

From: Rebecca Terk <rebeccat@dakotarural.org>
Sent: Tuesday, January 27, 2026 3:45 PM
To: Binegar, Brenda <Brenda.Binegar@state.sd.us>
Cc: Bridger Advocate <bridgeradvocate@gmail.com>
Subject: [EXT] EXNI 453 Brief Treaty Rights

Good afternoon Brenda,

Attached please find Intervenor Elizabeth Lone Eagle's Brief in Opposition to CNEC Motion to Preclude Consideration of Treaty Rights.

The original is being sent to you via USPS this afternoon, with copies mailed to all listed on the appended certificate of service.

Thank you.

Rebecca

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Rebecca M. Terk (she/hers)

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"DRA is a grassroots family agriculture and conservation group that organizes South Dakotans to protect our family farmers and ranchers, natural resources, and unique way of life."

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 ELIZABETH LONE EAGLE'S BRIEF IN OPPOSITION TO CLEAN NUCLEAR
ENERGY CORPORATION MOTION TO PRECLUDE CONSIDERATION OF TREATY RIGHTS

I. INTRODUCTION

Applicant Clean Nuclear Energy Corp. ("CNEC") asks this Board to do something it has no lawful authority to do: to blind itself to controlling federal law by categorically excluding evidence and argument concerning Tribal treaty rights from the hearing on the merits of Permit Application EXNI 453. The motion is not a neutral procedural request. It is an attempt to pre-decide the scope of the evidentiary record in a manner that favors the applicant while stripping intervenors of the ability to present legally relevant evidence bearing directly on the Board's statutory duties.

As an Intervenor, I do not ask this Board to adjudicate title to the Black Hills, to re-litigate the Fort Laramie Treaties, or to issue declaratory judgments regarding treaty interpretation. That framing is a strawman advanced by the applicant. Treaty rights are raised because they remain enforceable federal law and because they are directly relevant to whether this proposed uranium exploration complies with governing law, protects public resources, and serves the public interest. The Board cannot lawfully exclude such evidence simply by declaring itself an "inappropriate forum."

For these reasons, the applicant's motion must be denied.

II. STANDARD GOVERNING MOTIONS TO PRECLUDE EVIDENCE

A motion to preclude is an extraordinary remedy. Evidence may be excluded only where it is irrelevant as a matter of law or where its probative value is substantially outweighed by unfair prejudice or confusion. Evidence is relevant if it has any tendency to make a fact of consequence more or less probable. Where evidence bears on statutory criteria the Board is required to consider, categorical preclusion is improper and constitutes reversible error.

III. TREATY RIGHTS ARE RELEVANT TO THE BOARD'S STATUTORY DUTIES

A. The Board Is Required to Apply All Applicable Law, Including Federal Law

Under Article VI of the United States Constitution, treaties are the supreme law of the land. State agencies are bound by federal treaties no less than state courts. The Board may not authorize conduct that conflicts with federally protected rights, nor may it insulate itself from federal law by declining to hear evidence implicating those rights.

The issue is not whether this Board can issue rulings on treaty ownership. It is whether the Board can approve a permit while refusing to consider evidence that the permitted activity may impair rights protected by superior federal law. The answer is no.

B. Treaty Rights Are Directly Relevant to Environmental Review and the Public Interest

SDCL § 45-6D-29 requires the Board to evaluate environmental impacts, impacts to water resources, and whether the proposed exploration is consistent with the public interest. Treaty-reserved rights to land use, water, wildlife, and cultural resources are inseparable from these considerations.

Evidence concerning treaty rights directly informs:

- Impacts to surface and groundwater;
- impacts to wildlife and habitat;
- impacts to cultural, historic, and spiritual resources;
- cumulative and long-term environmental effects; and
- whether the proposed activity serves or undermines the public interest.

Excluding treaty-based evidence would artificially narrow the record and prevent the Board from performing the analysis required by statute.

IV. CONSIDERATION OF TREATY RIGHTS DOES NOT REQUIRE THE BOARD TO ADJUDICATE OR INTERPRET TREATIES

The applicant's motion rests on a fundamental mischaracterization. Considering treaty rights as part of an environmental and public-interest analysis does not require the Board to adjudicate treaty boundaries, determine compensation, or exercise purely judicial powers.

Administrative agencies routinely apply federal law in the course of decision-making. Doing so is not an impermissible exercise of judicial authority; it is a legal obligation. The Board's task is to determine whether issuance of a permit would authorize activity that conflicts with existing law. Declining to consider treaties does not preserve neutrality—it guarantees legal error.

V. THE SUPREME COURT'S 1980 DECISION DOES NOT RENDER TREATY RIGHTS IRRELEVANT

The applicant's reliance on *United States v. Sioux Nation of Indians* is misplaced. That decision addressed compensation for an unlawful taking of tribal land. It did not hold that treaty-reserved rights were extinguished for all purposes, nor did it declare treaties irrelevant to future governmental actions affecting land, water, or resources.

Courts have repeatedly recognized that treaty rights may survive land cessions and continue to constrain state action, particularly where natural resources and cultural practices are implicated. A monetary judgment does not convert treaties into historical artifacts devoid of present legal effect.

VI. THE BOARD CANNOT EVADE FEDERAL LAW BY DECLINING TO HEAR RELEVANT EVIDENCE

A state agency cannot avoid its obligations under federal law by labeling an issue "outside its jurisdiction." If certain disputes ultimately belong in federal court, the proper course is not

categorical exclusion, but careful consideration of treaty-based evidence to the extent it bears on permit compliance.

Granting the applicant's motion would:

- produce an incomplete and legally defective administrative record;
- expose the Board's decision to reversal on judicial review; and
- improperly elevate applicant convenience over lawful decision-making.

VII. PUBLIC POLICY AND TRUST OBLIGATIONS COMPEL DENIAL OF THE MOTION

The State holds public lands and resources in trust for the people of South Dakota. Where federal treaties recognize enduring Tribal relationships to land and resources, the Board's responsibilities require deliberate consideration, not preemptive silencing.

Excluding treaty-based evidence at the outset undermines the integrity of the administrative process, erodes public confidence, and risks authorizing activity that may later be found unlawful.

VIII. CONCLUSION

The applicant's motion seeks insulation from inconvenient law, not procedural clarity. Treaty rights are relevant, enforceable, and legally necessary considerations in the evaluation of the Clean Nuclear Energy Corp. uranium exploration permit application EXNI 453.

For these reasons, Intervenor Elizabeth Lone Eagle respectfully requests that the Board deny Applicant's Motion to Preclude Consideration of Treaty Rights in its entirety.

Respectfully submitted,



Elizabeth Lone Eagle
Intervenor
EXNI 453

Undersigned individual intervenors affirm support of EXNI 453 Treaty Rights Brief submitted by Elizabeth Lone Eagle:

- 1) Maile Coo
Maile Cooley
- 2) Julie Plachta
Julie Plachta
- 3) Sarah Peterson
Sarah Peterson
- 4) Gena Parkhurst
Gena M. Parkhurst
- 5) Sanders Schaller
Sanders Schaller
- 6) Ben Sharp
BEN R SHARP
- 7) Caryn Lerman
Caryn Lerman
- 8) Cheryl Angel
CHERYL ANGEL
- 9) Helen Redfeather
HELEN RED FEATHER.
- 10) Elizabeth Lone Eagle
Elizabeth Lone Eagle
- 11) Beverly Larson
Beverly Larson
- 12) Red Bear Shirt
Red Bear Shirt
- 13) Jean Roach
Jean Roach
- 14) Taylor Gunhammer
Taylor Gunhammer
- 15) Denise Gago
Denise Gago
- 16) Lilia Jones Tardine
Lilia Jones Tardine

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the original of the Intervenor Elizabeth Lone Eagle's Brief in Opposition to CNEC Motion to Preclude Consideration of Treaty Rights was served electronically, and by via United States Mail, First Class, Postage Prepaid upon the following to be filed in the above captioned matter:

Brenda Binegar
Department of Agriculture & Natural Resources
523 E Capitol Ave Pierre, SD 57501
Email: Brenda.Binegar@state.sd.us

Further, the undersigned certifies that true and correct copies of the above referenced documents were served via United States Mail, First Class, Postage Prepaid upon the following:

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Dated this 27 day of January, 2026

Signature:

Rebecca M Terk
Rebecca M Terk