RAS 7611

Official Transcript of Proceedings

NUCLEAR REGULATORY COMMISSION

Title: Hydro Resources, Inc.

Docket Number: 40-8968-ML

Location: (telephone conference)

Date: Wednesday, April 14, 2004

DOCKETED
USNRC

April 16, 2004 (10:06AM)

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

Work Order No.: NRC-1417

Pages 33-69

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NUCLEAR REGULATORY COMMISSION

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ATOMIC SAFETY AND LICENSING BOARD PANEL

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TELECONFERENCE

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IN THE MATTER OF:	
HYDRO RESOURCES, INC.	Docket No. 40-8968-ML
UNDER CONTRACT NO.	
N62472-98-C-4150	

Wednesday,

April 14, 2004

The teleconference commenced at 2:00 p.m.

BEFORE:

THE HONORABLE JUDGE THOMAS MOORE

APPEARANCES:

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

(2:00 p.m.)

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

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

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

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

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

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

JUDGE MOORE: Excellent. Will two weeks do it?

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

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

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

MR. JANTZ: Yes, sir.

JUDGE MOORE: And it appears to me that

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

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

MS. LEMONCELLI: Yes, Your Honor.

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

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

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

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

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

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

However, Your Honor, beyond --

JUDGE MOORE: In the hearing file?

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

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

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

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

MS. LEMONCELLI: By this Friday, Your Honor?

JUDGE MOORE: Yes.

MS. LEMONCELLI: Certainly.

JUDGE MOORE: Mr. Jantz?

MR. JANTZ: Yes, Your Honor.

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

MR. JANTZ: Yes, Your Honor.

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

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

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

April 30th joint status report.

MS. LEMONCELLI: Certainly, Your Honor.

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

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

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

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

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

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

MR. THOMPSON: No, Your Honor.

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

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

Mr. Jantz?

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

JUDGE MOORE: With respect to Section 8?

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

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

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

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

MR. JANTZ: Granted.

JUDGE MOORE: Section 8, all litigation is

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

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

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

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

Let's hear from Mr. Thompson, HRI.

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

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

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

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

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

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

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

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

MR. THOMPSON: That would be our position.

JUDGE MOORE: Ms. Lemoncelli, for the

Staff.

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

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

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

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

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

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

believe that this new information merits supplementation of the FEIS.

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

MS. LEMONCELLI: Yes, Your Honor.

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

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

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

JUDGE MOORE: I understand that. I'm

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

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

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

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

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

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

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

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

MR. JANTZ: Right.

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

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

yet to be litigated.

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

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

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

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

JUDGE MOORE: Well, I understand the

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

MR. JANTZ: I understand, Your Honor.

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

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

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

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

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

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

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

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

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

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

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

MS. LEMONCELLI: Yes, Your Honor.

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

supplemented? Mr. Jantz?

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

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

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

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

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

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

JUDGE MOORE: Square one --

MR. JANTZ: I'm sorry?

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

MR. JANTZ: Sure.

JUDGE MOORE: Whose housing development is it?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

And it seems to me it's their

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

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

MR. THOMPSON: Right.

JUDGE MOORE: Or something of that ilk.

MR. THOMPSON: Yes, Your Honor.

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

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

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

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

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

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

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

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

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

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

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

MR. THOMPSON: Right.

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

MR. THOMPSON: Yes.

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

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

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

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

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

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

needs to essentially formally deal with this issue.

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

MS. LEMONCELLI: Yes, Your Honor.

JUDGE MOORE: Okay.

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

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

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

JUDGE MOORE: Staff, is that your view?

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

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

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

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

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

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

MS. LEMONCELLI: Yes, Your Honor.

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

And let's assume that the Staff issued no

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

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

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

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

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

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

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

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

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

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

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

JUDGE MOORE: And then --

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

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

MR. THOMPSON: Yes.

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

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

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

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

be within the next week to two weeks.

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

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

MR. JANTZ: The Commission?

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

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

MR. JANTZ: May 14th?

JUDGE MOORE: That's exactly 30 days.

MR. JANTZ: Okay.

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

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

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

JUDGE MOORE: Staff?

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

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

MR. JANTZ: Will do, Your Honor.

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

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

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

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

MR. JANTZ: Yes, Your Honor.

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

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

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

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

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

JUDGE MOORE: Yes.

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

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

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

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

Thank you.

(Whereupon, at 2:49 p.m., the 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.

Katherine Kravchonok
Official Reporter
Neal R. Gross & Co., Inc.