

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))	

OGLALA SIOUX TRIBE’S MOTION FOR STAY OF EFFECTIVENESS OF LICENSE

I. INTRODUCTION

Pursuant to 10 C.F.R. § 2.1213, Intervenor Oglala Sioux Tribe (“Tribe”) hereby files this Motion for Stay of Effectiveness of the License issued to the applicant Powertech (USA) Inc. (“Powertech” or “applicant”). NRC Staff provided notice of the issuance of the license on Tuesday, April 8, 2014, but did not provide copies of the actual License or documents incorporated by reference into the License. Pursuant to 10 C.F.R. § 2.1213(a), any motion for stay is due within five days of the notice of the issuance of the license. Because the fifth day fell on a Sunday, pursuant to 10 C.F.R. § 2.306(a), this Motion is due April 14, 2014, and thus is timely filed.

The Tribe contends that a stay is necessary and appropriate in this case due to the distinct and present threat of irreparable to its cultural resources that will result from the applicant Powertech commencing ground disturbing construction activities at the site before the issues raised by the Tribe for hearing are resolved. The irreparable harms would occur regardless of whether the mine may become fully operational, and cannot be repaired should the Board or Commission decide to invalidate the License or add conditions protective of the Tribe’s cultural resources. Although Powertech has publicly stated that it has no plans to begin construction until

2015, Powertech counsel recently advised the Board that construction activities may be imminent. Where the NRC has unique duties involving Tribal concerns, there is a strong public interest in protecting the status quo until the licensing hearings and NRC's federal responsibilities involving cultural resource protection and trust responsibilities toward the Tribe have been fulfilled.

As set forth herein and elsewhere in the hearing file, the NRC Staff and applicant have yet to complete a competent cultural resources inventory or survey of the site, and have yet to design, plan for, or put in place any demonstrated effective mitigation measures to protect cultural resources at the site. Thus, given the lack of information related to the existence and location of significant cultural resources at the site, the harm to the Tribe, both to its cultural resources directly and to its procedural rights under the National Environmental Policy Act (NEPA) and National Historic Preservation Act (NHPA) will be irreparable, and will begin to occur the moment any ground-disturbing construction activities commence at the site.

The standards for a stay under 10 C.F.R. § 2.1213(d) require the Board to undertake consideration of four factors:

- (1) Whether the requestor will be irreparably injured unless a stay is granted;
- (2) Whether the requestor has made a strong showing that it is likely to prevail on the merits;
- (3) Whether the granting of a stay would harm other participants; and
- (4) Where the public interest lies.

NRC caselaw provides some useful detail on the Board's duties in applying this standard:

Under the NRC's Rules of Practice . . . the criteria for ruling upon a stay request involve the same four factors as those classically applied in judicial proceedings. *See Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958). Thus, the decision-maker must consider (1) the extent of the probability that the moving party will succeed on the merits; (2) whether the moving party will suffer irreparable injury, and if so to what extent, if the stay is not granted; (3) the extent of the injury the party opposing the stay will suffer if the stay is granted; and (4) where the public interest lies.

Although all four factors are to be weighed in the balance, the first two -- probability of success on the merits and extent of irreparable injury -- are generally considered the more important, and the moving party has the burden of demonstrating that they weigh in its favor. The greater the showing on one of the factors, the less may have to be demonstrated on the other. *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-338, 4 NRC 10, 14 (1976); Cuomo v. NRC, 772 F.2d 972, 974 (D.C. Cir. 1985).

CFC Logistics, Inc. (Materials License), 2004 WL 1397968, at *4, 30-36239-ML, 03-814-01-ML (2004). As shown below, the Tribe satisfies all four parts of this test, and thus the stay should be issued.

II. The Standards Favor Granting a Stay

A. The Tribe has Demonstrated Irreparable Harm

“Regarding the first factor - irreparable injury -- a motion for a stay must be bolstered by more than a mere allegation of irreparable harm. Rather, an irreparable injury must be ‘reasonably demonstrated’ by the movant. *See Philadelphia Electric Co.* (Limerick Generating Station, Units 1 & 2), ALAB-814, 22 NRC 191, 196 (1985).” *Pacific Gas and Electric Co.* (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), LBP-02-15, 56 N.R.C. 42 (2002).

In this case, irreparable harm is ‘reasonably demonstrated’ based on the attached declarations of Michael CatchesEnemy, the current Tribal Historic Preservation Officer for the Oglala Sioux Tribe (attached as Exhibit 1) and the Declaration of Wilmer Mesteth (attached as Exhibit 2). Specifically, any construction activities slated for the site before the Tribe has its chance to present and have its full case resolved on the merits will cause irreparable harm to the Tribe’s ability to protect its cultural resources, and its procedural rights in the NEPA and NHPA

processes to have those cultural resources competently identified and ensure proper and effective mitigation is employed.

Powertech, through counsel, has affirmatively asserted to this Board that it believes it has the full right to conduct all activities associated with the license, including ground-disturbing construction, upon license issuance, and is free to do so: “Well, upon issuance of that license, the licensee is free to move forward with operations under that license including construction, other types of activities, up and including operating a facility.” Transcript of Wednesday February 12, 2014 teleconference, at page 562, lines 13-17 (quoting Powertech counsel Chris Pugsley). Thus, the applicant’s position is that construction may commence immediately upon issuance of the license, thereby demonstrating injury. Where the rules applicable to the present proceeding do not afford the Tribe an opportunity to conduct discovery, there are no means by which the Tribe or the Board can confirm Powertech’s actual construction schedule. Therefore, imminence must be inferred from statements of Powertech counsel.

Further, the evidence submitted herewith on behalf of the Tribe demonstrates the irreparable nature of the imminent harm. As Oglala Sioux Tribal Historic Preservation Officer CatchesEnemy states in his declaration:

Any harm done to these cultural resources, especially to burial and artifacts, perhaps because the Applicant and NRC Staff did not properly judge the significance of certain artifacts or other resources, will be an irreparable injury to the very identity of the Tribe, caused by the actions of the Applicant, and condoned by the NRC Staff, the Tribe’s trustee.

Declaration of Michael CatchesEnemy at ¶ 5. These harms are confirmed by the Powertech’s own materials submitted with the project application. As Mr. CatchesEnemy recounts:

the Memorandum of Agreement (with amendments) entered into between Powertech and the Archaeological Research Center (ARC), a program of the South Dakota State Historical Society, reproduced in the Environmental Report at Appendix 4.10-B, specifically recognizes that **“Powertech has determined that the Project may have an**

affect on archaeological or historic sites that contain or are likely to contain information significant to the state or local history or prehistory....”

Id. at ¶ 13. Lastly, Mr. CatchesEnemy details both the irreparable harms to cultural resources and the irreparable harms to the Tribe’s procedural rights under NEPA and the NHPA:

Should construction go forward without first developing a lawful plan mitigating the impacts to sites and their setting, opportunities to implement mitigation options such as moving facility features and prohibiting disturbance of sensitive areas would be forever lost.

As detailed in Mr. Mesteth’s Declaration, the numbers and density of cultural resources at the site proposed for mining demonstrate that any mining activity, including ground-disturbing construction activity, is likely to irreparably adversely impact the cultural resources of the Oglala Sioux Tribe. The failure to meaningfully involve the Tribe in the analysis of these sites, or to conduct any ethnographic studies in concert with a field study designed with credible scientific methodology as part of the NEPA process further exacerbate the impacts on the Tribe’s interests as a procedural matter causing irreparable harm by negatively affecting the Tribe’s ability to protect its cultural resources. If the project were not to go forward as planned, the interests of the Oglala Sioux Tribe would be protected as the potential for impact to the Tribe’s cultural resources would be diminished or outright eliminated.

Id. at ¶¶ 24-25.

These harms are also evident from the Declaration of Wilmer Mesteth, the former Tribal Historic Preservation Officer for the Oglala Sioux Tribe.¹ Mr. Mesteth recounts evidence of burial sites and other highly sensitive sites that have not been documented, accounted for, located, or analyzed under the current NRC Staff FSEIS or Powertech application material. Declaration of Wilmer Mesteth at ¶¶ 15-20.

Given the lack of a scientifically-defensible cultural resources inventory on the site and the lack of any analysis of mitigation plans or the effectiveness thereof in the FSEIS (as

¹ The Declaration of Wilmer Mesteth was submitted in April 2010 at the intervention stage of this proceeding, but, as affirmed by Ms. CatchesEnemy, because of the lack of any scientifically-defensible cultural resource survey for the project site, Mr. Mesteth’s testimony is and remains current and relevant. Declaration of Michael CatchesEnemy at ¶ 17.

discussed *infra*), the Tribe has demonstrated that irreparable harm to the Tribe's interests will occur at this site immediately upon commencement of construction.

B. The Tribe is Likely to Succeed on the Merits

The Tribe is likely to succeed on the merits of their contentions under the National Environmental Policy Act. Particularly strong are the contentions for which the Tribe has moved the Board for summary disposition: Contention 1A (Failure to Meet Applicable Legal Requirements Regarding Protection of Historical and Cultural Resources) and Contention 6 (Failure to Adequately Describe or Analyze Proposed Mitigation Measures). These claims relate directly to the Tribe's demonstrated irreparable harms concerning impacts to significant cultural and historic resources within the project area.

The Tribe's summary disposition papers set forth in detail the legal and factual basis for these contentions, but a basis for each is a failure of NRC Staff to conduct a scientifically-defensible cultural resources survey or to conduct the NEPA-required analysis of mitigation measures and the anticipated effectiveness of such mitigation. In short, NEPA requires that mitigation measures must be developed, disclosed, reviewed, and evaluated for effectiveness throughout the FSEIS, with the benefit of review and comment by other agencies, the public, and the Tribe. 42 U.S.C. § 4332(2)(C) *cited by New York v. NRC*, 681 F.3d 471, 476 (D.C. Cir. 2012); 10 C.F.R. §§ 51.10, 51.70 and 51.71; 40 C.F.R. § 1502.14(d)(include mitigation in alternatives), § 1502.16(h) (examine mitigation in consequences analysis). Here, the NRC Staff failed to conduct the required analysis of cultural resources or mitigation, including any effectiveness analysis.

The Declaration of Michael CatchesEnemy confirms the underlying factual basis of these claims. The mine project area is in a location that evidences substantial cultural resources.

Declaration of Michael CatchesEnemy at ¶¶ 5, 8, 11-13. Further, the Tribe confirms that no independent cultural resources survey with scientifically-defensible and reviewed methodology has been undertaken at the site since the application was filed, including as part of the FSEIS. *Id.* at ¶ 9. The lack of such a survey is despite NRC Staff commitments to perform exactly this type of survey, with the participation of the Tribe, and with the opportunity for public comment and review. *Id.* at ¶¶ 10, 19-20. Lastly, NRC Staff’s “Programmatic Agreement” was not analyzed in the FSEIS, was not final as of the date of the publication of the FSEIS, has not been accepted by the Tribe, and effectively relegates any development of mitigation measures to some future date, outside the scope of any NEPA process. *Id.* at ¶¶ 18-23.

Given the forgoing, the Tribe has demonstrated that the NRC Staff has not fulfilled its duties under NEPA with regard to analysis of cultural resources and mitigation for impacts thereto in the FSEIS. As such, the Tribe is likely to prevail on the merits in this matter.

C. The Harm to Powertech and NRC Staff is Minimal or Nonexistent

In stark contrast to the irreparable harms demonstrated by the Tribe to its interests, neither Powertech nor NRC Staff can show any substantial harm associated with the granting of a stay. NRC Staff has no interest at stake that would be impaired by the relatively short stay requested here – as whether or not Powertech is allowed to commence construction during the pendency of this hearing does not affect the agency. To the extent a delay results in some economic impact to a mining company, courts have held that such economic harm is not irreparable. *Sampson v. Murray*, 415 U.S. 61, 90 (1974).

Although Powertech has basis to claim some injury, as it would be prevented from beginning construction until the hearing can be held and the issues presented therein resolved, this harm is minimal. The application in this case has been pending for more than four years –

the few more months associated with the requested stay are not significant in comparison. Further, Powertech must obtain multiple additional permits in order to begin operations, including permits/authorizations from U.S. EPA, the Bureau of Land Management, the State of South Dakota, as well as local government approval. Without these approvals, immediate initial ground-disturbing construction activities on the site will not benefit the company or reduce the time-frame under which actual operations could occur. Therefore, Powertech has no significant injury resulting from a stay over the next few months while the Tribe's legal issues are resolved.

D. The Public Interest Favors a Stay

The Tribe's demonstration of the presence of numerous and significant cultural and historic resources with the project area, combined with the lack of a scientifically-defensible cultural resources survey, alone weighs heavily in favor of granting a stay. Courts have held that the public interest is served by preserving cultural resources. *Quechan Tribe*, 755 F.Supp.2d 1104, 1122 (S.D. Cal. 2010)(“Congress has adjudged the preservation of historic properties and the rights of Indian tribes to consultation to be in the public interest”).

Closely linked with the protection of cultural resources is the U.S. NRC's solemn trust responsibility owed the Tribe. The U.S. Supreme Court phrases this responsibility as “moral obligations of the highest responsibility and trust” to the Tribe, requiring the government use “great care” in its dealings. *Seminole Nation v. U.S.*, 316 US 286, 296 (1942); *U.S. v. Mason*, 412 US 391, 398 (1973). The public interest favors ensuring that the NRC fully meets this lofty standard.

Lastly, the U.S. NRC is bound by international law to ensure the Tribe maintains the ability to protect its cultural and historic resources. In 2010, the United States of America officially endorsed and declared its support of the United Nations Declaration on the Rights of

Indigenous Peoples, United Nations, 07-58681 (March 2008).² Among many other provisions, Article 12 of the Declaration mandates that the Tribe be afforded “the right to maintain, **protect**, and have access in privacy to their religious and cultural sites.”

There is very little on the applicant’s side of the ledger with respect to the public interest test. This is especially true given the number of permit yet to be acquired before full operations may begin. *See* FSEIS at 1-12 to 1-14 (Table 1.6-1 - listing of required federal, state, and local permits). A stay of ground-disturbing construction activities is not a significant impairment for long-term production, should the company prevail in obtaining all of its required permits.

III. Conclusion

Based on the foregoing, the Tribe has demonstrated a right to a stay of the effectiveness of the license.

Respectfully Submitted,

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² Announcement of U.S. Support for the United Nations Declaration on the Rights of Indigenous Peoples, <http://www.state.gov/documents/organization/184099.pdf>.

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Dated at Lyons, Colorado
this 14th day of April, 2014

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Motion for Summary Disposition in the captioned proceeding were served via the Electronic Information Exchange (“EIE”) on the 14th 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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