

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))	

DECLARATION OF KYLE WHITE

1. My name is Kyle White. I am the Director of the Oglala Sioux Tribe Natural Resources Regulatory Agency. The Oglala Lakota Cultural Affairs and Historic Preservation Office is a department within the Natural Resources Regulatory Agency.
2. The Oglala Sioux Tribe is a body politic comprised of approximately 41,000 citizens with territory of over 4,700 square miles on the Pine Ridge Reservation in the southwestern portion of South Dakota. The Oglala Sioux Tribe is the freely and democratically-elected government of the Oglala Sioux people, with a governing body duly recognized by the Secretary of Interior. The Oglala Sioux Tribe is the successor in interest to the Oglala Band of the Teton Division of the Sioux Nation, and is a protectorate nation of the United States of America. The Oglala Band reorganized in 1936 as the “Oglala Sioux Tribe of the Pine Ridge Indian Reservation” (“Oglala Sioux Tribe” or “Tribe”) under section 16 of the Indian Reorganization Act of June 18, 1934, ch. 576, 48 Stat. 987, 25 U.S.C. § 476, and enjoys all of the rights and privileges guaranteed under its existing treaties with the United States in accordance with 25 U.S.C. § 478b. Its address is P.O. Box 2070, Pine Ridge, South Dakota 57770-2070.
3. In 1992 the U.S. Congress adopted amendments to the National Historic Preservation Act (P.L. 102-575) that allow federally recognized Indian tribes to take on more formal responsibility for the preservation of significant historic properties on tribal lands. Specifically, Section 101(d)(2) allows tribes to assume any or all of the functions of a State Historic Preservation Officer (“SHPO”) with respect to tribal land.
4. I am familiar with the license application submitted to the Nuclear Regulatory Commission (NRC) by Powertech (USA) Inc. (“Powertech” or “Applicant”) for the proposed Dewey-Burdock in-situ leach uranium mine in southwest South Dakota.
5. The lands encompassed by the Powertech proposal are within the Oglala Sioux Tribe’s aboriginal lands. As a result, the cultural resources, such as burials, items of cultural patrimony, artifacts, sites, and other material culture, etc., belong to and/or could be

associated with the Tribe upon proper identification, documentation, evaluation, and recordation. By enacting NEPA (42 U.S.C. §§ 4231 *et seq.*), NAGPRA, (25 U.S.C. §§ 3001 *et seq.*), NHPA (16 U.S.C.S. §§ 470 *et seq.*) and other statutes, the United States Government has assured that the cultural resources of a tribe will be protected, even when they are not within reservation boundaries. Since there are cultural resources identified in the license application, and there may well be more that only the Tribe can identify and ensure that they are properly protected, the Tribe has a protected interest here. Any harm done to these cultural resources, especially to burials and artifacts, perhaps because the Applicant and NRC Staff did not properly judge the significance of certain artifacts or other resources, will be an irreparable injury to the very identity of the Tribe, caused by the actions of the Applicant, and condoned by the NRC Staff, the Tribe's trustee.

6. In any case, the discovery of significant cultural resources and prehistoric artifacts in the Tribe's treaty and aboriginal territory implicates important tribal interests such that the Tribe's rights are threatened by the Applicant's proposed construction and mining activity in its aboriginal territory.
7. The Oglala Sioux Tribe has taken, and continues to take, the necessary course of action to participate fully as a party in the NRC proceeding in part in order to safeguard its interests in the protection of cultural, historic, and natural resources, including ground water, at and in the vicinity of the mine site.
8. The Nuclear Regulatory Commission ("NRC") has upheld this Atomic Safety and Licensing Board's ("ASLB") rulings that NRC Staff failed to comply with the National Environmental Policy Act (NEPA) with respect the Staff's failure to conduct an adequate survey for, and analysis of impacts to and mitigation for, cultural resources at the proposed mine site. Despite these acknowledged illegalities, the Commission nevertheless affirmatively confirmed the issuance of the disputed license. The NRC's action in doing so harms the Tribe's interests in ensuring the protection of its cultural, historic, and natural resources
9. The Tribe was granted standing in the hearing process before the Nuclear Regulatory Commission over the actively litigated objections of the applicant. NRC Staff did not object to the Tribe's standing. The ASLB found that the "Oglala Sioux Tribe has shown it has standing to participate in this proceeding...." *In the Matter of Powertech (USA), Inc.* (Dewey-Burdock In-Situ Uranium Recovery Facility), LPB-10-16, 72 NRC 361 (2010), at 3. Specifically, the ASLB found that the substantive injuries to the Tribe resulting from the proposed project as well as the procedural injuries resulting from the lack of compliance with NEPA and the NHPA confer standing on the Tribe. LPB-10-16, at 22-25.
10. During the evidentiary hearings held in August of 2014, Oglala Sioux Tribe witnesses Mr. Mesteth and Mr. CatchesEnemy testified in detail as to the ongoing harm to the Tribe's substantive and procedural interests as a result of the lack of analysis as to the cultural and water impacts associated with the proposed project.

11. Included within the territory the Powertech proposal would impact are current or extinct water resources. Such resources are known to have been favored camping sites of indigenous peoples, both historically and prehistorically, and the likelihood that cultural artifacts and evidence of burial grounds exist in these areas is strong.
12. While the Powertech application includes some evidence of a cultural resource study, no comprehensive study identifying all such resources has been adequately conducted by either the Applicant or NRC Staff, nor incorporated into the FSEIS. No such study has been conducted by the Tribe. While some other tribes have reviewed the site, these surveys are not sufficient to identify cultural and historic resources significant to the Oglala Sioux Tribe. The FSEIS does not describe any uniform or scientifically-verified methodology employed by these surveys, nor explain any methodology or scientific basis for the selection of certain cultural resources as significant or eligible for listed on the national register of historic places, while others are not granted such status or protections.
13. Powertech's Environmental Report accompanying the license application indicates that personnel from the Archaeology Laboratory at Augustana College ("Augustana"), Sioux Falls, South Dakota, conducted on-the-ground field investigations between April 17 and August 3, 2007. To my knowledge, the Tribe was not involved in this study, and no surveys have been made by any persons with relevant cultural experience. This study remains the primary basis for the NRC Staff's analysis of cultural resources in its FSEIS. NRC Staff committed in its Draft Supplemental Environmental Impact Statement to conduct additional scientifically-valid cultural resource surveys within the mine project area, and distribute such surveys for public comment as required by NEPA. Despite these express commitments, NRC Staff failed to conduct any such surveys or solicit any additional public comment.
14. As stated in the Powertech Environmental Report, at 3-179, the Augustana study found that "the sheer volume of sites documented in the area [was] noteworthy," and the area proposed for mining was found to have a "high density" of cultural resources. As also recognized in the environmental report, this indicates that use of the area by indigenous populations was, and has been, extensive.
15. The Powertech Environmental Report also states, at 3-178, Augustana documented 161 previously unrecorded archaeological sites and revisited 29 previously recorded sites during the current investigation. Among these were some 200 hearths within 24 separate sites. Significantly, however, twenty-eight previously recorded sites were not relocated during a subsequent investigation.
16. Powertech asserts in its Environmental Report, at page 2-9, Table 2.11-1, that impacts to cultural resources will be "none." However, the Memorandum of Agreement (with amendments) entered into between Powertech and the Archaeological Research Center

(ARC), a program of the South Dakota State Historical Society, reproduced in the Environmental Report at Appendix 4.10-B, specifically recognizes that “Powertech has determined that the Project may have an affect on archaeological or historic sites that contain or are likely to contain information significant to the state or local history or prehistory....”

17. The NRC Staff’s Final Supplemental Environmental Impact Statement (FSEIS) relies heavily on the Augustana study and a “Programmatic Agreement” (PA) developed outside of the NRC Staff’s National Environmental Policy Act (NEPA) review. As a result, the FSEIS defers its analysis of the impacts of the project construction, and development of mitigation plans and protocols to a later time.
18. Significantly, Powertech has not entered into any Memorandum of Agreement with the Tribe. Similarly, the “Programmatic Agreement” was finalized by NRC Staff without agreement, and over the official objections of, the Oglala Sioux Tribe. The NRC Staff has not obtained the Tribe’s participation in the development of any mitigation measures or other stipulations purported to result in the diminishment of impacts to the Tribe’s cultural and historic resources at the site. Nor has Powertech sought to include the Tribe in any of the “Dispute Resolution” procedures through which the Programmatic Agreement purports to remedy disagreements regarding the significance of cultural resources on the site, or the impact of any mining operations on these cultural resources. As a result, NRC Staff and Powertech have failed to adequately include the Tribe in this process, and leaves the Tribe’s cultural resources at significant risk.
19. In February of 2014, then Oglala Sioux President Brian V. Brewer submitted a letter to the NRC setting forth in some detail the significant problems with the NRC Staff’s approach to both compliance with NEPA and the National Historic Preservation Act (NHPA). The issues identified in that letter have not been resolved, and the Tribe believes that significant historic and cultural resources remain at risk from the proposed mine project as a result.
20. The Oglala Sioux Tribe submitted declarations in the NRC administrative process in 2010 signed by then-THPO Wilmer Mesteth and Director of the Oglala Sioux Tribal Land Office Denise Mesteth, and in 2014 signed by then-THPO Michael CatchesEnemy. Because no scientifically-defensible site-wide cultural resources study or inventory has been conducted for the project area since the filing of those declarations, the criticisms and critiques of the cultural resources studies conducted with respect to the mine project area remain valid and current.
21. I have received letters confirming that NRC Staff is still trying to identify cultural resources and still has not obtained the Tribe’s participation in the development of any mitigation measures or other plans purported to result in the diminishment of impacts to the Tribe’s cultural and historic resources at the site.

22. The Oglala Sioux Tribe has a concrete interest in a lawful and complete NEPA process. Using the NEPA process ensures Tribal members are able to engage the cultural resources decisions being made by NRC Staff and work to ensure that cultural and natural resources are protected from desecration and destruction.
23. The FSEIS, Record of Decision, and license were issued before Powertech or NRC Staff completed a Programmatic Agreement (“PA”) to establish the newly segregated cultural resources analysis. The Oglala Sioux Tribe is not a signatory to any PA concerning the Powertech proposal.
24. The NRC’s December 23, 2016 Order (CLI-16-20) upheld this Board’s ruling that NRC Staff had failed to comply with NEPA in its assessment and analysis of impacts to cultural resources at the proposed mine site. Nevertheless, the Commission approved the effectiveness of Powertech’s license without first properly surveying for or mitigating impacts on both identified and unidentified cultural resources.
25. On July 20, 2018, the United States Court of Appeals for the District of Columbia Circuit issued a decision in a case brought by the Oglala Sioux Tribe against the Nuclear Regulatory Commission alleging violations of federal law, including NEPA, for leaving the Powertech license in place despite the lack of a NEPA-compliant cultural resources impact and mitigation analysis.
26. Should the license remain active or construction go forward without first completing a proper survey and developing a lawful plan mitigating the impacts to sites and their setting, opportunities to implement mitigation options such as moving facility features and prohibiting disturbance of sensitive areas would be forever lost.
27. As detailed in Mr. Mesteth’s and Mr. CatchesEnemy’s Declarations, the numbers and density of cultural resources at the site proposed for mining demonstrate that any mining activity, including ground-disturbing construction activity, is likely to irreparably adversely impact the cultural resources of the Oglala Sioux Tribe. The failure to meaningfully involve the Tribe in the analysis of these sites, or to conduct any ethnographic studies in concert with a field study designed with credible scientific methodology as part of the NEPA or NHPA processes further exacerbate the impacts on the Tribe’s interests as a procedural matter causing irreparable harm by negatively affecting the Tribe’s ability to protect its cultural resources. If the project were not to go forward as planned, the interests of the Oglala Sioux Tribe would be protected as the potential for impact to the Tribe’s cultural resources would be diminished or outright eliminated.
28. In my capacity as Director of the Oglala Sioux Tribe Natural Resources Regulatory Agency, I participated in the NRC Staff’s most recent effort to design and undertake a competent cultural resources survey of the Dewey-Burdock property. The schedule for the proposed cultural resources survey effort was set forth in an enclosure to an April 13, 2018 letter from NRC Staff personnel to myself. The schedule contemplated meetings via webinars and teleconferences starting May 28, 2018 “to discuss and

establish the survey methodology and the areas to be examined during the field survey.”

29. I joined the conference call and webinar established for June 4, 2018, and the follow up teleconference on June 5, 2018, along with Mr. Lance Rom, principal at Quality Services, Inc., a professional cultural resources firm. Mr. Rom was participating as a professional paid consultant for the Oglala Sioux Tribe.
30. During the June 4 and 5, 2018 teleconferences, topics of discussion included how the methodology for the cultural resources would be developed and what confidentiality protections would be in place to ensure protection of sensitive cultural information.
31. Confidentiality is critical to Oglala Sioux Tribe, and is the subject of tribal codes and ordinances. The Tribe provided NRC Staff with these provisions with the expectation that they would be applicable to all participants in the survey with access to sensitive cultural information, including NRC Staff and contractors.
32. Despite the Tribe’s explanation of the importance of additional confidentiality provisions, NRC Staff refused to provide for any expansion of existing SUNSI orders. NRC Staff did not provide any means to address the Tribe’s concerns over ownership of the information collected, both through the survey and the oral interviews.
33. During the teleconference discussions, the Tribe had repeatedly informed NRC Staff that the open site approach was not based on any recognized discipline or methodology and was therefore unacceptable.
34. On June 5, 2018, NRC Staff contractor Dr. Nickens provided a proposed “initial work plan” to the Tribe. The June 5, 2018 initial work plan lacked any identifiable scientific methodology for a cultural resources survey. In fact, it constituted an open site survey proposal that failed to respond to the Tribe’s longstanding objections. The proposal called for:
 - a. “windshield survey” provided by Powertech driver;
 - b. Field visits to 3-5 previously identified sites per day;
 - c. Prioritize sites based on some unstated criteria;
 - d. Contractor-prepared “daily package” of information explaining why sites to be visited that day were chosen;
35. Dr. Nickens’ work plan contains no methodology. Dr. Nickens lacks the qualifications to design and implement a scientifically sound cultural resources survey methodology. Dr. Stoffle did not interact with the Tribe after the webinars and follow-up call were completed.

36. The Tribe raised objections to Dr. Nickens' June 5, 2018 open site survey immediately.
37. Dr. Nickens confirmed on the phone conference that the open site survey is not the type of approach he would recommend.
38. Dr. Nickens confirmed on the phone conference that his efforts were constrained by time pressure and NRC budget.
39. NRC Staff has never released the work plan and budget that constrained Dr. Nickens' work. Dr. Nickens offered to assist the Tribe to prepare a methodology.
40. On June 8, 2018, given the lack of a concrete plan from NRC Staff for development of a methodology or the site survey, the Tribe's presented, through counsel, a detailed work plan to NRC Staff. The plan included a summary of the discussions held to-date, a summary of the Tribe's concerns regarding issues that the Tribe had requested be addressed prior to field visits, including confidentiality concerns, as well as a detailed daily schedule for the Tribe and NRC Staff and contractors to finalize the survey methodology. The NRC Staff accepted the proposal and agreed to work to develop a methodology with face-to-face meetings during the week of June 11, 2018.
41. Given the lack of any scientific survey methodologies presented by NRC Staff or contractors, apart from the one-page summary work plan provided on June 5, 2018, and in order to facilitate the discussions and provide NRC Staff and its contractors information on the type of methodologies the Tribe would like to incorporate, an initial proposal was hand delivered in Pine Ridge to NRC Staff and contractors on June 12, 2018. The proposal was not presented as any kind of ultimatum, but rather as a starting point for discussion on specific methodologies with NRC Staff.
42. The Tribe's methodologies were discussed at the June 13, 2018 emergency meeting of the Oglala Sioux Tribe Cultural Affairs and Historic Preservation Advisory Council Meeting. Dr. Nickens and NRC Staff attended the meeting. During the meeting, the Advisory Council discussed the methodologies and gave input on Oglala Lakota cultural principles.
43. The Tribe believed that progress had been made toward at least a preliminary agreement on the methodology, which the "approach" contemplated would be established before carrying out the survey. NRC Staff requested that the Tribe update its June 12 document based on the input of the Advisory Council before it would respond. NRC Staff notified the Tribe that no activities would occur until NRC Staff could respond to the Tribe's updated document.
44. The Tribe provided an update to the June 12 document on June 15, 2018, expecting to continue working on the methodology, while also beginning field work within the original schedule proposed by NRC Staff for the field survey. However, on June 15,

counsel for NRC Staff informed the counsel for the Tribe that NRC Staff had rejected all aspects of the methodology developed by the Tribe and its contractors during face-to-face meetings. NRC Staff sent a similar email to myself on the same day. Neither email rejection provided any substantive explanation of why each and every methodological component was unacceptable, or why no portion of the Tribe's methodologies could be implemented in any manner.

45. Without any attempt to negotiate, and despite the Tribe's request that the field work commence on June 18, 2018, with a full week left in the original schedule for field work, NRC Staff left Pine Ridge on June 15, 2018. NRC Staff and Dr. Nickens have made no attempt to resolve this matter. The positive steps made by the in-person discussions were curtailed by NRC Staff's decision that NRC Staff would not return to Pine Ridge on June 18, 2018 to continue implementing the plan.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on September 21, 2018 at Pine Ridge Indian Reservation.



Kyle White