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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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BEFORE THE COMMISSION

OFFICE OF THE
ADMINISTRATIVE
ADJUTANT GENERAL

In the Matter of)
)
HYDRO RESOURCES, INC.)
P.O. Box 15910)
Rio Rancho, New Mexico)

Docket No. 40-8968-ML

NRC STAFF'S RESPONSE TO MOTION TO SUPPLEMENT THE RECORD

INTRODUCTION

On January 27, 2000, Intervenors Eastern Navajo Diné Against Uranium Mining ("ENDAUM") and Southwest Research and Information Center ("SRIC") jointly filed a "Motion to Supplement the Record" (Joint Motion), asking the Commission to take "judicial notice" of *HRI, Inc. v. Environmental Protection Agency*, No. 97-9556, a decision of the United States Court of Appeals for the Tenth Circuit dated January 6, 2000. Joint Motion, at 1. ENDAUM and SRIC also requested, pursuant to 10 C.F.R. § 2.730, that the record of the above-captioned Hydro Resources Inc. (HRI) proceeding be supplemented with a copy of the Tenth Circuit's *EPA* decision, which they claim is "directly relevant" to issues pending before the Commission in the HRI proceeding. Joint Motion, at 1.

As discussed below, the *EPA* decision is not relevant here, and the concept of "judicial notice" is not applicable to it in any case. Additionally, the Intervenors' request to

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supplement the record should be denied due to the failure to address the requirements specified in 10 C.F.R. §2.734 for reopening a closed record.

DISCUSSION

A. Jurisdictional Issues in HRI, Inc. v. EPA Have No Relevance Here

The Staff has reviewed *HRI v. EPA*, ___ F.3d ___, 2000 WL 14443 (10th Cir. 2000), and finds no issues there which are relevant to any matters now pending before the Commission in the above-captioned proceeding. *HRI v. EPA* involves a jurisdictional dispute among HRI, EPA, the Navajo Nation, and the State of New Mexico, concerning whether EPA's underground injection control (UIC) program, or the State of New Mexico's UIC program, governs HRI's proposed mining at the Section 8 and 17 sites.¹ See *EPA*, 2000 WL 14443, at 1-2. The dispute arose when the EPA issued a letter, dated July 14, 1997, announcing that it was asserting its UIC authority over these two sites. *Id.*, at 6-7. Regarding Section 8--the only relevant mining site with respect to the issues pending before the Commission--the dispute turns on the question of whether this HRI property has "Indian country" status. If it does, Section 8 would fall within EPA's UIC authority; if not, the State of New Mexico's UIC program governs there. The court found that this key "Indian country" issue was not

¹ The Staff referenced the then-pending Tenth Circuit litigation in its September 17, 1999 "Response to Petitions for Review of LBP-99-18, LBP-99-19, and LBP-99-30," at 28, and pointed out there that the Commission had previously addressed the issue of EPA's regulatory jurisdiction over the UIC permitting process, and had directed the Presiding Officer not to adjudicate that issue. See *HRI*, CLI-98-16, 48 NRC 119, 120-21, and n.2 (1998). The Intervenor fails to explain how, in light of this 1998 Commission decision, the Tenth Circuit's *EPA* decision is nonetheless relevant.

yet ripe for judicial review, and remanded it to the EPA for final agency action. *See EPA*, 2000 WL 14443, at 7, 18, and 25. Thus, even if the subject of UIC regulatory authority was relevant to the issues now pending before the Commission, the *EPA* decision leaves the matter unresolved with respect to Section 8. This lack of finality is emphasized by the court's characterization of EPA's July 1997 letter as a "tentative revocation of the Section 8 aquifer exemption" that the EPA had issued in 1989. *EPA*, 2000 WL 14443, at 13.

Remarkably, the Intervenors rely on this "tentative revocation" of the 1989 aquifer exemption as support for their argument that the *EPA* decision is relevant to their pending petition for Commission review of LBP-99-30,² yet they fail to show (1) how the UIC jurisdictional rulings undermine any of LBP-99-30's technical groundwater findings; and (2) that EPA's "tentative revocation" was based on anything other than purely jurisdictional concerns. In LBP-99-30, the Presiding Officer cited the 1989 aquifer exemption³ in the

² The Intervenors argue that in LBP-99-30 the Presiding Officer erred in stating that Section 8 "is not required to be an area where the subsurface water must be potable by EPA standards; it is exempt." Joint Motion, at 2 (footnote omitted), *citing* LBP 99-30, Partial Initial Decision Concluding Phase I (Groundwater, Cumulative Impacts, NEPA and Environmental Justice), 50 NRC 77, 102, 108, and 109 (1999). The Intervenors add that "[a]ny findings by the Presiding Officer that rest on the presumption of a validly issued aquifer exemption or UIC permit must be reversed." Joint Motion, at 3.

³ A copy of the EPA's June 21, 1989 aquifer exemption was submitted by HRI as part of its February 19, 1999 groundwater presentation, as Attachment 22 to the "Affidavit of Mark S. Pelizza Pertaining to Water Quality Issues." The EPA's 1989 aquifer exemption states in pertinent part that a portion of the Westwater aquifer was being exempted because "(a) it is not currently used as a drinking water supply, and (b) it cannot be used as a drinking water source in the future because it is mineral producing or can be shown by a permit applicant to contain minerals that are expected to be commercially producible."

context of his detailed finding that there is a reasonable likelihood that groundwater quality will be restored to acceptable levels following any HRI mining at Section 8. *See* LBP 99-30, *supra*, 50 NRC at 99-106. In addition to citing the 1989 aquifer exemption, the Presiding Officer emphasized the small aquifer area to be affected by HRI's proposed mining, and the natural barriers preventing any widespread contamination:

The subsurface water in this part of the Westwater [aquifer] is not potable today; it does not meet EPA standards. It also should be recognized that the Westwater is huge, so that it can tolerate relatively small toxic areas like the Section 17's old mine workings and still provide high quality drinking water. The water near the old mine workings is undrinkable yet the aquifer as a whole has not suffered because toxic elements that migrate out of this area are affected by both precipitation and dilution. These natural mechanisms help to protect the quality of water in the aquifer as a whole from the toxicity contained in small areas.

LBP 99-30, *supra*, 50 NRC at 102 (citations omitted).

Accordingly, the Intervenors have failed to show that the *EPA* decision has any relevance⁴ or bearing on whether the Commission should grant their pending petition to review LBP-99-30.

⁴ The Commission is of course free to consider or take notice of any judicial opinion it deems relevant. However, such opinions are nonevidentiary matters to which the concept of "judicial notice" does not apply. *See Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), ALAB-905, 28 NRC 515, 521 (1988); *see also Black's Law Dictionary*, 7th Ed., at 851 (concept only applies to facts which are "well-known and indisputable," such as the temperature at which water freezes). Accordingly, even should the Commission view the *EPA* decision as relevant here, taking "judicial notice" of it as requested by the Intervenors would be improper.

B. Intervenors' Request to Supplement the Record Should be Denied

ENDAUM's and SRIC's request that the record of the HRI proceeding be supplemented with a copy of the *EPA* decision (*see* Joint Motion, at 1) should be denied. Supplementing the record in such fashion would entail reopening a closed record, an action which is authorized only if the requirements specified in 10 C.F.R. §2.734 are met. Rather than addressing these requirements, the Intervenors simply cite 10 C.F.R. §2.730, which only authorizes the filing of motions in general.

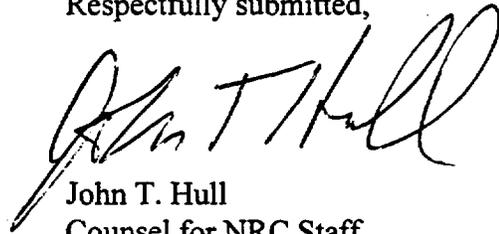
To reopen a closed record, a movant must show, *inter alia*, that "a significant safety or environmental issue" is at stake (10 C.F.R. § 2.734(a)(2)), and this showing must be supported by one or more factual and/or technical affidavits. *See* 10 C.F.R. § 2.734(b). As discussed in Section A, *supra*, the *EPA* decision deals only with jurisdictional issues, and does not raise the type of safety or environmental issues necessary to justify reopening a closed record.

Accordingly, the request to supplement the record of the HRI proceeding with a copy of the *EPA* decision should be denied.

CONCLUSION

For the reasons discussed above, the Commission need not consider the *EPA* decision, as it is not relevant to any pending issues in the above-captioned proceeding. Additionally, the Commission should deny the Intervenor's request to supplement the record with a copy of the *EPA* decision, for failure to meet the applicable 10 C.F.R. § 2.734 requirements.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "John T. Hull". The signature is written in a cursive style with a large, sweeping initial "J".

John T. Hull
Counsel for NRC Staff

Dated at Rockville, Maryland
this 3rd day of February 2000

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S RESPONSE TO MOTION TO SUPPLEMENT THE RECORD" in the above-captioned proceeding have been served on the following by U.S. Mail, first class, or as indicated by a single asterisk through deposit in the Nuclear Regulatory Commission's internal mail system (those parties marked by double asterisks were also served by e-mail) this 3rd day of February 2000:

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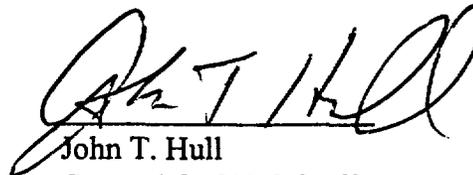
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