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Subject: [EXT] CNEC EXNI 453

Good evening.

Attached for filing please find the Brief of Cheyenne River Sioux Tribe and Oglala Sioux Tribe on Admissibility and Relevance of Evidence Relating to Treaties.

I am sending a courtesy copy to the Hearing Officer.

Thank you.

Steven J. Gunn
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STATE OF SOUTH DAKOTA
DEPARTMENT OF AGRICULTURE & NATURAL RESOURCES

BOARD OF MINERALS AND ENVIRONMENT

IN THE MATTER OF CLEAN NUCLEAR ENERGY CORP. URANIUM EXPLORATION PERMIT APPLICATION EXNI 453	)	**BRIEF OF CHEYENNE RIVER SIOUX TRIBE AND OGLALA SIOUX TRIBE ON ADMISSIBILITY AND RELEVANCE OF EVIDENCE RELATING TO TREATIES**

The Cheyenne River Sioux Tribe and the Oglala Sioux Tribe (collectively "Intervenor Tribes") submit this brief in response to the motion of Clean Nuclear Energy Corp. ("CNEC") to exclude from the hearing on the merits "evidence, testimony and argument regarding Treaty rights concerning the property on which the exploration project will be located," CNEC Motion at p. 3 (Dec. 1, 2025), and in response to the Order on Pre-Hearing Motions (Jan. 20, 2026).

INTRODUCTION

The Intervenor Tribes do not invite a ruling by the Hearing Officer or the Board of Minerals and Environment on their "Treaty rights" or on the continuing force of those rights. That said, the fact that the proposed exploration area and surrounding lands are within the treaty-recognized territory of the Intervenor Tribes is a significant fact that is relevant to the determination of adverse effects under S.D.C.L. § 45-6D-29. So, too, is the fact that the proposed exploration area is within the Black Hills, which are sacred to the Intervenor Tribes, and which are the site of their most sacred cultural and religious ceremonies.

Under state law, the Board may not issue a uranium exploration permit if the adverse effects on historic, archaeologic, recreational, and other aspects of the land outweigh the benefits of the proposed exploration, *id*. at § 45-6D-29(3), or if the proposed exploration will harm watershed lands, wells, aquifers, or significant agricultural areas, *id*. at § 45-6D-29(4), or if the proposed exploration will adversely affect threatened or endangered wildlife, *id*. at § 45-6D-29(5).

Every party to this proceeding has the right to "present evidence in support of the party's interest." S.D.C.L. § 1-26-18. This includes "evidence on issues of fact and argument on issues of law or policy." *Id*. The hearing officer may exclude "irrelevant, incompetent, immaterial, or unduly repetitious evidence." S.D.C.L. § 1-26-19(1). The civil court rules of evidence generally apply in administrative proceedings, *id.*; *DuBray v. South Dakota Dept. of Social Services*, 690 N.W.2d 657, 661 (2004), and those rules use "a lenient standard for relevance," *Supreme Pork, Inc. v. Master Blaster, Inc.*, 764 N.W.2d 474, 488 (2009).

The Intervenor Tribes submit that all parties should be permitted to offer relevant evidence at the hearing on the merits, including evidence related to the federal government's treaties with

the Sioux tribes, and the Hearing Officer should rule on any objections to the relevance of that evidence at the time it is offered. The Hearing Officer should not issue a preemptive order precluding parties from offering evidence on the treaties. Further, all parties should be permitted to offer argument on issues of law, including issues related to the treaties, and the Hearing Officer should not issue an order preempting such arguments before the hearing commences.

TRIBAL TREATIES

The Intervenor Tribes are signatories to the Fort Laramie Treaty of 1851, 11 Stat. 749 (Sept. 17, 1851), and the Fort Laramie Treaty of 1868, 15 Stat. 635 (Apr. 29, 1868). These treaties are the supreme law of the land. U.S. Const., art. VI, cl. 2. It is undisputed that the Black Hills, Craven Canyon, and the proposed exploration area are all within the territory set apart for the Sioux tribes in both treaties. The hearing officer may take notice of these "judicially cognizable facts." S.D.C.L. § 1-26-19(2).

The Intervenor Tribes disagree with CNEC's characterization of the Fort Laramie Treaties of 1851 and 1868, including CNEC's characterization of the continuing force of the treaties. For example, CNEC argues that the Act of February 28, 1877, 19 Stat. 254, abrogated the Fort Laramie Treaty of 1868. However, the 1877 Act expressly provides that, except as modified therein, the provisions of the Fort Laramie Treaty of 1868 "shall continue in full force." 1877 Act, art. 8. The United States has reaffirmed the continuing force of the Fort Laramie Treaty of 1868 in subsequent legislation. *See*, *e.g.*, Act of March 2, 1889, 25 Stat. 888, § 19 ("all provisions of the said treaty … not in conflict with the provisions and requirements of this act, are hereby continued in force according to their tenor and limitations, anything in this act to the contrary, notwithstanding"). Further, the federal courts continue to enforce the federal government's obligations under the Fort Laramie Treaty of 1868. *See*, *e.g.*, *Rosebud Sioux Tribe v. United States*, 9 F.4th 1018, 1026 (8th Cir. 2021); *Richard v. United States*, 677 F.3d 1141, 1153 (Fed. Cir. 2012); *Elk v. United States*, 87 Fed. Cl. 70, 82–83 (2009).

The Intervenor Tribes maintain that they have unextinguished rights that touch and concern the proposed exploration area, including the surrounding federal lands. In its brief in opposition to CNEC's motion, the Great Plains Tribal Water Alliance provided two examples of such rights in the affected area. First, under the Native American Graves Protection and Repatriation Act, the Intervenor Tribes have ownership rights to cultural items, including sacred objects and cultural patrimony, on federal and tribal land within their treaty territory, including the Black Hills. *See* 25 U.S.C. § 3002(a)(2)(C)(1). *See also* 25 U.S.C. § 3001(3). Second, under the National Historic Preservation Act, the Intervenor Tribes have the right to consultation on actions that may affect historic properties of religious and cultural significance within their aboriginal and treaty territory. *See* 36 C.F.R. § 800.2(c)(2)(ii)(D).

There are numerous other examples. For example, the Intervenor Tribes have the right to petition the Secretary of the Interior to take land into trust in the Black Hills, *see* 25 U.S.C. § 5108, and the Secretary is directed to give "great weight" to land acquisitions that protect tribal homelands, sacred sites, and cultural resources, *see* 25 C.F.R. § 151.3(b)(3), and acquisitions that protect treaty rights, *see* 25 C.F.R. § 151.9(b)(7). In recent years, several Sioux tribes purchased the sacred lands known as *Pe' Sla* in the Black Hills. The Secretary of the Interior approved an

application made by the tribes to take *Pe' Sla* into trust. The tribes have kept the lands in their original and natural state, reintroducing buffalo and other natural species, and preserving the area for traditional cultural and religious ceremonies.

The Intervenor Tribes have the right to enter co-stewardship agreements with the U.S. Departments of Agriculture and the Interior concerning the management of lands and resources within their treaty territory, including the Black Hills. *See* Joint Secretarial Order on Fulfilling the Trust Responsibility to Indian Tribes in the Stewardship of Federal Lands and Waters, Order No. 3403 (Nov. 15, 2021). The Intervenor Tribes were among eight Sioux tribes to enter an agreement with the U.S. Forest Service concerning stewardship and protection of the Black Hills National Forest. *See* Memorandum of Understanding between Great Sioux Nation Tribes (Cheyenne River Sioux Tribe, Crow Creek Sioux Tribe, Flandreau Santee Sioux Tribe, Lower Brule Sioux Tribe, Oglala Sioux Tribe, Rosebud Sioux Tribe, Santee Sioux Tribe of Nebraska, Sisseton-Wahpeton Oyate, Standing Rock Sioux Tribe, Spirit Lake Sioux Tribe, and Yankton Sioux Tribe) and USDA, Forest Service, Rocky Mountain Region, Black Hills National Forest, FS Agreement No. 24-MU-11020300-045 (Aug. 22, 2024).[1]

The Intervenor Tribes already informed the Board that they reserve their rights under the treaties and federal law, and they do not, in any way, waive those rights in this proceeding or otherwise. The Intervenor Tribes also already informed the Board that they do not invite a ruling by the Hearing Officer of the Board on their treaty rights or on the continuing force of those rights. The Intervenor Tribes' federal treaty rights are not subject to interpretation, restriction, or limitation in a state administrative proceeding. Tribal treaty rights are subject to the exclusive jurisdiction of the federal government and tribal governments. State administrative agencies lack the authority to interpret, restrict, or limit tribal treaty rights absent express congressional authorization and tribal consent, neither of which is present in this case. Further, the Intervenor Tribes assert that a ruling by the Board on any treaties to which the Intervenor Tribes are parties would be inappropriate without the full participation of all other Tribes that are signatories and parties to those treaties, since those Tribes would be necessary and indispensable parties.

THE BLACK HILLS

The Black Hills have extraordinary historic, cultural, and religious significance to the Intervenor Tribes and all other tribes of the *Oceti Sakowin*, or Seven Council Fires of the Great Sioux Nation. The significance of the Black Hills to the *Oceti Sakowin* is reflected by the fact that the Black Hills are included within the treaty territory of the Great Sioux Nation.

> To the Indian spiritual way of life, the Black Hills is the center of the Lakota people. There ages ago, before Columbus came over the sea, seven spirits came to the Black Hills. They selected that area, the beginning of sacredness to the Lakota people. The seventh spirit brought the Black Hills as a whole – brought it to the Lakota forever, for all eternity, not only in this life, but in the life hereafter. The two are tied together. Our people that have passed on, their spirits are contained in the Black Hills. This is

[1] This list of examples is by no means exhaustive.

> why it is the center of the universe, and this is why it is sacred to the [Lakota people]. In this life and the life hereafter, the two are together.

Alexandra New Holy, *The Heart of Everything That Is: Paha Sapa, Treaties, and Lakota Identity*, 23 Okla. City U. L. Rev. 317, 318 (1998) (quoting Lakota medicine man Pete Catches).

The Lakota people refer to the Black Hills as *Pahá Sápa or He Sapa.* They are the center of the universe – "the heart of everything that is." New Holy, *The Heart of Everything That Is*, 23 Okla. City. U. L. Rev. at 318 (quoting Charlotte Black Elk). The Lakota first emerged onto the earth in the Black Hills. *Id*. at 322. The Black Hills are the site of the most sacred Lakota sacraments and ceremonies. Since time immemorial, and still today, Lakota people commune with the Creator in the Black Hills. They gather plants for medicinal and religious purposes in the Black Hills. They pray, perform ceremonies, and perform other rituals in the Black Hills. The Black Hills are essential to Lakota religious practice, culture, identity, and the Lakota way of life.

RELEVANCE

The Intervenor Tribes (and all other parties) should be able to offer evidence of the historic, cultural, and religious significance of the Black Hills and of their traditional and ongoing use of land within the Black Hills, including land on or near the proposed exploration area, for cultural and religious ceremonies, hunting, fishing, gathering, and other purposes. This evidence is relevant to the Board's determinations under S.D.C.L. § 45-6D-29(3), (4) & (5).

The South Dakota Supreme Court has adopted "a lenient standard for relevance." *Supreme Pork, Inc. v. Master Blaster, Inc.*, 764 N.W.2d 474, 488 (2009). This standard "permits evidence to be admitted even if it only slightly affects the trier's assessment of the probability of the matter to be proved." *Id.* (citation omitted). The court explained that, "even though each piece of evidence considered separately is less than conclusive, if when considered collectively with other evidence it tends to establish a consequential fact, such evidence is relevant." *Id*.

The lenient standard for relevance is illustrated by the South Dakota Supreme Court's ruling in *State v. Bowker*, 754 N.W.2d 56, 68 (2008), that "the law favors admitting relevant evidence no matter how slight its probative value" and that it is sufficient that the evidence has a tendency to make a consequential fact even the least bit more probable or less probable than it would be without the evidence. The court has consistently reaffirmed this approach in recent decisions, including *Knecht v. Evridge*, 940 N.W.2d 318 (2020), and *State v. Hankins*, 982 N.W.2d 21 (2022). This lenient standard applies equally in administrative proceedings.

DEFERRED RULING

The traditional purpose of a motion in limine is to prevent prejudicial evidence from reaching the ears of a jury. This is not a concern in an administrative hearing with no jury. The courts have long held that, "when an action is tried to the court, the presumption is that improperly admitted testimony is disregarded." *Matter of R.S.S.*, 474 N.W.2d 743, 750 (1991).

Due process requires consistent and fair application of evidentiary rules for all parties, and a blanket, pre-hearing order preventing all parties from offering relevant evidence would deprive the parties of their due-process right to be heard and to "present evidence in support of the party's interest." S.D.C.L. § 1-26-18. Instead of issuing a pre-hearing order, the Hearing Officer should rule on evidentiary objections as they arise. The Hearing Officer should also defer to the hearing any ruling on arguments concerning admitted evidence, including arguments related to treaties.

CONCLUSION

For the foregoing reasons, the Intervenor Tribes respectfully submit that CNEC's motion should be denied.

Dated: February 10, 2026

By: _____

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CERTIFICATE OF SERVICE

I certify that on February 10, 2026, I caused a true and correct copy of the foregoing to be served electronically, facsimile, and by U.S. mail, postage prepaid, for filing upon the following:

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