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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

RESPONSE OF HYDRO RESOURCES, INC.
TO COMMISSION'S QUESTIONS IN CLI-00-12

By Memorandum and Order, CLI-00-12, dated July 7, 2000 (the "Order"), the Commission requested that Intervenors, Eastern Navajo Dine Against Uranium Mining ("ENDAUM") and Southwest Research and Information Center ("SRIC"), licensee, Hydro Resources, Inc. ("HRI"), and Nuclear Regulatory Commission ("NRC") Staff ("Staff") answer the following questions:

(1) Did the Presiding Officer rely upon a current valid aquifer exemption or UIC permit for any of his technical groundwater filings?

(2) If so, would any of these findings be undermined if Section 8 ultimately were found conclusively to fall within "Indian Country" and thus within the jurisdiction of the federal UIC program?

(3) Was it even necessary for the Presiding Officer to address whether the HRI project would comply with the Safe Drinking Water Act?

(4) What practical effect does the Tenth Circuit's decision have upon HRI's schedule or plans for mining Section 8?

HRI respectfully responds as follows:

(1) Did the Presiding Officer rely upon a current valid aquifer exemption or UIC permit for any of his technical groundwater findings?

Template = SECY-049

SECY-02

The Presiding Officer's Partial Initial Determination Concluding Phase I, LBP-99-30, devotes approximately 45 pages (*see* LBP-99-30 at 7-52) to discussion and analysis of the "Groundwater Concern." *Id.* at 7. Over these 45 pages, the Presiding Officer, aided by Special Assistant Robin Brett, takes pains to assess and compare the testimony offered by twelve experts, as well as numerous treatises, articles and exhibits. *Id.* at 7-52. The Presiding Officer discusses, at length, the geological, hydrological, and chemical properties of the aquifer and the effects those properties can be expected to have on the quality of groundwater in the aquifer and its amenability to restoration. *Id.* at 8-49. At the very end of this discussion (*id.* at 49-51), the Presiding Officer addresses Intervenors' allegation that HRI's project will violate the Safe Drinking Water Act (SDWA). *Id.* at 49. Summarizing the detailed review of the geological, hydrological, and chemical factors examined over the preceding 42 pages (*id.* at 49-50), the Presiding Officer states

> **For these reasons I conclude** that HRI's project does not violate the SDWA at Church Rock Section 8, nor has there been a showing that the license should be invalidated because of a serious problem under the SDWA at Crownpoint.
>
> . . .
>
> In reaching this conclusion, I **note** again that *the portion of the aquifer* in which the Church Rock ore is found has been exempted . . . .

Id. at 51 (emphasis added; italics in original). The detailed explanation of the technical groundwater findings and the Presiding Officer's characterization of the manner in which he reached those findings both make clear that he did not rely primarily on the aquifer exemption or underground injection control (UIC) permit to arrive at his findings.

Even if the Presiding Officer had relied upon the aquifer exemption or UIC permit in reaching his groundwater findings, nothing in the Tenth Circuit decision and nothing in

the record from Environmental Protection Agency (EPA) Region 9 raises any question regarding the *technical validity* of the existing aquifer exemption. Regardless of the jurisdictional dispute (*i.e.*, between the State of New Mexico and Region 9 regarding SDWA jurisdiction over Section 8), the aquifer exemption was granted based on EPA Region 6's finding that the technical criteria for an aquifer exemption (which have nothing at all to do with "indian country" legal disputes) were satisfied.[1]

(2) If so, would any of these findings be undermined if Section 8 ultimately were found conclusively to fall within "Indian country" and thus within the jurisdiction of the federal UIC program?

As set forth in response to the Commission's question (1), above, HRI submits that the Presiding Officer's technical groundwater findings, including his findings regarding the hydrological properties of the aquifer, the pre-existing or background water quality of groundwater at the site, the feasibility of groundwater restoration, and the

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[1] EPA's criteria for exempting certain aquifers from SDWA requirements are set forth at 40 CFR § 146.4. That regulation provides, in pertinent part,

> An aquifer or a portion thereof which meets the criteria for an "underground source of drinking water" in §146.3 may be determined under 40 CFR 144.8 to be an "exempted aquifer" if it meets the following criteria:
>
> (a) It does not currently serve as a source of drinking water; and
> (b) It cannot now and will not in the future serve as a source of drinking water because:
> (1) It is mineral, hydrocarbon or geothermal energy producing, or can be demonstrated by a permit applicant as part of a permit application for a Class II or III operation to contain minerals or hydrocarbons that considering their quantity and location are expected to be commercially producible."

EPA granted the aquifer exemption for Section 8 because it satisfied the above noted criteria in (a) and (b)(1). These facts will not change whether jurisdiction ultimately is determined to lie with EPA or the State. The section 8 portion of the aquifer so exempted is, in fact, not a suitable source of drinking water now (because the minerals in question, (uranium and associated naturally occurring radionuclides radium and radon) are present in concentrations that are orders of magnitude above existing or proposed SDWA limits and will remain so even after successful restoration is completed.

suitability of the Westwater aquifer for ISL mining, are not affected by the jurisdictional dispute over the UIC program.

Assuming, arguendo, that Section 8 is determined to be within the jurisdiction of the federal UIC program, this means only that HRI must seek its underground injection control (UIC) permit from the EPA rather than from the New Mexico Environment Department ("NMED"). Inasmuch as EPA Region 6 had, prior to the onset of the jurisdictional dispute over Section 8, already granted an aquifer exemption for Section 8[2] as an amendment to NMED's SDWA delegation, it is not clear that the aquifer exemption has been affected in any way by the jurisdictional dispute.[3]

Whatever the resolution of this jurisdictional dispute, its impact would appear to be limited to determining the appropriate regulatory entity to whom HRI must apply for its UIC permit for Section 8. Again, this jurisdictional dispute has no bearing on the *technical validity* of the Presiding Officer's groundwater findings.

(3) Was it even necessary for the Presiding Officer to address whether the HRI project would comply with the Safe Drinking Water Act?

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[2] As noted in the Tenth Circuit's opinion, "Although EPA Region 6 is generally responsible for supervising New Mexico's UIC program, under an internal EPA three-region agreement, EPA Region 9 is responsible for the federal UIC program for the Navajo Nation." 198 F 3d at 1233. This does not necessarily mean that an *EPA* finding regarding an aquifer exemption is affected by the jurisdictional dispute in the same manner that a UIC permit would be.

[3] This outcome is made more likely in light of the Navajo Nation's recent policy on *in situ* leach mining on Navajo Nation lands. By resolution dated January 19, 2000, the Resources Committee of the Navajo Nation Council provided guidance for acceptable *in situ* leach mining activities on Navajo land and stated that the Navajo Nation Minerals Department and Navajo Nation Environmental Protection Agency "shall rely on federal regulators to protect the health, welfare, and safety of the Navajo people on uranium solution extraction activities within the Navajo Nation . . .." Thus, while this could someday change, the Navajo Nation apparently is content to leave environmental protection and public health and safety issues associated with *in situ* mining to the EPA and NRC. A copy of the resolution is attached. It is worth mentioning also that on the basis of the same criteria set forth above, EPA Region 9 has granted an aquifer exemption for *in situ* leach copper mine employing sulfuric acid as a lixiviant. This exemption was granted for an aquifer within three miles of the drinking water supply for Florence, Arizona.

The SDWA is administered by EPA and, as the name suggests, the statute is intended to ensure the safety and continued quality of the nation's drinking water aquifers. Part C of the SDWA established UIC program to provide safeguards so that injection wells do not endanger current and future underground sources of drinking water ("USDW").[4] Pursuant to its authority under SDWA, EPA promulgated regulations which define five classes of wells according to the type of waste injected and where the waste is injected. *See* 40 C.F.R. § 144.6. Of particular relevance here is the regulation governing Class III wells. A Class III well is defined as follows:

> Wells which inject for extraction of minerals including:
>
> (1) Mining for sulfur by the Frasch process;
> (2) In situ production of uranium or other metals; this category includes only in situ production from ore bodies which have not been conventionally mined.

40 C.F.R. § 146.5.

As noted above, the UIC program regulations, at 40 CFR §144.3, also provide for exempting aquifers from the definition of USDW, so that injection can occur. The UIC regulations, at 40 CFR §§144.7 and 146.4 define and provide criteria for exempting aquifers.

As discussed above, regardless of how the dispute between EPA and NMED ultimately is resolved, it will be up to the appropriate environmental regulatory body (*i.e.*, EPA or NMED) rather than the NRC to determine HRI's compliance SDWA regulatory requirements.

[4] The Tenth Circuit opinion prompting the Commission's inquiries herein (*Hydro Resources, Inc. v. EPA*, 198 F.3d 1224 (10th Cir. 2000), *rehearing en banc denied*, No. 97-9566 (Mar. 30, 2000), contains an informative outline of the structure and purposes of the Safe Drinking Water Act. *See* 198 F.3d at 1232 – 1234.

NRC is responsible for ensuring that NRC-issued licenses do not compromise public health and safety and for determining that NRC licensees are in compliance with the terms and conditions of their licenses. HRI's license, at LC 9.14, mandates that, "(P)rior to injection of lixiviant, the licensee shall obtain all necessary permits and licenses from the appropriate regulatory authorities." Thus, as a condition of the license, NRC will be required to determine that HRI possesses all necessary permits before ISL mining can commence. HRI must have an aquifer exemption and a UIC permit before injection activities can begin at Section 8 or it will be in violation of EPA or NMED regulations. Questions regarding HRI's SDWA compliance or the propriety of a UIC permit or aquifer exemption are not within the NRC's jurisdiction.

(4) What practical effect does the Tenth Circuit's decision have upon HRI's schedule or plans for mining Section 8?

As discussed in response to question 3, above, HRI's license requires that HRI possess all necessary permits and licenses before it may commence ISL mining at the site. Thus, HRI cannot go forward with mining on Section 8 until any jurisdictional dispute and accompanying uncertainty regarding the status of HRI's UIC permit and, if relevant, its aquifer exemption is resolved.

The "practical effect" of the Tenth Circuit's decision on HRI's plans for mining Section 8 likely are minimal or nonexistent. HRI has stated, in multiple filings and public pronouncements before the Commission and before the Presiding Officer, that it will not commence ISL mining on Section 8 (the first part of the Crownpoint Uranium Project to be mined under HRI's license) until the market price for uranium justifies the effort and expense required to extract and process the uranium. Because the market price

for uranium is substantially less than HRI's floor price[5] and appears unlikely to increase significantly in the near term, HRI has no current schedule for commencing operation. HRI expects that the aforereferenced jurisdictional dispute and associated uncertainty regarding the UIC permit and aquifer exemption will be resolved before uranium markets recover sufficiently to justify going forward with the project. Thus, HRI expects the Tenth Circuit decision to have no practical effect on HRI's plans or schedules.

Respectfully submitted this 9th day of August, 2000.

SHAW PITTMAN

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ON BEHALF OF HYDRO RESOURCES, INC.

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[5] The current market price for uranium is approximately $8.05 per pound; HRI's production costs are approximately $11-13 per pound.

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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

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing document, Response of Hydro Resources, Inc. to Commission's Questions in CLI-00-12 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 9th day of August, 2000.

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RESOLUTION
OF THE RESOURCES COMMITTEE
OF THE NAVAJO NATION COUNCIL

Approving the Navajo Nation Policy on Uranium Solution Extraction Activities on the Navajo Nation

WHEREAS:

1. Pursuant to 2 N.N.C. § 691, the Resources Committee of the Navajo Nation Council is established and continued as a standing committee of the Navajo Nation Council; and

2. Pursuant to 2 N.N.C. § 695, the purpose of the Resources Committee is to insure the optimum utilization of all resources of the Navajo Nation and to protect the rights, interest and freedom of the Navajo people to such resources. Pursuant to 2 N.N.C. § 695 (A), the Resources Committee is authorized to adopt resolutions, regulations or policies that shall be necessary and proper for carrying into execution its powers and authorities; and

. Pursuant to 2 N.N.C. § 695 (B) (7), the Resources Committee is authorized to oversee and regulate all activities within the Navajo Nation lands including actions which may involve disposition or acquisition of resources, surface disturbance or alteration of the natural state of the resources. The Resources Committee is further authorized by 2 N.N.C. § 695 (B) (12) to establish the Navajo Nation policy with respect to the optimum utilization of all resources, including the authority to initiate and require studies of the natural resources for the protection and efficient utilization, management, administration and enhancement of such resources and to approve consultants for such studies; and

4. By an Executive Order in 1992, President Zah executed a moratorium on uranium mining activities on the Navajo Nation as follows:

> In 1983, the Navajo Nation announced the policy that a moratorium shall be placed on all uranium mining activities on Navajo lands until such a time that the Navajo people are assured that the hazards associated with uranium mining activities can be addressed and resolved. Uranium mining and related activities on Navajo lands have created health hazards to livestock and human beings and have contaminated ground and water to the detriment of the Navajo people. To this day, the Navajo Nation is working with the United States government to clean up the harmful residue or past uranium mining activity and to address the harmful effects caused by exposure to radiation which have created suffering and hardship for many Navajo families.

Goal 6 of the President's Energy Policy for the Navajo Nation (January 1992) states that energy development shall "Protect and enhance the quality of the environment, and respect and preserve Navajo cultural values". The President's Energy Policy further states: "The Navajo Nation shall not approve any exploration, development, mining, milling, or transportation of uranium ore within the jurisdiction of the Navajo Nation unless and until the responsible party is able to certify and prove that the proposed activities will not contribute directly or indirectly to any further radioactive or heavy metal contamination of Navajo air, water, soil, vegetation, wildlife, or livestock."

Therefore, in order to further establish and continue the policy of the Navajo Nation and in the best interests of the Navajo people, I hereby issue this Executive Order to reiterate and formally recognize that a moratorium is placed on uranium mining activity until such a time that the Navajo people can be assured that all safety and health hazards related to such activity can be addressed and resolved.

5. The Resources Committee has reviewed the methods of uranium extraction, both conventional open pit and underground mining, including the modern in-situ leach method. The Resources Committee finds that opun pit and underground mining methods are not economically feasible today and that these methods caused significant waste and mill tailings that are not associated with in-situ method. It is a fact that underground uranium mining caused exposure to radiation to underground miners which created suffering and hardship for many Navajo families; and

6. The purpose of the Executive Order of 1992, which placed a moratorium on uranium extraction, was to prevent and eliminate harmful open pit and underground uranium extraction methods on the Navajo Nation. The Resources Committee will not at this time consider uranium extraction for open pit and underground mining methods. The Resources Committee will require studies of the uranium ore deposit within the Navajo Nation for the protection and efficient utilization, management, administration, and enhancement of such resources. Currently, the Navajo Nation has not adopted a policy, by a legislative body having oversight matter, about how to specifically handle uranium solution extraction methods on the Navajo Nation; and

7. Title 18 Navajo Nation Code, Sections 601-854, sets forth procedures for the exploration, extraction, processing or other development for oil and gas, uranium, coal, geothermal, or other energy or non-energy mineral resources. By the adoption of environmental and health laws, the Navajo Nation has assured that

oil and gas, uranium, coal, geothermal, or other energy or non-energy mineral resources production and related activities on Navajo lands protect Navajo air, water, soil, vegetation, wildlife, or livestock, as follows:

(a) The Navajo Nation Solid Waste Code, 14 N.N.C. § 101 et seq.;
(b) The Navajo Nation Pesticide Act, 14 N.N.C. § 301 et seq.;
(c) The Navajo Mine Lands Reclamation Code, 14 N.N.C. § 501 et seq.;
(d) The Navajo Energy Development Administration, 14 N.N.C. § 701 et seq.;
(e) The Navajo Nation Environmental Policy Act, 14 N.N.C. § 901 et seq.;
(f) The Navajo Nation Air Pollution Prevention and Control Act, 14 N.N.C. § 1101 et seq.;
(g) The Navajo Nation Safe Drinking Water Act, 22 N.N.C. § 2501 et seq.;
(h) The Navajo Nation Pollutant Discharge Elimination System Act, CJA-16-96, ____ N.N.C. § _____; and

8. In 1992 when the moratorium was executed, many of the laws mentioned above were not yet approved. Currently, the Navajo Nation has approved many environmental and health laws and regulation to safeguard against the contamination of Navajo air, water, soil, vegetation, wildlife or livestock. The Navajo Nation continues to approve new laws as new extraction technologies are developed. The Navajo Nation must coordinate tasks with federal regulators and state regulation to protect the health, welfare and safety of the Navajo people when dealing with oil and gas, uranium, coal, geothermal, or other energy or non-energy mineral resources development and related activities on Navajo lands.

NOW THEREFORE BE IT RESOLVED THAT:

1. The Resources Committee of the Navajo Nation Council, pursuant to its authorities delineated in 2 N.N.C. § 695 et seq., hereby approves the Navajo Nation Policy on Uranium Solution Extraction as follows:

a. A Uranium Extraction Permit shall be recommended by the Director of the Navajo Nation Minerals Department when the Minerals Department Director determines that hazards associated with uranium solution extraction activity are addressed and resolved pursuant to Navajo Nation laws and regulations.

b. The Director of the Navajo Nation Minerals Department shall recommend the issuance of a Uranium Solution Extraction Permit when a company has certified that the proposed activities will not contribute directly or

indirectly to any radioactive or heavy metal contamination of Navajo air, water, soil, vegetation, wildlife, or livestock.

c. The Resources Committee of the Navajo Nation Council shall consider a Uranium Solution Extraction Permit, upon the recommendation of the Navajo Nation Minerals Department, when all safety and health hazards related to such activity are addressed and resolved.

d. Prior to the issuance of a Uranium Solution Extraction Permit, the Director of the Navajo Nation Minerals Department and the Director of the Navajo Environmental Protection Agency shall obtain a concurrent recommendation on the application for uranium solution extraction activity from the United States Nuclear Regulatory Commission.

e. The applicant or responsible party shall certify that exploration, development, solution extraction or transportation of uranium ore will not contribute to contamination of Navajo air, water, soil, vegetation or livestock.

f. An Environmental Impact Statement shall be required for a Uranium Solution Extraction Permit within the Navajo Nation. The Environmental Impact Statement shall consider the effects on the environment such as: Air quality, geology and soils, hydrology (ground water and surface water), ecology, land use, socioeconomic risk, health physics, radiological impacts, cost/benefit analysis, and transportation. The Environmental Impact Statement shall be prepared by an inter-agency from the Nuclear Regulatory Commission and the Bureau of Indian Affairs. The Bureau of Land Management shall be a part of the inter-agency if it has applicable jurisdictional matters. The Resources Committee of the Navajo Nation Council shall review and approve Environmental Impact Statements that deal with oil and gas, uranium, coal, geothermal, or other energy or non-energy mineral resources production and related activities on Navajo lands.

g. The Navajo Nation Minerals Department and the Navajo Environmental Protection Agency shall rely on federal regulators to protect the health, welfare and safety of the Navajo people on uranium solution extraction activities within the Navajo Nation as follows: Lands held in trust by the United States for the Navajo Tribe.

h. The Resources Committee of the Navajo Nation Council and the Navajo Nation Minerals Department may request review and assistance from the United States Nuclear Regulatory Commission on matters of uranium solution extraction activities.

i. The Resources Committee of the Navajo Nation Council shall consider and recommend to the Navajo Nation Council mineral agreements (such as: Mineral leases, operating agreements and any other agreements authorized by the Indian Mineral Development Act of 1982), upon the recommendation of the Navajo Nation Minerals Department, when all safety and health hazards related to such activity are addressed and resolved.

j. The Resources Committee of the Navajo Nation Council shall, pursuant to 2 N.N.C. § 695 (A), maintain the necessary and proper authorities to carry out the policy on uranium solution extraction activities and to promulgate rules and regulations thereto.

2. The Navajo Nation Policy on Uranium Solution Extraction activities shall hereafter supersede the Executive Order of 1992 which placed a moratorium on uranium mining on the Navajo Nation.

CERTIFICATION

I hereby certify that the foregoing resolution was duly considered by the Resources Committee of the Navajo Nation Council at a duly called meeting at Window Rock, Navajo Nation (Arizona), at which a quorum was present and that same was passed by a vote of 5 in favor, 1 opposed and 0 abstained, this 19th day of January, 2000.

Robert B. Whitehorse
Vice Chairperson
Resources Committee

Motion: Elmer L. Milford
Second: Jones Begay

THE NAVAJO NATION

ALBERT A. HALE
PRESIDENT

June 05, 1996

THOMAS E. ATCITTY
VICE PRESIDENT

Received
JUN - 6 1996
OFFICE OF THE VICE PRESIDENT

MEMORANDUM

TO: Albert A. Hale, President
The Navajo Nation

FROM: Melvin F. Bahnsta, Executive Director
Division of Natural Resources

SUBJECT: Moratorium on Uranium Mining

This is in reference to the EXECUTIVE ORDER proclaiming a moratorium on uranium mining issued by President Peterson Zah in 1992. At a time when the Navajo Nation is seeking additional revenues, Navajo employment and economic development projects, it does not seem practical to prohibit outright any potential mineral development projects. Naturally, we recognize and are also very concerned over the numerous environmental and health-related problems that have resulted from past uranium development practices and which prompted to issue the moratorium. However, most of these problems resulted from inadequate and unregulated mining and milling practices of decades past.

Since the Nation owns proven uranium resources of at least 75 million pounds of U_3O_8, grading from .05% to .25% at depths of less than 2500 feet, we should consider the potential benefits to the Nation if favorable market conditions and safe and environmentally sound uranium extraction techniques make it feasible to develop the resource. Moreover, the Nation might be eligible in the future for Federal grants to participate in pilot projects to extract uranium safely.

Because any uranium exploration or development projects that might be proposed by industry will be subject not only to the scrutiny of all technical and regulatory departments of the Navajo Nation, but to that of other Federal and State agencies, placing a blanket moratorium on uranium mining may be too extreme a measure. We would hope that the Executive Branch would have confidence enough in the Resources Committee of the Navajo Nation Council and in the technical abilities of the Historic Preservation Department, the Navajo Environmental Protection Agency, the Minerals Department, and the Navajo Water Resources Department to allow them to appropriately evaluate any uranium related proposals that might be presented to the Nation. The merits of any uranium exploration or development proposals on Navajo land should be analyzed by the Nation with full consideration of protecting public health and the environment in mind.

The Navajo Nation depends on revenues and Navajo employment generated from minerals development. For this reason, the Division of Natural Resources urges you to rescind the Executive Order placing a Moratorium on Uranium Mining and allow Navajo Nation evaluation of any uranium exploration or development proposal.

Please advise if you have any questions.

xc: Thomas E. Atcitty, Vice President, The Navajo Nation