

RECEIVED

SEP 09 2013

WATER RIGHTS  
PROGRAM

STATE OF SOUTH DAKOTA  
DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES  
WATER MANAGEMENT BOARD

---

IN THE MATTER OF WATER PERMIT  
APPLICATIONS 2685-2 AND 2686-2,  
POWERTECH (USA) INC.

POWERTECH'S  
MOTION TO ALLOW NARRATIVE  
TESTIMONY

IN THE MATTER OF THE 2012  
GROUNDWATER DISCHARGE PLAN  
APPLICATION SUBMITTED BY POWERTECH  
(USA) INC.

---

Powertech (USA) Inc. ("Powertech") hereby moves Hearing Chair Everett Hoyt for entry of an order allowing testimony in narrative form during the hearing in this matter. This motion is made on the grounds and for the reasons set forth below.

SDCL 1-26-19(1) states that in agency contested cases, "[t]he rules of evidence as applied under statutory provisions and in the trial of civil cases in the circuit courts of this state . . . shall be followed." Rule 611(a) of the South Dakota Rules of Evidence provides:

The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to:

- (1) Make the interrogation and presentation effective for the ascertainment of the truth;
- (2) Avoid needless consumption of time; and
- (3) Protect witnesses from harassment or undue embarrassment.

SDCL 19-14-18.

South Dakota Rule of Evidence 611(a) is almost identical to Rule 611(a) of the Federal Rules of Evidence, which states:

**(a) Control by the Court; Purposes.** The court should exercise reasonable control over the mode and order of examining witnesses and presenting evidence so as to:

- (1) make those procedures effective for determining the truth;
- (2) avoid wasting time; and
- (3) protect witnesses from harassment or undue embarrassment.

In *United States v. Pless*, 982 F.2d 1118 (7th Cir. 1992), the court applied Fed.R.Evid. 611(a) to the issue of whether or not it was proper to allow testimony in narrative form. The court held:

On such evidentiary matters we give special deference to the trial court, reversing the district judge's decision to admit testimony only where there has been a clear abuse of discretion (*United States v. Allen*, 930 F.2d 1270, 1273 (7th Cir. 1991) ). That is not at all the case here: Fed.R.Evid. 611(a) provides district judges with authority to allow testimony in narrative form rather than as answers to specific questions (see 3 Jack Weinstein and Margaret Berger, *Weinstein's Evidence* ¶ 611[01], at 611-19-611-20 (1991)), and we ourselves have said that "[t]here is . . . nothing particularly unusual, or incorrect, in a procedure of letting a witness relate pertinent information in a narrative form as long as it stays within the bounds of pertinency and materiality" (*United States v. Garcia*, 625 F.2d 162, 169 (7th Cir. 1980)). Indeed, both *Weinstein's Evidence* and *Garcia* suggest that the narrative may well be the preferable form in some respects.

*Pless* at 1123.

In *In re Air Crash Disaster at Stapleton Int'l., Denver, Colorado, on November 15, 1987*, 720 F.Supp.1493 (D. Colo. 1989), the court also applied Fed.R.Evid. 611(a) to allow narrative testimony of deposition summaries to be used, and noted that due to "the efficient application of summary testimony techniques, and elongated trial days, a trial estimated to extend over a six week period was completed in less than three weeks." *In re Air Crash Disaster at Stapleton Int'l. Airport* at 1504 (footnote omitted).

The hearing in the instant matter is scheduled for two weeks, and the parties have identified numerous expert witnesses. Allowing testimony in narrative form will be efficient and will avoid needless consumption of time, and will still be effective for the ascertainment of the truth.

Water Permit Applications / Powertech's Motion to Allow Narrative Testimony

Dated this 6<sup>th</sup> day of September, 2013.

BENNETT, MAIN & GUBBRUD, P.C.  
Attorneys for Powertech

By Max Main  
Max Main  
618 State Street  
Belle Fourche, SD 57717-1489  
(605) 892.2011

STATE OF SOUTH DAKOTA  
DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES  
WATER MANAGEMENT BOARD

IN THE MATTER OF WATER PERMIT  
APPLICATIONS 2685-2 AND 2686-2,  
POWERTECH (USA) INC.

CERTIFICATE OF SERVICE

IN THE MATTER OF THE 2012  
GROUNDWATER DISCHARGE PLAN  
APPLICATION SUBMITTED BY POWERTECH  
(USA) INC.

I, MAX MAIN, as one of the attorneys for Powertech (USA) Inc., do hereby certify that on the 6<sup>th</sup> day of September, 2013, I caused the original of the following documents:

- 1. POWERTECH'S MOTION TO ALLOW NARRATIVE TESTIMONY;
- and
- 2. CERTIFICATE OF SERVICE,

to be filed with: Eric Gronlund  
DENR  
Foss Building, 523 E. Capitol Ave.  
Pierre, SD 57501-3182

and full, true and complete copies of said documents to be served upon the following named persons at their last known mailing addresses, as follows:

Roxanne Giedd  
Deputy Attorney General  
Office of the Attorney General  
1302 E. Hwy. 14, Ste. 1  
Pierre, SD 57501-8501

Michael M. Hickey  
Attorney for Black Hills Wild Horse  
Sanctuary, Dayton Hyde & Susan Watt  
P.O. Box 2670  
Rapid City, SD 57709-2670

Diane Best  
Assistant Attorney General  
Office of the Attorney General  
317 N. Main Ave.  
Sioux Falls, SD 57104

Sabrina King  
917 Wood Ave.  
Rapid City, SD 57701

Gary E. Heckenlaible  
P. O. Box 422  
Rapid City, SD 57709

Bruce Ellison  
Attorney for Clean Water Alliance  
P. O. Box 2508  
Rapid City, SD 57709

Rebecca R. Leas  
6509 Seminole Lane  
Rapid City, SD 57702

Rick Summerville  
6509 Seminole Lane  
Rapid City, SD 57702

Andy Johnson  
610 Nellie Lane  
Spearfish, SD 57783

Cindy Gillis  
Attorney for Oglala Sioux Tribe  
522 7th Street, Suite 202  
Rapid City, SD 57701

Cheryl A. and Roger Rowe  
7950 Dark Canyon  
Rapid City, SD 57702

Douglas C. Uptain  
3213 W. Main #112  
Rapid City, SD 57702

Lilias Jones Jarding  
418 N. 44th St.  
Rapid City, SD 57702

Gena M. Parkhurst  
P. O. Box 1914  
Rapid City, SD 57709

Marvin Kammerer  
22198 Elkvale Rd.  
Rapid City, SD 57701

Cindy Brunson  
11122 Fort Igloo Rd.  
Edgemont, SD 57735

Rodney G. Knudson  
P. O. Box 25  
Hulett, WY 82720

Rebecca M. Lord  
P. O. Box 952  
Hill City, SD 57745

Mark Boddicker  
13850 Battle Creek Rd.  
Hermosa, SD 57744

Dahl H. McLean  
11853 Acorn Ridge Rd.  
Spearfish, SD 57783

Brenda Gamache  
2337 Wilson Ave.  
Hot Springs, SD 57747

Susan R. Henderson  
11507 Hwy 471  
Edgemont, SD 57735

Attn: Doris Ann Mertz  
Custer County Library  
447 Crooks St., Ste. 4  
Custer, SD 57730

Attn: Michelle May  
Woksape Tipi  
Oglala Lakota College  
P. O. Box 310  
Kyle, SD 57752

Attn: Ashley Cortney  
Edgemont Public Library  
P. O. Box A / 412 2nd  
Edgemont, SD 57735

Attn: Jason Walker  
Rapid City Public Library  
610 Quincy Street  
Rapid City, SD 57701

Attn: Cindy Messenger  
Hot Springs Public Library  
2005 Library Drive  
Hot Springs, SD 57747

Angelia Baldwin  
P. O. Box 1914  
Pierpont, SD 57468-0191

Frank Kloucek  
29966 423 Avenue  
Scotland, SD 57059

Jeffrey Hallem  
Assistant Attorney General  
1302 E. Hwy. 14 #1  
Pierre, SD 57501

Jill Anawaty  
2804 Willow Avenue  
Rapid City, SD 57701

Richard Draeger  
617 Saint Cloud  
Rapid City, SD 57701

Gwen E. Kaneshiro &  
William M. C Ing  
1446 Evanston Ave.  
Hot Springs, SD 57747

Everett E. Hoyt, Hearing Chair  
4422 Carriage Hills Dr.  
Rapid City, SD 57702

by depositing the same in the United States Mail in Belle Fourche, South Dakota with first class postage thereon fully prepaid, in envelopes addressed as above.

  
MAX MAIN