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NUCLEAR REGULATORY COMMISSION

Title: Powertech USA, Inc.
Dewey-Burdock in situ
Uranium Recovery Facility

Docket Number: 40-9075-MLA

ASLBP Number: 10-898-02-MLA-BD01

Location: teleconference

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1 UNITED STATES OF AMERICA

2 NUCLEAR REGULATORY COMMISSION

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4 ATOMIC SAFETY AND LICENSING BOARD PANEL

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6 ORAL ARGUMENTS

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8 In the Matter of: :

9 POWERTECH USA, INC. : Docket No. 40-9075-MLA

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

11 (Dewey-Burdock :

12 in situ uranium :

13 recovery facility) :

14 ----------x

15 Tuesday, May 13, 2014

16

17 Teleconference

18

19 BEFORE:

20 WILLIAM J. FROELICH, Chair

21 RICHARD F. COLE, Administrative Judge

22 MARK O. BARNETT, Administrative Judge

23

24

25

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1 P R O C E E D I N G S

2 2:01 p.m.

3 CHAIRMAN FROELICH: Good afternoon. Let us

4 begin. This is a telephone oral argument in the

5 matter of the Powertech USA Dewey-Burdock in situ

6 uranium recovery facility case. Docket number 40-

7 9075-MLA. ASLBP docket number 10-898-02-MLA-BD01.

8 {Comment off mic.)

9 CHAIRMAN FROELICH: All right. One moment.

10 We're just going to make sure that the public, which

11 has a separate line, is able to connect and hear our

12 oral argument.

13 (Pause in the proceedings.)

14 CHAIRMAN FROELICH: Okay. Good afternoon.

15 We are going to take care of the public line so that

16 parties who - the participants and people who are

17 interested in the proceeding will be able to listen

18 in. Our administrative assistant is going to take

19 care of that.

20 I think in the meantime we'll get started

21 with the oral argument on motions for a stay of the

22 effectiveness of the license filed on April 14th,

23 2014, by the Oglala Sioux Tribe and the Consolidated

24 Intervenors.

25 This is Judge William Froelich here in

1 Rockville, Maryland, May 13th, 2014, at 2:00 p.m.
2 With me are Dr. Richard Cole. And by telephone, Dr.
3 Mark Barnett.
4 Also present here with us in Rockville are
5 our law clerk, Nicholas Sciretta, and our program
6 analyst, Twana Ellis, who is actually out of the room
7 at the moment checking to make sure that the public
8 line is open and available.
9 At this point, could I ask and take the
10 appearances of the parties and I'd like to make sure
11 that the representatives of the staff, Powertech,
12 Consolidated Intervenors and the Oglala Sioux are on
13 the line and ready to begin.
14 Can we begin with the staff?
15 MR. CLARK: Hi. Good afternoon. For the
16 NRC staff, this is Mike Clark, C-L-A-R-K.
17 MS. JEHLE: This is Patricia Jehle, J-E-H-
18 L-E.
19 CHAIRMAN FROELICH: Thank you, counsel.
20 And for Powertech, the applicant?
21 MR. PUGSLEY: Christopher Pugsley, Your
22 Honor, for Powertech. P-U-G-S-L-E-Y.
23 CHAIRMAN FROELICH: Thank you, sir.
24 MR. THOMPSON: And Anthony Thompson for
25 Powertech, although Mr. Pugsley is going to handle the

1 argument.

2 CHAIRMAN FROELICH: Thank you, sir.

3 For the Intervenor, Consolidated

4 Intervenors, do we have Mr. Frankel, Mr. Ballanco or

5 Mr. Ellison?

6 MR. FRANKEL: David Frankel, Your Honor, F-

7 R-A-N-K-E-L, for Consolidated Intervenors.

8 MR. ELLISON: Bruce Ellison, E-L-L-I-S-O-N,

9 Consolidated Intervenors.

10 MR. BALLANCO: Good morning from

11 California, Your Honor. This is Thomas Ballanco for

12 Dayton Hyde.

13 CHAIRMAN FROELICH: Thank you.

14 And for the Oglala Sioux Tribe?

15 MR. PARSONS: Thank you, Your Honor. Jeff

16 Parsons on behalf of the Tribe.

17 CHAIRMAN FROELICH: Thank you.

18 MR. STILLS: And good morning, Your Honor.

19 Travis Stills on behalf of the Tribe. Jeff will be

20 handling the argument though.

21 CHAIRMAN FROELICH: Okay. Are there any

22 other party representatives on the line at this point?

23 All right. We'll move onto background.

24 On April 8th, the NRC staff issued NRC source

25 materials license number SUA1600 to Powertech.

1 This license allows Powertech to possess
2 and use source and byproduct material in connection
3 with the Dewey-Burdock project.
4 On April 14th, 2014, pursuant to 10 CFR
5 2.1213, the Oglala Sioux Tribe and the Consolidated
6 Intervenors filed motions to stay this license
7 alleging inter alia irreparable harm to its cultural
8 resources. On April 24th, the NRC staff and Powertech
9 filed oppositions to both motions for stay.
10 On April 30th, 2014, this Board issued a
11 temporary stay of the license pending this oral
12 argument.
13 On May 1st, 2014, the Board issued an
14 order scheduling this oral argument. The order
15 included areas upon which the Board desired
16 exposition.
17 These include the likelihood - this
18 includes the application of the four-part test from 10
19 CFR 2.1213 for the grant of the stay, the nature and
20 likelihood of the alleged irreparable injury, the
21 nature and extent of the planned earth-disturbing
22 activities and the potential effect on cultural and
23 historical resources.
24 The Board also encouraged the parties to
25 discuss the possibility of a stipulation on agreement

1 addressing the protection of cultural and historic
2 resources and the earth-disturbing activities proposed
3 for the period before a final decision is rendered in
4 this docket.
5 As we begin today's argument, please
6 remember to identify yourself before speaking for the
7 benefit of our court reporter and to ensure we have a
8 clear transcript. The transcript of this oral
9 argument will be made part of the record in this
10 proceeding.
11 I'd like to ask the parties at this point
12 if you've met or discussed the possibility of some
13 sort of an agreement which would cover the period
14 between now and the end of the year approximately when
15 a decision on the merits would be issued.
16 MR. PARSON: Your Honor, this is Jeff
17 Parsons on behalf of the Tribe. We have communicated
18 via email several possibilities with respect to coming
19 to some agreement. That is to say that Consolidated
20 Intervenors and the Tribe proposed some possible
21 solutions.
22 NRC staff also proposed some solutions and
23 we have not been able to reach agreement with regard
24 to a settlement whether it be holding the stay in
25 abeyance or withdrawing the stay motion or having some

1 sort of notice provision for ground-disturbing
2 activities that would allow us to stand back from the
3 briefing as it exists.
4 And certainly Powertech and staff should
5 comment as well.
6 CHAIRMAN FROELICH: All right. Mr.
7 Pugsley, no success in reaching an agreement which
8 would permit Powertech to go forward with project
9 development in such a way that the Intervenors'
10 cultural and historic concerns are satisfied between
11 now and the end of the year?
12 MR. PUGSLEY: Your Honor, Chris Pugsley for
13 Powertech. No, sir, there has been no success on
14 settlement.
15 Mr. Parsons is absolutely correct. There
16 were proposals exchanged from Consolidated
17 Intervenors, the Tribe and NRC staff and unfortunately
18 Powertech does not - is not inclined to acquiesce to
19 them.
20 CHAIRMAN FROELICH: Okay. Staff, do you
21 care to be heard on your perspective or -
22 MR. CLARK: This is Mike Clark and I think
23 the statements you heard are correct. The parties did
24 discuss possible settlements. We weren't able to
25 reach any - we came, I think, close in some areas, but

1 we weren't able to reach any agreement.

2 CHAIRMAN FROELICH: Okay. Thank you.

3 While I have you, Mr. Clark, what does the grant of an

4 NRC license permit Powertech to do that couldn't be

5 done prior to the April 8th, the date that that

6 license issued?

7 MR. CLARK: Well, the biggest thing, Your

8 Honor, is through the lost use power projection use

9 byproduct and/or source material, and also byproduct

10 material that's generated during its operations.

11 It's a - unlike reactor licenses which are

12 construction and operation licenses, Powertech's

13 license is a possession and use license.

14 But also related to that, it allows

15 Powertech to engage in construction that has some

16 nexus to radiological health and safety.

17 The NRC has a definition of

18 "construction." It's in Title 10 of the Code of

19 Federal Regulations Section 40.4. That defines

20 activities that are considered construction and also

21 defines activities that are not considered

22 construction.

23 Now, some of the activities that are not

24 construction are actually - have similarities to

25 construction. There are things like excavation,

1 erecting certain structures.

2 The point is those are activities that an

3 applicant or a licensee can engage in even without an

4 NRC license.

5 Construction under the definition 10 CFR

6 40.4 refers to activities that they need an NRC

7 license, or, in this case, an effective NRC license to

8 engage in.

9 CHAIRMAN FROELICH: And those are related

10 solely or primarily to the handling or the use of the

11 radiological element?

12 MR. CLARK: They're related to structures

13 that are used to - in this case, in Powertech's case

14 they involve the wells which would be used to inject

15 dry uranium from underneath the surface. They would

16 also relate to the central processing plant.

17 So, those if we're talking specific

18 activities, drilling monitoring wells, I'm referring

19 to the definition - Your Honor, I'm going to read from

20 the definition, because I think it would be clearest

21 for everyone.

22 Construction means the installation of

23 wells associated with radiological operations, for

24 example, production, injection or monitoring well

25 networks associated with in situ recovery or other

1 facilities, installation of foundations that were in
2 place, assembly, erection, fabrication or testing for
3 any structure system or component of a facility or it
4 could be subject to the regulations in this part.
5 So, essentially, they are drilling the
6 wells that would be used during operations and
7 building the central processing plant and maybe some
8 of the header houses.
9 Activities beyond that generally will not
10 be considered construction. And Powertech could
11 proceed with those activities even without a license
12 or while their license is stayed.
13 CHAIRMAN FROELICH: Thank you, Mr. Clark.
14 That's very helpful. Could I ask Mr. Pugsley if any
15 of the activities that you just described involving
16 the drilling of the wells, the injection, the
17 foundations or whatever for the processing plant, are
18 the types of activities that are contemplated between
19 now and the end of the year?
20 MR. PUGSLEY: Your Honor, Chris Pugsley for
21 Powertech. Just to give you a little background,
22 Powertech is currently pursuing additional permits
23 with the BLM, EPA and state of South Dakota.
24 There is a gray - there is a third area
25 here with respect to activities that can be engaged in

1 with or without an NRC license.

2 I think the best way to answer your

3 question is, really, what activities would Powertech

4 plan to do by the end of the year that would be able

5 to be done without an NRC license and without state

6 permits, et cetera.

7 The answer to that is there are activities

8 currently contemplated within the next, I guess, would

9 be seven months.

10 And I guess the best example of that would

11 be the drilling of additional sampling wells at the

12 Dewey-Burdock site to gather additional - to gather

13 additional monitoring data. And then, again, this is

14 just sampling.

15 It could be sediment sampling and there

16 could be groundwater sampling, but those activities

17 can be engaged in without an NRC license and without

18 the other requisite permits.

19 CHAIRMAN FROELICH: Okay.

20 MR. PARSONS: Your Honor, this is Jeff

21 Parsons, if I may.

22 CHAIRMAN FROELICH: Yes, sir.

23 MR. PARSONS: Thank you. I understand the

24 distinction that Mr. Pugsley is making. I guess from

25 our perspective, we have not been provided with any

1 clarity with respect to the scope of the activities
2 proposed.
3 There was some discussion amongst the
4 parties in - as Mr. Pugsley just stated, it was
5 indicated that the Tribe, that the Company has plans
6 to proceed with what they term monitoring wells and
7 other limited facilities.
8 We're not exactly sure what that involves
9 precisely. And given our reading when we read the
10 definition of "construction," it specifically
11 references installation of wells, including monitoring
12 well networks.
13 And so, it is not clear to us that those
14 - the only activities that Powertech intends to engage
15 in are things that would not require a license. And
16 I think that's part of our issue here not having that
17 precise description of what's planned.
18 MR. PUGSLEY: Your Honor, this is Chris
19 Pugsley for Powertech. Let me be as clear as I can
20 here on Mr. Parsons' point.
21 It is typical at an in situ recovery
22 facility even pre-license application submission, to
23 drill sampling wells to gather data on groundwater.
24 That does not necessarily mean that those
25 wells would in any way be used in the production

1 operation whether they be as an injection to
2 production or a monitor well.
3 It is distinctly possible in these
4 situations that those wells might be plugged and
5 abandoned in accordance with appropriate requirements
6 prior to the installation of a well field for NRC
7 either review, review and verification, review and
8 approval.
9 I believe, and I can say this with some
10 certainty, that the construction rule 40.4 and
11 40.32(e) when they talk about well installation,
12 they're talking about the installation of an entire
13 well field, including when they say a monitor well
14 network.
15 And that is really defined as the entire
16 monitor well ring that would encompass the injection
17 and production wells in a given well field.
18 So, the answer to - the short answer to
19 the question is, does Powertech contemplate installing
20 an entire well field this year? The answer is, to the
21 best of my knowledge, no.
22 CHAIRMAN FROELICH: Okay. And just so that
23 I am crystal clear, the sampling and the activities
24 that you described in your prior answer are all things
25 that can be done without an NRC license. And,

1 therefore, staying an NRC license will have no effect
2 on the company's ability to drill the sampling wells
3 and those other type of non-construction activities.
4 Is that correct from your perspective, Mr.
5 Pugsley?
6 MR. PUGSLEY: Your Honor, Chris Pugsley for
7 Powertech. Yes, that is our perspective. That's our
8 position that it can be done without an NRC license.
9 JUDGE COLE: Yeah, this is Judge Cole.
10 You've already done a considerable amount of that
11 already, haven't you?
12 MR. PUGSLEY: I'm not - Judge Cole, Chris
13 Pugsley for Powertech. We've done what was required
14 under NRC regulations for a license application and to
15 attain a license. But as in situ recovery operations
16 are phased processes and you gather as much data as
17 you can, it is important to have additional data in
18 terms of sampling wells.
19 So, we've done what was required for a
20 license, but this type of sampling is to move towards
21 operations, but it's nothing more than sampling and
22 gathering data.
23 It is not an attempt to install a well
24 field.
25 JUDGE COLE: I understand that, but you had

1 to do a lot of drilling to find out where the uranium
2 was, didn't you?
3 MR. PUGSLEY: Chris Pugsley for Powertech.
4 Yes, Judge Cole, we did have to do drilling at the
5 site under whether it be an exploration permit or for
6 the 12 months of data we were to gather prior to
7 submission of a license application.
8 So, yes, we have done that.
9 JUDGE COLE: Okay. Well, what other tasks
10 have to be done before you can start construction of
11 a well field?
12 MR. PUGSLEY: Typically speaking there is
13 a delineation drilling that is used to define the ore
14 body completely to understand where your wells will be
15 placed.
16 And, you know, NRC requires under
17 performance-based licensing that we submit a well
18 field package that includes all of these well data,
19 location, well water data necessary to determine UCLs,
20 upper control limits, and restoration target values
21 and in order to set up appropriate excursion criteria,
22 monitoring criteria.
23 So, really, I think that if we're talking
24 about the construction of a site, a lot of activities
25 happen in parallel. I mean, you really would be

1 constructing your well fields the same time you're
2 putting your ancillary facilities together, including
3 the central processing plant.
4 But at this time, Powertech's approach to
5 this project is to gather additional sampling data to
6 better prepare itself for moving toward those
7 activities that would require an NRC license.
8 JUDGE COLE: All right. Thank you.
9 MR. PUGSLEY: Yes, sir.
10 MR. FRANKEL: Your Honor, David Frankel.
11 Can I make a comment?
12 JUDGE FROELICH: Yes, please.
13 MR. FRANKEL: This is David Frankel for
14 Consolidated Intervenors. I'm interested as to
15 whether this new phase that Powertech plans would
16 somehow involve bringing up any radioactive water.
17 Any development water is typically -
18 contains mobilized substances that are subject to the
19 NRC license. So, I'd like to understand how close
20 Powertech intends to come to that while we're on this
21 issue.
22 CHAIRMAN FROELICH: Mr. Pugsley, could you
23 answer whether this is within the scope of the
24 sampling that can be done without a license sort of to
25 tie your last answer with the question, I guess, that

1 Mr. Frankel has raised?

2 MR. PUGSLEY: Yes, sir. Chris Pugsley for

3 Powertech. By definition if the activity does not

4 require an NRC license, it is not - it is not

5 considered an Atomic Energy Act material.

6 It's been stated in many documents

7 including the FSEIS and other documents associated

8 with this administrative record, for example, that

9 even if Powertech were putting in an entire well

10 field, and they are not, but even if they were

11 drilling an entire well field, items such as the drill

12 cuttings from the wells and any associated materials

13 with that are considered to be technologically

14 enhanced naturally occurring radioactive material, or

15 TENORM, and that is not an Atomic Energy Act material.

16 Thus, that type of material would not be subject to an

17 NRC license.

18 We have drilled many, many holes down

19 there and taken up groundwater samples to provide NRC

20 with the grounds to issue us a license.

21 It's no different from the water we would

22 bring up to sample in these wells, and that was done

23 without an NRC license.

24 CHAIRMAN FROELICH: Thank you. Thank you.

25 That answer was helpful. Thank you so much.

1 MR. FRANKEL: Your Honor, David Frankel for
2 Consolidated Intervenors. Might I comment just one
3 more time on that issue?
4 CHAIRMAN FROELICH: Sure. Make your
5 comment brief.
6 MR. FRANKEL: Thank you, Your Honor. David
7 Frankel for Consolidated Intervenors. The kind of
8 activity that Mr. Pugsley was just referring to,
9 though, all those sampling wells were done under some
10 form of NRC regulations and as part of the application
11 process.
12 I mean, I don't think Mr. Pugsley is
13 suggesting that any private land owner that has had no
14 communication with the NRC can go drilling a bunch of
15 holes like that.
16 So, isn't that entire regulatory umbrella,
17 the NRC regulations that culminates in the issuance of
18 the license on April 8th?
19 And, therefore, wouldn't all of those
20 prior drillings have taken place under the auspices of
21 NRC regulations?
22 MR. PUGSLEY: Your Honor, this is Chris
23 Pugsley for Powertech. Would you like me to answer
24 that?
25 CHAIRMAN FROELICH: Well, go ahead. And

1 then I think I have a short answer as well. Go ahead.
2 MR. PUGSLEY: Well, I would just say, Mr.
3 Frankel, that I understand what you're saying.
4 However, all of the drilling, data gathering, air
5 monitoring, meteorological data gathering, everything
6 that went into that license application was not done
7 under NRC's regulatory oversight as granted to them
8 under the Atomic Energy Act.
9 They were done in an effort to provide NRC
10 with the data necessary to issue a license, because it
11 is our position that NRC has no regulatory oversight
12 over anyone unless they have a license. And at this
13 time we have a license, but then we did not and we did
14 not need one.
15 However, things like drilling wells -
16 things like drilling wells all covered under typical
17 State Engineer's Office requirements and those sorts
18 of things, but, no, there was no NRC regulatory
19 oversight over our pre-license application drilling.
20 CHAIRMAN FROELICH: Thank you, Mr. Pugsley.
21 Mr. Frankel, I guess my next question goes
22 to you. You're asking or requesting a stay of a
23 license. However, the activities that I understand to
24 be taking place or to be taking place in the short
25 term are all things that can go forward with or

1 without that license.

2 How would staying the license address your

3 concerns about immediate irreparable injuries to

4 potential sites that have cultural and historic

5 significance?

6 MR. FRANKEL: Your Honor, David Frankel for

7 Consolidated Intervenors. Your Honor, it seems to us

8 that Powertech's representations about their

9 intentions has changed from what they communicated to

10 us in their response which refers specifically to

11 additional monitoring wells and other limited

12 facilities. And today, you're talking about sampling

13 wells to get monitoring data.

14 And it's just these kind of bending of the

15 regulations that we're concerned about. It always

16 seem like they get bent in Powertech's favor.

17 Reference the motion I made today over their exceeding

18 the 10-page limit. And so, you know, we don't really

19 trust Powertech's view of the situation as being the

20 definitive legal authority of things.

21 We believe that there is a legal

22 obligation to protect and preserve cultural resources,

23 including graves, and we think that their

24 intentionally not looking for it or ignoring it and

25 having a no-data-no-problem approach is completely

1 inappropriate and violates everything that's involved.
2 If we get a ruling that says that, in
3 fact, NRC has no authority and the stay and the
4 license issuance are basically irrelevant to the kind
5 of earth-moving activities that we feel threaten
6 cultural resources, then we have what we need to go to
7 a federal court and seek a remedy.
8 But I believe that the federal court is
9 waiting for this administrative agency to take the
10 position, and I think that's the subject matter of
11 this motion.
12 So, either the NRC has some authority over
13 these activities in which case we want a stay, or they
14 don't, in which case we want a ruling that we can take
15 to someone who does have authority.
16 MR. PARSONS: Your Honor, this is Jeff
17 Parsons, if I may.
18 CHAIRMAN FROELICH: Yes, Mr. Parsons.
19 MR. PARSONS: Thank you. So, I think that
20 based on the license, and Mr. Pugsley is talking about
21 the well field packages, our position is that is a
22 license requirement that they go out and gather that
23 additional data and information and present it to the
24 NRC staff for their review as a license condition.
25 And so, our view is that those activities

1 as part of a license condition, fall under the
2 jurisdiction or authority of the NRC.
3 And also once you have an application
4 submitted and a NEPA process engaged, NEPA requires an
5 analysis of connected and cumulative impacts.
6 And so, where you have these activities
7 even to the extent that they're not directly regulated
8 by the NRC, they fall under the obligation in the NEPA
9 process to review the impacts associated with those
10 activities.
11 And I think we lay this out in our
12 briefing with respect to the NEPA requirements there
13 appears to be some conflation of the NHPA phase
14 approach, which the NRC has endorsed previously, and
15 the NEPA requirements to have the analyses and
16 information particularly as it relates to this issue,
17 the cultural resources surveys and information up
18 front prior to ground-disturbing activities or impacts
19 that could occur including those that are undertaken
20 by private parties not subject to - directly to the
21 NRC.
22 So, we think that based on the connected
23 action issues associated with NEPA, as well as the
24 fact that these monitoring well drilling activities
25 are required by the license, those activities are part

1 of that condition for Powertech to submit those data
2 that that brings it within the ambit of the license
3 and that irreparable harm based on the license is
4 still at play.
5 Further, just to clarify, I understand Mr.
6 Pugsley indicated that Powertech does not intend to
7 install a complete monitoring well network, but what
8 I did not hear, and I think what's likely, is that
9 some of those wells that will be drilled will be part
10 of those networks.
11 And so, I think that it's a little bit
12 unclear and I'm not sure Powertech can give us those
13 assurances that the monitoring wells that they're
14 planning on drilling are not indeed part of a
15 monitoring well network that is subject to the NRC
16 regulation and within the ambit of the definition of
17 construction.
18 So, I think based on those points, the
19 stay of a license would have the - give the relief to
20 - at least in part to the Tribe and to the
21 Consolidated Intervenors to protect those cultural
22 resources from any further impact particularly without
23 having what we see as a competent cultural resources
24 inventory.
25 CHAIRMAN FROELICH: Mr. Parsons, I'm having

1 a little bit of trouble with connecting the dots in
2 your last answer.
3 In order to get a stay, it's your burden
4 to come forward with immediate and irreparable
5 injuries or harm to your cultural and historic
6 materials.
7 And I don' see how the sampling wells and
8 the preliminary activities which Powertech is engaging
9 in, activities which could be performed without a
10 license, how you can square that and meet the burden
11 of immediate and irreparable injury when the actions
12 that are taking place are things that could be done
13 without even before the NRC license had issued.
14 And if this Board were to stay the
15 license, they could still move forward with the
16 sampling and those activities which don't require a
17 license.
18 I can't make that connection. Can you
19 help me, please?
20 MR. PARSONS: Sure. I guess I'll start
21 with the - I think the standard as noted by all the
22 parties is to reasonably demonstrate irreparable harm.
23 So, I don't think we have to prove that, you know, I
24 think that's less than a demonstration that it will
25 absolutely occur, reasonably demonstrate irreparable

1 harm. And I think we've done so in this case based on
2 our declarations.
3 And as I stated a moment ago, the drilling
4 of additional monitoring wells is contemplated - is
5 referenced in the definition of "construction."
6 Now, I understand that Powertech does not
7 intend to construct entire monitoring well networks.
8 But where they're constructing additional monitoring
9 wells and cannot demonstrate that those are not part
10 of those networks, I think that is where that
11 connection and those dots are connected.
12 CHAIRMAN FROELICH: And the immediacy of
13 the harm that the test requires, could you speak to
14 the immediacy of the harm to your client, to your
15 position?
16 MR. PARSONS: Sure. Thank you. I think in
17 this case, what we have is a cultural resources
18 inventory that is not scientifically competent.
19 As was stated in our declarations and
20 comes straight from Powertech's environmental report
21 in the original college study that was done to support
22 the application, this is an environmental report at 3-
23 179, that study noted the sheer volume of sites
24 documented at the site - at the area, rather, was
25 noteworthy. And the area has a high density of

1 cultural resources.

2 And so, where you have that high density

3 and sheer number of cultural resources, our position

4 is that additional drilling pursuant to the license

5 where you have not had a comprehensive survey of the

6 cultural resources at the site, presents the distinct

7 reasonable demonstration, that is, that irreparable

8 harm will occur. Once these sites are disturbed, our

9 position is that that constitutes irreparable harm.

10 I understand that both Powertech and the

11 NRC staff rely heavily on the programmatic agreement

12 that's been put in place, but I'll note that the

13 programmatic agreement, first of all, has not

14 undergone any NEPA review. It was finalized after the

15 NEPA process was completed in this case and it speaks

16 to if there are unidentified - if there - it talks

17 about if there are encounters with unevaluated

18 properties that somehow we'll have that study later.

19 So, I think the programmatic agreement

20 recognizes that there are unevaluated properties out

21 there, tries to make or take account of those, but in

22 our view those studies should have been done prior and

23 that allowing ground-disturbing activities pursuant to

24 a license without having done that comprehensive study

25 is contrary to law.

1 And, again, where those activities occur
2 and to the extent they impact cultural resources at
3 the site and given the sheer number that exist at that
4 site, we think that that suffices for the reasonable
5 demonstration of irreparable harm.
6 CHAIRMAN FROELICH: Actually, the question
7 was to the immediacy of the irreparable harm. And if
8 I understood your answer, you mentioned the
9 programmatic agreement.
10 Why does not the programmatic agreement
11 together with administrative condition 9.8 of the
12 materials license address your underlying concern?
13 MR. PARSONS: Thank you, Your Honor. So,
14 as to immediacy, I think we heard from Powertech that
15 they intend to go out there in the intervening time
16 and conduct additional ground-disturbing work. So, I
17 think the immediacy is evident.
18 CHAIRMAN FROELICH: The kind of work that
19 they described as I understood it, was the sampling
20 and those type of things that don't require an NRC
21 license to begin with. They could do that whether or
22 not the staff had issued the license.
23 So, I'm at a loss to understand how
24 staying the license, which under the scenarios they
25 laid out, they don't need to do these things, will

1 address your concern and prevent any irreparable or
2 immediate harm to cultural and historic resources.
3 MR. PARSONS: Thank you, Your Honor. It
4 goes back to the definition of "construction" which
5 explicitly identifies monitoring wells as construction
6 under the NRC regulations. And so, those are
7 activities that can only occur pursuant to a license.
8 Now, I understand, you know, there may be
9 a disagreement there, but the 40.4 definition of
10 construction specifically contemplates monitoring
11 wells, which it - and although I understand it will
12 not be the entire monitoring well network that will be
13 put in place, those monitoring wells, our position,
14 are the type of monitoring wells that fall within the
15 definition of construction.
16 And as to the programmatic agreement, this
17 gets obviously into the merits of the case. But
18 having a programmatic agreement that says if we
19 encounter cultural sites, we will stop and identify
20 them, the problem is - our position is no competent
21 survey has been completed of the site.
22 And so, it is unlikely in our view that -
23 or likely, at least, that Powertech as they're
24 conducting their monitoring well construction, that
25 they will not know that they're ensuring cultural

1 resources, because no study has been done to
2 demonstrate where all those cultural resources are.
3 And so, that is our - that is our position
4 that without that knowledge on the front end of where
5 those sites exist, that it's having a condition saying
6 that if we encounter some, we will stop, does not
7 provide the protection against irreparable harm that
8 it might appear to you on its face.
9 JUDGE COLE: Yeah, this is Judge Cole.
10 I've got a couple of concerns. The programmatic
11 agreement which was allegedly designed to avoid the
12 kind of problems the Tribe and the Consolidated
13 Intervenors are concerned with, why is the
14 programmatic agreement insufficient to protect the
15 cultural resources?
16 That's what it's designed to do.
17 MR. PARSONS: Thank you, Judge Cole. Jeff
18 Parsons again. To the extent that there were a
19 comprehensive survey of the site, the programmatic
20 agreement would be much more valuable.
21 The Tribe objected strenuously to the
22 programmatic agreement. The programmatic agreement
23 failed to note that.
24 It does indicate that the Oglala Sioux
25 Tribe provided input on the programmatic agreement,

1 but does not indicate the nature of that input, which
2 was highly critical of that agreement.
3 And so, having a condition in the
4 programmatic agreement that the company will stop its
5 construction if it encounters cultural resources based
6 on, I mean, based on what?
7 If there's not a study done that
8 identifies, comprehensively identifies the cultural
9 resources, then having an agreement like that loses
10 its meaning because there's no way for Powertech to
11 identify those sites without the scientific
12 methodology, the professionalism involved in an
13 archaeological study. And that's what we contend
14 should have been done from the start.
15 I can't imagine that the well drillers are
16 trained in a way that will allow them to do the kind
17 of professional work that scientists would expect when
18 they are conducting the comprehensive cultural
19 resources inventory that we assert should have been
20 done in this case.
21 JUDGE COLE: What is the main concern of
22 the Indian tribes with respect to cultural resources?
23 Is it graves, burials and ceremonial areas or - and
24 what else if it's not mainly that?
25 MR. PARSONS: I would say it is that, as

1 well as other cultural sites. The position of the
2 Tribe is that where you have disturbance of cultural
3 sites it impacts the Tribe.
4 It impacts their ability to ensure those
5 sites are protected and conserved and treated with the
6 respect that they deserve.
7 And so, without knowing where those are,
8 it is - the problem is there's no way for Powertech
9 when they're conducting their construction activities
10 to recognize that they're impacting those sites.
11 And, again, that's what we think renders
12 that programmatic agreement inept.
13 JUDGE COLE: Thank you. The area of
14 concern here as the project area, it's about 10,600
15 acres, right?
16 MR. PARSONS: As I understand it, yes, Your
17 Honor.
18 JUDGE COLE: Yeah, that's about four square
19 miles. Not a very big area. And they've been
20 studying this project from a cultural resources
21 viewpoint since - for at least four or five years.
22 In fact, Augustana College had started in
23 2008 and there have been six studies of this area in
24 four square miles.
25 Is it that difficult to do a kind of

1 cultural resource study in an area like that?

2 MR. PARSONS: Your Honor, our position is

3 yes. To say that they have been studying it for four

4 or five years I think is not quite an accurate

5 portrayal.

6 There have been two rounds, essentially,

7 as you referred to of review of this site. One was

8 conducted by Augustana College, which although I have

9 certainly nothing against Augustana College, it's not

10 a professional archaeological study.

11 In fact, the NRC staff itself in response

12 to the contentions on the draft supplemental

13 environmental impact statement promised in the Tribe's

14 view to conduct an additional independent review and

15 to update and supplement that cultural resources study

16 based on an agreed-to scientific methodology for

17 identifying those sites.

18 That promise was not fulfilled. Instead,

19 they abandoned the creation and implementation of a

20 concrete and sufficient scientific methodology and

21 allowed tribes to come out onto the site on their own

22 without any established or reviewed methodology.

23 And what you ended up with was reviews by

24 the - reports submitted by the tribes which were the

25 Arapaho - northern Arapaho, northern Cheyenne,

1 Cheyenne-Arapaho tribes of Oklahoma and the Crow
2 nation were the only tribes that submitted any
3 reports.
4 And our contention is that the differences
5 between those tribes is sufficient and significant
6 enough that those tribes would not have the experience
7 and have the knowledge that the Oglala Sioux tribe has
8 as to what to look for and what are significant
9 resources at the site.
10 So, I don't think it's been studied for
11 four or five years. I think there have been two
12 rounds of cultural resources review, neither of which
13 rises to the level of what could be considered a
14 competent scientific study.
15 So, we contend that that has yet to be
16 done at this site. And, yes, it is a challenge and
17 it's something that the Tribe takes very seriously.
18 These are ancestral lands that have
19 enormous cultural significance to the Tribe. And we
20 expect that the cultural studies and impact studies be
21 done with the utmost professionalism and scientific
22 rigor.
23 And I think the records from our
24 perspective, clearly indicates that that has not been
25 done.

1 JUDGE COLE: Thank you.

2 MR. ELLISON: Judge Cole, this is Bruce
3 Ellison, if I might just add one thing additional,
4 sir.

5 JUDGE COLE: Sure.

6 MR. ELLISON: I would ask that it be noted
7 that the tribes which are in the closest proximity to
8 this area, the Oglala Sioux Tribe, the Rosebud Sioux
9 Tribe, the Standing Rock Sioux Tribe, they have all
10 not signed this agreement all for the same reasons
11 that Mr. Parsons just mentioned and they are eager for
12 a serious study to be done.

13 If the whole purpose of protecting
14 cultural resources had some real validity, then these
15 tribes certainly take the position that - and the
16 tribal members who we represent as Consolidated
17 Intervenors - that there should be the greatest amount
18 of input done in a scientifically sound bases to
19 protect these sites and these areas, because otherwise
20 their opinions will be lost forever.

21 And so, the purpose of a stay would be to
22 protect incidental or, as Mr. Parsons pointed out,
23 equipment operators who really don't know what they're
24 looking for and we would submit it as the tribal
25 historic preservation officers say, the Augustana

1 College folks who, with all due respect to them, they
2 did not really know what they were looking for, but
3 what they were looking for was only a small portion of
4 what actually exists. So, what could be the harm of
5 a stay?
6 And in addition to that, Powertech in its
7 applications to the DENR said it was not going to
8 engage in any construction activities until they had
9 all its permits.
10 They're now coming to the NRC and saying,
11 well, you gave us this license. Now, we can do
12 everything.
13 And I wanted to point that out, because
14 it's a great concern to us that this license is being
15 used as basically the go-ahead for construction
16 activities that otherwise would need licenses for
17 including even a Class III injection well, which it
18 sounds like they want to build.
19 And if they are - some of these wells may,
20 in fact, become part of well fields, that's exactly
21 what a Class III license would be.
22 So, I believe there's no authority for
23 Powertech to believe that the NRC by granting this
24 license at this point really makes it basically
25 supersede any other license that is needed and they

1 can just go ahead and see what happens later.

2 JUDGE COLE: Thank you.

3 MR. ELLISON: Thank you, sir.

4 JUDGE COLE: We have several in situ mines

5 with licenses in the area and several applications

6 pending, also.

7 Could maybe Mr. Pugsley or Mr. Clark or

8 anybody else could answer this question: How do you

9 handle cultural resource issues in in situ mine

10 applications?

11 Now, we talked about this one. What about

12 the other cases? How do they handle it?

13 MR. PUGSLEY: Your Honor, this is Chris

14 Pugsley for -

15 JUDGE COLE: Do they accept the Level III

16 cultural surveys?

17 MR. PUGSLEY: Judge Cole, this is Chris

18 Pugsley for Powertech. Let me - I can't speak to a

19 ton of them, but I can speak to one that is the most

20 current, which is the Strata Energy Ross Project in

21 Northeastern Wyoming.

22 They are handling -

23 (Simultaneous speaking.)

24 MR. PUGSLEY: Okay. That's true. They

25 handle cultural resources the exact same way that it's

1 been handled in Powertech.

2 They submit a Class III survey prior to

3 the license application being submitted. Then NRC

4 staff is the lead agency in this case, and in Strata's

5 case, conducts the Section 106 consultation process

6 under the National Historic Preservation Act, and in

7 Strata they are also going to be having - and staff

8 can correct me if I'm wrong, but they're going to also

9 have a programmatic agreement - they have a

10 programmatic agreement.

11 And the important thing is in both that

12 case and in the Dewey-Burdock case the critical

13 factor, Your Honor, is those signatories, two of the

14 signatories, mandatory signatories to that agreement

15 are the State of South Dakota's State Historic

16 Preservation Office and the Advisory Council on

17 Historic Preservation. They both signed the

18 programmatic agreement.

19 And given the fact that they are the

20 expert agencies, they deal with cultural resources and

21 they both signed it and the 106 process which the

22 programmatic agreement was the final agreement

23 document that was a product of that process was signed

24 off on by the agency that implements the National

25 Historic Preservation Act through its 36 CFR Part 800

1 regulations, it appears that Powertech got in both
2 cases, Strata Ross and Dewey-Burdock, that it's been
3 handled according to law.
4 MR. PARSONS: Your Honor, this is Jeff
5 Parsons. I would only note that the basis for the
6 Tribe's motion for stay on likelihood of success on
7 the merits dealt with the NEPA compliance.
8 Whether or not the National Historic
9 Preservation Act allows for a phased compliance
10 approach to the NHPA Section 106, that is wholly
11 distinct and apart from the requirements under the
12 National Environmental Policy Act which specifically
13 requires these studies be done before decisions are
14 made and before actions are taken.
15 I think that is an absolutely critical
16 distinction that the Board understand that the
17 Advisory Council on Historic Preservation and the
18 South Dakota preservation officer have no
19 responsibilities under NEPA with respect to this site.
20 And, in fact, in their signatures and
21 comments, made no representations of any kind that
22 NEPA had been satisfied.
23 And so, I think again we're dealing with
24 an issue of conflating compliance with the NHPA with
25 the National Environmental Policy Act and they're very

1 different standards. Thank you.

2 MR. FRANKEL: Your Honor, David Frankel, if

3 I might make a comment.

4 JUDGE COLE: Okay. Go ahead, Mr. Frankel.

5 MR. FRANKEL: Thank you, Judge Cole. David

6 Frankel for Consolidated Intervenors. I want to point

7 out that we've submitted expert testimony in several

8 letters and opinions from Dr. Lou Redman concerning

9 the very unique nature of this specific part of land.

10 That it has traditionally and since ancient times had

11 valuable lithic resource materials, that it was a

12 place that was transected and camped at especially in

13 the low-lying areas near springs and intermittent

14 springs probably exactly where the company wants to

15 put its well fields, and that we have asserted from

16 the beginning that there has been a lack, an

17 intentional looking away of subsurface testing and

18 that we believe that there are very significant

19 cultural resources, graves right in those low-lying

20 areas.

21 So, if they want to run over those areas

22 with some ground-penetrating radar before they drive

23 on them and drill on them and show there's nothing

24 under there, I'm sure that would satisfy us.

25 But to proceed blindly seems very

1 imprudent and a violation of their responsibilities
2 and the federal government's responsibilities if it
3 lets them do that. Thank you, Your Honor.
4 JUDGE COLE: Thank you.
5 MR. CLARK: This is Mike Clark for the
6 staff if I could just say a word or two.
7 CHAIRMAN FROELICH: Please, go ahead.
8 MR. CLARK: First, I just want to address
9 Mr. Parsons' last comment regarding conflating NEPA
10 and NHPA.
11 The staff explained in its response to the
12 stay motions that the final supplemental environmental
13 impact statement is not the staff's decision document.
14 The decision document is our record of
15 decision, which was not issued until the staff
16 finalized the programmatic agreement.
17 Thus, the programmatic agreement and the
18 protections in that agreement, those inform the
19 staff's NEPA review. So, it's not a case of the staff
20 segmenting NEPA and NHPA.
21 I also want to address what I think is an
22 important point. Their license allows them to take
23 certain actions. The license also requires that they
24 take certain actions.
25 In one, I believe Judge Froelich here

1 referred to as license condition 9.8 requires
2 compliance with the programmatic agreement.
3 As it stands right now, there's no NRC
4 enforcement action, at least administrative
5 enforcement action available if Powertech were to
6 violate the PA.
7 The parties of the PA could possibly
8 pursue some remedy in federal court, but staying the
9 license has the effect of also staying the protections
10 afforded by various license conditions including 9.8.
11 In the staff's view, having the license
12 remain in effect is actually more protective of
13 cultural resources not just because of the specific
14 protections in the programmatic agreement, but also
15 because the staff, if necessary, could take NRC
16 enforcement action issuing a Notice of Violation and
17 possibly taking other actions against Powertech if
18 they were to violate the programmatic agreement.
19 The one other point I'd raise is I think
20 as everybody is aware, there's a - Judge Cole referred
21 to a four or five-year history of working to identify
22 sites. And the staff has been working for four years
23 trying to consult under the National Historic
24 Preservation Act to identify and assess impacts to
25 properties of significance to tribes and other

1 persons. And before that, Powertech did
2 investigations in their Class III survey.
3 The staff recently issued a document, a
4 17-page compilation of the results of its efforts.
5 And I know the efforts haven't always gone smoothly,
6 but the staff is certainly expending substantial
7 effort in consulting under Section 106 of the National
8 Historic Preservation Act.
9 They also afforded interested tribes the
10 opportunity to do field surveys of the geographic
11 slate last April and May. Seven tribes took those
12 opportunities and did their own surveys.
13 Now, I know we've heard complaints that
14 those surveys lack methodology, but I want to read a
15 quotation from input we received from Oglala Sioux
16 Tribe.
17 And the quotation is - I believe this was
18 from President Brewer. It is self-evident that each
19 tribe will have expertise in recognizing its own
20 sacred place. The Oglala Sioux Tribe strongly objects
21 to the use of persons without any expertise in Sioux
22 traditional cultural properties to identify Sioux
23 traditional cultural properties.
24 The staff took those concerns seriously.
25 And for that, it decided the best approach was to

1 invite those people with specialized expertise in
2 identifying sites of each tribe to the Dewey-Burdock
3 site. And that was done last April and May.
4 The Oglala Sioux Tribe did not participate
5 in the surveys. Nonetheless, the staff continued to
6 consult with the tribe and with other tribes. And as
7 a result, it was able to produce a programmatic
8 agreement which it includes - the programmatic
9 agreement is lengthy. It includes numerous sections
10 that protect different categories of resources.
11 And one important section is, I believe
12 Mr. Ellison said there's no monitoring, but
13 Stipulation 13 of the programmatic agreement provides
14 for compliance monitoring.
15 So that when Powertech does construction
16 in areas where sites have not been located, there will
17 be people there to make sure it will not be just
18 construction operators who are responsible for
19 observing whether sites may be found.
20 So, there are serious protections in the
21 programmatic agreement. The programmatic agreement is
22 nothing new. It's not a novel approach. As Judge
23 Cole mentioned, and I think as Mr. Pugsley followed
24 up, it's been used in other NRC cases. More than
25 that, it's been used in other cases by other federal

1 agencies.

2 And the Advisory Council on Historic

3 Preservation, the staff would submit would not have

4 entered into the programmatic agreement if it found it

5 deviated significantly from the programmatic

6 agreements used by other agencies.

7 That's all I have. Thank you.

8 CHAIRMAN FROELICH: Thank you, Mr. Clark.

9 JUDGE COLE: Mr. Clark, I just wanted to

10 follow up on your last answer. Because 10 CFR 2.1213

11 requires us to weigh the public interest, is it your

12 argument that having the license in effect, i.e., not

13 subject to a stay, having it in effect would protect

14 the public more than staying the license at this point

15 because of the ability of the staff to monitor the

16 actions of Powertech, as well as enforce the

17 conditions of the programmatic agreement?

18 Did I understand you correctly?

19 MR. CLARK: Yes, Your Honor. This is Mike

20 Clark. The staff believes it would have additional

21 enforcement options available if the license remains

22 in effect because it could pursue administrative

23 enforcement action against Powertech if they were to

24 violate the PA.

25 If the license is stayed, then License

1 Condition 9.8 is also stayed. Although the
2 programmatic agreement would remain in effect, there
3 wouldn't be any NRC administrative enforcement
4 remedies available and the parties would most likely
5 have to pursue a violation of the PA in federal court.
6 CHAIRMAN FROELICH: Okay, thank you. And
7 you had mentioned that there is precedent for this
8 bifurcated approach of separating, you know, the NEPA
9 aspects from the NHPA. I wondered if Mr. Parsons and
10 Mr. Frankel could cite me to any federal court's
11 decision which has disallowed or struck down the
12 separation or the use of a programmatic agreement.
13 MR. PARSONS: Thank you, Your Honor. This
14 is Jeff Parsons. I think that what I can cite you to
15 is case law that says that while a programmatic
16 agreement may be sufficient for, may go to, rather,
17 National Historic Preservation Act compliance, it does
18 not suffice for, on its own, National Environmental
19 Policy Act compliance. And the National Environmental
20 Policy Act compliance is separate and distinct and
21 requires that those issues and impacts be reviewed as
22 part of the NEPA process without regard to a
23 bifurcation of the National Historic Preservation Act.
24 That is to say they're separate and
25 distinct standards. Just because there's a

1 bifurcation in a programmatic agreement does not
2 suffice in itself for National Environmental Policy
3 Act. And I will, I believe we cited that in our
4 briefing and will pull it for you momentarily.
5 CHAIRMAN FROELICH: Okay.
6 MR. FRANKEL: Your Honor, David Frankel
7 for Consolidated Intervenors. I don't have a cite
8 about invalidating programmatic agreements generally.
9 I would suggest that in this case where the Standing
10 Rock Sioux Tribe and Oglala Sioux Tribe have both
11 objected in writing concerning the nature and extent
12 of the proceedings and fairness or unfairness of those
13 proceeding that gave rise to the programmatic
14 agreement, I can't imagine that it would hold up from
15 the standpoint of protecting the Oglala Sioux Tribe's
16 interests.
17 So I just want to reiterate that this is
18 not an example of a programmatic agreement that's been
19 meaningfully participated in as represented by those
20 objection letters. If there were no objection letters
21 then I think that the tribes and the tribal members
22 would have a much more difficult argument in this
23 case.
24 But here where it's been one-sided and
25 basically implementation and imposition of this

1 federal programmatic agreement that's just one more
2 dictate on the tribes and the tribal members, it's
3 hard for us to see that that will be validated when
4 held up against the responsibilities of the trust
5 duty, which incidentally the NRC in their response to
6 the motion to stay believes that it doesn't apply in
7 these hearings.
8 And we object to that and submit that
9 notwithstanding their old Court of Claims citation
10 that our Supreme Court cases are still valid and there
11 is a trust duty of the United States federal
12 government to these people that goes back 100 years
13 and is as valid now as it was then. Thank you.
14 MR. PARSONS: Your Honor, sorry. This is
15 Jeff Parsons. I have found that citation. The quote
16 is, "Compliance with the NHPA does not relieve a
17 federal agency of the duty of complying with the
18 impact statement requirement to the fullest extent
19 possible." That's Lemon versus McHugh, 668 F. Supp.
20 2d, 133, at Page 144, District of D.C., 2009, quoting
21 Preservation Council, Inc. versus Pierce, 667 F. 2d
22 851 out of the 9th Circuit, 1982. So we believe
23 there's, and that's cited in the tribe's motion for
24 summary disposition at Page 10.
25 CHAIRMAN FROELICH: Thank you. While I

1 have you, it seems to me as I've read the pleading
2 there's a dispute between the type of field surveys
3 that were conducted and the type of study that the
4 Intervenors and the Oglala Sioux Tribe would like to
5 have done. This is referred to, I guess, in the
6 pleadings as ethnographic study versus a field survey.
7 Could you just enlighten me as to the
8 difference between these two types of surveys?
9 MR. PARSONS: I will do my best, Your
10 Honor. I think --
11 CHAIRMAN FROELICH: That this is at least
12 a pivot point for the Intervenors as to the type of
13 studies that were conducted versus the type of a study
14 that you believe should have been conducted.
15 MR. PARSONS: Sure. I think the
16 difference is, and in this case it deals with the
17 extent to which you employ a scientific methodology
18 that accounts for the particular people who use that
19 area and how they used those areas.
20 Mr. Frankel alluded to their expert's
21 report, Dr. Redmond talking about the use of low-lying
22 areas and how that the ancestors of the Sioux, of the
23 Oglala Sioux in particular, would have used that land
24 as opposed to another tribal group or people.
25 And so you would have to incorporate the

1 experiences and traditions of that group, of that
2 tribe that had used the land, into that study in order
3 to ensure that you're conducting the survey with
4 sufficient scientific rigor.
5 And I would say that in this case we were
6 going down that road, there was to be a scientific
7 survey including an ethnographic study of that site
8 with expert archeologists and the tribes together with
9 an agreed upon methodology, and we thought that was an
10 appropriate course.
11 Unfortunately there was not agreement.
12 There was some disagreement, I guess I'd say, as to
13 the scope and nature of that methodology which the
14 tribe anticipated would be worked out and resolved.
15 Instead the NRC staff decided to abandon that approach
16 and simply allow whatever tribes wanted to come on the
17 ground to do so and do whatever study they felt
18 appropriate based on whatever methodology they
19 preferred without those checks, without that
20 established methodology that would have provided for
21 a competent study.
22 So the fact that the NRC staff offered a
23 tribe to come on the land, we strongly disagree that
24 that somehow equates to or suffices for the kind of
25 expert, scientifically designed study that was

1 anticipated and expected.

2 CHAIRMAN FROELICH: With that answer, I'm

3 going to ask of Mr. Clark for the staff, I believe it

4 was the staff pleading that cited the Board to the

5 Narragansett Indian Tribe versus the Warwick Sewer

6 Authority Court of Appeals case finding no irreparable

7 harm in part because archeologists are monitoring work

8 and will continue to do so.

9 I wonder if under the programmatic

10 agreement or the license conditions whether there are

11 archeologists monitoring the work going forward at the

12 Dewey-Burdock site.

13 MR. CLARK: Your Honor, this is Mike

14 Clark. And Stipulation 13 in the programmatic

15 agreement is the one that is a stipulation addressing

16 compliance monitoring, and Section C of Stipulation 13

17 actually addresses this issue.

18 And it says, monitor, or construction

19 activities will meet the Secretary of the Interior's

20 professional qualifications for archeology.

21 Preference will be given to individuals meeting those

22 qualifications where employed a tribal enterprises,

23 especially during phases of the monitoring program

24 when sites with religious and cultural significance to

25 tribes might be affected.

1 MR. PARSONS: And Your Honor, of course we
2 would say -- this is Jeff Parsons -- that without
3 having that scientific study in the first place, how
4 is the applicant to know when they're, or the staff
5 for that matter, when they're engaged in an area of
6 that nature? That is sort of the underlying problem
7 we are encountering with this approach.
8 CHAIRMAN FROELICH: One of the points in
9 2.1213 is the harm to the various parties to the case
10 if a stay were granted. I wonder if I could hear from
11 Mr. Pugsley as to the potential harm to Powertech if
12 a temporary stay were continued.
13 MR. PUGSLEY: Your Honor, Chris
14 Pugsley for Powertech. As we brief, put in our
15 pleadings, there will be harm to Powertech as a result
16 of this. Because as you may or may not be aware, we
17 have ongoing hearings in the state of South Dakota for
18 large-scale mining permits and water right permits as
19 well as we are in the process of obtaining a plan of
20 operations from the Bureau of Land Management and
21 permits from the EPA under the Safe Drinking Water Act
22 and Underground Injection Control Program.
23 There is, as we said in our pleading,
24 right now the state had essentially held the remainder
25 of their hearings in abeyance ending the

1 determinations of NRC and to find out whether or not
2 the license would indeed be issued.
3 And as we stated in our pleadings, it is
4 that the uncertainty associated with this current
5 temporary stay as well as if a permanent stay were to
6 be imposed would potentially result in the further
7 delay of those proceedings and would not allow
8 Powertech to move forward with presenting its case to
9 those adjudicatory bodies.
10 CHAIRMAN FROELICH: Okay. Yes?
11 MR. ELLISON: This is Bruce Ellison. I
12 would just like to clarify a little bit what's going
13 on in the state court proceedings. Both the Water
14 Management Board and the Mining Board have not stayed
15 pending the NRC license, they have stayed pending all
16 other licenses. That would include the EPA, would
17 include BLM approval. It would include any other
18 state or county permits that would be necessary. Then
19 we go back to state court.
20 So what part of our concern is, is the
21 extensive operations, construction operations that
22 Powertech seems to be contending it can engage in,
23 many of which cover, are involved in some of these
24 other permits which are not even going to get back to
25 a hearing until we're all done at the federal level.

1 So it's not just the NRC, it's the EPA.
2 And the EPA has sent a letter last month indicating
3 that they don't know how long their process is going
4 to take. So that's what our concern is.
5 This seems to be a carte blanche license
6 to go forward with a lot of activities that other
7 permits are really also needed for, and that this
8 license should not be construed as superseding those
9 other permits.
10 We're a long ways away from finality of
11 Powertech having all of its licenses, and it promised
12 the state in writing its applications it wouldn't do
13 any construction until it had all of its permits. Now
14 it's saying something very different, and they should
15 be held to it.
16 MR. PUGSLEY: Your Honor, this is Chris
17 Pugsley for Powertech. I'd like to note for the
18 record that in no way on this telephone conference has
19 Powertech said at any time that it was going to engage
20 in site construction activities. All that was
21 mentioned were sampling rights, and that a), does not
22 meet the NRC definition of construction, and b), is
23 not any construction of sample plants, well fields or
24 anything, any activities that you would require a
25 state, large-scale mine permit for or any other

1 permit.

2 The point here is that if you talk about
3 sampling wells, I mean that is not within the
4 construction rule. I also tend to disagree with the
5 statement that the state of large-scale mine permit,
6 et cetera, is holding this in abeyance until all
7 federal and state and county, other state and county
8 permits are issued. I believe that the case is that
9 it's just federal permits.

10 And that's where some of the potential
11 harm comes in because it was, and unless I'm
12 mischaracterizing this, I think that EPA, and
13 certainly the Bureau of Land Management because BLM
14 was a cooperating agency on the Supplemental
15 Environmental Impact Statement as well as a signatory
16 to the programmatic agreement, they are developing
17 their plan of operations.

18 And it is distinctly possible, well, not
19 possible, it's really true that at least EPA was
20 waiting for NRC's decision. And if the stay is
21 maintained, those processes could be further delayed.

22 And regardless of whether the statement is
23 that their hearing, they don't know how long their
24 hearing process will take, it will be, I don't know
25 how long the hearing process takes plus seven months.

1 So what Powertech is saying is that there
2 is the great potential for the permitting process with
3 these other agencies to be strung out in perpetuity
4 pending the resolution of this, when we believe that
5 the Intervenors have not met their burden under Part
6 2.1213.
7 MR. PARSONS: Your Honor, this is Jeff
8 Parsons, if I may briefly. I think opposition is that
9 Powertech's argument that a temporary stay for the
10 hearing process in this case would string out other
11 permits indefinitely is pure speculation.
12 And we would note that nowhere did
13 Powertech provide any evidence of any harm. There are
14 no declarations or affidavits incorporated into
15 Powertech stay response, merely the assertions of
16 counsel. We think that is in stark contrast to the
17 affidavits submitted by both the tribe and
18 Consolidated Intervenors.
19 CHAIRMAN FROELICH: Okay. I've exhausted
20 the questions I have prepared. Judge Cole, do you
21 have anything?
22 JUDGE COLE: No, I'm finished.
23 CHAIRMAN FROELICH: And Judge Barnett,
24 you've been quiet there on the phone. Do you have any
25 questions at this point?

1 JUDGE BARNETT: No, all my questions have
2 been answered.
3 CHAIRMAN FROELICH: Okay. While we're all
4 on the line and on this call, I'd like to address two
5 or three procedural items that are pending, and also
6 assure the parties that the Board will expeditiously
7 issue its order on the request for stay within a
8 matter of days I would hope.
9 But first we will formally grant the April
10 30th unopposed motion that the parties filed which
11 would clarify the filing deadlines and will adopt the
12 six filing deadlines that are listed in the procedural
13 schedule.
14 Also at this point, I would note for the
15 record that we received a motion from the Consolidated
16 Intervenors seeking to strike, I guess, Pages 11
17 through 21 of the Powertech answer response. At this
18 point in time the Board is going to deny the
19 Consolidated Intervenors' motion to strike, not
20 because we necessarily disagree with them.
21 I believe that the rules intend answers to
22 be limited to ten pages for a motion for stay, but
23 because the motion to strike was not in compliance
24 with 10 CFR 2.32382 which requires all motions to be
25 filed within ten days of the triggering event.

1 Since that 20-page Powertech answer of
2 complaint of was filed on April 24th, the motion to
3 strike was due on May 4th which would have been a
4 Sunday. To be timely it would have had to have been
5 filed by Monday, May 5th.
6 And at this point the Board is going to go
7 forward based on the motion and answers that have been
8 filed, plus the transcript and record made at this
9 oral argument, and we'll issue its ruling, its order,
10 within the next few days.
11 I also would like to apprise the parties
12 that the Board has been moving forward on preparations
13 for the oral limited appearance statements and the
14 hearing scheduled for the week of August 18th, 2014.
15 Currently we are planning to hold a number
16 of oral limited appearance sessions at the Mueller
17 Civic Center in Hot Springs, South Dakota on Monday,
18 August 18th. At this point we're just trying to
19 figure out how many individual sessions and at what
20 time of the day or evening to hold them to have the
21 maximum amount of public participation possible.
22 The hearing in this case will be held
23 beginning Tuesday, August 19th, and we are currently
24 looking to hold it at the South Dakota School of Mines
25 and Technology in Rapid City, South Dakota.

1 Are there any other matters that any of
2 the parties wish to raise at this point concerning the
3 motions for stay or any procedural matters involved in
4 this case?
5 MR. PARSONS: On behalf of the tribe, Your
6 Honor, this is Jeff Parsons. I would just like to
7 thank the Board for obviously taking this under
8 serious consideration.
9 CHAIRMAN FROELICH: Thank you.
10 MR. PUGSLEY: Your Honor, Chris Pugsley
11 for Powertech. Nothing from the licensee.
12 CHAIRMAN FROELICH: And staff?
13 MR. CLARK: Mike Clark for the staff.
14 Nothing more. Thank you, Your Honor.
15 CHAIRMAN FROELICH: Okay. This then
16 concludes the oral argument on the motions for stay.
17 The Board will issue its order within the next few
18 days. It's just a matter of getting back to our
19 desks, conferring with one another and drafting it up.
20 I thank the parties for their attention, for their
21 arguments, and this session has been helpful to me and
22 to the Board. We stand adjourned.
23 (Whereupon, the foregoing matter went off
24 the record at 3:23 p.m.)
25