

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

William J. Froehlich, Chairman
Dr. Mark O. Barnett
G. Paul Bollwerk, III

In the Matter of

POWERTECH USA, INC.

(Dewey-Burdock
In Situ Uranium Recovery Facility)

Docket No. 40-9075-MLA

ASLBP No. 10-898-02-MLA-BD01

August 22, 2019

ORDER

(Regarding Submission of Non-disclosure Agreements, Motion to Permit Statement by Tribal President, and Additional Board Exhibit for Evidentiary Hearing on Contention 1A)

During the Licensing Board's August 1, 2019 prehearing conference with the parties to this proceeding to discuss procedural and other items concerning the upcoming evidentiary hearing in Rapid City, South Dakota, the Board advised that it might be necessary to close a portion of the hearing to discuss non-public information.¹ In addition, the Board indicated that only those party counsel, witnesses, and representatives/personnel who had on file with the Office of the Secretary (SECY) a non-disclosure agreement (NDA) executed in accordance with the existing protective order issued in this case would be allowed to remain in the hearing room during such a closed session.² Thereafter, on August 20, the Board issued a memorandum

¹ Tr. at 1680.

² See Tr. at 1680–86; see also Licensing Board Memorandum and Order (Protective Order Governing the Disclosure of Sensitive Unclassified Non-Safeguards Information (SUNSI) (Mar. 5, 2010) (unpublished); Licensing Board Order (Granting Joint Motion to Amend Protective Order) (Sept. 12, 2014) (unpublished).

regarding several Board prefiled exhibits, including two non-public documents identified during the discovery process in this proceeding.³ SECY has now advised the Board that because Consolidated Intervenor counsel Ellison and Powertech counsel Pugsley and Thompson have not submitted an NDA, they were not served with these non-public documents.

One effect of the protective order now in place in this proceeding is that SECY will not add any counsel or party representative (other than an NRC Staff counsel or Staff representatives/personnel) to the E-Filing system's non-public service list unless they have filed an NDA. Without access to the non-public service list, a party will not be able to use the E-Filing system to electronically file a non-public submission or receive non-public filings. Accordingly, should counsel wish to be served with non-public filings, an NDA must be filed with SECY as soon as possible.⁴ Additionally, party counsel, witnesses,⁵ and representatives/personnel (other than NRC Staff counsel or Staff representatives/personnel) must have an NDA on file with SECY at the start of the evidentiary hearing to remain in the hearing room during a closed session.

Also at the August 1, 2019 prehearing conference, counsel for intervenor Oglala Sioux Tribe indicated he planned to file a written motion to permit the tribal president to make a brief statement to the Board.⁶ The Board's anticipates that for such a motion to be timely, it must be

³ See Licensing Board Memorandum (Regarding Board Exhibits for Evidentiary Hearing on Contention 1A and Opportunity to Address Recent Judicial Decision) (Aug. 20, 2019) (unpublished); see also Letter from Patricia Jehle, NRC Staff Counsel, to Licensing Board attach. 3, at 1 (Dec. 3, 2012).

⁴ Once counsel Ellison, Pugsley, and Thompson have submitted NDAs, they would need to contact SECY to arrange for service of the non-public Board prefiled exhibits.

⁵ Specifically, Oglala Sioux Tribe witnesses Kyle White, Dr. Kelly Morgan, and Dr. Craig Howe.

⁶ Tr. at 1692.

filed on or before Monday, August 26, 2019, and include the information regarding consultation with counsel for the other parties required by 10 C.F.R. § 2.323(b).⁷

Finally, as is described in the attached revised exhibit list included as Attachment A to this issuance, submitted today is an additional prefiled Board exhibit, BRD-013. As is the case with the other Board prefiled exhibits, this document will be identified for the record and admitted into evidence along with the Board's other twelve prefiled exhibits at the same time as the parties' prefiled exhibits in accord with the process outlined by the Board in its May 2, 2019 case management order.⁸

It is so ORDERED.

FOR THE ATOMIC SAFETY
AND LICENSING BOARD

/RA/

William J. Froehlich, Chairman
ADMINISTRATIVE JUDGE

Rockville, Maryland

August 22, 2019

⁷ In addition, if this request is timely submitted and granted, to the degree the tribal president intends to address the Board using the Lakota language, as a courtesy to the Board we would request that the court reporter be provided with a written copy of his statement to ensure that any Lakota words are properly transcribed into the record.

⁸ See Licensing Board Order (Providing Case Management Information) (May 2, 2019) at 8–9 (unpublished).

APPENDIX A: LIST OF PREFILED EXHIBITS
IN THE MATTER OF POWERTECH (USA) INC.
(DEWEY-BURDOCK IN SITU URANIUM RECOVERY FACILITY)
DOCKET NO. 40-9075-MLA

Board Exhibits	
Exhibit Number	Title
BRD-001	Color Version of Figure 3.9-1 from Environmental Impact Statement for the Dewey-Burdock Project in Custer and Fall River Counties, South Dakota, NUREG-1910, Supplement 4, Vol. 1 (Jan. 2014) (Ex. NRC-008-A-1).
BRD-002	Excerpt from Environmental Impact Statement for the Ross ISR Project in Crook County, Wyoming, NUREG-1910, Supplement 5 (Feb. 2014).
BRD-003	Strata Energy, Inc., Ross ISR Project, NRC Docket #040-09091, Scope of Work for Assessment of Properties of Religious and Cultural Significance (Aug. 31, 2012).
BRD-004	Excerpt from Enterprise Wide IDIQ Contract for Technical Assistance in Support of NRC Environmental and Reactor Programs.
BRD-005	Enclosure 2 to NRC Staff January 25, 2019 Letter (NRC- 204) in Response to Oglala Sioux Tribe January 11, 2019 Letter (NRC-203).
BRD-006	February 6, 2018 Notice of Summary Report of Counsel Conference Call with Attached Summary of Counsel-to-Counsel Meeting Held on February 1, 2018.
BRD-007	NRC Staff February 20, 2018 Letter to Powertech.
BRD-008	NRC Staff April 12, 2018 Letter to Crow Creek Sioux Tribe.
BRD-009	NRC Staff December 12, 2018 E-Mail Response to Oglala Sioux Tribe December 10, 2018 E-Mail.
BRD-010	Oglala Sioux Tribe June 8, 2018 E-Mail Response to NRC Staff June 8, 2018 E-Mail.
BRD-011	Kadrmass, Lee & Jackson, Inc., Scope and Fee for the U.S. Nuclear Regulatory Commission and Powertech (USA) (Oct. 2012) (Non-Public).
BRD-012	Makoche Wowapi / Mentz-Wilson Consultants, Proposal with Cost Estimate for Traditional Cultural Properties Survey for Proposed Dewey-Burdock Project (2012) (Non-Public).

BRD-13	NRC Staff October 31, 2012 E-Mail to Tribal Historic Preservation Officers Forwarding October 31, 2012 NRC Staff Letter and Enclosed Revised Proposal for Dewey-Burdock Traditional Cultural Properties Study.
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NRC Staff Exhibits	
Exhibit Number	Title
NRC-176-R	Prefiled Direct Testimony of Diana Diaz-Toro and Jerry Spangler.
NRC-177	Statement of Professional Qualifications of Diana Diaz-Toro.
NRC-178	Statement of Professional Qualifications of Jerry Spangler.
NRC-179	U.S. Department of Interior, National Park Services, National Register Bulletin 15, "How to Apply the National Register Criteria for Evaluation" (Rev. 1997).
NRC-180	Branam, Kelly M., et al., "Survey to Identify and Evaluate Indian Sacred Sites and Traditional Cultural Properties in the Twin Cities Metropolitan Area" (August 2010).
NRC-181	Stoffle, Richard W., et al., "The Land Still Speaks: Traditional Cultural Property Eligibility Statements for Gold Strike Canyon, Nevada and Sugarloaf Mountain, Arizona" (2000).
NRC-182	Toupal, Rebecca S., et al., "Cultural Landscapes and Ethnographic Cartographies: Scandinavian-American and American Indian Knowledge of the Land," <i>Environmental Science and Policy</i> 4:171–84 (August 2001).
NRC-183	North Dakota Department of Transportation, "Design Manual," Chapter II, "Environmental and Public Involvement," Section 5, "Cultural Resources," revised March 6, 2017.
NRC-184	Ball, David, et al., "A Guidance Document for Characterizing Tribal Cultural Landscapes," Outer Continental Shelf (OCS) Study BOEM 2015-047, Bureau of Ocean Energy Management (2015).
NRC-185	Odess, Daniel, "A Landscape-Scale Approach to Mitigating Adverse Effects on Historic Properties," U.S. Department of the Interior draft document, June 6, 2016.
NRC-186	Summary of May 19, 2016 meeting with the Oglala Sioux Tribe.

NRC-187	NRC November 23, 2016 Letter to the Oglala Sioux Tribe Regarding an Invitation for Teleconference and Continued Consultation.
NRC-188	Summary of NRC Staff and Oglala Sioux Tribe Teleconference Call on January 31, 2017.
NRC-189	NRC Staff April 14, 2017 Letter to Oglala Sioux Tribe - Coordination of Tribal Survey to Identify Cultural Resources.
NRC-190	Oglala Sioux Tribe May 31, 2017 Letter Responding to NRC's April 14, 2017 Letter.
NRC-191	NRC Staff December 6, 2017 Letter to Trina Lone Hill, Oglala Sioux Tribe, Regarding US Nuclear Regulatory Commission Proposal to Identify Historic, Cultural, and Religious Sites.
NRC-192	NRC March 16, 2018 Letter to Oglala Sioux Tribe Transmitting NRC's Approach to Identify Historic, Cultural, and Religious Sites.
NRC-193	Oglala Sioux Tribe January 19, 2019 Response to NRC's December 6, 2018 Letter.
NRC-194	Oglala Sioux Tribe's February 15, 2018 Responses to NRC Counsel Questions.
NRC-195	NRC November 21, 2018 Letter to Oglala Sioux Tribe Resuming Implementation of the NRC Staff March 16, 2018 Approach.
NRC-196	Summary of Tribal Cultural Heritage Resources Data Acquired in June 2018 at the Dewey-Burdock In Situ Uranium Recovery Project – Fall River and Custer Counties, South Dakota.
NRC-197	Oglala Sioux Tribe's June 12, 2018, Cultural Resources Survey Methodologies Proposal (Non-Public).
NRC-198	Oglala Sioux Tribe's June 15, 2018 Updated Cultural Resources Survey Methodologies Proposal (Non-Public).
NRC-199-R	Makoche Wowapi / Mentz-Wilson Consultants, Proposal with Cost Estimate for Traditional Cultural Properties Survey for Proposed Dewey-Burdock Project (2012) (Public redacted version).
NRC-200	NRC Staff July 2, 2018 Letter to the Oglala Sioux Tribe Regarding June 2018 Proposals.
NRC-201	WILL BE REMOVED FROM THE FINAL EXHIBIT LIST AS NOT ELIGIBLE FOR IDENTIFICATION AND ADMISSION TO AVOID DUPLICATION
NRC-202	Powertech's December 5, 2018 Response to NRC Staff's November 21, 2018 Letter Confirming Reimbursement and Honoraria.

NRC-203	Oglala Sioux Tribe's January 11, 2019 Response to NRC's November 21, 2018 Letter Proposing to Resume Negotiations.
NRC-204	NRC January 25, 2019 Letter in Response to Oglala Sioux Tribe Letter dated January 11, 2019.
NRC-205	February 8, 2019 Teleconference Call Summary with Oglala Sioux Tribe Comments.
NRC-206	LeBeau, Sebastian, "Reconstructing Lakota Ritual in the Landscape: The Identification and Typing System for Traditional Cultural Property Sites" (2009).
NRC-207	July 22, 2015 Letter from Dennis Yellow Thunder, Oglala Sioux Tribe, Responding to NRC's June 23, 2015 Letter.
NRC-208	June 8, 2018 Letter from Travis Stills, Oglala Sioux Tribe, to the NRC Staff, Proposed Schedule for Cultural Resources Survey.
NRC-209	January 29, 2019 Letter from President Julian Bear Runner, Oglala Sioux Tribe, "Invitation to February 22, 2019, Meeting of the Tribe's Tribal Historic Preservation Advisory Council."
NRC-210	April 11, 2018 Powertech Response to NRC Staff's March 16, 2018 Letter Confirming Reimbursement and Honoraria.
NRC-211	Oglala Sioux Tribe March 12, 2019 Response to NRC's March 1, 2019 Letter.
NRC-212	September 24, 2015 Letter from Oglala Sioux Tribe.
NRC-213	Oglala Sioux Tribe's Counsel December 5, 2018 E-mail to NRC Counsel.
NRC-214	Proposed Draft Cultural Resources Site Survey Methodology.
NRC-215	NRC's March 1 Letter to Oglala Sioux Tribe - Negotiations Regarding Development of a Methodology for a Tribal Site Survey to Identify Historic, Cultural, and Religious Sites.
NRC-216	NRC Staff's March 15, 2019 E-mail to Oglala Sioux Tribe Regarding No Additional Meetings.
NRC-217	February 19, 2019 Teleconference Call Summary with Oglala Sioux Tribe Comments (Draft).
NRC-218	Oglala Sioux Tribe's Summary of the Meeting with NRC Staff on February 22, 2019 in Pine Ridge, SD.
NRC-219	Oglala Sioux Tribe's March 30, 2018 Response to NRC Staff's March 16, 2018 Approach.

NRC-220	NRC Staff Comments on February 22, 2019 Meeting Summary.
NRC-221	Oglala Sioux Tribe's March 29, 2013 Letter, Invitation for Government to Government Consultation.
NRC-222	Patricia L. Parker, Traditional Cultural Properties: What You Do and How We Think, CRM, Vol. 16 (1993).
NRC-223	Oglala Sioux Tribe's January 31, 2011 Letter.
NRC-224	Nickens, Paul, Literature Review of Lakota Historic, Cultural, and Religious Resources for the Dewey-Burdock ISR Project.
NRC-225	NRC Staff's Reply Testimony.

Oglala Sioux Tribe Exhibits	
Exhibit Number	Title
OST-042-R	Declaration of Kyle White.
OST-043-R	Declaration of Dr. Kelly Morgan.
OST-044-R	Statement of Professional Qualifications of Dr. Kelly Morgan.
OST-045-R	Declaration of Dr. Craig Howe.
OST-046	Statement of Professional Qualifications of Dr. Craig Howe.
OST-047	April 6, 2018 conference call transcript.
OST-048	WILL BE REMOVED FROM THE FINAL EXHIBIT LIST AS NOT ELIGIBLE FOR IDENTIFICATION AND ADMISSION TO AVOID DUPLICATION
OST-049	WILL BE REMOVED FROM THE FINAL EXHIBIT LIST AS NOT ELIGIBLE FOR IDENTIFICATION AND ADMISSION TO AVOID DUPLICATION
OST-050	December 6, 2018 conference call transcript.
OST-051	January 29, 2019 conference call transcript.

OST-052	June 5, 2018 open site survey “methodology” prepared by Dr. Nickens.
OST-053	September 21, 2018 Oglala Sioux Tribe Response to Motion for Summary Disposition.
OST-054	August 19, 2014 Transcript of Hearing with NRC Staff corrections.
OST-055	February 15, 2018 NRC Staff billing summary data.
OST-056	January 17, 2018 NRC Staff Response to January 9, 2018 Order.
OST-057	March 7, 2013 NRC Staff Answer to Oglala Sioux Tribe Statement of Contentions on Draft SEIS (excerpt).
OST-058	April 13, 2018 Enclosure 1 to Letter from NRC Staff to Oglala Sioux Tribe.
OST-059	June 15, 2018 Email from NRC Staff counsel to Oglala Sioux Tribe counsel; June 15, 2018 Email from NRC Staff to Kyle White, Oglala Sioux Tribe.

Consolidated Intervenor Exhibit	
Exhibit Number	Title
INT-023	Affidavits – Testimony Re: Oglala Lakota Cultural Resources.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of)
)
POWERTECH (USA) INC.) Docket No. 40-9075-MLA
(Dewey-Burdock In Situ Recovery Facility))
)

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **ORDER (Regarding Submission of Non-disclosure Agreements, Motion to Permit Statement by Tribal President, and Additional Board Exhibit for Evidentiary Hearing on Contention 1A)** have been served upon the following persons by Electronic Information Exchange, and by electronic mail as indicated by an asterisk (*).

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POWERTECH (USA) INC., DEWEY-BURDOCK IN SITU RECOVERY FACILITY
DOCKET NO. 40-9075-MLA

ORDER (Regarding Submission of Non-disclosure Agreements, Motion to Permit Statement by Tribal President, and Additional Board Exhibit for Evidentiary Hearing on Contention 1A)

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[Original signed by Krupskaya T. Castellon]
Office of the Secretary of the Commission

Dated at Rockville, Maryland,
this 22nd day of August 2019