

RAPID CITY

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BANGS McCULLEN
— LAW FIRM —

Reply to Rapid City Office

Writer's e-mail address: mhickey@bangsmccullen.com

September 11, 2013

RECEIVED
SEP 13 2013
MINERALS & MINING PROGRAM

Mr. Mike Cepak
DENR Minerals & Mining Program
523 East Capitol Ave.
Joe Foss Building
Pierre, SD 57501-3182

Re: LARGE SCALE MINING PERMIT - POWERTECH (USA) INC.

Dear Mr. Cepak:

I enclose for your information and records the following original documents:

1. **Black Hills Wild Horse Sanctuary, Susan Watt, & Dayton Hyde's Response to Powertech's Motion to Allow Narrative Testimony;**
2. **Black Hills Wild Horse Sanctuary, Susan Watt, & Dayton Hyde's Response to Powertech's Motion in Limine;** and
3. **Certificate of Service.**

By a copy of this correspondence, all counsel of record and the Status A List are being served. Thank you.

Sincerely,

BANGS, McCULLEN, BUTLER,
FOYE & SIMMONS, L.L.P.

Michael M. Hickey

MMH:bah
Enclosures

cc w/enc.: Clients; Rex Hagg; Charles McGuigan; Steven R. Blair/Richard Williams; Max Main; Roxanne Giedd; Bruce Ellison; Status A Participants

RAPID CITY

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MINERALS & MINING PROGRAM

STATE OF SOUTH DAKOTA

**DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES
BOARD OF MINERALS AND ENVIRONMENT**

**IN THE MATTER OF THE LARGE
SCALE MINE PERMIT APPLICATION
OF POWERTECH (USA) INC.**

**Black Hills Wild Horse
Sanctuary, Susan Watt, &
Dayton Hyde's Response
to Powertech's Motion to
Allow Narrative
Testimony**

Black Hills Wild Horse Sanctuary, Susan Watt, and Dayton Hyde, ("Wild Horse") offer the following response to Powertech's Motion to Allow Narrative Testimony.

Wild Horse opposes Powertech's Motion to Allow Narrative Testimony as written. Wild Horse notes that even Powertech's own authority acknowledges that narrative testimony may be permissible only "as long as it stays within the bounds of pertinency and materiality." *United States v. Pless*, 982 F.2d 1118, 1123 (7th Cir. 1992) quoting *United States v. Garcia*, 625 F.2d 162, 169 (7th Cir. 1980).

To assure that the narrative testimony remains pertinent and material, Wild Horse reserves its right to object to specific testimony for any reason contemplated by the South Dakota Rules of Evidence, and

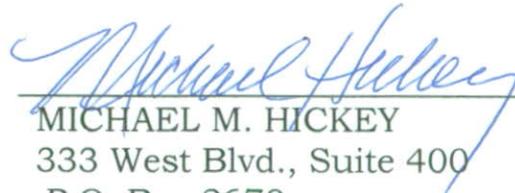
may request that counsel for Powertech ask specific questions depending upon the area of testimony. Moreover, Wild Horse also opposes the Motion to Allow Narrative Testimony to the extent Powertech would have it apply to cross examination or the examination of a hostile witness.

While Powertech's motion does not make a distinction between direct and cross examination or the testimony of an adverse witness, Wild Horse contends this type of evidence is simply not amenable to narrative testimony. In fact, to permit narrative testimony on cross examination or from an adverse witness would be less efficient and prolong the hearing and undermine the utility of cross examination as is the "greatest legal engine ever invented for the discovery of truth." *California v. Green*, 399 U.S. 149, 158 (1970).

Dated this 11th day of September, 2013.

BANGS, McCULLEN, BUTLER,
FOYE & SIMMONS, L.L.P.

BY:



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**Attorneys for Black Hills
Wild Horse Sanctuary,
Dayton Hyde and Susan Watt**

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BOARD OF MINERALS AND ENVIRONMENT**

**IN THE MATTER OF THE LARGE
SCALE MINE PERMIT APPLICATION
OF POWERTECH (USA) INC.**

**Black Hills Wild Horse
Sanctuary, Susan Watt, &
Dayton Hyde's Response
to Powertech's
Motion in Limine**

Black Hills Wild Horse Sanctuary, Susan Watt, and Dayton Hyde, ("Wild Horse") offer the following response to Powertech's Motion in Limine.

Wild Horse objects to Powertech's Motion in Limine. Initially, Wild Horse believes the Motion in Limine is so vague and general that a specific response is difficult, if not impossible.

Even though some of the documents to which Powertech refers may initially be considered hearsay, that initial determination does not render the documents inadmissible. Even if hearsay, the documents may nonetheless be admissible as exceptions to the hearsay rule. For example, SDCL § 19-16-10 creates an exception for business records, SDCL § 19-16-12 creates an exception for public records, and indeed the Board is empowered to admit hearsay in certain situations where the

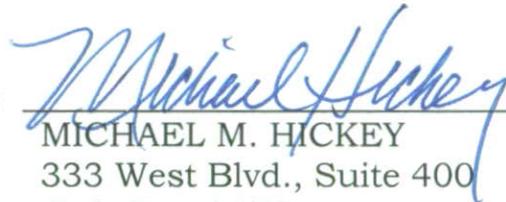
hearsay is probative of a fact not reasonably susceptible of proof under normal rules and is of a type commonly relied upon by reasonably prudent persons in the conduct of their affairs. *Dail v. South Dakota Real Estate Comm.*, 257 N.W.2nd 709 (S.D. 1977). See also SDCL §§ 19-16-28 and 35.

Thus, Wild Horse believes that the public interest is best served if the admissibility of the items that are the subject of Powertech's Motion in Limine is determined on a document by document basis.

Dated this 11th day of September, 2013.

BANGS, McCULLEN, BUTLER,
FOYE & SIMMONS, L.L.P.

BY:



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**Attorneys for Black Hills
Wild Horse Sanctuary,
Dayton Hyde and Susan Watt**

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BOARD OF MINERALS AND ENVIRONMENT**

**IN THE MATTER OF THE LARGE
SCALE MINE PERMIT APPLICATION
OF POWERTECH (USA) INC.**

Certificate of Service

The undersigned hereby certifies that he filed the originals with Mike Cepak and served copies of the following:

1. **Black Hills Wild Horse Sanctuary, Susan Watt, & Dayton Hyde's Response to Powertech's Motion to Allow Narrative Testimony;**
and
2. **Black Hills Wild Horse Sanctuary, Susan Watt, & Dayton Hyde's Response to Powertech's Motion in Limine.**

upon the persons herein next designated, all on the date below shown:

**Charles D. McGuigan
Office of the Attorney General
1302 E. Hwy. 14, Suite 1
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**Steven R. Blair and
Richard M. Williams
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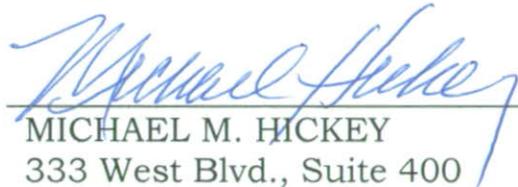
**Rex Hagg
Whiting, Hagg, Hagg,
Dorsey & Hagg
P.O. Box 8008
Rapid City, SD 57709-8008**

and upon each of the persons shown in the attached list, including Libraries, by depositing copies thereof in the United States mail at Rapid City, South Dakota, postage prepaid, in envelopes addressed to said addressees, which are the last addresses of the addressees known to the subscriber.

Dated this 11th day of September, 2013.

BANGS, McCULLEN, BUTLER,
FOYE & SIMMONS, L.L.P.

BY:



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Attn: Government Documents
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