UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

William J. Froehlich, Chairman
Dr. Richard F. Cole
Dr. Mark O. Barnett

In the Matter of	Docket No. 40-9075-MLA
POWERTECH USA, INC.	ASLBP No. 10-898-02-MLA-BD01
(Dewey-Burdock In Situ Uranium Recovery Facility)	June 2, 2014

ORDER
(Denying Motions for Summary Disposition)

I. INTRODUCTION

This proceeding addresses challenges to the application of Powertech (USA), Inc., (Powertech) to construct and operate an in-situ leach uranium recovery (ISR) facility in Custer and Fall River Counties, South Dakota. On August 5, 2010 the Board in the above-captioned matter ruled on two petitions to intervene and requests for hearing, and admitted the Oglala Sioux Tribe and Consolidated Intervenors as intervenors. The Board also admitted seven contentions proposed by the Oglala Sioux Tribe and the Consolidated Intervenors. These contentions related to cultural resources (Consolidated Intervenors' Contention K and Oglala Sioux Tribe's Contention 1), baseline groundwater conditions (Consolidated Intervenors' Contention D and Oglala Sioux Tribe's Contention 2), hydrogeology (Consolidated Intervenors' Contention E/J and Oglala Sioux Tribe's Contention 3), and groundwater consumption (Oglala Sioux Tribe's Contention 4). The Board rejected contentions challenging, among other issues,

Powertech's discussion of its plans for disposal of 11e.(2) byproduct material and the analysis of actions connected to the Dewey-Burdock Project.

On November 15, 2012, the Nuclear Regulatory Commission Staff (NRC Staff) issued its Draft Supplemental Environmental Impact Statement (DSEIS) prepared pursuant to the National Environmental Policy Act (NEPA), 42 U.S.C. § 4332, and the agency's implementing regulations, 10 C.F.R. Part 51. On January 25, 2013, both the Oglala Sioux Tribe and the Consolidated Intervenors filed proposed contentions relating to the DSEIS. The Board held that, under the migration tenet, a number of the proposed contentions in response to the DSEIS were in para materia with previously admitted contentions. These contentions were combined and reworded by the Board and substituted for the original admitted contentions. The Board also admitted three new contentions proposed in response to the DSEIS (Oglala Sioux Tribe's Contentions 6, 9, and 14.

On January 29, 2014 the NRC Staff issued the Final Supplemental Environmental Impact Statement (FSEIS). On March 17, 2014, both the Oglala Sioux Tribe and the Consolidated Intervenors filed "Statements of Contentions" with proposed contentions relating to the FSEIS. The Oglala Sioux Tribe filed 10 contentions and the Consolidated Intervenors filed five contentions. The Board found that the previously admitted contentions which referred to the DSEIS migrated to include the FSEIS and the additional proposed FSEIS contentions were inadmissible.

Meanwhile, on April 8, 2014 the NRC Staff issued NRC Source Materials License No. SUA-1600 to Powertech. The license allows Powertech to possess and use source and byproduct material in connection with the Dewey-Burdock Project.

II. LEGAL STANDARDS

The hearing in this matter will be conducted under the procedures in Subpart L of 10 C.F.R. Part 2. Under Subpart L, the parties may file summary disposition motions to resolve

issues before the evidentiary hearing.[1] The Board may grant a motion for summary disposition on any matter for which a party shows (1) there is "no genuine issue as to any material fact," and (2) "the moving party is entitled to a decision as a matter of law."[2] In a summary disposition motion, the moving party also must provide a "short and concise statement of material facts for which the moving party contends that there is no genuine issue to be heard." See 10 CFR § 2.1205(a). After a moving party submits its motion, the Licensing Board may summarily dispose of arguments within such motion if the opposing party cannot make a showing that there is a genuine issue of material fact.[3] While making this determination, the Board views the record in the light most favorable to the party opposing the motion.[4] In deciding a motion for summary disposition, the Board should consider whether granting the motion for summary disposition will expedite resolution of the matter before the Board.[5]

III. MOTIONS FOR SUMMARY DISPOSITION

On April 11, 2014, both NRC Staff and the Oglala Sioux Tribe filed motions for summary disposition.[6] The Oglala Sioux Tribe's motion for summary disposition "seeks summary

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[1] 10 C.F.R. § 2.1205. In its hearing schedule for this proceeding, the Board set specific deadlines for summary disposition motions. The deadline for summary disposition motions regarding previously admitted contentions was April 11, 2014.

[2] FirstEnergy Nuclear Operating Co. (Davis-Besse Nuclear Power Station, Unit 1), LBP-12-26, 76 NRC 559, 564 (2012); see also Entergy Nuclear Operations, Inc. (Indian Point, Units 2 and 3), CLI-11-14, 74 NRC 801, 805–806 (2011).

[3] See Advanced Medical Systems, Inc. (One Factory Row, Geneva, Ohio 44041), CLI-93-22, 38 NRC 98, 102 (1993).

[4] Id.

[5] 10 C.F.R. § 2.1205(c) states that, when ruling on a motion for summary disposition, the Board shall apply the standards set forth in Subpart G of 10 C.F.R. Part 2. Under Subpart G, "[t]he presiding officer need not consider a motion for summary disposition unless its resolution will serve to expedite the proceeding if the motion is granted." 10 C.F.R. § 2.710(d)(1).

[6] NRC Staff's Motion for Summary Disposition on Safety Contentions 2 and 3 (Apr. 11, 2014) [hereinafter Staff Motion]; Oglala Sioux Tribe's Motion for Summary Disposition National

disposition of National Environmental Policy Act ("NEPA") issues in Contentions 1A and 6 regarding the failure to disclose and analyze mitigation measures and the effectiveness of mitigation measures."[7] The NRC Staff's motion for summary disposition seeks "summary disposition on Contentions 2 and 3 to the extent they were admitted as safety contentions."[8] The NRC Staff asserts "there is no longer any genuine issue of material fact relative to the contentions" and therefore the Board should "dismiss Contentions 2 and 3 to the extent they allege that Powertech fails to meet the safety criteria in NRC regulations."[9]

On April 25 responses to the motions for summary disposition were filed by all parties. The NRC Staff urges the Board to deny the Oglala Sioux Tribe's motion because "the [Oglala Sioux] Tribe fails to support its motion with references to undisputed facts."[10] The NRC Staff also argues that the Oglala Sioux Tribe's motion "lacks a legal basis."[11]

Powertech contends that the Oglala Sioux Tribe "has failed to satisfy NRC requirements for summary disposition for portions of admitted Contentions 1A and 6 in this proceeding.[12] Powertech urges the Licensing Board to "grant NRC Staff's motion for summary disposition of the safety components of admitted Contentions 2 and 3."[13]

Environmental Policy Act Contentions 1A and 6 – Mitigation Measures (Apr. 11, 2014) [hereinafter OST Motion].

[7] OST Motion at 1.

[8] Staff Motion at 1.

[9] Id.

[10] NRC Staff's Response to Oglala Sioux Tribe's Motion for Summary Disposition (Apr. 25, 2014) at 1.

[11] Id.

[12] Powertech (USA) Inc's Response to Oglala Sioux Tribe and NRC Staff Motions for Summary Disposition (Apr. 25, 2014) at 1.

[13] Id.

The Oglala Sioux Tribe, responding to the NRC Staff summary disposition motion, argues "summary disposition is not appropriate because NRC Staff has failed to demonstrate that the safety components of Contentions 2 and 3 are contentions of omission. As a result, because no other basis for dismissal appears in the [NRC Staff] Motion, dismissal at this stage is not warranted."[14] The Oglala Sioux Tribe concludes that "nowhere does NRC Staff demonstrate (or even attempt to demonstrate) that the information resolves the adequacy issues identified by the Tribe and admitted into this proceeding. Because Contentions 2 and 3 are contentions of adequacy and not simply contentions of omission, and NRC Staff did not expand its argument or factual assertions to address any adequacy issues, NRC Staff's Motion must fail."[15]

The Consolidated Intervenors reply that "neither Contention 2 nor Contention 3 has been adjudicated as a 'safety contention.' It is a material and genuine dispute as to whether Contention 2 or Contention 3 is a safety contention."[16]

IV. DISCUSSION

Review of the motions for summary disposition and the responses thereto reveal a number of genuine issues of material fact remain, as well as a number of genuine issues which need to be heard. Based on the pleadings, especially the statements of material facts in opposition, it is not possible to find that either moving party is entitled to summary disposition as a matter of law.

Specifically, the Oglala Sioux Tribe's argument that NRC Staff has taken final action on behalf of the Commission by preparing the required NEPA documentation and granting

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[14] Oglala Sioux Tribe's Response to NRC Staff's Motion for Summary Disposition (Apr. 25) at 3.

[15] Id. at 8.

[16] Consolidated Intervenors' Response to NRC Staff's Motion for Summary Disposition on Contentions 2 and 3 (Apr. 25, 2014), Attach. 1, Statement of Material Facts in Opp'n to Mot. for Summ. Disposition on Contentions 2 and 3 ¶ 1.

Powertech's license request without analyzing the effectiveness of proposed mitigation measures is the crux of admitted Contention 6. Similarly, whether or not the legal requirements under NEPA have been met as to the protection of historical and cultural resources remains hotly contested[17] and is the subject of admitted contention 1A.

The NRC Staff motion which seeks to dismiss the 'safety portions' of Contentions 2 and 3 is controverted. The motion is premised on the assumption that Contentions 2 and 3 are contentions of omission which were rendered moot by Powertech's responses to the NRC Staff's requests for additional information. Admitted Contention 2, as combined by the Board (from proposed Contentions D and 2) and Admitted Contention 3, which was formed from proposed Contention E (as merged with proposed contention J) and proposed Contention 3 are arguably contentions of adequacy as the word "adequate" appears in the original proposed Contentions D,[18] E,[19] and 2.[20] In any event, the admitted contentions challenge the adequacy of hydrological information in the Staff environmental documents.[21] At this juncture the Board is unable to rule as to what extent any safety component that may be lurking in Contention 2 or Contention 3 can be dismissed as a matter of law. The Board notes that safety contentions are evaluated against the Atomic Energy Act's (AEA's) mandate to issue only licenses that are not

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[17] See NRC Staff Motion, Attach. 1, NRC Staff's Statement of Material Facts to Supp. Mot. For Summ. Disposition on Safety Contentions 2 and 3.

[18] "Criterion 5B of Appendix A of Part 40 by failing to adequately describe confinement of the host aquifer." Consolidated Request for Hearing and Petition for Leave to Intervene (Mar. 8, 2010) at 38.

[19] "The License may not be granted because it would violate Section 40.32(d) because of lack of adequate confinement of the host Inyan Kara aquifer." Id. at 39.

[20] "It fails to provide an adequate baseline groundwater characterization." Petition to Intervene and Request for Hearing of the Oglala Sioux Tribe (Apr. 6, 2010) at 17.

[21] Contention 2, "The FSEIS fails to include necessary information for adequate determination of baseline ground water quality." Contention 3, "The FSEIS fails to include adequate hydrogeological information to demonstrate ability to contain fluid migration and assess potential impacts to groundwater." LBP-14-5, 79 NRC at __ (slip op. at Appendix A) (Apr. 28, 2014).

inimical to the common defense and security and the public health and safety.[22] Environmental contentions are evaluated under NEPA, as amended,[23] and the Commission's regulations at 10 C.F.R. Part 51.

While viewing the record in the light most favorable to the party not moving for summary disposition,[24] the above findings make it impossible for the Board to grant either the NRC Staff or Oglala Sioux Tribe request for summary disposition.

V. BOARD ORDER

1. The NRC Staff's Motion for Summary Disposition on Safety Contentions 2 and 3 filed on April 11, 2014 is denied.

2. The Oglala Sioux Tribe's Motion for Summary Disposition National Environmental Policy Act Contentions 1A and 6 – Mitigation Measures filed April 11, 2014 is denied.

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[22] 10 C.F.R. Part 20, Part 40 and Appendix A to Part 40.

[23] 42 U.S.C. § 4332

[24] One Factory Row, CLI-93-22, 38 NRC at 102.

3. Petitions for review of this order may be filed with the Commission pursuant to 10 C.F.R. § 2.341. Such petitions must be filed within twenty-five (25) days of the service of this order.

It is so ORDERED.

THE ATOMIC SAFETY
AND LICENSING BOARD

/RA/

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William J. Froehlich, Chair
ADMINISTRATIVE JUDGE

/RA/

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Richard F. Cole
ADMINISTRATIVE JUDGE

/RA/

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Mark O. Barnett
ADMINISTRATIVE JUDGE

Rockville, Maryland
June 2, 2014

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of	)	
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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 (Denying Motions for Summary Disposition)** have been served upon the following persons by Electronic Information Exchange, and by electronic mail as indicated by an asterisk*****.

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DOCKET NO. 40-9075-MLA
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[Original signed by Clara Sola]
Office of the Secretary of the Commission

Dated at Rockville, Maryland,
this 2nd day of June 2014.