

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

In the Matter of)
)	Docket No. 40-0975-MLA
POWERTECH (USA), INC.) ASLBP No. 10-898-02-MLA-BD01
)
(Dewey-Burdock) December 21, 2018
In Situ Leach Facility))

**CONSOLIDATED INTERVENORS RESPONSE IN OPPOSITION TO POWERTECH
(USA) INC. PETITION FOR INTERLOCUTORY REVIEW**

Consolidated Intervenors¹ hereby submit their Response in Opposition to Powertech (USA) Inc. Petition for Interlocutory Review. Since the Petition and this Response involves the treatment of cultural resources and Consolidated Intervenors include enrolled members of the Oglala Sioux Tribe, Consolidated Intervenors hereby join in the Response filed by Intervenor Oglala Sioux Tribe on December 20, 2018 and expressly adopt all arguments and assertions filed therein. Consolidated Intervenors have the following in addition thereto.

Powertech (USA) Inc. (“Powertech”) bases its Petition for Interlocutory Review (“Petition”) on the mistaken premise that NRC Staff owes its NEPA responsibility to the Oglala Sioux Tribe because of the latter’s status as an Intervenor in this underlying action. The Consolidated Intervenors assert that the U.S. Court of Appeals (D.C. Cir) decision in *Oglala Sioux Tribe v. NRC*, 896 F.3d 520 (D.C. Cir 2018) demonstrates that despite OST’s direct connection to this specific site and the cultural properties located there, the protection of cultural resources from damage or destruction during federally licensed activity, generally, is a

¹ Susan Henderson, Dayton Hyde and Aligning for Responsible Mining.

compelling public interest under NEPA, whether or not a federally recognized tribe appears to assert and prosecute a claim:

We know that the environmental values protected by NEPA are of high order— because Congress has told us so *referencing* 42 U.S.C. § 4331 recognizing ‘the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man’ and declaring the federal government’s responsibility to ‘preserve important historic, cultural, and natural aspects of our national heritage.’

Id. at fn 6.

Consolidated Intervenor do not believe that the NRC fully understands its obligations under NEPA. However, the NRC is compelled to apply its own regulations.

Consolidated Intervenor note that Powertech/Azarga has raised and spent tens of millions of dollars, some of which could have been spent on a proper traditional cultural properties survey and related protection of cultural resources.

Consolidated Intervenor further note that the Lakota people did not invite Powertech but rather Powertech made the decision to go to the Black Hills, the most sacred place on Earth to the Lakota people, and start a major federal licensed action. The easily foreseeable budget for that endeavor from the beginning should have included the costs of a proper cultural resources survey which usually are fairly substantial - in the hundreds of thousands of dollars if not millions of dollars.

The Black Hills are the place where the Lakota have been birthing, living, dying and buried for generations. The origination story of the Lakota people takes place in the Black Hills. Therefore, the Lakota people and their oral historians, culture protectors and elders must be

involved in any survey process and the information shared must be made confidential. None of this is new information to Powertech or the NRC. Since these costs and this activity should have been expected by Powertech and because this issue has been in litigation for many years, the markets have already absorbed the information and there is no irreparable harm to Powertech or the stockholders of its foreign holding company.

Consolidated Intervenor acknowledges that it may be preferable for the parties to move beyond the ASLBP process and into the federal courts but that decision was already litigated in this case in the form of the motion for summary disposition and that was denied. It is not appropriate for Powertech to attempt to use the interlocutory appeal process to re-litigate the summary disposition motion.

Therefore, the most efficient use of resources at this point is to follow through with the current process to completion thereby allowing the parties to exhaust their administrative remedies and move this matter to the next stage.

Consolidated Intervenor asserts that the Commission should not delay implementation of the D.C. Circuit's remand directive. All parties to this case have had an opportunity to state their views to the Commission on this topic. Again, Powertech seeks to use the interlocutory process to re-litigate prior issues.

CONCLUSION

Powertech has failed to meet the intentionally strict NRC standards for granting interlocutory review. Powertech has attempted to re-litigate prior issues with heavy emphasis on its hope that Chairman Svinicki will turn prior dissenting statements into new rulings in its favor. However, that would turn the entire ASLBP process on its head and would change the rules mid-

game thereby violating the Administrative Procedures Act. Therefore, Powertech's Petition to review LBP 18-05 should be denied.

Dated this 21th day of December, 2018.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to 10 C.F.R. § 2.305 (as revised), I certify that, on this date, copies of the foregoing **CONSOLIDATED INTERVENORS RESPONSE IN OPPOSITION TO POWERTECH (USA) INC. PETITION FOR INTERLOCUTORY REVIEW** were served upon the Electronic Information Exchange (the NRC’s E-Filing System), in the above-captioned proceeding.

Dated: December 21, 2018.

Signed (electronically) by David C. Frankel

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