

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Kristine L. Svinicki, Chairman  
Jeff Baran  
Annie Caputo  
David A. Wright

In the Matter of

POWERTECH (USA), INC.

(Dewey-Burdock  
*In Situ* Uranium Recovery Facility)

Docket No. 40-9075-MLA

**CLI-19-09**

**MEMORANDUM AND ORDER**

Powertech (USA), Inc. (Powertech) petitions for review of the Atomic Safety and Licensing Board's decision denying the Staff's motion for summary disposition of Contention 1A.<sup>1</sup> Powertech requests that we reverse the Board's denial of summary disposition and terminate this proceeding.<sup>2</sup> For the reasons described below, we deny Powertech's petition for review.

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<sup>1</sup> *Brief of Licensee Powertech (USA), Inc. Petition for Review of LBP-18-05* (Nov. 26, 2018) (Petition); see also LBP-18-5, 88 NRC 95 (2018).

<sup>2</sup> Petition at 1-2, 25.

## I. BACKGROUND

### A. The Litigation Prior to LBP-18-5

The Board described the history of this proceeding in its decision.<sup>3</sup> Briefly, this proceeding commenced when the Oglala Sioux Tribe (Tribe) and Consolidated Intervenors (together, Intervenors) were granted intervention and a hearing concerning Powertech's 2009 license application.<sup>4</sup> The Staff issued a Final Supplemental Environmental Impact Statement (FSEIS) in January 2014 and issued the license to Powertech in April 2014.<sup>5</sup> An evidentiary hearing followed in August 2014.

In 2015, the Board issued a partial initial decision, which found in favor of the Staff and Powertech on all contentions except Contentions 1A and 1B, both of which concerned the Staff's consideration of the potential impacts of the proposed project on Native American cultural resources at the project site.<sup>6</sup> With respect to Contention 1A, the Board found that the FSEIS "does not contain an analysis of the impacts of the project on the cultural, historical, and religious sites of the Oglala Sioux Tribe and the majority of the other consulting Native American tribes," without which the National Environmental Policy Act's (NEPA) "hard look requirement has not been satisfied."<sup>7</sup> The Board found that suspension of the license was not necessary, but it held that the Staff should work to remedy the deficiencies in the FSEIS, report to the

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<sup>3</sup> LBP-18-5, 88 NRC at 101-07.

<sup>4</sup> LBP-10-16, 72 NRC 361, 376 (2010).

<sup>5</sup> See Exs. NRC-008-A-1 to NRC-008-B-2, "Environmental Impact Statement for the Dewey-Burdock Project in Custer and Fall River Counties, South Dakota, Supplement to the Generic Environmental Impact Statement for *In-Situ* Leach Uranium Milling Facilities" (Final Report), NUREG-1910, Supplement 4, vols. 1-2 (Jan. 2014) (ADAMS accession nos. ML14246A350, ML14246A329, ML14246A330, ML14246A331); Ex. NRC-012, License Number SUA-1600, Materials License for Powertech (USA) Inc. (Apr. 8, 2014) (ML14246A408).

<sup>6</sup> LBP-15-16, 81 NRC 618, 708-10 (2015).

<sup>7</sup> *Id.* at 655.

Board on its progress, and eventually resolve the contention with a settlement agreement or, if not able to reach a settlement, with a motion for summary disposition.<sup>8</sup> In 2016, we affirmed the Board decision in LBP-15-16 in all respects relevant to this appeal.<sup>9</sup>

Over the course of the following three years, the Staff sought the Tribe's participation in properly characterizing cultural resources at the site. In April 2017, the Staff offered the Oglala Sioux Tribe an opportunity to participate in a cultural resources survey, but in May 2017, the Tribe declined, providing a list of specific conditions for its participation.<sup>10</sup> In August 2017, the Staff filed its first motion for summary disposition of Contentions 1A and 1B and argued that further efforts to consult with the Tribe would be unlikely to result in an agreement.<sup>11</sup> The Board granted summary disposition of Contention 1B but denied it with respect to Contention 1A.<sup>12</sup> Although Powertech sought the Commission's review of the Board's decision with respect to Contention 1A, the Staff continued to work with the Tribe to find an acceptable method to identify cultural resources at the site.<sup>13</sup> We declined Powertech's petition for interlocutory review of the Board's denial of summary disposition.<sup>14</sup>

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<sup>8</sup> *Id.* at 657-58, 710.

<sup>9</sup> See CLI-16-20, 84 NRC 219, 262 (2016). We affirmed the Board's decision on the merits, but we disagreed that its ruling rendered the decision non-final. We held that the Board's decision was final and appealable, although we ultimately approved the Board's approach in retaining jurisdiction over the matter until the deficiencies identified in the FSEIS were resolved. See *id.* at 242-43, 250-51.

<sup>10</sup> See *NRC Staff's Motion for Summary Disposition of Contention 1A* (Aug. 17, 2018) (Staff Motion), Attach. 1, NRC Staff's Statement of Material Facts to Support Motion for Summary Disposition of Contention 1A, at 2 (Statement of Facts).

<sup>11</sup> *NRC Staff's Motion for Summary Disposition of Contentions 1A and 1B* (Aug. 3, 2017).

<sup>12</sup> LBP-17-09, 86 NRC 167 (2017). Contention 1B concerned whether the Staff had satisfied its obligation under the National Historic Preservation Act (NHPA) to consult with the Tribe.

<sup>13</sup> See Staff Motion, Attach. 1, Statement of Facts at 3-12.

<sup>14</sup> CLI-18-7, 88 NRC 1 (2018).

## **B. The March 2018 Approach**

In March 2018, the Staff proposed a survey approach that appeared to potentially satisfy the Tribe's specific requests for a cultural resources site survey as stated in the Tribe's May 2017 response to the Staff's April 2017 proposal.<sup>15</sup> This approach involved hiring a contractor to facilitate a new survey, inviting other Lakota Sioux Tribes that had not participated in an earlier survey, obtaining oral histories from tribal elders, allowing more than one opportunity to examine the site, and allowing the participating Tribes to comment on the field survey report.<sup>16</sup> According to the proposal, the precise survey methodology would be worked out in consultation among the Staff, the contractor, and the Tribe in the weeks before the initial phase of the survey.<sup>17</sup>

After some initial disagreement, Powertech and the Tribe eventually agreed to the March 2018 Approach.<sup>18</sup> With the parties in agreement, the Staff performed various activities in preparation for the first phase of the onsite survey, scheduled to take place during the two-week period of June 11-22, 2018.<sup>19</sup> On June 1 and 4, 2018, the contractor, Dr. Paul Nickens, and the Staff held webinars and teleconference calls to discuss the survey methodology with the invited

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<sup>15</sup> See Letter from Cinthya I. Román, Chief, Environmental Review Branch, NRC, to Trina Lone Hill, Director, Cultural Affairs & Historic Preservation Office, Oglala Sioux Tribe (Mar. 16, 2018) (ML18075A499) (March 2018 Approach), Encl. 1 – Timeline for NRC Staff's Approach for Obtaining Information on Lakota Sioux Cultural Resources Potentially Impacted by the Dewey-Burdock ISR Project (Mar. 16, 2018) (ML18075A502) (Timeline).

<sup>16</sup> Staff Motion, Attach. 1, Statement of Facts at 10-11.

<sup>17</sup> See March 2018 Approach at 2; *id.*, Encl. 1, Timeline.

<sup>18</sup> See *Oglala Sioux Tribe's Response to NRC Staff's March 16, 2018 Cultural Resources Survey Proposal* (Mar. 30, 2018), at 1 (Tribe's Response to March 2018 Approach); Letter from John Mays, Chief Operating Officer, Powertech USA, Inc., to Cinthya I. Román, Chief, Environmental Review Branch, NRC (Apr. 11, 2018), at 1 (unnumbered) (ML18101A223).

<sup>19</sup> Staff Motion, Attach. 1, Statement of Facts at 15-18.

Tribes.<sup>20</sup> During a June 5 teleconference, Dr. Nickens presented a proposed work plan and requested comments from the Tribes.<sup>21</sup>

On June 8, however, counsel for the Tribe informed the Staff that the Tribe would not participate in the field survey scheduled to start on June 11.<sup>22</sup> On June 12, the Tribe provided the Staff and Dr. Nickens with a document entitled “Discussion Draft – Cultural Resources Survey Methodology” (June 12 Discussion Draft), which proposed numerous additions to Dr. Nickens’s proposed survey methodology.<sup>23</sup> The June 12 Discussion Draft proposed bringing several dozen tribal elders, spiritual leaders, warrior society leaders, and technical staff to visit the site over several days in each of the seasons of the year and a field survey performed at 10-meter intervals throughout the site (approximately 10,500 acres).<sup>24</sup> These additions would cause the survey to take more than a year to complete and, by the Tribe’s estimate, cost over \$2 million to perform.<sup>25</sup> On June 13, 2018, the Tribe held an emergency meeting of its Cultural Affairs and Historic Preservation Advisory Council to discuss the survey methodology, with the NRC Staff and Dr. Nickens in attendance.<sup>26</sup> The Tribe provided an updated “discussion draft”

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<sup>20</sup> See *id.*, Attach. 1, Statement of Facts at 17; see also Summary of NRC Webinar and Teleconference Call Sessions to Discuss Survey Methodology for the Dewey-Burdock In Situ Uranium Recovery (ISR) Project (June 29, 2018) (ML18164A241) (Summary of Survey Methodology Sessions). Although other Tribes were invited to participate, only the Oglala Sioux Tribe participated on June 1 and 4. *Id.* at 1. On the June 5 teleconference, the Rosebud Sioux Tribe participated, along with the Oglala Sioux Tribe. *Id.*

<sup>21</sup> See Staff Motion, Attach. 1, Statement of Facts at 18; see also “Proposed Initial Work Plan for Phase 1 Tribal Field Survey at the Dewey-Burdock ISR Project Area, June 11-22, 2018” (ML18157A092).

<sup>22</sup> See Email from Travis Stills, Oglala Sioux Tribe Counsel, to Diana Diaz-Toro, Project Manager, NRC (June 8, 2018) (ML18159A585).

<sup>23</sup> See LBP-18-5, 88 NRC at 119-21.

<sup>24</sup> See *id.*

<sup>25</sup> *Id.* at 121.

<sup>26</sup> Staff Motion, Attach. 1, Statement of Facts at 21.

on June 15, 2018 (June 15 Discussion Draft), which, in addition to the conditions stated in the June 12 Discussion Draft, also called for examining areas over 20 miles from the Dewey-Burdock site.<sup>27</sup> The June 15 Discussion Draft further stated that the Tribe was aware that the Staff expected the budget to be much lower than the Tribe's proposal and that it was "now NRC's task to either accept the [Tribe's] proposal or to propose an approach that limits the [Tribe's] proposed survey methodology to meet what NRC considers a reasonable budget."<sup>28</sup>

Soon afterwards, the Staff informed the Tribe that it was discontinuing survey efforts.<sup>29</sup> Counsel for the Staff explained via email that the Tribe's proposal was "far apart . . . from what the staff expected" preparing for the first phase of the survey and that it represented "structural differences, rather than minor details that could be promptly resolved" before the second week of the scheduled phase one survey.<sup>30</sup> Staff counsel stated that Staff was not prepared to continue to incur day-to-day costs at the site and considered it necessary to discontinue the activities scheduled for the following week.<sup>31</sup>

The Tribe disagreed with the Staff's decision to terminate all field work.<sup>32</sup> During the June 15 email exchange, counsel for the Tribe claimed that the plan Dr. Nickens had presented in the webinars was simply an "open site survey," to which the Tribe had long objected and which included "no plan for protecting the Tribes' confidential cultural resources information."<sup>33</sup>

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<sup>27</sup> *Id.*, Attach. 1, Statement of Facts at 21-22.

<sup>28</sup> LBP-18-5, 88 NRC at 121.

<sup>29</sup> See Email exchange between Emily Monteith, NRC Staff Counsel, and Travis Stills, Oglala Sioux Tribe Counsel (June 15, 2018), at 2 (unnumbered) (ML18173A266) (Email Exchange).

<sup>30</sup> *Id.* at 1, 2 (unnumbered).

<sup>31</sup> *Id.* at 1 (unnumbered).

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 3 (unnumbered). The Board explained that the term "open site survey" has been used throughout the proceeding to mean "a survey 'where there is no support from NRC staff or

The Tribe stated that, nonetheless, progress had been made toward “a viable survey methodology.”<sup>34</sup> The Tribe’s counsel also stated that the Tribe was prepared to continue with a planned “windshield tour” and fieldwork scheduled for the second week of phase one.<sup>35</sup> Despite the Tribe’s response, the fieldwork remained discontinued.

### **C. The Staff’s Motion**

On August 17, 2018, the Staff moved a second time for summary disposition of Contention 1A and argued that the Staff had done all that it reasonably could to remedy the NEPA deficiencies identified by the Board in LBP-15-16. Therefore, the Staff argued, the information should be deemed “not reasonably available” as described by Council on Environmental Quality (CEQ) regulations:<sup>36</sup>

(b) If the information relevant to reasonably foreseeable significant adverse impacts cannot be obtained because the overall costs of obtaining it are exorbitant ... the agency shall include within the environmental impact statement: (1) A statement that such information is incomplete or unavailable; (2) a statement of the relevance of the incomplete or unavailable information to evaluating reasonably foreseeable significant adverse impacts on the human environment; (3) a summary of existing credible scientific evidence which is relevant to evaluating the reasonably foreseeable significant adverse impacts on the human environment, and (4) the agency’s evaluation of such impacts based upon theoretical approaches or research methods generally accepted in the scientific community.<sup>37</sup>

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contractor . . . [a]nd it is essentially opening the site to the tribes to go out and do what they will do and be totally responsible for providing all the data and the analysis with no set protocol or methodology.” LBP-18-5, 88 NRC at 116-17 (quoting Tr. at 1431 (Apr. 6, 2018)).

<sup>34</sup> Email Exchange at 3 (unnumbered).

<sup>35</sup> *Id.* at 1 (unnumbered).

<sup>36</sup> Staff Motion at 33-34.

<sup>37</sup> 40 C.F.R. § 1502.22. Although CEQ regulations do not bind the NRC, we give their regulations substantial deference, subject to certain conditions. See 10 C.F.R. § 51.10(a); see also *Dominion Nuclear North Anna, LLC* (Early Site Permit for North Anna ESP Site), CLI-07-27, 66 NRC 215, 222 n.10 (2007).

The Staff acknowledged in its motion that no new cultural resources information had been obtained.<sup>38</sup> The Staff maintained that the March 2018 Approach was reasonable because it included the elements that the Tribe had previously identified as necessary for a sufficient survey, including involving other tribes, hiring a qualified contractor, involving tribal elders, and providing two opportunities to view the site.<sup>39</sup> The Staff argued that the cost to obtain more complete information with the Tribe's help would be exorbitant due to the Tribe's conditions set forth in the June 12 Discussion Draft and June 15 Discussion Draft.<sup>40</sup> It argued that the Tribe's discussion drafts constituted constructive repudiation of the previously agreed-upon March 2018 Approach.<sup>41</sup> Therefore, the Staff argued that obtaining the Tribe's cooperation to identify additional cultural resources was not reasonably feasible.<sup>42</sup>

Powertech filed a brief in support of the Staff's motion, and the Tribe both opposed the Staff's motion and filed a cross-motion for summary disposition.<sup>43</sup>

In opposing the Staff's Motion, the Tribe argued that the Staff never prepared a scientific methodology as contemplated by the March 2018 Approach.<sup>44</sup> According to the Tribe, Dr. Nickens's proposed methodology amounted to an "open site survey," which the Tribe has

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<sup>38</sup> Staff Motion at 15.

<sup>39</sup> *Id.* at 18-24.

<sup>40</sup> *Id.* at 13, 17-35.

<sup>41</sup> *Id.* at 16, 29-33.

<sup>42</sup> *Id.* at 33.

<sup>43</sup> *Powertech (USA) Inc.'s Response in Support of NRC Staff Motion for Summary Disposition of Contention 1A* (Aug. 31, 2018); *Oglala Sioux Tribe's Response in Opposition to NRC Staff's Motion for Summary Disposition of Contention 1A* (Sept. 21, 2018) (Tribe Response); *Oglala Sioux Tribe Motion for Summary Disposition* (Aug. 17, 2018) (Tribe Motion for Summary Disposition).

<sup>44</sup> Tribe Response at 5-6.



repeatedly rejected as inadequate and unscientific.<sup>45</sup> The Tribe claimed that during the June 5, 2018, teleconference, Dr. Nickens acknowledged that the survey was “not the type of approach he would recommend.”<sup>46</sup> The Tribe maintained that its discussion drafts were intended “to facilitate the discussions” about the type of methodology to use, and that it had expected the NRC Staff to “continue working on the methodology” instead of abruptly discontinuing field activities.<sup>47</sup>

The Tribe, in its own motion for summary disposition, argued that the Staff had abandoned its attempts to comply with NEPA.<sup>48</sup> It therefore renewed its request for the Board to “vacate the license and remand the matter to the NRC Staff to comply with NEPA.”<sup>49</sup> It also argued that, in the alternative, the Board “should vacate [Powertech’s] license, enter a final decision in the Tribe’s favor on Contention 1A, and dismiss Powertech’s license application.”<sup>50</sup>

#### **D. The Board’s Ruling in LBP-18-5**

The Board rejected both motions for summary disposition and found that there were material facts in dispute that could not be resolved without an evidentiary hearing.<sup>51</sup> With respect to the Staff’s motion, the Board recognized that had the March 2018 Approach been

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<sup>45</sup> See Tribe Response, Attach., “Declaration of Kyle White” (Sept. 21, 2018), at 6-7 (White Declaration). Mr. White is the Director of the Oglala Sioux Tribe’s Natural Resources Regulatory Agency and its Acting Tribal Historic Preservation Officer. *Id.*, Attach., White Declaration at 1.

<sup>46</sup> *Id.*, Attach., White Declaration at 7. This statement is not included in the Summary of Survey Methodology Sessions, but that summary does not purport to be a verbatim transcript of the participants’ statements.

<sup>47</sup> *Id.*

<sup>48</sup> Tribe Motion for Summary Disposition at 9.

<sup>49</sup> *Id.* at 10.

<sup>50</sup> *Id.*

<sup>51</sup> LBP-18-5, 88 NRC at 100, 133-34.

carried out, it might well have satisfied NEPA's hard look requirement.<sup>52</sup> The Board found that all parties had accepted the March 2018 Approach as reasonable by the time the contractor began its survey in June 2018.<sup>53</sup> The Board also found that the approach attempted to address each of the Tribe's concerns, including hiring a qualified contractor, involving other Lakota Sioux Tribes, providing iterative opportunities to view the site, involving tribal elders, and using a scientific methodology.<sup>54</sup> But the Board held that although the March 2018 Approach "could constitute a valid path for resolving Contention 1A," there was still a factual dispute over whether the Staff had acted reasonably in its attempts to implement that approach.<sup>55</sup> Therefore, it could not grant summary disposition in the Staff's favor.

Specifically, the Board found that the reasonableness of Dr. Nickens's proposed survey methodology was a material fact in dispute.<sup>56</sup> The Board noted that the March 2018 Approach did not stipulate a survey methodology but called for the contractor and the Tribe to agree on an appropriate methodology before the field survey.<sup>57</sup> In addition, the Board found a question of fact concerning the reasonableness of the Staff's decision to discontinue efforts to implement the March 2018 Approach.<sup>58</sup> The Board noted that the Staff could have conducted other planned aspects of the March 2018 Approach, such as conducting interviews with tribal elders, while it continued to work with the Tribe to identify an acceptable methodology.<sup>59</sup> The Board

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<sup>52</sup> *Id.* at 126.

<sup>53</sup> *Id.* at 111.

<sup>54</sup> *Id.* at 112-19.

<sup>55</sup> *Id.* at 100.

<sup>56</sup> *Id.* at 130.

<sup>57</sup> *Id.* at 126.

<sup>58</sup> *Id.* at 132-34.

<sup>59</sup> *Id.* at 133.

concluded that a material fact remained in dispute regarding whether the Staff's decision not to implement the March 2018 Approach—or any other approach—was reasonable.<sup>60</sup> Therefore, the Board found that material factual disputes existed regarding the Staff's explanation that the information is “not reasonably available.”<sup>61</sup>

The Board also found that the material factual dispute about the reasonableness of the Staff's actions likewise precluded it from granting summary disposition to the Tribe.<sup>62</sup>

The Board concluded that the Staff had two choices: either resume implementation of the March 2018 Approach or prepare for another evidentiary hearing.<sup>63</sup> The Board observed that the Tribe had agreed to the timeframes for the survey, that is, two phases of two weeks each.<sup>64</sup> The Board cautioned the Tribe that, if the Staff chose to move forward with the survey, “the *only* aspect of the Approach that is open for discussion is the site survey methodology.”<sup>65</sup> Therefore, “any tribal negotiating position or proposal should *only* encompass the specific scientific method that would fit into the two week periods set out in the March 2018 Approach.”<sup>66</sup> The Board stated that if the Staff were to choose to go to evidentiary hearing, then the Staff must show that the March 2018 Approach “contained a reasonable methodology,” that the Staff acted reasonably in discontinuing all work, and that the Tribe's proposed alternatives were cost

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<sup>60</sup> *Id.* at 128.

<sup>61</sup> *Id.* at 129-30. Despite the Board's section heading, the Board concluded here that summary disposition at this time would be “wholly inappropriate,” due to the existence of material factual disputes.

<sup>62</sup> *Id.* at 130.

<sup>63</sup> *Id.* at 134-35.

<sup>64</sup> *Id.* at 136.

<sup>65</sup> *Id.* at 135.

<sup>66</sup> *Id.* at 135.

prohibitive.<sup>67</sup> The order concluded with a schedule for an evidentiary hearing that would take place in late February 2019 and an instruction for the Staff to notify the Board of its choice by November 30, 2018.<sup>68</sup> The Staff initially chose to continue to work toward implementing a new survey of the site.<sup>69</sup>

On February 15, 2019, Staff provided the Tribe with another proposal for survey methodology.<sup>70</sup> The parties met on February 22, 2019, to further negotiate the proposed survey methodology within the limitations set by the Board in LBP-18-5.<sup>71</sup> During a subsequent teleconference with the Board, the Staff stated that the February 22 negotiation was not productive and that it planned to file a motion requesting a schedule for an evidentiary hearing on the reasonableness of the Staff's February 22, 2019, proposal.<sup>72</sup> The Board granted the Staff's motion and scheduled a hearing on this issue for August 28-30, 2019.<sup>73</sup>

## II. DISCUSSION

### A. Standard for Interlocutory Review

A ruling denying a motion for summary disposition is an interlocutory decision, and we generally disfavor interlocutory review.<sup>74</sup> Our rules of procedure allow interlocutory review only

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<sup>67</sup> *Id.* at 136.

<sup>68</sup> *Id.* at 139.

<sup>69</sup> See Letter from Lorraine Baer, NRC Staff Counsel, to Administrative Judges (Nov. 30, 2018) (ML18334A295).

<sup>70</sup> See Proposed Draft Cultural Resources Site Survey Methodology For the Dewey Burdock *In-Situ* Uranium Recovery Project in Fall River and Custer Counties, South Dakota (Feb. 15, 2019) (ML19046A443).

<sup>71</sup> Tr. at 1563.

<sup>72</sup> Tr. at 1563-65, 1619-21; see *Motion to Set Schedule for Evidentiary Hearing* (April 3, 2019).

<sup>73</sup> Order (Granting NRC Staff Motion and Scheduling Evidentiary Hearing) (Apr. 29, 2019) (unpublished).

<sup>74</sup> See CLI-18-7, 88 NRC at 6.

where the party requesting review can show that it is threatened with “immediate and serious irreparable impact” or the board’s decision “affects the basic structure of the proceeding in a pervasive and unusual manner.”<sup>75</sup>

Powertech acknowledges that its petition addresses a non-final Board decision and is therefore interlocutory, but it asserts that it can meet our standard for interlocutory review.<sup>76</sup>

Powertech argues that the Board “committed legal error with pervasive effect” when it found that there was still a genuine issue of material fact in the litigation and when it found that the Staff had not shown that further Native American cultural resources information is “unavailable” as that term is used in CEQ regulations. It argues further that these errors will cause Powertech immediate and irreparable harm.<sup>77</sup>

## **B. Powertech Has Not Met the Standard for Interlocutory Review**

### *1. Irreparable Harm*

Powertech claims that the “series of erroneous decisions” by the Board have “prolonged” the proceeding with “no end in sight.”<sup>78</sup> Powertech argues that, as long as the proceeding drags on, Powertech cannot start operations and generate income, and it is increasingly difficult for Powertech to raise investment capital.<sup>79</sup> Therefore, Powertech claims that it will suffer immediate and irreparable harm in the form of financial collapse.

We are not persuaded by this argument. We have rejected claims that delay constitutes immediate and irreparable harm that warrants our interlocutory review.<sup>80</sup> We have also

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<sup>75</sup> *Id.*; see also 10 C.F.R. § 2.341(f)(2)(i)-(ii).

<sup>76</sup> Petition at 6.

<sup>77</sup> See *id.* at 2.

<sup>78</sup> Petition at 16.

<sup>79</sup> *Id.* at 17-18.

<sup>80</sup> See CLI-18-7, 88 NRC at 7.

specifically rejected unsubstantiated claims that risks to a licensee's "credit rating, ability to obtain financing and ability to carry on its work" constituted irreparable harm.<sup>81</sup> Aside from the assertions in its petition, Powertech's claims are not supported by any evidence, such as affidavits or declarations.

2. *Pervasive and Unusual Effect on the Structure of the Proceeding*

Powertech next argues that the Board "committed legal error with pervasive effect" in its rulings<sup>82</sup> and therefore affected the "basic structure of the proceeding in a pervasive and unusual manner."<sup>83</sup> We have found such an effect in rare situations, as where a board splits a proceeding among two boards or admits a contention conditionally.<sup>84</sup> We have found no examples, however, where we took interlocutory review on the bases Powertech argues here and Powertech has not provided any examples.

a. *Protracted Litigation*

Powertech argues that the Board's decision will affect this proceeding in a pervasive manner by prolonging it indefinitely.<sup>85</sup> Elsewhere in its petition, Powertech argues that if the Tribe can create a material issue of fact simply by "chang[ing] its perspective at . . . will," the

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<sup>81</sup> See *Sequoyah Fuels Corp. and General Atomics* (Gore, Oklahoma Site), CLI-94-11, 40 NRC 55, 61 (1994); see also *Entergy Nuclear Operations, Inc.* (Indian Point, Units 2 and 3), CLI-09-6, 69 NRC 128, 133-36 (2009) (rejecting the argument that "truly exceptional delay or expense," resulting from contention potentially requiring production of thousands of documents, constituted "irreparable harm" warranting interlocutory review).

<sup>82</sup> Petition at 2, 20-22.

<sup>83</sup> 10 C.F.R. § 2.341(f)(2)(ii).

<sup>84</sup> See, e.g., *Shaw Areva MOX Services, LLC* (Mixed Oxide Fuel Fabrication Facility), CLI-09-2, 69 NRC 55, 62-63 (conditional dismissal of contention); *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), CLI-02-7, 55 NRC 205, 213-14 (2002) (decision to adjudicate construction permit separately from operating permit); *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-98-7, 47 NRC 307, 310 (1998) (establishment of separate board for different contentions).

<sup>85</sup> Petition at 20-21.

proceeding could never come to a conclusion.<sup>86</sup> But Powertech supplies no example in our case law where we have found that protracted litigation in itself provides grounds for our immediate review. In fact, we have specifically rejected such arguments in the past.<sup>87</sup> Indeed, prolonging litigation is a likely result when a board denies a motion for summary disposition.

Moreover, while we do not need to decide whether “indefinite” litigation warrants interlocutory review as a “pervasive and unusual effect,” we find that this case does not present that scenario. The challenged Board ruling did *not* find that the proceeding would continue until the Tribe’s cooperation was finally secured—it found only that the reasonableness of the Staff’s efforts was still in dispute.<sup>88</sup>

The Board’s ruling did not give the Tribe free reign to change its perspective, as Powertech claims. The Board stated that the Tribe was bound by the terms it had agreed to in accepting the March 2018 Approach, including the two two-week periods allotted to accomplish the survey.<sup>89</sup> We also observe that summary disposition is not the only option for ending this proceeding. The Board was prepared to proceed to an evidentiary hearing to establish whether further cultural resources information was reasonably obtainable. That hearing occurred in August 2019.

*b. Claim that the Board Overstepped its Role*

Powertech also argues that the Board’s ruling alters the structure of the proceeding in a pervasive and unusual manner in that it “appears . . . to dictate the terms of satisfaction of

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<sup>86</sup> *Id.* at 16.

<sup>87</sup> See, e.g., *Connecticut Yankee Atomic Power Co.* (Haddam Neck Plant), CLI-01-25, 54 NRC 368, 373-74 (2001).

<sup>88</sup> LBP-18-5, 88 NRC at 130-34.

<sup>89</sup> *Id.* at 135-36.

Contention 1A.”<sup>90</sup> Powertech argues that the Board apparently will accept nothing “short of implementation of the March 2018 Approach as dispositive” of the contention.<sup>91</sup>

It is well-established that a Board has no authority to direct the manner in which the Staff conducts its safety and environmental reviews,<sup>92</sup> and we do not find that the Board inappropriately dictated the Staff’s non-adjudicatory activities. The question of whether NEPA could be satisfied through an approach other than the March 2018 Approach was not before the Board. The Staff’s Motion for Summary Disposition did not ask the Board to sanction some alternative approach for gathering cultural resources information. And the Board’s decision suggested that an alternative approach might work as well to gather information about cultural resources.<sup>93</sup> In addition, the Board had no role in the development of the March 2018 Approach. The Staff proposed the approach, and Powertech and the Tribe agreed to it; Powertech’s own petition for review acknowledges that it agreed to the March 2018 Approach.<sup>94</sup> And there were details still to be worked out within that approach—the survey methodology—that the Board did not purport to dictate or disturb. Therefore, we do not find that the Board has dictated the Staff’s non-adjudicatory activities.

### 3. *Novelty of Issue*

Powertech further argues that the Commission should take review because “historic and cultural resources in NEPA processes present a novel issue that warrants Commission

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<sup>90</sup> Petition at 21.

<sup>91</sup> *Id.*

<sup>92</sup> See CLI-16-20, 84 NRC at 250; *Entergy Nuclear Operation, Inc.* (Indian Point, Units 2 and 3), CLI-11-14, 74 NRC 801, 813 n.70 (2011); *Shaw Areva MOX Services*, CLI-09-2, 69 NRC at 63.

<sup>93</sup> See LBP-18-5, 88 NRC at 127 (“The NRC Staff has not implemented the mutually agreed-upon March 2018 Approach or any alternative approach ....”).

<sup>94</sup> Petition at 4.



review.”<sup>95</sup> Our regulations provide that a presiding officer (or board) may refer a ruling to the Commission for immediate review if *in the presiding officer’s judgment*, the ruling presents “significant and novel legal or policy issues.”<sup>96</sup> And a party may request that the board certify a ruling for our immediate review.<sup>97</sup> We may also take review on our own initiative. But as the case Powertech cites for the Commission’s authority to take review points out, a petitioner may not solicit Commission review on that basis.<sup>98</sup> Therefore, Powertech’s request is procedurally improper.

Moreover, Powertech does not explain why it would be advantageous for the Commission to take review at this point in the litigation as opposed to waiting until the litigation is complete and the record fully developed. Powertech argues that this proceeding, in addition to another *in situ* uranium recovery project case posing similar cultural resources issues, poses “unique challenges for the Commission and NRC Staff to develop a uniform policy for addressing both NHPA and associated NEPA reviews.”<sup>99</sup> However, we are not convinced that the creation of a uniform policy regarding cultural resources would benefit from our involvement before the Board issues a final ruling.

While we do not find that Powertech’s concerns related to duration meet our high standards for interlocutory review, we are mindful of these considerations. As noted above, the Staff has now elected to terminate this adjudication through an evidentiary hearing, and the

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<sup>95</sup> *Id.* at 23.

<sup>96</sup> 10 C.F.R. § 2.323(f)(1).

<sup>97</sup> *Id.* § 2.323(f)(2).

<sup>98</sup> Petition at 7 (citing *Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant), CLI-00-11, 51 NRC 297, 299 (2000)); *see also Haddam Neck*, CLI-01-25, 54 NRC at 374-75; *Indian Point*, CLI-09-6, 69 NRC at 138 (Commission will not entertain requests from a party that we take review in the exercise of our inherent supervisory authority).

<sup>99</sup> Petition at 23.

Board has established a schedule to complete this adjudication in the coming months.<sup>100</sup> We anticipate that the Board will use the available case management tools to close this proceeding consistent with the established schedule.<sup>101</sup> We also expect the parties to support the Board in reaching this goal.<sup>102</sup>

To further these objectives, we offer the following observation. To clarify our stance on 40 C.F.R. § 1502.22, the Board suggests that we previously accepted “the procedural requirements included in section 1502.22(b), so their applicability in these circumstances continues to be appropriate” for addressing a situation where the agency has incomplete or unavailable information in the NEPA context.<sup>103</sup> On the contrary, we have recently reiterated that as an independent regulatory agency we are not bound by section 1502.22 and reformulated a contention to remove references to that regulation’s requirements for developing a NEPA analysis when information was incomplete or unavailable.<sup>104</sup> Rather, we have consistently directed the Staff to undertake reasonable efforts to obtain unavailable information.<sup>105</sup> As Chairman Svinicki noted in her earlier dissent in this proceeding, section 1502.22 can be a useful guide in determining what is reasonable, but it is not controlling.<sup>106</sup> To the extent the Board has focused its analysis on whether the Staff advanced a reasonable

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<sup>100</sup> Order (Granting NRC Staff Motion and Scheduling Evidentiary Hearing) (Apr. 29, 2019) (establishing November 29, 2019, as the deadline for a decision from the Board).

<sup>101</sup> *Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18, 20-21 (1998).

<sup>102</sup> *Id.* at 21-22.

<sup>103</sup> LBP-18-5, 88 NRC at 129 (citation omitted).

<sup>104</sup> *Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-11-11, 74 NRC 427, 438, 444 (2011).

<sup>105</sup> *Entergy Nuclear Generation Company and Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-10-22, 72 NRC 202, 208-09 (2010).

<sup>106</sup> CLI-16-20, 84 NRC at 264 & n.7 (Svinicki, dissenting in part).

proposal to conduct the survey and whether its determination to discontinue the survey was reasonable, we do not see a legal error with respect to section 1502.22. We offer this clarification to prevent overreliance on section 1502.22 throughout the remainder of this adjudicatory proceeding.

**III. CONCLUSION**

For the foregoing reasons, we deny review of the Board's decision in LBP-18-5.

IT IS SO ORDERED.

For the Commission

**NRC SEAL**

**/RA/**

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Annette L. Vietti-Cook  
Secretary of the Commission

Dated at Rockville, Maryland,  
this 26th day of September 2019.

### **Additional Views of Chairman Svinicki**

Today's ruling marks the third time in four years the Commission has entered an order regarding Contention 1A in this proceeding. When the Commission initially upheld the Board's determination to admit Contention 1A, in CLI-16-20, I dissented.<sup>1</sup> I found that the Board insufficiently addressed the Staff's claim that it met the National Environmental Policy Act's (NEPA) requirement to undertake reasonable efforts to obtain the information on cultural resources that Contention 1A asserted was lacking.<sup>2</sup> Subsequently, I joined the majority in rejecting Powertech's appeal from a Board order denying summary disposition on Contention 1A in CLI-18-07.<sup>3</sup> However, I again wrote separately to emphasize that while I found our standards for interlocutory appeal unmet, my views on the admissibility of Contention 1A were unchanged.<sup>4</sup>

Regarding the current appeal, I agree with the majority that Powertech's filing falls short of our high standards for interlocutory review. Nonetheless, I continue to believe that a stricter application of NEPA at the time of contention admissibility may have saved the agency many years of litigation. As I observed in my previous additional views accompanying CLI-18-07, the order upheld in CLI-16-20 led to an unworkable adjudicatory proceeding resulting in now three years of adjudicatory delay.<sup>5</sup> That delay, and associated expense, forms the basis for much of Powertech's instant appeal. While I concur with the majority that the Commission has not historically found concerns related to delay and expense sufficient to warrant interlocutory

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<sup>1</sup> CLI-16-20, 84 NRC 219 (2016).

<sup>2</sup> *Id.* at 263-64.

<sup>3</sup> CLI-18-07, 88 NRC 1 (2018).

<sup>4</sup> *Id.* at 11.

<sup>5</sup> *Id.*

review, Powertech's appeal illustrates to me that extreme cases of adjudicatory delay might. Nonetheless, as the majority observes, the parties are now pursuing an evidentiary hearing that should complete this proceeding in the coming months. I join the majority in offering my expectation that the Board and parties will work together to meet the established schedule.

### **Additional Views of Commissioner Baran**

While I agree with the Commission's decision to deny review of the Board's conclusions in LBP-18-5, I write separately because I do not believe the "observation" about the NRC Staff's compliance with the National Environmental Policy Act made in the final paragraph of II.B.3. is necessary to reach a decision in this case. My agreement with the overall decision should not be read as an endorsement of this unnecessary dicta.

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

In the Matter of )  
)  
POWERTECH (USA) INC. ) Docket No. 40-9075-MLA  
(Dewey-Burdock In Situ Recovery Facility) )  
)

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **COMMISSION MEMORANDUM AND ORDER (CLI-19-09)** have been served upon the following persons by Electronic Information Exchange, and by electronic mail as indicated by an asterisk (\*).

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[Original signed by Wendy Moore \_\_\_\_\_]  
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Dated at Rockville, Maryland,  
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