submit contractor proposals: "NRC staff asked participants in the September 5, 2012, meeting in Bismarck, North Dakota to designate a preferred contractor to submit a proposal for a survey on their behalf." Final Supplemental Environmental Impact Statement at 1-22 (ML14024A477). While not a bar to its participation, the Tribe repeats its request that the contractor selection process and the finalizing of the scope of work for the contractor be open to input from the Tribes in order to avoid potential conflicts of interest that could diminish Tribal participation and to ensure the greatest level of support possible from the Tribes.

Second, the NRC Staff's March 16, 2018 proposal does not include any specifics related to reimbursement for costs and staff time of any of the Tribes in conducting necessary duties contemplated in the proposal. The Tribe noted in both its January 19, 2018 and February 15, 2018 correspondence with NRC Staff the expectation that such reimbursement would be

included as part of the proposal. The Tribe stated in its January 19, 2018 letter that the proposal should be designed in such a way as to not “unduly burdening the already taxed resources of the Tribal historic preservation offices.” The NRC Staff’s March 16, 2018 proposal relies heavily on commitments by the Tribes to participate in a variety of ways, including significant out-of-pocket and staff time costs for carrying out critical components such as surveys, interviews, and reviews of agency analysis documents. It is not a reasonable request to expect the Tribes to engage in such an extensive way without including reimbursement for costs and staff time. Indeed, every other iteration of a cultural resources site survey proposal since the licensing process was underway included such consideration. See, e.g. Final Supplemental Environmental Impact Statement at 1-24 (ML14024A477)(discussing 2013 proposal with such items as per diem and travel costs for tribal representatives as well as an additional unconditional grant in consideration for staff time expended).

As noted by the Board in its March 29, 2018 Order, there is strong support throughout federal agency guidance for reimbursement of Tribal expenses when such work is a meaningful component of a required survey effort. The question of reimbursing necessary costs for the Tribes’ participation is also wholly consistent with NEPA’s “provisions of 40 C.F.R. §§ 1501.5 and 1501.6 relating to lead agencies and cooperating agencies.” 10 C.F.R. § 51.10(b)(2). The NEPA regulations applicable to cooperating agencies contemplate that “[t]he lead agency shall, to the extent available funds permit, fund those major activities or analyses it requests from cooperating agencies. Potential lead agencies shall include such funding requirements in their budget requests.” 40 C.F.R. § 1501.6(b)(5). Although the ongoing NEPA analysis of cultural resources is not proceeding pursuant to a formal designation of the Tribes as cooperating agencies, the letter and spirit of NEPA regulations contemplate reimbursement for the Tribes’

participation in “major activities and analyses” the Tribes are being is asked to carry out as part of NRC Staff’s effort to satisfy NEPA duties. *Id.*

To date, the licensee Powertech has not agreed to reimburse the Tribes or NRC Staff for expenses as part of NRC’s full fee recovery program. As committed on the March 27, 2018 conference call with the Board and referenced in the Board’s March 29, 2018 Order, the Tribe and its undersigned counsel will continue to be available to work diligently with counsel for the licensee to attempt to reach agreement on this matter. As of the date of this filing, the Tribe is awaiting any information from the licensee as to its position on any aspect of the NRC Staff’s survey approach. As noted on the March 27, 2018 conference call with the Board and as requested in the Board’s March 29, 2018 Order, counsel for the Tribe remains available to engage in discussions as soon as the licensee provides its position. Given these circumstances, as intimated by the Board in its March 29, 2018 Order, NRC Staff should not unreasonably rely on the licensee’s consent, but simply include the necessary reimbursement for participating Tribes, commensurate with what had been previously proposed throughout this proceeding, as a mandatory component of the final cultural resources survey approach.

Lastly, as noted in the Tribe’s January 19, 2018 letter to NRC Staff, the specific field survey methodology has yet to be established. The Tribe looks forward to discussing this critical issue further as contemplated in the timeline attached to NRC Staff’s March 16, 2018 proposal, in partnership with both NRC Staff and with the benefit of the expertise and experience of the selected contractor. The Tribe realizes that the proposed timeline presented by NRC Staff, while appearing achievable, preserves some flexibility to account for finalization of the methodology as well as any other unforeseen circumstances.

Respectfully Submitted this 30th Day of March 2018,

/s/ Jeffrey C. Parsons

Jeffrey C. Parsons
Western Mining Action Project
P.O. Box 349
Lyons, CO 80540
(303) 823-5738
Fax (303) 823-5732
wmap@igc.org

Travis Stills
Energy & Conservation Law
1911 Main Street, Ste. 238
Durango, CO 81301
(970) 375-9231
stills@frontier.net

Counsel for Oglala Sioux Tribe

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
)
(Dewey-Burdock In Situ Uranium Recovery)
Facility))

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing OGLALA SIOUX TRIBE’S RESPONSE TO NRC STAFF’S MARCH 16, 2018 CULTURAL RESOURCES SURVEY PROPOSAL in the above-captioned proceeding were served via the Electronic Information Exchange (“EIE”) on the 30th day of March 30, 2018, 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 _____

Jeffrey C. Parsons
Western Mining Action Project
Counsel for Oglala Sioux Tribe