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NUCLEAR REGULATORY COMMISSION

Title: Hydro Resources, Inc.

Docket Number: 40-8968-ML

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1 UNITED STATES OF AMERICA

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5 ATOMIC SAFETY AND LICENSING BOARD PANEL

6 + + + + +

7 TELECONFERENCE

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10 IN THE MATTER OF: ||

11 HYDRO RESOURCES, INC. || Docket No. 40-8968-ML

12 UNDER CONTRACT NO. ||

13 N62472-98-C-4150 ||

14 _____

15 Wednesday,

16 April 14, 2004

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19 The teleconference commenced at 2:00 p.m.

20 BEFORE:

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22 THE HONORABLE JUDGE THOMAS MOORE

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P-R-O-C-E-E-D-I-N-G-S

(2:00 p.m.)

1
2
3 JUDGE MOORE: This is Judge Moore. With
4 me is the Panel Law Clerk Amy Roma.

5 We'll get started. The first order of
6 business deals with Intervenors' outstanding document
7 request.

8 Mr. Thompson, on behalf of HRI, have you
9 and Intervenors been able to reach an agreement and
10 resolve the matter of those documents that are in your
11 possession?

12 MR. THOMPSON: Judge Moore, we have been
13 in touch with the Intervenors' counsel. We, as Mr.
14 Jantz, are -- weren't sure exactly what documents they
15 were looking for. He is going to be looking into that
16 or has been looking into that with his experts. We
17 have sent him a draft protective order, which he is
18 looking at.

19 We anticipate continuing to discuss, as we
20 -- as perhaps having a telephone conference with
21 representatives from HRI and Mr. Jantz and his expert
22 or experts to make sure we all understand exactly what
23 it is that people are looking for and what we can
24 agree is appropriate for them to view, and how we
25 would go about all of that.

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1 So we are -- we are moving forward on it
2 and will anticipate trying to get a telephone
3 conference here in the near future to sort of refine
4 our understanding of exactly what it is that we are
5 going to be talking about.

6 JUDGE MOORE: Excellent. Will two weeks
7 do it?

8 MR. THOMPSON: I would hope so. I would
9 think so. Mr. Jantz -- I don't want to speak for
10 Eric.

11 MR. JANTZ: Yes, Judge Moore. This is
12 Eric Jantz for ENDAUM. I think -- I think two weeks
13 is probably a good timeframe to get to the point where
14 we'll know whether we'll be able to resolve this or
15 not for sure. Yes, I would say two weeks is
16 reasonable.

17 JUDGE MOORE: All right. Then, the first
18 reporting back to me, let's make it two weeks from
19 this Friday, and I'll give you a date in just a moment
20 when I get a calendar. And we'll have another joint
21 status report, and you can report at that time where
22 we stand. That would be April 30th, Friday,
23 April 30th.

24 MR. JANTZ: Yes, sir.

25 JUDGE MOORE: And it appears to me that

1 you're all on the right track, and I hope you'll be
2 able to resolve it and reach quick agreement.

3 Now, turning to the Staff, Ms.
4 Lemoncelli --

5 MS. LEMONCELLI: Yes, Your Honor.

6 JUDGE MOORE: -- in the previous joint
7 status report, the Staff indicated that there were --
8 Staff had no documents, that they were either already
9 in the hearing file or they were never in the Staff's
10 possession.

11 Now, we're talking about references in
12 Staff-produced documents like the EIS, as I understand
13 it. So can you give us the hearing file numbers?
14 Since the Intervenors claimed the documents that they
15 have referred to are not in the hearing file, can you
16 give us the hearing file numbers?

17 MS. LEMONCELLI: Oh, Your Honor, if I
18 could back up for just a moment. First and foremost,
19 the Staff does maintain that all of the information
20 that we have had in our possession that's appropriate
21 for the hearing file has been supplemented and is in
22 the hearing file.

23 In terms of the references made by the
24 Intervenors, Staff has not found some of the same
25 language that the Intervenors have indicated is in the

1 FEIS. We have not found references to fence diagrams,
2 the structural cross-sections, or driller's logs.

3 We have found some similar information
4 that we have -- we indicate is in the -- is in two
5 different RAIs -- one that's just a request for
6 information that we received from HRI before we
7 granted the license to them. One we received in 1992,
8 another in 1996, and I'll be happy to provide session
9 numbers for both.

10 However, Your Honor, beyond --

11 JUDGE MOORE: In the hearing file?

12 MS. LEMONCELLI: Yes, Your Honor, that's
13 correct.

14 JUDGE MOORE: Okay. And then you can
15 provide hearing file numbers for those.

16 MS. LEMONCELLI: That's correct, Your
17 Honor.

18 JUDGE MOORE: All right. Would you be so
19 kind as to identify those documents in a filing? This
20 is Wednesday. Is that possible by Friday -- to just
21 set forth in a writing those document -- those
22 document titles and hearing file numbers?)

23 MS. LEMONCELLI: By this Friday, Your
24 Honor?

25 JUDGE MOORE: Yes.

1 MS. LEMONCELLI: Certainly.

2 JUDGE MOORE: Mr. Jantz?

3 MR. JANTZ: Yes, Your Honor.

4 JUDGE MOORE: Here in the March 26th joint
5 status report, you indicated that these were
6 references, among others, of the -- in the EIS.

7 MR. JANTZ: Yes, Your Honor.

8 JUDGE MOORE: Staff has just said that
9 they cannot locate the references to the EIS that
10 you're referring to. I would suggest that you and the
11 Staff immediately discuss this matter and see if you
12 can identify precisely what those are, because if they
13 are documents that are referenced in Staff-produced
14 documents, i.e. the EIS, it is the presiding officer's
15 view that those are materials that upon request must
16 then be put in the hearing file. So --

17 MR. JANTZ: Absolutely, Your Honor. Sorry
18 to interrupt. I will be happy to get with the
19 attorneys for the Staff and see if we can't figure out
20 what's going on.

21 JUDGE MOORE: Ms. Lemoncelli, can you meet
22 with Mr. Jantz, have a telephone conference, and get
23 to the bottom of it as quickly as possible, and
24 hopefully resolve it? And if not, then I'll expect a
25 report on any disagreements outstanding in that same

1 April 30th joint status report.

2 MS. LEMONCELLI: Certainly, Your Honor.

3 JUDGE MOORE: I'm sorry. I didn't
4 understand you, Ms. Lemoncelli.

5 MS. LEMONCELLI: Yes, Your Honor. That
6 will be fine.

7 JUDGE MOORE: All right. Then that seems
8 to take care of document matters. Are there any other
9 matters relating to these that any party would wish to
10 raise?

11 MS. LEMONCELLI: Speaking on behalf of the
12 Staff, no, Your Honor.

13 MR. JANTZ: This is Eric Jantz. At this
14 time, I think we have our direction. And at this
15 time, I don't think there are any other matters that
16 need to be raised.

17 JUDGE MOORE: And Mr. Thompson, is -- do
18 you have anything further on this?

19 MR. THOMPSON: No, Your Honor.

20 JUDGE MOORE: Let's move on, then, to the
21 question of EIS supplementation. In the Board's
22 previous order of March 31, you were alerted to the
23 fact that -- to the question that in light of the
24 proceeding regarding Section 8, that I would be asking
25 each of you whether, in your view, the presiding

1 officer has any jurisdiction over any matter relating
2 to Section 8.

3 Mr. Jantz?

4 MR. JANTZ: Thank you, Your Honor. It's
5 ENDAUM's position that, in fact, the Licensing Board
6 does have jurisdiction to address the supplementation
7 issue -- meet the supplementation issue with respect
8 to --

9 JUDGE MOORE: With respect to Section 8?

10 MR. JANTZ: With respect to Section 8,
11 yes, Your Honor.

12 JUDGE MOORE: And what is the basis for
13 that position?

14 MR. JANTZ: Well, the basis for that
15 position is that the supplementation is basically a
16 completely different issue that hasn't been addressed
17 at all. It hasn't been litigated whatsoever with
18 respect to any of the sites, including Section 8.

19 JUDGE MOORE: Let me interrupt, Mr. Jantz.
20 I will grant you that I don't see a jurisdictional
21 question with regard to Section 17 or Unit 1 or Crown
22 Point, because those are yet to be litigated. Those
23 are currently in front of me.

24 MR. JANTZ: Granted.

25 JUDGE MOORE: Section 8, all litigation is

1 concluded, and has either already been appealed and
2 reviewed on appeal, or is currently pending on appeal.

3 MR. JANTZ: But our position, Your Honor,
4 is that the -- with respect to these new
5 circumstances, these significant new circumstances,
6 that that hasn't been addressed. And the point is to
7 have the record supplemented as to these new -- as to
8 these new circumstances to -- that is, the Springstead
9 Housing Development.

10 And another point that I'd just like to
11 make is that if the Licensing Board doesn't have
12 jurisdiction to hear this matter with respect to
13 supplementation, I don't know what remedy or what
14 relief the Intervenors could --

15 JUDGE MOORE: Well, I would suggest, Mr.
16 Jantz, that a motion with regard to Section 8 would
17 lie with the body with jurisdiction of this -- of the
18 proceeding as to Section 8, which is the Commission.

19 Let's hear from Mr. Thompson, HRI.

20 MR. THOMPSON: Your Honor, I'd sort of
21 actually jump ahead to the question of whether it's a
22 question of mixed law and fact, and so forth and so
23 on. It seems to us that Section 8 has been litigated,
24 and all of the decisions have found that there is no
25 threat from groundwater, airborne, direct radiation,

1 or anything else, to the theoretical most-exposed
2 person outside the fenceline of Section 8; and,
3 therefore, something that is several miles away, which
4 is: a) up gradient, so groundwater doesn't run
5 uphill, and also is upwind, the prevailing wind
6 direction blows away from the development -- that that
7 issue is -- is not ripe as to Section 8.

8 And the development isn't there yet
9 either. I mean, it's --

10 JUDGE MOORE: Okay. But let's just talk
11 straight terms first of jurisdiction. Do I have
12 jurisdiction to entertain in the current posture of
13 this proceeding anything about Section 8?

14 MR. THOMPSON: I guess -- well, our view
15 is everything is on appeal, either on appeal or been
16 decided.

17 JUDGE MOORE: And that's -- Mr. Thompson,
18 is that you speaking?

19 MR. THOMPSON: Yes. Yes, Your Honor. I'm
20 sorry. I should have identified myself.

21 JUDGE MOORE: Ergo that I -- that I would
22 not have jurisdiction over any matter relating to
23 Section 8.

24 MR. THOMPSON: That would be our position.

25 JUDGE MOORE: Ms. Lemoncelli, for the

1 Staff.

2 MS. LEMONCELLI: Yes, Your Honor. The
3 Staff agrees with HRI's position that currently the
4 Board does not have jurisdiction over this matter.

5 JUDGE MOORE: "This matter" being anything
6 relating to Section 8?

7 MS. LEMONCELLI: Supplementation of the
8 FEIS regarding -- in regards to Section 8. That's
9 correct, Your Honor. And I would cite to the
10 Commission decision rejecting an earlier Intervenor
11 request that the FEIS be supplemented, and that was in
12 CLI 0104.

13 It is the Staff's position that this issue
14 has been litigated, both before the presiding officer
15 and before the Commission, and the issue is no longer
16 viable.

17 JUDGE MOORE: Was there previously a
18 motion before the Commission for supplementation with
19 regard to the circumstances of a new housing
20 development?

21 MS. LEMONCELLI: No, Your Honor. That, of
22 course, is a new issue. But the Staff would take --
23 take issue with the notion of Mr. Jantz's
24 characterization that this is a significant new
25 circumstance. The Staff, as per 5192, does not

1 believe that this new information merits
2 supplementation of the FEIS.

3 JUDGE MOORE: Well, I'm interested only at
4 this point in the question of jurisdiction, and you've
5 answered that question.

6 MS. LEMONCELLI: Yes, Your Honor.

7 JUDGE MOORE: Mr. Jantz, do you have
8 anything further to add?

9 MR. JANTZ: Well, I just wanted to
10 reemphasize, Your Honor, that, again, it's our
11 position -- it's ENDAUM's position that this is a
12 completely different issue that hasn't been litigated.
13 To the extent that supplement -- the supplementation
14 of the FEIS issue touches on -- on subjects that have
15 already been litigated, such as groundwater and air
16 emissions, those will only -- should only be
17 considered in the context of supplement --
18 supplementing the FEIS.

19 I just want to make clear that we're not
20 looking to relitigate any of the issues that have
21 already been settled. We simply want to proceed with
22 a complete record regarding the effects of HRI's
23 operation on this new housing project that's going to
24 house approximately 4,000 individuals.

25 JUDGE MOORE: I understand that. I'm

1 talking strictly of my jurisdiction to entertain any
2 motion with regard to Section 8, because it appears to
3 me that that jurisdiction has all passed to the
4 Commission.

5 Now, let me give you an analogy. If this
6 were treated -- as a practical matter the way it's
7 being treated -- as separate cases, with the first one
8 having been the litigation of Section 8, if that was
9 a separate proceeding and we were now dealing with a
10 second proceeding dealing with the other three sites,
11 and it's in the same posture we had -- the licensing
12 -- or the presiding officer had concluded all of the
13 litigation and it was on appeal to the Commission, in
14 that totally separate proceeding, Mr. Jantz, would I
15 have any jurisdiction to entertain, while it's before
16 the Commission, anything having to do with that first
17 case dealing with Section 8?

18 MR. JANTZ: Offhand, I would say I don't
19 think so. However, in this case, it's a little
20 different in that this is one license, and it has been
21 the Commission's position that this license should be
22 -- this license should be litigated as a whole.

23 JUDGE MOORE: I understand that. But
24 because of provisions that were made a long time ago,
25 it proceeded on a track that subsequently was

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1 determined not to have been the best approach. But
2 nevertheless, it did proceed that way.

3 That said, I don't see, as far as the
4 jurisdiction is concerned, how I have any jurisdiction
5 to entertain any motion with regard to supplementation
6 with regard to Section 8. And I would so rule if a
7 motion were put in front of me, so I would suggest,
8 Mr. Jantz, that if you're going to file such a motion
9 you file it directly with the Commission.

10 I would caution you, however, that the
11 Commission is -- has indicated, I believe, that they
12 -- in extending their review time on the pending
13 petitions for review, I believe it was May 19th. I
14 could well be wrong on the date, so you may have to
15 keep one eye to the clock, because the Commission --
16 the case may then subsequently be concluded after that
17 date or whatever date the Commission noted.

18 And then you may find yourself in the
19 position of a motion to reopen as well --

20 MR. JANTZ: Right.

21 JUDGE MOORE: -- so I would caution you in
22 that regard.

23 Let's, then, turn to the supplementation
24 question with regard to the outstanding three
25 sections, albeit covered by the same license that are

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1 yet to be litigated.

2 Mr. Jantz, I take it your position is that
3 I do have jurisdiction to entertain such a motion with
4 regard to those sections?

5 MR. JANTZ: Absolutely. Although I would
6 like to note, Your Honor, it puts us in kind of a
7 strange and awkward position to litigate those three
8 -- those three sections with regard to supplementation
9 without having the benefit of comprehensive
10 supplementation in that we don't necessarily -- we
11 won't necessarily have a full picture of the
12 information that we need to make arguments on
13 supplementation.

14 That is, we wouldn't have information,
15 say, for example, about the cumulative effects of the
16 Section 8 and Section 17 on the proposed housing
17 development. We wouldn't have information about the
18 processing plant, which lies in Section 8, with
19 respect to those impacts on the housing development.

20 So, I mean, I think without question the
21 Licensing Board Panel has jurisdiction over the
22 remaining three sections. But I'm not sure it will be
23 able to reasonably or meaningfully litigate those
24 without a comprehensive supplementation to the FEIS.

25 JUDGE MOORE: Well, I understand the

1 difficulty, but the jurisdictional hurdle is often
2 high and is very rigid. And I -- I do not see how I
3 can have jurisdiction over something that has -- all
4 litigation has been completed and it's pending in
5 front of another tribunal.

6 MR. JANTZ: I understand, Your Honor.

7 JUDGE MOORE: Mr. Thompson, is it the --
8 is HRI's view with respect to jurisdiction that I have
9 jurisdiction to entertain a supplementation motion
10 should one be filed with regard to the remaining three
11 outstanding sites?

12 MR. THOMPSON: Your Honor, I guess our
13 view would be that you would have jurisdiction to
14 consider that.

15 JUDGE MOORE: Staff, is that your position
16 as well?

17 MS. LEMONCELLI: Yes, Your Honor. We do
18 believe that you would have jurisdiction to look at --

19 JUDGE MOORE: Now let's get to the
20 question of -- the question of supplementation. Is
21 this strictly a legal question? Mr. Jantz?

22 MR. JANTZ: I don't believe so, Your
23 Honor. There are legal questions, I believe, but I
24 believe it's a mix. I think there are facts that need
25 to be developed, and the Staff's refusal to supplement

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1 the EIS and the joint status report, which is, to my
2 knowledge, the only -- the only written document
3 regarding their reason, they simply say that they have
4 reviewed the record and that supplementation is
5 inappropriate in any event. Intervenors can litigate
6 this in the context of the remaining sections.

7 So -- but it seems to me that there needs
8 to be some factual questions answered about -- at
9 least about the Staff's rationale for rejecting a
10 supplementation. So I think that some analysis of
11 facts and some building of a record needs to be had.

12 JUDGE MOORE: Okay. Mr. Thompson, what is
13 your view as to the question of supplementation at
14 this point -- at this -- with the proceeding in this
15 posture? Is it a strictly legal question, or is it a
16 mixed legal and factual question?

17 MR. THOMPSON: I guess my view is a mixed
18 legal and factual question.

19 JUDGE MOORE: Okay. Now, Ms. Lemoncelli,
20 for the Staff, is that the Staff's position as well?

21 MS. LEMONCELLI: Yes, Your Honor.

22 JUDGE MOORE: All right. Then, if it is
23 a mixed legal and factual question, how in the posture
24 of a proceeding like this is the record developed so
25 it can be determined whether the EIS must be

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1 supplemented? Mr. Jantz?

2 MR. JANTZ: Well, it seems to me that the
3 initial step was -- the initial step would have to be
4 some determination by the Staff about why the EIS
5 should or should not be supplemented. I guess at this
6 point it would -- it would be that the Staff would not
7 supplement, but there should be some determination as
8 to why it shouldn't be supplemented, taking into
9 consideration the facts that we know.

10 With respect to building a record, it
11 seems to me that we obviously have had some sort of
12 hearing process, whether it be paper, in person, that
13 develops these facts. And as to which tribunal that
14 goes before, I mean, I think that's -- that's one of
15 the initial questions of law that would have to be
16 addressed.

17 JUDGE MOORE: Mr. Jantz, what facts need
18 to be developed?

19 MR. JANTZ: Well, for example, I don't
20 think there has been a consideration of the effect of
21 -- the potential effect of the new housing development
22 on the groundwater issue -- for example, the reversal
23 of the hydrological gradient.

24 We did sort of a back of the envelope
25 calculation. We conservatively estimated that this

1 housing development would use around 219 million
2 gallons of water a year. And I think that is
3 something that would -- that would need to be at least
4 considered by the Staff in making a determination
5 about whether or not to supplement the EIS and --

6 JUDGE MOORE: Square one --

7 MR. JANTZ: I'm sorry?

8 JUDGE MOORE: Let's go back to square one.

9 MR. JANTZ: Sure.

10 JUDGE MOORE: Whose housing development is
11 it?

12 MR. JANTZ: This is a housing development
13 that's being built by the Fort Defiance Housing
14 Corporation. It's a private nonprofit development
15 corporation, in conjunction with the Navajo Housing
16 Authority and funded by HUD.

17 JUDGE MOORE: Has this project already
18 surmounted all of the bureaucratic red tape, so it is,
19 in fact, going to be built?

20 MR. JANTZ: I am not entirely sure about
21 that, Your Honor. They have -- it is my understanding
22 that they have surmounted the bulk of the red tape,
23 and that this is the -- the surety of this going
24 through is fairly certain. It's my understanding that
25 things are fairly certain that this is going to go

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1 through. And, in fact, it's my understanding that
2 they have actually broken ground on some parts of the
3 development.

4 JUDGE MOORE: Is the aquifer from which
5 this new housing community will draw its water the
6 same aquifer that would be in these sections?

7 MR. JANTZ: That's one of the facts that's
8 unclear, Your Honor, and that I think would need to be
9 clarified for determination prior to supplementation.
10 I mean, obviously, if it's not going to be the same
11 aquifer, or they're not going to use any aquifer at
12 all, they're going to ship their -- pipe their water
13 in from elsewhere, you know, that certainly wouldn't
14 be as much of a consideration.

15 JUDGE MOORE: Assume for the moment that
16 it, like Crown Point, is drawing its water from an
17 aquifer that would be impacted by HRI's mining
18 activities. Is that an analogy that would hold true,
19 then, that you could not mine like at Crown Point with
20 the license conditions the Staff has imposed?

21 MR. JANTZ: Well, again, that's unclear,
22 and I think that would be the purpose of
23 supplementation -- to take something like that into
24 account, and for the Staff to determine whether or not
25 prophylactic measures like the license condition

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1 that's been imposed for Crown Point should be imposed
2 for Church Rock as well.

3 JUDGE MOORE: Turning to the Staff, since
4 supplementation is a Staff responsibility, if there is
5 to be one, what factual gathering did the Staff do to
6 determine any of the matters affecting this -- the
7 environment with regard to this proposed housing
8 development? Ms. Lemoncelli?

9 MS. LEMONCELLI: Well, Your Honor, as we
10 had indicated in the joint status report, when we
11 noted that we did not intend to supplement the EIS,
12 the Staff maintains that if the Intervenors -- if the
13 Intervenors do want the FEIS supplemented, then a
14 formal motion on the record, a written motion, should
15 be presented by the Intervenors, at which --

16 JUDGE MOORE: No question about that, Ms.
17 Lemoncelli. But what I'm trying to do is to speed
18 this process, and they -- Intervenors have indicated
19 they're going to file such a motion.

20 So what I'm trying to do is to find out
21 how we proceed and whether we need ultimately to
22 proceed first with that before we can go ahead with
23 any of the rest of this proceeding.

24 That said, the Staff said they will not
25 supplement. Now that may only be an informal

1 determination, because it was only stated in a status
2 report. But in reading what the Staff's position is,
3 it does not appear that they've done anything other
4 than look at past filings in this case. And this is
5 a new proposed housing development.

6 What I'm wondering is, frankly, whether
7 the Staff needs to do any investigation before they
8 can reach a conclusion that says they won't
9 supplement.

10 MS. LEMONCELLI: Your Honor, I know that
11 the -- the Staff has certainly considered Mr. Jantz's
12 request. We have looked at the EA. And,
13 unfortunately, Your Honor, beyond indicating that the
14 Staff made that determination of no, in terms of their
15 specific analysis, I'm unable to provide you with that
16 information.

17 JUDGE MOORE: Okay. You can't tell us,
18 then, whether this is going to be -- this is the same
19 aquifer that this housing development will be drawing
20 its water from.

21 MS. LEMONCELLI: Your Honor, at this time
22 it's unknown.

23 JUDGE MOORE: Okay. Mr. Thompson, does
24 the applicant licensee in this case have an obligation
25 to in any way amend its ER?

1 MR. THOMPSON: I don't -- we don't believe
2 so, Your Honor. It seems to me that if -- if the
3 Intervenors have some reasons other than sort of
4 generalized statements and back-of-the-envelope
5 calculations that nobody is privy to about the need
6 for supplementation, they need to present those to the
7 Staff. Otherwise, at any point in any proceeding
8 somebody can say, "Well, we need to supplement because
9 of X."

10 I mean, they've got to come forward with
11 something that has some -- it seems to me some legs
12 that the Staff can address and that the licensee can
13 address. It shouldn't be our responsibility to figure
14 out all of this without them coming forward with what
15 it is they think it needs -- why it needs to be
16 supplemented.

17 The Staff looked at the prior record. The
18 prior record said there's no problem at the fenceline.
19 This is several miles away up gradient. So it would
20 seem that without something else -- and, indeed,
21 Section 17 is in between Section 8 and this -- of this
22 alleged project -- that without something concrete
23 from the Intervenors to address, it's just an
24 amorphous kind of a request.

25 And it seems to me it's their

1 responsibility to come forward with some detailed --
2 a detailed discussion of what the problem might be and
3 then let the Staff and/or the licensee address it.

4 JUDGE MOORE: Well, on the face of it, it
5 appears that the standard for supplementation is --
6 and under the regulations is significant new
7 information.

8 MR. THOMPSON: Right.

9 JUDGE MOORE: Or something of that ilk.

10 MR. THOMPSON: Yes, Your Honor.

11 JUDGE MOORE: And it strikes me that if
12 somebody is going to put a housing development that
13 will contain 4,000 people, and if it's the same
14 aquifer that is going to be used in mining, there
15 would appear to be somewhat of a direct analogy to the
16 Staff's treatment of Crown Point where the license
17 condition says you can't mine Crown Point as long as
18 Crown Point is drawing its drinking water from that
19 aquifer.

20 MR. THOMPSON: Well, I mean, frankly, I --
21 I'm not absolutely -- I mean, we're talking about an
22 aquifer that covers the whole State of New Mexico. I
23 mean, we're not talking about some separate aquifer.
24 I mean, and the exempt portion of that aquifer is the
25 mining zone. It's a huge aquifer.

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1 I mean, and so, you know, they need to
2 come forward and say how -- you know, how big is the
3 aquifer, and how is drawing down this kind of water in
4 an aquifer that covers the whole State of New Mexico
5 going to be affected by this in some way that's going
6 to make groundwater run uphill?

7 JUDGE MOORE: Okay. Now, assuming the
8 Intervenors go ahead and files a motion before the
9 presiding officer seeking supplementation, and in that
10 motion they provide whatever support they have for
11 their motion, then is it decided on that basis alone,
12 or is there some threshold -- only some threshold that
13 has to be met?

14 MR. THOMPSON: I'm not sure I understand.

15 JUDGE MOORE: The question I'm wrestling
16 with is: if supplementation has -- if it's
17 determined, however you get there, that
18 supplementation is necessary, what ultimately I'm
19 looking at for scheduling purposes is, how do we then
20 proceed with the rest of these issues?

21 MR. THOMPSON: Oh, okay. I understand
22 now. Well, my view on this, Your Honor, would be that
23 if supplementation was determined to be necessary, or
24 consideration of supplementation in more detail was
25 determined to be necessary, that you can't go -- I

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1 mean, the first issue sort of out of the box is
2 groundwater, so I -- I don't see how you could start
3 litigating that as to 17, Crown Point, etcetera, until
4 you -- until you first addressed this issue.

5 JUDGE MOORE: Well, that was certainly the
6 thought in the back of my mind, that -- are there, in
7 your opinion, Mr. Thompson, any of the seven groupings
8 that we could go ahead and wrestle with without
9 dealing with the supplementation first?

10 MR. THOMPSON: You know, Your Honor, I
11 would have to go back and look. I suspect there
12 probably are some, but certainly your groundwater,
13 your airborne, those -- those you would have to deal
14 with the supplementation first. I'm just looking
15 at --

16 JUDGE MOORE: And one of them specifically
17 deals with the adequacy of the existing EIS, which
18 would --

19 MR. THOMPSON: Right.

20 JUDGE MOORE: -- seemingly consume the --
21 any supplementation issue.

22 MR. THOMPSON: Yes.

23 JUDGE MOORE: Mr. Thompson, let me ask you
24 this. The Staff has indicated that they believe that
25 any supplementation could take place just in dealing

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1 with these seven groupings of issues. I'm hesitant to
2 jump off that cliff, because if you do and you're
3 wrong, there's an awful lot of work that has to be
4 done to fix it.

5 MR. THOMPSON: Yes, to undo it. Your
6 Honor, my feeling is that if there is a decision that
7 some kind of supplementation is necessary, that needs
8 to be done before you start getting entwined with all
9 of these issues, because even though they are separate
10 issues, they are necessarily entwined to some extent.

11 JUDGE MOORE: Yes. Ms. Lemoncelli, for
12 the Staff, what is your view on these matters I have
13 just been asking Mr. Thompson?

14 MS. LEMONCELLI: Your Honor, in terms of
15 the order of the proceeding, the Staff has -- takes no
16 issue with -- with dealing with supplementation of the
17 EIS as our first threshold question. In other words,
18 Your Honor, the Staff maintains that this is --
19 supplementation of the EIS would be an appropriate
20 place to start.

21 JUDGE MOORE: Okay. Now, let's speak
22 specifically to supplementation, Ms. Lemoncelli. I
23 may well have wrestled with this problem in the past,
24 but if I have I -- I cannot recall it. And there have
25 been several suggestions this afternoon that the Staff

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1 needs to essentially formally deal with this issue.

2 Is it the Staff's position that that would
3 be done if a motion is placed before the presiding
4 officer on supplementation, that that then would state
5 the Staff's position?

6 MS. LEMONCELLI: Yes, Your Honor.

7 JUDGE MOORE: Okay.

8 MS. LEMONCELLI: If the Intervenors did
9 make a formal motion on the record, the Staff would
10 indeed answer that motion.

11 JUDGE MOORE: Now, let's take it into that
12 troublesome area of factual development. If everyone
13 is agreed that it's a mixed legal and factual
14 question, then it would appear that the motion would
15 need to set forth at least a prima facie case, both of
16 a factual nature -- that would establish that this is
17 a substantial new set of circumstances. Is that what
18 we're shooting at here?

19 MR. THOMPSON: Yes, Your Honor. This is
20 HRI. Yes, Your Honor.

21 JUDGE MOORE: Staff, is that your view?

22 MS. LEMONCELLI: Yes. Yes, Your Honor.
23 And in looking at 10 CFR 5192, the appropriate
24 regulation that speaks to supplementation -- in
25 addition to the notion of whether or not this housing

1 project presents new significant -- new and
2 significant information, another issue to be
3 addressed, perhaps a threshold question in this arena,
4 is -- I refer you to 5192(a), which indicates if the
5 proposed action has not been taken, then the NRC staff
6 will prepare a supplement.

7 Arguably, Your Honor, the proposed action
8 has been taken, i.e. the license has been issued
9 already. So that is an additional area for
10 discussion.

11 JUDGE MOORE: Except in the circumstances
12 where you issue the license and then litigate, is
13 that, in the Staff's view, an insurmountable barrier,
14 that there can never be supplementation?

15 MS. LEMONCELLI: Well, Your Honor, the --

16 JUDGE MOORE: Let me put it this way, Ms.
17 Lemoncelli.

18 MS. LEMONCELLI: Yes, Your Honor.

19 JUDGE MOORE: If there had been no
20 litigation at all in this case, but the Staff -- and
21 the Staff, because it's an informal materials license
22 -- I'm sorry, it's a materials license that would be
23 followed only by an informal proceeding -- that
24 license can issue immediately.

25 And let's assume that the Staff issued no

1 EIS in the case, and let's further assume that that
2 was an erroneous determination. That determination
3 would only be made, would it not, at the conclusion of
4 the litigation?

5 And what you're saying is, because the
6 Staff action had already been taken, the question is
7 off the table, can never be looked at. I'm sensing
8 the cat chasing its tail here.

9 MS. LEMONCELLI: I understand that, Your
10 Honor. While the Staff would -- Your Honor, I think
11 it's an arguable position whether or not the proposed
12 action has been taken. But certainly I don't think
13 that the door is completely closed here.

14 As the Commission has indicated that the
15 FEIS, within the context of litigation, is always
16 subject to modification by the presiding officer or
17 the Commission. And that becomes part of the
18 adjudicatory record and essentially becomes part of
19 the FEIS.

20 So going back, Your Honor, is the issue
21 completely closed? No, I don't believe so.

22 JUDGE MOORE: All right. Now, but the
23 part that's troubling me is if the Intervenors file a
24 motion and make a prima facie case, then -- this is an
25 informal proceeding. Is this just going to be -- the

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1 record is going to be developed in dealing with this
2 motion with a -- with papers and affidavits filed? Or
3 do we have to have the traditional staff investigation
4 or look at it, and that would require the applicant to
5 amend its ER and put forth the facts, so the Staff can
6 make its determination of whether we go forward.

7 I'm having trouble with how it would work
8 in this context. Can you shed some light on that, Ms.
9 Lemoncelli?

10 MS. LEMONCELLI: Your Honor, it's
11 difficult to speculate the type and amount of Staff
12 analysis necessary without a formal motion on the
13 record by the Intervenors.

14 JUDGE MOORE: Okay. Mr. Thompson, do you
15 have anything to add to what Ms. Lemoncelli has said?
16 Mr. Thompson?

17 MR. THOMPSON: Yes. I'm sorry, Your
18 Honor. As a practical matter, it seems to me that --
19 that if something is proposed to the Staff, the Staff
20 can either -- either -- or in the context of this
21 proceeding, you can suggest or direct that the
22 licensee prepare responses, or the Staff can ask the
23 licensee for responses, and make a ruling -- the Staff
24 can make a ruling, and then -- and then that issue --
25 that could be subject to litigation.

1 JUDGE MOORE: And then --

2 MR. THOMPSON: And I don't think we would
3 necessarily have to amend the ER first. That could be
4 done if you decided that it needed to be done.

5 JUDGE MOORE: But I think the -- that
6 would be the cart before the horse. I think you've
7 probably driven the nail true. If a motion is filed
8 -- and they've said they're going to file one -- then
9 in determining whether and what response to make, the
10 Staff may have to direct the applicant to do
11 something.

12 MR. THOMPSON: Yes.

13 JUDGE MOORE: Okay. Mr. Jantz, do you
14 have anything to add to -- in response to the
15 questions I have posed to the Staff and the applicant
16 licensee?

17 MR. JANTZ: Not at this time, Your Honor,
18 no.

19 JUDGE MOORE: Okay. Mr. Jantz, are you
20 now -- and at what time are you going to file such a
21 supplementation motion? You have indicated you were
22 going to file one.

23 MR. JANTZ: I believe that was something
24 we had talked about, yes. And it's kind of hard for
25 me to say exactly when, but I would imagine it would

1 be within the next week to two weeks.

2 JUDGE MOORE: Let's see if we can't set a
3 target, and I'll tell you why. Because I agree with
4 -- with HRI and the Staff that it really makes no
5 sense to start these other groups of issues having the
6 filings on them until we have wrestled with the
7 supplementation. And if supplementation is necessary,
8 that we get that out of the way before we then
9 proceed.

10 So we're having a status report two weeks
11 from this Friday. And May 19th is the date, I
12 believe, that the Staff --

13 MR. JANTZ: The Commission?

14 JUDGE MOORE: -- the Commission, rather,
15 has extended its time to deal with the pending
16 petitions for review. Let's extend the time in which
17 you file any motion so that -- because you have -- if
18 you're going to pursue anything with Section 8, you
19 have to do that with the Commission, which will tie in
20 with the same thing you're doing with the other
21 sections.

22 So I -- let's extend that date to -- any
23 motion you are going to file to supplement must be
24 filed by May 14th.

25 MR. JANTZ: May 14th?

1 JUDGE MOORE: That's exactly 30 days.

2 MR. JANTZ: Okay.

3 JUDGE MOORE: Now, normally I wouldn't do
4 that. But because of the -- the split, if you will,
5 you might as well just do it all in one fell swoop,
6 because you're -- if you're going to pursue anything
7 with the Commission, you'll need to do it. And then
8 everybody is going to have to respond.

9 So, Mr. Thompson, in your view is that
10 reasonable, or do you want to see it on a tighter
11 leash?

12 MR. THOMPSON: Well, I think that's fine,
13 Your Honor.

14 JUDGE MOORE: Staff?

15 MS. LEMONCELLI: We have no objection,
16 Your Honor.

17 JUDGE MOORE: Okay. Then, I will expect
18 a joint status report on the 30th of April. And then,
19 Mr. Jantz, if you're going to file any motion for
20 supplementation, please do so by the 14th.

21 MR. JANTZ: Will do, Your Honor.

22 JUDGE MOORE: Now, that will entail
23 responses, and under the rules that's a short
24 timeframe. And what I would suggest is that the Staff
25 and HRI immediately file a motion telling me what time

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1 -- length of time beyond the -- the regulatory
2 prescribed response to motions they are going to need,
3 instead of me setting an arbitrary time right now,
4 without you having seen the motion.

5 MR. JANTZ: Okay, Your Honor. That's
6 fine.

7 JUDGE MOORE: Please, if -- and you'll
8 have to forgive me if I -- I believe it's -- you have,
9 pursuant to 1237, I think it's either seven or 10
10 days. I'm sorry, I cannot recall. But I would hope
11 that you file that as expeditiously as possible within
12 that initial timeframe, please.

13 MR. JANTZ: Yes, Your Honor.

14 JUDGE MOORE: Then we'll hold off on
15 deciding any other issues as to the groupings of how
16 we'll hear the issues. And in that time I will
17 endeavor to, looking on downstream, getting a motion
18 out -- I'm sorry, an order out with the proposed type
19 of schedule, leaving it very flexible because we're --
20 at this point it's unknown what we're going to do with
21 the supplementation.

22 But we'll go ahead and set it out, so that
23 everyone can -- can see what kind of timeframe we're
24 going to deal with with the rest of these issues, as
25 well as we'll endeavor to set forth how precisely we

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1 want those filings, so that there is full agreement,
2 unlike in the last go-around, on how the filings will
3 be done, so that every -- everyone is responding
4 properly and we don't have ships passing in the night.

5 I have nothing further. Do any of you
6 have any matters you wish to raise at this time?

7 MS. LEMONCELLI: Your Honor, Mauri
8 Lemoncelli for the Staff.

9 JUDGE MOORE: Yes.

10 MS. LEMONCELLI: I just wanted to be sure
11 -- Friday, Your Honor, by Friday I will be providing
12 the parties with the session numbers that we
13 referenced for those two RAIs. Is e-mail appropriate,
14 Your Honor?

15 JUDGE MOORE: Fine. And then, please, you
16 and Mr. Jantz communicate and see if you can't work it
17 out so that the matter is resolved.

18 MS. LEMONCELLI: Yes, Your Honor. Thank
19 you.

20 JUDGE MOORE: Thank you. If there's
21 nothing further, I thank you for your participation
22 today and look forward to your status report.

23 Thank you.

24 (Whereupon, at 2:49 p.m., the
25 teleconference was adjourned.)

CERTIFICATE

This is to certify that the attached proceedings before the United States Nuclear Regulatory Commission in the matter of:

Name of Proceeding: Hydro Resources, Inc.

Docket Number: 40-8968-ML

Location: telephone conference

were held as herein appears, and that this is the original transcript thereof for the file of the United States Nuclear Regulatory Commission taken by me and, thereafter reduced to typewriting by me or under the direction of the court reporting company, and that the transcript is a true and accurate record of the foregoing proceedings.



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