

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 MOTION
TO SET FILING FOR SUMMARY DISPOSITION MOTIONS

Pursuant to 10 C.F.R. § 2.323(c) and the Board’s Order of July 11, 2018, the Oglala Sioux Tribe (Tribe) hereby submits this Response to NRC Staff’s Motion to Set Filing Deadline for Summary Disposition Motions.

In its Motion, NRC Staff concedes that it made the unilateral decision to abandon all efforts to negotiate with the Tribe to establish a cultural resources methodology. The decision to abandon negotiations was made despite the fact that such negotiation and development of a methodology was expressly contemplated as a central component in the “March 2018 approach” formally adopted by NRC Staff on April 12, 2018.

Although the “March 2018 approach” is premised on NRC Staff hiring qualified persons to develop and implement an acceptable methodology to meet NRC’s duties, a fundamental problem arose when NRC Staff contractors presented two open site survey options in the June 4, 2018 webinar. During the webinar and follow-up discussions, NRC Staff’s contractors stated that they would have proposed something different if given the opportunity, but were restrained by NRC Staff budget and scope of work, neither of which NRC Staff has disclosed. NRC Staff

never proposed any cultural resource survey methodology and provided no meaningful response to the Tribe's proposals.

The Tribe adamantly disagrees with NRC Staff's assertions that the Tribe's discussion drafts of proposed methodologies presented to NRC Staff posed a fundamental obstacle to pursuing the basic framework of the March 2018 approach. Notably, the Tribe expressly explained its proposals were provided to NRC Staff as discussion drafts – not as ultimatums or non-negotiable terms. The draft proposals present accepted, culturally relevant methodologies the Tribe believes could allow NRC Staff to meet its duties, but also expressly noted that the Tribe did not expect discussion drafts would be adopted in full. The Tribe expended uncompensated resources and acted in good faith by presenting the Tribe's methodological preference as a discussion draft, expecting that the parties could then negotiate an approach acceptable to NRC Staff that incorporated as much as possible of the Tribe's proposal within the timing and budget restraints of the March 2018 approach.

While the full record can be briefed in full at the request of the Board, Tribe's development of a survey methodology was necessitated by the NRC Staff's continued reliance on an informal open site survey instead of a methodologically sound survey developed by qualified contractors, with the Tribe's input. Yet, upon receiving the discussion drafts, and despite express invitations from the Tribe, NRC Staff refused to provide any substantive input, refused to identify any obstacles with any specificity, or even agree to engage in any further discussion to resolve any obstacles NRC Staff purports to have observed. Instead, despite the Tribe's repeated expressed willingness to begin field surveys during the week of June 18, even in the absence of a finalized methodology to lay the foundation for additional field work in the Fall, NRC Staff cancelled all field work on June 15 (the same day NRC Staff received the Tribe's

updated discussion draft). NRC Staff shut down the process a full week ahead the June 24 end date for field work set out in the March 2018 schedule. Finalizing the methodology for the oral interviews and September follow-up field surveys posed no obstacle to the NRC Staff and Tribes' Staff going into the field to conduct initial surveys during the week of June 18, 2018. Instead, NRC Staff abruptly cancelled all further survey activities and apparently instructed its contractors to suspend ongoing staking and other field survey activities carried out during the week of June 11, 2018.

Based on NRC Staff's apparent lack of ability or training required to engage in effective communication with the Tribe's professional staff, let alone the Tribe's membership, the Tribe requested on multiple occasions that NRC Staff involve experts in communications with tribes within the NRC Federal, State, and Tribal Liaison Program. NRC Staff ignored these requests entirely, despite the very recent findings by the NRC Office of Inspector General leveling serious critiques of NRC Staff's failure to engage this critical resource. See "Audit of NRC's Consultation Practices with Federally Recognized Native American Tribal Governments," OIG-18-A-10 (April 4, 2018).

Given this background and NRC Staff's failure to develop the required methodologies, the Tribe does not believe that NRC Staff's request to abandon the March 18 approach in favor of Motions for Summary Disposition is appropriate or consistent with federal trust responsibilities. Rather, the Tribe believes that it is incumbent on NRC Staff to engage in substantive discussions on an acceptable methodology for a field survey and oral interview, including the specific bases upon which NRC Staff believes there are no aspects of the Tribe's discussion draft proposals that be incorporated into an acceptable field survey methodology. At minimum, the Board should require NRC Staff to engage its Tribal Liaison Program to facilitate

discussions, as repeatedly requested by the Tribe. Further, the Tribe believes that the parties should avail themselves of a Settlement Judge as contemplated by 10 C.F.R. § 2.338. In either of these ways, the Tribe believes the interests of the Tribe, NRC Staff, this Board, and the protection of the Tribe's interests in its cultural resources can be better served than resorting to adversarial litigation without the NRC Staff providing input on what NRC Staff constitutes a reasonable methodology to conduct a cultural resource survey.

Alternatively, should the Board decides to establish summary disposition deadlines, the Tribe requests, consistent with the reasons and information conveyed through NRC Staff's Motion, that the Board set an August 17, 2018 deadline for the Tribe to file a motion compelling Powertech and NRC Staff to disclose all relevant information (e.g. costs previously incurred, scope of work, survey data collected in June 2018, budgets, etc.) relevant to the pending contention. The failure to disclose relevant information was discussed in previous Board conference calls and is a proper subject to revisit on any upcoming call the Board may schedule. The Tribe submits that an appropriate deadline for summary disposition motions and any new contentions arising from NRC Staff's actions would be thirty days after Powertech and NRC Staff update their required disclosures.

Respectfully Submitted this 16th Day of July 2018.

/s/ Jeffrey C. Parsons
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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Response to NRC Staff’s Motion to Set Filing Deadline for Summary Judgment Motions in the above-captioned proceeding were served via the Electronic Information Exchange (“EIE”) will be filed as soon as possible after the 16th day of July 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/ Jeffery C. Parsons

Jeffrey C. Parsons
Western Mining Action Project

I hereby certify that, due to technical barriers that prevented filing with the EIA system, copies of the foregoing Response to NRC Staff’s Motion to Set Filing Deadline for Summary Judgment Motions in the above-captioned proceeding were served by email on the 16th day of July 2018, to those on the EIS Service List for the captioned proceeding.

/s/Travis E. Stills

Travis E. Stills
Energy & Conservation Law