

January 23, 2014

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)
)
Northern States Power Company)
)
Prairie Island Nuclear Generating Plant)
)
(Independent Spent Fuel Storage))
)

Docket No. 72-10-ISFSI-2
ASLBP No. 12-922-ISFSI-MLRBD01

PRAIRIE ISLAND INDIAN COMMUNITY’S REPLY ON
MOTION TO ADMIT NEW AND AMENDED CONTENTIONS

The Prairie Island Indian Community (“PIIC”) respectfully replies to the respective responses of the NRC Staff (“Staff”) and Northern States Power (“NSPM”) to PIIC’s motion to admit new and amended contentions. The Staff and NSPM presented several arguments on why PIIC’s proffered contentions on the NRC’s draft Environmental Assessment (“Draft EA”) should not be admitted. Some of these arguments were the same. However, some arguments offered by the Staff were not offered by NSPM and vice versa. Finally, there were some assertions made by both parties with which PIIC agrees. We respond to all of these arguments below.

EA Contention 1. The Draft Environmental Assessment Improperly Minimizes Waste Storage Impacts.

Both the Staff and NSPM stated that, like PIIC’s original Contention 1, this amended Contention 1 should be held in abeyance pending further order of the Commission regarding the Waste Confidence rulemaking. PIIC agrees that amended Contention 1 should be held in abeyance until the Commission’s Waste Confidence rulemaking is completed. This would also apply to the long term (beyond 60 years) cumulative impacts of spent fuel storage at the site, with the exception of the issue raised in PIIC’s EA Contention 2 on the ability to safely transport

high burnup fuel (“HBF”) offsite to either an interim storage facility or a disposal facility. The issue there is not the safety of the transport *per se*, but rather the fact that the difficulties of transporting HBF would essentially keep the HBF onsite at PINGP indefinitely. As discussed *infra*, PIIC does not believe that the Waste Confidence rulemaking and the Commission’s Order cover this possibility.

EA Contention 2. The Draft Environmental Assessment Does Not Adequately Address Cumulative Impacts of Related Projects on the PIIC, Its Members and Its Land.

EA Contention 2 addresses the potential impacts on cultural and historic resources (“cultural resources”) at the PINGP and PI ISFSI sites. Before addressing the Staff’s Response (“Response”) and NSPM’s Answer (“Answer”), it must be emphasized that the cultural resources of Prairie Island are integral to the Community and its historical and cultural continuity as a people. Tribal homelands and cultural resources are an irreplaceable forum for cultural vitality based on religious practices and cultural traditions (e.g., creation stories). Cultural resources provide an essential link between the past and the future.

In regard to PIIC’s EA Contention 2, the Staff offered a number of reasons why it believes the analysis in the Draft EA was sufficient. First, the Staff does not believe it is required to perform a cumulative impacts analysis of the potential ISFSI expansion until it is a “ripe and interdependent proposal before the Commission.” Staff Response at 7 (citing *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2 and Catawba Nuclear Station, Units 1 and 2), CLI-02-14, 55 NRC 278 (20002)). Second, the Staff states that it has in fact performed a cumulative impacts analysis of a potential expansion of the ISFSI to 98 casks consistent with a Memorandum of Understanding with PIIC that established PIIC as a cooperating agency to provide early consultation with the NRC on certain portions of the Draft EA. The Staff

conclusion was that any impacts on cultural resources would be adequately addressed in any future NRC license application review for the expanded ISFSI, as well as by the operation of NSPM's Cultural Resource Management Plan ("CRMP").

In response, the PIIC is appreciative of the NRC entering into the cooperating agency agreement. However, the PIIC must highlight any deficiencies that might still be found in the resulting Draft EA. Although the Staff purported to consider the cumulative impacts on cultural resources of the ISFSI expansion in the Draft EA, it did not actually evaluate any potential impacts. Rather it stated that future NRC licensing reviews and NSPM's CRMP would suffice to address any potential future impacts. PIIC does not believe that this "wait and see" approach fulfills the requirements of NEPA's cumulative impacts analysis, either under NRC or Federal case law. In addition, the CRMP is not a condition of NSPM's license. It is primarily in the control of NSPM. PIIC is usually notified after the fact about any cultural resources implications. For example, PIIC had no input whatsoever into the archaeological investigation in support of the PI ISFSI license renewal application. We received the report after the work had been completed. If PIIC had been consulted, we would have requested that the consultant look at the likely ISFSI expansion area, as NSPM had already been granted a Certificate of Need by the Minnesota Public Utilities Commission. This is at the heart of PIIC's concern in these contentions. There is no guarantee that PIIC will be involved before anything is undertaken by NSPM that could affect cultural resources. Irreversible damages to important cultural sites that have occurred in the construction of PINGP do not make PIIC comfortable with a "wait and see" approach, nor with relying on NSPM's procedures. PIIC notes that it does not doubt the sincerity and commitment of NSPM's staff. However, the expansion area needs to be

investigated before any renewal is granted and the CRMP must be made a condition of the NSPM's license.

The Staff cited the Commission's decision in *McGuire* for the proposition the NRC would not have to include the ISFSI expansion in its cumulative impact analysis. However, a reading of *McGuire* not only demonstrates the facts of that case were completely different than the instant situation, but, based on the Commission's reasoning in the *McGuire* case, it also supports the conclusion that the ISFSI expansion must be considered in the cumulative impacts analysis. The *McGuire* case involved a license application from Duke Energy to renew the licenses for four power reactors. The contention offered by an intervener in the case asserted that the possible use of MOX fuel in the reactors should be considered as a cumulative impact in the NRC Environmental Impact Statement on the license renewal. The Commission found that the possible future action must at least constitute a "proposal" – i.e., "ripeness" – and must in some way be interrelated with the licensing action under consideration – i.e., a "nexus." *McGuire*, 55 NRC at 294-97. In terms of the ripeness criterion, the Commission stated that it ultimately boils down to what constitutes a "proposal." The future action must be a concrete or reasonably certain project, not projects that are "merely contemplated." The Commission was not aware of any of Duke's future MOX fuel plans and the only evidence of those plans was a Duke contract for the delivery of MOX fuel some six and a half years in the future. The Commission found that any number of events, including international events, could happen that would render the use of MOX fuel as unnecessary. The use of MOX fuel was dependent on a number of factors entirely outside of Duke's control. Thus, there was no "ripeness." In terms of the nexus criterion, the Commission reasoned that there must be some interdependence between the Duke license renewal and any future fuel-related amendment application. On this issue, the

Commission found that the Duke plants could operate through their license term and any future renewal without using MOX fuel, and that MOX fuel could be used in the reactors without any renewal of the license. Therefore, there was no “interdependence.”

The facts surrounding NSPM’s PI ISFSI license renewal are entirely different and demonstrate the “ripeness” and the “nexus” that the Commission required for a cumulative impacts analysis. In this case, the NSPM has already submitted an application for a Certificate of Need to expand the ISFSI to 64 casks, and NSPM has been granted a Certificate of Need by the Minnesota Public Utilities Commission (“PUC”) to physically expand the ISFSI. The expanded ISFSI is necessary for the storage of spent fuel produced during the remaining term of the PINGP reactors. According to the Certificate of Need from the PUC, the ISFSI must be expanded to accommodate the spent fuel generated during the remainder of the PINGP Units 1 and 2 extended license terms, as the PINGP has already generated enough spent fuel to fill more than the 48 casks of its current license. There are not any normal events that would render the need for the expansion unnecessary. The PI ISFSI expansion must happen for the reactors to operate until the end of their respective licenses. This demonstrates how “interdependent” the instant license renewal request is with the expanded ISFSI. *McGuire* would not require that a license application must be submitted for the ISFSI expansion before it would be the proper subject of a cumulative impacts analysis, as the Staff seems to reason. Why would it need to be the subject of a cumulative impacts analysis at that point? The need would long be gone, along with the opportunity to factor in the potential impacts of the expansion into the Staff’s environmental analysis for this renewal, including the choice of alternatives. A cumulative impacts analysis of the ISFSI expansion falls squarely within the Commission’s reasoning in *McGuire* for what constitutes an appropriate subject for the cumulative impacts analysis.

Finally, and most importantly, the Licensing Board's initial decision in this case, found that "[t]he fact that Northern States has applied for a Certificate of Need to build more pads...strongly suggests that such a future expansion is at least "reasonably foreseeable."

Northern States Power Company (Prairie Island Nuclear Generating Plant Independent Spent Fuel Storage Installation), LBP-12-24, 76 NRC 503, 513 (Dec. 20, 2012).

PIIC finds the analysis in the draft EA to be particularly deficient in not requiring an archaeological survey of the area slated for the future ISFSI expansion or in not imposing a mitigating condition on any license granted for this renewal. The only way to truly consider the reasonably foreseeable impacts would be to identify and evaluate them now or to impose a license condition on this renewal to prohibit any future expansion that would have an impact on cultural resources. This need flows from the finding in the Staff cumulative analysis that there is a "high probability" that unrecorded cultural resources will be found on the PINGP site. Draft EA at 3-19, 4-10, 4-11. This obviously could include any area of future ISFSI expansion and PIIC does not believe that it is speculative on where the ISFSI expansion might take place.

Although NSPM did not cite the *McGuire* case, or any other decision, to assert that the NRC did not have an obligation to evaluate the cumulative impacts of the expansion of the ISFSI, it did address the additional PIIC basis for a more complete cumulative impacts analysis, that of the NRC obligations under environmental justice ("EJ"). See NSPM Answer at 10. In this regard, NSPM asserted that PIIC's contention was "unsupported" because the Staff did in fact evaluate the potential expansion to 98 cases and found them, using the EJ criteria, not to be "high and adverse," stating that there were no cultural resources or sites within the "area of potential impact *for this license renewal*." NSPM Answer at 8 (emphasis added). PIIC would call to the Board's attention the fact that the focus of the expansion to 98 casks is not specifically

the “area of potential effect” for this license renewal – it is for the expanded PI ISFSI and the construction and excavation necessary in the area of the expansion. And again, to repeat the Staff’s conclusion that there is a high probability that additional unrecorded cultural resources may exist within the PINGP property underlines the conclusion that this is a “disproportionately high and adverse” impact on the minority community that the Staff identified in the draft EA – the PIIC. NSPM also asserted that PIIC did not cite any “expert” opinion in its discussion of cultural resources. NSPM Answer at 7. Very simply put, we are relying on the expertise reflected in the Staff’s analysis and supporting documentation in the EA on these issues.

Note that the Staff did not refute or address the PIIC arguments on environmental justice, including the PIIC assertions about the intent of the Commission’s Environmental Justice Policy in regard to the mitigation of impacts. However, NSPM did address this issue in its response. NSPM claims that PIIC’s assertion that NRC is required to take action now to mitigate potential impacts of a future expansion, based on EJ arguments, is unsupported by law. In particular, NSPM notes that NEPA is a procedural statute and does not impose substantive obligations on a reviewing agency or require the enforcement of mitigation measures. PIIC holds to its argument in its original pleading on the Draft EA – the Commission’s EJ Policy requires mitigation of impacts, at least those within NRC’s purview. In addition, although NEPA is a procedural statute, it does impose procedural requirements, including requirements to take a hard look at reasonably foreseeable impacts and factor those impacts into an agency’s decision-making process.

As NSPM noted in its Answer, the Licensing Board in the PINGP license renewal proceeding stated the NRC must at least “determine and discuss whether there are any mitigative measures to reduce the impact.” NSPM Answer at 10 (quoting Order Granting Motion for Leave

to File New Contentions and Denying Their Admission (Feb. 25, 2001) at 7). The thrust of the contention here is that NRC must take the hard look and discuss mitigative measures now or condition future actions. Under the Commission's EJ guidance, this will serve to "take care to mitigate or avoid special impacts." PIIC does not believe that the Staff discussed the full and logical mitigative measures. If the CRMP sufficiently addresses mitigative measures for future actions, it should be a condition of the instant license renewal. PIIC believes that the NRC should impose a license condition on any renewal granted for the ISFSI that any expansion of the ISFSI that requires excavation of land and additional construction shall not be approved by the NRC if it will adversely affect or have an impact on cultural or historical resources at the site of expansion. This would be in addition to, or could include, the statement that NSPM's CRMP is a condition of the license.

PIIC's Contention 2 also asserts that the Draft EA fails to analyze the cumulative impacts of the potential difficulties of being able to remove HBF from the ISFSI site, resulting in the possibility that such fuel might have to remain on site indefinitely. As noted *supra*, the issue here is not the safety of the transport *per se*, but rather the fact that the HBF would need to remain in storage onsite at PINGP if the fuel could not be transported off site. PIIC notes that the Staff did not challenge this part of the contention on basis and specificity or timeliness arguments of new or amended contentions. The Staff does argue that this portion of the amended contention is objectionable because the Staff is not required under NEPA to wait for information that is currently unavailable with regard to the safety and possible environmental impacts of long-term storage and eventual transportation of HBF, but may proceed to complete its environmental assessment now and rely on the soon-to-be-completed safety analysis, as well as future activities (studies on long-term storage of HBF; future transport cask certifications) and

existing regulations (requiring a demonstration of safety, clad integrity etc.) to address problems in the longer term. The Staff argues that any potential environmental impacts from HBF beyond what has been analyzed for low-burn up fuel is “remote and speculative” and need not be considered in the EA now. *See* Staff Response at 9-12.

The Staff’s assertions have direct implications for the preferred alternative in the Draft EA, which supports the 40-year renewal requested by NSPM. The 20-year renewal alternative was rejected. From a safety perspective, the Staff’s argument implies that licensing must be limited to what we can now reasonably predict. Thus, the Staff’s argument, in effect, supports only a limited extension of the ISFSI license to 20 years, not the 40-year term requested by NSPM. This seems to undermine the Staff’s choice in the Draft EA of the 40-year renewal period as the preferred alternative, and instead supports the rejected alternative of a 20-year renewal term. While the Staff states that there is no evidence to suggest that HBF cannot be safely stored beyond 20 years, there clearly is no hard evidence that HBF *can* be safely stored beyond 20 years. From a cumulative environmental impact perspective, if the Staff’s safety review allows HBF storage beyond 20 years in this case, it must automatically mean that the environmental impacts of such storage are not remote and speculative but are reasonably predictable and they must, in turn, be factored into the cumulative impact analysis for the current action. In addition, even for storage less than 20 years, the Staff may need to factor into its EA any reasonably foreseeable impacts from special treatment or unique features of the HBF during storage (e.g., radiation exposures from special inspections or increased monitoring, potential off-normal releases from HBF storage that might not occur for low burnup stored fuel).

In regards to the HBF issue, NSPM argues that this is really a Waste Confidence issue and should be held in abeyance pending Waste Confidence completion. Although the Staff did

not address PIIC's argument that the issue of HBF staying on site indefinitely is outside the Waste Confidence rulemaking, NSPM notes that the draft Waste Confidence Generic Environmental Impact ("GEIS") considers longer term storage and transport of HBF and analyzes the impacts of repackaging. *See* NSPM Answer at 5. Therefore, this issue should be held in abeyance until the Waste Confidence rulemaking is finalized. PIIC does not agree that the draft Waste Confidence GEIS properly disposes of all aspects of this issue and, at this point, it cannot be said that the impacts were fully assessed in the context of Prairie Island or properly factored into the cumulative impact analysis for the PI ISFSI. Thus, it remains an issue to be considered. NSPM's statement that PIIC pointed to no "legal requirement" that to obtain or renew an ISFSI license there must be an existing certified method of transporting the fuel offsite, *see* NSPM Answer at 6, does not have relevance to the analysis of impacts in a NEPA context. NSPM also argues that PIIC's contention that HBF transport must be evaluated by current technology is unsupported by law, is untimely and lacks specificity and should be rejected. The PIIC believes that it is clearly possible to evaluate potential impacts of transportation of HBF using current technology (better than no analysis at all) even without a currently certified cask, and that this contention is timely, despite the earlier existence of varied pieces of information and analysis, because the draft EA and its treatment (or non-treatment) of this issue, which gives rise to this contention, was issued in November 2013. PIIC filed in a timely manner after the Draft EA was issued. In addition, the Staff's apparent position is that this is a proper and timely contention that should be considered when the Waste Confidence rulemaking matters are resolved.

NSPM asserts that PIIC's original contention 2 is now moot and must be dismissed because the draft EA addresses the cumulative impacts of the ISFSI expansion on

cultural/historical resources. NSPM Answer at 12. For the reasons noted earlier, the draft EA does not actually identify and address the impacts of a future expansion of the ISFSI on cultural/historical resources. The contention, as amended, should remain.

EA Contention 3. THE DRAFT ENVIRONMENTAL ASSESSMENT FAILS TO SATISFY THE NRC’S FEDERAL TRUST RESPONSIBILITY TO ASSESS AND MITIGATE THE POTENTIAL IMPACTS ON THE PIIC, ITS PEOPLE, AND ITS LAND.

PIIC Contention 3 argues that the Indian trust responsibility obligates NRC to address two issues in the Draft EA. The first is the cumulative impacts of the expansion of the ISFSI described in Contention 2. The second is to provide an analysis of the potential environmental impacts of a terrorist attack. The Staff argues that it is well settled that regulatory agencies, like the NRC that do not control or supervise Indian affairs, discharge their federal trust responsibility simply by ensuring compliance with general regulations and statutes not specifically directed at Indian tribes. Thus, Staff asserts that it meets its trust responsibility by complying with its statutory duty. NSPM also addressed this issue and asserted that it is unsupported by law, raise issues outside the scope of this proceeding, and is untimely. NSPM asserts that the contention that NRC must do more than what is required by statute and regulation applicable to the general public to fulfill its trust responsibility is not supported by law or facts. Both the Staff and NSPM cited the case of *Morongo Band of Mission Indians v. FAA*, 161 F.3d 569 (9th Cir. 1998). Staff argues, in addition, that settled and long-standing Commission precedent establishes that the impacts of a postulated terrorist attack need not be considered under NEPA outside of the 9th Circuit. NSPM asserts that the contention’s claim that a terrorist attack should have been assessed is untimely and unsupported by law.

More than mere compliance with requirements that apply to the general public is needed for a federal agency like the NRC to fulfill its trust responsibility. The federal government’s role

as trustee imposes “moral obligations of the highest responsibility and trust” and should “be judged by the most exacting fiduciary standards.” *Seminole Nation v. United States*, 316 U.S. 286, 297 (1942). “It is fairly clear that *any* Federal government action is subject to the United States’ fiduciary responsibilities toward the Indian tribes.” *Nance v. EPA*, 645 F.2d 701, 711 (9th Cir. 1981). When the NSPM initially sought approval for forty-eight dry-storage casks in the 1990s, the PIIC was assured that dry storage was a temporary solution until a permanent repository was established. But no permanent repository has been established, and if the federal government continues its failure to do so, the PI ISFSI will need to be expanded to accommodate ninety-eight casks.

In order for the trust responsibility to have any vitality, Federal agencies must exercise a higher responsibility when taking actions that may affect a federally recognized Indian tribe, its people, land and cultural and natural resources. It is precisely this trust responsibility that led federal officials to refuse to approve the construction of an ISFSI on reservation lands of the Skull Valley Band of Goshute Indians, even though the tribe *wanted* to host that facility. In its Record of Decision, the Bureau of Indian Affairs noted that it was acting as a “fiduciary” with respect to reservation lands, which were held in trust for the Skull Valley Band. *See* Bureau of Indian Affairs, Record of Decision for the Construction and Operation of an Independent Spent Fuel Storage Installation (ISFSI) on the Reservation of the Skull Valley Band of Goshute Indians (Band) in Tooele County, Utah (“ROD”) at 17.¹ “As trustee-delegate, the Secretary has the complex task of weighing the long-term viability of the Skull Valley Goshute reservation as a homeland for the Band (and the implications for preservation of Tribal culture and life) against

¹ Online: <http://www.deq.utah.gov/Issues/topics/highlevelwaste/docs/2006/Sep/ROD%20PFS%2009072006.pdf> (last accessed January 23, 2014).

the benefits and risks from economic development activities proposed for property held in trust by the United States for the benefit of the Band.” *Id.* at 18. Because of the delay in constructing a permanent repository to store nuclear waste, the Secretary was concerned that even though the reservation lease was only for a 25-year storage term, in fact, the nuclear waste might end up staying much longer. *Id.* at 19. The Secretary stated that its “primary duty as trustee-delegate” was “the protection of the trust *res* as a future homeland and productive land base for the Band through the prudent exercise of informed discretion after considering all relevant factors.” *Id.* at 18-19. In that case, the Secretary concluded “that it is not consistent with the conduct expected of a prudent trustee to approve a proposed lease that promotes storing [spent nuclear fuel] on the reservation.” *Id.* at 19.² A critical consideration of the Secretary was that “years-long delays in construction of a permanent [spent nuclear fuel] repository, reflected in the Waste Confidence Decisions of the NRC, provide[] no firm basis to determine when and under what circumstances [spent nuclear fuel] might be taken away from trust land if the proposed ISFSI is built.” *Id.*

The same considerations ought to apply to the ongoing – indeed, potentially indefinite – storage of spent nuclear fuel at the PI ISFSI on Prairie Island. The Draft EA is insufficient because it fails to adequately consider and weigh the long-term viability of the Prairie Island

² The Secretary’s decision was ultimately vacated and remanded by the U.S. District Court for the District of Utah, because the Secretary’s ROD did not even mention 25 C.F.R. § 162.107(a). That provision requires the Secretary to defer, “to the maximum extent possible,” to the tribe’s determination that the lease was in its best interests. *Skull Valley Band of Goshute Indians v. Davis*, 728 F.Supp.2d 1287 (D. Utah 2010). Since the Skull Valley Band was in favor of storing nuclear waste on its reservation, the Secretary needed to at least explain why it was not possible to defer to this determination. This decision is irrelevant here, because the Tribe has consistently opposed the storage of nuclear waste near its Reservation. The Secretary’s concerns about the impact of long term spent nuclear fuel storage and the federal government’s trust responsibility seems prescient in light of the withdrawal of the Yucca Mountain license application and the invalidation of the NRC Waste Confidence Decision and the Temporary Storage Rule. To date, the Secretary has not taken further action on the subject lease or right of way.

Reservation as a homeland for the PIIC (and the implications for preservation of Tribal life and culture) against the risks of continued, indefinite storage of an ever-increasing amount of spent nuclear fuel. A spent fuel accident or act of sabotage (even if unsuccessful) would have a devastating socioeconomic impact on the PIIC, and perhaps render the PIIC's reservation homeland uninhabitable. PIIC cannot simply go out and buy new land and relocate its reservation.³ It is a long, cumbersome and uncertain process pursuant to which the PIIC must apply to have land placed into trust by the United States for the benefit of the PIIC, and there is no guarantee that its fee-to-trust application would be approved.

Furthermore, because of the trust responsibility, compliance with requirements that apply to the general public requires recognition that tribal cultural resources are sacred, religious matters and must be considered and protected the way any religious resource (church cemeteries or places of worship) or any historical resource where it is highly likely that such resources will exist – and once again PIIC cites the Staff's finding that there is a high probability that they do exist – the agency must go beyond compliance with laws and regulations directed to the public in general, regardless of the trust responsibility. To carry the Staff's argument to its "logical" conclusion, if not for the Indian Trust Doctrine, Native Americans would be owed less than the general public in terms of compliance with safety and environmental regulations. As to NSPM's untimeliness claim, it should be noted that the trust responsibility is uniquely tied to the Federal government itself and does not directly involve regulated parties. Similarly, NEPA responsibilities for hard looks and impact analyses attach to Federal agencies. Thus, PIIC needed to look to the NRC (not the licensee) as to how the NRC would deal with terrorism in

³ The Indian Reorganization Act (IRA), enacted in 1934, authorizes the Secretary of the Interior to acquire land and hold it in trust "for the purpose of providing land for Indians." 25 U.S.C. § 465; *see also* 25 C.F.R. Part 151.

fulfilling its trust responsibilities and NEPA duties. The proper focus and triggering event for that purpose is the issuance of the Draft EA and PIIC's contention regarding terrorism is timely based on the Staff's Draft EA.

CONCLUSION

For the foregoing reasons, the PIIC's motion for leave to file new and amended contentions should be granted and its new and amended contentions should either be admitted or held in abeyance.

Respectfully submitted,

Signed (electronically) by Philip R. Mahowald

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **Prairie Island Indian Community's Reply on Motion to Admit New and Amended Contentions**, dated January 23, 2014, was provided to the Electronic Information Exchange for service on the individuals listed below, this 23rd day of January, 2014.

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