

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

Docket No. 40-9075-MLA

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. § 4330 *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 burial 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. While only the federal government can actually *consult* with the Tribe, the Tribe maintains that the determination and identification of cultural resources in the area by both the Applicant and the NRC Staff in its Final Supplemental Environmental Impact Statement (FSEIS) is not comprehensive.

6. In any case, the discovery of significant cultural resources and prehistoric artifacts in the Tribe's treaty and aboriginal territory at issue in this application 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 is taking the necessary course of action to participate fully as a party in this proceeding in part in order to safeguard its interests in the protection of cultural and historic resources at and in the vicinity of the mine site.
8. Included within the territory the Powertech application contemplates 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.
9. 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.
10. 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 has not

made a similar study of the proposed mining area. 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.

11. 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.
12. 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 the current investigation.
13. 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...."
14. The NRC Staff's Final Supplemental Environmental Impact Statement (FSEIS) relies heavily on the Augustana study and a "Programmatic Agreement" (PA) to be 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 the later completion of the PA.
15. 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 it 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.

16. In February of 2014, 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.
17. The Oglala Sioux Tribe submitted a declaration in this matter in 2010 signed by Wilmer Mesteth. Because no scientifically-defensible site-wide cultural resources study or inventory has been conducted for the project area since the filing of that declaration, the criticisms and critiques of the cultural resources studies conducted with respect to the mine project area remain valid and current.
18. 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.
19. In response to concerns raised by the Tribe, NRC Staff had promised to provide a supplemental NEPA comment opportunity to cure the issues raised in admitted DSEIS Contentions 1A and 6 before the FSEIS issued. NRC Staff's Answer to Contentions on DSEIS at 13.
20. However, in November 2013 NRC Staff abandoned these promises in favor of a process that would develop, analyze, and disclose, and analyze cultural resources impacts and develop mitigation measures outside the NEPA process. NRC Staff Response to FSEIS Contentions at 5.
21. Using the NEPA process ensures Tribal members are able to engage the cultural resources decisions being made by NRC Staff.
22. The FSEIS 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.
23. NRC Staff have approved Powertech's license without first the mitigating impacts on both identified and unidentified cultural resources.
24. Should construction go forward without first 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.

25. As detailed in Mr. Mesteth's Declaration, 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 process 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.

This Affidavit is submitted in accordance with 10 C.F.R. Section 2.304(d) and 28 U.S.C. Section 1746. I declare under penalty of perjury that the foregoing is true and correct.

Executed on April 14, 2014 at Pine Ridge Indian Reservation.


Michael CatchesEnemy