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OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)	
)	
CROW BUTTE RESOURCES, INC.)	Docket No. 40-8943
In-Situ Leach Facility, Crawford, Nebraska)	
)	ASLBP No. 07-859-03-MLA-BD01
(License Amendment for the North Trend)	
Expansion Project))	

NRC STAFF'S REPLY TO PETITIONERS' MEMORANDUM OF LAW REGARDING
INDIGENOUS RIGHTS, TREATIES, AND FEDERAL INDIAN LAW

INTRODUCTION

Pursuant to the Board's January 24, 2008 Order, the NRC Staff ("Staff") hereby replies to Petitioners' "Memorandum of Law Regarding Indigenous Rights, Treaties and Federal Indian Law" ("Petitioners' Brief"). For the reasons discussed below, Petitioners' arguments regarding the Fort Laramie Treaties¹ and the U.N. Declaration, along with other doctrines of Federal Indian law, statutes, and executive orders, do not support their standing or contentions in this proceeding.

¹ Petitioners have stated in their Brief that Petitioner Thomas Cook is not a member of the Oglala Sioux Tribe and therefore is not asserting rights under the Fort Laramie Treaties. Petitioners' Brief at 1. Further, Petitioners have not shown that Western Nebraska Resources Council (WNRC) can assert such rights, because WNRC has not claimed or demonstrated any connection to the Oglala Sioux Tribe. Therefore, the Staff's position is that only Petitioners Debra White Plume, Owe Aku, and Slim Buttes Agricultural Development Corporation (SBADC) have shown sufficient ties to the Oglala Sioux Tribe to assert any treaty rights that might exist.

BACKGROUND

On January 24, 2008, the Board issued an order directing the parties to file briefs on the law relating to the Fort Laramie Treaties of 1851 and 1868 ("1851 Treaty" and "1868 Treaty," respectively), and the United Nations Declaration on the Rights of Indigenous Peoples ("U.N. Declaration"), "insofar as they may be relevant to standing and any contentions concerning water rights and consultation with Native Americans on historical sites and artifacts." Order (Confirming Matters Addressed at January 23, 2008, Telephone Conference) at 2, January 24, 2008 ("Board's January 24, 2008 Order"). On February 22, the NRC Staff,² Crow Butte Resources, Inc. ("Applicant"),³ and Petitioners⁴ filed their initial briefs. The parties were also directed to file replies to each other's initial briefs no later than February 29, 2008. *Id.* at 3. The NRC Staff's Brief describes the context in which these issues were raised, along with the specific assertions made; therefore, the Staff will not repeat that information here.

DISCUSSION

I. Procedural Defects in Petitioners' Brief

The Board should disregard those portions of Petitioners' Brief that exceed the scope of the Board's request and subsequent order. As discussed below, Petitioners are attempting to use this opportunity for briefing to raise new issues, new bases for their contentions, and new documents that were not part of their original petition. The scope of the briefing was clearly

² "NRC Staff's Brief on Law Related to the Fort Laramie Treaties and the United Nations Declaration of Rights of Indigenous Peoples" (Feb. 21, 2008) ("NRC Staff's Brief").

³ "Crow Butte Resources, Inc.'s, Brief on Treaties and United Nations Declaration" (Feb. 22, 2008) ("Applicant's Brief").

⁴ "Petitioners' Memorandum of Law Regarding Indigenous Rights, Treaties, and Federal Indian Law" (Feb. 22, 2008) ("Petitioners' Brief"), submitted on behalf of Petitioners Thomas Cook, Slim Buttes Agricultural Development Corporation ("SBADC"), Western Nebraska Resources Council ("WNRC"), Owe Aku, and Debra White Plume.

limited to "law related to the Fort Laramie Treaties and the U.N. Declaration" as they relate to water rights and consultation requirements (*i.e.*, Contentions A and C). See Board's January 24, 2008 Order at 2. Therefore, any additional information in the brief is outside the scope of the Board's Order.

The Commission has held that replies "must focus narrowly on the legal or factual arguments first presented in the original petition or raised in the answers to it," and that "new bases for a contention cannot be introduced after the date the original contentions are due, unless the petitioner meets the late-filing criteria set forth in [10 C.F.R. §§] 2.309(c) and (f)(2)." *Nuclear Management Co. (Palisades Nuclear Plant)*, CLI-06-17, 63 NRC 727, 732 (2006). Furthermore, "if the contention as originally pled did not cite adequate documentary support, a petitioner cannot remediate the deficiency by introducing in the reply documents that were available to it during the time frame for initially filing contentions." *Id.* The Commission's regulations also prohibit new or amended contentions after the original filing date unless the requirements of sections 2.309(c) and (f)(2) are met. See *Consumers Energy Company, Nuclear Management Company, LLC, Entergy Nuclear Palisades, LLC, and Entergy Nuclear Operations, Inc. (Palisades Nuclear Power Plant)*, CLI-07-18, 65 NRC 399, 413 n.46 (2007); *Palisades*, CLI-06-17, 63 NRC at 732; *Louisiana Energy Services, L.P. (National Enrichment Facility)*, CLI-04-35, 60 NRC 619, 625 (2004).

In light of the clear instructions from the Board on the scope of this briefing, as well as the Commission's regulations regarding new and late-filed contentions, the Commission's reasoning in *Palisades* should be applied to Petitioners' attempt to raise new issues or new bases in support of their contentions, and to supply additional documentary support, in this brief. The new issues or bases include (1) adverse impact on Petitioners' spiritual practices from

contamination of groundwater (Petitioners' Brief at 17-24, 34, 45),⁵ (2) adverse impact on Petitioners' hunting and fishing rights (Petitioners' Brief at 12, 32-33, 41, 48) (3) alleged violation of the Clean Water Act (Petitioners' Brief at 36-37), and (4) consultation requirements "in connection with the proposed ISL mining" and impacts on the tribe's water resources (Petitioners' Brief at 40, 42).⁶ Petitioners also refer to several additional documents,⁷ which were available well before the deadline for filing petitions, in a discussion of restoration of groundwater at ISL mines. See Petitioners' Brief at 37-38. The Staff objects to this discussion, which is completely outside the scope of the Board's Order, and to this further attempt by Petitioners to bring in additional documentary support for their contentions.

II. Petitioners have failed to show that they possess treaty rights or reserved water rights that support their standing or contentions in this proceeding.

As the Applicant noted in its brief, neither the NRC nor the Board has the authority to decide jurisdictional disputes such as water rights determinations or applicability of treaties.

⁵ Petitioners initially raised this issue in their replies and supplemental affidavits. See "Reply to NRC Staff Response [of Thomas K. Cook, Slim Buttes Agricultural Development Corporation, and Western Nebraska Resources Council]" at 17 (Dec. 28, 2007) ("Cook Reply"), Affidavit of Thomas Cook at ¶¶ 5-6 (Dec. 28, 2007); Affidavit of Joseph American Horse at ¶¶ 5-6 (Dec. 28, 2007). The Staff noted its objections to the raising of this issue and other new issues, bases and documents in its response to the supplemental affidavits and at the January 16, 2008 oral argument. See NRC Staff's Response to Supplemental Affidavits at 5, 11 (Jan. 4, 2008); Transcript of January 16, 2008 Hearing ("HT") at 227-236.

⁶ Previously, Petitioners' contention regarding consultation requirements was limited to Contention C, consultation regarding the prehistoric Indian camp. See Reference Petition at 21-23.

⁷ The documents are *Consideration of Geochemical Issues in Groundwater Restoration at Uranium In-Situ Leach Mining Facilities: Draft Report for Comment*, NUREG-6870, and "Uranium ISL Ground-Water Data from Written Testimony of William P. Staub, Ph.D., in support of ENDAUM-SRIC Presentation on Groundwater Issues in Hydro Resources, Inc., Docket No. 40-8968." The Staff notes that the version of NUREG/CR-6870 cited in Petitioners' Brief is a draft for comment; the final version is *Consideration of Geochemical Issues in Groundwater Restoration at Uranium In-Situ Leach Mining Facilities*, NUREG/CR-6870 (Jan. 2007). At the January 16, 2008 oral argument, the Staff objected to Petitioners attempt to introduce NUREG/CR-6870 in their reply of December 28, 2007. See "Reply to NRC Staff Response to Petition of Owe Aku and Debra White Plume" at 11-12 (Dec. 28, 2007) ("Owe Aku Reply"); HT at 232-35.

Applicant's Brief at 5, citing *Hydro Resources, Inc.* (P.O. Box 777, Crownpoint, NM 87313), CLI-06-29, 64 NRC 417, 420 (2006) ("HRI"). Thus, to the extent that Petitioners' treaty rights, including water rights, are uncertain, the Board cannot decide whether such rights exist or to what extent they exist, and such determinations are outside the scope of this proceeding. *HRI*, CLI-06-29, 64 NRC at 420. However, to the extent that such rights have already been clearly established or extinguished in federal treaties, statutes, or case law, the Board can apply that law in making decisions on standing and contention admissibility.

A. Petitioners no longer possess any title in the North Trend area under the Fort Laramie Treaties.

As outlined in the NRC Staff's Brief, federal law clearly shows that the Oglala Sioux Tribe retains no title, aboriginal or recognized, to land in Nebraska that they once had rights to under the Fort Laramie Treaties. The United States Court of Claims held that the 1868 Treaty ceded large tracts of land, including the land in northwestern Nebraska where the North Trend site is located, under the 1868 Treaty. *Sioux Tribe of Indians v. United States*, 6 Cl. Ct. 91, 92 (1984); *United States v. Sioux Tribe*, 616 F.2d 485, 487 (Ct. Cl. 1980). The Court of Claims awarded the tribe compensation for that cession, which extinguished all title the Sioux had to the ceded land.⁸ *Sioux Tribe of Indians v. United States*, 14 Cl. Ct. 94, 100 (1987), *aff'd* 862 F.2d 275, 277 (Fed. Cir. 1988), *cert. denied*, *Oglala Sioux Tribe v. United States*, 490 U.S. 1075 (1989). Moreover, in 1877, Congress enacted a statute that ratified an agreement in

⁸ The award of a final judgment for the Sioux claims under the Indian Claims Commission Act, and payment of that judgment into a trust account in the United States Treasury, extinguished all future "claims and demands touching any of the matters involved in the controversy." Indian Claims Commission Act, 25 U.S.C. § 70 (1976), 60 Stat. 1049, 1055 (1946); *United States v. Dann*, 470 U.S. 39, 41 n.2, 50 (1985). The Indian Claims Commission Act was the sole remedy established by Congress for claims arising before August 13, 1946, and the statute of limitations under that Act has run. *Oglala Sioux Tribe of the Pine Ridge Reservation v. United States*, 650 F.2d 140, 143-44 (8th Cir. 1981), *cert. denied* 455 U.S. 907 (1982). Thus, unless Congress in the future decides to allow further claims, the judgments of the Indian Claims Commission and the Court of Claims cannot be challenged. *Id.*

which the Sioux “relinquish[ed] and cede[d] all the territory lying outside the [Great Sioux] reservation ... including all privileges of hunting.” Act of February 28, 1877, 19 Stat. 254, 255 (1877) (“1877 Act”). The 1877 Act also abrogated Article 16 of the 1868 Treaty. *Id.* Thus, because federal law indisputably shows that the Oglala Sioux Tribe retains no title to the subject lands, Petitioners cannot base their standing or contentions on such title.

B. Petitioners do not possess hunting and fishing rights in the North Trend area under the Fort Laramie Treaties.

Petitioners assert that their hunting and fishing rights under the treaties gives them “an interest” in this proceeding. Petitioners’ Brief at 33. There is no question that members of an Indian tribe have exclusive hunting, fishing and gathering rights within their reservation lands, regardless of whether those rights were expressly granted at the time the reservation was created. *See, e.g., Menominee Tribe v. United States*, 391 U.S. 404, 406 (1968). Those rights exist regardless of how the reservation was created. *United States v. Dion*, 476 U.S. 734, 745 n.8 (1986). However, because the North Trend area is not within an Indian reservation, the foregoing principles do not apply in this proceeding.

As noted in the NRC Staff’s Brief, under the 1851 Treaty, the various signatory tribes retained “the privilege of hunting, fishing, or passing over” any of the lands of other tribes. Kappler, 2 Ind. Aff. L. & Treaties 594, 595 (1904) (hereinafter “Kappler”). Under the 1868 Treaty, the Sioux relinquished “all claims of right in and to any portion of the United States or Territories” except for the land within the bounds of the reservation (as describe in Article 2) and as provided in Articles 11 and 16. 15 Stat. 635, 636, 641 (Apr. 29, 1868). Within the reservation, the Sioux had the right of “absolute and undisturbed occupation and use,” 15 Stat. at 536, which carried with it implied rights of hunting, fishing, and gathering. *See Menominee Tribe* 391 U.S. at 406. Under Article 11 the Sioux expressly retained hunting rights in lands outside the reservation, including northwestern Nebraska; however, fishing rights were not

mentioned. *Id.* at 639. Thus, any fishing rights the Sioux retained would have either been included within the express grant of hunting rights or would have been implied rights.⁹

Petitioners incorrectly assert that the Article 11 hunting rights granted to the Sioux in the 1868 Treaty still exist. Petitioners' Brief at 3, n. 4. Contrary to this assertion, the clear and unambiguous language of the 1877 Act extinguished those rights.¹⁰ 19 Stat. at 255. Because the Sioux hunting rights outside of the reservation were abrogated in 1877, Petitioners no longer have any hunting rights in the area of the North Trend site, or anywhere in Nebraska, under the Fort Laramie Treaties, and Petitioners cannot base standing on such rights.

Petitioners also assert that they retain fishing rights under the Fort Laramie Treaties. Petitioners' Brief at 12, 33, 48. If the fishing rights were included within the express hunting rights, they were abrogated under the 1877 Act. 19 Stat. at 255. Otherwise, the status of Petitioners' fishing rights is unclear.¹¹ As discussed at the beginning of Section II, the Board

⁹ Petitioners' refer to the "reserved rights doctrine" as the principle under which such implied rights are retained, but this is inaccurate. See Petitioners' Brief at 6-7, 11. The reserved rights doctrine refers specifically to the reservation of water rights. See *United States v. New Mexico*, 438 U.S. 696, 700, 715 (1978).

¹⁰ Although Petitioners initially recognize that Article 16 was abrogated, Petitioners' Brief at 2 n.3, Petitioners later state that "[n]either the 1851 Treaty nor the 1868 Treaty have been abrogated by Congressional statute and both are in effect." *Id.* at 7, n.6. The clear and unambiguous language in Article 1 of the 1877 Act clearly abrogates both Article 11 and Article 16 of the 1868 Treaty. 19 Stat. at 255.

¹¹ In order to determine whether an implied right was abrogated in a later treaty, agreement or statute, a court must examine "the larger context" of the treaty that granted the implied right, including its history, the negotiations, the understandings of the parties, and the customs and practices of the Indians. *Minnesota v. Mille Lacs Bands of Chippewa Indians*, 526 U.S. 172, 196 (1999); *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin*, 758 F. Supp. 1262, 1270 (W.D. Wis. 1991). When land is ceded, a right not expressly reserved is reserved if the right was significant to the Indians at the time the treaty was made. See *United States v. Michigan*, 471 F.Supp. 192, 213 (D. Mich. 1979), *aff'd* 653 F.2d 277 (6th Cir. 1981). At the time of the 1868 Treaty negotiations, the Sioux's lives revolved around buffalo hunting. They migrated to various hunting grounds to hunt buffalo, which were their primary source of food and also a source of clothing and shelter. See *United States v. Erickson*, 478 F.2d 684 (8th Cir. 1973); *Sioux Tribe of Indians v. United States*, 42 Ind. Cl. Comm. 214, 236 (stating that hunting was sole means of Sioux livelihood). The records of the 1868 Treaty negotiations (including (continued. . .))

lacks the authority to determine whether such rights exist. See *supra* at 4-5. If the Petitioners' fishing rights are not clearly established, they are merely speculative for the purposes of this proceeding, and any injury to those rights is likewise speculative. Standing requires an injury that is "concrete and particularized, not "conjectural" or "hypothetical." *Sequoyah Fuels Corp. & Gen. Atomics* (Gore, Oklahoma Site), CLI-94-12, 40 NRC 64, 72 (1994). Furthermore, Petitioners bear the burden of establishing standing. *Babcock & Wilcox* (Apollo, Pennsylvania Fuel Fabrication Facility), LBP-93-4, 37 NRC 72, 81 (1993). Thus, if Petitioners' fishing rights are unclear, Petitioners cannot rely on those rights to establish standing.

Petitioners also claim that "the *Winters* doctrine, as applied to hunting, fishing and gathering rights" forms a basis for their standing. Petitioners' Brief at 12. However, hunting and fishing rights are governed by treaty rights, as discussed above, not by the *Winters* doctrine. The *Winters* doctrine reserves sufficient water to satisfy the present and future needs of an Indian reservation as a permanent homeland. *Arizona v. California*, 373 U.S. 546, 600 (1963). The *Winters* doctrine does not extend by analogy to hunting or fishing rights (e.g., reserving sufficient amounts of game or fish for the needs of the reservation).

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statements from both government officials and tribe members) indicate that hunting and the ability to retain hunting rights were major considerations for the Sioux, but fishing was not even mentioned. See *Sioux Tribe of Indians*, 42 Ind. Cl. Comm. at 234, 236, 242, 245-48, 250-52. Also, Article 11 of the 1868 treaty, which expressly granted hunting rights to the Sioux in territory outside the Great Sioux Reservation, specifically tied those hunting rights to the supply of buffalo. 15 Stat. at 639. The predominance of buffalo in the Sioux culture at the time, and the absence of any mention of fishing rights in the negotiations, leads to the conclusion that fishing was not significant to the Sioux at the time of the treaty, and therefore that fishing rights reserved in the 1851 Treaty were abrogated in the 1868 Treaty.

C. Petitioners do not have reserved water rights under *Winters* that support their standing or contentions in this proceeding.

As mentioned above, the *Winters* doctrine applies specifically to the creation of an Indian reservation that was intended to be a permanent homeland. *Arizona v. California*, 373 U.S. 546, 600 (1963). Therefore, Petitioners cannot assert *Winters* rights based on aboriginal title, or even recognized title, unless that title relates to a reservation created for the exclusive use of the Sioux. The 1851 Treaty did not create a permanent reservation for the Sioux, because all of the signatory tribes retained the rights to hunt, fish and pass over the other tribes' lands. Kappler at 595. The 1868 Treaty created a permanent reservation for the Sioux, but that reservation did not extend into the State of Nebraska. 15 Stat. at 636. The 1877 Act extinguished the remaining rights that the Sioux possessed in Nebraska and elsewhere within the original 1851 Treaty lands. 19 Stat. at 255. Thus, the Sioux Nation retains no title to land in Nebraska, either aboriginal or recognized, based on the Fort Laramie Treaties. See Section II.A *supra*.

Even if the Sioux had received *Winters* rights under the 1851 Treaty or the 1868 Treaty, those rights were extinguished when the land was ceded pursuant to the 1877 Act. *Winters* rights are created when a reservation is created, and *Winters* rights expire when reserved land is ceded and placed in the public domain. *United States v. Anderson*, 736 F.2d 1358, 1363 (9th Cir. 1984). The rights are extinguished upon cession of land because the purpose of *Winters* rights, to provide for the needs of the reserved land, no longer exists if the land is no longer reserved. *Id.* This principle is consistent with the Supreme Court's dictate that *Winters* reserves "what is needed for the reservation, no more" *Cappaert v. United States*, 426 U.S. 128, 141 (1976). Also, *Winters* rights are allocated to provide for the reservation's "present and future needs," not its past needs. *Arizona v. California*, 373 U.S. at 600. In conclusion,

because the Oglala Sioux Tribe had no *Winters* rights under the Fort Laramie Treaties, or, in the

alternative, lost those rights under the 1877 Act, Petitioners cannot assert *Winters* rights to the North Trend site based on the treaties.

The Oglala Sioux Tribe and its members who live on the Pine Ridge Reservation are entitled to federally reserved water rights. However, Petitioners have affirmed that the water rights of the tribe have not been quantified. Petitioners' Brief at 34. As discussed in the NRC Staff's Brief, the Licensing Board does not have the power to determine water rights, and should not delay this proceeding to do so. NRC Staff's Brief at 11-12. Determining a reservation's *Winters* rights (*i.e.*, the amount of water necessary to accomplish its purpose) is a "fact-intensive inquir[y] that must be made on a reservation-by-reservation basis." *In re General Adjudication of All Rights to use Water in the Gila River System and Source*, 35 P.3d 68, 79 (Ariz. 2001) (en banc) ("Gila River"). The Staff notes, however, that the distance of the Pine Ridge Reservation from Crawford, Nebraska makes it highly unlikely that the tribe's *Winters* rights on the reservation would extend to the North Trend site. Petitioners have not cited any cases showing that *Winters* rights apply to surface water or groundwater forty or more miles away from a reservation. In their brief, Petitioners incorrectly asserted that, in *Cappaert v. United States*, "the Supreme Court ordered a junior water interest to curtail their use of a water well to prevent lowering of the water level of a lake¹² 100 miles away." In fact, the well in question was only 2 1/2 miles away, and the Court specifically noted that the findings of fact were limited to wells within that distance. 426 U.S. at 133, 143 n.7. Therefore, any assertion that Petitioners possess reserved water rights extending beyond the boundaries of the

¹² The body of water in question, located in Devil's Hole National Monument, contained rare fish whose viability was threatened by declining water levels.

reservation is speculative at this point,¹³ as is any assertion of *injury* to rights extending beyond the reservation's boundaries. Moreover, regardless of the extent of their water rights, Petitioners must still show an injury-in-fact that is fairly traceable to the challenged action and within the zone of interests of the Atomic Energy Act (AEA) or the National Environmental Policy Act (NEPA). *Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant, Unit 1), LBP-07-11, 65 NRC 41, 52 (2007), citing *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-98-21, 48 NRC 185, 195-96 (1998). An injury that is merely speculative or hypothetical cannot confer standing. *Sequoyah Fuels Corp. & Gen. Atomics* (Gore, Oklahoma Site), CLI-94-12, 40 NRC 64, 72 (1994). Thus, Petitioners cannot rely on the Oglala Sioux Tribe's undetermined *Winters* rights as a basis for standing.

III. Petitioners assertions of rights under the Trust Doctrine, Federal statutes and Executive Orders do not support their standing or admissibility of their contentions.

A. The Trust Doctrine

The Federal Government, as trustee for Indian tribes, has a fiduciary duty to act in the tribe's best interest. *Seminole Nation v. United States*, 316 U.S. 286, 296-97 (1942). The Department of the Interior, which houses the Bureau of Indian Affairs, has a significant fiduciary duty based on its role as manager of "all Indian affairs and all matters arising out of Indian affairs."¹⁴ See 25 U.S.C. §§ 1, 1a, 2. For agencies such as NRC, which do not manage,

¹³ It is also possible that the reserved water rights do not extend to the limits of the reservation, because, as the Supreme Court held in *Cappaert*, the reserved amount is no more than the amount needed for the reservation. 426 U.S. at 141.

¹⁴ Petitioners assert that "federal officials that manage, control, or supervise tribal resources are duty bound" to perform several enumerated tasks, such as consulting with the tribe, analyzing all relevant information, making decisions in the tribe's best interests, and providing an accurate accounting to the tribe. Petitioners' Brief at 6. However, the case Petitioners cited to support this proposition held only that the United States Bureau of Reclamation had a responsibility to divert sufficient water to meet a tribe's quantified reserved water rights. *Klamath Water Users Protective Ass'n v. Patterson*, 204 F.3d 1206, 1213 (9th Cir. 1999). In any case, the NRC is not an agency that performs management, control, or (continued. . .)

control, or supervise Indian affairs, "unless there is a specific duty that has been placed on the [agency] with respect to Indians, this responsibility is discharged by the agency's compliance with general regulations and statutes not specifically aimed at protecting Indian tribes."

Morongo Band of Mission Indians v. FAA, 161 F.3d 569, 574 (9th Cir. 1998); accord *Okanogan Highlands Alliance v. Williams*, 236 F.3d 468, 479 (9th Cir. 2000). The NRC exercises its trust responsibility in the context of the AEA and NEPA, and is not required to afford an Indian tribe or its members greater rights than they would otherwise have under those statutes. Cf. *Skokomish Tribe of Indians v. FERC*, 121 F.3d 1303, 1309 (9th Cir. 1997) (stating that FERC was required to exercise its trust responsibility in the context of the Federal Power Act and properly declined to provide the tribe "greater rights than they otherwise have under the FPA and its implementing regulations."). Thus, as long as NRC complies with its statutory duties, it will have fulfilled its trust responsibility. At this stage of the proceeding, any assertions that the NRC has not honored its trust obligations is premature, because the NRC has accepted the application for review but the Staff has not completed its detailed environmental and technical reviews.¹⁵

Petitioners assert that "the Trust Doctrine is violated where federal agencies undertake or license actions off the reservation which either diminish on-reservation water supplies, or cause pollution on the reservation or to its water supplies." Petitioners' Brief at 6. In support of

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supervision functions with respect to tribal resources.

¹⁵ Acceptance Review, License Amendment Application for North Trend Expansion Area, Crow Butte Resources, Inc., Crawford, NE (TAC J00523), ADAMS Accession No. ML072390004. The initial acceptance review is "not be [sic] a detailed technical review and does not address quality and thoroughness of the ER; rather, the acceptance review determines if the submitted information is complete in order to begin the detailed technical review." NUREG-1748, *Environmental Review Guidance for Licensing Actions Associated with NMSS Programs: Final Report*, at 1-6 (Aug. 2003).

this assertion, Petitioners rely on *Pyramid Lake Paiute Tribe v. Morton*, 354 F. Supp. 252 (D.D.C. 1972) ("Paiute Tribe"). However, the cited case does not support the proposition that any licensing action that adversely impacts a tribe's water supplies is a violation of an agency's trust obligations. In *Paiute Tribe*, the court's conclusion that the trust obligations to the tribe had been violated stemmed from its holding that a Department of the Interior regulation was arbitrary and capricious and an abuse of discretion.¹⁶ In a later case, the same tribe sued the Department of the Navy alleging violations of the Endangered Species Act, NEPA, and the Navy's fiduciary obligations to the tribe. *Pyramid Lake Paiute Tribe of Indians v. Dept. of the Navy*, 898 F.2d 1410, 1413-14 (9th Cir. 1990). The court held that the Navy's actions, including its rejection a proposed alternative by the Tribe that would use less water, were not arbitrary and capricious, and that the Navy had not violated its duties to the tribe. *Id.* at 1417, 1421. The trust doctrine does not mean that a tribe's interest trumps all other interests. *Hoopa Valley Indian Tribe v. Ryan*, 415 F.3d 986, 992 (9th Cir. 2005). Therefore, Petitioners' broad assertion is not correct.

B. Rights of Consultation

Petitioners devote a considerable portion of their brief to a discussion of several statutes, Executive Orders, and other documents which they claim create binding consultation

¹⁶ Under the Administrative Procedure Act, 5 U.S.C. § 706, the Paiute Tribe challenged a Department of Interior regulation that diverted water from their reservation. *Paiute Tribe*, 354 F.Supp at 254. The diversion of water threatened the continued utility of a desert lake on the Paiute Tribe's reservation. *Id.* The lake had no other inflow and was the tribe's principal source of livelihood. The court stated that the fundamental issue was "whether or not the Secretary's resolution of conflicting demands" created by several competing water interests "was effected arbitrarily rather than in the sound exercise of discretion." *Id.* at 255. The court found that the Secretary failed to formulate the regulation precisely, but instead made a "judgment call" without explaining or indicating the factors or computations he used to arrive at his decision. *Id.* at 256. The Staff notes that this case involved a decision by the Secretary of the Interior, whose agency has direct and substantial responsibilities for Indian affairs. See 25 U.S.C. § 2.

requirements on the NRC.¹⁷ See Petitioners' Brief at 12-29. Before discussing each document separately, the Staff has several general observations. First, as mentioned above, the only action NRC has taken at this point is acceptance of the application for review. The Staff is currently performing its detailed review of the application but has not completed the environmental assessment or the technical evaluation. Therefore, any assertion that the NRC has failed to consult or take other appropriate actions is premature and unripe for adjudication at this juncture. Second, the Oglala Sioux Tribe is governed by a Tribal Council. The Oglala Sioux Tribe did not file a petition to intervene in this matter, and none of the Petitioners have demonstrated that they are authorized to represent the Tribal Council. Thus, any requirements to consult with the tribal government are outside the scope of this proceeding.

The Staff also notes that while NRC is required to take certain actions under NEPA and the National Historic Preservation Act (NHPA), those statutes do not impose any requirements on applicants for NRC licenses. Likewise, the U.N. Declaration and the other documents (statutes, Executive Orders, Presidential Memorandum) that Petitioners discuss in their brief impose requirements on either the Federal Government or government agencies, but not individuals. Thus, none of the documents Petitioners cite impose any requirements on applicants. Furthermore, this NRC adjudicatory proceeding is limited in scope to issues within the zone of interests protected by the AEA and NEPA. *Shearon Harris*, LBP-07-11, 65 NRC at 52, citing *Yankee*, CLI-98-21, 48 NRC at 195-96. NRC does not have over claims under other environmental statutes such as the Clean Water Act. See Policy Statement on the Treatment of Environmental Justice Matters in NRC Regulatory and Licensing Actions, 69 Fed. Reg. 52,040,

¹⁷ Petitioners also discuss the U.N. Declaration, which was the one document they were directed to discuss by the Board.

52046-47 n.2 (Aug. 24, 2004) ("EJ Policy Statement"). Finally, as explained below, the additional sources of consultation rights that Petitioners cite are either not binding on the NRC or otherwise not applicable to this proceeding.

1. Presidential Memorandum

Petitioners cite the President Clinton's Memorandum, "Government-to-Government Relations With Native American Tribal Governments," 59 Fed. Reg. 22,951 (Apr. 29, 1994), as a requirement that NRC consult with the Oglala Sioux tribe. Petitioners' Brief at 12. However, a presidential memorandum is not binding unless it "implies a private right of action and the tribe has standing." *Lower Brule Sioux Tribe v. Deer*, 911 F.Supp 395, 401 (D.S.D. 1995). In *Lower Brule Sioux Tribe*, the district court held that this presidential memorandum did not create an enforceable duty because it had "no specific foundation in congressional action."¹⁸ *Id.*, citing *In Re Surface Min. Regulation Litigation*, 627 F.2d 1346, 1357 (D.C.Cir.1980). Therefore, the presidential memorandum creates no enforceable right of consultation. The staff also notes that even if a private right of action existed, a separate showing of standing would be required. *Id.* The Staff has already presented its position that Petitioners have not shown standing in prior pleadings and at oral argument.

2. Executive Order 13175

Petitioners cannot rely on Executive Order 13175 to establish consultation requirements, because the order explicitly exempts independent regulatory agencies, such as NRC, from mandatory compliance. See "Consultation and Coordination with Indian Tribal Governments," Executive Order 13,175, 65 Fed. Reg. 67,249, 67,249 (Nov. 9, 2000) (specifically excluding

¹⁸ The memorandum "was intended primarily as a political tool for implementing the President's personal Indian affairs policy and not as a legal framework enforceable by private civil action." *Id.*

"independent regulatory agencies, as defined in 44 U.S.C. § 3502(5)"). The NRC is listed as an independent regulatory agency in 44 U.S.C. § 3502(5).

3. Religious Freedom Restoration Act (RFRA)

Petitioners' argument that RFRA gives them standing in this proceeding, see Petitioners' Brief at 45, is flawed in several respects.¹⁹ First, since RFRA applies only to "government," the Applicant is not subject to its requirements. See 42 U.S.C. §§ 2000bb(b)(2) and 2000bb-2. Second, NRC has no jurisdiction to enforce RFRA, because NRC's authority (and thus that of the Board) is limited to issues arising under the AEA and NEPA. *Shearon Harris*, LBP-07-11, 65 NRC at 52. Thus, any claim that NRC has infringed Petitioners' RFRA rights cannot be addressed in this proceeding. Third, any claim by Petitioner that NRC has violated RFRA is premature, because NRC has yet to take any action in this proceeding other than accepting the application for review. Petitioners therefore have no "actual or imminent" injury to support their standing. The situation here is readily distinguishable from *Navajo Nation v. United States Forest Service*, where the Forest Service had completed its review, issued its Final Environmental Impact Statement (FEIS) and stated in the FEIS that contamination of the land in question would occur as a result of the action. 479 F.3d 1024, 1030-31, 1039 (9th Cir. 2007).

In *Navajo Nation*, there was no question that an actual injury-in-fact had occurred and that it resulted from the challenged action. *Id.* Here, the situation is completely different,

¹⁹ The Staff renews its objection to the issue of infringement of religious practices as a new issue not raised in the original petition. The Staff has already objected to this issue, which was raised for the first time in Petitioners' reply. See HT at 230. Petitioner's counsel, in rebuttal, pointed to a single sentence, one of a string of direct quotations from the U.N. Declaration, that mentions "spiritual impact," see Ref. Pet at 4, and claimed that this constituted a contention (see HT at 268-69). Nowhere else in the petition is there a reference to spiritual or religious practices. Thus, there is no contention concerning religious impacts that meets the contention requirements of 10 C.F.R. § 2.309(f)(1). Petitioners' Brief devotes approximately five pages to detailed descriptions of Lakota religious beliefs and practices, with references to several affidavits that were not submitted with the brief.

because, as argued in prior pleadings and at oral argument, Petitioners have not established an injury-in-fact that would be fairly traceable to the North Trend expansion. If Petitioners were to bring an action in federal court under RFRA, they would be required to meet the same standing requirements that they are required to meet in this NRC proceeding: (1) actual or imminent injury-in-fact that is concrete and particularized, not conjectural or hypothetical, (2) injury that is fairly traceable to the challenged action, (3) injury that is redressable by a favorable decision. 42 U.S.C. § 2000bb-1(c); *Friends of the Earth, Inc. v. Laidlaw Env'tl. Servs. (TOC), Inc.*, 528 U.S. 167, 180-81 (2000). Thus, Petitioners' assertion that RFRA "gives the Indigenous Petitioners standing" is incorrect. Petitioners' Brief at 45. RFRA alone does not confer standing; any claim under RFRA still requires Petitioners to show injury in fact.

4. Native American Graves Protection and Repatriation Act (NAGPRA)

Petitioners assert that a right of consultation under NAGPRA "requires giving a reasonable opportunity and ample time to tribal officials to inspect an area for artifacts and human remains and an opportunity to remove any objects discovered during the inspection." Petitioners' Brief at 24. Petitioners' assertion is unjustified, because NAGPRA does not apply to the NRC or to the North Trend site. The provision of NAGPRA relating to ownership of Native American human remains and objects applies only to those which are "excavated or discovered on Federal or tribal lands."²⁰ 25 U.S.C. §§ 3002(a), (c). All of the other provisions of NAGPRA apply only to Federal agencies "which have possession and control" over such items, such as museums and research institutions. See *id.* at §§ 3003-3005. The North Trend site and the

²⁰ The relevant definition of "tribal lands" under NAGPRA is "all lands within the exterior boundaries of any Indian reservation." 25 U.S.C. § 3001(15)(A). Federal lands include "any land other than tribal lands which are controlled or owned by the United States...." *Id.* at § 3001(5).

land surrounding it is neither Federal nor tribal land,²¹ and NRC does not take possession or control of any items protected by NAGPRA. Consequently, Petitioners cannot rely on NAGPRA to support standing or their right of consultation.

5. American Indian Religious Freedom Act (AIRFA)

Petitioners' assertion of rights under AIRFA is unfounded, because AIRFA is merely a policy statement that does not create a cause of action or any enforceable rights. *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 455 (1988); *U.S. v. Mitchell*, 502 F.3d 931, 949 (9th Cir. 2007). In fact, the Eighth Circuit has held specifically that AIRFA does not create a cause of action for failure to consult with Indian tribes. *Lockhart v. Kenops*, 927 F.2d 1028, 1036 (8th Cir. 1991), *cert. denied*, 502 U.S. 863, *rehrg denied*, 502 U.S. 1020.

6. UN Declaration

Petitioners concede that the U.N. Declaration is a "non-binding" document. Petitioners' Brief at 26, 29. Nonetheless, Petitioners argue that the "U.N. Declaration ... should apply to the NRC's consideration of the North Trend Expansion due to its focus on preventing disproportionate impacts to the environmental and cultural interests of the Indigenous Petitioners..." Petitioners also assert that the International Covenant on Civil and Political Rights²² is somehow "persuasive," but do not explain why that is so, or how the Covenant is relevant to their standing or Contentions A and C. The NRC has no authority to enforce Petitioners' rights to enjoy their culture, practice their religion, or use their native language.

²¹ Unlike the instant case, *Yankton Sioux Tribe v. U.S. Army Corps of Engineers*, cited by Petitioners, involved a situation where Indian remains were found on Federal lands. 83 F.Supp.2d 1047, 1049 (D.S.D. 2000).

²² The ICCPR asserts that ethnic, religious, and linguistic minorities should not be denied the right to enjoy their culture, to practice their religion, and to use their native language. Petitioners' Brief at 26.

Petitioners' statement that the Covenant is "enforceable against the United States by the U.N. Committee on Ethnic and Racial Discrimination" suggests a potential future action that is speculative at best. Such considerations are outside the scope of this proceeding.

7. Executive Order 12898

Petitioners also proclaim that "under the U.N. Declaration and Executive Order 12898, NRC must consider its own environmental justice strategy, implemented by the Department of Energy." Petitioners' Brief at 27. Because NRC is an independent agency, not an arm of the Department of Energy ("DOE"), Petitioners' reliance on DOE's environmental justice strategy is misplaced. Furthermore, Executive Order 12898 expressly states that it does not "create any right, benefit, or trust responsibility, substantive or procedural, enforceable at law or equity by a party against the United States, its agencies, its officers, or any person." "Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations," Executive Order 12,898, 59 Fed. Reg. 7,629, 7,632-33 (Feb. 16, 1994). Likewise, the Order expressly precludes judicial review involving compliance or noncompliance with its provisions. *Id.* at 7,633.

In 2004, NRC issued a policy statement concerning environmental justice in NRC proceedings that addresses Executive Order 12898. Policy Statement on the Treatment of Environmental Justice Matters in NRC Regulatory and Licensing Actions, 69 Fed. Reg. 52,040 (Aug. 24, 2004) ("EJ Policy Statement"). The Commission concluded that the Order itself "does not provide a legal basis for contentions to be admitted and litigated in NRC licensing proceedings."²³ *Id.* at 52,046 (citing *Louisiana Energy Services, Inc.* (Claiborne Enrichment

²³ The Commission has also stated that "[t]he basis for admitting EJ contentions in NRC licensing proceedings stems from the agency's NEPA obligations," and that "NEPA is the only available statute under which the NRC can carry out the general goals of [the Order]." EJ Policy Statement, 69 Fed. Reg. (continued. . .)

Facility), CLI-98-3, 47 NRC 77 (1998); *Private Fuel Storage* (ISFSI), CLI-02-20, 56 NRC 147 (2002)). Moreover, a Licensing Board has held that the Order does not contain any requirement that the Staff consult with an Indian tribe during the Staff's environmental review of a proposed license amendment. *International Uranium Corp.* (White Mesa Uranium Mill), LBP-02-11, 55 NRC 301, 304 (2002).

C. Petitioners assertions relating to the Clean Water Act and lack of authority of the State Historical Preservation Officer do not support standing or admissibility of their contentions

For the first time in this proceeding, Petitioners argue that they have an interest in this proceeding based on the Clean Water Act ("CWA"). Petitioners' Brief at 35-37. They argue that NRC has violated Section 313 of the CWA by failing to require the Applicant to conduct certain tests to show that they can meet restoration standards. *Id.* at 36. As discussed above, actions under the Clean Water Act are outside the scope of the Board's authority. See Section II.B *supra* at 15.

Petitioners also claim that "[a]ctions taken without proper respect for obligations to the Tribe and its members" are an injury-in-fact sufficient to support standing and admissibility of Contentions A, B and C. Petitioners' Brief at 47. Petitioners refer to the Applicant's purported statement that the Nebraska State Historical Preservation Officer (SHPO) has authority over

(. . .continued)

52,046-47 n.2. Furthermore, the Commission considers environmental justice "when and to the extent required by NEPA." Admissible contentions related to environmental justice must "allege, with the requisite documentary basis and support as required by 10 C.F.R. Part 2, that the proposed action will have significant adverse impacts on the physical or human environment that were not considered *because the impacts to the community were not adequately evaluated.*" *Id.* at 52,047 (emphasis added). The Commission has also noted that the NRC has no permitting authority under other environmental statutes, such as the Resource Conservation and Recovery Act, the Clean Water Act, and the Clean Air Act. *Id.* at 52,046-47 n.2.

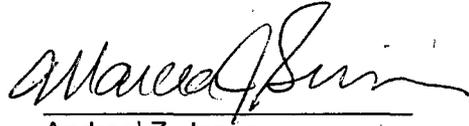
tribal issues. Petitioners' Brief at 47. This assertion of injury appears to stem from Petitioners' contention regarding consultation with tribal leaders. As discussed in Section II.B. above, an applicant in an NRC licensing proceeding has no obligation to consult with a tribe under NEPA, NHPA, or the other authorities Petitioners cited. Also, any assertion that NRC has violated its obligations under NEPA and NHPA, including its obligations to consult with Indian tribes, is premature.²⁴

CONCLUSION

For the reasons explained above, neither the Oglala Sioux Tribe nor its members possess any present rights to land or water in the area of the proposed North Trend Expansion based on the Fort Laramie Treaties of 1851 and 1868. Likewise, neither the Tribe nor its members retain hunting or fishing rights in that area based on the treaties. Therefore, Petitioners cannot assert standing based upon such rights. Furthermore, because the extent of the Tribe's reserved water rights has not been determined, those rights are speculative and thus cannot be used as a basis for standing. Finally, none of the statutes, Executive Orders, or other documents cited by the Petitioners support Petitioners' standing or contentions related to groundwater or rights of consultation.

²⁴ The Staff notes that Appendix D of NUREG-1748, *Environmental Review Guidance for Licensing Actions Associated with NMSS Programs: Final Report* (Aug. 2003), discusses the agency's consultation procedures for its environmental reviews. Appendix D indicates that consultations with the Tribal Historic Preservation Officer (THPO) are to be performed when appropriate. *Id.*

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Marcia J. Simon". The signature is written in black ink and is positioned above a horizontal line.

Andrea' Z. Jones
Marcia J. Simon
Counsel for NRC Staff

Dated at Rockville, Maryland
this 29th day of February, 2008

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)	
)	
CROW BUTTE RESOURCES, INC.)	Docket No. 40-8943
In-Situ Leach Facility, Crawford, Nebraska)	
)	ASLBP No. 07-859-03-MLA-BD01
(License Amendment for the North Trend)	
Expansion Project))	

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S REPLY TO PETITIONERS' MEMORANDUM OF LAW REGARDING INDIGENOUS RIGHTS, TREATIES AND FEDERAL INDIAN LAW" in the above-captioned proceeding have been served on the following by deposit in the United States mail; through deposit in the Nuclear Regulatory Commission's internal system as indicated by an asterisk (*), and by electronic mail as indicated by a double asterisk (**) on this 29th day of February, 2008:

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