

May 18, 2005

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE PRESIDING OFFICER

In the Matter of )  
 )  
HYDRO RESOURCES, INC. ) Docket No. 40-8968-ML  
P.O. Box 777 )  
Crownpoint, NM 87313 )

NRC STAFF'S RESPONSE TO INTERVENORS' REPLY ON GROUNDWATER  
PROTECTION AND RESTORATION ISSUES; AND NOTICE OF INTENT

On March 7, 2005, the intervenors submitted a written presentation on their groundwater areas of concern. On April 21, licensee Hydro Resources Inc. (HRI) submitted its response to the March 7 presentation, and on April 29, 2005 the NRC Staff filed its response. In a filing dated May 9, 2005 – but not received electronically at the NRC until after 5 p.m. on May 10, 2005 – the intervenors filed a reply to the HRI and NRC Staff responses. See “Intervenors’ Reply to [HRI’s] and the [NRC Staff’s] Responses in Opposition to Intervenors’ Joint Groundwater Presentation” (Intervenors’ Reply). Therein, the intervenors state that unspecified portions of HRI’s and the Staff’s groundwater responses which discuss “collateral estoppel or the law of the case should . . . be stricken from the record.” Intervenors’ Reply, at 3 n.2. To the extent that this short statement could be viewed as a motion to strike the Staff’s law of the case argument submitted on April 29, 2005, the Staff files this brief response.

Upon reviewing the Intervenors’ Reply, the Staff realized it had overlooked an unpublished order (issued four years ago by the former presiding officer) directing HRI and the Staff to provide notice within 30 days of an intervenor written presentation if the response thereto was going to include discussion of either collateral estoppel or the law of the case doctrine. See Intervenors’ Reply, at 3-4, *quoting* May 25, 2001 order (unpublished), at 6. The Staff’s error was inadvertent,

and does not prejudice the intervenors for the reasons discussed below.

As reflected in the unpublished order, during a telephone conference held on May 10, 2001 counsel for HRI and the Staff alerted intervenors' counsel that further written presentations would face collateral estoppel or law of the case arguments (see May 25, 2001 order (unpublished), at 1 and 5), so the fact these arguments were made in HRI's and the Staff's groundwater responses should not have come as any surprise. Additionally, in his November 5, 2004 order (unpublished), the former presiding officer provided an implicit reminder these arguments would be made in setting forth the following briefing requirements governing this round of written presentations:

[E]ach of the Intervenor's' written presentations and each of the responses of HRI and the Staff shall include as part of their discussion of each mining site for each area of concern and related subsidiary issues and/or subissues, a separate section detailing Judge Bloch's findings on that area of concern, related subsidiary issues and/or subissues with respect to the Section 8 site, including an exact citation to the rulings containing such findings and any Commission decision on review.

November 5 order, at 4 (emphases added). Moreover, if intervenors' counsel had any doubts about whether to prepare replies to collateral estoppel or law of the case arguments when the May 2001 order's 30-day notice period expired in early April this year, suitable inquiries could easily have been made.

As the May 2001 order intended, in filing Intervenor's' Reply, the intervenors have now had the opportunity to challenge the collateral estoppel and law of the case arguments. Striking portions of HRI's and the Staff's groundwater responses discussing collateral estoppel and the law of the case doctrine would also require striking the Intervenor's' Reply. The Staff maintains that the better course here would be for the Presiding Officer to consider all of the collateral estoppel and the law of the case arguments, and not strike any parts of the existing record.

Notice of Intent to Argue Law of the Case Doctrine

On April 28, 2005, intervenors Grace Sam, Marilyn Morris, Eastern Navajo Diné Against Uranium Mining, and Southwest Research and Information Center (collectively, "Intervenors"), submitted a written presentation on their areas of concern pertaining to cultural resource issues at the Section 17, Unit 1 and Crownpoint sites. See "[Intervenors'] Written Presentation in Opposition to Hydro Resources, Inc.'s Application for a Material License With Respect to: Cultural Resources Issues" (April 28 Brief). The NRC Staff hereby gives notice that its response to the April 28 Brief will include a discussion of the law of the case doctrine, and will set forth previous rulings relevant to the cultural resource areas of concern presented in the April 28 Brief. This notice is being filed in accordance with the May 25, 2001 order (unpublished), at 6.

CONCLUSION

To the extent that the Intervenors' Reply may be viewed as a motion to strike the Staff's law of the case argument submitted on April 29, 2005, the Staff requests that the Presiding Officer refuse to strike that argument, for the reasons stated above.

Respectfully submitted,

*/RA/*

John T. Hull  
Counsel for NRC Staff

Dated at Rockville, Maryland  
this 18<sup>th</sup> day of May, 2005

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S RESPONSE TO INTERVENORS' REPLY ON GROUNDWATER PROTECTION AND RESTORATION ISSUES; AND NOTICE OF INTENT" in the above-captioned proceeding have been served on the following persons, by electronic mail, and by deposit in the United States mail, first class, or as indicated by an asterisk (\*) through deposit in the Nuclear Regulatory Commission's internal distribution system, on this 18<sup>th</sup> day of May, 2005.

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