

**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 REPORT AND RECOMMENDATIONS

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 was 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. The D.C. Circuit has now reached such a decision, and accordingly the parties file this Joint Report and Recommendations.

Report Concerning D.C. Circuit Decision

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*, No. 20-1489, 2022 WL 3205888. *See* Opinion, Attachment 1. As relevant to the Board’s Order Granting Motion to Stay Subject to Conditions and to this proceeding, the D.C. Circuit decision addresses the sufficiency of the NRC’s compliance with the National Historic Preservation Act, concluding that “[t]he Commission reasonably satisfied its obligations under the NHPA’s regulatory scheme.” *Id.* at *9.

The D.C. Circuit decision is not yet final. In accordance with an order issued the same day as the decision, the D.C. Circuit 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.” *See* Order, Attachment 2. 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).

Petitioner Oglala Sioux Tribe makes the following representation concerning its intentions to file any petition for rehearing or rehearing en banc in the D.C. Circuit matter, or any petition for a writ of certiorari in the Supreme Court concerning that matter: Petitioner Oglala Sioux Tribe is assessing the Opinion and Order and is considering its options and next steps, which may include, but are not limited to, filing a petition for panel rehearing or rehearing en banc (FRAP 35(c), 40(a)(1)) and/or seeking a stay of the mandate pending the filing of a petition for a writ of certiorari in the Supreme Court (FRAP 41(d)).

Recommendations

The parties agree that judicial efficiency, and the other interests identified in the Board's Order Granting Motion to Stay Subject to Conditions, will be best served by extending the present Stay until a final resolution of the D.C. Circuit matter, including the resolution of any petitions for rehearing or for a writ of certiorari. Therefore, the parties have the following recommendations to the Board:

- (1) The parties will file a report to the Board within seven days after any of the following events:
 - a. The issuance of the mandate in the D.C. Circuit matter;
 - b. The filing of any petition for rehearing in the D.C. Circuit matter;
 - c. The 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;
 - d. The resolution of any petition for rehearing or motion to stay the mandate in the D.C. Circuit matter.
- (2) If any petition for rehearing or motion to stay the mandate is filed, the Board may require further status reports from the parties as appropriate.

(3) After receiving a report concerning the issuance of the mandate, the Board may issue a revised scheduling order with deadlines for the parties to make their required filings in this matter.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that the foregoing Joint Report and Recommendations 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 August 22, 2022.

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