UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD PANEL
Before Administrative Judges:
Ann Marshall Young, Chair
Dr. Richard F. Cole
Dr. Fred W. Oliver

In the Matter of CROW BUTTE RESOURCES, INC. (In Situ Leach Facility, Crawford, NE)	Docket No. 40-8943 ASLBP No. 07-859-03-MLA-BD01 February 22, 2008

PETITIONERS' MEMORANDUM OF LAW REGARDING
INDIGENOUS RIGHTS, TREATIES AND FEDERAL INDIAN LAW

Petitioners[1] hereby respectfully submit this Memorandum of Law Regarding Indigenous Rights, Treaties and Federal Indian Law, pursuant to Judge Young's Order dated January 24, 2008 and her invitations during the January 16th Hearing in this matter to provide relevant legal authority and standards concerning the 1851 and 1868 Fort Laramie Treaties, federal Indian law, the United Nations Declaration of Indigenous Rights ("UN Declaration") and applicable standards of consultation required when dealing with, or taking actions affecting the rights of, Indian tribes and their members, especially involving water.[2] These principles are relevant to standing and the contentions regarding water use and contamination (Contentions A & B), regarding the pre-historic Indian Camp and artifacts (Contention C) and environmental justice (Contention F).

[1] By email dated February 22, 2008, Bruce Ellison, Attorney for Petitioners Owe Aku and Debra White Plume, approved of this Memorandum and authorized the undersigned to file it on behalf of his clients as well as those represented by the undersigned.

[2] See Hearing Transcript ("HT") at 187 (re: treaty issues), at 190 (re: water rights in the West), at 307 (re: law related to consultation with tribes),

INTRODUCTION

It is important to understand this proceeding in the context of the rights of the Indigenous people in the area surrounding the proposed North Trend Expansion under federal and international law. As noted by Chief Red Cloud (HT at 179), the entire area including and surrounding the existing Crow Butte mine and the proposed North Trend expansion site was occupied and controlled by the Great Sioux Nation for many generations preceding the landing of Columbus in 1493. Accordingly, the Sioux people are considered the original inhabitants of the area. The Sioux were a large nation with 10,000 campfires, they were nomadic hunter/gatherers and their vast territory covered what is now called Nebraska, South Dakota, North Dakota, Minnesota and Missouri which are all Lakota names. See Remarks of Chief American Horse, HT at 179.

The discovery of gold in California in 1848 and in the Black Hills of South Dakota in 1874 brought tens of thousands of settlers to the West and increased the desire for Indian land. The U.S. Calvary went along with them to protect the settlers. This resulted in violent warfare between the Great Sioux Nation and the United States which killed many people on each side. Although the United States might have been able to overpower them in warfare, victory would have been very costly in human and economic terms. In an effort to avoid those costs, the United States entered into two significant peace treaties with the Sioux, the 1851 and 1868 Ft. Laramie Treaties. The Ft. Laramie Treaties remain in effect.[3]

[3] Except that Article 2 of the 1868 Treaty was modified and Article 16 of the 1868 Treaty was

As a result of the 1851 Treaty, the Sioux allowed the non-Indian settlers and miners to pass[4] 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 in Crawford, Nebraska[5], the Lakota (Oglala Sioux Tribe) 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 is a federally recognized Tribe situated at Pine Ridge Indian Reservation (the "Reservation") pursuant to the 1851 and 1868 Ft. Laramie Treaties. "'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).

I. Federal Indian Law Applies in this Proceeding.

Federal law applies to Indian tribe 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). State laws "can have no force" on an Indian reservation without the express consent of Congress. Worcester at 561.

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expressly abrogated by Article I of the Act of Feb. 28, 1877, 19 Stat. 254, 255 (1877).

[4] The hunting rights preserved in the 1868 Treaty included "any lands north of North Platte," which now also includes Applicant's new 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.

[5] Signed at what was called the "Red Cloud Agency" and what is now called "Ft. Robinson." See HT at 181.

Federal Indian Law includes the Trust Doctrine, 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 persuasive treaties like the International Covenant on Civil and Political Rights (ICCPR).

In this case, Applicant's request for the NRC's approval of the proposed License Amendment 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.

A. **The 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.")

Between 1787 and 1871, the US entered into nearly four hundred treaties with Indian tribes. During those years, "the native nations were still relatively powerful and autonomous," and although the US might have been able to overpower them in warfare, victory would have been very costly. In an effort to avoid those costs, the US frequently entered into peace treaties, like the 1851 and 1868 Ft. Laramie Treaties, with Indian tribes. In these treaties, the US obtained the land and other rights and accommodations it wanted from the tribes, and in return, the US set aside other reservation lands for those tribes and guaranteed that the federal government would respect "the sovereignty of the tribes…would 'protect' the tribes…[and would] provide food, clothing and services to the tribes." See M.C. Woods, "Indian Land and the Promise of Native Sovereignty: The Trust Doctrine Revisited," Utah L. Rev. 1471, 1497 (1994).

The 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).

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 in Section I.F below.

B. 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".

C. Federal Indian Treaty Law. 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."[6] 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 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

[6] 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.

"Canons of Indian Treaty Construction" apply[7]:

(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).

D. The Winters Doctrine: Superior Water Rights of Indian Tribes. At noted by Judge Young at the January 16th Hearing, water rights in the West are controversial. HT at 190. 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 the reservation livable." Winters v. U.S., 207 U.S. 564 (1908) ; Arizona v. California, 373 U.S.

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

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.

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 available at Pine Ridge Indian Reservation so that Oglala Sioux may continue to practice traditional spiritual practices involving pristine water and so that the quantity of water the Tribe is entitled to is pure enough to use for the agricultural purposes and to make the Reservation "**livable**." See HT at 85-86 (re: water quality important to farming and ranching operations; re: purity of water as related to traditional Lakota ways; re: purity of water related to fishing rights).

E. 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. Also, the depletion of water to a point that it interferes with such rights 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).

F. 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", 59 Fed. Reg. 22951, 1994 WL 16189198 (April 24, 1994). 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.

Id. at 22952**.** 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**.
>
> (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, 65 FR 67249, 2000 WL 1675460 (Pres.Exec.Order Nov 06, 2000).

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:
***
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, 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.**

Id. (Emphasis added.) Neither of these Executive Orders has been rescinded, modified or revoked by President George W. Bush 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." (See General Assembly Resolution A/61/L.67 of 7 September 2007.)

G. Rights Under Religious Freedom Restoration Act ("RFRA"). Under RFRA, there is a right to the free exercise of religion which may not be substantially burdened unless the government demonstrates that application of the burden to the person – (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 USC Section 2000bb, *et seq*.; 42 USC Section 2000bb-1.[8] To determine whether there has been a violation of a person's right to freely exercise their

[8] As this matter is before a federal administrative court, concerning a federal licensing process, it is not relevant that RFRA was found to be unconstitutional as applied to state and local governments because it was an unlawful assertion of federal authority under Section 5 of the 14th Amendment of the Constitution. See City of Boerne v. Flores, 521 U.S. 507 (1997), however Congress has attempted to close the gap with the adoption of the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"). 42 U.S.C. § 2000cc et seq.

religious beliefs pursuant to RFRA, we are guided to four-step analysis:

First, RFRA requires that the burden be caused by a governmental action. 42 U.S.C. § 2000bb-1(a), such as in the instant case.

Second, RFRA requires a review of the religious belief that is burdened. RFRA protects "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 USC Section 2000bb-2(4), 42 USC Section 2000cc-5(7)(A). "The governmental action must burden a religious belief rather than a philosophy or a way of life." Werner v. McCotter, 49 F.3d 1476, 1480 (10th Cir. 1995) (citing Wisconsin v. Yoder, 406 U.S. 205, 215-219 (1972)). The burdened belief must be sincerely held, and the government need only accommodate the exercise of actual religious convictions. Id.

In Navajo Nation v. USFS, 479 F.3d 1024 (9th Cir. 2007), the Court held that the religious beliefs of the Navajo and the Hopi peoples were legitimate because of the testimony offered regarding the use of the San Francisco Peaks by the Tribes in their ceremonies.

In this case, Petitioners Debra White Plume, Owe Aku, and Slim Buttes Ag. Dev. Corp. are traditional Oglala Sioux (Lakota) and Petitioner Cook is a traditional Iroquois Mohawk who practices Lakota spiritual traditions. Their spiritual beliefs and practices are ancient and well-formed, and they rely on the relationship between the individual and elements of the physical earth, all of which are deities which have chosen to also manifest in a physical form, in part in order to be in relationship with each other and with the human beings. See James R. Walker, Lakota Belief and Ritual, University of Nebraska Press, R. DeMallie and E. Jahner, Ed. (1991).

Indigenous people believe that water is one of the most significant spiritual life forces in creation. Affidavit of Flordemayo at Paragraph 6-12; Affidavit of Mona Ann Polacca at

Paragraph 6-12. Water has a place in every major ceremony of the Lakota, including the "*inipi"* (sweat lodge). See Affidavit of Joseph R. American Horse, Sr., Sr. at Paragraphs 4-5; Affidavit of Harvey Whitewoman at Paragraphs 11-12; Affidavit of Oglala Sioux Grandmother Beatrice Long Visitor Holy Dance at Paragraphs 5-14; Affidavit of Oglala Sioux Grandmother Rita Long Visitor Holy Dance at Paragraphs 6-11.

A rare explanation of the "*inipi"* (sweat lodge) was provided by George Sword, an Oglala Sioux Holy Man, warrior, agency policeman and judge of the Court of Indian Offenses at Pine Ridge around the turn of the Century:

> The white people call it sweat lodge. The Lakotas do not understand it so. The Lakota think of it as a lodge to make the body strong and pure. They call it *initi*. The means a tipi to do *ini* in. When a Lakota does the *ini*, he makes his *ni* strong and helps it to bring all out of the body that is hurtful to it. The *ni* of a Lakota is that which he breathes into his body and it goes all through it and keeps it alive. When the *ni* leaves the body of a Lakota, he is dead. When a Lakota says *inipi*, he means he does the *ini*. The *ni* goes all through the body all the time. Sometimes it is weak and then hurtful things get into the body. When this happens, a Lakota should *inipi* in an *initi*.
>
> **The spirit of the water is good for the *ni* and it will make it strong.** Anything hot will make the spirit of the water free and it goes upward. It is like the *ni* which can be seen with the breath on a cold day. **An *initi* is made close so that it will hold the spirit of water**. **Then one in it can breathe it into the body**. They wash it and it comes out on the skin like *te mini*. *Te mini* is sweat. It is water on the body. A Lakota does not *inipi* to make the water on the body. He does it to wash the inside of the body.
>
> He may do this to cure himself when he is sick or he may do it to make himself feel strong. He should always do it when he is about to do some important ceremony so that he will be clean inside before the *Wakan* beings. When a Lakota says *ni*, or *ini* or *inipi*, or *initi*, he does not think about sweat. He thinks about making his *ni* strong so that it will purify him.

Ni, Ini, and *Initi* told by George Sword (Miwakan) (b. ca. 1840) (translated by Burt Means) (Colorado Historical Society), Document 17 in James R. Walker, Lakota Belief and Ritual, infra,

at 100 (emphasis added). When an indigenous person lives in a place, an integral part of his or her way of life is knowing the water from that place. See Remarks of Chief Oliver Red Cloud, HT at 184 ("…and I know how the water works"); Affidavit of Oglala Sioux Grandmother Beatrice Long Visitor Holy Dance at Paragraphs 5-14; Affidavit of Oglala Sioux Grandmother Rita Long Visitor Holy Dance at Paragraphs 6-11; Affidavit of Winona LaDuke at Paragraphs 7-8; Affidavit of Indigenous Grandmother Mona Ann Polacca at Paragraph 6-15. It is important that the ceremonies utilize water from a source "on the land" where the ceremony is taking place. This grounds the ceremony into the relationship with the local elements, life forces and spirits (deities). Affidavit of Oglala Sioux Grandmother Beatrice Long Visitor Holy Dance at Paragraphs 5-14; Affidavit of Oglala Sioux Grandmother Rita Long Visitor Holy Dance at Paragraphs 6-11; Affidavit of Winona LaDuke at Paragraph 7; Affidavit of Flordemayo at Paragraphs 6-12; Affidavit of Mona Ann Polacca at Paragraphs 6-12.

The Indigenous Petitioners' religious beliefs include the use of clean, uncontaminated water for ceremonies, and recognize the sacred nature of water as a deity. See Remarks of Chief Joseph American Horse, HT at 179; Affidavit of Harvey Whitewoman at Paragraphs 9-12; and Remarks of George Sword, infra; Affidavit of Winona LaDuke at Paragraph 9; Affidavit of Oglala Sioux Grandmother Beatrice Long Visitor Holy Dance at Paragraphs 5-14; Affidavit of Oglala Sioux Grandmother Rita Long Visitor Holy Dance at Paragraphs 6-11; Affidavit of Mona Ann Polacca at Paragraphs 7-15. Contaminating a water source for a spiritual Lakota person is not like for other people, who might accept a delivery of potable water every couple of weeks as a reasonable mitigation. To the Lakota person, this would separate him/her from the local elements, and make it impossible to conduct certain ceremonies because the water from the

ground is contaminated. These are sincere religious beliefs of the Lakota. Id. Affidavit of Winona LaDuke at Paragraphs 6, 8-9.

To Lakota person, the nature of water has cultural and spiritual significance and value that is much greater than its use and value as a vital natural resource. Affidavit of Oglala Sioux Grandmother Beatrice Long Visitor Holy Dance at Paragraphs 5-14; Affidavit of Oglala Sioux Grandmother Rita Long Visitor Holy Dance at Paragraphs 6-11; Affidavit of Mona Ann Polacca at Paragraph 6; Affidavit of Harvey Whitewoman at Paragraph 9.

In Lakota language, water is honored as "***mni***" which means the "water" itself, as well as "***mni wiconi***" which means "water of life," and "***mni wakan***" which means "sacred water" or "holy water." Affidavit of Oglala Sioux Grandmother Beatrice Long Visitor Holy Dance at Paragraphs 5-14; Affidavit of Oglala Sioux Grandmother Rita Long Visitor Holy Dance at Paragraphs 6-11; Affidavit of Harvey Whitewoman at Paragraphs 10-12. This means that the Indigenous Petitioners honor the "***mni***" as water for drinking, bathing, domestic, farming and other benign uses and it has a value to us for such purposes. Id.; See also HT at 85-86.

The Indigenous Petitioners also honor the "***mni wiconi***" which is the water of life that is used as a medicine during sacred prayer ceremonies like the "***inipi"*** (sweat lodge ceremony). Affidavit of Oglala Sioux Grandmother Beatrice Long Visitor Holy Dance at Paragraphs 5-14; Affidavit of Oglala Sioux Grandmother Rita Long Visitor Holy Dance at Paragraphs 6-11; Affidavit of Joseph R. American Horse, Sr. at Paragraphs 5-6; Affidavit of Thomas K. Cook at Paragraphs 5-6. The Indigenous Petitioners also believe that there is a life and spirit in the water which they, as indigenous people, recognize and commune with and pray with and know its healing power. This means that the Indigenous Petitioners also honor the "***mni wakan***" which is

the sacred water used to conduct sacred prayer ceremonies like the "***inipi***" ceremony. This means that the sacredness of the spirit of the water is recognized by them as indigenous people. See Remarks of George Sword, infra; Remarks of Chief Joseph American Horse, HT at 85-86; Affidavit of Oglala Sioux Grandmother Beatrice Long Visitor Holy Dance at Paragraphs 5-14; Affidavit of Oglala Sioux Grandmother Rita Long Visitor Holy Dance at Paragraphs 6-11.

RFRA protects the exercise of their religious beliefs, including the right to traditional ceremonies, and the right to the use of uncontaminated water from the locations of their traditional ceremonies. See Affidavit of Oglala Sioux Grandmother Beatrice Long Visitor Holy Dance at Paragraphs 5-14; Affidavit of Oglala Sioux Grandmother Rita Long Visitor Holy Dance at Paragraphs 6-11; Affidavit of Harvey Whitewoman at Paragraphs 8-12; Affidavit of Mona Ann Polacca at Paragraphs 9-15.

Third, RFRA requires that the person establish that the governmental action will impose a substantial burden on the such person's ability to freely practice his or her religious beliefs. 42 U.S.C. 2000bb-1(a). See also, Navajo Nation v. USFS, 479 F.3d at 1042. The burden must be "more than an inconvenience" Id. (citing Guam v. Guerrero, 290 F.3d 1210, 1220-21 (9th Cir. 2002)) and must prevent the person from engaging in religious conduct or having a religious experience. Id. citing Bryant v. Gomez, 46 F.3d 948, 949 (9th Cir. 1995). If a federally authorized activity results in contamination of the aquifer, it will significantly interfere with the ability of the Indigenous Petitioners to continue to practice their traditional ceremonies, because they will be unable to utilize natural, local water in such ceremonies in order to properly connect them with the elements (four directions, Mother Earth, Father Sky). Within the context of the

belief system of the Lakota, this would be a very substantial burden, akin to a Catholic not being able to use wine in given ceremonies because of a prohibition law.

In Navajo Nation v. USFS, the United States Forest Service ("USFS") had granted a permit to a ski area operating on the San Francisco Peaks to utilize the City of Flagstaff's treated wastewater to make snow, in order to extend the ski season in dry seasons. The USFS found that it was an important interest to permit the ski area to expand operations, because the National Forest Management Act mandates that the USFS encourage and provide for multiple uses. The San Francisco Peaks are sacred to a number of tribes, and the Navajo Nation and the Hopi in particular were able to establish that presence of the treated wastewater would contaminate the purity of the San Francisco Peaks, and substantially burden the exercise of their religions by negatively impacting their ceremonies and ways of prayer that rely on the San Francisco Peaks. Navajo Nation v. USFS, 479 F.3d at 1043.

Fourth, RFRA requires that if the person has established that their sincerely held religious beliefs are being substantially burdened by a governmental action, the burden shifts to the government to establish that the burden is in furtherance of a compelling governmental interest, and that the action is the least restrictive means of furthering that compelling governmental interest. 42 USC Section 2000bb-1(b). See also Werner v. McCotter, 49 F.3d 1476, 1480 Note 2 (10th Cir. 1995). "Requiring a State to demonstrate a compelling interest and show that it has adopted the least restrictive means of achieving that interest is the most demanding test known to constitutional law." Navajo Nation v. USFS, 479 F.3d at 1043. "Only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion." Id. citing Yoder, 406 U.S. at 215. Additionally, the Supreme Court more

recently ruled that "even with respect to governmental interests of the highest order, a 'categorical' or general asserting of a compelling interest is not sufficient." Id. citing Gonzales v. O Centro Espirita Beneficente, 546 U.S. 418 (2006), in which "the Court held under RFRA that the government's general interest in enforcing the Controlled Substances Act was insufficient to justify the substantial burden on religious exercise imposed on a small religious group by a ban on a South American hallucinogenic plant." Id. "The Court stated that it did not doubt the general interest in promoting public health and safety …, but under RFRA invocation of such general interests, standing alone, is not enough." Id. "[S]trict scrutiny at least requires a case-by-case determination of the question, sensitive to the facts of each particular claim." Id. (citations omitted).

H. 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. 25 USC Sections 3001-3013. 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.)

I. 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 Peoples of the Western Hemisphere. See 42 U.S.C. 1996. Due to the use of water for ceremonial and cultural purposes by the Indigenous Petitioners and the potential impact on Petitioners' 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 Lakota Chiefs and OST government prior to any possible issuance of the sought license amendment from the NRC. According to the Congressional Report on this Act:

> **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. (Emphasis added).

American Indian Religious Freedom Act Report, P.L. 95-341, pp. i-ii. 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." (Emphasis added). 42 U.S.C. Section 1996(1).

J. Rights Under UN Declaration 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.[9] 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 (CERD).

> The UN Declaration, therefore, should apply to the NRC's consideration of the North Trend Expansion due to its focus on preventing disproportionate impacts to the environmental and cultural interests of the Indigenous Petitioners which are implemented at NRC through the its Environmental Justice Strategies. **Environmental Justice**

On February 11, 1994, President Clinton issued Executive Order 12898, "Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations." This

[9] 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.

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

Under the UN Declaration and Executive Order 12898, the NRC must consider its own environmental justice strategy, implemented by the Department of Energy. This policy provides:

> a structured framework of the Department of Energy's efforts to integrate feasible environmental justice principles set forth in Executive Order 12898 into our operations. The strategy is structured in the spirit of the Administration's principles for reinventing government and is consistent with the principles set forth in the National Performance Review as it emphasizes a more responsive government and accountability by employees for achieving results. Individual strategies reflect a refocusing of policies and programs by Departmental elements, more meaningful dialogue with our stakeholders to address the impact of our operations on communities, and ***the continuation of on-going programmatic activities with the infusion of a heightened sensitivity to the principles of environmental justice***. Implementation of the strategy will be carried out mainly within current programmatic and budgetary provisions of existing Departmental elements. As current budgetary situations change, the Department will work with stakeholders to prioritize strategies for implementation.

Further, the Commission's strategy:

> reflects the commitment of the Department to participate in efforts to advance the human well-being of communities. It reflects an integrated approach by all our components to formulate strategies based on clear priorities and tangible benefits and actions that address programmatic,

> legislative, and regulatory responsibilities. It also emphasizes community participation and empowerment of our stakeholders and communities, refocused research agendas to reflect a new recognition of various health issues, encourages modified approaches for structuring models for occupational and environmental science research for high risk communities and workers, embraces interagency coordination to ensure environmental justice, and includes plans to heighten the sensitivity of our managers and staff to environmental justice options within our Department's infrastructure.

http://www.lm.doe.gov/env_justice/documents/envjus2.htm (emphasis added.)

Finally, the Commission's environmental justice strategy identifies a list of programs, policies, and planning processes for possible revision, in order to ensure improved environmental quality and health standards within Departmental operations. These include the use of policies and programmatic actions relating to:

- The National Environmental Policy Act of 1969 (NEPA) as it relates to "socio-economic impacts," "environmental consequences," and "affected environment;"
- DOE Order 5400.1 (General Environmental Protection);
- Programmatic Environmental Impact Statements (PEIS);
- Environmental Impact Statements (EIS);
- Waste Minimization Pollution Prevention Awareness Plan;
- Risk Assessment Approaches;
- Future revisions of the Office of Civilian Radioactive Waste Management Strategic Plan; and
- Guidance and standards for worker and public health protection from unwarranted exposures.

http://www.lm.doe.gov/env_justice/documents/envjus2.htm.

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 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.

II. Rights of Indigenous Petitioners[10]

A. 1851 & 1868 Ft. Laramie Treaty Issues. The1851 Ft. Laramie Treaty and the

[10] Petitioner Thomas Kanatakeniate Cook is Indigenous Mohawk and so does not make claims under the Ft. Laramie Treaties because he is not a member of the Oglala Sioux Tribe.

1868 Ft. Laramie Treaty was a peace treaty of the kind described above in Section I.A above.[11] As a result, the Oglala Sioux Petitioners are entitled to such rights under federal law, including the benefits of interpretation of the Canons of Indian Treaty Interpretation that the terms be liberally construed in favor of the Indians and as they would have understood it at the time. As an example of the importance of the water in relation to describing the new treaty territory under the 1868 Ft. Laramie Treaty, Chief American Horse (grandfather of Chief Joseph American Horse) made the following remarks addressing the 1889 'Sioux Bill' Land Commissioners on June 21, 1889, at Pine Ridge during debate on what the 1868 treaty boundaries were:

> "I was there and I heard with my own ears and I think I understood what the treaty was. I understood at the time of the Treaty of 1868 **the line was to follow the waters of the Platte River, and it was to follow up and take in half of the waters as it goes to Independent Rock**. It will follow the ridge from there until it strikes what is called White Buttes. It would then follow the Big Horn River and cross the Yellowstone River, and it would follow on up till it strikes the Missouri River, near the mouth of the Yellowstone River, and **it would follow from hence down the Missouri River and take in its waters until it gets to the mouth of the Platte River**, and it would follow up and up the South Platte, from thence to the beginning.
>
> And the treaty that we signed gave us plainly to understand that within the boundaries of the lines I speak of we was to roam inside of, **and all the animals that roamed inside of that should be our meat**, and we should raise our children inside of that." **(Congressional Record** at ____).

This shows that the Reserved Rights and the hunting and fishing rights as understood by the

[11] "The aforesaid nations, parties to this treaty,...do hereby covenant and agree to abstain in future from all hostilities whatever against each other, to maintain good faith and friendship in all their mutual intercourse, and to make an effective and lasting peace." Article I, 1851 Ft. Laramie Treaty. "From this day forward all war between the parties to this agreement shall for ever cease. The…United States desires peace, and….[t]he Indians desire peace." Article I, 1868 Ft. Laramie Treaty.

Indians at the time included all right to the meat of the wildlife and by extension of the Winters doctrine and the Trust Doctrine, it includes fishing and gathering rights. It also shows they knew the water and described their boundaries with reference to the water and the waters.

1. The Proposed New Applicant Mine Is Located Within Boundaries Of "Indian Country" Described 1851 and 1868 Treaties Granting An Interest In Preserving The Water, Air, And Land Therein.

Petitioners White Plume and the Lakota members of Owe Aku and Slim Buttes Ag. Dev. Corp. are the descendants of the signers and other members of the Lakota Nation signing the 1851 and 1868 Ft. Laramie Treaties with the United States. The boundaries of both Treaties include the proposed mine site within their boundaries as part of "Indian Country," within its terms. Article 5, 1851 Ft. Laramie Treaty; Article II, 1868 Ft. Laramie Treaty.

As such, such Oglala Sioux Petitioners have a direct interest and therefore standing to raise contentions related to the degradation of water quality of aquifers used or intermixing with aquifers used or useful for domestic, agricultural, and spiritual purposes within the Treaty boundaries, including the Reservation. 10 C.F.R. § 2.309(a); see also 42 USC Section 2239(a). As reflected in the testimony of Lakota Chiefs Oliver Red Cloud and Joseph American Horse, together with the remarks of Floyd Looks For Buffalo Hand at the January 16th Hearing, the Lakota interest in protecting the water, air, and land within the Treaty boundaries remains strong to this day. See, Remarks of Chief Oliver Red Cloud HT at182-184; Id., Testimony of Chief Joseph American Horse, HT at 179-181; Ibid, Testimony of Floyd Looks for Buffalo Hand, HT at 185-186.

2. Surface And Ground Water Resources. Article VI of the 1868 Ft.

Laramie Treaty expressly guarantees the members of the Lakota Nation, such as the White Plume Tiospaye (Family) and their descendants the right to farm. As generally is the case, the success of the White Plumes' farming operation and their ability to exercise their Agricultural treaty rights on the Pine Ridge Indian Reservation, has always depended upon the quantity and quality of the surface and subsurface water supplies of their land to do so. Under the Winters Doctrine, they are to be guaranteed such water supplies.

One member of Owe Aku, David House, utilizes the Brule aquifer for his domestic water supply. Due to the real potential for intermixing of the more toxic and radioactive "restored" waste water with the water supplies utilized by Petitioners, such water supplies are potentially in danger from contamination and degradation due to Applicant's proposed mine site and the northward flow of the Arikiree aquifer north from the site towards the Pine Ridge Indian Reservation.

Members of Owe Aku, such as Lester Davis, live along and long fished for food from the White River which flows towards the Pine Ridge Indian Reservation after the river flows northward from watershed areas in Nebraska, including the Applicant's proposed new mine site. Due to the history of surface water contamination of the Yellow River by Applicant including some 100,000 gallons of a total of 300,000 spilled on the frozen winter prairie of the Yellow River watershed, the potential for contamination of a member of Petitioner's food supply from the river. Mr. Davis has hunting and fishing rights that are burdened substantially by Applicant's activities.

The Oglala Sioux Petitioners therefore contend that pursuant to their agricultural

treaty rights and hunting and fishing rights, they have an interest in any in the proposed new Applicant in situ mine site, which potentially could degrade the quality of the water they use and their descendants will use for domestic, agricultural and spiritual purposes, that flows under or on through any part of the Pine Ridge Indian Reservation and surrounding area from the new mine site.

Due to the existing hydrological inter-relationship between underground and surface water in a region, courts have recognized that actions many miles away involving an aquifer may affect surface water supplies. 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.

Petitioners obtain their domestic water supplies from either the Arikiree or Brule aquifers, the latter being proposed to be mined at the new mine site. Based upon geological and other studies, reports, and proffers of evidence and expert testimony submitted and cited by Petitioners to date, Petitioners contend there is a known fault line through the proposed project area and known and substantial amounts of fracturing and faulting which creates or potentially creates hydrological flow between the aquifer proposed to be mined by Applicant and the aquifers used by Petitioners.

Applicant has admitted that after the water is mined for uranium it may never again be used as a US Drinking Water source ("USDW"). Since the Arikiree, aquifers utilized by Petitioners and to be used by their descendants for domestic, farming,

and spiritual purposes are potentially threatened by Applicant's ISL mining procedure which will degrade these water supplies (requiring such an exemption for Applicant under the Clean Water Act ("CWA").

In Winters, the Supreme Court expressly noted that a tribe's right to water was reserved not only for agriculture, but also for "acts of civilization." Ibid, 207 U.S. at 576. In interpreting what this means, it has been recognized that the overall purpose of securing for a tribe a permanent and self-sufficient place to live "is a broad one and must be liberally construed." Colville Confederated Tribes v. Walton, 647 F.2d, 42, 47 (9th Cir.1981), cert.den., 454 U.S. 1092 (1981). See also, In re General Adjudication of All Rights to the Water in the Gila River System and Source, 35 P.3d 68, 76 (Ariz. 2001); Montana ex rel. Greeley v. Confederated Salish and Kootenai Tribes, 712 P.2d 754, 767 (Mont. 1985); United States v. Finch, 548 F.2d 822, 832 (9th Cir. 1976), rev'd on other grnds, 433 U.S. 676 (1977); Pyramid Lake Paiute Tribe v. Morton, 354 F.Supp. 252 (D.D.C. 1972). Joseph American Horse, Sr., President of Slim Buttes Ag. Dev. Corp., has asserted that the Oglala Sioux Tribe, among other tribes of the Great Sioux Nation, possess superior water rights in the region, never quantified, arising from federal treaties with the Great Sioux Nation in 1851 and 1868. Affidavit of Joseph R. American Horse, Sr., at Paragraph 7.

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." 33 U.S.C. 1377(c)(2) (emphasis added). Such an amendment reflects a Congressional acknowledgment of the interest of tribal members, such as Petitioners, whose water may be impacted.

Thus, the Oglala Sioux 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 Nebraska, in setting water quality standards related to actions which potentially could

affect the Tribe's water quality. Such Tribal authority permits the Tribe to establish even more stringent water quality standards on Applicant's operations than the NDEQ. 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 Tribe's regulatory powers, whether or not exercised, to adopt more stringent water quality standards does not diminish the Petitioner's own interest in protecting their own water supplies.

The proposed new mine requires a license amendment from the Nuclear Regulatory Commission (NRC) to operate. The NDEQ has assumed the otherwise federal responsibility from the Environmental Protection Agency (EPA) to ensure compliance with the requirements of the Clean Water Act (CWA), pursuant to 33 U.S.C. §1342(b) in licensing of corporate activity which involves discharging effluent into surface or subsurface water supplies. As a result, in connection with Applicant's proposed North Trend expansion, it has applied to the NDEQ for a Class III aquifer exemption to exempt a portion of the aquifer it intends to mine from the Clean Water Act and "restore" it not by returning it to baseline conditions but rather by compliance with a relaxed set technical specifications which remains toxic and harmful to plants, wildlife and humans.

The water quality protection standards required by the CWA have been violated by failing to require Applicant to conduct "Bench Scale" followed by "Pilot Scale" tests to prove they can meet restorative standards prior to conducting any mining activity. This violates section 313 of the Clean Water Act which requires federal agencies to comply

with water quality standards when they are "engaged in any activity resulting, or which may result, in the discharge or runoff of pollutants" 33 U.S.C. § 1323(a). In addition, Section 303 of the CWA requires states to develop water quality standards, which specify the appropriate uses of water bodies and set standards to protect those uses and to place those waters not meeting water quality standards on the 303(d) list. 33 U.S.C. § 1313(d)(1)(A)−(B). States must then calculate total maximum daily loads (TMDLs) for those waters not meeting water quality standards. Id. § 1313(d)(1)(C); 40 C.F.R. § 130.7. The NRC must insure that its preferred alternative approach to listed water bodies without approved TMDLs does not lead to continuous violations of the CWA.

Further, testing of the geochemistry of relevance to groundwater quality restoration at in-situ uranium leach mining facilities with focusing on radioactive and heavy metals has been used to model groundwater restoration and stabilization efforts. Consideration of Geochemical Issues in Groundwater Restoration at Uranium In-Situ Leach Mining Facilities Draft Report for Comment U.S. Geological Survey, U.S. Nuclear Regulatory Commission Office of Nuclear Regulatory Research Nebraska, DC 20555-0001 (USGS Study). (Manuscript Completed: December 2004; Date Published: June 2005).[12]

As in the case of Applicant's ISL mining, this study found that it is difficult to predict the restoration of ground water even with intensive intervention and likely

[12] Prepared by J.A. Davis, G.P. Curtis, USGS, Menlo Park, CA 94025; J.D. Randall, NRC Project Manager, Prepared for Division of Systems Analysis and Regulatory Effectiveness, Office of Nuclear Regulatory Research, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001, NRC Job Code Y6462.

depends on types of minerals present, the rate of groundwater flow into the mined area, and the dissolved oxygen concentration of the groundwater. Id. In addition, whether long-term stabilization of the mined zone is likely is dependent upon the addition of large quantities of hydrogen sulfide to the purification process and the right natural gradient conditions. If not, "concentrations of Uranium, Arsenic, and Selenium will likely rebound significantly above the baseline for a long period of time …before decreasing back to baseline conditions." Id.

Water is "consumed" when it has been handled so that, before it could be used for drinking and after, it cannot be used for drinking. Applicant consumes 9,000 gpm, which is its current permit limit to pump, going up to 13,500 gpm with this north trend expansion. Applicant maintains that its 'net consumptive use' is 113 gpm, which credits Applicant for the volume of geo-chemically changed water they reinject to the aquifer.

Studies illustrate, however, that no uranium mining company has ever been able to clean up water affected by the mining process to "restoration standard" levels. *See,* study by Dr. William P. Stuab.[13] The Stuab and other studies illustrate that, so far, restoration efforts have only been able to meet what are called "alternative concentration limits" which are nothing more than reduced amounts of radiation and heavy metals in water samples through expensive and complicated water purification processes.

Nevertheless, NRC has accepted Applicant's restoration standards (in License Condition 10.3(C)) knowing that the Mine will never meet them. In fact, Applicant admits that such a goal is not possible with today's technology.

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[13] URANIUM ISL GROUND-WATER DATA FROM WRITTEN TESTIMONY OF WILLIAM P. STAUB, PH.D.,January 9, 1999, In support of ENDAUM-SRIC Presentation on Groundwater Issues in the Matter of Hydro Resources, Inc., USNRC ASLBP-95-706-01-ML USNRC Docket No. 40-8968.

Based on the fact, therefore, that the Expansion will consume much more water than Applicant is suggesting, they will be impacting water rights held by the Petitioners as listed in the Treaties of the Oglala Souix Indian Tribe. The Petitioners contend that pursuant to the Agricultural Rights of the 1868 Treaty, they have and interest and therefore standing before the NRC to ensure that when the NRC issues its own Environmental Evaluation on the proposed new mine site, that it considers the potential impact on surface and ground water supplies which may immediately and over time be negatively impacted thereby.

3. Consultation Regarding Mineral and Water Resources.

Petitioners contend that since Applicant's proposed new mine site lies with the 1851 and 1868 Ft. Laramie Treaty boundaries, and affects water supplies , that consultation, at least, with the traditional Chiefs, as well as the Oglala Sioux Tribe, was required prior to the foreign mining company's pursuit of an NRC license to operate the North Trend Expansion Project. Petitioners contend that such consultation was so required since Applicant's proposed mine involves the removal of natural resources accompanied by resulting degradation and devaluation of water, if not air and land resources.

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 , discussed in Section I.F 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 both in connection with the proposed ISL mining, the discussion with Mr. Harvey Whitewoman concerning water quality, and with regard to the pre-historic Indian Camp and artifacts are substantial. Much more is required than the empty process-driven letter sending described by Counsel for Applicant. See, HT at 321 ("Harvey White Woman called and spoke to the Crow Butte. That's a statement of fact, that's in the nature of a consultation…"); HT at 323 ("Those requirements are that you consult with tribes, tribal governments in the potentially affected area, send out letters, follow up to make sure they respond."); HT at 326 ("in this particular set of circumstances it doesn't because no one from the tribes responded to the letter and identified potential cultural or archeological resources in the area of the project. They didn't respond to the consultation. So that they didn't avail themselves of the opportunity to make a determination. That's all there is."); HT at 327 ("It's a consultation which is here is what we are going to do, do you have anything to say back. And if there is nothing back then that is the end of the process, there's-nothing more for the applicant to do there. They've responded.") The foregoing description of a consultation process is not one that complies with the Trust Doctrine. 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 in Section I.F above, it is clear that Indian Nations, Tribes and people 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, adjacent to the

Reservation, and contamination of surface water and groundwater supplies relied upon by the Oglala Sioux living on the Reservation, 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)].

In its Technical Report [TR:2.4.1], attached to its Application, Applicant noted that it was contacted by Harvey White Woman, reportedly on behalf of the Oglala Sioux Tribe, who inquired about what effects the proposed project might have on water quality. Petitioner contends the record fails to show his questions were answered. HT at 281. At the Hearing, Applicant acknowledged Mr. White Woman's query about "possible impacts on water issues," and then claimed that "they discuss the project and apparently his concerns were addressed." Id, at 319. See, also, HT at 320 (Counsel for Applicant: "I mean his concerns were addressed"). To the contrary, Mr. Whitewoman attests that no

concerns of any kind were addressed. Affidavit of Harvey Whitewoman at Paragraphs 3-6.[14]

Petitioners contend that the failure of Applicant to reasonably consult with Lakota elders and the OST, rather than being satisfied by the "exchange" with Mr. White Woman, is exemplified by Applicant's position and the record.

As attested to by the attached Affidavits of Harvey Whitewoman, at the time, Mr. Whitewoman was employed as assistant to Mr. Johnson Holy Rock, who was the Fifth Member of the OST Council. The Office of the Fifth Member is a member of the Executive Committee of the Tribal Council and does not have any authority to bind the Tribe. Such authority rests with the Tribal Council and to some extent the Tribal President. Under the Oglala Sioux Tribe Constitution and Bylaws.

Upon receipt of Applicant's notice to the Tribe that it planned to expand to a new site just south of the Pine Ridge Indian Reservation, Mr. Holy Rock sent a letter to Applicant to inquire about possible impacts on the Tribe's water resources. Receiving no response, Mr. Whitewoman as administrative assistant to the Fifth Member called to follow-up on the letter and spoke with a company representative, who explained the *in situ* mining process. Applicant's representative did not provide information to either Mr. Whitewoman, Mr. Holy Rock, or the OST on the potential impacts of the proposed new mine site on the Tribe's water resources. 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. See 36 CFR Section 800 et seq.; Affidavit

[14] Discrepancies like this between Applicant's presentation of facts and the actual facts related by the involved witness call for the Subpart G discovery that Petitioners have requested.

of Harvey Whitewoman at Paragraphs 8-9.

Accordingly, it is clear that Applicant has failed to engage in reasonable efforts to bring about consultation with the Lakota or the 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.43

4. Consultation Regarding Cultural Resources.

Applicant agrees that the National Historic Preservation Act (NHPA) and the Environmental Protection Act (NEPA) require consultation on cultural resources and that "[t]hose requirements are that you consult with tribes, tribal governments in the potentially affected area, send out letters," and that Applicant "follow up to make sure they respond." HT at 322-323.

Applicant contends that its sending of a letter to the Oglala Sioux Tribe simply notifying it the proposed new mine site ("they're told that here is the project" - Ibid, at 327), the inquiry of Harvey White Woman regarding "only water quality" in response, together with its consultation with and the conclusions of the State Historic Preservation Officer (SHPO), adopted by Applicant in its Environmental Report 4.8 (which identified indigenous resources were of little historic value), without more, were sufficient to satisfy NEPA and the NHPA. See, HT at 317-320, 328-329.

The NRC staff, for its part, noted that Applicant's Application did not conclude that the "prehistory Indian camp," for example "was not significant" and that the NHPA required that "any potential archeological sites be taken into consideration." See, HT at

310-312. The NRC staff, though, had not, as of the date of the Hearing "gotten to the point of actually looking at that particular...portion of the application." Ibid, at 312. While initially asserting that part of the NRC's process was to consult with the SHPO to comply with §106 of the NHPA, it acknowledged that "we also have to potentially look at the possibility of consulting tribal historic preservation offices." Id., p. 312-313. The NRC Staff further stated that they were unaware of law on what standards were to be applied in determining that Applicant had sufficiently and appropriately sought consultation with the Tribe or its elders regarding cultural resources in and around the new mine site. Id., at 315.

Petitioner's contend that the record is clear that Applicant, while informing the Oglala Sioux Tribe by letter that it was contemplating the new mine site, failed to inform the Tribe 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, but which were not located during the SHPO investigation. See, HT at 304-309. Indeed, Applicant sought to withhold the specifics of known cultural resource information from disclosure. See, May 30, 2007 Affidavit from Applicant Mine Manager Jim Stokey to Director of the Office of Federal and State Material and Environmental Management Programs, Charles Miller, p. 1-3,[15] ADAMS ML071620327.

[15] Specifically, "*Crow Butte Resources North Trend Expansion Area Class III Cultural Resource Inventory, Dawes County, Nebraska*, February 2006, Appendix B, Site Location Map" and "*Crow Butte Resources North Trend Expansion Area Class III Cultural Resource Inventory, Dawes County, Nebraska*, February 2006, Appendix C, Site Forms." Id. at 2. Petitioners have contacted NRC Staff and Applicant concerning a stipulated release of this information to the Indigenous Petitioners under a mutually satisfactory nondisclosure agreement. By email dated February 21, 2008, NRC Counsel Andrea Jones indicated that Petitioners' request was under

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 questions and a dialogue intended to develop a meaningful consultation about the known existence of a "prehistory" Indian camp and various artifacts located during Nebraska's survey of the area in and around the proposed new Applicant mine site, all of which is within the Treaty boundaries. Petitioners contend that consultation is further required under the U.N. Declaration, the National Environmental Protection Act (NEPA) the National Historic Preservation Act (NHPA) and the public interest under the Atomic Energy Act . See, HT at 304-309.

B. RFRA, NAGPRA and AIRFA Issues. As discussed above in Section I.G, RFRA protects the rights of the Indigenous Petitioners to use pristine water on the Reservation for spiritual ceremonies like the "***inipi***" (sweat lodge) and the NRC would not be authorized to burden the religious practices of the Indigenous Petitioners absent a compelling governmental interest and using the least restrictive means of a burden. This gives the Indigenous Petitioners standing.

"Requiring a State to demonstrate a compelling interest and show that it has adopted the least restrictive means of achieving that interest is the most demanding test known to constitutional law." Navajo Nation v. USFS, 479 F.3d at 1043 (citing City of Boerne, 521 U.S. at 534, 117 S.Ct. 2157). "Only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion." Id. (citing Yoder, 406 U.S. at 215). Additionally, the Supreme Court more

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review. By email dated February 22, 2008, Counsel for Applicant likewise indicated that Petitioners' request was under review.

recently ruled that "even with respect to governmental interests of the highest order, a 'categorical' or general asserting of a compelling interest is not sufficient." Id. (citing Gonzales v. O Centro Espirita Beneficente, 546 U.S. 418 (2006).

There is no evidence, or even any suggestion, on the record that the interests of nuclear power in general and uranium mining by this Canadian multi-national corporation would constitute a compelling governmental interest. The NRC may argue that the expansion of the mine site in question serves a compelling governmental interest of some sort. However, these arguments represent general interests, under the test set forth in Gonzales v. O Centro Espirita Beneficente, the NRC needs to establish that there is a compelling reason why this mine must be given this expansion approval. Furthermore, to the extent the NRC establishes that there is a compelling governmental interest, the NRC must establish that there is no less restrictive means of achieving the governmental interest. 42 U.S.C. § 2000bb-1(b)(2). There are many other potential uranium sites, NRC would have to establish that no other sites could potentially be located that would not impact religious practices. It is unlikely that Applicant or the NRC Staff will be able to present evidence on the record to support such an argument.

Any NRC approval of the proposed License amendment would be a governmental action that would substantially burden the sincerely held religious beliefs and practices of the Indigenous Petitioners. The proposed permit does not serve a compelling governmental interest, and to the extent that the NRC finds that it does serve a compelling governmental interest, it is not the least restrictive means of furthering the compelling governmental interest.

In addition, as discussed in Section I.H above, NAGPRA requires that the Oglala Sioux Petitioners be given an opportunity to examine the pre-historic Indian Camp and artifacts and to make sure there are no graves or human remains in the area. If any such remains are discovered, they must be returned to the Oglala Sioux Tribe under NAGPRA.[16]

Further, as discussed in Section I.I above, AIRFA requires consultation due to the use of water for ceremonial and cultural purposes by the Indigenous Petitioners and the potential impact on such Petitioners' water resources by the operation of Applicant's proposed mine site and the interrelation between the aquifers, groundwater and surface waters. 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." (Emphasis added). 42 U.S.C. Section 1996(1).

These failures to comply with Indigenous Petitioners' rights under RFRA, NAGPRA and AIRFA constitute a concrete injury in fact for standing purposes and support the admissibility of Contentions A, B and C.

C. Lack of Authority of SHPO Due to Federal Supremacy Clause. During the Hearing, Applicant asserted that the Nebraska State Historical Preservation Officer (SHPO) has authority over tribal issues. Any such conclusion is incorrect under Worcester, as discussed in Section I above. Actions taken without proper respect for obligations to the Tribe and its members constitutes a concrete injury in fact and supports the admissibility of Contentions A, B and C.

[16] We note that Chief Oliver Red Cloud made reference to "desecration and grave robbing." HT at 186.

D. Hunting and Fishing Rights. In its Application, Applicant states that contaminants may enter the human body through water or through ingestion of meat, of livestock and/or fish. or wild game exposed to the contamination. It further says contaminants include radon, thorium, uranium. and arsenic, inorganic arsenic. HT at 292. The Oglala Sioux Petitioners submit that such exposure to contamination violates their hunting and fishing rights guaranteed by federal law. This gives them additional grounds for standing.

CONCLUSION

Upon the above argument, authority, and citations to the record, the Indigenous Petitioners contend that pursuant to federal Indian law, the 1851 and 1868 Ft. Laramie Treaties, the UN Declaration of Indigenous Rights, Executive Orders, the NEPA, the NHPA, the AEA, and the AIRFA, RFRA, NAGPRA, they have standing and admissible contentions regarding the potential impact of the proposed new Applicant North Trend *in situ* mining operation as described in the Petition. Petitioners further respectfully submit that pursuant to federal Indian law, the 1851 and 1868 Ft. Laramie Treaties, Executive Orders, the UN Declaration of Indigenous Rights, the NEPA, the NHPA, the AEA, the AIRFA, RFRA, NAGPRA, Applicant has failed to take reasonable steps to ensure meaningful consultation with the Lakota elders or the Oglala Sioux Tribe.

For the reasons stated above, the foregoing legal principles clearly support of the standing of Petitioners and the admissibility of Contentions A, B and C stated in the Petition.

Respectfully submitted,

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