From: Peter Capossela <peter@pejutatokahe.com>
Sent: Monday, January 5, 2026 9:05 AM
To: Binegar, Brenda <Brenda.Binegar@state.sd.us>
Cc: Matthew Naasz <mnaasz@gpna.com>; Blair, Steven <Steven.Blair@state.sd.us>; McVey, David <David.McVey@state.sd.us>; Neyhart, Melissa <Melissa.Neyhart@state.sd.us>; ccintervenors@dakotarural.org; brendagamache49@gmail.com
Subject: [EXT] EXNI 453 Tribal Water Alliance motion and proposed brief

Good morning Brenda - attached is a motion requesting the filing of a brief in opposition to the applicant's Motion in Limine to Preclude Treaty Rights, with a proposed brief and certificate of service, for filing in the above referenced docket. Thank you very much..

Peter
--

Peter Capossela
Attorney at Law PC
Post Office Box 10643
Eugene, Oregon 97440
(541) 505-4883

BEFORE THE STATE OF SOUTH DAKOTA
DEPARTMENT OF AGRICULTURE AND NATURAL RESOURCES

BOARD OF MINERALS AND ENVIRONMENT

IN THE MATTER OF CLEAN NUCLEAR ENERGY CORP. URANIUM EXPLORATION PERMIT APPLICATION	)
EXNI 453	)

INTERVENOR GREAT PLAINS TRIBAL WATER ALLIANCE, INC. MOTION TO ALLOW THE FILING OF OPPOSITION BRIEF OUT OF TIME TO APPLICANT'S MOTION IN LIMINE TO PRECLUDE TREATY RIGHTS

COMES NOW, intervenor Great Plains Tribal Water Alliance, Inc., and respectfully moves for an order allowing the filing of the attached brief out of time, which opposes the applicant's *Motion in Limine to Preclude Consideration of Treaty Rights*. Intervenor requests relief from the Scheduling Order dated September 2, 2025, as the time between receipt of the applicant's motion and the deadline for responses was very compressed. Counsel for the Tribal Water Alliance represent Tribes and Tribal organizations in numerous current federal administrative and federal court proceedings regarding significant changes being rapidly implemented by federal agencies, with deadlines coinciding with the December 15th deadline to respond to the applicant's motion in limine. There has been inadequate time to properly respond to the motion, or even to timely request additional time to respond.

This motion is filed for no improper purpose, or to cause delay. Counsel for intervenor consulted with counsel for the applicant, and was informed the applicant does

not oppose this motion, so long as the opposition brief is filed and served in advance of the January 6, 2026 pre-hearing conference, to provide the applicant time to review the intervenor's responsive pleading in advance of January 6.

Intervenor's proposed *Brief Opposing the Applicant's Motion in Limine to Preclude Consideration of Treaty Rights* is attached. Intervenor respectfully requests an oral or written order granting leave to file the attached brief and a directive for the brief to be filed in the administrative record in this docket. In any event, the Great Plains Tribal Water Alliance requests the right to present argument on the applicant's motion on January 6.

This motion is based upon the discretion under the applicable rules and case law recognizing the discretion of the hearing officer to modify an existing order, and the pleadings and papers on file herein.

Dated this 2nd day of January 2026

By: Chase Iron Eyes

Chase Iron Eyes
Attorney at Law
Post Office Box 393
Pine Ridge, South Dakota 57770
(605) 415-9238
Chase@Lakotalaw.org
S.D. Bar No. 3981

Peter Capossela

Peter Capossela, PC
Attorney at Law
Post Office Box 10643
Eugene, Oregon 97440
(541) 505-4883
peter@pejutatokahe.com

BEFORE THE STATE OF SOUTH DAKOTA

DEPARTMENT OF AGRICULTURE AND NATURAL RESOURCES

BOARD OF MINERALS AND ENVIRONMENT

IN THE MATTER OF CLEAN NUCLEAR ENERGY CORP.URANIUM EXPLORATION PERMIT APPLICATION	)
EXNI 453	)

INTERVENOR GREAT PLAINS TRIBAL WATER ALLIANCE, INC. BRIEF IN OPPOSITION TO APPLICANT'S MOTION IN LIMINE TO PRECLUDE CONSIDERATION OF TRIBAL TREATY RIGHTS

The applicant's motion in limine must be denied because the Uranium Exploration Act requires an examination of "the historic, archaeologic, geologic, scientific, or recreational aspects of affected or surrounding land," SDCL §45-6D-29(3), and the Treaty rights of the intervenor Tribes directly relate to these statutory criteria, rendering them relevant under Rule 401. SDCL §19-19-401. Moreover, the South Dakota Court interprets Rule 401 on relevant evidence liberally. *Supreme Pork Inc. v. Master Blaster, Inc.*, 746 N.W.2d 474, 488 (S.D. 2009), and the applicant's motion in limine takes a very restrictive view of relevance which is inconsistent with South Dakota law.

Inquiry into the historic and archaeological impacts of the proposed uranium exploration *requires* consideration on Tribal Treaty Rights

Not only are Tribal Treaty rights relevant evidence, arguably, consideration of the Tribal Treaties is *required* under SDCL §45-6D-29(3). This section requires the Board to

consider the impacts of the proposed exploration on "the historic, archaeologic, geologic, scientific, or recreational aspects of affected or surrounding land." *Id*. The 1868 Fort Laramie Treaty, 15 Stat. 636, and 1851 Fort Laramie Treaty, 11 Stat. 747, on their face relate to the history and archaeology of the affected land.

These Treaties directly relate to the statutory criteria for issuance of the permit applied for by the applicant. The task of the Board is not to "relitigate" Treaty issues, but to consider them and confer such weight in its informed discretion that it deems appropriate.

In fact, the federal statutes and regulations under which the affected cultural resources have or should have been surveyed and evaluated, such as the Native American Graves Repatriation Act (NAGPRA), 25 U.S.C. §§3001-3013, and National Historic Preservation Act, 54 U.S.C. §§320303, both incorporate Treaty rights into the review and management requirements of Native burials and cultural objects on land immediately adjacent to the proposed drill pads. For example, under NAGPRA section 2:

> [I]f the cultural affiliation of the objects cannot be reasonably obtained and if the objects were discovered on Federal land that is recognized by a final judgment of the Indian Claims Commission or the United States Court of Claims as the aboriginal land of some Indian trine – (ownership of the objects vests) in the Indian Tribe that is recognized as aboriginally occupying the area…

25 U.S.C. §3002(a)(2)(C)(1).

The "Federal Land that is recognized by a final judgment," as refenced in the statute, *id*. includes the area on and adjacent to the proposed uranium exploration, as the Court ruled in *United States v. Sioux Nation of Indians*, 448 U.S. 371, 374-375 (1980). The case cited by the applicant purportedly to justify preclusion of evidence of the Sioux

Treaties on relevancy grounds, actually demonstrates that cultural properties on affected land, according to the U.S. Court of Claims as upheld by the Supreme Court, are owned by the intervenor Tribes – *because* of the Treaties.

Under section 2 of NAGPRA, the Tribes possess ownership and repatriation rights to these cultural objects within their Treaty territory. 25 U.S.C. §3002(a)(2)(C)(1). Under the NHPA regulations, the Tribes enjoy consultation rights when projects may impact traditional cultural properties within their Treaty territory. The applicable regulation states:

> Federal agencies should be aware that frequently historic properties of religious and cultural significance are located on ancestral, aboriginal, or ceded lands of Indian Tribes and should consider that when complying (with NHPA).

36 CFR §800.2(c)(2)(ii)(D).

This means that the process for evaluating and determining impacts to cultural sites on land that is or could be affected by the application, because of the 1868 and 1851 Fort Laramie Treaties, confers consultation rights to the intervenor Tribes. Whether the footprint of the proposed project extends to these sites, to which the Tribes have consultation rights because of the Treaties, is for the fact finder at the hearing. The Tribes' rights relating to these sites is codified under federal statutes such as NAGPRA, 25 U.S.C. §3002(a)(2)(C)(1), and regulations under the NHPA, 36 CFR §800.2(c)(2)(ii)(D), whose processes are relied upon by the SHPO and archaeologists for industry in the evaluation of projects on traditional cultural properties.

The delineation of aboriginal territories in Tribal Treaties confers on Tribes rights of ownership and in the consideration of impacts to cultural properties within these territories. In order to fulfill its duties under SDCL §45-6D-29(3), it is important for the

Board to consider whether the project is within the Treaty boundaries of the Tribes, and how that affects the identification and evaluation of impacts to traditional cultural properties.

The project area in this docket is within such a Treaty-defined territory, and consequently without question evidence of the Fort Laramie Treaties is relevant to the issues before the Board. The Motion in Limine to Preclude Evidence of Tribal Treaties should be denied.

The Motion in Limine misconstrues the standard for relevance under Rule 401

In South Dakota, "Our rules favor 'the admission of evidence in the absence of strong considerations to the contrary." *State v. Guthrie*, 627 N.W.2d 401, 407 (S.D. 2001) quoting State v. Wright, 593 N.W.2d 792, 799. The South Dakota Court interprets the relevance statute liberally. *Supreme Pork Inc. v. Master Blaster, Inc.*, 746 N.W.2d at 488. The Court explained, "Rule 401 uses a lenient standard for relevance," and explicitly rejected a "narrow interpretation of relevant evidence under the rules." *Id*. at 487-488. Any broad request for "preclusion" based upon relevancy must be viewed skeptically.

The applicant contends "The Board of Minerals is not the place to relitigate Tribal Treaty rights issues that have been adjudicated at the Nation's highest Court." *Motion in Limine*, p. 2. No one is asking for that. As discussed below, in order to properly consider the criteria for issuance of the uranium exploration permit in SDCL §45-6D-29(3), the Board must determine whether the intervenor Tribes enjoy certain rights under federal law to cultural sites that may be affected by the application, because those sites are within

the Tribe's Treaty territory. Consequently, the Tribal Treaties constitute admissible evidence under SDCL §19-12-1.

RESPECTFULLY SUBMITTED this 2nd day of January 2026

By: Chase Iron Eyes

Chase Iron Eyes
Attorney at Law
Post Office Box 393
Pine Ridge, South Dakota 57770
(605) 415-9238
Chase@Lakotalaw.org
S.D. Bar No. 3981

Peter Capossela

Peter Capossela, PC
Attorney at Law
Post Office Box 10643
Eugene, Oregon 97440
(541) 505-4883
peter@pejutatokahe.com

Admitted pro hac vice

BEFORE THE STATE OF SOUTH DAKOTA
DEPARTMENT OF AGRICULTURE AND NATURAL RESOURCES

BOARD OF MINERALS AND ENVIRONMENT

IN THE MATTER OF CLEAN NUCLEAR ENERGY CORP. URANIUM EXPLORATION PERMIT APPLICATION	)
EXNI 453	)

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this day, the afore motion and proposed brief were served via electronic mail to:

Brenda Binegar
Brenda.Binegar@state.sd.us

Bob Morris
bobmorris@westriverlaw.com

Matthew Naasz
mnaasz@gpna.com

George Nelson
gjnlaw@gmail.com

All other individual pro se intervenors at
CCintervenors@Dakotarural.org

Rebecca Terk, Dakota Rural Action, Inc.
Rebecca@dakotarural.org

Brenda Gamache
Brendagamache49@gmail.com

The undersigned further certifies that on this day, a copy of the afore was served via U.S. mail with proper postage affixed to:

Steven R. Blair
Deputy Attorney General
P.O. Box 70
Rapid City, S.D. 57702

Cheryl Angel
1212 Columbus St.
Rapid City, S.D. 57701

Ruddell Bear Shirt
P.O. Box 88
Wounded Knee, S.D. 57794

Robert Bordeaux
740 University St. Apt. 3
Spearfish, S.D. 57783

Candi Brings Plenty
725 Saint Charles St.
Rapid City, S.D. 57701

Mashanaposhe Camp
P.O. Box 339
Porcupine, S.D. 57772

Kimberly Craven
CRST Attorney General
P.O. Box 590
Eagle Butte, S.D, 57625

Marla Cooley
145 S. Garden St.
Hot Springs, S.D. 57747

Jeremiah "Jay" Davis
130 East Centennial St.
Rapid City, S.D. 57701

Seth Eagle Bear Jr.
P.O. Box 44
Wounded Knee, S.D. 58894

Beverly Katz
Asst. Attorney General
1302 E. S.D. Highway 1889 Ste. 1
Pierre, S.D. 57501-8501

Beverly Larson
P.O. Box 82
Wounded Knee, S.D. 57794

Caryn Lerman
337 S. 5th St.
Hot Springs, S.D. 57747

Elizabeth Lone Eagle
202 Bald Eagle Lane Box 11
Rapid City S.D. 57701

Ailene Maea
715 Haines Ave. Apt. 3
Rapid City, S.D. 57701

Susan McPhail Pang
28017 Cascade Rd.
Hot Springs, S.D. 57747

Michael Melius
Black Hills Chapter Sierra Club
P.O. Box 1624
Rapid City, S.D. 57709

George Nelson
Attorney at Law
2640 Jackson Blvd. Ste. 1
Rapid City, S.D. 57702

Thomas O'Connor
4601 Mohawk St.
Lincoln, NE 68510

Gena Parkhurst
514 Americas Way #20805
Box Elder, S.D. 57719

Law Office of Bruce Ellison
P.O. Box 2508
Rapid City, S.D. 57709

Brenda Gamache
2337 Wilson Ave.
Hot Springs, S.D. 57747

Denise Giago
221 E. Jackson St.
Rapid City, S.D. 57701

Taylor Gunhammer
221 E. Jackson St.
Rapid City, S.D. 57701

Steven Gunn
OST Legal Dept.
P.O. Box 1204
Pine Ridge, S.D. 57770

Delores Hawk Wing
P.O. Box 25
Wounded Knee, S.D. 57794

Susan Hey
312 N. 40th St.
Rapid City, S.D. 57702

Lillias Jones Jarding
P.O. Box 591
Rapid City, S.D. 57709

Sarah Peterson
510 Jennings
Hot Springs, S.D. 57747

Julie Plachta
P.O. Box 635
Hot Springs, S.D. 57747

Reno Red Cloud
P.O. Box 4052
Pine Ridge, S.D. 57770

Helen Red Feather
P.O. Box 173
Wounded Knee, S.D. 57794

Jean Roach
3711 Ivy Ave.
Rapid City, S.D. 57701

Sanders Schaller
322 4th St.
Smithwick, S.D. 57782

Ben R. Sharp
28290 Flagpole Rd.
Hot Springs, S.D. 57747

Tonya Stands
202 Bald Eagle Lane #8
Rapid City, S.D. 57701

Michelle Tyon
P.O. Box 1838
Pine Ridge, S.D. 57770

DATED this 5th day of January 2026

Peter Capossela