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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED
USNRC

BEFORE THE COMMISSION

'00 APR 24 P4:39

In the Matter of:)
)
)
HYDRO RESOURCES, INC.)
P.O. Box 15910)
Rio Rancho, New Mexico 87174)
_____)

Docket No. 40-8968-ML
ASLBP No. 95-706-01-ML

**OPPOSITION OF HYDRO RESOURCES, INC.
TO INTERVENORS EASTERN NAVAJO DINE AGAINST
URANIUM MINING'S AND SOUTHWEST RESEARCH AND INFORMATION
CENTER'S MOTION FOR LEAVE TO REPLY TO HRI'S OPPOSITION TO
INTERVENORS' MOTION TO REOPEN AND SUPPLEMENT THE RECORD**

I. INTRODUCTION

Hydro Resources, Inc. ("HRI"), respectfully opposes the Motion (hereinafter, "Motion") of Intervenors, Eastern Navajo Dine Against Uranium Mining ("ENDAUM") and Southwest Research and Information Center ("SRIC") for Leave to Reply to HRI's Opposition to Intervenors' Motion to Reopen and Supplement the Record in this matter. HRI opposes the Motion on the grounds that Intervenors fail to make any showing of good cause to allow a reply and should not be permitted to prolong these hearings further to introduce untimely, unqualified opinion testimony based on questionable data available long before the record was closed.

II. DISCUSSION

Intervenors have no right to reply to HRI's Opposition to their request that this hearing record be reopened. 10 C.F.R. § 2.730(c). Indeed, Intervenors themselves acknowledge that "(a) party who files a motion shall not have a right to reply to an answer in opposition thereto, unless prior leave is obtained Such leave will be granted sparingly, and then only upon a strong

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showing of good cause.” *Commonwealth Edison Company* (Byron Station, Units 1 and 2), 14 NRC 364, 372. Intervenors have not, and cannot, make the required showing in this instance.

Intervenors offer three assertions in support of their request for leave to reply to HRI’s Opposition to Intervenors’ Motion to Reopen the Record¹: “First . . . 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’ Brief* at 2. This assertion strains credulity. Dr. Fogarty did not conduct the research upon which he bases his opinion. As discussed in both HRI’s and the NRC Staff’s Oppositions to Intervenors’ Motion to Reopen, the data relied upon by Dr. Fogarty was published well before the evidentiary record in this case was closed. Intervenors make no attempt to explain *why* they could not submit testimony regarding the alleged health effects of the restoration standard adopted by the NRC in a timely manner. Intervenors’ unsupported and dubious conclusory assertion does not constitute the “strong showing of good cause” justifying leave for further pleading.

Second, Intervenors argue that they “seek to correct HRI’s false assumption that it is somehow entitled to an aquifer exemption” *Intervenors’ Brief* at 2. This assertion is misguided and an inappropriate basis for leave to reply to HRI’s Opposition to Intervenors’ attempt to reopen the record. Whether or not HRI is entitled to an aquifer exemption² does not justify according Intervenors leave to continue arguing about reopening the evidentiary record. If HRI again obtains an aquifer exemption, then the subject aquifer, by definition, can never be

¹ Intervenors also have sought leave to reply to NRC Staff’s Opposition to Intervenors’ Motion to Reopen.

² Of course, HRI previously had obtained an aquifer exemption from the U.S. Environmental Protection Agency. Intervenors are correct that the Tenth Circuit United States Court of Appeals recently invalidated that aquifer exemption. The Tenth Circuit’s determination that, at least for some of the proposed mining area, jurisdiction over the underground injection control (“UIC”) program pursuant to which the exemption was granted rested with U.S. EPA and not the State of New Mexico, mandated this result. The merits of HRI’s aquifer exemption were not before the Court.

used as a drinking water source. Should the aquifer exemption be denied, then mining in the subject area will be prohibited. Intervenors previously have briefed their groundwater concerns twice to the Presiding Officer and once to the Commission. Intervenors have made no strong showing of good cause to support their request for leave to argue this point further.

Finally, Intervenors assert that they “should be given leave to reply to HRI’s misleading and unwarranted attack on the qualifications of Dr. John Fogarty.” *Intervenors’ Brief* at 3.

Taking another pass at presenting to the Commission Dr. Fogarty’s qualifications, again, falls short of the “strong showing of good cause” required to secure leave to file a reply. Intervenors wish to qualify Dr. Fogarty as an expert on the alleged relationship between the groundwater restoration standard NRC incorporated in HRI’s license and alleged deleterious effects on the human kidney.³ In the Reply they seek leave to file, Intervenors assert that “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. . . .” *Intervenors’ Reply* at 5 (emphasis in original). In support of their effort to qualify Dr. Fogarty, Intervenors previously have offered Dr. Fogarty’s *curriculum vitae* (CV). Nothing in Dr. Fogarty’s CV or in his affidavit suggests *any* education, training, or experience even remotely related to the chemical toxicity of uranium as it affects the kidney. Dr. Fogarty’s CV makes no mention of uranium or toxicology and invokes the word “kidney” only in stating that he knows that kidney disease can be a long-term effect of diabetes. HRI does not misunderstand Dr. Fogarty’s

³ It should be noted that bringing meaningful interpretation to the relationship between the applicable groundwater restoration standard and potential human health impacts requires that expertise be brought to bear on a sequence of occurrences or conditions. Even if Dr. Fogarty were qualified to offer an expert opinion on the impact on the human kidney of uranium in drinking water, he could offer nothing on the fate and transport of uranium in groundwater, *i.e.*, whether or where and in what concentration solubilized uranium would migrate in the aquifer, and the likelihood, if any, that it might be present at a potential receptor site.

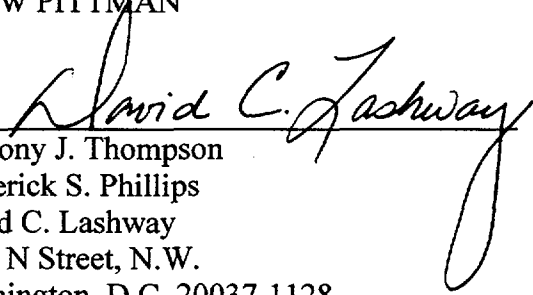
credentials: he clearly does not possess the expertise required to support the opinions he wishes to offer.

III. CONCLUSION

Intervenors' Motion to Reopen failed to meet the standard for reopening the evidentiary record and Intervenors now fail to meet the standard for being accorded leave to reply to HRI's Opposition to their Motion. In light of the foregoing, HRI respectfully requests that Intervenors' Motion for Leave to Reply be denied and that this lengthy proceeding be brought expeditiously to a resolution on the merits.

Respectfully submitted this 20th day of April, 2000.

SHAW PITTMAN



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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing document, OPPOSITION OF HYDRO RESOURCES, INC. TO INTERVENORS EASTERN NAVAJO DINE AGAINST URANIUM MINING'S AND SOUTHWEST RESEARCH AND INFORMATION CENTER'S MOTION FOR LEAVE TO REPLY TO HRI'S OPPOSITION TO INTERVENORS' MOTION TO REOPEN AND SUPPLEMENT THE RECORD in the above-captioned proceeding has been served on the following by electronic mail (as indicated) and on all parties by first class mail, postage pre-paid, on this 20th day of April, 2000.

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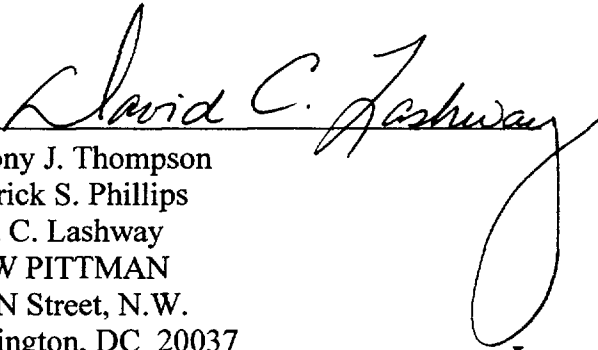
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