RAS #EE-02

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD PANEL
Before Administrative Judges:
Alex S. Karlin, Chair
Paul B. Abramson
William M. Murphy

In the Matter of COGEMA MINING, INC. (Christensen & Irigaray Ranch Facilities)	Docket No. 040-08502 ASLBP No. 09-887-01-MLR-BD01 May 12, 2009

PETITIONER'S CONSOLIDATED REPLY TO APPLICANT AND NRC STAFF ANSWERS TO PETITION TO INTERVENE OF THE OGLALA DELEGATION OF THE GREAT SIOUX NATION TREATY COUNCIL

Petitioner, the Oglala Delegation of the Great Sioux Nation Treaty Council, hereby submits this consolidated Reply to the Answer of Applicant COGEMA Mining, Inc. ("CMI") dated May 5, 2009 (the "CMI Answer"), and to the Answer of the NRC Staff dated May 5, 2009 (the "NRC Staff Answer").[1][2]

[1] Pursuant to a Referral Memorandum dated May 8, 2009, Acting Secretary of the Commission referred this proceeding to the Chief Administrative Judge ("Chief Judge") of the Atomic Safety and Licensing Board Panel ("ASLBP") for appropriate action in accordance with 10 CFR §2.346(i). Pursuant to the Board Establishment Order dated May 12, 2009, the Chief Judge established this Board. The Petitioner's Motion to Make E-Mail Filings, set forth at page 125 of the Petition (the "Motion"), was referred by the Secretary of the Commission to the Chief Judge, and by the Chief Judge to the Board. See Board Establishment Order at footnote 1. As described in the Motion, it is difficult and burdensome for Petitioner's counsels to make filings directly in the EIE System due to the NRC's PC-dominated computer system incompatibilities with Petitioner's counsels' Apple computers. All parties and counsels have actually received filings by email (or fax) without problem; accordingly, there being no prejudice to any party or counsel and in light of the trust responsibility and Canons of Interpretation, discussed *infra*, Petitioner shall continue to make filings by E-Mail in PDF format and shall continue to receive filings via the EIE System, all as described in the Motion, until such time as there is a clear, express, final and appeal-able order of the Board to the contrary. In the event that such Motion is denied, for any reason, such denial would be arbitrary and capricious, an abuse of discretion and would be subject to appeal and reversal under the Administrative Procedure Act.

[2] Petitioner shall address both Applicant and NRC Staff Answers where appropriate.

Temp = SECY-041

DS03

I. INTRODUCTION

Petitioner timely filed a Request for Hearing and Petition to Intervene dated April 10, 2009 (the "Petition"). Applicant and the NRC Staff each timely filed an Answer to the Petition on May 5, 2009.[3] Petitioner notes that the "legitimate amplification" of originally-filed contentions is permitted under Entergy Nuclear Generation Co. (Pilgrim Nuclear Power Station), LBP-06-23, 64 NRC 257, 359 (2006)). Nonetheless, no additional affidavits are filed herewith.

Despite all the voluminous legal filings, some fundamental questions raised in the Petition remain unanswered, including:

A. What happened to the 2005 Yellowcake that was produced during the "2005 Drying Program" having a value of over $5,000,000? Was it sold to a US buyer, a foreign company and/or a foreign government?

B. How much of the $5,000,000 stayed in the community surrounding the mine site?

C. What are the names and addresses of the responsible parties, i.e., the real decisionmakers concerning Applicant? Those people with the ability to hire and fire Applicant's General Manager and/or Radiation Safety Officer and/or other key officers and directors of Applicant?

D. Have such persons submitted to US jurisdiction? If not, what makes them subject to any form of accountability for violating, even intentionally, NRC regulations?

E. What is the authority in France for a corporation owned and controlled by the United States Government to be issued a source materials license by the Government of France?

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[3] A Request for Hearing was also filed in this matter by the Powder River Basin Resource Council ("PRBRC"); Applicant and NRC Staff timely filed Answers to PRBRC's Request on May 5, 2009.

Under the law of France, would the US controlled front company (e.g., a French or Monaco shell corporation) be legally required to disclose that the ultimate parent and decisionmakers are within the Government of the United States?

Until such questions are clearly answered and the answers are disclosed to the public and any issues are resolved, there can be no finding other than that **the issuance of a source materials license to an Applicant controlled by persons unknown and beyond the reach of US jurisdiction and beyond the jurisdiction of NRC regulations is inimical to common defense and security and to the health and safety of the public.**

II. PRELIMINARY MATTERS

A. Federal Indian Law Applies. As discussed in Petitioners' Memorandum of Law Re: Indigenous Rights, Treaties and Indian Law, ML080640548, incorporated by reference in the Petition,[4] there is a large body of substantive federal law concerning the rights of Native Americans, particularly those of the Oglala Lakota. Federal law applies to Indian tribal issues to the exclusion of state law. See US Const. Art. I, Sect. 8 (re: Congressional power to regulate commerce with the Indian tribes); US Const., Art. II, Sect. 2, cl. 2 (treaty clause); Worcester v. Georgia, 31 US 515 (1832). In this case, Applicant's request for the NRC's approval of the proposed License Renewal constitutes a "federal action." Therefore, in the Application, and this proceeding, Applicant must anticipate the obligations of the NRC to adhere to the high standards of trust responsibility when dealing with Indian tribes and the rights of Indian tribe members.

Federal Indian Law includes the Trust Doctrine, (including the Canons of Interpretation),

[4] Petition at 7.

the Reserved Rights Doctrine, Federal Indian Treaty Law, Rights of Consultation, the Winters Doctrine, Hunting and Fishing Rights, applicable statutes such as the American Indian Religious Freedom Act (AIRFA), the Religious Freedom Restoration Act (RFRA) and the Native American Graves Protection and Repatriation Act (NAGPRA), and applicable Executive Orders such as the 1994 Executive Order (re: Government-to-Government relations) and the 2000 Executive Order (re: Consultation and Coordination with Tribal Governments). These elements of federal Indian Law are discussed below. Persuasive guidance is also taken from international standards like the UN Declaration and binding treaties like the International Covenant on Civil and Political Rights (ICCPR) and the International Convention on the Elimination of all forms of Racial Discrimination (ICERD).[5]

These rights, especially the Treaty Rights, are of particular importance because they were fought for in armed combat between the Oglala Lakota and the United States. In order to resolve that armed combat, which was costing the United States dearly in both dollars and lives, the United States treated with the Oglala Lakota. The Ft. Laramie Treaties remain in effect.[6]

As a result of the 1851 Treaty, the Oglala Lakota allowed non-Indian settlers and miners to pass[7] through their territory but not to settle there and in return, the Sioux obtained certain agreements from the United States. As a result of the 1868 Treaty, which was partially signed at

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[5] International Convention on the Elimination of All Forms of Racial Discrimination New York, 7 March 1966, ratified 21 October 1904; Petition at 66. As a treaty ratified by the United States, ICERD constitutes the supreme law of the land.

[6] Except that Article 2 of the 1868 Treaty was modified and Article 16 of the 1868 Treaty was expressly abrogated by Article I of the Act of Feb. 28, 1877, 19 Stat. 254, 255 (1877).

[7] The hunting rights preserved in the 1868 Treaty included "any lands north of North Platte," which includes the mine site. Obviously such game resources are dependent upon surface and subsurface water quality in the immediate area. Art. II and Art. XI, Ft. Laramie Treaty of 1868.

the Red Cloud Agency (Crawford, Nebraska)[8], the Oglala Lakota agreed to cease hostilities and in return, gave up part of their traditional territory and were granted rights to hunt and follow wildlife in a large tract of territory, the "Unceded Territory" and the Pine Ridge Indian Reservation was created.

Currently, the Oglala Sioux Tribe ("OST") is a federally recognized IRA government under the Bureau of Indian Affairs, of the Department of the Interior, situated at Pine Ridge Indian Reservation (the "Reservation"). "'Hence, by the 1870s, the government had successfully placed Native Americans in a state of coerced dependency' on the federal government." U.S. v. Kagama, 118 U.S. 375, 384-85 (1886); U.S. v. Sandoval, 231 U.S. 28 (1913).

In contrast, the Oglala Delegation of the Great Sioux Nation Treaty Council is not dependent on the BIA for anything and expresses the traditional sovereign will of the Oglala Lakota through the traditional Lakota Tiospaye system.

B. Distinction Between Oglala Delegation and the IRA Government OST.

In order to properly characterize the role of the Great Sioux Nation Treaty Council, and the corresponding role of its Oglala Delegation, one must acknowledge the utter dominion the Unites States Government has sought to exercise over the Lakota nation of Indians. The language in the body of "Federal Indian Law" is replete with unilateral, self-serving definitions on the part of the United States. Terms such as "federally recognized tribe," "plenary power" and "effectuated a taking" are simply euphemisms intended by the United States to create some colorable

[8] What was called the "Red Cloud Agency" is now called "Ft. Robinson."

justification for its continuing unlawful occupation of Lakota traditional lands guaranteed by treaty.

When the two nations first encountered each other, the Lakota people established the Great Sioux Nation Treaty Council to represent the national interests in government-to-government relations with the United States. That Council, comprised of members from each of the Lakota bands, negotiated and entered the Ft. Laramie Treaties of 1851 and 1868. The latter being entered after ancestors of the Petitioners fought the United States army to a stand-still in the very region where COGEMA proposes to reactivate its mine.

The Ft. Laramie Treaty represents the last time the Lakota nation and the United States met on equal terms, that is, where each nation chose its own representatives to conduct the negotiations. Every other, so-called "agreement," or act since then has either been undertaken by the United States government unilaterally, or based on some form of coerced approval by Lakota "representatives" picked and "recognized" by the United States. The Oglala Sioux Tribe ("OST"), formed under the auspices of the Indian Reorganization Act, is just such an example.

The OST was formed pursuant to a "constitution" that acknowledges the near-total oversight of the United States Department of the Interior via the Bureau of Indian Affairs. Traditional Lakota government did not cease to exist when the OST was created. The Oglala Delegation of the Great Sioux Nation Treaty Council is the continuing representative of traditional Oglala Lakota interests in all dealings with the United States government. While the United States may choose to disregard the promises it made in treaties, the Oglala Delegation does not, nor will it be compelled to accept the United States' own interpretations and "abrogated treaties."

Such is the case with the U.S. Supreme Court's ruling in United States v. Sioux Nation of Indians, 448 U.S. 371 (1980). That the highest court in the United States chose to decry the theft of Lakota lands, yet upheld the action provided sufficient compensation was provided, does not change the Oglala Delegation's relationship to the lands in question. Nor does such a ruling divest the Oglala Delegation of its traditional responsibility to safeguard Lakota lands, culture, water, air, plants, animals and all other manner of ecological, cultural and spiritual health. The Oglala Delegation is appointed and serves at the pleasure of the Oglala Lakota, not the United States.

The fact that virtually any surviving native nation could make a similar argument about standing on almost all land subject to federal jurisdiction is no reason to avoid allowing Petitioner's Intervention. Indeed, the very intrigues and diabolical dealings that color the United States' history, particularly as it regards native nations, is precisely the reason why Petitioner should be afforded standing. At best, the United States has made many mistakes in its dealing with the ancient cultures that inhabited this land prior to the middle of the last millennium. Acknowledging the rights of the Oglala Delegation to be legitimately concerned about the cultural and ecological health of its traditional land is the smallest step towards reconciliation and transparency on the part of the United States.

C. US Federal Recognition of Oglala Lakota. The requisite federal recognition is provided by the treaties.

Applicant points out that the Oglala Delegation is not one of the listed 'BIA recognized

entities'.[9] NRC Staff argues without citation that federally recognized Indian Tribe must be an IRA Government.[10] NRC argues that an advisory body lacking executive or legislative responsibilities was determined by the Commission to be so far removed from having representative authority to speak and act for the public as not to qualify as a government entity.[11] However, such is not the case with the Oglala Delegation which is a bona fide local governmental body and traditional Oglala Lakota organization, as described herein.

D. Trust Doctrine. Broadly, the trust doctrine requires the federal government to support and encourage tribal self-government and economic prosperity, duties that stem from the government's treaty guarantees to 'protect' Indian tribes and respect their sovereignty. "The undisputed existence of a general trust relationship between the US and the Indian people" has long dominated the government's dealings with Indians. US v. Mitchell, 463 U.S. 206, 225 (1983); see also, Cobell v. Norton, 240 F.3d 1081, 1098 (D.C. Cir. 2001) ("the government has longstanding and substantial trust obligations to Indians.")

The United States Supreme Court has held that treaties of this nature create a special relationship between Indian tribes and the federal government – a unique bond – that obligates the government to keep its end of the bargain, now that the tribes have kept theirs. The promises made in exchange for millions of acres of tribal land impose on the federal government 'moral obligations of the highest responsibility and trust." Seminole Nation v. US, 316 U.S. 286, 296-97 (1942); See also, US v. Mitchell, *infra*; Morton v. Mancari, 417 U.S. 535, 551-552 (1974); US v. Mason, 412 U.S. 391, 397 (1973).

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[9] Applicant Answer at 9.
[10] NRC Staff Answer at 11-12.
[11] Id.

The federal government's trust duty is owed to all Indian Tribes. Lincoln v. Vigil, 508 US 182, 195 (1993), quoting with approval Hoopa Valley Tribe v. Christie, 812 F.2d 1097 (9th Cir. 1986). The Trust Doctrine includes:

(1) a clear duty to protect the native land base and the ability of tribes to continue their ways of life;

(2) Duties arising from federal control or management of tribal land and property which are fiduciary in nature.

Under Trust Doctrine, federal officials that manage, control, or supervise tribal resources are duty bound to: (1) consult with the tribe in determining how best to use those resources, (2) to carefully analyze all relevant information regarding how to manage them, (3) to make their decisions based on the tribe's best interests; and (4) to maintain and provide to the tribe an accurate accounting. See Klamath Water Users Protective Ass'n v. Patterson, 204 F.3d 1206, 1214 (9th Cir. 1999), cert. den., 121 S.Ct. 44 (2000). The Trust Doctrine requires federal officials to coordinate and consult with each other (e.g., NRC to consult with Bureau of Indian Affairs, Department of the Interior ("BIA"). See 36 CFR Section 800 et seq.; and the 1994 Executive Order and the 2000 Executive Order discussed in Section I.F below.

Courts have held 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. Pyramid Lake Paiute Tribe of Indians v. Morton, 354 F. Supp. 252 (D.DC. 1972), rev'd on other grounds, 499 F.2d 1095 (D.C. Cir.1974), Thus, federal officials, as a result of the Trust Doctrine, should interpret their responsibilities to Indians broadly and assist them to the maximum extent allowable under the treaties and statutes they are implementing. See also the Executive Orders discussed below.

E. Reserved Rights Doctrine. An Indian treaty should be viewed, the Supreme Court has explained, "not [as] a grant of rights to the Indians, but a grant of rights from them." U.S. v. Winans, 198 US 371 (1905). Tribes therefore have many rights, in addition to those listed in treaties. In fact, any right that a sovereign nation would normally possess that is not expressly extinguished by a treaty (or by a subsequent federal statute) is generally "reserved" to the tribe. Menominee Tribe v. U.S., 391 US 404 (1968); U.S. v. Dion, 476 US 734, 739 (1986); Swim v. Bergland, 696 F.2d 712 (9th Cir. 1983). This is a fundamental principle of Indian law known as the "Reserved Rights Doctrine".

F. Federal Indian Treaty Law and Canons of Construction. A treaty is a contract between nations. Article VI, Section 2 of the US Constitution declares that treaties are the "supreme law of the land." Treaties are therefore superior to state constitutions, state laws, and are equal in authority to laws passed by Congress. See Worcester v. Georgia, *infra*. "The unique trust relationship between the federal government and Native Americans" requires that "if an ambiguity in a statute or treaty "can reasonably be construed as the Tribe would have it construed, it must be construed that way."[12] Ramah Navajo Chapter v. Lujan, 112 F.3d 1455, 1462 (10th Cir. 1997), quoting Muscogee (Creek) Nation v. Hodel, 851 F.2d 1439, 1445 (D.C. Cir. 1988), cert. den., 488 U.S. 1010 (1989); See also Oneida County, NY v. Oneida Indian

[12] In 1871, Congress passed the "Section 71" which changed the nature of Congressional dealings with Indian tribes limiting tribal powers under federal law. See 16 Stat. 544, codified at 25 U.S.C. Section 71. Prior to the passage of the "Section 71" which was referred to by Chief Red Cloud (HT at 183), the United States government entered into the 1851 and 1868 Ft. Laramie Treaties. Section 71 expressly provides that "no obligation of any treaty...shall be hereby invalidated or impaired." Neither the 1851 Treaty nor the 1868 Treaty have been abrogated by Congressional statute and both are in effect.

Nation of New York State, 470 U.S. 226, 247 (1985); US v. Washington, 157 F.3d 630, 643 (9th Cir. 1998), cert. den., 526 U.S. 1060 (1999); McNabb for McNabb v. Bowen, 829 F.2d 787, 792 (9th Cir. 1987). The following "Canons of Indian Treaty Construction" apply[13]:

(1) ambiguities in treaties must be resolved in favor of the Indians; Carpenter v. Shaw, 280 US 363, 367 (1930); DeCoteau v. District County Court for 10th Judicial District, 420 US 425, 447 (1975); Bryan v. Itasca County, MN, 426 US 373, 392 (1976).

(2) treaties must be interpreted as the Indians would have understood them; Jones v. Meehan, 175 US 1, 10 (1899); US v. Shoshone Tribe, 304 US 111, 116 (1938); Choctaw Nation v. Oklahoma, 397 US 620, 631 (1970).

(3) Indian treaties must be construed liberally in favor of the Indians. Tulee v. Washington, 315 US 681, 684-85 (1942); Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 US 658, 690 (1979); Oneida County, NY v. Oneida Indian Nation of the State of New York, 470 US 226, 247 (1985).

(4) Treaty abrogation may not be inferred and neither a federal agency nor a state may abrogate an Indian treaty. Minnesota v. Mille Lacs Band of Chippewa Indians, 526 US 172, 196, 194 n.5, 202 (1999); See also Menominee Tribe v. US, 391 US 404 (1968); Oneida Indian Nation v. Oneida County, 414 US 661, 670 (1974); Arizona v. California, 373 US 546 (1963).

G. The Winters Doctrine: Superior Water Rights of the Oglala Lakota. The western portion of the United States is arid or semiarid, and the supply of water is far from sufficient to meet demand. With populations soaring and commerce increasing, the need for water is becoming ever more critical. The most pressing resource concern in virtually every western state is that of obtaining more water. Water in the West is synonymous with progress, and municipal governments, agriculture, business, mineral development, and wildlife management compete for this scarce resource.

The United States Supreme Court has held that whenever an Indian reservation is created by the federal government, there is an "implied reservation of water rights....necessary to make

[13] The same rules apply when interpreting the application of federal statutes regarding Indians.

the reservation livable." Winters v. U.S., 207 U.S. 564 (1908) ; Arizona v. California, 373 U.S. 546, 600 (1963). Under the Winters Doctrine, enough water is reserved by the federal government on behalf of the Tribe to meet its present and future needs. Since the tribe's Winters Doctrine water rights are based on federal law, they are superior to any and all rights held under state law, called the "doctrine of prior appropriation", including any rights of Applicant under Nebraska law. In addition, a tribe cannot lose Winters rights due to nonuse and the amount of water a tribe is entitled to use is not determined by and limited to the tribe's initial use. "On the contrary, a tribe with Winters rights is entitled to take all the water it needs to fulfill the purpose for which its reservation was created. Further, since underground and surface waters in a region is often hydrologically interrelated, Winters rights extend to groundwater. In Cappaert v. United States, 426 U.S. 128 (1976), applying the Winters Doctrine, 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 lake 100 miles away after it was shown the two were hydrologically related. Id., 426 U.S. at 142-143.

Under Colville Confederated Tribes v. Walton, 647 F.2d 42 (9th Cir. 1981), cert. den., 454 US 1092 (1981), three factors must be considered: (1) the history of the tribe for which the reservation was created (including the tribe's historical use of water); (2) the stated and implied intentions of those who created the reservation; and (3) the tribe's need to maintain itself under changed circumstances. The court found that the reservation was created to give the Tribe a viable home; (2) Congress reserved by implication enough water to the Tribe to continue traditional fishing and agricultural activities; (3) due to changed circumstances, the Tribe now needed enough water to maintain their lake. Therefore, if the Tribe traditionally depended on hunting and fishing for food, Congress intended to reserve to the tribe enough water to keep its

forests, streams, and lakes capable of supporting the game and fish it needs to prosper. See e.g., Carson-Truckee Conservancy Dist. v. Clark, 741 F.2d 257 (9th Cir. 1984); Pyramid Lake Paiute Tribe v. Morton, 354 F. Supp. 252 (D. D.C. 1972).

The federal government has a trust responsibility to enhance tribal autonomy and self-government and protect Indian property. Water in a usable quantity and quality is essential to tribal self-government and economic independence, as the Winters doctrine indicates. Therefore, the federal government has an affirmative duty to protect tribal water rights, to assure adequate supplies of water to Indian reservations, and to manage tribal water in the best interests of the tribe. See Lane v. Pueblo of Santa Rosa, 249 US 110 (1919); Klamath Water Users Protective Ass'n v. Patterson, 204 F.3d 1206, 1214 (9th Cir. 1999), cert. den., 121 S.Ct. 44 (2000); White Mountain Apache Tribe v. Hodel, 784 F.2d 921 (9th Cir. 1986), cert. den., 479 US 1006 (1987); Pyramid Lake, *infra*.

As discussed above, the Supreme Court has recognized that the United States has "moral obligations of the highest responsibility and trust" to Indians and must use "great care" in its dealings with them. See Seminole Nation v. U.S., 316 US 286 (1942); U.S. v. Mason, 412 US 391, 398 (1973). Therefore, the Winters Doctrine, when viewed in light of the Trust Doctrine, requires protection of purity of the water so that Oglala Lakota may continue to live well and to make the Reservation "**livable**.".

Clearly, courts have recognized the necessity of protecting of quality, in addition to quantity of ground and surface waters for farming, domestic, and spiritual purposes, which flow through Indian reservations, such as the Pine Ridge Reservation, even where the source of water restriction or contamination is outside reservation boundaries. See, e.g., United States v. Gila

Valley Irrigation District, 920 F.Supp. 1444 (D. Ariz. 1996), aff'd., 117 F.3d 425 (9th Cir. 1997) (upstream farmers ordered to stop using pollutants which increased salinity of tribe's water supply).

Courts have held that to protect water supplies, tribes may prevent contamination under the Clean Water Act (CWA). In Albuquerque v. Browner, 97 F.3d 415 (10th Cir. 1996), *cert.den.*, 522 U.S. 965 (1997) and Montana v. U.S. Environmental Protection Agency, 137 F.3d 1135 (9th Cir. 1998), Courts of Appeals held that the CWA vests tribes with significant authority to protect the quality of their water supply.

Indeed, in 1987, the CWA was amended by Congress to authorize the EPA "to treat Indian tribes as states under circumstances for purposes of the Clean Water Act" when a state assumes the EPA's responsibility for water quality and quantity protection. The CWA amendment authorizes tribes to be on an equal footing with the potentially impacted State in the determination of water quality standards applicable for corporate or municipal activities which threaten tribal water supplies "which are held by an Indian tribe, held by the United States in trust for Indians, **held by a member of an Indian tribe** if such property interest is...otherwise within the borders of an Indian Reservation."[14] Such an amendment reflects a Congressional acknowledgment of the interest of tribal members, such as Petitioners, whose water may be impacted.

Thus, the Oglala Lakota may assert authority under the CWA and in accord with their sovereignty, to protect their water supplies on par with, or superior to, the State of Wyoming, in setting water quality standards related to actions which potentially could affect the Tribe's water

[14] 33 U.S.C. 1377(c)(2) (emphasis added).

quality. Such Tribal authority permits the Tribe to establish even more stringent water quality standards on Applicant's operations than the WDEQ. See, City of Albuquerque v. Browner, supra, 97 F.3d at 43; Montana v. U.S. Environmental Protection Agency, supra, 137 F.3d at 11_. However, the existence of the OST's regulatory powers, whether or not exercised, to adopt more stringent water quality standards does not diminish the Petitioner's own interest in protecting the same water supplies.

H. Indian Hunting and Fishing Rights Under Federal Indian Law. Hunting and fishing have always been of vital importance to Indians. Traditionally, access to wildlife was 'not much less necessary to the existence of the Indians than the atmosphere they breathed." Winans, *infra*, at 381. Until the reservation system was created in the nineteenth century, many western tribes, including the Sioux, were nomadic, pursuing the seasonal migration of deer, elk, bison and anadromous fish (like salmon)....As a result of treaties and statutes, Indians have a right to take a considerable amount of wildlife. In addition, many species of wildlife on which tribes once subsisted have become scarce or extinct due to the large number of non-Indians who now live in the region and the degree to which these non-Indians have changed and degraded the natural environment. As a result, treaties, such as the Ft. Laramie Treaties, that guarantee hunting and fishing rights have been interpreted by the courts to include gathering and trapping rights for those tribes that obtained their food by those methods. See U.S. v. Aanerud, 893 F.2d 956 (8th Cir.), cert. den., 498 US 822 (1990).

In addition, under the Reserved Rights Doctrine, every Indian tribe has the inherent right to be self-governing, and that encompasses the right to regulate wildlife found within its

territory. New Mexico v. Mescalero Apache Tribe, 462 US 324 (1983). Therefore, unless a tribe's hunting and/or fishing rights have been limited by treaty or a statute expressly abrogating an applicable treaty, the tribe retains its original right to hunt and fish on tribal lands. U.S. v. Felter, 752 F.2d 1505, 1509 (1985). Further, even if a treaty is silent on hunting and fishing rights, they are presumed to exist in full force. Winans, *infra*, at 381; Menominee Tribe v. U.S., 391 US 404 (1968). Each tribe is presumed to retain its traditional right to hunt and fish, regardless of whether its reservation was created by treaty, statute, or an executive order. See U.S. v. Dion, 476 US 734, 745 n. 8 (1986). Either a tribe or an individual tribal member may file suit to enforce a tribe's treaty rights. See Puyallup Tribe, Inc. v. Dept. of Game, 433 US 165 (1977) (suit by tribe); Sohappy v. Smith, 302 F. Supp. 899 (D. Or. 1969) (suit by tribal members).

Under the Winters Doctrine, as applied to hunting, fishing and gathering rights protected under the Reserved Rights Doctrine and under the Treaties, the contamination of the fish, wildlife and/or plants due to radiation emissions, spills and/or mixing of the aquifers would be a violation of the Indigenous Petitioners rights and would convey standing. See City of Tacoma v. Federal Energy Regulatory Commission, 460 F.3d 53 (D.C. Cir. 2006) (right to fish guaranteed in 1855 Treaty of Point No Point to Skokomish Indian Tribe created an interest in licensing procedure for an off-reservation hydro-electric project which would affect water levels and silting in an on-reservation lake used for fishing).

I. Rights of Consultation. Indian tribes have substantial rights to meaningful consultation under federal and international law. In 1994, President Clinton issued a Presidential Memorandum that requires all federal agencies, including the NRC, to conduct their business

with tribes on a "government-to-government" basis, respectful of tribal sovereignty.

"Government-to-Government Relations with Native American Tribal Governments".[15] The 1994 Executive Order states:

> The United States Government has a unique legal relationship with Native American tribal governments as set forth in the Constitution of the United States, treaties, statutes, and court decisions. **As executive departments and agencies undertake activities affecting Native American tribal rights or trust resources, such activities should be implemented in a knowledgeable, sensitive manner respectful of tribal sovereignty....**The purpose of these principles is to clarify our responsibility to ensure that the Federal Government operates within a government-to-government relationship with federally recognized Native American tribes.[16]

The Executive Order further provides, in pertinent part, that:

> In order to ensure that the rights of sovereign tribal governments are fully respected, executive branch activities, including NRC activities, shall be guided by the following:
>
> (b) Each executive department and **agency shall consult, to the greatest extent practicable and to the extent permitted by law, with tribal governments prior to taking actions that affect federally recognized tribal governments. All such consultations are to be open and candid so that all interested parties may evaluate for themselves the potential impact of relevant proposals.**
>
> (c) Each executive department and **agency shall assess the impact** of Federal Government plans, projects, programs, and activities on tribal trust resources **and assure that tribal government rights and concerns are considered during the development of such plans, projects, programs, and activities.**
>
> (d) Each executive department and **agency shall take appropriate steps to remove any procedural impediments to working directly and effectively with tribal governments on activities that affect the trust property and/or governmental rights of the tribes.**

[15] 59 Fed. Reg. 22951, 1994 WL 16189198 (April 24, 1994).
[16] Id. at 22952.

(e) Each executive department and agency shall work cooperatively with other Federal departments and agencies to enlist their interest and support in cooperative efforts, where appropriate, to accomplish the goals of this memorandum.

(f) Each executive department and agency shall apply the requirements of Executive Orders Nos. 12875 ("Enhancing the Intergovernmental Partnership") and 12866 ("Regulatory Planning and Review") to design solutions and tailor Federal programs, in appropriate circumstances, to address specific or unique needs of tribal communities.

Id. In 2000, President Clinton issued Executive Order No. 13175, Consultation and Coordination With Indian Tribal Governments:[17]

By the authority vested in me as President by the Constitution and the laws of the United States of America, and in order to establish regular and meaningful consultation and collaboration with tribal officials in the development of Federal policies that have tribal implications, to strengthen the United States government-to-government relationships with Indian tribes, and to reduce the imposition of unfunded mandates upon Indian tribes; it is hereby ordered as follows:
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Sec. 2. Fundamental Principles. In formulating or implementing policies that have tribal implications, agencies shall be guided by the following fundamental principles:

(a) The United States has a unique legal relationship with Indian tribal governments as set forth in the Constitution of the United States, treaties, statutes, Executive Orders, and court decisions. Since the formation of the Union, the United States has recognized Indian tribes as domestic dependent nations under its protection. The Federal Government has enacted numerous statutes and promulgated numerous regulations that establish and define a trust relationship with Indian tribes.

(b) Our Nation, under the law of the United States, in accordance with treaties, statutes, Executive Orders, and judicial decisions, has recognized the right of Indian tribes to self-government. As domestic dependent nations, Indian tribes exercise inherent sovereign powers over their members and territory. The United States continues to work with Indian tribes on a government-to-government basis to address issues concerning Indian tribal self-government, tribal trust resources,

[17] 65 FR 67249, 2000 WL 1675460 (Pres. Exec. Order Nov 06, 2000).

and Indian tribal treaty and other rights.

(c) The United States recognizes the right of Indian tribes to self-government and supports tribal sovereignty and self-determination.

Sec. 3. Policymaking Criteria. In addition to adhering to the fundamental principles set forth in section 2, agencies shall adhere, to the extent permitted by law, to the following criteria when formulating and implementing policies that have tribal implications: ***67250**

(a) **Agencies shall respect Indian tribal self-government and sovereignty, honor tribal treaty and other rights, and strive to meet the responsibilities that arise from the unique legal relationship between the Federal Government and Indian tribal governments.**

(b) With respect to Federal statutes and regulations administered by Indian tribal governments, the Federal Government shall grant Indian tribal governments the maximum administrative discretion possible.

(c) When undertaking to formulate and implement policies that have tribal implications, agencies shall:

(1) encourage Indian tribes to develop their own policies to achieve program objectives;

(2) where possible, defer to Indian tribes to establish standards; and

(3) in determining whether to establish Federal standards, consult with tribal officials as to the need for Federal standards and any alternatives that would limit the scope of Federal standards or otherwise preserve the prerogatives and authority of Indian tribes.

Sec. 4. Special Requirements for Legislative Proposals. Agencies shall not submit to the Congress legislation that would be inconsistent with the policymaking criteria in Section 3.

Sec. 5. Consultation. (a) Each agency shall have an accountable process to ensure meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications. Within 30 days after the effective date of this order, the head of each agency shall designate an official with principal responsibility for the agency's implementation of this order. Within 60 days of the effective date of this order, the designated official shall submit to the Office of Management and Budget (OMB) a description of the agency's consultation

process.

(b) To the extent practicable and permitted by law, no agency shall promulgate any regulation that has tribal implications, that imposes substantial direct compliance costs on Indian tribal governments, and that is not required by statute, unless:

(1) funds necessary to pay the direct costs incurred by the Indian tribal government or the tribe in complying with the regulation are provided by the Federal Government; or

(2) the agency, prior to the formal promulgation of the regulation,

(A) consulted with tribal officials early in the process of developing the proposed regulation;

(B) in a separately identified portion of the preamble to the regulation as it is to be issued in the Federal Register, provides to the Director of OMB a tribal summary impact statement, which consists of a description of the extent of the agency's prior consultation with tribal officials, a summary of the nature of their concerns and the agency's position supporting the need to issue the regulation, and a statement of the extent to which the concerns of tribal officials have been met; and

(C) makes available to the Director of OMB any written communications submitted to the agency by tribal officials.

(c) To the extent practicable and permitted by law, no agency shall promulgate any regulation that has tribal implications and that preempts tribal law unless the agency, prior to the formal promulgation of the regulation,

(1) consulted with tribal officials early in the process of developing the proposed regulation;

(2) in a separately identified portion of the preamble to the regulation as it is to be issued in the Federal Register, provides to the Director of OMB a tribal summary impact statement, which consists of a description of the extent of the agency's prior consultation with tribal officials, a summary of the nature of their concerns and the agency's position supporting the ***67251** need to issue the regulation, and a statement of the extent to which the concerns of tribal officials have been met; and

(3) makes available to the Director of OMB any written communications

submitted to the agency by tribal officials.

> (d) **On issues relating to tribal self-government, tribal trust resources, or Indian tribal treaty and other rights, each agency should explore and, where appropriate, use consensual mechanisms for developing regulations, including negotiated rulemaking.**[18]

Neither of these Executive Orders has been rescinded, modified or revoked by President George W. Bush or by President Obama and, accordingly, remain in full force and effect and apply to the instant case.

In addition there are international human rights standards indicate that Indigenous peoples' whose lands are affected by development projects have the right to "free, prior and informed consent." In the United Nations Declaration on the Rights of the World's Indigenous Peoples ("UN Declaration"), Article 32, ¶ 1, "Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources," and ¶ 2, "States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources," and ¶ 3, "States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact." [19]

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[18] Id. (Emphasis added.)
[19] See General Assembly Resolution A/61/L.67 of 7 September 2007.

Under the Trust Doctrine, and in accordance with the 1994 Executive Order and the 2000 Executive Order, and guided by the UN Declaration and the ICERD (which unlike the UN Declaration **is** binding on the US), discussed above, the NRC is required to engage in a meaningful and respectful consultation process. As a result, in this proceeding, Applicant and the Application must be viewed with respect to the standards under which the NRC is required to act. Accordingly, the nature of the consultation required in connection with the proposed ISL mining is substantial. Much more is required than the empty process-driven letter sending engaged in by Applicant. It lacks the due care, good faith, reasonableness that are indicative of compliance with the Trust Doctrine.

Consistent with the UN Declaration, the 1994 and 2000 Executive Orders and the Rights of Consultation described above, it is clear that Indian Nations, Tribes and people, including the Oglala Lakota, are to be treated with respect and dignity, which at a minimum, would include informed and meaningful consultation on proposed federal licensing of this ISL uranium mine which involves extraction of minerals from Treaty lands, within 150 miles of the Reservation and creating a contamination pathway to the Missouri River from which the Reservation gets its water, and contamination of surface water and groundwater supplies relied upon by the people and wildlife near the mine site, to the degradation of their environment and access to wildlife for hunting, fish for fishing and plants for gathering in accordance with their treaty and reserved rights.

In addition, before approving a license, the NRC, as a federal agency, has an obligation under the government's "trust responsibility" towards indigenous nations and people within the borders of the United States, to protect their natural resources for the current and future uses of

the Lakota Nation. See, e.g., Klamath Water Users Protective Ass'n v. Patterson, 204 F.3d 1206, 1214 (9th Cir. 1999), cert. den., 121 S.Ct. 44 (2000); Section I.A infra. Petitioners contend "the trust relationship between the United States and the Native American people" requires that the NRC give a "liberal construction" of any provisions of law, that are "for the benefit of Indian tribes." Cobell v. Norton, 240 F.3d 1081, 1101 (D.C. Cir. 2001) [quoting, Bryan v. Itasca County, 426 U.S. 373, 392 (1976)].

And, despite the existence of a legal mechanism for formal consultations with the Tribe and the Bureau of Indian Affairs, no efforts have been made by Applicant to do so.[20]

Accordingly, it is clear that Applicant has failed to engage in reasonable efforts to bring about consultation with the Oglala Delegation or with the IRA government - Oglala Sioux Tribe, which it must do because it has requested NRC authority, as part of the NRC licensing process, which constitutes a federal action requiring such consultations.

Petitioner contends that the record is clear that Applicant, while informing the Oglala Sioux Tribe (IRA Government but not the Oglala Delegation) by letter concerning the mine license renewal, it failed to inform the OST or the Oglala Delegation that cultural resources had been located in and around the site, failed to identify the nature and location of such resources, and failed to specifically seek consultation as to these and other such resources which may have been known to exist by the Tribe or its members.

The Petitioners contend that Applicant's efforts were unreasonable, and that pursuant to the 1851 and 1868 Ft. Laramie Treaties and NAGPRA, that tribal elders, or at least the tribal government should have received a respectful, detailed and complete disclosure allowing for

[20] See 36 CFR Section 800 et seq.

questions and a dialogue intended to develop a meaningful consultation about the known existence of various artifacts located during a survey of the area in and around the mine sites, all of which is within the Treaty boundaries. Petitioner contends that consultation is further required under the U.N. Declaration, ICERD, the National Environmental Protection Act (NEPA) the National Historic Preservation Act (NHPA) and the public interest under the Atomic Energy Act.

J. Rights Under Native American Graves Protection and Repatriation Act ("NAGPRA"). In 1990, Congress passed NAGPRA to: (1) allow tribes to recover religious and cultural items belonging to them that were held in federally funded institutions, and (2) to protect the right of tribes to safeguard remains and artifacts that might be found or excavated in the future.[21] Rights under NAGPRA are not well defined. However, when viewed through the lens of the Trust Doctrine, it 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. See, e.g., Yankton Sioux Tribe v. U.S. Army Corps of Engineers, 83 F. Supp.2d 1047 (D. S.D. 2000) (enjoining federal officials from raising the water level of a lake until tribal officials were given an opportunity to remove artifacts and human remains discovered in the area to be flooded.)

K. Rights Under the American Indian Religious Freedom Act (AIRFA). In passing the American Indian Religious Freedom Act (AIRFA), Congress officially recognized the existence, legitimacy, and significance of the spiritual and ceremonial ways of the indigenous

[21] 25 USC Sections 3001-3013.

Peoples of the Western Hemisphere.[22] Due to the use of water for ceremonial and cultural purposes by the Indigenous Petitioner and the potential impact on Petitioner's water resources by the operation of the proposed new mine site and interrelation of the aquifers, groundwater and surface waters, AIRFA would further require consultation with the Oglala Delegation and OST government prior to any possible issuance of the sought license renewal from the NRC. According to the Congressional Report on this Act:

[22] See 42 U.S.C. 1996.

Native traditional religions are the fabric of Native American cultures. At one time, the repression of American Indian religions by government agents was a common practice and these religions were held up to ridicule by American society. Partly out of ignorance and partly as a result of these regrettable practices and attitudes, **federal policies and practices not directed toward Native traditional religions were also hostile or indifferent to their religious values**.

And, when the official policy of deliberate repression was ended, no comprehensive review was made of the residual incidental impact of federal practices on Native American religions.[23]

[23] American Indian Religious Freedom Act Report, P.L. 95-341, pp. i-ii (emphasis added.)

Therefore, the NRC, as a federal agency, must adhere to "the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express and exercise the traditional religions." [24]

L. Rights Under UN Declaration, ICERD and International Law.

A non-binding text, the UN Declaration sets out the individual and collective rights of indigenous peoples, as well as their rights to culture, identity, language, employment, health, education and other issues. The document emphasizes the rights of indigenous peoples to maintain and strengthen their own institutions, cultures and traditions and to pursue their development in keeping with their own needs and aspirations. It also prohibits discrimination against indigenous peoples and promotes their full and effective participation in all matters that concern them, and their right to remain distinct and to pursue their own visions of economic and social development. In addition UN Declaration, the International Covenant on Civil and Political Rights (ICCPR) is persuasive.[25] Article 27 of the ICCPR provides that:

> In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language. Id..

The ICCPR is under the jurisdiction and is enforceable against the United States by the UN Committee on Ethnic and Racial Discrimination (ICERD). The UN

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[24] 42 U.S.C. Section 1996(1) (emphasis added).

[25] Adopted by General Assembly Resolution 2200A (XXI), December 16, 1966, entered into force March 23, 1976 in accordance with Article 49 thereof; ratified by US Senate, 102nd Cong. 2nd Sess., Exec. Rept. 102-23 (March 24, 1992); http://www2.ohchr.org/english/law/ccpr.htm. 27

Declaration, therefore, should apply to the NRC's consideration of the license renewal due to its focus on preventing disproportionate impacts to the environmental and cultural interests of the Indigenous Petitioner which are implemented at NRC through the its Environmental Justice Strategies.

On February 11, 1994, President Clinton issued Executive Order 12898, "Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations." This Order requires federal authorities to consider the environmental and human health conditions of low-income populations and to develop an environmental justice strategy to counter any additional impacts of proposed activities. As a result, Region 7 has developed an environmental justice strategy that identifies and addresses unfair environmental impacts on programs, policies, and activities in minority and low-income populations.[26]

Therefore, the NRC must consider its own environmental justice strategy and guidelines and apply them in the instant case. This is regardless of the fact that the impact on Petitioners is illustrated by the studies showing the impacts to water quality and quantity used by the Petitioners.

Although non-binding, the UN Declaration illustrates that the United Nations, including the United States, and other authorities on international law and the rights of aboriginal people have taken a step closer to concurrence with such peoples who argue that water and similar resources upon which they depend

[26] See, http://www.epa.gov/rgytgrnj/ej/pdf/english_ej_factsheet.pdf.

is a "fundamental right." Similarly, Indian Tribes and/or their members have often appeared before international tribunals after they are unable to obtain satisfaction in the protection of indigenous and treaty rights in U.S. courts. Such tribunals often rule on violations of traditional rights to land and water resources and the harm to tribal communities from government actions. This international law enforcement process encourages government agencies such as the NRC to comply with these non-binding international standards as well as its own environmental justice strategy.

M. Impact of the Purported Agreement of 1877; 1877 Act and Limitations of *US v. Sioux Nation of Indians*.

As discussed above, nothing in United States v. Sioux Nation of Indians, 448 U.S. 371 (1980) changes the Oglala Delegation's relationship to the lands in question as it pertains to their Lakota cultural rights and duties. Nor does such a ruling divest the Oglala Delegation of its traditional responsibility to safeguard Lakota lands, culture, water, air, plants, animals and all other manner of ecological, cultural and spiritual health.

Accordingly, Applicant's argument that "standing must be denied because it is contrary to US v Sioux Nation of Indians" must be rejected. Petitioner maintains that the mine site is within the 1851 treaty territory and the 1868 Treaty territory and nothing in the above-referenced Supreme Court decision gives the Applicant the right to contaminate the area – or deprives the Oglala Lakota of their inherent right to stand up for the sanctity of the water, wildlife, eagles and

land from contamination. The 1877 Act was rank – it barely slipped through the legalities to deprive the Oglala Lakota of legal title – and, accordingly, the Trust Doctrine requires that no interpretation be made that such deprived them of their birthrights to protect the cultural and environmental values within their aboriginal territory.

N. Applicant's Self-Created Procedural Technicality Does Not Estop Petitioner From Raising Issues. In several places in its Answer, Applicant attempts to prevail on its arguments by emphasizing that this Application is about a 'continuation' of operation[27] but fails to acknowledge that the mine has been decommissioned and is being restarted pursuant to a planned series of amendment and renewal applications. Therefore, there is a basic change of circumstances. Under the Canons of Construction, this must be interpreted as the Lakota would understand it – therefore, there is no procedural technicality that can be used to estop the Oglala Delegation from asserting protection over Lakota cultural resources existing within the Treaty Territory. Since no other Oglala Lakota party stepped forward at another part of this series of applications to convert the mine from decommissioned status to an operating and fully licensed and renewed mine, this is the one opportunity that the Oglala Lakota have to participate in this licensing proceeding and series of applications. The Applicant may not be allowed to use its own staging and filing of applications in its own orchestrated manner to avoid answering fundamental questions of the Oglala Lakota presented in its Petition.

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[27] See, e.g., Applicant Answer at 52; 62-63; 67; 84; 85; and 96.

O. Contamination Pathways; Chain of Causation.

NRC Staff states that Petitioner has made no attempt to identify pathways to contamination.[28] Petitioner is located within 150 miles of the mine sites that are described in the Application and is in the pathway of contaminants from the ISL uranium mining operations of Applicant CMI described in the Application. Petitioner has maintained that Applicant's ISL mining operations have caused adverse health and environmental impacts related to these contaminants. Petitioners have noted the impact high arsenic levels. Petitioner has made the Board aware of a study from the Johns Hopkins Bloomberg School of Public Health which indicates that even low level inorganic arsenic levels in the water is related to the onset of Type 2 Diabetes in Adults.[29] The Johns Hopkins Study concluded that "total urine arsenic was associated with increased prevalence of type 2 diabetes. This finding supports the hypothesis that low levels of exposure to inorganic arsenic in drinking water, a widespread exposure worldwide, may play a role in diabetes prevalence."[30]

The aquifer being mined (the Wasatch aquifer)[31] is itself is being used for domestic purposes by a small number of persons, and by wildlife in and around the region including sacred Eagles (wanbli). This causes adverse health and environmental impacts to Petitioner and/or those for which Petitioner is steward

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[28] NRC Answer at 35.
[29] Arsenic Exposure and Prevalence of Type 2 Diabetes in US Adults, Ana Navas-Acien, MD, PhD; Ellen K. Silbergeld, PhD; Roberto Pastor-Barriuso, PhD; Eliseo Guallar, MD, DrPH, Journal of the American Medical Association, 2008;300 (7):814-822 (August 20, 2008).
[30] Id.
[31] Petition at 83.

and has a cultural responsibility as Oglala Lakota. Further, because water travels long ways and in unpredictable ways, the contaminants from Applicant's mine travel to the outer unpredictable places. Finally, spills into Willow Creek and its related watershed, which can flow into the Powder River as well as groundwater contamination that reaches the Powder River flow North East towards the Missouri River and the people at Pine Ridge Indian Reservation get their water from the Missouri River.

Spills do happen and have happened at Applicant's ISL operation despite regulatory mandated precautions against spills and contamination from spills. Applicant includes a generalized discussion of the procedures in place for dealing with spills without including a discussion about the actual results of those procedures when spills did, in fact, happen. Applicant's fights against having an obligation to include a discussion of past spills when it talks about how it would handle future spills.

Contaminants also spread through accumulation in plants and in animal tissues that may be consumed by people. This interferes with substantial hunting and fishing rights and environmental, recreational and cultural values of the Oglala Lakota.

The Aquifer to be mined by Applicant uses up substantial amounts of water per year that are to be injected into Applicant's deep disposal well. In addition, once mined by Applicant, the Aquifer becomes irretrievably committed and may never again be used as a US Drinking Water source ("USDW"). The

foregoing facts support standing on the environmental and safety contentions.

P. Materiality Under Section 40.9. Applicant's own ironclad obligation to make full disclosure under Section 40.9 of all material facts, ***which include all facts that a reasonably prudent person making a licensing decision would consider important.***[32] How could the total foreign control, ownership and domination of Applicant not be considered important? How could the voidability of the Applicant's mineral leases due to a transfer to foreign ownership not be considered important? These are the ironclad obligations that must be fulfilled by Applicant in order to give meaning to the responsibilities of the NRC as the unique agency that it is with the mandate to regulate nuclear materials in the US national interest.[33]

NRC Regulation Section 40.9 provides that all information provided to the Commission by Applicant shall be complete and accurate in "all material respects" which should be read to mean that the Applicant has disclosed all information that a reasonably prudent regulator would consider important in making a licensing decision.[34] Further, Section 40.9(b) requires Applicant to

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[32] See, e.g., Basic Inc. v. Levinson, 485 U.S. 224 (1988), establishing the federal law standard for materiality in securities transactions. Petitioners submit that the standard for disclosure of material facts in the area of nuclear licensing should be at least as stringent as the standard applicable for the sale of a share of stock which, unlike source material licensing, typically does not involve irreparable harm to a damaged party.

[33] See 42 U.S.C. § 2012 (a), (c)-(e).

[34] 10 CFR 40.9(a). Rules for establishing materiality under federal law are well-established by the Supreme Court under the securities laws, see TSC Industries, Inc. v. Northway, Inc., 426 U.S. 438 (1976), concluding in the proxy-solicitation context that "[a]n omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote." Id., at 449. Acknowledging that certain information concerning corporate developments could well

notify the Commission if Applicant has identified information having a significant implication for public health and safety or common defense and security. Petitioners further assert that the same type of due diligence obligations apply to professionals in preparing and filing NRC applications as are applicable to professionals preparing and filing SEC documents.[35]

NRC Staff disputes that there is any duty to disclose material facts to the NRC in connection with a source materials license.[36] NRC Staff argues that Section 40.9(a) only encompasses completeness and accuracy of information otherwise required to be submitted[37]; an argument which is ripe for loopholes and is itself inimical to national security, common defense and the health and safety of the public. NRC Staff goes on to argue that Section 51.45(e) should be read in a vacuum; and exercise which demonstrates why there is a materiality standard as understood by Petitioner and expressed in the Petition.

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be of "dubious significance," id., at 448, 96, the Court was careful not to set too low a standard of materiality; it was concerned that a minimal standard might bring an overabundance of information within its reach, and lead management "simply to bury the shareholders in an avalanche of trivial information-a result that is hardly conducive to informed decisionmaking." Id., at 448-449. It further explained that to fulfill the materiality requirement "there must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available." *Id.*, at 449. We now expressly adopt the TSC Industries standard of materiality for the § 10(b) and Rule 10b-5 context. Basic Inc. v. Levinson, 485 US 224, 231-232 (1988).

[35] See, e.g., Escott v. BarChris Const. Corp., 283 F.Supp. 643 (S.D.N.Y. 1968) (finding lawyer among others did not have benefit of due diligence defense when he had knowledge that information in forms submitted to SEC, which were themselves treated as revisions to previously filed documents, contained false information. The court held that in the case of company counsel, Birnbaum, he could not claim a due diligence defense because he should have known better as lawyer for the company involved.)

[36] See NRC Staff Answer at 19-20.

[37] Id.

Q. Purported Impermissible Challenges. In several places Applicant suggests or argues that some part of Petitioner's position is an "impermissible challenge" under Section 2.335. No where in the Petition or in any of Petitioner's arguments does it impermissibly challenge NRC regulations within the meaning of Section 2.335.

If Applicant were correct, a foreign government owned front corporation could surreptitiously purchase a US uranium mine (and take over its license) after it received the original nuclear source materials license, and continue to operate pursuant to the license authorized by the NRC for a U.S. corporation, not a foreign government-owned, controlled and dominated one, the illegality of the issuance of its original and renewed license would be beyond regulation by the United States and challenge by any petitioner. To accept Applicant's argument would be to condone and immunize such conduct, despite its violation of the spirit and letter of the AEA and related Regulations. Therefore, Applicant's argument that Petitioners' challenge constitutes an "impermissible challenge to an activity already permitted" is hollow and must also fail. Any such conclusion would reward applicants for their non-disclosure and would run afoul of the Unclean Hands Doctrine.[38]

III. STANDING

A. Applicable Principles of Standing. Petitioner has standing because it has demonstrated that it, and the sacred cultural resources, environment, wildlife, water and land that it is duty bound to steward and protect,

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[38] . See Precision Inst. Mfg. Co. v. Automotive M.M. Co., 324 U.S. 806 (1945).

may be affected by a decision in this proceeding. The applicable statute, 42 U.S.C. Section 2239(a), provides that "the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding, and shall admit any such person as a party to such proceeding.[39] **The presiding officer must "construe the [intervention] petition in favor of the petitioner."[40]** In LBP-08-06 and in LBP-08-24[41], and pursuant to the binding legal precedent cited therein, the applicable principles concerning standing are as follows:

> Any person requesting a hearing and seeking to intervene in an NRC proceeding must demonstrate that he or she has "standing" to participate in the proceeding. Standing is a concept that concerns whether a party has "sufficient stake" in a matter, as defined by relevant legal principles. The question of standing "focuses on the question of whether the litigant is the proper party to fight the lawsuit" — as contrasted with the separate question of whether there is a "justiciable," or "real and substantial controversy . . . appropriate for judicial determination," and not merely a hypothetical dispute. The petitioner bears the burden of demonstrating standing, but in ruling on standing a licensing board is to "construe the petition in favor of the petitioner."[42]

A licensing board shall consider three factors when deciding whether to grant standing to a petitioner: the nature of the petitioner's right under the AEA to be made a party to the proceeding; the nature and extent of the petitioner's property, financial, or other interest in the proceeding; and the possible effect of any order that may be entered in the proceeding on the petitioner's interest.[43]

In addition, Commission precedent directs licensing boards, in deciding

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[39] 42 U.S.C. Section 2239(a).
[40] Georgia Inst. of Tech. (Georgia Tech Research Reactor), CLI-95-12, 42 NRC 111, 115 (1995) (emphasis added).
[41] The Crow Butte ASLBP rulings.
[42] See, e.g., LBP-08-06 at 28-29 and cases cited therein.
[43] Id. at 29.

whether a petitioner in an NRC proceeding has established the necessary "interest" to show standing under Commission rules, to follow the guidance found in judicial concepts of standing, as stated in federal court case law.[44]

Under these concepts, we are to consider whether a petitioner has "allege[d]

[1] a concrete and particularized injury that is (2) fairly traceable to the challenged action and (3) likely to be redressed by a favorable decision." The requisite injury may be either actual or threatened, but must arguably lie within the "zone of interests" protected by the statutes governing the proceeding — here, either the AEA or the National Environmental Policy Act (NEPA).[45] And, as indicated above, the injury must be "concrete and particularized," and not "conjectural" or "hypothetical."[46] In a case involving indigenous petitioners, the "zone of interests" includes the US Government's obligations of trust responsibility and under the treaties.

In reviewing the facts with respect to standing, a decision maker should "avoid 'the familiar trap of confusing the standing determination with the assessment of petitioner's case on the merits.'[47] Petitioners are not required to

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[44] Yankee Atomic Elec. Co. (Yankee Nuclear Power Station), CLI-98-21, 48 NRC 185, 195 (1998); Quivira Mining Co. (Ambrosia Lake Facility, Grants, New Mexico), CLI- 98-11, 48 NRC 1, 5-6 (1998); Georgia Tech, CLI-95-12, 42 NRC at 115.

[45] LBP-08-06 at 29.

[46] Id.

[47] Sequoyah Fuels Corp. (Gore, Oklahoma Site Decontamination and Decommissioning Funding, LBP-94-5, 39 NRC 54 (1994) (*citing* City of Los Angeles v. National Highway Traffic Safety Administration, 912 F.2d 478, 495 (D.C.Cir.1990) (citations omitted)), aff'd, CLI-94-12, 40 NRC 64 (1994). In the Matter of HydroResources, Inc., LBP-98-9, 47 NRC 261, 272 (1998) ("HRI I").

rely on the good will of Applicant, the future decisions of the NRC Staff, or the staff of the Environmental Protection Agency. A determination that the injury is fairly traceable to the challenged action, however, does not depend "on whether the cause of the injury flows directly from the challenged action, but **whether** the **chain of causation is plausible.**" [48] The redressability element of standing requires a petitioner to show that the claimed actual or threatened injury could be cured by some action of the decisionmaker.[49]

B. Standing of Chief Oliver Red Cloud, Oglala Lakota.

1. Individually.

(i) Name, Address and telephone number[50]:

Chief Oliver Red Cloud, Pine Ridge, Pine Ridge Indian Reservation, great-grandson of Chief Red Cloud, signer of the [Ft. Laramie Treaty of 1851] and the Ft. Laramie Treaty of 1868. At age 90, s the man recognized by traditional Lakota Tiospaye, in traditional Lakota ways, as Chief of the Oglala Lakota, Oliver Red Cloud has appeared in response to the Hearing Notice, through counsels, to represent himself, his Tiwahe, his Tiospaye, the Oglala Delegation, the People (Oyate), the sacred Eagles (Wanbli) in the area of the mine sites and the environment (Unci Maka – '*grandmother earth*'), and water (Mni). To a

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[48] Sequoyah Fuels, CLI-94-12, 40 NRC at 75 (emphasis added).
[49] Sequoyah Fuels Corp. (Gore, Oklahoma Site Decommissioning), CLI-01-2, 53 NRC 9, 14 (2001).
[50] Nothing in Section 2.309(d) requires a Petitioner to provide Personal Identifying Information ("PII") in this publicly filed document. Many Petitioners live in rural areas and rely on Post Office Box addresses. However, the geographic location has been provided for each Petitioner sufficient to identify location for purposes of evaluating standing and contentions. The telephone number of the undersigned Attorneys for Petitioner may be used for Petitioner to satisfy Section 2.309(d)(1)(i).

traditional Lakota elder such as Oliver Red Cloud there are no distinctions. He does not understand any distinctions and it is not possible to communicate such distinctions to him in Lakota and he does not speak English well enough to understand any such distinctions.[51] Therefore, based on the Canons of Construction requiring that these matters be interpreted in the manner in which they are understood by the indigenous petitioner, the Board must accept Petitioner's view of his status and interest in this proceeding.

(ii) The nature of this Petitioner's right under the Act to be made a party to the proceeding: The AEA specifically requires atomic energy and source materials to be regulated in the US national interest to assure the common defense and security and to protect the health and safety of the public.[52] To the extent that Applicant's ISL mining operation may interfere with this Petitioner's health and safety, he has rights to be protected against activities that might harm im as a member of the general public referred to in the AEA.[53] These are referred to herein as "General Public Rights").

Oliver Red Cloud is a member of the Oglala Sioux Tribe and the Oglala Delegation and lives at Pine Ridge Indian Reservation. He has rights as a Native American under the trust responsibility and federal Indian law (hereinafter referred to as "Native American Rights") and as an Oglala Lakota under Treaties with the United States of 1825, 1851 and 1868 ("Treaty Rights"). He has the

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[51] Petitioner has provided its own Lakota language translators at no cost to the NRC.
[52] AEA Section 2012(a), (c)(d)(e).
[53] Id. and AEA Section 2239(a).

right to clean water for drinking and to irrigate his family gardens from which he eats regularly. This Petitioner has the right to have clean water for bathing. His health and safety are adversely impacted due to flows of contaminants through his land and also due to flows of contaminants from the mined aquifer to the Missouri River upon which this Petitioner relies for drinking water and domestic use. As a result, this Petitioner's health is jeopardized. This Petitioner is a great-grandfather, an elder, and respected as a Chief.

This Petitioner has a right to exercise his inherent rights and to perform his traditional Lakota cultural duties to protect and preserve the environment, the water, the quality of the land, for the sacred Eagles, the people, the wildlife, and in the name of life itself, and to serve as such a steward for those seven generations down the line.

As a Lakota Chief, and respected Lakota elder, this Petitioner has an absolute obligation to his people, and fundamental right, to express the interests of his people, his family, his children, grandchildren and those of future generations and to continue Lakota traditions for all those people ("Lakota Cultural Rights"). The trust responsibility and treaty obligations owed by the NRC Staff as representatives of the United States Government require that this Petitioner's the NRC Staff accept what this Petitioner describes as his obligations to Lakota tradition and culture. Accordingly, this Petitioner has substantial, concrete and particularized injuries that support standing.

This Petitioner has the General Public Rights, Native American Rights,

Treaty Rights, Religious Rights, Water Rights, and Lakota Cultural Rights. In addition, like many of his relatives, Oliver Red Cloud is a diabetic and needs clean environment. Since he is a diabetic, he is very sensitive to any exposures to arsenic or other contaminants. This is especially true in light of the new study linking arsenic and diabetes and the relationship of arsenic as a toxic release from the massive oxidation occurring during ISL uranium mining.

(iii) The nature and extent of the requestor's/petitioner's property, financial or other interest in the proceeding: This Petitioner has a substantial interest in protecting and preserving his General Public Rights, Native American Rights, Treaty Rights, Religious Rights, Water Rights, and Lakota Cultural Rights. In addition, interest as a diabetic in not being exposed to additional arsenic from Applicant's ISL mining.

(iv) The possible effect of any decision or order that may be issued in the proceeding on the requestor's/petitioner's interest.

(a) The rights referred to in subsection (iii) above would be impaired or substantially restricted if Applicant's ISL operation is licensed for renewal without obtaining reasonable evidence that its operations are not causing pollution at Petitioner's location or at the mine site.

(b) The value of Petitioner's real and personal property would be reduced by contamination of the air, surface water and groundwater in and around the property.

(c) Petitioner's family members who eat from the gardens irrigated from the

Missouri River, have their personal health put at risk and may be damaged by continued uranium mining, further "Excursions" and continued contamination of the air, surface water and groundwater unless it is proven that the ISL operation is not causing any adverse health impacts or any contamination of the Missouri River.

(d) An approval of the renewal would put Petitioner and Petitioner's family at further risk of personal health problems associated with contamination of the air, surface water and groundwater by CMI's operations.

(e) An approval of the renewal would adversely affect Petitioner's property values due to contamination of the air, surface water and groundwater by CMI's operations.

(f) A denial of the renewal would protect Petitioner's health, wellbeing and property values, and those of people who are similarly situated to Petitioner.

(g) An approval of the amendment would put Petitioner and Petitioner's family members who eat from the gardens irrigated with water from the Missouri River at further risk of personal health problems associated with contamination of the air, surface water and groundwater by uranium mining (such as arsenic, thorium, radium, etc.).

This Petitioner is a diabetic and would be put at continued risk due to arsenic contamination if the License renewal is approved.

This Petitioner's Religious Rights, Treaty Rights and Water Rights include continued access to pristine water from one's own tribal land for use in one's own

tribal ceremonies and for the wildlife and sacred Eagles (wanbli) and in protection and stewardship of the environment.

2. **Red Cloud Tiwahe, by Oliver Red Cloud**

(i) The name, address[54] and telephone number of the requestor or petitioner:

Red Cloud Tiwahe (Small Family Organization), Pine Ridge Village, Pine Ridge Indian Reservation

(ii) The nature of the requestor's/petitioner's right under the Act to be made a party to the proceeding: This organization has the same rights as those of Oliver Red Cloud, individually, and his children, grandchildren, great-grandchildren and great-great grandchildren. This organization has the General Public Rights, Native American Rights, Treaty Rights, Religious Rights, Water Rights, Lakota Cultural Rights.

(iii) The nature and extent of the requestor's/petitioner's property, financial or other interest in the proceeding: Cultural and historical interests; property interests; health interests; and the interests expressed with respect to Oliver Red Cloud, individually.

(iv) The possible effect of any decision or order that may be issued in the proceeding on the requestor's/petitioner's interest. This Petitioner has the same possible effects of any decision in this proceeding as are stated above with respect to Oliver Red Cloud, individually. The Red Cloud Tiwahe has both organizational and representational standing.

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[54] The address of an organizational petitioner is for reference only and does not imply that such address itself gives rise to specific rights.

3. **Red Cloud Tiospaye, by Oliver Red Cloud**

The Red Cloud Tiospaye (large family organization) has a substantial interest in preservation of cultural resources that are significant to tribal history.

(i) The name, address and telephone number of the requestor or petitioner

Red Cloud Tiospaye (large family organization), Pine Ridge Indian Reservation

(ii) The nature of the requestor's/petitioner's right under the Act to be made a party to the proceeding;

This organization has the same rights as those of Oliver Red Cloud, individually, and the other members of his extended family. This organization has the General Public Rights, Native American Rights, Treaty Rights, Religious Rights, Water Rights, Lakota Cultural Rights.

(iii) The nature and extent of the requestor's/petitioner's property, financial or other interest in the proceeding:

This organization has interests cultural and historical interests; property interests; health interests; and the interests expressed with respect to Petitioner Joe American Horse, Sr. concerning treaties, and his rights.

(iv) The possible effect of any decision or order that may be issued in the proceeding on the requestor's/petitioner's interest.

This organization has the same possible effects of any decision in this proceeding as are stated above with respect to Oliver Red Cloud, individually.

4. **Oglala Delegation of the Great Sioux Nation Treaty Council.**

(i) The name, address and telephone number of the requestor or petitioner:

Oglala Delegation of the Great Sioux Nation Treaty Council, Pine Ridge Indian Reservation.

(ii) The nature of the requestor's/petitioner's right under the Act to be made a party to the proceeding:

Organizational: The Oglala Delegation of the Great Sioux Nation Treaty Council is its own organization separate from Oliver Red Cloud and separate from the Red Cloud Tiwahe and the Red Cloud Tiospaye; although the Red Cloud Tiospaye is among the Tisopaye represented by the Oglala Delegation. By virtue of the organization of the Oglala Delegation pursuant to Oglala Lakota traditions, it is sufficient to accept the statements by Chief Oliver Red Cloud describing the Oglala Delegation and set forth in his Affidavits filed with the NRC.[55] Since no party has come forward from the Oglala to challenge the organizational integrity of the Oglala Delegation and the OST has not objected to the involvement of the Oglala Delegation in this proceeding, the Petitioner's right under the Act to be made a party to the proceeding as a federally-recognized Indian Tribe and as a local governmental body should be recognized. The very existence of the organization is to enforce Treaty Rights and other of the rights described herein and to represent the Oglala Lakota people in any negotiations or matters pertaining to the matters covered by the treaties with the United States.

Representational: In addition, by virtue of Oliver Red Cloud's position as the Chief of the Oglala Delegation, he conveys representational standing for the

[55] In a manner similar to when a court complies with the business judgment rule not to second guess the decisions of a corporate board, or the internal workings of a corporate decision in the absence of fraud or other challenge.

organization.

(iii) The nature and extent of the requestor's/petitioner's property, financial or other interest in the proceeding:

Organizational: Petitioner has an organizational interest in obtaining complete public disclosure of information related to Applicant's ISL mine in order to protect the natural resources of the unceded Lakota territory including its air and water, wildlife, sacred Eagles (wanbli) and environment (Unci Maka).

Representational: By virtue of its Tiospaye members including the Red Cloud Tiospaye led by Chief Oliver Red Cloud, this organization has representational interests with respect to the following interests of its members: (a) to protect and preserve the rights expressed above; (b) the interests of each of the members of the Treaty Council discussed above.

(iv) The possible effect of any decision or order that may be issued in the proceeding on the requestor's/petitioner's interest:

The possible effect of a decision on this Petitioner's interest is that a denial of the License Renewal until Applicant proves that there is no health impact to the people or environment in the unceded Lakota territory.

This Petitioner has the same possible effects of any decision in this proceeding as are stated above with respect to Oliver Red Cloud, individually.

IV. CONTENTIONS[56]

A. Admissibility of Contentions and Pleading Requirements. The threshold standard is necessary to ensure that hearings cover only genuine and pertinent issues of and that the issues are framed and supported concisely enough at the outset to ensure that the proceedings are effective and focused on real, concrete issues.[57] It is also recognized that "**technical perfection is not an essential element of contention pleading," and that the "[s]ounder practice is to decide issues on their merits, not to avoid them on technicalities.**"[58] The rules are still held to "bar contentions where petitioners have only 'what amounts

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[56] (f) Contentions. (1) A request for hearing or petition for leave to intervene must set forth with particularity the contentions sought to be raised. For each contention, the request or petition must: (i) Provide a specific statement of the issue of law or fact to be raised or controverted, *provided further,* that the issue of law or fact to be raised in a request for hearing under 10 CFR 52.103(b) must be directed at demonstrating that one or more of the acceptance criteria in the combined license have not been, or will not be met, and that the specific operational consequences of nonconformance would be contrary to providing reasonable assurance of adequate protection of the public health and safety;
(ii) Provide a brief explanation of the basis for the contention;
(iii) Demonstrate that the issue raised in the contention is within the scope of the proceeding;
(iv) Demonstrate that the issue raised in the contention is material to the findings the NRC must make to support the action that is involved in the proceeding;
(v) Provide a concise statement of the alleged facts or expert opinions which support the requestor's/petitioner's position on the issue and on which the petitioner intends to rely at hearing,
together with references to the specific sources and documents on which the requestor/petitioner
intends to rely to support its position on the issue;
(vi) In a proceeding other than one under 10 CFR 52.103, provide sufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact. This information must include references to specific portions of the application (including the applicant's environmental report and safety report) that the petitioner disputes and the supporting reasons for each dispute, or, if the petitioner believes that the application fails to contain information on a relevant matter as required by law, the identification of each failure and the supporting reasons for the petitioner's belief.

[57] See LBP-08-06 at 58; and the cases cited therein; see also LBP-08-24 and cases therein.

[58] Id. (Emphasis added).

to generalized suspicions, hoping to substantiate them later.'"[59] Such is not the case in this Proceeding.

A petitioner must "read the pertinent portions of the license application, including the Safety Analysis Report and the Environmental Report, state the applicant's position and the petitioner's opposing view," and explain why it disagrees with the applicant.[60] Petitioner has done this. Petitioner has made specific references to the Application, stated Applicant's position, stated Petitioner's opposing view and dispute, and has explained why it disagrees with Applicant, all as required. A petitioner must support its contentions with "[d]ocuments, expert opinion, or at least a fact-based argument."[61] A petitioner is not, however, "require[d] . . . to prove its case at the contention stage," and "need not proffer facts in 'formal affidavit or evidentiary form,' sufficient 'to withstand a summary disposition motion." The petitioner must make a minimal showing that material facts are in dispute, thereby demonstrating that an 'inquiry in depth' is appropriate." In other words, "a petitioner 'must present sufficient information to show a genuine dispute' and reasonably 'indicating that a further inquiry is appropriate.'"[62] "[S]ome sort of minimal basis indicating the potential validity of the contention" is required. A petitioner is not required "to provide an exhaustive list of possible bases, but simply to provide sufficient alleged factual or legal bases to support the contention."[63]

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[59] Id.
[60] Id. at 58-59; cases cited therein.
[61] Id.
[62] Id. at 60; cases cited therein.
[63] Id.

Finally, the "brief explanation of the basis" that is required by § 2.309(f)(1)(ii) helps define the scope of a contention — "[t]he reach of a contention necessarily hinges upon its terms coupled with its stated bases." But it is the contention, not "bases," whose admissibility must be determined.

A basis for a contention is set forth with reasonable specificity if an applicant is sufficiently put on notice so that it will know, at least generally, what it will have to defend against or oppose, and if there has been sufficient foundation assigned to warrant further exploration of the proposed contention.[64] Reasonable specificity requires that a contention include a reasonably specific articulation of its rationale and a contention that simply alleges that some general, nonspecific matter ought to be considered does not provide the basis for an admissible contention."[65] Section 2.309(f)(vi) requires a pleading of sufficient information to show that a genuine dispute exists with the Applicant on a material issue of law or fact and includes references to the specific portions of the Application that petitioner disputes.[66] Nothing that prohibits a petitioner from demonstrating standing and admissible contentions by making "references to, quotations from, and comparisons between language from various sections of the Application, noting some inconsistencies and pointing out some statements they challenge by reference to other statements therein.[67]

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[64] Kansas Gas & Electric Co. (Wolf Creek Generating Station, Unit 1), LBP-84-1, 19 NRC 29, 34 (1984).
[65] Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), LBP-93-23, 38 NRC 200, 246 (1993).
[66] Texas Utilities Company, et. al. (Comanche Peak Steam Electric Station, Unit 2), LBP-92-37, 36 NRC 370, 384 (1992).
[67] See LBP-08-06 at 94 and discussion and cases therein.

Standing and admissibility of contentions should be granted where, as here, a petitioner has raised significant questions concerning the lack of information about ownership by a foreign government, and about fractures, faults, conductivity between aquifers, and related issues, as well as about the potential environmental, health, and safety impacts of these.[68] Petitioner has referenced leaks, including a spill of about 110,000 gallons into the wetland areas surrounding Willow Creek — which according to the Application flows into the Powder River, and North East toward the Missouri River, as discussed in the standing section above.

Moreover, issues relating to threats to public health and safety and potential impacts on the environment arising out of water quality issues are clearly within the scope of this proceeding, and material to the decision whether to grant or deny the requested license renewal.[69] Petitioners provide a fact-based argument that clearly satisfies the "brief explanation" and "specific" and "concise statement[s]" requirements of the rule. Although the requirements of NEPA are directed to Federal agencies and thus the primary duties of NEPA fall on the NRC Staff in the NRC proceedings, the initial requirement to analyze the environmental impacts of an action, including a materials licensing application, is directed to applicants under relevant NRC rules. Accordingly, 10 C.F.R. § 51.60(a) requires a materials license amendment applicant to submit with its application an environmental report, which is required to contain the information

[68] Id. at 96-98.
[69] Id.

specified in § 51.45.[70]

B. Replies to Applicant Concerning General Principles.

1. Applicant Answer at 23. At Footnote 130, Applicant claims that it would be prejudiced and "produce significant and unnecessary uncertainty in the domestic and international uranium industry" should the foreign ownership issues be included in this proceeding as it has been in the Crow Butte proceedings. First, there has been no identified or demonstrable impact to the domestic or international uranium industry resulting from including the foreign ownership issues within the Crow Butte proceedings. Second, it is inappropriate for Applicant to claim prejudice when it could have avoided this entire situation by expressly disclosing the ownership and control by the Government of France and seeking a special Act of Congress, if necessary, to authorize the NRC to issue the sought for license. Such an Act of Congress has been done in the past and is a viable method for the Government of France to obtain this license renewal for Applicant. Finally, the doctrine of *unclean hands* requires that the Applicant not be rewarded for its own failure to properly disclose and address its foreign ownership issues.[71]

2. Applicant Answer at 25. Applicant proposes without citation that the Board adopt a new standard for materiality, a "double materiality", that:

> To show materiality, an allegation that the Application is incomplete or inaccurate must also allege and properly support the

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71 . See Precision Inst. Mfg. Co. v. Automotive M.M. Co., 324 U.S. 806 (1945).

further claim that the missing or inaccurate information is material; i.e., that it is essential to one of the required findings in Section 40.32.

There is no reason for the Board to establish such a new standard; any ruling to that effect would be an abuse of discretion and subject to reversal under the Administrative Procedure Act and, in any case, the Trust Doctrine requires that the Oglala Delegation not be the 'test case' for such a new standard.

3. Applicant Answer at 30. Applicant argues that unless a change of ownership is involved in the license application, foreign ownership is not within the scope of the proceeding, even when as here ownership by a foreign government is undisclosed in the Application under review despite requirements concerning disclosure of citizenship. Coupled with their argument that failure to disclose citizenship of the ultimate parent and decisionmakers is immaterial, this would create the gigantic loophole which would give rise to major breaches of national security – an Iranian front company with a Delaware subsidiary could then secretly acquire the stock of a Wyoming mining company and only disclose the details related to the Delaware sub – the Iranian (and/or Dubai intermediary) company would not be mentioned. Any inquiry would be beyond the scope of the application proceeding even if evidence were brought forward as here that there is foreign ownership not disclosed in the application. The failure to disclose is inimical as is the thing not being disclosed, namely ownership by a foreign government.

Applicant does not deny that the French Government controls the

Yellowcake produced at the Mine and that "the policies of the French Government may change with respect to nuclear power and uranium mining."[72]

Applicant's argument is an excellent example of a syllogism – i.e., something that sounds true but is not true - a circular argument that "[s]ince it is not pertinent to the matters that are properly before the NRC in this license renewal proceeding, the Petitioner's foreign ownership contention is not admissible."[73]

Which is to say that Applicant's argument is that 'foreign ownership is not admissible because it is not pertinent because the NRC's review is limited so as to exclude it because there is no change of ownership at issue in the application (which they wrote and decide what to put in or omit)'. Such cannot be the conclusion when the issuance of a source materials license is involved in light of Section 7(c) of the 1946 Act.[74] Furthermore, there is no way to explain such an argument in the Lakota language. Therefore, under the Canons of Interpretation, such a circular argument must be disregarded.

4. Applicant Answer at 31. Applicant states without citation that:

> Since this proceeding does not involve issuance of an export license, the Petitioner's detailed discussion of concerns about export or possible unauthorized use of the yellowcake produced at COGEMA's Facilities is manifestly outside the scope of the proceeding.

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[72] Applicant Answer at 30.
[73] Id.
[74] Despite many bald assertions by Applicant and the NRC Staff to the effect that Section 7(c) of the 1946 Act was superseded by the 1954 Act, no party has been able to offer a citation or legal reference to support any such assertions. Therefore, Petitioner's assertion that Section 7(c) of the 1946 Act continues to apply must be accepted by the Board.

Despite Applicant's desire to push the proliferation issues outside the scope of this proceeding, there is no dispute that once a source materials license is issued or renewed, coupled with that license is the ability to contract with a licensed export shipper to pick up and deliver as many 55-gallon drums of U308 Yellowcake as Applicant provides upon such instructions as Applicant may provide. Therefore, it is not helpful to Applicant that there exists an export licensing proceeding under Part 110 because it is this proceeding which gives rise to the right of Applicant to issue instructions to the licensed export shipper. Further, since there is no reasonable public participation in the export licensing proceedings, this is the only time the public has an opportunity to participate. Therefore, Applicant can't argue that the existence of a complimentary regulatory structure in which the public does not participate such as in Part 110 is a ground for excluding the foreign export and proliferation issues from the determination of inimicality in this proceeding.

5. Applicant Answer at 32. Applicant admits that under the AEA "an applicant must be a U.S. person in order to hold an NRC license.[75] However, Applicant argues that unlike other areas of the law concerning far lesser potential threat to national security or public health and safety (such as Hart Scot Rodino) which look to the 'ultimate parent' – Applicant suggests that the requirement that an applicant must be a US person is satisfied by interposing a $750 off-the-shelf Delaware corporation between the actual owners/decisionmakers and the regulatory authorities. It is not possible that this

[75] Applicant Answer at 32.

conclusion holds in light of the express purposes of the 1946 Act and the 1954 Act. If it is prudent to look to the ultimate parent and control parties for purposes of securities law and anti-trust laws, then it is also appropriate to look to the ultimate parent in the laws associated with radioactive source materials, special nuclear materials, and the like.

6. Applicant Answer at 33. Applicant states that:

> Moreover, as discussed above, the NRC has long been aware of COGEMA's chain of corporate ownership, having approved the transfer to COGEMA of the NRC source material license for ISL mining at the same properties in Wyoming (Irigaray and Christensen Ranch) that are the subjects of the Application.[76]

Yet if you ask the people who live in and around the mine site or in the region or state, they are surprised to learn that COGEMA is owned by the Government of France – and since Applicant does not disclose such information to the public in the Application, which is what the public relies on, there is no other way for the public to be informed on that issue without hiring a nuclear regulatory lawyer or researcher. Such imposes an undue burden and chilling effect upon the public participation in the licensing process and, as a result, violates the due process clause.

7. Applicant Answer at 34. Applicant mentions the existence of the President of CMI, who is located in France (and may never have actually physically been present at the mine sites). However, Applicant fails to mention any details about that person's submission to the jurisdiction of the US or the

[76] Applicant Answer at 33.

identities of the persons who are able to hire/fire and remove such individual currently serving as the President of CMI. Therefore, we assume that such individuals have not submitted to the jurisdiction of the United States any more than Osama Bin Laden. We further assume that the President of CMI is easier to find and would willingly come forward and submit himself and his assets to US jurisdiction and the jurisdiction of the NRC regulations and enforcement powers and that the individuals controlling such person would likewise submit to such jurisdiction. However, such assumptions have yet to be demonstrated and it is up to the Applicant to come forward with that.

Applicant states:

> [c]ontrary to the Petitioner's contention, the NRC's rules do not require applicants for source material licenses to establish that all of their officers and directors reside in the United States and are "subject to U.S. jurisdiction.

Petitioner submits that by not disclosing the identity of the actual control persons of the licensee, Applicant deprives the regulators and the public from an opportunity to ask questions about their inter-relations, and obtain jurisdiction over such persons. For example, if a safer kind of plastic liner for the evaporation ponds is recommended by the US General Manager but it costs an extra Fifty Euros (∋50.00) per square meter, and if the decisionmaker over in France is facing budget cuts, being so far away and not subject to any form of regulatory jurisdiction, and not being attached to the well-being of the People of the United States, such person might easily reject the request for upgrading to the safer kind of plastic liner that doesn't puncture in the Spring Thaw.

9. Applicant Answer at 35. Applicant recites a litany of cooperation between the United States and the Government of France. Petitioner submits that as great as relations seem to be with the French, the French Government and the United States are not aligned on every issue.[77] Further, the legal issue does not turn on the identity of the foreign country but on the issue of ownership by a foreign government.[78]

10. Applicant Answer at 37. Applicant discusses treaties and safety agreements between the United States and France but none is mentioned that authorizes France to own US uranium licenses; and we submit that it is unlikely that France's CEA would consent to the US Government owning uranium mines within France through a front company much less allowed it to be implicit in their laws and beyond the scope of their administrative review.

11. Applicant Answer at 38. Applicant argues that the Presiding Officer lacks authority to review inimicality of foreign ownership despite the existence (and admitted applicability) of Section 40.32(d), due to conflict with the jurisdiction of the Executive Branch. This ignores the fact that the NRC is part of the Executive Branch. Accordingly, the argument is circular and must fail.[79]

Also in its Answer at page 38, Applicant admits that the foreign ownership contention would manifest substantial foreign policy issues and makes a veiled

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[77] Disagreements especially at the level of the UN Security Council are frequent.
[78] CITE
[79] NRC Commissioners are nominated by the President with the advice and consent of the Senate; therefore, the NRC is clearly recognized as part of the Executive Branch.

threat on behalf of the Government of France that demonstrates why both the failure to make a disclosure in the Application, and the existence of ownership by a foreign government, are both separate grounds for finding inimicality.

Applicant states its French master's threat as follows:

> admitting the Petitioner's foreign ownership and control contention essentially would constitute a finding by the Presiding Officer that there is a "genuine issue" of fact as to whether such indirect CEA control of COGEMA presents an "exceptionally grave risk" to the common defense and security of the United States. **Substantial foreign policy issues manifestly would be presented if the Presiding Officer admitted this contention and thus opened a debate about whether the French Government's indirect ownership of COGEMA presents a genuine "inimicality" issue.**[80]

This clearly makes it sound like the French are threatening to make trouble with the United States on an international level if the NRC enforces the AEA with respect to COGEMA. This threat is itself grounds for a finding of inimicality.

Applicant also argues without any citation that several past Presidents have made certain conclusions which are contrary to the position of the Oglala Lakota and therefore the contention cannot be admitted. Under this fallacious reasoning, the genocidal conclusions of past Presidents to wipe out the Oglala Lakota (by killing off the Buffalo, by biological warfare, starvation, forced marches and warfare), clearly contrary to the position of the Oglala Lakota that they have a human right to live without jeopardy of genocide, could be used to defeat standing. Such an argument should be flatly rejected as anachronistic.

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[80] Applicant Answer at 38 (emphasis added); note also that footnote 193 is irrelevant to this matter as there have been not pleas by the State Department on behalf of COGEMA as was the case in Gen. Elec. Co. & S.w. Atomic Energy Assocs., 3 AEC 99, 103 (1966).

12. Applicant's Answer at 40-41. Applicant states without citation that "[t]he AEA does not prohibit FOCD of holders of source material licenses, including licenses to operate ISL uranium mines." There is no legal authority for issuing such licenses despites Applicant's unsupported assertions to the contrary. Applicant then argues that:

> The NRC's repeated issuance of Part 40 and Part 70 licenses to U.S. companies, including AREVA NP, that are indirectly owned by French, British, and other foreign entities confirm that the Commission does not bar indirect foreign ownership of such licenses.[81]

Petitioner submits that the foregoing shows only that the legality of foreign entities being issued source material licenses has not been fully resolved by the courts. Nothing about that makes this an impermissible challenge. Further, where, as here and as in many cases, the ultimate foreign control persons are concealed from disclosure in the Application, many of such license proceedings may have omitted any proper analysis of the inimicality issue due to lack of presentation of all material facts by the applicant. Further, Applicant fails to recognize the distinction between a licensee that is owned by foreign persons and a licensee that is owned by a foreign government. Petitioner maintains that in both cases, the license issuance would be inimical and should be denied under Section 40.32(d).

13. Applicant's Answer at 42-43. Applicant states without citation that the 1946 Act "was superseded upon enactment of the current AEA in 1954." The fact that neither the NRC Staff nor Applicant are able to offer any citation for

[81] Applicant's Answer at 41.

the proposition that Section 7(c) of the 1946 Act was superseded by the 1954 Act shows that it was not, in fact, legally superseded. Applicant argues that contrary to Section 40.32(d), the standards of inimicality should not be applied to include the implications of foreign ownership despite Section 7(c) of the 1946 Act. Such argument is contrary to the express purposes of both the 1946 Act and the 1954 Act and must fail under Vogel.

14. Applicant Answer at 49-51. Applicant suggests that Petitioner's statements concerning the Applicant's CFIUS requirements were false. Because CFIUS files are not publicly available the Petitioner could not have known that a CFIUS review was conducted when the Petition was filed. Further, the exhibits to the Answer indicate that a CFIUS review occurred and a pass but it is unknown what disclosures were made at that time in order to obtain the findings necessary to conclude the CFIUS review. It is noteworthy that even in the Answer, the Applicant fails to make a full disclosure concerning the foreign ownership of CMI. In footnote 231, Applicant states that the Government of France is a majority shareholder of CMI's ultimate parent without mentioning that it is the overwhelmingly large, majority and controlling shareholder (over 95% voting). This evidences a culture of nondisclosure or least disclosure on the part of Applicant.

CFIUS involves a review of a foreign investment for potential national security concerns. The NRC is not part of the CFIUS review process. Yet Applicant argues that the prior CFIUS review should be a substitute for a Section

40.32(d) inimicality analysis at this time.[82] Such action would be an abuse of discretion and contrary to law because it would allow the NRC Staff to shirk statutorily mandated responsibilities to make a determination as to the inimicality of common defense and security and health and safety of the public.

15. Applicant Answer at 52. Applicant (and NRC Staff) put great emphasis on the fact that the Oglala Delegation is not the same as the IRA Government OST. However, there is nothing in NRC Regulations that requires the federally recognized Indian tribe to be an IRA government or be recognized by the BIA. It simply says 'federally recognized Indian tribe' which for the reasons discussed above, includes the Oglala Lakota recognized by the United States federal government expressly by signing and performing the Ft. Laramie Treaties. In fact, in both the HRI and Crow Butte proceedings (both of them now pending), the traditional tribal councils (including the Oglala Delegation in the case of the Crow Butte proceedings) were consulted (and/or admitted to the proceeding) in addition to the IRA government.

16. Applicant Answer at 53-54. Applicant confuses 'consultation' with 'notification'. As discussed above in Section II, meaningful consultation requires more than just a form letter sending campaign to the tribes in the area. Applicant also is confused about the persons entitled to be meaningfully consulted when it argues that only the IRA government OST need be consulted. Rather, the Oglala Delegation as the traditional governing body

[82] Applicant Answer at 50-51.

recognized according to the traditional Lakota ways and in the Lakota language, must be meaningfully consulted.

Petitioner further notes that because the IRA government OST is beholden to the BIA for funding, it was adversely impacted by the recent budget cuts (including the failure of the United States government to pass a complete budget in October 2008 and to proceed on a continuing resolution with 41% cutbacks). Therefore, the IRA government was deprived by the United States of the funds that it requires to deliver basic social services and it lost its budget to litigate these issues. Such is already a violation of the trust responsibility and treaty obligations of the United States to the Oglala Lakota.

Such budget cutbacks left the Oglala Delegation as the only body that was ready, willing and able to step forward to stand up for the people, water, land and wildlife. Therefore the Oglala Delegation must be accorded all the respect of a designated representative of a federally recognized Indian tribe in this case and/or all the respect of a local governmental body.

Further, Applicant's argument that NAGPRA doesn't apply relies on a finding that the Oglala Delegation is not an affected Indian tribe. As discussed above, it is impossible to reach that conclusion in this case, especially when it is widely known that the Red Cloud Tiospaye and the Oglala Lakota fought and died on the land in and around where the mine is situated.

17. Applicant Answer at 55. Applicant's arguments concerning SUNSI are mooted by NRC saying in its Answer that they are going to un-SUNSI

the information and publicly disclose it in ADAMS.

18. Applicant Answer at 57. Applicant correctly states that the Declaration of Rights is not binding upon the United States but fails to recognize that due to ICERD, which is a binding obligation of the United States the NRC is required to keep track of the nuclear activities of foreign corporations in the United States and report them to the United Nations.[83] As noted in the Petition but meriting emphasis here is the following:

> The lack of proper identification by the United States of foreign corporations would frustrate this duty on the part of the foreign state under the ICERD and frustrate the duties of both member states in their UN Charter responsibilities to take joint and separate action with regard to human rights as required by the UN Charter. The US would become complicit in human rights violations if it failed to properly identify perpetrators, frustrating, *inter alia,* their binding Charter obligations. With regard to the United States, in 2008 the CERD Committee voiced the following concern and made the following recommendations:[84]
>
> > "The Committee is concerned about reports relating to activities – such as nuclear testing, toxic and dangerous waste storage, mining or logging – carried out or planned in areas of spiritual and cultural significance to Native Americans, and about the negative impact that such activities allegedly have on the enjoyment by the affected indigenous peoples of their rights under the Convention. (Articles 5 (d) (v), 5 (e) (iv) and 5 (e) (vi)).
> >
> > "The Committee recommends that the State party take all appropriate measures – in consultation with indigenous peoples concerned and their representatives chosen in accordance with their own procedures – to ensure that activities carried out in

[83] See Petition at 67-70.

[84] Concluding observations of the Committee on the Elimination of Racial Discrimination, United States of America, UN Doc. CERD/C/USA/CO/6,..February 2008, paragraph 29.

> areas of spiritual and cultural significance to Native Americans do not have a negative impact on the enjoyment of their rights under the Convention.
>
> "The Committee further recommends that the State party recognise the right of Native Americans to participate in decisions affecting them, and consult and cooperate in good faith with the indigenous peoples concerned before adopting and implementing any activity in areas of spiritual and cultural significance to Native Americans. While noting the position of the State party with regard to the United Nations Declaration on the Rights of Indigenous Peoples (A/RES/61/295), the Committee finally recommends that the declaration be used as a guide to interpret the State party's obligations under the Convention relating to indigenous peoples."

This Panel has dealt with areas of spiritual significance and the right of consultation in previous proceedings. The concern of the CERD Committee extends to the rights under the convention that include these and other rights, including the right to land and to spirituality. Whether or not formally recognized internally, these rights are inherently the international human rights of indigenous peoples. The United States has a binding obligation to observe these rights that protect the health and safety of Indigenous Peoples.

Indeed, the CERD Committee has directed the United States to recognize and observe the UN Declaration on the rights of Indigenous Peoples as a measure of compliance with the ICERD. Through the ICERD the United States is bound to respect and observe the rights under the UN Declaration on the rights of Indigenous Peoples. Since the 1998 EA quoted above refers to culturally valuable and sacred landscapes, and the Application omits any discussion of such cultural resources, the foregoing international law principles and obligations create a genuine dispute with Applicant.

With regard to the requirement of consultation, the UN Declaration would require that Indigenous Peoples give their free prior and informed consent ***prior*** to the approval of this project:[85]

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[85] United Nations Declaration on the rights of indigenous peoples, GA res. A/61/L.67, Sixty-first Session, September 2007, Article 32.2.

> "States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources."

This same Article, in part 3, requires that, "States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact." These Articles refer to a process that includes the right of Indigenous Peoples to themselves protect their own health and safety with regard to these dangerous projects.

It is clear within this examination of international law and obligation, that persons, and Indigenous People and individuals have access to international mechanisms to protect their rights (e.g., the Inter-American Commission and Court, the United Nations Special Procedures such as the Special Representative of the Secretary General and Treaty Monitoring Bodies). With regard to Indigenous Peoples these rights are critical for the protection of their health and safety. Without the identification of the perpetrator of violations of these rights, particularly foreign transnationals, Indigenous peoples would be effectively denied any redress or remedy for threats or harms to their health and safety at the international level.

The National interest as well as the protection of the health and safety of the public, including Indigenous Peoples and individuals, are best served by a proper and continuing identification of transnational alien corporations wishing to do business, particularly dangerous business such as uranium mining in the United States. Such a practice is necessary to fulfill the binding obligations of the United States in the United Nations (and the Organization of American States) and particularly its nternational human rights obligations. Not to require it would frustrate the fulfillment of these obligations and threaten the health and safety of Indigenous Peoples and effectively deny them access to the international human rights mechanism established to protect their human rights, including rights related to their health and safety.

Indeed, it is difficult to imagine that a government would not

> be interested in identifying with a high degree of certainty those who would do business in the United States, in order to be able to ensure that its own laws are strictly observed. Such certainty must be required for those who would engage in such perilous and inherently dangerous activity as uranium mining that has been shown to result in severe harm to the health and safety of people, children and the unborn, our water and our Sacred Mother Earth.

Nothing in Applicant's Answer disputes the foregoing as being part of the binding international obligations of the United States and part of the 'supreme law of the land.' Applicant asks in its footnote 275 a question about the identities of the Lakota elders. These are Oglala Lakota who are addressed in the Lakota language. If Applicant addresses the Oglala Delegation respectfully in Lakota language, the Oglala Delegation allow its Secretary or designee to coordinate with the Lakota elders as needed to comply with the Board's needs in this matter.

19. Applicant Answer at 59. Applicant bases its arguments regarding Contention VII on the validity of the 1877 Act – rankest act of the US – and even though such land was not returned and found to be a taking subject to the paying of just compensation, the 1877 Act was found to be invalid. Therefore, the Oglala Delegation's authority to protect its cultural lands remains intact.

20. Applicant Answer at 61. Applicant's many arguments fail to include any reference to any ISL project which has actually returned the water to baseline levels as part of restoration and decommissioning – including Applicant's own restoration activities.

21. Applicant Answer at 62-63; 67. Applicant argues that

Contention VIII.B doesn't apply because this Application is for a continuation of the activities that are recently licensed to be restarted but have not actually been restarted. As discussed above, this Procedural Status Technicality may not be used as a basis to deny the Oglala Delegation's its treaty and aboriginal rights, or standing or the admissibility of contentions.

22. Applicant's Answer at 63-64. The Application discusses spills in general without discussing the actual spills at the mines – which should be disclosed as adverse information. At Applicant's Answer page 64, Applicant's suggests that NUREG-1569's omission of a reference to Section 51.45(e) constitutes authority to omit past information that is relevant to a discussion in the Application. Such suggestion is itself an impermissible challenge under 2.335. Applicant states:

> For example, as discussed further below, the NRC received timely notice of the "110,000 gallon spill" cited by the Petitioner along with an analysis of its cause, environmental impacts, and corrective actions. Such information does not need to be recapitulated in a license renewal application, and certainly no regulation requires that such information be provided in a license renewal application. Consequently, this aspect of Contention VIII.B does not raise a material issue.[86]

Petitioner submits that a complete discussion is what the public expects, and what due process and the AEA and NEPA and the Trust Doctrine and Treaties require and to be complete, the discussion of how future spills would be addressed must be complimented with a discussion of past spills at the same locations and how they were handled and the contamination resulting therefrom despite their good plans and intentions.

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[86] Applicant's Answer at 64.

23. Applicant's Answer at 65. Applicant also states that:

> Similarly, no issue of significance is raised by the Petitioner's comment that Section 7.4 does not mention the possibility of faults, fractures, CBM projects, etc. The Petitioner's list of possible causes of excursions is entirely encompassed within the statement in Section 7.4 that "[t]he potential non-radiological effects of the operation include the possibility of lixiviant excursion." A list of possible causes of excursions is simply not germane to a section that focuses on effects, rather than causes. Consequently, this aspect of Contention VIII.B does not raise a material issue.[87]

Petitioner submits that in order to understand what is being proposed, it is important to discuss all the relevant information in an easy to understand manner. This is especially true in Indian Country and in order to comply with the Canons of Construction and the Trust Doctrine.

24. Applicant's Answer at 69. Applicant states that "the Petitioner improperly seeks to shift its burden, under Section 2.309(f)(1), to demonstrate the admissibility of its contentions to COGEMA." [88] However, the ultimate burden on every issue is required to be met by the Applicant as the proponent of the license renewal.[89]

25. Applicant's Answer at 75-76. Applicant states:

> In particular, Appendix B considers whether CBM water use could cause vertical excursion by drawing down the aquifer immediately below the ISL operations. Appendix B explains that CBM uses water from an aquifer that is some 800 to 1000 ft or more below

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[87] Applicant's Answer at 65.
[88] Applicant's Answer at 69.
[89] See Florida Power & Light Co. (St. Lucie Plant, Unit No. 2), 14 NRC 1167, LBP-81-58 (1981); 1981 NRC Lexis 13, 17 ("the ultimate burden of persuasion rests with Applicant, who seeks a licensing order".) See also Siegel v. Atomic Energy Commission, 400 F.2d 778, 784 (DC Cir. 1968) ("applicant for a license should bear the burden of proving the security.'

> the region affected by ISL operations, and that there are numerous intervening stratigraphic layers that act as aquitards and prevent CBM drawdown from **significantly affecting ISL operations**.[90]

Petitioner questions the meaning of Applicant's term "significantly affecting ISL operations"? Does that include significant impacts on the environment because those aren't really ISL operations. This ambiguity is a demonstration of the existence of a genuine dispute with Applicant on a material issue within the scope of this proceeding.

Applicant further states that:

> Appendix B concludes that "the CBM induced drawdown will not have a measurable impact on ore sand water levels unless there is an artificial connection through an improperly completed well or improperly abandoned bore hole.

Petitioner submits that if there is any human or mechanical error, there would be an improperly completed well or improperly abandoned bore hole and a high likelihood of contamination.

26. Applicant Answer at 79. Applicant states, concerning Contention VIII.E, that "Application also relies on a system of operation that confines the lixiviant through the arrangement and operation of the injection and recovery wells."[91] Petitioner submits that except for the 2005 Yellowcake Drying Campaign which they weren't supposed to be doing, Applicant and its staff actually have very little experience operating the system and there are always human and technological errors and power outages that cause excursions, leaks & spills and that such should be disclosed as adverse information.

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[90] Applicant's Answer at 75 (emphasis added).
[91] Applicant's Answer at 79.

27. Applicant Answer at 81-82. Applicant would rather not talk about the Arsenic issue and simply push it outside the scope but it is part of the safety finding that NRC must make. The Arsenic test results need to be explained and the arsenic levels in the 'restored mine units' need to be disclosed and explained.

28. Applicant Answer at 85-87. First, Applicant attempts to dispose of Petitioner's issues using the Procedural Status Technicality discussed above. For the same reasons it must fail here. At page 86, Applicant argues that amount of information needed to be disclosed in a renewal application is very small. Petitioner submits that 10 CFR §51.60(a) says the disclosures 'may be limited' not that they 'must be limited' and Section 51.60(a) is qualified by the rest of 51.60 which provides "including any significant environmental change resulting from operational experience or a change in operations or proposed decommissioning activities." Here, we have a significant environmental change from operational experience and a proposed change in operations ~ so the information must be updated. This is especially true where new technologies developed in the past 10 years have enabled a better understanding of the geology and hydrogeology and hydrology.

Petitioner also notes that Applicant is not arguing that the information is current but that they are not required to update it. Applicant argues that the

omission is not material because must establish a link between a claimed deficiency and protection of health & safety of the public or environment. Here, we are asking for updated hydrogeologic information which is critical and has been known to change substantially as new research is published with findings that are based on new technology and computer models. Failure to include recent research is an admissible contention.

Petitioner notes that Applicant attempted to skip the environmental report and so appears to be trying to get its license done without updating the science.

29. Applicant's Answer at 91-92. Since Applicant has already had restoration and decommissioning, it should state that it was not able to return to baseline at that time and are not planning to return to baseline in the future.

30. Applicant's Answer at 94-96. Applicant bases its arguments on purported differences between wetlands and watersheds.[92] Since wetlands are part of watersheds, Applicant's arguments must fail. Applicant also attempts to use the Procedural Status Technicality to prevail; which attempt must also fail.

Applicant argues that there is no connection between an assessment of the economic value of Willow Creek watersheds and any regulatory requirement for such an assessment. In doing so, Applicant ignores the requirements for evaluating the "No Action" Alternative under NEPA.

31. Applicant's Answer at 99. Applicant seems unsure how France would or could exercise control over CIC, a private French bank. In the

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[92] **See EPA re: Wetlands and Watersheds at http://www.epa.gov/owow/wetlands/facts/fact26.html.**

same manner as the US exercises control over US banks. At a minimum, Applicant should be made to use a US bank.

32. Applicant Answer at 107. Applicant argues that:

> The portion of the Application referenced by the Petitioner states that "[t]he reader is referred to Section 6.3 (pages 6-35 to 6-54) of the January 5, 1996 Irigaray-Christensen Ranch license renewal application (as revised in August, 2002) for a full discussion of surface reclamation for the sites.[93]

Petitioner submits that the failure to include the 1996 information is a material omission.

C. Replies to NRC Staff Concerning General Principles.

1. NRC Answer at 23-24. NRC Staff argues that Section 7(c) of the 1946 Act does not apply but fails to provide any legal citation to that effect. There is no section of the 1954 Act that repeals all the provisions of the 1946 Act, therefore, Section 7(c) of the 1946 Act prohibiting the issuance of licenses to a foreign government or any entity controlled by a foreign government remains in full force and effect. This presents an insurmountable challenge for Applicant in the absence of an express Act of Congress passed prospectively to deal with Applicant's situation and signed into law by the President.

2. NRC Answer at 25. NRC Staff argues that there is no provision in 10 CFR Part 40 which requires the Applicant specifically include information regarding foreign control or ownership, including ownership and control by a foreign government. Such is not a possible conclusion consistent with the NRC Staff's obligations to make the findings of non-inimicality under

[93] Applicant Answer at 107.

Section 40.32(d). One cannot imagine a more material fact – ownership and control by a foreign government – so it is clearly material and, therefore, Section 40.9 requires it be disclosed in conjunction with the information concerning the 'citizenship of the Applicant.' Otherwise, how can a Section 40.32(d) inimicality analysis be done? Further, the NRC Staff fails to distinguish between ownership by a foreign company and ownership by a foreign government. Yet the NRC Staff admits that foreign ownership is one factor the Staff may consider in its inmicality analysis.[94]

3. NRC Answer at 26-27. NRC attempts to create a new contention admissibility standard without citation – that to raise a contention based on inimicality requires a petitioner to raise some material allegation of inimicality in addition and in relation to the fact of foreign ownership. Petitioner has argued that foreign ownership itself, especially ownership by a foreign government, is itself inimical – nothing more need be alleged. Further, there is no reasonable basis in law or fact for creating such a new standard; any such new standard would be arbitrary and capricious and an abuse of discretion and would violate the trust responsibility if used in this case.

4. NRC Answer at 28-29. At 28, NRC Staff only recognizes Section 106 NHPA consultation and fails to recognize the meaningful consultation requirements of Indian Law and under the Executive Orders and ICERD, all as discussed above.

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[94] NRC Staff Answer at 26.

At 29, NRC Staff accuses the claim of being unripe which puts Petitioner in kafka-esque position of never getting a ripe claim on this issue in time for filing the Petition. Accordingly, NRC Staff's argument must fail under due process concerns.

5. NRC Answer at 30. As discussed above, the UN Declaration is non-binding as NRC argues but ICERD applies to require similar respect of the rights of the Oglala Lakota as indigenous people minorities within the member State.

6. NRC Answer at 31-32. NRC argues that Petitioner has failed to provide evidence of statement that there is no project to return to baseline levels; but NRC doesn't cite to one project where baseline levels were achieved at restoration.

7. NRC Answer at 33. According to the NRC Staff, there is no need to discuss past spills or leaks even when talking about how they generally plan to deal with future spills and leaks. Such would violate the integrity of the public notice, disclosure and participation process and would violate the Trust Doctrine and the Canons of Construction.

8. NRC Answer at 34. NRC ignores that Petitioner has made fact-based argument based on Application and has called into question complex impacts and potential for faults, fractures and pressures to make system not fully contained – i.e., leaky.

9. NRC Answer at 43. NRC Staff suggest that, contrary to the

Trust Doctrine, it is not required to publicly post the old 1996 data in ADAMS, and Applicant is not required to include the information in the Application itself, but rather refers Petitioner to the NRC Public Document Room in Washington, DC.

10. NRC Answer at 46.

The Staff does not dispute that if an impact to the identified watersheds in the area were found, the Staff would conduct a value assessment of such as part of the Staff's NEPA analysis. However, this contention should not be admitted since the Petitioner does not allege any impacts to the watersheds that would degrade their quality by COGEMA's continued operation.

11. NRC Answer at 47. NRC Staff at 47 ignores the collection issue and focuses only on the amount.

CONCLUSION

For all the foregoing reasons, the Commission should finding standing for the Petitioner and that all the proffered contentions are admissible.

Dated this *12th* day of May, 2009.

Respectfully submitted,

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of COGEMA MINING, INC. (License Renewal In Situ Leach Facility, Irigaray & Christensen Ranch, WY)	Docket No. 40-8502 License SUA-1341 May 12, 2009

CERTIFICATE OF SERVICE

I hereby certify that copies of **PETITIONER'S CONSOLIDATED REPLY TO APPLICANT AND NRC STAFF ANSWERS TO PETITION TO INTERVENE OF THE OGLALA DELEGATION OF THE GREAT SIOUX NATION TREATY COUNCIL**, together with attachments thereto referenced therein" in the above captioned proceeding has been served on the following persons by electronic mail (or fax as indicated); on this 12th day of May, 2009:

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Hearing Docket

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Subject: Transmitting Document in Docket No. 040-08502 - ASLBP No. 09-887-01-MLR-BD01
Attachments: Petitioner Reply to COGEMA and NRC Answers 05122009.pdf; COS 05122009.pdf

Dear Sir or Madam,

Attached for filing is Petitioner's Consolidated Reply to Applicant and NRC Staff Answers in this matter, and attached COS.

Sincerely,

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