

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

In re:

Powertech (USA) Inc.

Permit No. SD31231-0000 and
SD52173-0000

UIC Appeal No. 20-01

JOINT STATUS REPORT

On June 10, 2021, the Environmental Appeals Board granted the Environmental Protection Agency Region 8's Motion to Stay in the above-captioned case. EPA Region 8 requested the stay in light of the potential for this action to be affected by litigation pending in the D.C. Circuit Court of Appeals in *Oglala Sioux Tribe v. U.S. Nuclear Regulatory Comm'n*, No. 20-1489. In that litigation, the Oglala Sioux Tribe is challenging the Nuclear Regulatory Commission's issuance of a license for the Dewey-Burdock uranium mining project, in part based on arguments that the Commission had not adequately complied with applicable National Historic Preservation Act (NHPA) requirements. EPA Region 8 represented to the Board that "the final D.C. Circuit decision as to the sufficiency of NRC's NHPA compliance would have a significant effect on these proceedings." Status Report and Motion for Stay of Proceedings at 4 (Apr. 19, 2021).

In response, the Board stayed this matter, subject to conditions, "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.” Order Granting Motion to Stay Subject to Conditions at 5 (June 10, 2021). The Board directed the parties to “apprise the Board within two weeks of any decision by the D.C. Circuit relevant to the NHPA issue or other issues potentially affecting the Board adjudication of the pending petition,” and in that event to “recommend next steps for orderly resolution of the present petition.” *Id.* at 6.

On August 9, 2022, the D.C. Circuit Court of Appeals issued a decision in *Oglala Sioux Tribe, et al. v. U.S. Nuclear Regulatory Comm’n*, 45 F.4th 291 (D.C. Cir. 2022). In accordance with the Board’s June 10, 2021 Order, on August 22, 2022, the parties submitted a Joint Report and Recommendations to the Board. As noted in the August 22, 2022 Joint Report and Recommendations, despite the issuance of a decision on August 9, 2022, the D.C. Circuit decision is not yet final. In an order issued the same day as the decision, the D.C. Circuit ruled that it will not issue the mandate in *Oglala Sioux Tribe* “until seven days after disposition of any timely petition for rehearing or petition for rehearing en banc.” Under the Federal Rules of Appellate Procedure (FRAP), any party may file a petition for panel rehearing or rehearing en banc within 45 days after entry of judgment. FRAP 35(c); 40(a)(1). Further, any party to that litigation may seek a stay of the mandate pending the filing of a petition for a writ of certiorari in the Supreme Court. FRAP 41(d).

Based on the parties’ Joint Report and Recommendations, the Board issued an Order Extending Stay Subject to Conditions on August 25, 2022. In its August 25, 2022 Order, the Board ordered that:

This matter continues to be stayed. The parties are hereby directed to file a report with the Board within seven days after any of the following events: 1) issuance of the mandate in the D.C. Circuit matter; 2) filing of any petition for rehearing in the D.C. Circuit matter; 3) filing of any motion to stay the mandate in the D.C. Circuit matter pending the filing of a petition for a writ of certiorari; 4) resolution of any petition for rehearing or motion to stay the mandate in the D.C. Circuit matter.

August 25, 2022 Order at 2-3.

Report Concerning D.C. Circuit Proceedings

This Joint Status Report is filed in accordance with the Board's August 25, 2022 Order, to inform the Board that on September 23, 2022, Petitioner Oglala Sioux Tribe filed with the D.C. Circuit Court of Appeals a Petition for Rehearing En Banc. The D.C. Circuit's rules make consideration of the Petition by the Court wholly discretionary, and there is no way to determine with precision the timeline of the Court's consideration of the Petition or when the matter will be finally resolved. Further, should the Court deny the Petition for Rehearing En Banc, the Oglala Sioux Tribe would have the further option of seeking a stay of the mandate pending the filing of a petition for a writ of certiorari in the United States Supreme Court. FRAP 41(d).

In accordance with the Board's August 25, 2022 Order, the parties will file additional reports to the Board as appropriate.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that the foregoing Joint Report in the matter of Powertech (USA) Inc., Appeal No. UIC 20-01, was filed electronically with the Environmental Appeals Board's E- filing System and served by email on the following persons on September 29, 2022.

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