June 2, 2009

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY & LICENSING BOARD

In the Matter of	)	
	)	
COGEMA MINING, INC.	)	Docket No. 40-8502-MLA
	)	
(Christensen & Irigaray Ranch Facilities)	)	
	)	

NRC STAFF'S RESPONSE TO THE OGLALA DELEGATION'S
MEMORANDUM REGARDING THE BOARD'S ORDER DATED MAY 21, 2009

INTRODUCTION

Pursuant to the Atomic Safety & Licensing Board's ("Board") Order dated May 21, 2009,[1] the NRC staff ("Staff") hereby responds to "Petitioner's Memorandum RE: Order dated May 21, 2009" ("Memorandum") filed by the Oglala Delegation of the Great Sioux Nation Treaty Council ("Petitioner" or "Delegation") on May 28, 2009. The Staff submits that the Delegation fails to demonstrate that it (1) "Is a 'local governmental body' duly elected, appointed or established by the relevant procedures within its Nation;" (2) "Is a 'federally recognized Indian tribe' as that term is used in 10 C.F.R. §§ 2.309(d) or 2.315(c), or any other relevant Federal law or regulation;" (3) "Is an entity which *must* be consulted under the National Historic Preservation Act pursuant to 36 C.F.R. § 800.2(c)(2);" and (4) "Is an 'Indian Tribe" within the meaning of 36 C.F.R. § 800.16(m)."[2] The Delegation also fails to establish that it has standing as required by 10 C.F.R. § 2.309(d)(1). Furthermore, there is also a fundamental discrepancy in Chief Oliver Red Cloud's revised affidavit.

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[1] Order (Setting Oral Argument and Briefing of Specified Issues) (May 21, 2009) ("Order").

[2] *Id.* at 3 (emphasis in original).

BACKGROUND

COGEMA Mining, Inc. ("COGEMA" or "Applicant') is licensed to operate an in-situ leach ("ISL") operation at the Irigaray / Christensen Ranch facilities located in Johnson and Campbell Counties, Wyoming.[3] On May 30, 2008, COGEMA filed with the NRC a license amendment application ("Application") (ADAMS Accession Package No. ML081850689), requesting renewal of its source materials license for the standard 10-year period.[4] In a letter to COGEMA dated December 29, 2008, the NRC Staff stated that it had found, per its administrative review, the Application acceptable to begin a technical review.[5] On February 9, 2009, a notice of opportunity to request a hearing or petition to intervene was published in the Federal Register.[6]

On April 10, 2009, the Delegation filed a timely request for hearing and petition for leave to intervene in the instant proceeding.[7] The Applicant and the Staff filed responses to the Petition on May 5, 2009.[8] On May 12, 2009, the Delegation filed a consolidated reply to the Applicant's and to the Staff's responses.[9]

In the Petition, the Delegation averred that it is "a local governmental body and … an

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[3] COGEMA possesses a source material license, SUA-1341.

[4] Letter from Tom Hardgrove to William von Till (dated May 30, 2008).

[5] Letter from William von Till to Tom Hardgrove (dated December 29, 2008).

[6] Notice of Request to Renew Source Materials License SUA-1341, COGEMA Mining, Inc., Christensen and Irigaray Ranch Facilities, Johnson and Campbell Counties, WY, and Opportunity to Request a Hearing, 74 Fed. Reg. 6,436 (Feb. 9, 2009).

[7] "Request for Hearing and Petition for Leave to Intervene" (April 10, 2009) ("Petition").

[8] "COGEMA's Answer Opposing Oglala Delegation of the Great Sioux Nation Treaty Council Request for hearing and Petition for Leave to Intervene" (May 5, 2009); "NRC Staff's Response to Request for Hearing and Petition to Intervene of the Oglala Delegation of the Great Sioux Nation Treaty Council" (May 5, 2009) ("Staff's Response").

[9] "Petitioner's Consolidated Reply to Applicant and NRC Staff Answers to Petition to Intervene of the Oglala Delegation of the Great Sioux Nation Treaty Council" (May 12, 2009) ("Reply").

affected Indian tribe."[10] As such, the Delegation argued that it had standing pursuant to 10 C.F.R. § 2.309(d)(2)(i).[11] However, the Delegation requested in the Petition "a reasonable time from notice of that decision to submit additional information in satisfaction of 10 CFR § 2.309(d)(1)" should it be found that 10 C.F.R. § 2.309(d)(2)(i) is inapplicable to it.[12] As to those statements and requests, the Board ordered the Delegation, on or before May 28, 2009, to

1. Submit a memorandum, that documents or demonstrates that the Oglala Delegation:
    a. Is a 'local governmental body' duly elected, appointed or established by the relevant procedures within its Nation;
    b. Is a 'federally recognized Indian tribe' as that term is used in 10 C.F.R. §§ 2.309(d) or 2.315(c), or any other relevant Federal law or regulation;
    c. Is an entity which must be consulted under the National Historic Preservation Act pursuant to 36 C.F.R. § 800.2(c)(2); and
    d. Is an 'Indian Tribe' within the meaning of 36 C.F.R. § 800.16(m).
2. Submit whatever 'additional information' (assuming 10 C.F.R. § 2.309(d)(2) is inapplicable) that documents and demonstrates that the Oglala Delegation has standing as required by 10 C.F.R. § 2.309(d)(1).
3. Submit an affidavit or declaration from Chief Oliver Red Cloud, authorizing the Oglala Delegation to represent him *in this proceeding*.[13]

The Board permitted, on or before June 2, 2009, the Applicant and the Staff to, respectively, submit responses to the foregoing submissions of the Delegation.[14]

On May 28, 2009, pursuant to the Board's directions, the Delegation filed the above-referenced Memorandum. The Staff's response is set forth below.

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[10] Petition at 11.

[11] *Id.*

[12] *Id.* at 12.

[13] Order at 3-4 (emphasis in original).

[14] *Id.* at 4.

DISCUSSION

I. Is the Delegation a "Local Governmental Body" Duly Elected, Appointed or Established by the Relevant Procedures within its Nation?

A. Petitioner's Argument.

According to the Petitioner, "[t]he Oglala Delegation is the unbroken traditional entity established by the Oglala Lakota to negotiate and enter into treaties between the Oglala Lakota and the United States, and to ensure the enforcement of the same. The Oglala Delegation is the only entity so selected and maintained through the traditional governing mechanisms."[15] Unlike the Oglala Sioux Tribe, which is a creation of the Indian Reorganization Act ("IRA"),[16] the Delegation "is not a creation of, or beholden to the IRA. [The Delegation] is beholden to the traditions of the Oglala Lakota and to its, now largely unilateral, adherence to the terms negotiated and agreed in the treaties."[17] In addition, the Delegation claims that "[i]t is an expression of the sovereignty of the Oglala Lakota people in accordance with the Lakota culture and traditional political ways and it is what remains under the IRA should the [Oglala Sioux Tribe] vote to exclude itself from Section 16 of the IRA."[18] For these reasons, the Delegation posits that it should be treated as a local governmental body.[19]

B. Staff's Response.

The Staff reiterates and reaffirms the position taken in its Response, that the Petitioner

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[15] Memorandum at 1-2.

[16] As amended, 25 U.S.C. 461 *et seq*.

[17] Memorandum at 3-4 (emphasis in original).

[18] *Id.* (*citing* 42 U.S.C. § 478b).

[19] *Id.* at 4.

does not qualify as a governmental entity for the purposes of section 2.309(d)(2)(i).[20] The Commission has stated that

> [n]ot all organizations with governmental ties are entitled to participate in our proceedings as a 'local governmental body (county, municipality, or other subdivision)' under section 2.309(d)(2), in much the same way not all organizations with governmental ties were entitled to participate in our proceedings as governmental agencies under our former regulation, 10 C.F.R. § 2.715(c), regarding participation by nonparties. Under that former section, an *advisory body that lacked executive or legislative responsibilities was determined by the Commission to be 'so far removed from having the representative authority to speak and act for the public that [it did] not qualify' as a governmental entity for the purpose of section 2.715(c).*[21]

Nowhere is it stated in the Petition or the Memorandum that the Delegation currently holds in any fashion executive or legislative authority over the Oglala Sioux Tribe. Nowhere is it asserted that the Delegation has representational authority to speak and act on behalf of the Oglala Sioux Tribe before the NRC.[22] Furthermore, nowhere is it stated, in either the Petition or the Memorandum, that Delegation has been delegated representational authority by the Oglala Tribal government. Therefore, based on its own assertions, the Delegation does not qualify as a local governmental body for the purposes of section 2.309(d)(2)(i).

The only claim made by the Petitioner in its Memorandum that is not made in its Petition is that pursuant to the IRA, 25 U.S.C. § 478b, if in the event that the Oglala Sioux Tribe were in

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[20] *See* Staff's Response at 12-13.

[21] Staff's Response at 12 (*quoting Consumers Energy Co., Nuclear Management Co., LLC, Entergy Nuclear Palisades, LLC, and Entergy Nuclear Operations, Inc.* (Palisades Nuclear Power Plant), CLI-07-08, 65 NRC 399, 408-09 (2007) (emphasis added) (*quoting Yankee Atomic Elec. Co.* (Yankee Nuclear Power Station), CLI-98-21, 48 NRC 185, 202-03 (1998) ("Not all organizations with governmental ties are entitled to participate in our proceedings as governmental 'agencies.' The Federal, state and local governments are all replete with numerous boards, commissions, advisory committees, and other organizations-all of which have governmental or quasi-governmental responsibilities. … We conclude that advisory bodies, by their very nature, are so far removed from having the representative authority to speak and act for the public that they do not qualify as governmental entities for purposes of section 2.715(c).")).

[22] *See Consumers Energy*, CLI-07-18, 65 NRC at 412 n.37.

the future to exclude itself from recognition by the IRA, "[a]ll laws, general and special, and all treaty provisions affecting [the Oglala Sioux] reservation … shall be deemed to have been continuously effective as to such reservation, notwithstanding the passage of [the IRA]."[23] However, the Delegation does not make clear why it would constitute the remaining governmental entity if the Oglala Sioux Tribe were to exclude itself from recognition under the IRA.[24] Even if that were the case, the Petitioner does not manifest in what manner it *currently* operates as a local governmental entity of the Oglala Sioux Tribe. Thus, the Petitioner does not establish that it qualifies as a local governmental entity duly elected and established by the Oglala Sioux Nation.

II. Is the Delegation a "Federally Recognized Indian Tribe" as that Term is Used in 10 C.F.R. §§ 2.309(d) or 2.315(c), or any other Relevant Federal Law or Regulation?

A. Petitioner's Argument.

The Petitioner argues that it should be considered a federally-recognized Indian tribe.[25] The Petitioner claims that "[i]f the Oglala Delegation, as representative of the Oglala Lakota in matters related to treaty territory, is not a 'federally recognized Indian tribe' then the definition employed by the US to recognize an Indian tribe is flawed, arbitrary and capricious."[26] According to the Petitioner, "[t]he mere fact that the Oglala Delegation is required to argue to justify 'recognition' of its own existence, in English, with the very nation that has the most interest in ignoring it strains the trust responsibility owed to the Oglala Delegation."[27]

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[23] *See* Memorandum at 2-3.

[24] *See id.*

[25] Memorandum at 3-5.

[26] *Id.* at 4.

[27] *Id.*

Furthermore, the Petitioner asserts that, according to applicable canons of construction, "any ambiguity must be resolved in favor of the Oglala Delegation and any laws, rules and regulations must be interpreted in the manner in which it would be understood by the Oglala Delegation."[28] As "[t]here is simply no way to explain to Chief Oliver Red Cloud in Lakota that the United States does not recognize the Oglala Delegation of the Great Sioux Nation Treaty Council … there is no way that this Board can rule to that effect and at the same time comply with the trust doctrine and Canons of Construction required thereby."[29]

B. Staff's Response.

The Delegation has not shown that it is a federally-recognized Indian tribe, as contemplated by relevant laws or regulations. The Commissioner of Indian Affairs "shall, under the direction of the Secretary of the Interior, and agreeably to such regulations as the President may prescribe, have the management of all Indian affairs and of all matters arising out of Indian relations."[30] Pursuant to this authority, the Department can "acknowledg[e] that certain American Indian groups exist as tribes."[31] Acknowledgement of tribal existence by the Department

> is a prerequisite to the protection, services, and benefits of the Federal government available to Indian tribes by virtue of their status as tribes. Acknowledgment shall also mean that the tribe is entitled to the immunities and privileges available to other federally acknowledged Indian tribes by virtue of their government-to-government relationship with the United States as well as the responsibilities, powers, limitations and obligations of such tribes. *Acknowledgment shall subject the Indian tribe to the same authority of Congress and the United States to which other federally acknowledged tribes are subjected.*[32]

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[28] *Id.*

[29] *Id.* at 4-5.

[30] 25 U.S.C. § 2.

[31] *See* 25 C.F.R. § 83.2.

[32] *Id.* (emphasis added).

On an annual basis, the Department is required to "publish in the Federal Register a list of all Indian tribes which the Secretary recognizes to be eligible for the special programs and services provided by the United States to Indians because of their status as Indians."[33] In the most recent version of this list published in the Federal Register, the Oglala Sioux Tribe of the Pine Ridge Reservation, South Dakota is included.[34] As far as the Staff is aware, there is no separate entry for the Oglala Delegation. In addition, as the Department's regulations state, "[s]plinter groups, political factions, communities or groups of any character that separate from the main body of a currently acknowledged tribe may not be acknowledged under these regulations."[35] This would seem to foreclose the possibility of the Department's classification of Petitioner as a federally-recognized Indian tribe.

Furthermore, the Petitioner makes no attempt to reconcile its claim that it is not beholden to US law[36] with the seemingly contradictory claim that it should be treated as a federally-recognized Indian Tribe.[37] Aside from arguing why it would be arbitrary and capricious not to recognize it as a federally-recognized Indian tribe, the Delegation fails to proffer any proof as to why it *is* a federally-recognized Indian tribe under applicable legal standards.

As to its argument that the trust responsibility of the United States necessitates that the Delegation be treated as a federally-recognized Indian Tribe, the Petitioner is mistaken. The

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[33] 25 U.S.C. § 479a-1.

[34] Indian Entities Recognized and Eligible to Receive Services From the United States Bureau of Indian Affairs, 73 Fed. Reg. 18,553, 18,555 (April 4, 2008).

[35] 25 C.F.R. § 83.3(d).

[36] *See* Memorandum at 2-3.

[37] *See id.* at 4-5.

NRC, as a Federal agency, does owe a fiduciary duty to the Oglala Sioux Tribe and its members.[38] However, the NRC exercises that duty in the context of its governing statues (*i.e.*, the AEA and NEPA) and is not required to afford members of a Tribe rights under these statutes and implementing regulations that are different from what it would afford to any other person.[39] Thus, unless otherwise prompted by applicable law or regulation, the NRC's fiduciary duty to the Tribe and its members does not oblige the NRC to treat the Delegation as a federally-recognized Indian tribe for the purpose of 10 C.F.R. §§ 2.309(d)(2)(1) or 2.315(c).

The Petitioner also claims that canons of construction for the interpretation of Indian treaties require "any ambiguity must be resolved in favor of the Oglala Delegation and any laws, rules and regulations must be interpreted in the manner in which it would be understood by the Oglala Delegation."[40] That is correct. "[C]anons of construction applicable in Indian law are rooted in the unique trust relationship between the United States and Indians."[41] One of these canons is that "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit."[42] However, the Petitioner does not point to any ambiguity or doubtful expression to be resolved in its favor, such that it should be federally recognized. Rather, the Petitioner seemingly argues that applicable canons of construction dictate that the Board must treat the Delegation as a federally-recognized Indian tribe. This argument is faulty. "[I]t is one thing to say that courts should construe treaties and statutes dealing with Indians

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[38] *See United States v. Mitchell*, 463 U.S. 206, 224 (1983); *Seminole Nation v. United States*, 316 U.S. 286, 296-97 (1942).

[39] *See Skokomish Indian Tribe v. FERC*, 121 F.3d 1303, 1308-09 (9th. Cir. 1997).

[40] Memorandum at 4.

[41] *Oneida County v. Oneida Indian Nation*, 470 U.S. 226, 247 (1985).

[42] *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985) (*citing McClanahan v. Arizona State Tax Comm'n,* 411 U.S. 164, 174 (1973); *Choate v. Trapp,* 224 U.S. 665, 675 (1912)).

liberally, and quite another to say that, based on those same policy considerations which prompted the canon of liberal construction, courts themselves are free to create favorable rules."[43] Thus, this argument should be rejected by the Board.

III. Is the Delegation an Entity which Must Be Consulted under the National Historic Preservation Act Pursuant to 36 C.F.R. § 800.2(c)(2)?

A. Petitioner's Argument.

The Petitioner seems to be making two arguments: (1) that, in the absence of the Oglala Sioux Tribe's Historic Preservation Officer's ("THPO") involvement, the Oglala Delegation should be consulted instead and (2) that, even with the participation of the Oglala Sioux THPO, "the Oglala Delegation would still be entitled to consultation due to its unique relationship with the U.S government and its traditional representative capacity with the Oglala Lakota."[44]

B. Staff's Response.

The Delegation has not demonstrated that it is an entity which must be consulted by the NRC pursuant to 36 C.F.R. § 800.2(c)(2). Section 106 of the National Historic Preservation Act ("NHPA") requires the NRC, as a federal agency, before the issuance of the subject renewal license, to "take into account the effect of the [issuance of the license] on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register."[45] Pursuant to Section 101(d)(6)(B) of the NHPA, the NRC is required to consult with any Indian Tribes which "attach[] religious and cultural significance to historic properties that may be affected" by the issuance of the renewal license.[46] The NRC must ensure consultation in the

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[43] *Fry v. U.S.*, 557 F.2d 646, 649 (9th Cir. 1977).

[44] *See* Memorandum at 5-7.

[45] 16 U.S.C. § 470f (2008).

[46] 36 C.F.R. § 800.2(c)(2)(ii).

Section 106 evaluation process provides to such an interested Tribe "a reasonable opportunity to identify its concerns about historic properties, advise on the identification and evaluation of historic properties, including those of traditional religious and cultural importance, articulate its views on the [effect of the issuance of the license] on such properties, and participate in the resolution of adverse effects."[47]

As to its first argument, the Petitioner references 36 C.F.R. § 800.2(c)(2)(i)(B),[48] which states "[w]hen an Indian Tribe has not assumed the responsibilities of the SHPO for section 106 on tribal lands under section 101(d)(2) of the act, the agency official shall consult with a representative designated by such Indian tribe in addition to the SHPO regarding undertakings occurring on or affecting historic properties on its tribal lands." The Petitioner seems to suggest that it is so authorized to act as a representative for the Oglala Sioux Tribe in such a capacity.[49] However, the Petitioner provides no documentation or other proof that such is the case. Thus, that argument fails.

As to the second argument, that the Delegation is independently entitled to consultation, the Petitioner indicates that the implementing regulations provide that "[c]onsultation should be conducted in a sensitive manner respectful of tribal sovereignty."[50] In light of that, the Petitioner "expects the 'sensitive manner' described in the Regulations to include recognition of the Oglala Delegation as an 'Indian Tribe'…"[51] However, the Petitioner does not explain why such should

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[47] 36 C.F.R. § 800.2(c)(2)(ii)(A).

[48] Memorandum at 5-6.

[49] *See id.*

[50] *Id.* at 6 (*citing* 36 C.F.R. § 800.2(c)(2)(ii)(B)).

[51] *Id.*

be the case, especially since the Delegation does not fall within the applicable definition of "Indian tribe" in 36 C.F.R. § 800.16(m).[52] Thus, this argument should be rejected by the Board.

IV. Is the Delegation an "Indian Tribe" within the Meaning of 36 C.F.R. § 800.16(m)?

A. Petitioner's Argument.

The Petitioner seems to be arguing that because the Oglala Lakota are entitled by treaty to certain privileges and rights, this means that the Oglala Delegation is an "Indian tribe" pursuant to the definition at 36 C.F.R. § 800.16(m).[53]

B. Staff's Response.

"Indian tribe" is defined by 36 C.F.R. § 800.16(m) as

> an Indian tribe, band, nation, or other organized group or community, including a native village, regional corporation, or village corporation, as those terms are defined in section 3 of the Alaska Native Claims Settlement Act (43 U.S.C. 1602), *which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians*.[54]

As previously discussed, the Oglala Delegation is not a federally-recognized Indian tribe.[55] Thus, the Delegation is not an "Indian tribe" within the meaning of 36 C.F.R. § 800.16(m).[56]

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[52] *See infra* section IV.B.

[53] *See* Memorandum at 7-9.

[54] (emphasis added).

[55] *See supra* section II.B.

[56] Section 2(15) of the Nuclear Waste Policy Act of 1982 defines "Indian tribe" as

> any Indian tribe, band, nation, or other organized group or community of Indians recognized as eligible for the services provided to Indians by the Secretary of the Interior because of their status as Indians, including any Alaska Native village, as defined in section 3(c) of the Alaska Native Claims Settlement Act (43 U.S.C. 1602(c)).

42 U.S.C. § 10101(15). This definition is substantively identical to that in 36 C.F.R. § 800.16(m). Thus, jus as the Delegation is not an "Indian tribe" within the meaning of 36 C.F.R. § 800.16(m), because it is not a federally-recognized Indian tribe, so too is the Delegation not an "Indian tribe" within the meaning of Section 2(15) of the Nuclear Waste Policy Act of 1982.

V. Has the Delegation Submitted "Additional Information" that Documents and Demonstrates that the Oglala Delegation has Standing as Required by 10 C.F.R. § 2.309(d)(1)?

In the Petition, the Delegation requested that "[i]n the event that the Commission … rule[s] that 10 CFR § 2.309(d)(2) is inapplicable to the Oglala Delegation, the [Petitioner] respectfully requests a reasonable time from notice of that decision to submit additional information in satisfaction of 10 CFR § 2.309(d)(1)."[57] The Board granted the Delegation an opportunity to tender "whatever 'additional information' … that documents and demonstrates that the Oglala Delegation has standing as required by 10 C.F.R. § 2.309(d)(1)."[58] Instead of submitting additional information, the Petitioner simply reiterates the same substantive claims made in the Petition regarding impacts: (1) to water and air quality, (2) to wildlife, and (3) to cultural resources.[59] As to those claims, the Petitioner fails to provide any additional details or further elaboration. Thus, the Staff reaffirms the position taken in its Response, that the Petitioner, as an organization, has not established a claim of standing pursuant to 10 C.F.R. § 2.309(d)(1).[60]

The Petitioner fails to manifest with respect to any of the organizational interests raised in its Petition a concrete and particularized injury sufficient to support a claim of standing.[61] Instead, the Petitioner only offers a short series of "conjectural" or "hypothetical" statements that

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[57] Petition at 12.

[58] Order at 4.

[59] *See* Memorandum at 9-16; Petition at 2-11.

[60] Staff's Response at 8-10.

[61] *See Consumers Energy Co., Nuclear Management Co., LLC, Entergy Nuclear Palisades, LLC, and Entergy Nuclear Operations, Inc.* (Palisades Nuclear Power Plant), CLI-07-08, 65 NRC 399, 408-09 (2007).

fail to establish a plausible chain of causation between the operation of the facilities and potential harm.[62]

The Petitioner alleges, without any explanation, that the operation of the COGEMA facility has affected the quantity and quality of its water supply, and affects negatively the health of its people. Petitioner fails to show a causal relationship between the alleged injury and the proposed licensing action.[63] The Petitioner does not establish a pathway or mechanism by which the operation of the facility could negatively impact the water resources cited by the Petitioner. In absence of such a chain of causation, the Petitioner raises only "unfounded conjecture."[64] Likewise, the Petitioner does not articulate the specific means by which identified wildlife, including eagles sacred to the Oglala Lakota, will be negatively impacted by the operation of the facility. Furthermore, the Petitioner's claim that cultural resources are not being adequately investigated and addressed is not a concrete and particularized injury-in-fact.[65] The Petitioner does not specify what cultural resources in the vicinity of the facilities are being inadequately investigated, nor does the Petitioner indicate in what manner the investigation is materially inadequate. As such, the Petitioner does not demonstrate that this harm sufficiently concrete so as to demonstrate standing. Without any indication of what manner in which Applicant's investigation of cultural resources is materially inadequate, it cannot be assessed whether Petitioner's claim can be redressed by this proceeding.[66]

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[62] *See Sequoyah Fuels & General Atomics* (Gore, Oklahoma Site), CLI-94-12, 40 NRC 64, 72 (1994).

[63] *See N. States Power Co.* (Pathfinder Atomic Plant), LBP-90-3, 31 NRC 40, 43-44 (1990).

[64] See *Int'l Uranium (USA) Corp*. (White Mesa Uranium Mill), CLI-01-21, 54 NRC 247, 252-53 (2001) (*compare with Sequoyah Fuels,* CLI-94-12, 40 NRC at 72).

[65] *See Consumers Energy*, CLI-07-08, 65 NRC at 408-09.

[66] *See Sequoyah Fuels*, CLI-94-12, 40 NRC at 76.

In light of the foregoing, the Petitioner, as an organization, has failed to demonstrate standing in this proceeding pursuant to 10 C.F.R. § 2.309(d)(1).[67]

VI. Chief Oliver Red Cloud's Revised Affidavit Does Not Reference the Oglala Delegation of the Great Sioux Nation Treaty Council.

The Board ordered the Delegation to "[s]ubmit an affidavit or declaration from Chief Oliver Red Cloud, authoring the Oglala Delegation to represent him in this proceeding."[68] Although the Delegation attempted to comply with this directive, the revised affidavit submitted by Chief Oliver Red Cloud authorizes the "Black Hills Sioux Nation Treaty Council"[69] rather than the "Oglala Delegation of the Great Sioux Nation Treaty Council," as stated in the Delegation's pleadings, including the instant Memorandum. It is unclear whether these are two different organizations or one in the same. Regardless, no reason for this discrepancy is given by the Petitioner.

CONCLUSION

For the reasons set forth above, Staff submits that the Delegation fails to demonstrate that it (1) is a local governmental body duly elected, appointed or established by the relevant procedures within its Nation; (2) is a federally recognized Indian tribe as that term is used in 10 C.F.R. §§ 2.309(d) or 2.315(c), or any other relevant Federal law or regulation; (3) is an entity which *must* be consulted under the National Historic Preservation Act pursuant to 36 C.F.R. § 800.2(c)(2); and (4) is an 'Indian Tribe within the meaning of 36 C.F.R. § 800.16(m). The

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[67] The Petitioner is also seems to be making a claim of representational standing based on Chief Red Cloud's interest in the license renewal. *See* Affidavit of Chief Oliver Red Cloud (April 2009). However, Chief Red Cloud's affidavit fails to allege a concrete and particularized interest sufficient to support a claim of representational standing. *See Consumers Energy Co.*, CLI-07-08, 65 NRC at 408-09.

[68] Order at 4.

[69] "Affidavit of Chief Oliver Red Cloud" (May 28, 2009).

Delegation also fails to establish that it has standing as required by 10 C.F.R. § 2.309(d)(1). Furthermore, there is also a fundamental discrepancy in Chief Oliver Red Cloud's revised affidavit.

Respectfully submitted,

Executed in Accord with 10 CFR 2.304(d)

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Dated at Rockville, Maryland
This 2nd day of June, 2009

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of	)	
	)	
COGEMA MINING, INC.	)	Docket No. 40-8502-MLA
	)	
(Christensen & Irigaray Ranch Facilities)	)	
	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "NRC STAFF'S RESPONSE TO THE OGLALA DELEGATION'S MEMORANDUM REGARDING THE BOARD'S ORDER DATED MAY 21, 2009" in the above captioned proceeding have been served via the Electronic Information Exchange ("EIE") this 2nd day of June 2009, which to the best of my knowledge resulted in transmittal of the foregoing to those on the EIE Service List for the above captioned proceeding.

Executed in Accord with 10 CFR 2.304(d)

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