

July 26, 2004 (10:55AM)

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION  
ATOMIC SAFETY AND LICENSING BOARD

OFFICE OF SECRETARY  
RULEMAKINGS AND  
ADJUDICATIONS STAFF

Thomas Moore, Presiding Officer

In the Matter of:	)	
	)	
	)	Docket No.: 40-8968-ML
Hydro Resources, Inc.	)	
P.O. Box 777	)	Date: July 19, 2004
Crownpoint, NM 87313	)	

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**HYDRO RESOURCES, INC.'S RESPONSE TO INTERVENORS' MOTION FOR LEAVE TO REPLY TO RESPONSES IN OPPOSITION TO MOTION TO SUPPLEMENT THE FINAL ENVIRONMENTAL IMPACT STATEMENT**

Hydro Resources, Inc. (HRI), by its undersigned counsel of record, hereby submits this Response to Intervenors' Motion for Leave to Reply to Responses in Opposition to Motion to Supplement the Final Environmental Impact Statement (FEIS) regarding HRI's NRC materials license to operate an *in situ leach* (ISL) uranium mining facility in Church Rock, New Mexico.

Intervenors' initial Motion requested that the Presiding Officer re-open the record with respect to Section 8 and direct NRC Staff to supplement the FEIS with respect to both Sections 8 and 17 due to the potential presence of the Springstead Estates Project (SEP). The SEP is a *proposed* Department of Housing and Urban Development (HUD) housing project for which an environmental assessment (EA) has been performed identifying no impacts from or to HRI's ISL uranium mining operations at Church Rock and for which mandatory water use studies and other developmental analyses have yet to

be performed.<sup>1</sup> The *proposed* SEP is to be located upgradient of HRI's Church Rock Sections 8 and 17 mining sites.

For the reasons described below, HRI respectfully requests that the Presiding Officer deny Intervenors' Motion for Leave to Reply to HRI's and NRC Staff's briefs in opposition to Intervenors' Motions to Re-Open the Record with respect to Section 8 and to Supplement the FEIS with respect to Sections 8 and 17, because they have failed to set forth a "strong showing of good cause" for leave to reply.

### STANDARD OF REVIEW

As a general proposition, with respect to replies to a responding party's pleading(s) "[t]he moving party shall have no right to reply, except as permitted by the presiding officer or the Secretary or the Assistant Secretary." 10 CFR § 2.730 (c); *see also Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), LBP-81-18, 14 NRC 71, \*3 (December 10, 2001). As acknowledged by Intervenors, "[l]eave to reply is granted 'sparingly, and then only upon a strong showing of good cause.'" *See* Intervenors' July 7, 2004, Motion at 2; *see also Commonwealth Edison Co.* (Byron Station, Units 1 and 2), LBP-81-30A, 14 NRC 364, 372 (1981).

### DISCUSSION

Intervenors have failed to demonstrate the requisite "strong showing of good cause" for leave to file a reply to a motion under 10 CFR § 2.730(c). Intervenors' allege that they have met this burden by stating that certain "erroneous and incomplete statements by HRI and the [NRC] Staff" should be corrected regarding:

"(1) the nature of the local hydrological gradient and the potential for HRI's Church Rock operations, when combined with pumping from

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<sup>1</sup> For a further discussion of the SEP, *please see* HRI June 21, 2004, Response Brief at 7-8.

- Springstead Estates Project...to influence groundwater flow;
- (2) HRI's and the [NRC] Staff's legal arguments regarding when and how the...("FEIS") should be supplemented;
  - (3) HRI and the NRC Staff's characterization of the geological and hydrological features of the Westwater, Dakota, and Cowsprings aquifers;
  - (4) the NRC Staff's analysis of the oxidizing conditions in and around the mine workings on Section 17;
  - (5) the characterization of the environmental justice community in Church Rock; and
  - (6) Intervenors should be given the opportunity to challenge the assumptions and processes involved with HRI's expert's groundwater modeling."

Intervenors' July 7, 2004, Motion at 2.

According to Intervenors, these allegations demonstrate that leave should be granted so that "the Presiding Officer to have a full and accurate record on these questions in order to make an informed decision about whether to supplement the FEIS." *Id.* at 4.

As a general proposition, requests to re-open a record and/or to supplement an environmental impact statement (EIS) should be deemed to be requests seeking extraordinary relief.<sup>2</sup> Hence, granting permission to re-open the record and/or to supplement an EIS should not be a routine matter, otherwise it would be extremely difficult to ever close a hearing record in any litigation or to ever complete an EIS. Indeed, during a April 14, 2004, telephone conference between the Presiding Officer, Intervenors, HRI, and NRC Staff, it was determined that, in order for Intervenors' Motion to prevail, they would have to make a *prima facie* case that the FEIS should be supplemented. *See Official Transcript of Proceedings, In the Matter of Hydro Resources, Inc.*, ML041100462 (April 14, 2004) ("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

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<sup>2</sup> A discussion of this subject is set forth in HRI's Response to Intervenors' initial Motion. *See* HRI June 21, 2004, Response Brief at 5-6, 16-18.

*prima facie* case, both of a factual [and a legal] nature---that would establish that this is a *substantial* new set of circumstances”) (emphasis added).

As a result, Intervenors’ Motion should be denied, because Intervenors have made no such showing of a *substantial* new set of circumstances. Intervenors were unable to present any *substantial* facts about potential impacts on the SEP from HRI’s ISL uranium mining operations, because the SEP is in a pre-developmental stage and because of the physical reality that potential contamination in air or water does not travel upwind or uphill.

Further, Intervenors’ Motion does nothing more than request the opportunity to challenge the arguments made by HRI and NRC Staff in their respective Responses in opposition. Each of Intervenors’ allegations claims that HRI and/or NRC Staff have either “mischaracterized” or provided “inaccurate and incomplete assertions” regarding argument and expert testimony submitted in their Responses.<sup>3</sup> Therefore, having failed to make a *prima facie* case that the record should be re-opened with respect to Section 8, that the FEIS should be supplemented with respect to the SEP or that “good cause” exists for permitting a reply to HRI’s and NRC Staff’s Response in opposition, Intervenors’ Motion should be denied.

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<sup>3</sup> Should Intervenors’ be permitted to reply, logically, HRI and NRC Staff should be allowed to respond to such a reply to correct any mischaracterizations or “inaccurate and incomplete” argument or expert testimony offered by Intervenors. Permitting Intervenors’ to reply to HRI’s and NRC Staff’s Responses, in the absence of making the required *prima facie* case, could result in an endless stream of pleadings, which would be unfair to HRI and NRC Staff and would waste the Licensing Board’s time and resources.

CONCLUSION

For the reasons discussed above, HRI respectfully requests that the Presiding Officer deny Intervenor's Motion for Leave to Reply to HRI's and NRC Staff's briefs in opposition to Intervenor's Motions to Re-Open the Record with respect to Section 8 and to Supplement the FEIS with respect to Sections 8 and 17, because they have failed to set forth a "strong showing of good cause" for leave to reply.

Respectfully Submitted,



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**UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION  
ATOMIC SAFETY AND LICENSING BOARD**

**Before the Presiding Officer:**

**Thomas S. Moore, Presiding Officer  
Richard F. Cole, Special Assistant**

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Hydro Resources, Inc.	)	Docket No.: 40-8968-ML
P.O. Box 777	)	
Crownpoint, NM 87313	)	Date: July 19, 2004
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**CERTIFICATE OF SERVICE**

**THIS IS TO CERTIFY** that a copy of the foregoing Hydro Resources, Inc.'s Response to Intervenors' Motion for Leave to Reply to Responses in Opposition to Motion to Supplement the Final Environmental Impact Statement in the above-captioned matter has been served upon the following via electronic mail and U.S. First Class Mail on this 21<sup>st</sup> day of June, 2004.

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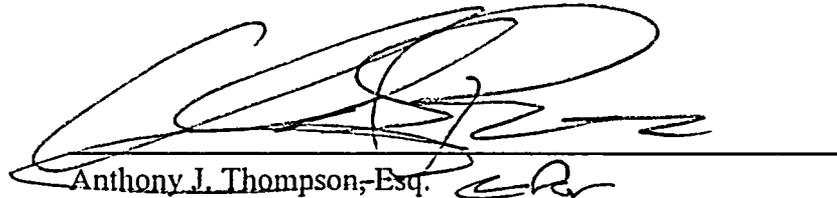
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July 19, 2004

**BY ELECTRONIC MAIL AND U.S. FIRST CLASS MAIL**

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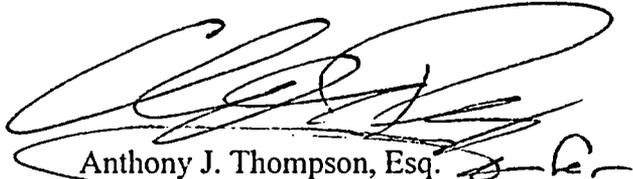
Re: In the Matter of: Hydro Resources, Inc.  
Docket No: 40-8968-ML  
ASLBP No: 95-706-01-ML

Dear Sir or Madam:

Please find attached for filing Hydro Resources, Inc.'s Response to Intervenors' Motion for Leave to Reply to Responses in Opposition to Motion to Supplement the Final Environmental Impact Statement in the above-captioned matter. Copies of the enclosed have been served on the parties indicated on the enclosed certificate of service. Additionally, please return a file-stamped copy in the self-addressed, postage prepaid envelope attached herewith.

If you have any questions, please feel free to contact me at (202) 496-0780.  
Thank you for your time and consideration in this matter.

Sincerely,



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Enclosures

(hydro resourcesCOVERLETTTER.doc)