

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Kristine L. Svinicki, Chairman
Jeff Baran
Stephen G. Burns
Annie Caputo
David A. Wright

In the Matter of

POWERTECH (USA) INC.

(Dewey-Burdock
In Situ Uranium Recovery Facility)

Docket No. 40-9075-MLA

CLI-18-07

MEMORANDUM AND ORDER

Powertech (USA) Inc. (Powertech) petitions for review of the Atomic Safety and Licensing Board's decision denying in part and granting in part the Staff's motion for summary disposition of Contentions 1A and 1B challenging the issuance of an *in situ* uranium recovery license to Powertech.¹ Powertech requests that we reverse the Board's partial denial of summary disposition and direct the Staff to supplement the Final Supplemental Environmental Impact Statement (FSEIS), thereby ending this proceeding.² For the reasons described below, we deny Powertech's petition for review.

¹ *Brief of Licensee Powertech (USA), Inc. Petition for Review of LBP-17-09* (Nov. 13, 2017) (Petition); see also LBP-17-9, 86 NRC 167 (2017).

² Petition at 1-2, 16, 20.

I. BACKGROUND

This proceeding has been pending since 2009, when Powertech first applied for a license for the Dewey-Burdock *In Situ* Uranium Recovery Facility. The Oglala Sioux Tribe (“Tribe”) and Consolidated Intervenors (together, “Intervenors”) were admitted as intervenors in 2010.³ The Staff issued the FSEIS in January 2014 and issued the license to Powertech in April 2014, while Intervenors’ admitted contentions were still pending before the Board.⁴ The Board held an evidentiary hearing on the Intervenors’ contentions in August 2014.

In April 2015, the Board issued a partial initial decision finding in favor of the Staff and Powertech on all contentions except Contentions 1A and 1B, both of which concerned the Staff’s consideration of the potential impacts of the proposed project on Native American cultural resources at the project site.⁵ Specifically, the Board found “that the FSEIS [had] not adequately addressed the environmental effects of the Dewey-Burdock project on Native American cultural, religious, and historic, resources” (Contention 1A) and “that the consultation process between the NRC Staff and the Oglala Sioux Tribe was inadequate” (Contention 1B).⁶ Despite these findings, the Board did not determine that suspension of the license was warranted.⁷ Instead, it found that the Staff should work to remedy the two identified

³ LBP-10-16, 72 NRC 361, 376 (2010).

⁴ See Exs. NRC-008-A-1 to NRC-008-B-2, “Environmental Impact Statement for the Dewey-Burdock Project in Custer and Fall River Counties, South Dakota, Supplement to the Generic Environmental Impact Statement for *In-Situ* Leach Uranium Milling Facilities” (Final Report), NUREG-1910, Supplement 4, vols. 1-2 (Jan. 2014) (ADAMS Accession Nos. ML14246A350, ML14246A329, ML14246A330, ML14246A331) (FSEIS); Ex. NRC-012, License Number SUA-1600, Materials License for Powertech (USA) Inc. (Apr. 8, 2014) (ML14246A408) (License).

⁵ LBP-15-16, 81 NRC 618 (2015).

⁶ *Id.* at 655, 657.

⁷ See *id.* at 657-58.

deficiencies, report to the Board on its progress, and eventually resolve the contention with a settlement agreement, or if not able to reach a settlement, with a motion for summary disposition.⁸

All parties appealed the Board's various rulings in LBP-15-16 (as well as various interlocutory rulings), but we affirmed the Board in all respects relevant to this appeal.⁹ We specifically rejected Powertech's argument that the Staff had already considered all information pertaining to cultural resources that was reasonably available and had therefore satisfied the National Environmental Policy Act (NEPA) as a matter of law.¹⁰ Instead, we found that "Powertech's dispute with the Board's decision [was] factual, not legal" and, in the absence of clear error, deferred to the Board's factual determinations concerning the adequacy of the FSEIS.¹¹

Over the course of the following two years, the Staff made several attempts to adequately consult with the Tribe, including correspondence and email, one face-to-face meeting, and a January 31, 2017, teleconference.¹² However, during this period, the Tribe and

⁸ *Id.* at 710.

⁹ See CLI-16-20, 84 NRC 219, 262 (2016). We affirmed the Board's decisions on the merits but we disagreed with the characterization that its ruling with respect to Contentions 1A and 1B rendered the decision non-final. We explained that the Board's decision was final and appealable, although we ultimately approved the Board's approach in retaining jurisdiction over the matter until the deficiencies identified in the FSEIS were resolved. See *id.* at 242-43, 250-51.

¹⁰ See *Brief of Licensee Powertech (USA), Inc. Petition for Review of LBP-15-16*, at 20-22 (May 26, 2015).

¹¹ CLI-16-20, 84 NRC at 247. The Tribe has filed a petition for review of CLI-16-20 in the United States Court of Appeals for the District of Columbia. *Oglala Sioux Tribe v. NRC* (D.C. Cir. No. 17-1059). On July 20, 2018, the court issued a decision remanding the case for further proceedings concerning the status of the license in light of the NEPA deficiency that has been identified.

¹² See *NRC Staff's Motion for Summary Disposition of Contentions 1A and 1B* (Aug. 3, 2017) (Staff Motion), attach. 1, *NRC Staff's Statement of Material Facts to Support Motion for Summary Disposition of Contentions 1A and 1B* (Aug. 3, 2017); *id.*, attach. 2, *Affidavit of Kellee*

the Staff could not agree upon a method to survey cultural, historic, and religious resources at the site or assess the possible impact of the project on such resources.¹³ During the January 2017 teleconference, the Staff proposed an “open-site” survey method that would involve representatives of the Tribe walking over the site for a period of time in exchange for mileage reimbursement, a per diem, and an honorarium of \$10,000.¹⁴ The open site survey proposal would have been similar to a survey performed in 2013 in which the Tribe declined to participate.¹⁵ According to the Staff’s summary of the teleconference, the Tribe did not accept this proposal and instead “expressed its preference to develop a survey methodology similar in nature to the Makoche Wowapi survey proposal that was submitted to the NRC in 2012.”¹⁶ As a result of the parties’ failure to reach an agreement on the survey methodology, no additional information about cultural resources at the site was able to be gathered from the Tribe.¹⁷

On August 3, 2017, the Staff moved for summary disposition of Contentions 1A and 1B, arguing that further attempts at consultation with the Tribe would be unlikely to result in an acceptable settlement.¹⁸ With respect to its obligations under NEPA, the Staff argued that its

L. Jamerson Concerning the NRC Staff’s Motion for Summary Disposition of Contentions 1A and 1B (Aug. 3, 2017); *see also* LBP-17-9, 86 NRC at 173.

¹³ *See* NRC Staff Final Status Report (Aug. 3, 2017) (Final Status Report).

¹⁴ *See* Summary of Teleconference with the Oglala Sioux Tribe Regarding the Dewey-Burdock In situ Uranium Recovery Project (Jan. 31, 2017) (ML17060A260) (Teleconference Summary).

¹⁵ *See* Ex. NRC-008-A, FSEIS § 1.7.3.5, at 1-24 to 1-26.

¹⁶ Teleconference Summary at 1. The Makoche Wowapi proposal included a professional survey with established protocols for identification of historical sites with Makoche Wowapi/Mentz-Wilson Consultants, LLP, acting as contractor to conduct the survey. This approach was estimated to cost \$818,000. *See* Ex. NRC-008-A, FSEIS § 1.7.3.5, at 1-23; LBP-17-9, 86 NRC at 181 n.66; *see also* Letter from Trina Lone Hill, Oglala Lakota Cultural Affairs & Historic Preservation, to Cinthya I. Román, NRC, at 8 (May 31, 2017) (ML17152A109); Staff Motion at 28-29.

¹⁷ Final Status Report at 2.

¹⁸ *See* Staff Motion; Final Status Report.

efforts satisfied the statute because “[u]nder NEPA’s ‘hard look’ standard, the proper inquiry is not whether the Staff obtained complete information on the sites of cultural, historical, and religious [significance] to the Oglala Sioux Tribe, but whether the Staff made reasonable efforts to do so.”¹⁹

Powertech filed a brief in support of the Staff’s motion, and the Intervenors opposed it.²⁰ With respect to the adequacy of the survey that had been proposed, the Tribe asserted that the proposed open site survey was not scientific or methodical, and that the survey should be conducted by professionals, in consultation with the Oglala and other Sioux Tribes. The Tribe argued that an open site survey conducted solely by Tribal representatives would essentially place the onus on the Tribe to survey the site and catalogue cultural resources there.²¹

The Board found that there was no remaining material issue of fact regarding the Staff’s consultation with the Tribe. It found that the Staff’s attempts at consultation had satisfied the requirements of the National Historic Preservation Act and, therefore, granted summary disposition of Contention 1B.²² But with respect to Contention 1A, the Board noted that no additional survey had been performed (such that the deficiencies in the FSEIS remained) and

¹⁹ Staff Motion at 34 (citing *Ground Zero Ctr. for Non-Violent Action v. U.S. Dept. of the Navy*, 383 F.3d 1082, 1089-90 (9th Cir. 2004); *Warm Springs Dam Task Force v. Gribble*, 621 F.2d 1017, 1026-27 (9th Cir. 1980)).

²⁰ *Brief of Powertech (USA) Inc. in Support of the United States Nuclear Regulatory Commission Staff’s Motion for Summary Disposition of Contentions 1A and 1B* (Sept. 1, 2017); *Oglala Sioux Tribe Response in Opposition to NRC Staff’s Motion for Summary Disposition of Contentions 1A and 1B* (Sept. 1, 2017) (Tribe Response in Opposition); *Consolidated Intervenors’ Opposition to Motion for Summary Disposition of Contentions 1A and 1B* (Sept. 1, 2017).

²¹ See LBP-17-9, 86 NRC at 193 (citing Tribe Response in Opposition at 33).

²² *Id.* at 188-90.

found that there was still a disputed fact issue as to whether the Staff's effort to characterize cultural resources at the site was reasonable.²³ More specifically, the Board found that the

Tribe's challenge to (1) the scientific integrity and lack of a trained surveyor or ethnographer coordinating the survey; (2) the number of tribal members invited to participate in the survey; (3) the length of time provided for the survey; and (4) the tribes invited to participate in the survey—establish a significant material factual dispute as to the reasonableness of the NRC Staff's proposed terms for an open-site survey to assess the identified deficiencies in this FSEIS.²⁴

Powertech appealed the denial of the Staff's motion with respect to Contention 1A.

Powertech requests that we "direct NRC Staff to supplement the [FSEIS] with all data and information for activities conducted to date by NRC Staff on historic and cultural resources and order the closure of Contention 1A upon completion of such supplement."²⁵ Powertech also asks for "expedited review" because, it claims, the State of South Dakota and the U.S.

Environmental Protection Agency and Bureau of Land Management are waiting for the NRC to approve the FSEIS supplement and end this proceeding before they grant approvals necessary for Powertech to begin operations.²⁶ Powertech also contended, in support of this request, that the Commission's expedited consideration of its petition could have rendered moot certain issues in the Tribe's petition for review before the D.C. Circuit.²⁷

²³ *Id.* at 194.

²⁴ *Id.* at 198.

²⁵ Petition at 1-2. The Staff continues to work to resolve the outstanding issues identified in LBP-15-16 and LBP-17-9. See Letter from Cinthya I. Román, NRC, to John M. Mays, Chief Operating Officer, Azarga Uranium Corp. (Dec. 6, 2017) (ML17340B374) (Proposal) (describing proposal to identify historic, cultural, and religious sites at the Dewey-Burdock site). Powertech is a wholly-owned subsidiary of Azarga.

²⁶ Petition at 20; see also *Reply to Oglala Sioux Tribe's and Consolidated Intervenors' Opposition to the Petition for Review of LBP-17-09*, at 5 (Dec. 18, 2017).

²⁷ Petition at 20-21.

II. DISCUSSION

A. Powertech's Petition Does Not Meet the Standard for Interlocutory Review

A board's denial of a motion for summary disposition is an interlocutory decision.²⁸ We generally disfavor interlocutory review; our rules of procedure provide for such review only where the petitioner can show that it is threatened with "immediate and serious irreparable impact" or the board's decision "affects the basic structure of the proceeding in a pervasive and unusual manner."²⁹

Powertech does not address the standard for interlocutory review in its petition. Nonetheless, we find, based on the record, that the standard, as stated in 10 C.F.R. § 2.341(f)(2), has not been met.³⁰ First, we find that Powertech will face no immediate and serious irreparable harm as a result of the Board's ruling. Powertech's request for "expedited review" claims that it will be harmed by delay and expense.³¹ But we have "uniformly rejected" arguments that "expenses of any kind" constitute irreparable injury.³² And, although Powertech

²⁸ See *Progress Energy Florida, Inc.* (Levy County Nuclear Power Plant, Units 1 and 2), CLI-11-10, 74 NRC 251 (2011); *Nuclear Innovation North America, LLC* (South Texas Project, Units 3 and 4), CLI-11-6, 74 NRC 203 (2011); see also *Entergy Nuclear Operations, Inc.* (Indian Point, Units 2 and 3), CLI-11-14, 74 NRC 801, 810-11 (2011), *Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-08-2, 67 NRC 31, 34 (2008) (grant of summary disposition motion, where other contentions are pending in the proceeding, is interlocutory).

²⁹ See 10 C.F.R. § 2.341(f)(2)(i)-(ii). Absent a finding that these circumstances are present, Intervenor would have to wait until the disposition of Contention 1A before they could seek review of the Board's summary disposition of Contention 1B.

³⁰ Powertech addresses the standard provided in 10 C.F.R. § 2.341(b), which governs petitions for review of final Board decisions, but, as noted above, LBP-17-9 is not a final decision.

³¹ Petition at 20.

³² *Entergy Nuclear Operations, Inc.* (Indian Point, Units 2 and 3), CLI-09-6, 69 NRC 128, 135 (2009) ("Indeed, we have found *no instance* in this agency's jurisprudence where either we or our boards have ruled that expenses of any kind constituted 'irreparable injury.' . . . [I]n situations where, as here, a movant for a stay or interlocutory review claims 'irreparable injury' based on excessive or unnecessary litigation expenses[,] we have uniformly rejected such arguments."); see also *Entergy Nuclear Operations, Inc.* (Indian Point, Units 2 and 3),

suggests that other state and federal approvals depend on the outcome of this litigation, we do not view that assertion, even if we deemed it accurate, to warrant deviation from our standard process here. In addition, it is not apparent that the Board's ruling has any effect on the "structure of the proceeding," let alone a "pervasive and unusual" one.³³ This proceeding will continue as it has since 2015, when the Board ruled in favor of the Tribe on Contention 1A.³⁴

Although Powertech's failure to meet the standard for interlocutory review is a sufficient reason to deny its petition, we also find, as described below, that it has failed to show that the Board erred in denying its motion.

B. Powertech Has Not Shown that the Board Erred in Denying Summary Disposition

Summary disposition is appropriate where there is no remaining material issue of fact. The standards governing summary disposition are set forth at 10 C.F.R. § 2.710(a) and "are based upon those the federal courts apply to motions for summary judgment under Rule 56 of the Federal Rules of Civil Procedure."³⁵ Under those standards, the moving party has the initial

CLI-10-30, 72 NRC 564, 569 (2010) (increased litigation and delay do not justify interlocutory review); *Connecticut Yankee Atomic Power Co.* (Haddam Neck Plant), CLI-01-25, 54 NRC 368, 373-74 (2001) (increased litigation resulting from the admission of a contention does not constitute serious or irreparable harm); *Sequoyah Fuels Corp. and General Atomics* (Gore, Oklahoma Site), CLI-94-11, 40 NRC 55, 61-62 (1994) (denial of motion for summary disposition or dismissal).

³³ The expansion of issues for resolution and the continuation of litigation that results from admitting a contention (see *Haddam Neck*, CLI-01-25, 54 NRC at 374) or denying summary disposition (see *Sequoyah Fuels*, CLI-94-11, 40 NRC at 62-63) does not necessarily have a "pervasive and unusual" effect on the litigation. It is simply part of the ebb and flow that characterizes complex adjudication.

³⁴ Powertech's petition does not elaborate on how a favorable Commission ruling would have "moot[ed]" the Tribe's petition for review of CLI-16-20 before the D.C. Circuit, see Petition at 2, 5, 20-21, and it is not apparent to us that interlocutory review would necessarily have had that result. Because this argument is not fully developed, we do not rule on whether potentially mooted a petition for review would present appropriate grounds for interlocutory review.

³⁵ *Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-10-11, 71 NRC 287, 297 (2010); see also *Advanced Medical Systems, Inc.* (One Factory Row, Geneva, Ohio 44041), CLI-93-22, 38 NRC 98, 102-03 (1993).

burden of showing that no genuine issue of material fact remains in the proceeding.³⁶ If the nonmoving party opposes the motion, it cannot rest on the allegations or denials of a pleading; instead, it must “go beyond the pleadings and . . . designate specific facts showing that there is a genuine issue for trial.”³⁷

Powertech’s Petition does not address the standard for granting summary disposition, that is, the standard under which the Board ruled on Contention 1A. But Powertech does argue that there is a logical contradiction in the Board simultaneously finding that the Staff had complied with its consultation obligations under the NHPA while at the same time falling short in its duties under NEPA.³⁸ To this end, Powertech asserts that the Board’s logic in LBP-17-9 clashes with its interpretation of the same statutes in LBP-15-16.³⁹ In LBP-15-16, the Board found with respect to Contention 1A that

the FSEIS has not adequately addressed the environmental effects of the Dewey-Burdock project on Native American cultural, religious, and historic resources. Without additional analysis as to how the Powertech project may affect the Sioux Tribes’ cultural, historical, and religious connections with the area, NEPA’s hard look requirement has not been satisfied[.]⁴⁰

Powertech points out that (in a separate section of LBP-15-16), the Board stated that “[t]his additional consultation is required in order (1) to satisfy the hard look at impacts required by NEPA and to supplement the FSEIS, if necessary; and (2) to satisfy the consultation requirements of the NHPA.”⁴¹ Powertech interprets these statements to mean that additional

³⁶ See *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

³⁷ *Id.* at 324 (internal quotation marks omitted).

³⁸ Petition at 12-16.

³⁹ *Id.*

⁴⁰ LBP-15-16, 81 NRC at 655.

⁴¹ *Id.* at 657.

consultation alone is sufficient to satisfy both NHPA and NEPA.⁴² Therefore, it argues, it is “legally illogical that you can conduct adequate consultation with a Native American Tribe on one hand and then be deemed to have failed to “[satisfy]” another statute with similar requirements on the other hand.”⁴³

We disagree. We do not interpret the Board’s language in LBP-15-16 to indicate that the Staff would necessarily satisfy its NEPA obligations simply through consultation with the Tribe. Rather, the Board explained that consultation was necessary to achieve the *end* of meeting NEPA’s “hard look” requirement; it did not suggest that the mere act of consultation would in and of itself be sufficient. And, in any event, NHPA and NEPA are separate statutes imposing different obligations on the Staff. It is thus not “legally illogical” for the Board to grant summary disposition with respect to one contention while denying it with respect to the other.

Nor do we find that the Board erred in holding that there was an unresolved dispute of material facts. The Board held that “there remains a material factual dispute as to whether the NRC Staff’s chosen methodology for obtaining information on the tribal cultural resources was reasonable.”⁴⁴ As the Board noted and the Staff acknowledged, the parties continued to dispute what would constitute a reasonable method to assess cultural resources at the site. We find that the Board did not err in its application of the standards for summary disposition.

Finally, much of Powertech’s Petition and Reply is devoted to arguing that the Tribe has unreasonably refused to cooperate in the consultation process. For example, Powertech argues that the Staff has satisfied NEPA because it has made reasonable efforts to obtain the

⁴² Petition at 12 n.17.

⁴³ *Id.* at 16.

⁴⁴ LBP-17-9, 86 NRC at 194.

missing information and therefore, the information is not “reasonably available.”⁴⁵ To the extent Powertech argues that the FSEIS was already sufficient before the 2014 evidentiary hearing, it is a challenge to the Board’s findings in LBP-15-16 and essentially a late-filed motion for reconsideration of CLI-16-20. We previously found that these arguments did not establish “clear error” by the Board.⁴⁶ Powertech does not provide a compelling reason to revisit those issues at this time. To the extent Powertech argues that the Tribe unreasonably failed to cooperate following the Board’s ruling in LBP-15-16, we note that the reasonableness of the Tribe’s efforts to help identify cultural resources at the site goes to the merits of Contention 1A. We discern no error in the Board’s identification of a dispute with respect to this issue, and we leave it to the Board to resolve it in the first instance.

⁴⁵ See Petition at 13 (arguing that the Board ignored Powertech’s expert witness statement and Powertech and Staff witness testimony at the 2014 evidentiary hearing), 15-16, 19 (arguing that site identification requirements were satisfied by the participation of other tribes and by the binding Programmatic Agreement), 17-18 (urging the Commission to adopt the arguments in then-Commissioner Svinicki’s partial dissent); see also *Brief of Powertech (USA), Inc. in Support of United States Nuclear Regulatory Commission Staff’s Motion for Summary Disposition of Contentions 1A and 1B* (Sept. 7, 2017), at 10-11.

⁴⁶ See CLI-16-20, 84 NRC at 246-47.

III. CONCLUSION

For the foregoing reasons, we deny review of the Board's decision in LBP-17-9.⁴⁷

IT IS SO ORDERED.

For the Commission

NRC Seal

/RA/

Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, Maryland,
this 24th day of July, 2018

⁴⁷ Because we decline review, Powertech's request for expedited review is moot.

Chairman Svinicki, Additional Views

I fully join with the majority's order today as it comports with well-established Commission precedent on the issues of interlocutory appeals and summary disposition. Given the posture of this proceeding, these strict standards are controlling. However, my position with respect to the underlying issues surrounding Contentions 1A and 1B in this proceeding has not changed. If anything, recent developments in this proceeding reinforce my conclusion that the Board's legal errors created an unworkable framework by requiring the parties to take measures beyond those reasonable efforts required by NEPA and the NHPA. As expressed in my earlier dissent with respect to Contention 1A, instead of considering the Staff's argument that it could not reasonably obtain the information it acknowledged was missing, the Board invalidated the FSEIS simply because the information was missing in the first place.¹ For Contention 1B, the Board sought to determine "which party or specific action led to the impasse preventing an adequate tribal cultural survey"² instead of determining whether the Staff had provided the Tribe a "reasonable opportunity" for consultation as required by statute.³ Because the Board applied the legal standards to Contentions 1A and 1B incorrectly, the Board's decision should have been overturned with respect to those two contentions and the proceeding terminated at that time. Now, almost two years later, this proceeding remains ongoing.

¹ LBP-15-16, 81 NRC 618, 655 (2015). Several authorities relied on by the Staff supported the position that agencies need only undertake reasonable efforts to acquire missing information. See 40 C.F.R. § 1502.22; *Town of Winthrop v. FAA.*, 535 F.3d 1 (1st Cir. 2008); *Entergy Nuclear Generation Company and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-10-22, 72 NRC 202, 208 (2010).

² LBP-15-16, 81 NRC at 656.

³ 36 C.F.R. § 800.2(c)(2)(ii)(A).

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of)
)
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 **COMMISSION MEMORANDUM AND ORDER (CLI-18-07)** have been served upon the following persons by Electronic Information Exchange, and by electronic mail as indicated by an asterisk.

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POWERTECH (USA) INC., DEWEY-BURDOCK IN SITU RECOVERY FACILITY
DOCKET NO. 40-9075-MLA

COMMISSION MEMORANDUM AND ORDER (CLI-18-07)

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[Original signed by Clara Sola _____]
Office of the Secretary of the Commission

Dated at Rockville, Maryland
this 24th day of July, 2018