

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

William J. Froehlich, Chairman
Dr. Mark O. Barnett
G. Paul Bollwerk, III

In the Matter of

POWERTECH USA, INC.

(Dewey-Burdock
In Situ Uranium Recovery Facility)

Docket No. 40-9075-MLA

ASLBP No. 10-898-02-MLA-BD01

July 19, 2018

ORDER

(Establishing Procedures for Filing Motions for Summary Disposition)

On March 16, 2018, the NRC Staff announced to the parties that it had selected a new approach to identify Lakota Sioux historic, cultural, and religious resources (the March 2018 Approach).¹ Licensee Powertech (USA), Inc. (Powertech), and Intervenor Oglala Sioux Tribe subsequently expressed support and willingness to participate in the NRC Staff's selected approach.²

¹ Letter from Cinthya I. Román, Chief, Environmental Review Branch, to John M. Mays, Chief Operating Officer, Azarga Uranium Corp. (Mar. 16, 2018) (ADAMS Accession No. ML18075A500); Letter from Cinthya I. Román, Chief, Environmental Review Branch, to Trina Lone Hill, Director, Cultural Affairs & Historic Preservation Office, Oglala Sioux Tribe (Mar. 16, 2018) (ADAMS Accession No. ML18075A499); Letter from Cinthya I. Román, Chief, Environmental Review Branch, to Consolidated Intervenor (Mar. 16, 2018) (ADAMS Accession No. ML18075A501).

² Oglala Sioux Tribe's Response to NRC Staff's March 16, 2018 Cultural Resources Survey Proposal (Mar. 30, 2018) (ADAMS Accession No. ML18089A655); Letter from John M. Mays, Chief Operating Officer, Azarga Uranium Corp., to Cinthya I. Román, Chief, Environmental Review Branch (Apr. 11, 2018) (ADAMS Accession No. ML18101A223); Tr. at 1346, 1392, 1394.

On July 2, 2018, the NRC Staff informed the Oglala Sioux Tribe that it was discontinuing its efforts to implement the March 2018 approach because the NRC Staff believed “the Tribe’s [recent] proposal was fundamentally incompatible with the March 2018 approach.”³ On July 5, 2018, the NRC Staff filed a motion with the Board to set a deadline different from the ten-day deadline required by section 2.323 for filing summary disposition motions to resolve Contention 1A.⁴ By order issued July 11, 2018, the Board suspended the deadline for filing summary disposition motions, noting that the deadline for any response to the NRC Staff’s July 5 motion was not due until July 16, 2018.⁵ The Oglala Sioux Tribe and Powertech filed timely responses.⁶

Powertech “supports NRC Staff’s filing and requests that the ASLB establish a briefing schedule as soon as possible so that a ruling on the substance of an NRC Staff-initiated motion can be entertained.”⁷

However, the Oglala Sioux Tribe staunchly opposes the NRC Staff’s motion:

The Tribe does not believe that NRC Staff’s request to abandon the March 18 approach in favor of Motions for Summary Disposition is appropriate or consistent with federal trust responsibilities. Rather, the Tribe believes that it is incumbent on NRC Staff to engage in substantive discussions on an acceptable methodology for a field survey and oral interview, including the specific bases upon which

³ Motion to Set Filing Deadline for Summary Disposition Motions (July 5, 2018) at 1 (ADAMS Accession No. ML18186A684) [hereinafter NRC Staff July 5 Motion]; see also Letter from Cinthya I. Román, Chief, Environmental Review Branch, to Kyle White, Interim Director, Oglala Sioux Tribe Natural Resources Regulatory Agency, Oglala Sioux Tribe at 2 (July 2, 2018) (ADAMS Accession No. ML18183A304).

⁴ See NRC Staff July 5 Motion.

⁵ Licensing Board Order (Suspending Deadline to File Motions for Summary Disposition) (July 11, 2018) (unpublished) (ADAMS Accession No. ML18192A785).

⁶ See Oglala Sioux Tribe’s Response to NRC Staff Motion to Set Filing for Summary Disposition Motions (ADAMS Accession No. ML18200A183) [hereinafter Oglala Sioux Tribe Response]; Powertech (USA), Inc.’s Response to United States Nuclear Regulatory Commission Staff’s Motion to Impose Filing Deadlines for Summary Disposition Motions for Contention 1A (ADAMS Accession No. ML18197A336) [hereinafter Powertech Response]. Consolidated Intervenor’s did not file a response to the NRC Staff’s July 5 motion.

⁷ Powertech Response at 2.

NRC Staff believes there are no aspects of the Tribe's discussion draft proposals that be incorporated into an acceptable field survey methodology.⁸

The Oglala Sioux Tribe also submits that "the Board should require NRC Staff to engage its Tribal Liaison Program to facilitate discussions [regarding a methodology],"⁹ and that "the parties should avail themselves of a Settlement Judge as contemplated by 10 C.F.R. § 2.338."¹⁰

Alternatively, the Oglala Sioux Tribe requests that, if the Board institutes a schedule for summary disposition motions, then the Board also "set an August 17, 2018 deadline for the Tribe to file a motion compelling Powertech and NRC Staff to disclose all relevant information (e.g. costs previously incurred, scope of work, survey data collected in June 2018, budgets, etc.) relevant to the pending contention."¹¹

In our order issued October 19, 2017, we outlined four possible paths to resolve this contention. The Board observed that the parties had the following options:

(1) in the near term, [the parties] may submit a joint motion to request the appointment of a Settlement Judge to conduct settlement negotiations to assist in the resolution of this dispute pursuant to 10 C.F.R. § 2.338, and pursue that avenue in an attempt to reach a settlement and dismissal of the contention; (2) [the parties] may continue to confer with one another in an attempt to find a method of addressing the deficiencies in the FSEIS that is mutually agreeable to both parties, and, if successful, file a joint motion for dismissal of the contention; (3) the NRC Staff may, without consultation with the Oglala Sioux Tribe, consider and select a method²³⁸ for addressing the FSEIS deficiencies, and file a new motion for summary disposition; or (4) if options one through three do not result in a resolution, prepare for and participate in an evidentiary hearing to resolve Contention 1A on the reasonableness of the terms of the NRC Staff's proposed open-site survey.

* * * * *

⁸ Oglala Sioux Tribe Response at 3.

⁹ Id. at 3–4.

¹⁰ Id. at 4.

¹¹ Id.

²³⁸ This may be a method entirely different from the currently proposed open-site survey or a version of the open-site survey that the NRC Staff can argue—with adequate legal and factual support—is not subject to the dispute of material fact on the method’s reasonableness.¹²

While, as we have previously recognized, it is inappropriate for the Board to direct the NRC Staff in the conduct of its NEPA review activities, it is also clear that the Board has the responsibility to manage the schedule for this adjudicatory proceeding.¹³ Therefore we grant the NRC Staff’s motion to set a schedule for summary disposition motions, and adopt the following procedural schedule for the efficient resolution of this proceeding.¹⁴

As set forth in Appendix A, any motion for summary disposition to resolve Contention 1A shall be due no later than August 17, 2018. In accordance with section 2.1205, motions must include a written explanation of the basis of the motion.¹⁵ “The 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.”¹⁶ Any response in support of a motion for summary disposition is due on August 31, 2018.

Any response opposing a motion for summary disposition must be filed on or before September 21, 2018. The party shall attach to any answer opposing the motion a short and concise statement of the material facts as to which it contends there exists a genuine issue to be heard. All material facts set forth in the statement required to be served by the moving party will be considered to be admitted unless controverted by the statement required to be served by

¹² LBP-17-9, 86 NRC 167, 209 (2017).

¹³ See 10 C.F.R. §§ 2.319(k), 2.332.

¹⁴ Although the Board on more than one occasion has suggested the possibility of having a settlement judge appointed for this proceeding, see, e.g., supra note 12 and accompanying text, Tr. at 1221–26 (Nov. 16, 2017); Tr. at 55–56 (Nov. 7, 2016), under the agency’s rules of practice, a joint motion of the parties is required, see 10 C.F.R. § 2.338(b)(1).

¹⁵ 10 C.F.R. § 2.1205(a).

¹⁶ Id.

the opposing party. No further supporting statements or responses to the motion will be entertained unless the Board requests such filings.

Finally, the Oglala Sioux Tribe requests the Board “set an August 17, 2018 deadline for the Tribe to file a motion compelling Powertech and NRC Staff to disclose all relevant information (e.g. costs previously incurred, scope of work, survey data collected in June 2018, budgets, etc.) relevant to the pending contention.”¹⁷ This request is denied, with one proviso. After reviewing any motions for summary disposition and supporting response, if the Oglala Sioux Tribe can identify relevant information that it believes has been withheld in violation of section 2.336, such that it is precluded from presenting facts essential to justify its opposition to the dispositive motion, the Oglala Sioux Tribe should include this issue in its response to the motion for summary disposition.¹⁸ In the response, the Oglala Sioux Tribe should identify the allegedly withheld information and explain why it is relevant and necessary to support its response.¹⁹ If such a showing is made, the Board will

¹⁷ Oglala Sioux Tribe Response at 4.

¹⁸ 10 C.F.R. § 2.710(c).

¹⁹ Section 2.336 provides for “general discovery” in Subpart L proceedings. In pertinent part, the regulation requires that “all parties . . . shall . . . disclose and provide . . . all documents and data compilations in the possession, custody, or control of the party that are relevant to the contentions.” Id. § 2.336(a)(2)(i). The regulation establishes that each party’s duty to submit these mandatory disclosures is ongoing, and that each party must make these mandatory disclosures once a month and without the filing of a discovery request by other parties. Id. § 2.336(a), (d). Furthermore, the Commission has made clear that the scope of mandatory disclosures is “wide-reaching.” Crow Butte Res., Inc. (N. Trend Expansion Project), CLI-09-12, 69 NRC 535, 572 (2009).

determine whether, and under what schedule, additional party filings are appropriate.

It is so ORDERED.

FOR THE ATOMIC SAFETY
AND LICENSING BOARD

/RA/

William J. Froehlich, Chairman
ADMINISTRATIVE JUDGE

Rockville, Maryland
July 19, 2018

APPENDIX A

Dispositive Motion(s) Schedule

Dispositive Motion(s) on Contention 1A Due	August 17, 2018
Responses Supporting Summary Disposition Motion(s) Due	August 31, 2018
Responses Opposing Summary Disposition Motion(s) Due	September 21, 2018

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)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **ORDER (Establishing Procedures for Filing 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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POWERTECH (USA) INC., DEWEY-BURDOCK IN SITU RECOVERY FACILITY
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 19th day of July, 2018