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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
BEFORE THE COMMISSION

In the Matter of)	
)	
HYDRO RESOURCES, INC.)	Docket No. 40-8968-ML
P.O Box 15910)	
Rio Rancho, NM 87174)	ASLBP No. 95-706-01-ML
)	

**INTERVENORS' MOTION FOR LEAVE TO REPLY TO
HYDRO RESOURCES, INC.'S RESPONSE IN
OPPOSITION TO MOTION TO REOPEN
AND SUPPLEMENT THE RECORD**

Pursuant to 10 C.F.R. § 2.1237 and the Commission's general authority to ensure the establishment of a meaningful record, Intervenor Eastern Navajo Diné Against Uranium Mining ("ENDAUM") and Southwest Research and Information Center ("SRIC") hereby request the Commission to allow leave to reply to the Response in Opposition of Hydro Resources, Inc. to Intervenor Eastern Navajo Dine Against Uranium Mining's and Southwest Research and Information Center's Motion to Reopen and Supplement the Record (March 29, 2000) (hereinafter "HRI's Response").¹

Although the right to reply to a response to a motion is not permitted under 10 C.F.R. 2.730(c), a party may seek leave to reply. Detroit Edison Co. (Enrico Fermi Atomic Plant, Unit 2), ALAB-469, 7 NRC 470, 471 (1978). Leave to reply is granted "sparingly, and then only

¹ Intervenor also note that yesterday they received the NRC Staff's Response to Intervenor's Motion to Reopen and Supplement the Record, which consists of a seventeen (17) page pleading and a seven (7) page affidavit. Intervenor are currently reviewing the NRC Staff's Response and anticipate that they may seek leave to file a reply.

upon a strong showing of good cause.” Commonwealth Edison Co. (Byron Station, Units 1 and 2), LBP-81-30A, 14 NRC 364, 372 (1981).

Intervenors submit that they have good cause to reply here, in order to correct misleading and incorrect statements by Hydro Resources, Inc. (“HRI”) regarding (a) whether the evidentiary record already addresses the issue of an appropriate groundwater restoration standard to an adequate degree; (b) the gravity of the issue of the groundwater protection standard as it relates to the current groundwater conditions at the Crownpoint Project; and (c) the qualifications of Intervenors’ expert, Dr. John Fogarty, to provide expert testimony regarding the chemical toxicity of uranium. All three of these issues are key to the disposition of the Intervenors’ Motion to Reopen.

First, Intervenors seek to correct HRI's erroneous assertion that the groundwater restoration issue was previously addressed twice by Intervenors. HRI's Response at 4. In fact, Dr. Fogarty's Declaration constitutes the first testimony that the Intervenors have been able to submit regarding the health effects of uranium concentrations of 0.44 mg/l. Intervenors previously submitted the testimony of Dr. Richard Abitz that compared the 0.44 mg/l secondary groundwater restoration standard for the Crownpoint Project to the Environmental Protection Agency's ("EPA") drinking water standard of 30 pCi/l (0.044 mg/l). As a geochemist, Dr. Abitz was not qualified or knowledgeable to give the kind of detailed testimony on health effects that Dr. Fogarty provides.

Second, Intervenors seek to correct HRI's false assumption that it is somehow entitled to an aquifer exemption under the Safe Drinking Water Act because the company believes it is a proven fact that the groundwater in Section 8 is entirely unpotable and can never be a source of

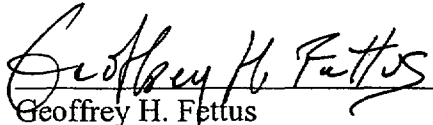
drinking water. Intervenor request leave to correct the record to show that (1) HRI does not have, and likely cannot obtain, an aquifer exemption under the Safe Drinking Water Act because Section 8 clearly meets EPA requirements for an underground drinking water source; and (2) while the groundwater in the immediate vicinity of the ore body may be unpotable, hydrological data clearly indicate that two separate zones of water quality exist at each mine site, and that water quality outside the ore zones is very good. Moreover, HRI uses a method for determining water quality that artificially inflates uranium level throughout the aquifer.

Third, Intervenor should be given leave to reply to HRI's misleading and unwarranted attack on the qualifications of Dr. John Fogarty. Dr. Fogarty is (1) well-qualified to conduct research on the subject and to comment on the literature survey discussed in his Affidavit; and (2) well-qualified as a physician with 15 years of experience in basic science and clinical research to render an expert opinion on the chemical toxicity of chronic, low doses of uranium in drinking water and how it affects the kidney.

Given the importance of the safety issue involved here, *i.e.*, the appropriate standard for restoration of groundwater, it is essential for the Commission to have a full and accurate record on these questions in order to make an informed decision whether to reopen the record. *See Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-756, 16 NRC 1340, 1343 (1983).² Accordingly, the Commission should grant Intervenor's request to

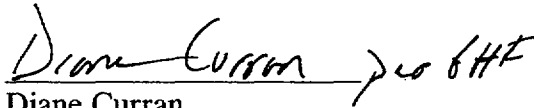
²Diablo Canyon concerned a motion by the Intervenor to reopen a closed record on quality assurance issues. The Appeal Board permitted the Intervenor to reply to the Applicant's and Staff's oppositions to Intervenor's motion to reopen the record, and also ordered other supplemental filings. The factors cited by the Appeal Board in taking this supplemental information included the "number of unanswered questions" regarding "the exact nature and significance of the new information," the "importance" of the quality assurance issue, and the

file the attached Reply to Hydro Resources, Inc.'s Response in Opposition to Motion to Reopen and Supplement the Record.



Geoffrey H. Fettus
Douglas Meiklejohn
Lila Bird

NM ENVIRONMENTAL LAW CENTER 1726 M Street, N.W., Suite 600
1405 Luisa Street, Suite 5
Santa Fe NM 87505
(505) 989-9022



Diane Curran
HARMON, CURRAN, SPIELBERG,
& EISENBERG, LLP

1726 M Street, N.W., Suite 600
Washington DC 20036
(202) 328-3500

Appeal board's "desire to be as informed as possible on the factual claims of the parties." As in the Diablo Canyon case, the question of what constitutes an appropriately protective groundwater restoration standard is a very important regulatory issue on which the Commission should assure itself that it is completely and accurately informed before making a decision on the Intervenor's motion to reopen the record.

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CERTIFICATE OF SERVICE

I hereby certify that on April 5, 2000, I caused to be served copies of the foregoing:

**MOTION FOR LEAVE TO FILE A REPLY TO HRI'S OPPOSITION TO THE
MOTION TO REOPEN AND SUPPLEMENT THE RECORD**

upon the following persons by U.S. mail, first class, and in accordance with the requirements of 10 C.F.R. § 2.712. Service was also made via e-mail to the parties marked below by an asterisk. The envelopes were addressed as follows:

Office of the Secretary
U.S. Nuclear Regulatory Commission*
Washington, D.C. 20555-0001
Attn: Rulemakings and Adjudications
Staff

Richard A. Meserve, Chairman
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Greta J. Dicus, Commissioner
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Nils J. Diaz, Commissioner
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Edward McGaffigan, Jr.,
Commissioner
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Jeffrey S. Merrifield, Commissioner
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Administrative Judge
Thomas S. Moore*
Atomic Safety and Licensing Board
Mail Stop T-3 F23
U.S. Nuclear Regulatory Commission
Washington D.C. 20555-0001

Office of Commission Appellate
Adjudication
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Administrative Judge
Thomas D. Murphy*
Special Assistant
Atomic Safety and Licensing Board
Mail Stop - T-3 F23
U.S. Nuclear Regulatory Commission
Washington DC 20555

Mitzi Young, Esq.
John T. Hull, Esq.
Office of the General Counsel*
Mail Stop - O-15 B18
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Diane Curran, Esq.
HARMON, CURRAN, SPIELBERG &
EISENBERG, LLP*
1726 M Street, N.W., Suite 600
Washington DC 20036

William Paul Robinson
Chris Shuey
SRIC
P.O. Box 4524
Albuquerque, NM 87106

Kathleen Tsosie
ENDAUM
P.O. Box 150
Crownpoint, NM 87313

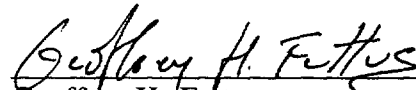
Eric Jantz, Esq.
DNA - People's Legal Services
PO Box 116
Crownpoint, NM 87313-0116

Levon Henry, Attorney General
Steven J. Bloxham, Esq.
Navajo Nation Department of Justice
P.O. Drawer 2010
Window Rock, AZ 86515

Anthony J. Thompson, Esq.
Frederick Phillips, Esq.
David Lashway, Esq.
SHAW PITTMAN
2300 "N" Street, N.W.
Washington, D.C. 20037-1128

Jep Hill, Esq.
Jep Hill & Associates
P.O. Box 30254
Austin, TX 78755

Dated at Santa Fe, New Mexico,
April 5, 2000


Geoffrey H. Feltus

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A. HRI's Response Is Misleading and Incorrect Regarding the Gravity of the Groundwater Protection Issue.

HRI makes several misleading and incorrect claims in support of its argument that the issue raised by Intervenors regarding the groundwater restoration standard for the Crownpoint Project is not "exceptionally grave" and therefore does not warrant opening the record.

First, HRI misleadingly argues that the groundwater restoration issue was previously addressed twice by Intervenors in briefs before the Presiding Officer and the Commission. HRI Response at 4. While the Intervenors submitted testimony by Dr. Richard Abitz that compared the 0.44 mg/l secondary groundwater restoration standard for the Crownpoint Project to the

EPA's drinking water standard of 30 pCi/l (0.044 mg/l), Dr. Abitz is a geochemist with limited knowledge of the human health effects of uranium. Dr. Fogarty's Declaration constitutes the first detailed testimony that the Intervenors have been able to submit regarding the health effects of uranium concentrations of 0.44 mg/l.¹

Second, HRI argues that "groundwater in the mine zone is unfit for consumption *in its present condition*, i.e., before any lixiviant injection occurs." HRI Response at 4 (emphasis in original, footnote omitted). This misleading assertion is based on HRI's faulty presumption that HRI's own view regarding the poor quality of groundwater in Section 8 is an established fact.²

HRI is incorrect and misleading in arguing that groundwater in Section 8 is unfit for human consumption. While the groundwater in the immediate vicinity of the ore body may be unpotable, hydrological data clearly indicate that two separate zones of water quality exist at each mine site, and that water quality outside the ore zones at the mine sites is very good. See Intervenors Written Presentation in Opposition to Hydro Resources, Inc.'s Application for Materials License With Respect to: Groundwater Protection, Legal Brief at 25 (January 11,

¹ As the Intervenors have previously stated, they did not previously identify Dr. Fogarty as a potential witness during the evidentiary proceeding, because at that time he did not live in Crownpoint, and had not undertaken his investigation of the groundwater restoration standard in the EIS and his study of chemical uranium toxicity. Intervenors have proffered Dr. Fogarty's testimony as soon as possible after receiving a copy of his letter to the Commissioners.

² HRI also asserts that the issue of the adequacy of the 0.44 mg/l groundwater restoration standard applies only to Section 8. HRI's Response at 4, n. 3. However, it is important to note that the 0.44 mg/l standard is incorporated into the HRI license and applies to all of HRI's mining sites. Because of this, and because the secondary restoration standard of 0.44 mg/l is discussed in the Environmental Impact Statement which is applicable to the entire license, Intervenors have challenged the groundwater restoration standard as it applies to the entire license, i.e., to all mining sites at the Crownpoint Project including Church Rock (Sections 8 and 17), Crownpoint and Unit 1.

1999) (hereinafter "Intervenors' Groundwater Presentation"), citing Testimony of Dr. Richard J. Abitz at 20 (January 8, 1999).

In this vein, HRI also misleads the Commission by insinuating that the Section 8 property is somehow entitled to an aquifer exemption (or may easily obtain one) under the Safe Drinking Water Act ("SDWA"), regardless of a recent Tenth Circuit U.S. Court of Appeals that overturned the issuance of an aquifer exemption for Section 8.³ HRI states that it previously obtained an aquifer exemption which "reflects the fact that groundwater in Section 8 is not suitable for drinking, irrespective of whether HRI proceeds with uranium extraction in this area." HRI's Response at 4, fn. 3. Contrary to HRI's argument, it is not an established fact that the water in Section 8 is not suitable as a drinking water source.

First, the Tenth Circuit's decision makes clear that the original aquifer exemption, granted by the State of New Mexico in 1989, is invalid and that HRI must re-apply to the U.S. Environmental Protection Agency for an equivalent aquifer exemption. HRI, Inc. v. EPA, No. 97-9556, *slip op.* at 19. Second, Intervenors believe that HRI will not qualify for an aquifer exemption on re-application because mining at Section 8 would contaminate a future drinking water source. The goal of the SDWA is to protect current and future sources of public drinking

³ HRI, Inc. v. EPA, No. 97-9556 (January 6, 2000), aff'd and modified en banc by Order dated March 30, 2000. A copy of the Order is attached. In HRI v. EPA, the Court found that EPA did not violate the law or abuse its discretion in determining that the Section 17 lands of the CUP constitute "Indian country" (*i.e.*, for purposes of the SDWA, within the regulatory jurisdiction of EPA Region 9 and the Navajo Nation rather than the state); and that Section 8 lands are subject to a jurisdictional dispute under the SDWA. The Court then remanded the Section 8 issue to EPA for a final determination as to whether that land is "Indian country." Id., *slip op.* at 29, 35-36, 45-50, and 63. A copy of the Court's decision is attached to Intervenors' Motion to Supplement the Record (January 25, 2000).

water from degradation due to industrial uses. Part C of the SDWA directs the Environmental Protection Agency to establish a regulatory program for the protection of underground sources of drinking water from underground injection.⁴ An aquifer qualifies as an "underground source of drinking water" if it (1) supplies any public water system, or it (2) contains enough groundwater to supply a public water system and either currently supplies drinking water for human consumption or contains fewer than 10,000 mg/l total dissolved solids. 40 C.F.R. § 144.3.

Intervenors have presented evidence demonstrating that the Church Rock mine sites (Sections 8 and 17), both meet the second definition of an underground source of drinking water.⁵ The Westwater aquifer in these mine site areas contains enough groundwater to supply a public water system. Moreover, the Westwater aquifer at both locations contains fewer than 10,000 mg/l total dissolved solids and thus meets EPA's regulatory definition of a potential underground drinking water source. See Final Environmental Impact Statement at 3-36, Table 3.19. 40 C.F.R. § 144.3.

Moreover, Intervenors have challenged HRI's method for determining baseline water quality as it will artificially inflate the baseline for uranium in groundwater in the Church Rock area. As Dr. Abitz demonstrated in his testimony, HRI does not distinguish between separate

⁴ 42 U.S.C.A. §§ 300h to 300h-8. Natural Resources Defense Council v. Environmental Protection Agency, 824 F.2d 1258, 1271 (1st Cir. 1987) (finding overall intent of SDWA is to protect future supplies of drinking water in holding that underground repositories are within scope of underground injection). See also Intervenors' discussion of the Congressional preference that the phrase "underground injection which endangers drinking water sources" be interpreted broadly. Intervenors' Groundwater Presentation at 63.

⁵ The Crownpoint and Unit 1 mine sites meet the first definition as water from both is part of the Crownpoint municipal water supply.

water quality zones in determining water quality, but combines the water quality in mineralized ore zones with the high quality groundwater in the surrounding areas to create an average that does not reflect the true values of the Westwater aquifer. Thus, using HRI's method for determining a water quality baseline may result in degradation of an area of the Westwater aquifer that is currently better than drinking water. See Intervenor's Groundwater Presentation at 47-48 and attached Affidavit of Dr. Richard Abitz at 11-15, and 43. Finally, HRI's Response fails to mention that there are drinking wells in the Westwater aquifer within only 1.5 miles of Section 8. See Intervenor's Groundwater Presentation, Exhibit 4.

The issue of an adequately protective secondary groundwater restoration standard is grave and warrants reopening the record. HRI's misleading and incorrect claims in objecting to reopening the record should not be countenanced.

B. Dr. Fogarty Is Qualified to Testify on the Sufficiency of the Groundwater Restoration Standard as it Relates to the Chemical Toxicity of Uranium.

HRI misunderstands Dr. Fogarty's qualifications to render an opinion on the sufficiency of the groundwater restoration standard for the HRI project as it relates to the chemical toxicity of uranium. HRI argues Dr. Fogarty does not have experience with "radiological health impacts, human health effects of exposure to uranium in groundwater, or fate and transport of uranium in groundwater." HRI's Response at 6. On this issue, HRI's Response is in part irrelevant and in part misguided.

First, whether Dr. Fogarty has experience with radiological health issues is irrelevant, as Dr. Fogarty is rendering an expert opinion on the chemical toxicity of uranium as it affects the kidney, something for which he is eminently qualified to testify. Dr. Fogarty is not testifying to

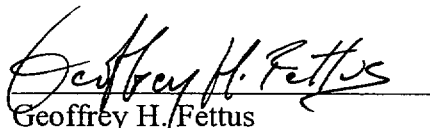
the radiological impacts of uranium ingested through groundwater.

Second, while Dr. Fogarty has not previously investigated the human health effects of exposure to uranium ingestion through water, he is well-qualified to conduct research on the subject and to comment on the literature survey discussed in his Affidavit. As a practicing M.D. who has been involved in basic science and clinical research for over 15 years with some of that time specializing in care of those with diabetes and other impairments of renal functions, Dr. Fogarty is well-qualified to assess the studies and literature regarding uranium in drinking water and render an expert opinion on the chemical toxicity of chronic, low doses of uranium in drinking water and how it affects the kidney. HRI's assertions about Dr. Fogarty's qualifications are therefore incorrect.

Conclusion

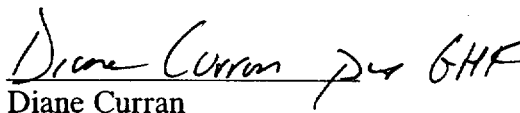
For the foregoing reasons, HRI's Opposition to Intervenor's Motion to Reopen and Supplement the Record is without merit. The Motion should be granted.

Respectfully submitted,



Geoffrey H. Fettus
Douglas Meiklejohn
Lila Bird

NM ENVIRONMENTAL LAW CENTER 1726 M Street, N.W., Suite 600
1405 Luisa Street, Suite 5
Santa Fe NM 87505
(505) 989-9022



Diane Curran
HARMON, CURRAN, SPIELBERG,
& EISENBERG, LLP

1726 M Street, N.W., Suite 600
Washington DC 20036
(202) 328-6874

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Attn: Rulemakings and Adjudications
Staff

Richard A. Meserve, Chairman
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Washington, D.C. 20555

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U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

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U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Administrative Judge
Thomas S. Moore*
Atomic Safety and Licensing Board
Mail Stop T-3 F23
U.S. Nuclear Regulatory Commission
Washington D.C. 20555-0001

Office of Commission Appellate
Adjudication
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Administrative Judge
Thomas D. Murphy*
Special Assistant
Atomic Safety and Licensing Board
Mail Stop - T-3 F23
U.S. Nuclear Regulatory Commission
Washington DC 20555

Mitzi Young, Esq.
John T. Hull, Esq.
Office of the General Counsel*
Mail Stop - O-15 B18
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Diane Curran, Esq.
HARMON, CURRAN, SPIELBERG &
EISENBERG, LLP*
1726 M Street, N.W., Suite 600
Washington DC 20036

William Paul Robinson
Chris Shuey
SRIC
P.O. Box 4524
Albuquerque, NM 87106

Kathleen Tsosie
ENDAUM
P.O. Box 150
Crownpoint, NM 87313

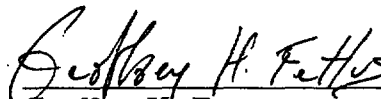
Eric Jantz, Esq.
DNA - People's Legal Services
PO Box 116
Crownpoint, NM 87313-0116

Levon Henry, Attorney General
Steven J. Bloxham, Esq.
Navajo Nation Department of Justice
P.O. Drawer 2010
Window Rock, AZ 86515

Anthony J. Thompson, Esq.
Frederick Phillips, Esq.
David Lashway, Esq.
SHAW PITTMAN
2300 "N" Street, N.W.
Washington, D.C. 20037-1128

Jep Hill, Esq.
Jep Hill & Associates
P.O. Box 30254
Austin, TX 78755

Dated at Santa Fe, New Mexico,
April 5, 2000


Geoffrey H. Fettus

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

HRI, INC.,

Petitioner,
v.

ENVIRONMENTAL PROTECTION
AGENCY,

Respondent.

No. 97-9556

NAVAJO NATION,

Intervenor,

BEVERLY MARTIN,

Amicus Curiae.

NEW MEXICO ENVIRONMENT
DEPARTMENT,

Petitioner,
v.

UNITED STATES
ENVIRONMENTAL PROTECTION
AGENCY,

Respondent.

No. 97-9557

NAVAJO NATION,

Intervenor,

BEVERLY MARTIN,

Amicus Curiae.

ORDER
Filed March 30, 2000

Before **EBEL, BRISCOE and LUCERO**, Circuit Judges.

These matters are before the court on petitioners' petitions for rehearing with suggestions for rehearing en banc. Upon review, the panel grants rehearing for the limited purpose of modifying one sentence in the court's slip opinion filed on January 6, 2000. The sentence is found on page 55 of the slip opinion and is the first sentence of the paragraph which begins "The parties do not dispute that Section 17 was purchased with funds from a 1928 Act of Congress appropriating" The sentence should be modified by adding the word "materially" before the word "dispute." The petitions are denied in all other respects.

The suggestions for rehearing en banc were transmitted to all of the judges of the court who are in regular active service as required by Fed. R. App. P. 35.

As no member of the panel and no judge in regular active service on the court requested that the court be polled, the suggestions are also denied.

Entered for the Court
Patrick Fisher, Clerk of Court

By: 
Deputy Clerk