

April 25, 2014

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))	

**NRC STAFF'S RESPONSE TO OGLALA SIOUX TRIBE'S
MOTION FOR SUMMARY DISPOSITION**

Introduction

The Nuclear Regulatory Commission (NRC) Staff responds to the Oglala Sioux Tribe's Motion for Summary Disposition on the portions of environmental contentions 1A and 6 pertaining to mitigation measures. The Board should deny the motion because the Tribe fails to support its motion with references to undisputed facts. The Board should also deny the Tribe's motion because it lacks a legal basis.

Background

The Staff recently issued Powertech (USA) Inc. a source and byproduct materials license for the proposed Dewey-Burdock in-situ uranium recovery (ISR) project in Fall River and Custer Counties, South Dakota.¹ Before granting Powertech a license, the Staff determined that Powertech met the applicable safety requirements in NRC regulations.² The Staff also evaluated the environmental impacts of Powertech's proposed licensing action, documenting its

¹ Dewey-Burdock Source Materials License (ADAMS Accession No. ML14043A392) (April 8, 2014).

² Safety Evaluation Report for the Dewey-Burdock Project Fall River and Custer Counties, South Dakota (ADAMS Accession No. ML13052A182) (March 18, 2013).

findings in a Final Supplemental Environmental Impact Statement (FSEIS).³ In addition, the Staff considered how Powertech's proposed action may affect properties eligible for inclusion on the National Register of Historic Places. After consulting with interested parties for approximately four years, the Staff finalized a Programmatic Agreement to protect historic and cultural resources that may be affected by the Dewey-Burdock Project.⁴ The Staff finalized the Programmatic Agreement on April 7, 2014. On April 8, 2014, the Staff issued its Record of Decision on Powertech's application for an NRC license, along with the license itself.⁵

I. The FSEIS

The Staff prepared its FSEIS consistent with the National Environmental Policy Act (NEPA) and the NRC's regulations at 10 C.F.R. Part 51, which explain how the NRC complies with NEPA. In the FSEIS, the Staff considers how the Dewey-Burdock Project may affect the environment in numerous areas, such as water resources, historic and cultural resources, public health, ecological resources, and air quality.

When considering the impacts of the Dewey-Burdock project, the Staff takes into account mitigation measures. As the Staff explains in the FSEIS, mitigation measures "are those actions or processes that will be implemented to control and minimize potential adverse impacts from construction, operation, aquifer restoration, and decommissioning of the proposed Dewey-Burdock ISR Project."⁶ In Chapter 6 of the FSEIS, the Staff summarizes mitigation

³ NUREG-1910, Supplement 4, "Environmental Impact Statement for the Dewey-Burdock Project in Fall River and Custer Counties, South Dakota; Supplement to the Generic Environmental Impact Statement for In-Situ Leach Uranium Milling Facilities" (ADAMS Accession Nos. ML14024A477 (Vol. 1) and ML14024A478 (Vol. 2)) (January 31, 2014).

⁴ Programmatic Agreement among U.S. Nuclear Regulatory Commission, U.S. Bureau of Land Management, South Dakota State Historic Preservation Office, Powertech (USA) Inc., and Advisory Council on Historic Preservation regarding the Dewey-Burdock In Situ Recovery Project Located in Falls River and Custer Counties, South Dakota. The documents associated with the Programmatic Agreement can be found at ADAMS Accession Nos. ML14066A347, ML14066A350, ML14098A464, ML14098A155, ML14098A107, ML14098A102, ML14098A110, and ML14099A025.

⁵ Dewey-Burdock Record of Decision (ADAMS Accession No. ML14066A466) (April 8, 2014).

⁶ FSEIS at 6-1.

measures identified by Powertech, as well as measures identified by the Staff itself. In Chapter 4, the Staff explains how the proposed mitigation measures will be effective in avoiding or reducing environmental impacts.⁷

II. The Programmatic Agreement for the Dewey-Burdock Project

Since 2010, the Staff has been consulting with the South Dakota State Historic Preservation Office (SHPO), the Bureau of Land Management (BLM), numerous American Indian tribes, and Powertech regarding properties that may be eligible for inclusion on the National Register of Historic Places. Appendix A of the FSEIS includes correspondence regarding the Staff's consultation under the National Historic Preservation Act (NHPA) through November 2013. In April 2014, the Staff issued an updated summary of its consultation efforts under the NHPA.⁸

Because Powertech has proposed a phased approach to developing wellfields at the Dewey-Burdock site, an approach that is standard in the ISR industry, the Staff worked with the consulting parties to prepare a Programmatic Agreement for the site. Using a Programmatic Agreement in these circumstances is permitted by NHPA regulations.⁹ The purpose of the Programmatic Agreement is to protect not only those historic and cultural properties that may be affected during the initial phase of the Dewey-Burdock Project, but to set forth an approach that will protect properties potentially affected by future phases of the project.

On April 7, 2014, the Staff finalized the Programmatic Agreement for the Dewey-Burdock Project. The signatories to the Programmatic Agreement include the NRC, Powertech, the South Dakota SHPO, BLM, and the Advisory Council on Historic Preservation (ACHP). Among

⁷ See, e.g., FSEIS at 4-6, 4-8, 4-9, 4-31, 4-33, 4-46, 4-76, 4-101, 4-148, 4-193, and 4-216.

⁸ Dewey-Burdock ISR Project Summary of Tribal Outreach (ADAMS Accession No. ML14099A010) (April 8, 2014).

⁹ 36 C.F.R. § 800.4(b)(2).

other issues, the Programmatic Agreement discusses measures that will be used to mitigate impacts to historic or cultural resources that may be affected by the Dewey-Burdock Project. These measures are discussed throughout the Programmatic Agreement, as well as in Appendix B.

III. The Record of Decision

When an agency issues a FSEIS, that document does not represent the end of the agency's NEPA review. Rather, the agency must also issue a Record of Decision.¹⁰ In the Record of Decision, the agency explains whether it is taking the proposed action, no action, or some other alternative. Because the Record of Decision follows the FSEIS, it may incorporate later documents that were relevant to the agency's decision on the proposed action but unavailable when the agency issued the FSEIS.

For the Dewey-Burdock Project, the Staff issued its Record of Decision on April 8, 2014.¹¹ In the Record of Decision, the Staff explains why it decided to issue Powertech a license. The Staff also summarizes mitigation measures associated with the Dewey-Burdock Project, including the measures set forth in the Programmatic Agreement.¹²

Legal Standard for Summary Disposition

The Board cannot grant a motion for summary disposition unless the moving party establishes (1) there is "no genuine issue as to any material fact" concerning the issue on which the party seeks summary disposition, and (2) "the moving party is entitled to a decision as a

¹⁰ See *NEPA and NHPA, A Handbook for Integrating NEPA and Section 106* at 35 ("The NEPA review may conclude with a CE, a FONSI, or a ROD. Under CEQ regulations, CEs, EAs, FONSIs and EISs are not decision documents."). The NRC's regulation at 10 C.F.R. § 51.103 governs the Staff's issuance of a ROD.

¹¹ ADAMS Accession No. ML14066A466.

¹² *Id.* at 3–4.

matter of law.”¹³ To support its motion, “[t]he moving party must attach a short and concise statement of material facts for which the moving party contends that there is no genuine issue to be heard.”¹⁴ The moving party must also explain the legal basis for its motion.¹⁵ The Board must reject the motion where the party opposing the motion shows there is a genuine issue of material fact, or where the opposing party calls into question the legal basis for the motion.¹⁶

Although summary disposition may be used to resolve issues that are shown by undisputed facts to have nothing to commend them, it is not a tool for trying to convince the Board to decide genuine issues of material fact that should be resolved at a hearing.¹⁷ The moving party fails to meet its burden when the filings demonstrate the existence of a genuine material fact or when the matters presented do not foreclose the possibility of a factual dispute.¹⁸ If there is any possibility that a litigable issue of fact exists or any doubt as to whether the parties should be allowed to proceed further, the Board must deny the motion.¹⁹

Discussion

The Tribe fails to meet either part of the test for granting summary disposition. Rather than establishing that there is no genuine issue concerning the facts offered in support of its motion, the Tribe relies on statements that are either factually incorrect or strongly disputed by other parties. The Tribe also fails to explain why it is entitled to summary disposition as a matter

¹³ *FirstEnergy Nuclear Operating Co.* (Davis-Besse Nuclear Power Station, Unit 1), LBP-12-26, 76 NRC 559, 564 (2012); *Southern Nuclear Operating Co.* (Early Site Permit for Vogtle ESP Site), LBP-08-2, 67 NRC 54, 62-63 (2008).

¹⁴ 10 C.F.R. § 2.1205(a).

¹⁵ *Id.*

¹⁶ *Advanced Medical Systems* (One Factor Row, Geneva, Ohio), CLI-93-22, 38 NRC 98, 102 (1993).

¹⁷ *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-01-39, 54 NRC 497, 509 (2001).

¹⁸ *Vermont Yankee*, LBP-06-5, 63 NRC at 122.

¹⁹ *General Electric Co.* (GE Morris Operation Spent Fuel Storage Facility), LBP-82-14, 15 NRC 530, 532 (1982).

of law, citing general legal precedent that does not directly support its motion. Because the Tribe fails to meet both requirements for summary disposition, the Board must reject the Tribe's motion.²⁰

I. The Tribe Does Not Support Its Motion with Undisputed Facts

The Tribe attaches to its motion a "Statement of Undisputed Material Facts." The document includes 45 paragraphs of statements that, in the Tribe's view, are not subject to dispute. In fact, the vast majority of the paragraphs contain nothing more than argument. For example, the Tribe argues:

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.

11. The DSEIS and FSEIS do not analyze the effectiveness of the BLM mitigation and reclamation guidelines incorporated in the FSEIS.

23. The FSEIS does not contain an accurate analysis of the effectiveness of mitigation measures as applied to the Powertech proposal.

31. The FSEIS conclusions regarding cultural resources are not supported by a completed consultation with Tribes and relevant federal and state agencies.

45. NRC Staff ignored public comments requesting the lawful NEPA disclosure and analysis of mitigation measures.

These are not undisputed facts of which the Board may take notice. Rather, they are legal arguments that reiterate, and in many cases seek to expand, the bases within the Tribe's existing Contentions 1A and 6. The Board cannot grant the Tribe summary disposition based on facts that are currently disputed in the hearing.²¹ Nor should the Board allow the Tribe to use its motion to expand the bases in its previously admitted contentions.²²

²⁰ The Staff recently filed its own motion for summary disposition on the safety components of Contentions 2 and 3. The Tribe's motion is directed to environmental Contentions 1 and 6. Because the Tribe's motion raises different issues and relies on different facts, denying the Tribe's motion would not, in itself, mean that there is a genuine issue requiring the Board to also deny the Staff's motion.

²¹ 10 C.F.R. § 2.710(a), as referenced in 10 C.F.R. § 2.1205(c).

²² See *Southern Nuclear Operating Co. (Early Site Permit for Vogtle ESP Site)*, CLI-10-05, 71 NRC 90, 100-01 (2010):

The Staff is attaching to its response a statement of material facts that are relevant to the Tribe's claims. (Attachment 1.)²³ Because the Tribe's statement of "facts" is primarily argument, however, the Staff will not try to refute the Tribe's statements simply by attaching its own statement of facts. Rather, the Staff will address the Tribe's statements for what they are—legal argument—and respond to those arguments within the "Discussion" section of this brief.

Because the Tribe bases its motion on contested facts and arguments, it does not meet the first requirement for summary disposition, which is that there be "no genuine issue as to any material fact" concerning the issue on which the party seeks a favorable ruling.²⁴ Because the Tribe fails to satisfy the first part of this test, the Board must reject its motion.

II. The Tribe Fails to Show It Is Entitled to Summary Disposition as a Matter of Law

The Board must also deny the Tribe's motion because it does not fully take into account the legal standards under which the Board must evaluate the Staff's actions. In particular, the Tribe overlooks NEPA precedent supporting the Staff's actions, as well as relevant NEPA guidance.

A. The Tribe Provides No Support for Its Claim that the Staff Failed to Evaluate the Effectiveness of Mitigation Measures

In Sections A and C of its motion, the Tribe argues that the Staff discussed mitigation measures inadequately in the FSEIS because the Staff did not consider whether the measures

The scope of a contention is limited to issues of law and fact pled with particularity in the intervention petition, including its stated bases, unless the contention is satisfactorily amended in accordance with our rules. . . . Parties and licensing boards must be on notice of the issues being litigated, so that parties and boards may prepare for summary disposition or for hearing. Our procedural rules are designed to ensure focused and fair proceedings.

²³ Under the summary disposition rule in Subpart G of 10 C.F.R. Part 2, a party opposing summary disposition must attach to its answer "a short and concise statement of the material facts as to which it is contended there exists a genuine issue to be heard." The Subpart L rule, which is the rule directly applicable to this proceeding, does not include this requirement. Out of an abundance of caution, the Staff is nonetheless attaching such a statement here.

²⁴ *Davis-Besse*, LBP-12-26, 76 NRC at 564.

it identified would be effective. Although the Tribe cites several decisions from the Ninth Circuit to support its argument, the Tribe does not provide the context for these decisions. Specifically, the Tribe does not explain what these decisions say about *how* an agency evaluates the effectiveness of mitigation measures.

The cases cited by the Tribe, and subsequent cases addressing similar issues, show that an agency considers the effectiveness of mitigation measures by describing how those measures will reduce environmental impacts in a resource area. "The discussion of effectiveness of mitigation measures does not need to be highly detailed."²⁵ For example, in a recent decision finding that an FEIS prepared by the Bureau of Land Management (BLM) complied with NEPA, the court gave the following examples of how BLM considered the effectiveness of mitigation measures:²⁶

- AR 60864 ("Overall, impacts [to air quality], however, would be reduced as the public would have access to fewer miles of unpaved roads and a number of roads would be closed and rehabilitated, decreasing the potential for fugitive dust throughout the Monuments.")
- AR 60900 (prohibition of off-road vehicle use will "reduce erosion, trampling, vandalism, and other surface disturbing impacts that damage geological and paleontological resources.")
- AR 60856–57 (prohibiting OHV use and limiting travel on designated roads would "limit impacts to air quality"; use of watering and chemical suppressants would "greatly reduce the amount of dust emissions from maintenance and on haul roads")
- AR 60869 ("The application of specific mitigation measures identified in activity level planning and NEPA level review would reduce or prevent impacts to water quality.")
- AR 60883 ("Restoration and vegetation treatment projects aimed at improving vegetation health and cover would reduce erosion potential and increase soil productivity.")
- AR 60958 (use restrictions on recreational activities and camping "should reduce or eliminate adverse effects to wildlife")

²⁵ *Moapa Band of Paiutes v. United States BLM*, 2011 WL 4738120 (D. Nev. Oct. 6, 2011).

²⁶ *Wilderness Soc'y v. United States BLM*, 822 F. Supp. 2d 933, 943-944 (D. Ariz. 2011) (affirmed by *Wilderness Soc'y v. BLM*, 526 Fed. Appx. 790 (9th Cir. 2013)).

- AR 60998-61002 ("Restricting surface-disturbing activities to the non-breeding season for Southwestern Willow Flycatchers would eliminate disturbance effects from noise and dust. Direct impacts from loss of habitat would be limited or eliminated as a result of floodplain restrictions")

This is exactly the type of analysis the Staff provides when discussing mitigation measures in the Dewey-Burdock FSEIS. For example:

- [Page 4-8] "Mitigation measures, such as performing concurrent reclamation and revegetation of disturbed surface areas, limiting construction of new access and secondary roads, and restricting vehicular traffic in wellfields and land application areas, will reduce the impacts of surface disturbance associated with construction activities for the land application disposal option."
- [Page 4-10] "Impacts of surface land disturbance will be minimized by mitigation measures, including concurrently reclaiming and revegetating surface disturbed areas, limiting construction of new access roads, and restricting vehicular traffic in wellfields and land application areas."
- [Page 4-46] "The applicant will implement the mitigation measures described in SEIS Section 4.5.1.1.1.1 to control erosion, stormwater runoff, and sedimentation during decommissioning activities."
- [Page 4-76] "The applicant will implement mitigation measures to control erosion and stormwater runoff. The NPDES permit will ensure that stormwater runoff will not contaminate groundwater."
- [Page 4-101] "However, NRC staff considers such chronic direct wildlife exposure to undiluted wastewater unlikely because the applicant's proposed wastewater controls (e.g., pond design, leak detection and mitigation, pressure monitoring) and SDDENR permitting requirements will limit direct contact that aquatic life and terrestrial wildlife have with wastewater solutions."
- [Page 4-148] "These mitigation measures will ensure that noise levels remain below guidelines for offsite receptors [e.g., 55-decibel daytime guideline to protect against activity interference and annoyance (EPA, 1974)] and below OSHA regulatory limits for workers in 29 CFR 1910.95."
- [Page 4-193] "Because construction of aboveground structures will consider topography to conceal plant facilities and infrastructure and mitigation measures (e.g., water application to control fugitive dust) will be implemented to reduce impacts to visual and scenic resources, NRC staff conclude that the visual and scenic impacts from operations for the Class V injection well disposal option will be SMALL."
- [Page 4-216] "In SEIS Section 4.7.1.1, NRC staff concluded that implementation of mitigation measures will result in fugitive dust emission levels that will not destabilize the air quality of the local area nor change the current attainment status of the air quality surrounding the proposed site areas. However, despite the use of controls,

short-term and intermediate fugitive dust emissions are possible when vehicles travel on unpaved roads.”

Accordingly, the Dewey-Burdock FSEIS analyzes the effectiveness of mitigation measures to the extent required for an EIS. The EISs courts have found inadequate, on the other hand, bear little resemblance to the Dewey-Burdock FSEIS. For example, in one case cited by the Tribe, the court stated:

[C]lose inspection reveals that the EIS does not in fact assess the effectiveness of the mitigation measures relating to groundwater. It states only, "Feasibility and success of mitigation would depend on site-specific conditions and details of the mitigation plan." *Nothing whatsoever is said about whether the anticipated harms could be avoided by any of the listed mitigation measures.* This discussion is inadequate.^[27]

In another case cited by the Tribe, the agency’s own expert admitted that the measures identified by the agency were not actually mitigation measures.²⁸ In sum, in none of the cases where the court rejected the agency’s EIS was the document comparable to the Staff’s FSEIS here. These cases therefore fail to support the Tribe’s motion for summary disposition.

The Tribe also cites one case in which the court found that the agency complied with NEPA by assigning an “effectiveness rating” (“low,” “moderate,” or “high”) to mitigation measures.²⁹ But the court did not find that such a rating was necessary in all cases. To the contrary, the court found that, in the EIS before it, the effectiveness rating compensated for a lack of qualitative description as to how mitigation measures would reduce environmental impacts.³⁰ In other words, the EIS lacked the types of descriptions the Staff included in the

²⁷ *South Fork Band Council of Western Shoshone of Nevada v. U.S. Dept. of Interior*, 588 F.3d 718, 727 (9th Cir. 2009) (emphasis added).

²⁸ *Neighbors of Cuddy Mountain v. U.S. Forest Service*, 137 F.3d 1372, 1381 (9th Cir. 1998).

²⁹ *Okanogan Highlands Alliance v. Williams*, 236 F.3d 468, 477 (9th Cir. 2000).

³⁰ *Id.* at 476–77.

Dewey-Burdock FSEIS. Other courts have confirmed that an agency need not assign an effectiveness rating to mitigation measures.³¹

In the remainder of Section A of its motion, the Tribe cites several cases providing general statements of NEPA law, such as the statement that mitigation measures must be discussed with “sufficient detail to ensure that environmental consequences have been fairly evaluated.”³² These cases do not support the Tribe’s motion, because the Tribe does not connect the cited language to the Dewey-Burdock FSEIS and explain why, in this particular case, the Board must grant summary disposition.

In sum, the Tribe fails to show that the Staff ignored whether mitigation measures would be effective in reducing impacts from the Dewey-Burdock Project. Having failed to make this showing, there is no basis for the Board granting summary disposition in favor of the Tribe.

B. The Tribe Incorrectly States that the Staff Finalized Its NEPA Review without Developing Mitigation Measures for Cultural Resources

In Section B of its motion, the Tribe argues that the Staff violated NEPA because, when the Staff issued the FSEIS, it was still consulting on a Programmatic Agreement for the Dewey-Burdock Project. What the Tribe overlooks is that the Staff’s Record of Decision, not the FSEIS, is the document with which the Staff concluded its NEPA review.³³ The Staff did not issue its Record of Decision until April 8, 2014, after it finalized the Programmatic Agreement for the Dewey-Burdock Project.

The Tribe cites several federal court decisions holding that an agency cannot defer its consideration of mitigation measures until after the NEPA process is complete. These cases

³¹ See *North Alaska Env'tl. Ctr. v. Norton*, 361 F. Supp. 2d 1069, 1080 (2005) (citation omitted) (“While it is true that the BLM did not rank the effectiveness of the mitigation measures . . . this Court is nonetheless convinced that the BLM did ‘ensure that the environmental consequences [were] fairly evaluated.’”).

³² *Rock Creek Alliance v. U.S. Forest Service*, 703 F.Supp. 2d 1152, 1179–80 (2010); *Natural Resources Defense Council, Inc. v. U.S. Forest Service*, 634 F.Supp. 2d 1045, 1065–66 (2007).

³³ See *NEPA and NHPA, A Handbook for Integrating NEPA and Section 106* at 31 (stating that “an agency must complete the NEPA and Section 106 reviews before signing a decision document” but explaining that “[u]nder CEQ regulations, CEs, EAs, FONSI, and EISs are not decision documents.”).

are inapposite, because the Staff finalized the Programmatic Agreement *before* issuing the Record of Decision—in other words, while the NEPA process remained open. In fact, the Staff did not issue its Record of Decision until April 8, 2014 precisely because it needed to finalize the Programmatic Agreement, including the mitigation measures specified in the Agreement, before reaching a licensing decision.

The Tribe also cites the Commission’s decision in *Hydro Resources* as support for its arguments, but the Tribe misreads the holding in that case. In *Hydro Resources*, the Commission did not “eventually excuse[] the NRC Staff’s NEPA violations where a post-EIS analysis and review was completed before licensing.”³⁴ Rather, the Commission found the timing of the Staff’s analysis irrelevant because the Staff had not yet issued a license to the applicant.³⁵ The same situation is involved here, where the Staff issued Powertech a license only after finalizing the Programmatic Agreement for the Dewey-Burdock Project. Rather than suggesting that the Staff violated NEPA in this case, *Hydro Resources* supports the Staff’s actions.

In Section B of its motion, the Tribe further argues that the Staff erred by not disclosing all of the mitigation measures for cultural resources in a NEPA document. The Tribe is effectively claiming that the Staff had to make the Programmatic Agreement part of the FSEIS, but it cites no legal basis for its claim. In fact, an agency is not required to merge the two documents—the only requirement is that the Programmatic Agreement inform the agency’s

³⁴ Tribe’s Motion at 10.

³⁵ See *Hydro Resources, Inc.* (2929 Coors Road, Suite 101, Albuquerque, NM 87120), CLI-99-22, 50 NRC 3, 14 (1999) (“The new information [related to cultural resources] did not present a ‘seriously different’ view of the environmental impacts. We do not find any legal flaw with its later release and consideration and, therefore, decline to alter the Presiding Officer’s decision.”).

NEPA review.³⁶ The Staff met that requirement, because it did not conclude its NEPA review until it finalized the Programmatic Agreement for the Dewey-Burdock Project.

In Section B the Tribe also claims that the Staff did not provide an opportunity for comments on mitigation measures related to cultural resources. The Tribe fails to acknowledge, however, that the Staff actively sought to involve the Tribe in developing these very measures. The Staff sent multiple draft versions of the Programmatic Agreement to the Oglala Sioux Tribe and other consulting parties for comment.³⁷ The Staff also held several teleconferences to discuss mitigation measures and other issues related to the Programmatic Agreement.³⁸ In addition, in the DSEIS the Staff discussed mitigation measures that might limit impacts to cultural resources, providing the Tribe and other interested persons an early opportunity to identify measures that might be incorporated in a Programmatic Agreement.³⁹

In conclusion, the Tribe's arguments related to mitigation measures for cultural resources do not support granting summary disposition in its favor.

³⁶ See 36 C.F.R. 800.4, "Identification of Historic Properties," at (b)(2) ("The agency official may also defer final identification and evaluation of historic properties if it is specifically provided for in a memorandum of agreement executed pursuant to § 800.6, a programmatic agreement executed pursuant to § 800.14 (b), or the documents used by an agency official to comply with the National Environmental Policy Act pursuant to § 800.8.").

³⁷ See Dewey-Burdock ISR Project Summary of Tribal Outreach (ADAMS Accession No. ML14099A010) (April 8, 2014) at 14–17 (providing dates, ADAMS accession numbers, and summaries of documents related to the Staff's development of the Programmatic Agreement).

³⁸ *Id.*

³⁹ NUREG-1910, Supplement 4, Volume 1, Draft 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 (ADAMS Accession No. ML12312A039) (November 30, 2012) at Section 4.9.

**C. The Tribe Fails to Show It Should Be Granted Summary Disposition
Because the Staff Considered How the Rules or Permitting Processes of
Other Agencies May Limit Environmental Impacts**

In the first part of Section C of its motion, the Tribe repeats its argument that the Staff failed to evaluate the effectiveness of mitigation measures. The Staff addresses this argument above, explaining why the Tribe fails to show it is entitled to summary disposition on this basis.

In Section C of its motion the Tribe also argues that the Staff did not sufficiently consider mitigation measures in Chapter 2 of the FSEIS, the chapter discussing alternatives to the proposed action. This argument is not currently a basis for Contention 6, because the Tribe did not make this argument in its DSEIS-related contentions.⁴⁰ In any event, the Tribe overlooks sections of Chapter 2 in which the Staff addresses mitigation measures. For example:

- [Page 2-63] Following the completion of mining, either by open pit or underground techniques, the mine will be reclaimed. Stockpiled overburden is reintroduced into the mined area, either during or following extraction operations, and topsoil is reapplied in an attempt to reestablish topography
- [Page 2- 64] The tailings pile is then covered with a thick radon barrier and earthen material or rocks for erosion control.
- [Pages 2-64 and 2-65] When heap leaching is complete, the depleted materials are byproduct material that must be placed in a conventional mill tailings impoundment unless NRC grants an exemption for disposal in place.
- [Page 2-65] Because it is technically more difficult to restore acid mine sites, the use of an acid-based lixiviant was eliminated from detailed analysis in the SEIS.
- [Pate 2-65] Because of the greater consumptive use of groundwater to meet groundwater restoration requirements, the use of an ammonia-based lixiviant was eliminated from detailed analysis.
- [Page 2-66] This method was considered and rejected due to . . . (iv) delay in final restoration and reclamation of the wellfield.

⁴⁰ See *Vogtle*, CLI-10-05, 71 NRC at 100–01 (holding that “the scope of a contention is limited to issues of law and fact pled with particularity in the intervention petition, including its stated bases, unless the contention is satisfactorily amended in accordance with [NRC] rules”).

Each of these measures qualifies as “mitigation” under the Council on Environmental Quality’s definition at 40 C.F.R. § 1508.20.⁴¹ Accordingly, the Tribe fails to show there is a genuine issue as to whether the Staff considered mitigation measures in its alternatives analysis, much less that it is entitled to summary disposition on the issue.

In Section C of its motion the Tribe further argues that the Staff improperly relied on certain mitigation measures that have not been fully developed, and which will be imposed by other agencies. The Tribe fails to explain why this supports summary disposition. Even where mitigation measures fall within the jurisdiction of the agency issuing an EIS, NEPA does not require the agency to include a fully developed mitigation plan in the EIS.⁴² In the examples the Tribe cites on page 14 of its motion, the mitigation measures fall outside the NRC’s jurisdiction. The Tribe fails to explain why it was improper for the Staff to incorporate the available information concerning these measures into its NEPA review.

Furthermore, the Tribe fails to take into account all of the information the Staff provided on mitigation measures. For each of the measures the Tribe cites on page 14 of its motion, as well as the two measures the Tribe cites on page 15, the Staff provides additional information in other sections of the FSEIS. The Staff discusses National Pollution Discharge Elimination Standards (NPDES) throughout the FSEIS. The Staff likewise discusses the statutes and

⁴¹ Sec. 1508.20 states that “Mitigation” includes:

- (a) Avoiding the impact altogether by not taking a certain action or parts of an action.
- (b) Minimizing impacts by limiting the degree or magnitude of the action and its implementation.
- (c) Rectifying the impact by repairing, rehabilitating, or restoring the affected environment.
- (d) Reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action.
- (e) Compensating for the impact by replacing or providing substitute resources or environments.

⁴² See *Bering Strait Citizens for Responsible Res. Dev. v. United States Army Corps of Eng’rs*, 524 F.3d 938, 955 (9th Cir. 2008). See also *Hydro Resources, Inc.* (P.O. Box 777, Crownpoint, NM 87313), CLI-06-29, 64 NRC 417, 427 (2006) (explaining that an EIS need not contain “a complete mitigation plan” or even “a detailed explanation of specific [mitigation] measures which will be employed” and stating that mitigation measures “need not be legally enforceable, funded or even in final form to comply with NEPA’s procedural requirements”). See also *Nuclear Innovation North America LLC* (South Texas Project Units 3 and 4), LBP-11-07, 73 NRC 254, 265 (2011) (explaining that NEPA does not “demand the presence of a fully developed [mitigation] plan” or a “detailed explanation of specific measures which will be employed to mitigate the adverse impacts of a proposed action”).

regulations applying to U.S. Fish and Wildlife Service monitoring plans, U.S. Environmental Protection Agency permits, and actions within the jurisdiction of other agencies. For example, although the Tribe claims that the Staff refers to “vaguely referenced and unspecified sound abatement controls” on page 4-149 of the FSEIS, on this page the Staff actually states, “Noise levels associated with project-related transportation activities on Dewey Road leading to and from the site will be within [Federal Highway Administration] noise abatement criteria at a distance of 480 m [1,575 ft] or greater and will be temporary (1 to 2 years).” Finally, the Tribe’s claim on page 15 of its motion that the Staff ignored groundwater mitigation measures overlooks FSEIS sections in which the Staff discusses these very measures.⁴³ The Tribe also overlooks Powertech’s license, which includes conditions requiring that Powertech restore groundwater to NRC standards.⁴⁴

Because the law the Tribe cites in Section C of its motion does not support its arguments, the Board must deny the Tribe’s request for summary disposition.

Conclusion

The Board should reject the Oglala Sioux Tribe’s motion for summary disposition.

Respectfully submitted,

/Signed (electronically) by/
Michael J. Clark
Michael J. Clark
Counsel for the NRC Staff

/Signed (electronically) by/
Patricia A. Jehle
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Counsel for the NRC Staff

Dated at Rockville, Maryland
this 25th day of April 2014

⁴³ See, e.g., FSEIS at 4-56 (explaining that a Class III UIC permit requires that all production, injection, and monitoring wells be cased and cemented to prevent migration of fluids into and between underground sources of drinking water).

⁴⁴ See, e.g., License Condition 10.6 (requiring Powertech to conduct groundwater restoration activities in accordance with the commitments in Section 6.1 of its license application).

Attachment 1

April 25, 2014

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))	

NRC STAFF'S STATEMENT OF MATERIAL FACTS IN OPPOSITION TO OGLALA SIOUX TRIBE'S MOTION FOR SUMMARY DISPOSITION

The NRC Staff submits the following statement of material facts in response to the Oglala Sioux Tribe's Motion for Summary Disposition regarding mitigation measures. In its accompanying brief, the Staff explains why, based on these facts, the Board should deny the Tribe's motion as a matter of law.

1. On January 31, 2014, the NRC Staff issued the Final Supplemental Environmental Impact Statement (FSEIS) for the Dewey-Burdock Project.
2. On April 7, 2014, the NRC Staff finalized the Programmatic Agreement for the Dewey-Burdock Project.
3. The signatories to the Programmatic Agreement are Powertech, the South Dakota State Historic Preservation Office, the Bureau of Land Management, the Advisory Council on Historic Preservation, and the NRC.
4. Prior to finalizing the Programmatic Agreement, the Staff sent multiple draft versions of the Agreement to the consulting parties for comment.
5. On April 8, 2014, the Staff issued the Record of Decision for the Dewey-Burdock Project.
6. On April 8, 2014, the Staff issued Materials License Number SUA-1600 to Powertech for use in connection with the Dewey-Burdock Project in Fall River and Custer Counties, South Dakota.

7. Under 40 C.F.R. § 1508.20, "Mitigation" includes:
 - (a) Avoiding the impact altogether by not taking a certain action or parts of an action.
 - (b) Minimizing impacts by limiting the degree or magnitude of the action and its implementation.
 - (c) Rectifying the impact by repairing, rehabilitating, or restoring the affected environment.
 - (d) Reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action.
8. In the FSEIS, the Staff analyzes measures that might be used to avoid, minimize, rectify, reduce, avoid, or eliminate environmental impacts related to the Dewey-Burdock Project.
9. The Staff discusses mitigation measures in multiple chapters of the FSEIS, including Chapters, 2, 3, 4, 6, and 7.
10. In Chapter 2 of the FSEIS, the Staff discusses mitigation measures that may be used to limit impacts from alternative actions. For example:
 - [Page 2-63] "Following the completion of mining, either by open pit or underground techniques, the mine will be reclaimed. Stockpiled overburden is reintroduced into the mined area, either during or following extraction operations, and topsoil is reapplied in an attempt to reestablish topography."
 - [Page 2- 64] "The tailings pile is then covered with a thick radon barrier and earthen material or rocks for erosion control."
 - [Pages 2-64 and 2-65] "When heap leaching is complete, the depleted materials are byproduct material that must be placed in a conventional mill tailings impoundment unless NRC grants an exemption for disposal in place."
 - [Page 2-65] "Because it is technically more difficult to restore acid mine sites, the use of an acid-based lixiviant was eliminated from detailed analysis in the SEIS."
 - [Page 2-65] "Because of the greater consumptive use of groundwater to meet groundwater restoration requirements, the use of an ammonia-based lixiviant was eliminated from detailed analysis."
 - [Page 2-66] "This method was considered and rejected due to . . . (iv) delay in final restoration and reclamation of the wellfield."

11. In Chapter 4 of the FSEIS, the Staff explains how the mitigation measures it identifies will avoid, reduce, or minimize environmental impacts. For example:

- [Page 4-8] “Mitigation measures, such as performing concurrent reclamation and revegetation of disturbed surface areas, limiting construction of new access and secondary roads, and restricting vehicular traffic in wellfields and land application areas, will reduce the impacts of surface disturbance associated with construction activities for the land application disposal option.”
- [Page 4-10] “Impacts of surface land disturbance will be minimized by mitigation measures, including concurrently reclaiming and revegetating surface disturbed areas, limiting construction of new access roads, and restricting vehicular traffic in wellfields and land application areas.”
- [Page 4-46] “The applicant will implement the mitigation measures described in SEIS Section 4.5.1.1.1 to control erosion, stormwater runoff, and sedimentation during decommissioning activities.”
- [Page 4-76] “The applicant will implement mitigation measures to control erosion and stormwater runoff. The NPDES permit will ensure that stormwater runoff will not contaminate groundwater.”
- [Page 4-101] “However, NRC staff considers such chronic direct wildlife exposure to undiluted wastewater unlikely because the applicant’s proposed wastewater controls (e.g., pond design, leak detection and mitigation, pressure monitoring) and SDDENR permitting requirements will limit direct contact that aquatic life and terrestrial wildlife have with wastewater solutions.”
- [Page 4-148] “These mitigation measures will ensure that noise levels remain below guidelines for offsite receptors [e.g., 55-decibel daytime guideline to protect against activity interference and annoyance (EPA, 1974)] and below OSHA regulatory limits for workers in 29 CFR 1910.95.”
- [Page 4-193] “Because construction of aboveground structures will consider topography to conceal plant facilities and infrastructure and mitigation measures (e.g., water application to control fugitive dust) will be implemented to reduce impacts to visual and scenic resources, NRC staff conclude that the visual and scenic impacts from operations for the Class V injection well disposal option will be SMALL.”
- [Page 4-216] “In SEIS Section 4.7.1.1, NRC staff concluded that implementation of mitigation measures will result in fugitive dust emission levels that will not destabilize the air quality of the local area nor change the current attainment status of the air quality surrounding the proposed site areas. However, despite the use of controls, short-term and intermediate fugitive dust emissions are possible when vehicles travel on unpaved roads.”

12. In Chapter 6 of the FSEIS, the Staff summarizes mitigation measures that may be used at the Dewey-Burdock Project.
13. In Chapter 7 of the FSEIS, the Staff describes programs that may be used to determine the effectiveness of mitigation measures and the need for additional measures.
14. The Programmatic Agreement includes numerous measures that are designed to avoid, minimize, rectify, reduce, or eliminate impacts to historic sites of significance to American Indian tribes. These measures include:
 - Stipulation 3 describes the procedures for the protection and evaluation of unevaluated properties within the Area of Potential Effects.
 - Stipulation 5 describes the process to be implemented to resolve adverse effects to historic properties.
 - Stipulation 6 describes the process to be implemented for the future identification of cultural resources if ground-disturbing activities will be required for the installation of electrical transmission lines outside the license boundary.
 - Stipulation 9 describes the process to be implemented in the case of unanticipated discoveries.
 - Stipulation 13 concerns compliance monitoring and affirms that the avoidance of adverse effects to historic properties remains the preferred course of action.
 - Appendix D describes the procedures for the treatment of any human remains discovered on state, private, or BLM land.
15. In addition to discussing measures designed to avoid or limit impacts to historic sites, the Programmatic Agreement addresses the following issues:
 - Stipulations 8 (Confidentiality) and 14 (Dispute Resolution) address concerns raised by tribal representatives to the NRC Staff.
 - Appendix B, "Cultural Resource Identification and Consultation Efforts," includes:
 - The Staff's assessment of the Class III Archaeological Investigations
 - Tribal Cultural Survey Results
 - Visual Effects Assessment (indirect effects)
 - A summary of tribal Consultation.
 - Table 1:0, "NRC Determinations of Eligibility and Impact Analysis for Previously Recorded Archaeological Sites and Tribal Sites"

- Table 2:0, “NRC Determination of Potential Adverse Effect Analysis for Previously Recorded Archaeological Sites and Tribal Sites”
 - Appendix C describes the reporting criteria for the annual Monitoring Plan that Powertech must prepare and requires Powertech to provide a report to the NRC detailing how the applicable terms of the Programmatic Agreement are being implemented.
16. The NRC staff incorporated into the Programmatic Agreement tribal comments on eligibility determinations and ways to continue the involvement of the consulting tribes. In response to tribal comments, the NRC changed the classification of some sites from “not eligible for listing on the NRHP” to “unevaluated.” As a result of this change, the parties to the Programmatic Agreement will need to consult with the tribes before Powertech can engage in ground-disturbing activities that could affect the sites.

Respectfully submitted,

/Signed (electronically) by/
Michael J. Clark
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Counsel for the NRC Staff

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CERTIFICATE OF SERVICE

Pursuant to 10 C.F.R. § 2.305, I certify that copies of the "NRC STAFF RESPONSE TO OGLALA SIOUX TRIBE'S MOTION FOR SUMMARY DISPOSITION" have been served via the NRC's Electronic Information Exchange (EIE) or, for those participants exempted from filing through the EIE, by electronic mail, on this 25th day of April, 2014.

***/Signed (electronically) by/
Patricia A. Jehle***

Patricia A. Jehle
Counsel for the NRC Staff
U.S. Nuclear Regulatory Commission
Mail Stop O-15 D21
Washington, DC 20555-0001
(301) 415-8366
Patricia.Jehle@nrc.gov
Date of Signature: April 25, 2014