

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)	
)	
POWERTECH (USA) INC.,)	Docket No. 40-9075-MLA
)	ASLBP No. 10-898-02-MLA-BD01
(Dewey-Burdock In Situ Uranium Recovery)	
Facility))	

STATEMENT OF UNDISPUTED MATERIAL FACTS

I. STANDARDS APPLIED TO THE PRESENT MATTER

This matter involves the 2009 Powertech request for the Nuclear Regulatory Commission to issue an operating license and an 11e.(2) Byproduct license necessary to conduct In Situ Leach uranium processing on lands that remain culturally and religiously important to the Oglala Sioux Tribe and other Tribes.

The licensing hearing is subject to Subpart L, which contains a summary disposition provision that incorporates the standards set out in Subpart G. 10 C.F.R § 2.1205(c). Both provisions require “a short and concise statement of material facts for which the moving party contends that there is no genuine issue to be heard.” *Id.* § 2.1205(c). The operative summary disposition rule provision states, in relevant part:

The presiding officer shall render the decision sought if the filings in the proceeding, depositions, answers to interrogatories, and admissions on file, together with the statements of the parties and the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a decision as a matter of law.

10 C.F.R. § 2.710(d)(2). The present statement of undisputed material facts relies on the filings in the proceeding, including previously filed party statements and affidavits, which establish that there is no genuine issue as to any material fact involving admitted Contentions 1A and 6. *Id.*

II. STATEMENT OF MATERIAL FACTS

1. The Tribe has concrete and particularized interests that will be impacted by the issuance of the license. *See* Affidavit of Wilmer Mesteth (Apr. 1, 2010), Affidavit of Denise Mesteth (Apr. 1, 2010), Petition to Intervene and Request for Hearing of the Oglala Sioux Tribe (Apr. 6, 2010) (ADAMS Accession No. ML100960645).
2. The impacts to the Tribe's interests are further injured where NRC does not adhere to the required NEPA disclosure and analysis of the effectiveness of mitigation measures that may avoid, reduce, or mitigate impacts to the cultural interests of the Tribe. *See e.g.* Exh. 2 to Oglala Sioux Tribe FSEIS Contentions at 2 (President Bryan V. Brewer, President, Oglala Sioux Tribe).
3. NRC Staff abandoned the promise, made in NRC Staff filings in these proceedings, to comply with NEPA's public involvement procedures when analyzing cultural resources impacts. *Id.* at 2, *citing* NRC Staff Response to DSEIS Contentions at 13.
4. In November 2013 NRC Staff abandoned further attempts to analyze and disclose cultural resources impacts and mitigation measures in the NEPA process in favor of a non-NEPA Programmatic Agreement. NRC Staff Response to FSEIS Contentions at 5 ("Although when the Staff issued the DSEIS it was using its NEPA process to satisfy the public participation requirements of the NHPA, in November 2013 the Staff separated the two processes, notifying the consulting tribes in advance of its decision. The Staff separated the processes because the FSEIS was largely complete, and the Staff did not want to delay making the FSEIS available to the public. The Staff also did so to avoid further delays in the hearing, understanding that issuing the FSEIS would likely trigger new contentions.")(emphasis supplied).
5. The FSEIS contains multiple references to an incomplete Programmatic Agreement, stating "[a]t this time, consultation on the evaluation and effects determination of historic properties is ongoing with all consulting parties, including interested tribes. The outcome of this consultation effort will be included in the programmatic agreement." FSEIS at 3-94; *See also* FSEIS at 1-16 ("NRC and SD SHPO staff also discussed the possibility of entering into a programmatic agreement or memorandum of agreement, pursuant to Section 106, with all consulting parties to set forth procedures and mitigation measures to preserve existing historic and cultural resources at the proposed Dewey-Burdock ISR Project site. "The NRC Staff continue to consult with the SD SHPO to evaluate the effects of the proposed project on historic and cultural resources."); FSEIS at E-186 ("The NRC Staff is currently developing a PA with all consulting parties to develop

measures to avoid, minimize, or mitigate sites that could be impacted such as those listed in Tables 4.9-1 and 4.9-3.”); FSEIS at E-190 (“Consultation continues on what mitigation measures should be implemented to protect historic properties. Consultation on programmatic agreement between NRC, SD SHPO, BLM, ACHP, interested Native American tribes, the applicant, and other interested parties is being developed in accordance with 36 CFR 800.14(b)(2).”); FSEIS at E-197 (“Currently the parties are discussing development of a programmatic agreement in accordance with 36 CFR 800.14(b)(2). The agreement will outline the mitigation process for affected resources identified at the site pursuant to 36 CFR 800.8(c)(1)(v).”); FSEIS at E-200 (“Potential impacts to sites of religious or cultural significance to tribes will be reduced through mitigation strategies developed during Section 106 consultations and the preparation of a programmatic agreement.”).

6. The FSEIS relies on the future issuance of a National Pollution Discharge Elimination Standards (“NPDES”) permit to specify mitigation measures and BMPs to prevent and clean up spills. FSEIS at 4-57.
7. The applicant has not yet submitted an application for an NPDES permit to SDDENR. FSEIS at 4-57.
8. The DSEIS and FSEIS do not disclose, describe, or analyze the specific mitigation measures that would be included in an NPDES permits to prevent and clean up spills and avoid water impacts.
9. The most recent, working BLM mitigation and reclamation guidelines (BLM, 2012a) were made available to NRC Staff and are incorporated into the FSEIS without NRC Staff analysis. FSEIS at 4-80. The DSEIS and FSEIS do not disclose, describe, or analyze the effectiveness of the BLM mitigation and reclamation guidelines.
10. The DSEIS and FSEIS do not disclose or describe which BLM mitigation and reclamation measures, if any, will be used by Powertech.
11. The DSEIS and FSEIS do not analyze the effectiveness of the BLM mitigation and reclamation guidelines incorporated in the FSEIS.
12. The FSEIS confirms that Powertech committed to follow an FWS-approved raptor monitoring and mitigation plan to minimize conflicts between active nest sites and project-related activities. (Powertech, 2009a).

13. The FSEIS further confirms that the effectiveness of mitigation of noise impacts was not analyzed in the FSEIS where Powertech has not yet obtained an FWS-approved raptor and mitigation plan. FSEIS 4-151 (“Potential noise-related impacts to active raptor nest sites will continue to be mitigated by adherence to timing and spatial restrictions within specified distances of active raptor nests as determined by appropriate regulatory agencies (e.g., FWS, SDGFP, and BLM) and by following an FWS-approved raptor monitoring and mitigation plan (Powertech, 2009a).”)
14. The DEIS and FSEIS do not analyze the effectiveness of raptor mitigation where Powertech has not obtained an FWS-approved raptor monitoring and mitigation plan.
15. The DSEIS and FSEIS rely on as-yet incomplete mitigation plans regarding raptors and Eagle nests. Bald eagle and other raptor nests are located in active sectors of the project area. FSEIS 4-91 (Figure 4.6-2. Map of Raptor Nest Locations in the Dewey-Burdock Project Area and Planned Facilities for the Deep Class V Injection Well Disposal Option Sources: BLM, 2012c; SDGFP, 2012c; Powertech, 2012a).
16. Powertech has not developed mitigation measures for protected species. Powertech Response to FEIS Contentions at 21 (“Powertech also is developing mitigation plans for bald eagles and other MBTA-species for each phase of the proposed project based on collaboration with South Dakota Department of Game, Fish, and Parks (SDGFP) and FWS.”).
17. The DSEIS and FSEIS do not contain a raptor monitoring and mitigation plan.
18. The DEIS and FSEIS provide no ecological support for NRC Staff’s conclusory statement that “[m]itigation measures provided in FSEIS Chapter 6 will support the continued nesting success of area raptors and minimize potential direct and indirect impacts.” FSEIS at 4-89.
19. The DSEIS and FSEIS provide no support for the NRC Staff’s conclusory statement that “[n]ongame and migratory birds will benefit from mitigation measures described in Chapter 6 because these will limit noise, vehicular traffic, and other human disturbances near these areas.” FSEIS at 4-92.
20. Mitigation measures involving air impacts were analyzed for effectiveness. FSEIS at 4-129 -130.
21. The FSEIS described the effectiveness of air mitigation by presenting a percentage reduction of emissions based on the type of mitigation measure being implemented.

“Table C–5 describes the effectiveness (i.e., the percent that the emissions are reduced) of the different tier levels based on the associated emission factors.” FSEIS at C–8.

22. The NEPA analysis of air mitigation measures was not completed. FSEIS at 4-130 (“The applicant identified other mitigation measures it will implement (see Table 6.2-1); however, these other measures are not incorporated in the calculation of the revised emissions inventory.”).
23. The FSEIS does not contain an accurate analysis of the effectiveness of mitigation measures as applied to the Powertech proposal. FSEIS at 4-136 (“Without additional consideration (e.g., incorporation of additional mitigation into the emission inventory), NRC will characterize the initial modeling results for the peak year concentrations as a LARGE impact.”).
24. The FSEIS does not contain an analysis of the effectiveness of sound mitigation measures as applied to the Powertech proposal where the SFEIS relies on generic references to examples of potential mitigation. FSEIS at 4-149 (“Implementation of mitigation measures, such as using sound abatement controls on operating equipment and facilities and using personal hearing protection for workers in high noise areas, will ensure that noise levels remain within guidelines for offsite receptors and workers.”).
25. The FSEIS states that “the applicant has committed to protect historic and unevaluated sites by avoidance or for certain sites by constructing protective fencing (Powertech, 2012e,f).” FSEIS at 4-167.
26. The FSEIS does not disclose or analyze the visual impacts and site integrity impacts of using fencing to mitigate cultural site disturbance.
27. The FSEIS states that “[t]he introduction of new visual and auditory elements also has the potential to diminish the integrity of historic properties in the project area.” FSEIS at 4-158.
28. The impacts of mitigation measures NRC Staff proposed to mitigate known cultural resources on the Powertech site were not developed, disclosed, or analyzed in the FSEIS.
29. NRC Staff has made plans to develop cultural resource mitigation measures, but such plans are not yet complete. FSEIS at 4-177 (“Potential impacts to previously recorded archaeological and tribal sites identified during the tribal cultural surveys will be reduced through mitigation strategies developed during NHPA Section 106 consultations. As discussed in SEIS Section 1.7.3.5, consultation involving NRC, the applicant, SD SHPO,

BLM, and interested Indian tribes is being conducted to determine what measures can be used to avoid, minimize, or mitigate adverse impacts to historic properties that may be impacted by site activities. Before beginning construction activities at the proposed project site, an agreement between NRC, SD SHPO, BLM, ACHP, interested Native American tribes (tribal government or designated THPO), the applicant, and other interested parties will be developed in accordance with 36 CFR 800.14(b)(2).”).

30. The FSEIS is based on cultural resource mitigation measures that have not been developed, disclosed or analyzed in the FSEIS. FSEIS 4-177 (“The agreement will outline the mitigation process for each affected resource identified at the site pursuant to 36 CFR 800.6. Therefore, potential impacts to previously recorded archaeological sites and newly discovered tribal sites identified during tribal cultural surveys are not anticipated.”).
31. The FSEIS conclusions regarding cultural resources are not supported by a completed consultation with Tribes and relevant federal and state agencies. FSEIS 4-181. (“The NRC concluded modern intrusions, such as public roads, an active railroad corridor, several modern residences and farms, and former open pit mines diminished the qualities of setting, feeling and association of 15 archaeological and tribal cultural properties with potential visual effects (39CU0459, 39CU3567, 39CU3600, 39CU3604, 39FA0096, 39FA1862, 39FA1881, 39FA1952, TS002, TS006, TS007-011, TS040, TS041-042, TS080-089/098, TS120).”); Exh. 2 to Oglala Sioux Tribe FSEIS Contentions at 2 (President Bryan V. Brewer, President, Oglala Sioux Tribe).
32. The FSEIS relies on NRC Staff predictions that cultural resource impacts will be mitigated. FSEIS at 4-182. (“Potential impacts to identified historic and cultural resources will have been mitigated prior to facility construction.”).
33. The FSEIS relies on ongoing and incomplete development, disclosure, and analysis of cultural resource mitigation measures. FSEIS at 4-186 (“The NRC Staff is currently developing a PA with all consulting parties to develop measures to avoid, minimize, or mitigate sites that could be impacted such as those listed in Tables 4.9-1 and 4.9-3). A license condition to ensure successful implementation of any agreement made in the PA will lessen the impacts to historic properties from this undertaking (NRC, 2013, License Condition 9.8). Based on implementation of mitigation measures and management recommendations documented here and within the PA, potential impacts to historic properties and unevaluated sites identified during archaeological field investigations are not anticipated.”).

34. Mitigation measures to address impacts to religious and cultural values are not addressed in the FSEIS where NHPA consultation is not yet complete. FSEIS at 4-211-212 (“Potential impacts to sites of religious or cultural significance to tribes will be reduced through mitigation strategies developed during Section 106 consultations.”); FSEIS at 4-213 (“Mitigation strategies will be developed through the ongoing Section 106 consultation for impacts to sites of religious or cultural significance to the tribes (see SEIS Section 4.9.1).”)
35. The FSEIS recognizes numerous accident scenarios, but provides no analysis of the effectiveness of any mitigation measure as applied to the Powertech proposal. FSEIS at 4-220 (“GEIS Section 4.2.11.2.2 describes and evaluates numerous accident scenarios that may result in impacts to public health and safety and identifies mitigation measures for each accident scenario.”).
36. The FSEIS does not develop, disclose, or analyze specific mitigation measures used for the evaporation pond disposal system or their effectiveness in avoiding impacts on ecological resources. FSEIS at 4-248 (“The evaporation ponds would be constructed at the same time and with the same mitigation measures described in SEIS Section 4.6 (Ecological Resources) for the construction of the rest of the facility. For these reasons, the estimated impact on ecological resources from an evaporation pond disposal system would be the same as identified in SEIS Section 4.6 and could be reduced to SMALL.”).
37. In responding to comments, NRC Staff admits that that mitigation effectiveness must be analyzed. FSEIS at E-33 (“The analysis should address the anticipated effectiveness of the mitigation measures in reducing adverse impacts or enhancing beneficial impacts.”).
38. The FEIS rejects public comment, without providing any analysis, that the common use of center pivot irrigation “effectively mitigates their potential impact on visual and scenic resources.” FSEIS at E-191.
39. The FSEIS summarizes, but does not analyze the effectiveness of Powertech’s proposed mitigation measures. FSEIS at E-240 (“The mitigation measures the applicant proposed to reduce and minimize adverse environmental impacts at the proposed Dewey-Burdock ISR Project are summarized in SEIS Section 6.2. These mitigation measures are described in greater detail in the Chapter 4 impact analyses for each resource area considered in the SEIS.”).
40. The response to comments confirms that Chapter 4 of the FSEIS summarized but did not analyze the effectiveness of mitigation measures identified by NRC Staff. FSEIS at E-240. (“Based on the potential impacts identified in Chapter 4 of this draft SEIS, the NRC

Staff identified additional potential mitigation measures for the proposed Dewey-Burdock ISR Project. These mitigation measures are summarized in SEIS Section 6.3.”).

41. Mitigation measures involving groundwater restoration rely on NRC Staff assumptions of Powertech compliance with 10 CFR Part 40, Appendix A, Criterion 5B(5). FSEIS at 4-46 (“Because the applicant commits to complying with permitting and regulatory requirements, NRC finds impacts to surface waters and wetlands during the aquifer restoration phase in conjunction with the Class V injection well disposal option at the proposed project site will be SMALL.”).
42. The response to comments does not identify any portion of the FSEIS where the effectiveness, residual impacts, or impacts of the mitigation measures are analyzed.
43. The FSEIS confirms the duty to disclose mitigation measures. FSEIS at E-243 (“For the purposes of NEPA, and consistent with 10 CFR 51.71(d) and 51.80(a), NRC is disclosing measures that could potentially reduce or avoid environmental impacts of the proposed project.”).
44. The Tribe provided detailed commented on the NRC Staff’s inadequate mitigation analysis during the NEPA process. *See* Oglala Sioux Tribe DEIS Contention Motion and Exhibits thereto; Oglala Sioux Tribe FSEIS Contention Motion and Exhibits thereto.
45. NRC Staff ignored public comments requesting the lawful NEPA disclosure and analysis of mitigation measures.

Respectfully Submitted,

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Dated at Lyons, Colorado
this 11th day of April, 2014

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Statement of Undisputed Material Facts in the captioned proceeding were served via the Electronic Information Exchange (“EIE”) on the 11th day of April 2014, and via email to those parties for which the Board has approved service via email, which to the best of my knowledge resulted in transmittal of same to those on the EIE Service List for the captioned proceeding.

/s/ signed electronically by _____
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