

**IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

OGLALA SIOUX TRIBE,

Petitioner,

v.

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY,

Respondent.

Case No. 21-1167

JOINT MOTION TO HOLD CASE IN ABEYANCE

Petitioner Oglala Sioux Tribe and Respondent United States Environmental Protection Agency (EPA) jointly move to hold this petition for review in abeyance until resolution of a parallel proceeding currently pending before the EPA Environmental Appeals Board. Movant-Intervenor Powertech (USA), Inc. expresses no position on this motion. As grounds for this motion, the Oglala Sioux Tribe and EPA state:

1. On January 22, 2021, the Oglala Sioux Tribe filed its petition for review of EPA's approval of an aquifer exemption, a final agency action associated with EPA's issuance of Underground Injection Control (UIC) permits under the Safe Drinking Water Act for the Dewey-Burdock In-Situ Recovery Project in Custer and Fall River Counties, South Dakota (the Dewey Burdock Project).

The pending petition is based on the Safe Drinking Water Act's judicial review provision for final agency actions. 42 U.S.C. § 300j-7(a)(2); *see* 40 C.F.R. § 23.7.

2. An approved aquifer exemption excludes an aquifer or a portion of an aquifer from protection as an underground source of drinking water under the Safe Drinking Water Act in accordance with EPA regulations. *See* 40 C.F.R. §§ 144.1(g), 144.7, and 146.4; *see also Western Nebraska Water Resources Council v. EPA*, 943 F.2d 867 (8th Cir. 1991). EPA approved an aquifer exemption for the Dewey Burdock Project on November 24, 2020, the same date that EPA issued the UIC permits associated with this exemption.
3. The Dewey Burdock Project intends to recover uranium and produce yellowcake. *Oglala Sioux Tribe v. U.S. Nuclear Regulatory Comm'n*, 896 F.3d 520, 524 (D.C. Cir. 2018). The project proposes to use Class III UIC wells to inject an oxidant-charged solution, called lixiviant, into the production zone aquifer where it will oxidize and dissolve the mineralized uranium. *See id.* at 524 n.1. The uranium-bearing lixiviant will be pumped from the production wells to a processing plant, where the dissolved uranium will be removed from solution. *Id.* Class V injection wells will be used to dispose of liquid wastewater generated during uranium recovery through deep well disposal. *See id.* at 524.

4. In addition to the aquifer exemption at issue in this petition for review, the Dewey Burdock Project requires two permits under the Safe Drinking Water Act before it may commence construction and operation. Those permit actions are currently under separate administrative review.
5. The Dewey Burdock Project requires permits under the Safe Drinking Water Act's Underground Injection Control Program, 42 U.S.C. §§ 300h – 300h-8. The wells proposed to be used to inject the lixiviant into the production zone aquifer require a Class III permit under EPA's Safe Drinking Water Act regulations governing underground injection wells. *See* 40 C.F.R. §§ 144.6(c)(2); 144.11; 144.31. The Class V wells proposed to be used to dispose of liquid wastewater are also permitted pursuant to EPA's regulations. *See id.* §§ 144.6(e); 144.11; 144.25.
6. EPA Region 8 issued permits for the Class III and Class V injection wells for the Dewey Burdock Project on November 24, 2020. The Oglala Sioux Tribe filed a petition for review of these permit decisions with the EPA's Environmental Appeals Board, *In re Powertech (USA) Inc.*, UIC Appeal No. 20-01. *See* 40 C.F.R. § 124.19(a) (providing for appeal of an underground injection control permit decision to the EPA Environmental Appeals Board). That appeal is pending, and therefore the permits are stayed, and are not subject to judicial review until the administrative challenge is resolved.

7. The aquifer exemption challenged in this Court is ancillary to the UIC permits under review by the EPA Environmental Appeals Board — at this time, this exemption has no practical effect without a final UIC permit. But EPA’s approval of the aquifer exemption is not subject to review by EPA’s Environmental Appeals Board. *In Re Florence Copper, Inc.* 17 E.A.D. 406, 419-21 (EAB 2017).
8. Holding this case in abeyance allows any judicial review of the applicable permits and aquifer exemption to occur at the same time.
9. The Court should hold this case in abeyance until EPA concludes its administrative review of the UIC Class III and Class V permits for the Dewey Burdock Project and issues any final permits. An Environmental Appeals Board decision could contain determinations that would affect the aquifer exemption approval that is the subject of this petition for review. The Environmental Appeals Board may leave the permits unchanged, or remand the permits to EPA Region 8 for further review, withdrawal or modification. An EPA decision to withdraw or modify one or both UIC permits could result in EPA’s withdrawal or modification of its approval of the associated aquifer exemption (*e.g.*, to change the boundaries of the exemption). An abeyance of this case seeking review of the aquifer exemption will ensure the Court

reviews the aquifer exemption only if and when a UIC permit is issued that relies on the Nov. 24, 2020 aquifer exemption approval.

10. Depending on the outcome of the Environmental Appeals Board proceeding, the Oglala Sioux Tribe will likely seek judicial review, which would likely be filed in this Court. *See* 42 U.S.C. § 300j-7(a)(2). In this event, judicial review of the injection well permits and the aquifer exemption approval will occur most efficiently and economically if the review of the permits and the associated aquifer exemption approval are briefed, heard, and decided together. Proceeding to briefing on the existing petition for review at this time will result in this Court's piecemeal consideration of the issues.
11. The Oglala Sioux Tribe and EPA jointly submit this motion. Powertech (USA), Inc. has moved to intervene in this case, but Powertech should not be prejudiced by this requested abeyance because it cannot proceed with the Dewey Burdock Project until the Class III and Class V permits are final.

WHEREFORE, the Court should order this case held in abeyance until the EPA Environmental Appeals Board decides the Oglala Sioux Tribe's petitions for review of the Class III and Class V well permits for the Dewey Burdock Project. EPA proposes to file a status report advising the Court of developments in the EPA Environmental Appeals Board decision in 60 days, and every 60 days thereafter until an Environmental Appeals Board decision.

Dated: February 24, 2021

Respectfully submitted,

s/ Alan D. Greenberg

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CERTIFICATE OF COMPLIANCE

1. This document complies with the type-volume limit of Federal Rule of Appellate Procedure 27(d)(2) because, excluding the parts of the document exempted by Federal Rule of Appellate Procedure 32(f), this document contains 1,026 words, as counted by counsel's word-processing system.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Joint Motion to Hold Case in Abeyance was filed on February 24, 2021 through the Court's CM/ECF system, which will serve all registered counsel.

s/ Alan D. Greenberg
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