BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

In re Powertech (USA) Inc.	)	UIC Appeal No. 20-01
Permit Nos. SD31231-00000 and SD52173-00000	)	

OGLALA SIOUX TRIBE'S RESPONSE TO BOARD ORDER REQUESTING ADDITIONAL BRIEFING

In its June 30, 2023 Order Requiring Additional Briefing, the Board requested the parties to provide responses to four questions. Petitioner Oglala Sioux Tribe provides the following responses.

1. Address the impact of the D.C. Circuit's decision in *Oglala Sioux Tribe v. U.S. Nuclear Regulatory Commission*, 45 F.4th 291 (D.C. Cir. 2022), on the issues set forth in the petition for review filed on December 24, 2020, and identify what remains for resolution by the Board.

The D.C. Circuit's decision in *Oglala Sioux Tribe v. U.S. NRC*, 45 F.4th 291 (D.C. Cir. 2022) (*OST II*) was limited to the issue of whether NRC satisfied its NEPA and NHPA obligations on remand from the previous D.C. Circuit opinion. *Id*. at 298. A NEPA "compliance" finding was not entered in *OST II*. *Id*. at 302. Rather, as with the previous opinion, *OST II* concluded that NRC's permitting did not involve "a NEPA violation requiring remand." *Id*. In deciding the violation did not require remand, *OST II* expressly did not resolve the "thorny question" of whether or not NRC is bound by the Council on Environmental Quality's NEPA regulations, further distinguishing the limited findings from questions regarding legal, factual, and policy questions involving EPA's ability to rely on NRC to achieve compliance with the Nation's premier environmental law. *Id*. at 300. Therefore, *OST II* has almost no legal or practical effect on this Board's adjudication of NEPA issues that turn on the Safe Drinking Water Act ("SDWA") and EPA's regulations, including those that implement NEPA.

Because EPA Region 8 ("the Region") did not intervene to address EPA's licensing process in the NRC licensing litigation, there is no legal doctrine identified by any party that would allow the EAB

to simply apply *OST II's* holdings regarding NRC's licensing regime to EPA's statutory duties. Although the previous filings vaguely hint at the law of the case doctrine for the proposition that EAB is somehow bound by *OST II*, that doctrine requires, "the *same* issue presented a second time in the *same* case in the *same* court should lead to the *same* result." *LaShawn A. v. Barry*, 87 F.3d 1389, 1393, 318 U.S. App. D.C. 380 (D.C. Cir. 1996) (en banc) (emphasis in original) *Cobell v. Salazar*, 400 679 F.3d 909, 916-17 (2012). Because the Region did not intervene in either Court of Appeals proceeding, it is no surprise that *OST II* did not reach any issues regarding the authorities applicable to EPA's exercise of Safe Drinking Water Act ("SDWA") jurisdiction in context of the National Historic Preservation Act ("NHPA"). Simply put, the question of the Region's compliance with NEPA and NHPA have not been presented to any court and both are properly addressed by the EAB applying EPA's regulations to the administrative record, supplemented to address post-permitting materials in the Region's possession and evidence the Tribe may offer. *Id.*

Similarly, without EPA's involvement in the litigation, *OST II* did not, and could not, reach the question of whether NRC's unique post-licensing NHPA and NEPA compliance procedures that culminated in a Programmatic Agreement actually complied with the Region's NEPA and NHPA duties. *Id*. Although NRC's decisionmaking process did not warrant a second remand in context of NRC's unique NEPA processes, there has been no EAB adjudication on an administrative record to determine whether NEPA authorities applicable to EPA allow the Region to defer important siting questions to NRC. The Tribe is not aware of any EPA regulations that allow the Region to issue a permit without first addressing the direct, indirect, and cumulative impacts of the siting decisions, including those involving cultural resources. NRC's regulations may operate to allow NEPA compliance after decisions are made, but Petitioner asserts that there are no EPA authorities that do allow EPA to avoid its legal responsibility to ensure NEPA compliance before decisions are made.

The Region claims to have designated NRC as a "lead agency," but provides no administrative record besides a "Response to Comments" to support that claim. Region Response to Petitioner's

Motion to Amend Petition for Review at 5 n. 4. A full administrative record is required to determine, among other things, why the Region did not join as a signatory to the Programmatic Agreement (finalized without any tribal signatories in early 2014) nor designate NRC as the "lead Federal agency" until the eve of the permit decision in late 2020. *Id* (citing to "the Region's Response to Comments on the draft permits"). This proverbial "last minute" designation is unambiguously contrary to clear Advisory Council on Historic Preservation ("ACHP") statements obliging the agency to do so "as early as possible in the Section 106 review process." ACHP Frequently Asked Questions About Lead Federal Agencies in Section 106 Review (found at https://www.achp.gov/digital-library-section-106-landing/frequently-asked-questions-about-lead-federal-agencies). This is for good reason, as the so-called "lead agency" cannot possibly incorporate into its consultation issues associated with a second agency's permitting if that second agency has not alerted the "lead" agency of its responsibilities in this regard. This issue warrants this Board's review.

In any case, at this stage in the Board's process, there is simply no record yet submitted that can demonstrate the Region took the necessary steps, at the correct time, as required to avoid remaining "individually responsible for [the Region's] compliance" with NHPA. 36 C.F.R. § 800.2(a)(2). Lacking access to the full administrative record (including documentation of any communications with non-agency parties including affected tribes and the permit applicant), given the extreme and unusually late designation of "lead agency" in this case, it is impossible for the Board (or the Tribe) to discern the basis for the Region's inexplicable course reversal to relying on a much criticized NRC process.

Further, the *OST II* ruling does not resolve the geographic scope issues implicated by a Programmatic Agreement that is limited to "the Dewey-Burdock Project site and its immediate environs, which may be directly or indirectly impacted by construction and operation activities associated with the proposed project" that is subject to the U.S. Nuclear Regulatory Commission ("NRC") the licensing jurisdiction. Programmatic Agreement at 2. The Programmatic agreement limited its reach only to that area that "coincides with the extent of potential ground disturbance…." Programmatic Agreement

Appendix A at 4. The Programmatic Agreement also expressly did not extend to project activities that impact or "occur on lands outside the [NRC] license boundary…." Programmatic Agreement at 2. Thus, impacts to water resources, which are of extreme cultural importance to the Tribe, are left poorly accounted for. *See* OST Petition for Review at 10, 33 (specifically asserting groundwater and impacts thereto as issues of cultural significance to the Tribe). Apart from these unreasonable geographic "surface disturbance" limitations that have not been shown to coincide with the groundwater impacts, the analysis of many project features (and associated alternatives and mitigation) were deferred to a later date, and have not been addressed by NRC or the D.C. Circuit. Nothing in *OST II* addresses the Region's duties under SDWA and EPA regulations implementing NEPA and NHPA.

Further, the overlap between *OST II* and this proceeding was limited to the possibility that the NRC licensing proceeding would be overturned, eliminating the premise on which the Region asserted compliance with the NHPA's consultation duties. In its June 10, 2021 Order Granting Motion to Stay Subject to Conditions, the Board stated that its decision to stay the proceedings subject to conditions was based on a "motion filed by the Region requesting to further stay this matter until the D.C. Circuit Court of Appeals ('D.C. Circuit' or 'Court') resolves a 'crucial National Historic Preservation Act (NPHA) [sic] question' pending before the Court." June 10, 2021 Order at 1. The "crucial" NHPA decision under review did not involve the EPA, and EPA never presented an administrative record for judicial review. *OST II* did not fully resolve the NHPA questions as they apply to the Region, only as they apply to NRC.

In granting the stay, the Board expressly ordered that "[t]his matter is stayed until such time as the D.C. Circuit renders a decision disposing of the challenge to NHPA compliance in connection with the Dewey-Burdock Project that is pending before the Court." *Id*. at 5. For its part, in its opposition to any stay of proceedings, Powertech argued that "any decision by the D.C. Circuit has no bearing on the matter before the Board because '[i]t is only the Region's permitting decisions that are under review here, not the NRC's compliance in a different administrative proceeding'…. *Id*. at 3. Thus, Powertech

seems to accept the non-binding application of *OST II*, with a limited and speculative l effect of the D.C. Circuit's decision on the NHPA arguments raised by the Tribe before this Board.

While the D.C. Court of Appeals opinions may be informative, persuasive, or even controlling on narrow points of law involving a direct holding, no party has offered a doctrine or controlling authority that would provide the EAB with discretion to foreclose further argument based on *OST II*, which presented *differing* issues, on a *different* permit, by a *different* agency, in a *different* adjudicatory forum. *LaShawn A. v. Barry*, 87 F.3d 1389, 1393 (D.C. Cir. 1996) (en banc). In short, *OST II* resolved no issue that has been presented for EAB decision based on EPA's SDWA authorities or NEPA compliance, the permits EPA issued, and the administrative record that EPA has not yet produced.

2. Explain, in light of the D.C. Circuit's decision in *Oglala Sioux Tribe v. U.S. Nuclear Regulatory Commission*, 45 F.4th 291 (D.C. Cir. 2022), the relevance of the cultural resources survey protocol for the Crow Butte Resources Inc. In Situ Uranium Recovery Facility in Nebraska to the November 24, 2020, permitting decisions at issue here.

On a very specific set of facts limited to U.S. NRC, the D.C. Circuit chose to not again remand the U.S. NRC decision to move forward with issuance of the NRC license to Powertech without a cultural resources survey based on a finding that "the [cultural resources] information was unavailable because of 'the Tribe's demonstrated unwillingness or unjustifiable failure to work' with the Commission, with no 'reasonable assurance' of a future accord. Without the Tribe's participation, its cultural resource information 'would not otherwise be obtainable' and thus was unavailable." *Oglala Sioux Tribe v. U.S. Nuclear Regulatory Comm'n*, 45 F.4th 291, 301 (D.C. Cir. 2022). The cultural resources survey protocol developed for the Crow Butte Resources facility in collaboration with the Oglala Sioux Tribe demonstrates the availability of the cultural resources information in the instant case that can, should, and must inform permitting exercises, including that by EPA and this Board.

Importantly, the Atomic Safety and Licensing Board that handled the adoption of the Crow Butte Resources facility cultural resources survey took pains to emphasize the importance of the collaboration and serves to dispel the myth that the Oglala Sioux Tribe is uncooperative in these endeavors, although

it also requires the agency and, importantly, the permit/license applicant to demonstrate the same level of collaboration and cooperation:

> Regarding the cultural resources survey methodology and process crafted by the parties and utilized in this proceeding, which included a CRM firm chosen by OST and retained using funding provided by CBR, OST counsel described it as "unique" and "somewhat of a model on how to proceed in other matters so that we have both NEPA compliance and [NHPA] compliance" while at the same time characterizing the NRC Staff's approach in creating the process as being "very cooperative and very patient with us." Tr. at 3120. Given the result here, OST counsel's observations about the cultural resources methodology and process developed in this proceeding warrant serious consideration by the NRC Staff, license applicants, and Native American tribes or individuals for use in the future to achieve compliance with applicant and NRC NHPA and NEPA responsibilities.

January 5, 2023 Memorandum and Order Granting Motion to Terminate Proceeding at 5 n. 19 (In the Matter of Crow Butte Resources, Inc.) (NRC Accession Number ML23005A127) (attached).

Here, because the Crow Butte Resources cultural resource protocol establishes the availability of the relevant cultural resources information necessary to fulfill the EPA's ongoing NHPA obligations, which did not exist at the time the D.C. Circuit issued its decision, circumstances have changed substantially. A concrete example of a viable means to fulfill the Region's obligations consistent with EPA's regulations, whether or not the Region actually took timely and necessary steps to delegate its responsibility to NRC, thus warrants review by the Board.

Additionally, the *OST II* Court entered no findings regarding the Tribe's previous interactions with the Region or the Tribe's ongoing willingness to cooperate with the Region's pre-permitting efforts, should this Board remand for additional identification and evaluation. By contrast, identification and evaluation was deferred, and is still ongoing, as part of NRC's post-licensing proceedings. *OST II* did confirm the NRC "can employ a phased identification and evaluation of historic properties through a programmatic agreement '[w]hen effects on historic properties cannot be fully determined prior to approval of an undertaking.'" *Id*. at 306. Therefore, NRC's "phased identification and evaluation process" remains relevant to the Region's attempt to rely on NRC's incomplete process. The Region's administrative record cannot have closed on an ongoing identification and evaluation process. The Crow

Butte materials therefore inform an ongoing, post-permitting process the Region purportedly chose to rely upon for permit compliance.

The Crow Butte materials are also relevant to any records the Region may possess regarding the availability of cultural resource information to meet EPA permitting duties. Based on the Region's filings, the administrative record may confirm that the Region will "remain individually responsible" for NHPA compliance based on the failure to timely designate NRC as the lead, or perhaps separately, to join as a Programmatic Agreement participant. Region Resp. at 5 n. 4. Thus, per the PA, the cultural resources evaluation process is incomplete and the ongoing "identification and evaluation" is relevant to this Board's review of the Region's compliance with EPA's interdisciplinary regulations, even if the NRC violations, viewed in light of NRC's procedures and mission, did "not merit remand." *OST II* at 306.

3. Explain how Board consideration of the November 2022 local ordinance referenced in the Tribe's motion to amend is consistent with Board precedent addressing the scope of Board review of UIC permitting decisions. See, e.g., In re Sammy-Mar, L.L.C., 17 E.A.D. 88, 98 (EAB 2016); In re Envtl. Disposal Sys., 12 E.A.D. 254, 266-267 (EAB 2005); In re Federated Oil & Gas, 6 E.A.D. 722, 725 (EAB 1997).

In the cases referenced by the Board, at stake was how the local regulations raised by the Petitioner would apply to the particular project at issue. In contrast, in this case, the project itself has been deemed illegal as a nuisance in the locale in which it is proposed. Thus, unlike the cases referenced by the Board, the question does not involve how the project will impact local emergency services, property values, or hunters (In re Sammy-Mar, L.L.C., 17 E.A.D. 88, 98 (EAB 2016); nor a request for the Board to resolve competing strictly private party property rights (In re Envtl. Disposal Sys., 12 E.A.D. 254, 266-267 (EAB 2005), In re Federated Oil & Gas, 6 E.A.D. 722, 725 (EAB 1997)).

The regulations allow the agency to reconsider suitability of a facility location where "new information or standards indicate that a threat to human health or the environment exists which was unknown at the time of permit issuance." 40 C.F.R. § 144.39(c). At this stage, the question is not how this Board may rule on the merits of the interplay between the ordinance and the UIC permit. The

question is whether the Board is obliged to uphold a permitting decision that contradicts a local ordinance that is more protective than the UIC permit.

In setting aside a blanket ban on a UIC-permitted facility, the 4th Circuit distinguished several permissible local ordinances that may have survived scrutiny, including evidence that the "UIC well constitutes a public nuisance as defined by common law or […that] a common law nuisance action against" the permittee was brought. *EQT Prod. Co. v. Wender*, 870 F.3d 322, 335 (4th Cir. 2017). The opinion also noted that a local effort "to codify common law in the Ordinance" may not have been preempted by a SDWA UIC. *Id.* The November 2022 ordinance is exactly the kind of record evidence that addresses the authority of the Region – and this Board – to abide by local regulations prohibiting what the UIC program may otherwise permit. *Id.* This Board has a constitutional duty to ensure the Region's SDWA licensing does not impinge on a proper exercise of a local codification of the common law of nuisance. *Id.*

4. Address how Board consideration of the three technical reports the Tribe identifies in its motion to amend (dated December 23, 2020, May 10, 2021, and August 10, 2021) comports with the regulations at 40 C.F.R. §§ 124.9, .18(b) and (c) that set forth the contents of the administrative record and deem it complete on the date the final permit is issued, as well as Board precedent on supplementing the administrative record as addressed in In re Gen. Elec. Co., 18 E.A.D. 575, 610-11 (EAB 2022).

The referenced three technical reports should be considered by the Board despite the standard language in 40 C.F.R. §§ 124.9 and .18(b) and (c) generally providing that the record includes documents before the agency at the time of the Region's decision. Administrative procedure principles and case law routinely recognize that agencies have authority and discretion to consider post-decision information when that information demonstrates a significant change in circumstances.

Here, the changes at issue not only affect the size and scale of the project through the addition of multiple satellite mines, but also the technical specifications for the Project, as Powertech now plans to include waste and residues from uranium processing involving wells slated to use acid leachates. At minimum, this development substantially changes EPA Region 8's consideration of the cumulative

impacts of the construction and operation of the drill holes authorized through the UIC permits at issue in this case. *See* 40 C.F.R. § 144.33(c)(3).

UIC permits are not fixed in time of the Region's signature, particularly when the Board has not taken final agency action on behalf of the EPA on the permit application. For example, the UIC regulations specifically contemplate EPA consideration of changing circumstances at a site, even after a permit is issued. 40 C.F.R. § 144.39. The regulations therefore contemplate revocation and reissuance, or modification, of permits where "information was not available at the time of permit issuance . . . that would have justified the application of different conditions at the time of issuance. For UIC permits (§ 144.33), this cause shall include any information indicating that cumulative effects on the environment are unacceptable." 40 C.F.R. § 144.39(a)(2). It would make no sense for this regulation to be suspended during an EAB appeal, particularly an appeal that has been on hold for nearly two years.

The regulations also allow for revocation and reissuance, or modification, where "[t]here are material and substantial alterations or additions to the permitted facility or activity which occurred after permit issuance which justify the application of permit conditions that are different or absent in the existing permit." 40 C.F.R. § 144.39(a)(1).

Lastly, the regulations allow the agency to reconsider suitability of a facility location where "new information or standards indicate that a threat to human health or the environment exists which was unknown at the time of permit issuance." 40 C.F.R. § 144.39(c).

As to federal administrative law, the Tenth Circuit recognizes several bases to allow for extra-record consideration, specifically that: (1) the agency action is not adequately explained and cannot be reviewed properly without considering the cited materials; (2) the record is deficient, because the agency ignored relevant factors it should have considered; (3) the agency considered factors that it left out of the formal record; (4) the case is so complex and the record so unclear that the reviewing court needs more evidence to enable it to understand the issues; and (5) the evidence coming into existence after the agency acted demonstrates that the actions were right or wrong. *Am. Mining Cong. v. Thomas,*

772 F.2d 617, 626 (10th Cir. 1985).

Of course, these extra-record principles used by district courts do not apply to administrative adjudications. These principles are used by district court judges to determine whether to supplement an administrative record was established in a proceeding built on "basic concepts of fair play" and an effort to examine all relevant factors. *Olenhouse v. Commodity Credit Corp*., 42 F.3d 1560, 1583 (10th Cir. 1994) "Where deficiencies in the administrative appeals process call into question whether adjudicative officials considered all relevant factors, agency action will be set aside." *Id*. (citation omitted) "Agency action will also be set aside if the administrative process employed violated basic concepts of fair play." Id. (internal quotation omitted). These "basic concepts of fair play," include "a full, albeit informal, discussion of the pertinent issues with the rights of confrontation and cross-examination." *Id*. 1584.

Under these circumstances of this administrative permit appeal, the technical requirements of the regulations must give way to basic concepts of fair play, which require the Tribe to present factors, even if the evidence of those factors did not come to light until after the Region issued the permit. *Id*. The Region and Powertech efforts to exclude the relevant information has identified a larger question regarding the EAB's use of procedures that do not allow the Tribe the rights of confrontation and cross examination in establishing the administrative record. *Id*.

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