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' PRESENTATION ON CULTURAL RESOURCE ISSUES

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June 24, 2005

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HYDRO RESOURCES, INC.	)	Docket No. 40-8968-ML
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P.O. Box 777	)	Re: Leach Mining and Milling
Crownpoint, NM 87313	)	License

NRC STAFF'S RESPONSE TO INTERVENORS' PRESENTATION ON CULTURAL RESOURCE ISSUES

INTRODUCTION

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).[1] Attachments to the April 28 Brief include affidavits of Dr. Thomas F. King (attached to the April 28 Brief as Exhibit B) (King Affidavit) and Thomas Morris, Jr. (attached to the April 28 Brief as Exhibit C) (Morris Affidavit).

As discussed below, and in the attached affidavit of Matthew Blevins (Staff Exhibit 1), the Intervenors – both in their April 28 Brief and in their supporting affidavits – have failed to show that their present cultural resource concerns have an adequate legal or factual basis. To the extent that

[1] The April 28 Brief is similar in many respects to the Intervenors' cultural resources presentation submitted in December 1998 during the Phase 1 proceedings on Section 8, in which areas of concern pertaining to the National Historic Preservation Act, 16 U.S.C. §§ 470-470w-6 (NHPA), and the Native American Graves Protection and Repatriation Act, 25 U.S.C. § 3001 *et seq.* (NAGPRA), were considered and rejected. But the Intervenors have chosen not to pursue their NAGPRA concerns. This proceeding is governed by the former 10 C.F.R. Part 2, Subpart L hearing procedures, under which "areas of concern" rather than contentions are litigated.

the Intervenors' concerns are based on alleged NHPA violations, they have failed to establish that any such violations have occurred, and they have further failed to show that the amended NHPA regulations on which they rely (which first became effective in June 1999) can be applied retroactively to the completed NHPA consultations at the Church Rock Section 17 site, and two Crownpoint sites. The previous NHPA findings and rulings made by the Presiding Officer and Commission – based on the NHPA regulations in force when HRI's license was issued in 1998 – are the law of the case, and apply equally to the Intervenors' present NHPA concerns. To the extent that the Intervenors' concerns are based on alleged violations of the National Environmental Policy Act (NEPA), they have similarly failed to establish that any such violations have occurred.

BACKGROUND

In 1988, Hydro Resources Inc. (HRI) submitted a license application to the NRC for authority to conduct *in situ* leach (ISL) uranium mining at its Church Rock site in McKinley County, New Mexico. HRI subsequently amended its application to include additional lease areas known as the Unit 1 and Crownpoint sites in and around Crownpoint, New Mexico, and to propose that processing of licensed material be conducted in a plant located at the Crownpoint site. The Intervenors first requested a hearing on HRI's license application in 1994. In February 1997 the NRC Staff published NUREG-1508, the "Final Environmental Impact Statement to Construct and Operate the Crownpoint Uranium Solution Mining Project" (FEIS). In December 1997 the NRC Staff issued its safety evaluation report (SER) on HRI's license application. In early January of 1998, the NRC Staff issued HRI a materials license, authorizing ISL mining and related process activities at the Church Rock, Unit 1 and Crownpoint sites after various license conditions are met. As set forth below, the NRC Staff has previously submitted to the Presiding Officer and Commission five sets of arguments pertaining to the Intervenors' NHPA (and related) concerns.

On January 15, 1998, the Intervenors filed "ENDAUM's and SRIC's Motion For Stay, Request For Prior Hearing, and Request For Temporary Stay" (Stay Motion), arguing in relevant part that the issuance of HRI's license was unlawfully premature under NHPA section 106 (16 U.S.C. § 470f). In response to the Stay Motion, the Presiding Officer imposed a temporary stay on the effectiveness of HRI's license. *See* LBP-98-3, 47 NRC 7 (1998). The Staff opposed the Stay Motion.[2] The Presiding Officer later revoked the temporary stay and denied the Stay Motion in April 1998, finding that the phased compliance process did not appear to violate the NHPA, and that Intervenors ENDAUM and SRIC had accordingly failed to make a strong showing on their NHPA claim. LBP-98-5, 47 NRC 119, 125 (1998).

The Intervenors sought Commission review of this decision (*see* "ENDAUM's and SRIC's Petition For Review of LBP-98-5" (Review Petition)), and the Commission issued an order imposing another temporary stay, pending its consideration of the Review Petition. *See* CLI-98-4, 47 NRC 111 (1998). The Staff opposed the Review Petition (*see* "NRC Staff's Response to Petition For Review [of LBP-98-5]" (April 23, 1998) (LL9804240160), and the related request for a temporary stay. *See* "NRC Staff's Response to Request For Stay Pending Review of LBP-98-5" (April 23, 1998) (LL9804240145).

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[2] *See* "NRC Staff's Response to Motion for Stay, Request for Prior Hearing, and Request for Temporary Stay" (February 20, 1998) (LL9802250238) ("Stay Motion Response"). The Stay Motion Response included the following NHPA-related items: (a) a March 1997 agreement between the Navajo Nation and the U.S. Department of the Interior (National Park Service), under which the Navajo Nation assumed NHPA responsibilities over "tribal lands" (Exhibit 1 to the Stay Motion Response); (b) excerpts of an April 1997 cultural resources report (covering Church Rock Sections 8 and 17, and Section 12 near Crownpoint) prepared by the Museum of New Mexico at HRI's request (Exhibit 2 to the Stay Motion Response); (c) affidavit of Robert Carlson, the NRC Staff project manager for HRI's license who oversaw the Staff's compliance with the NHPA's Section 106 process (Exhibit 3 to the Stay Motion Response); (d) June 19, 1997 letters to the Navajo Nation's Historic Preservation Department, the New Mexico State Historic Preservation Officer, the Pueblo of Zuni Heritage and Historic Preservation Office, and the Hopi Cultural Preservation Office (Exhibits 4-7, respectively, to the Stay Motion Response); (e) the New Mexico State Historic Preservation Office's November 20, 1997 response to the June 19, 1997 letter (Exhibit 8 to the Stay Motion Response); and (f) affidavit of Susan Schexnayder, NRC Staff consultant regarding the NHPA's Section 106 process (Exhibit 11 to the Stay Motion Response).

Relying in part on license condition 9.12 of HRI's license (a copy of which is attached to the April 28 Brief as Exhibit A),[3] the Commission later denied the Review Petition and lifted its temporary stay, stating that while it was not reaching the merits of the Intervenors' NHPA argument it was "skeptical of whether the alleged NHPA injury will occur at all, much less immediately." CLI-98-8, 47 NRC 314, 321-22 and n.8 (1998).

Among the areas of concern subsequently admitted by the Presiding Officer were ones pertaining to the NHPA. *See* LBP-98-09, 47 NRC 261, 282 (1998). By unpublished orders (dated September 22, 1998 and October 13, 1998), the Presiding Officer split this adjudicatory proceeding into phases, whereby areas of concern pertaining to HRI's Church Rock Section 8 site would first be considered and decided. The Commission denied the Intervenors' petition to review these orders, terming them as ones which defined the first phase of litigation as covering "all issues pertinent solely to Church Rock Section 8, and issues clearly relevant jointly to Section 8 and the other sites" (*i.e.*, the Church Rock Section 17, Unit 1 and Crownpoint sites). CLI-98-22, 48 NRC 215, 218 (1998).

On this basis the Intervenors then submitted their initial NHPA written presentation in December of 1998,[4] to which the Staff responded in January 1999.[5] In February 1999 the Presiding Officer rejected the Intervenors' NHPA and related cultural resource concerns. *See* LBP-99-9, 49 NRC 136 (1999). The Intervenors sought Commission review of LBP-99-9, a petition

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[3] License condition 9.12 states in part that before "engaging in any construction activity not previously assessed by the NRC," HRI must "conduct a cultural resources inventory," and otherwise act in compliance with NHPA.

[4] *See* "Eastern Navajo Diné Against Uranium Mining's and Southwest Research and Information Center's Brief in Opposition to [HRI's] Application for a Materials License With Respect to: Compliance with the [NHPA], [NAGPRA] and Related Cultural Resource Issues" (December 1998 Brief).

[5] *See* "NRC Staff's Response to ENDAUM and SRIC Presentation on NHPA and NAGPRA Issues" (Jan. 19, 1999) (LL9901200080)

which the Staff opposed.[6] The Commission granted review of LBP-99-9, and affirmed the Presiding Officer's NHPA findings. *See* CLI-99-22, 50 NRC 3, 12-13 (1999).[7]

On November 5, 2004, the Presiding Officer issued an order setting the schedule for phase two of the litigation, in which written presentations on the areas of concern for the Section 17, Unit 1 and Crownpoint sites would be considered and ruled upon. "Order (Schedule for Written Presentations)," dated November 5, 2004 (unpublished) (November 5 Order), at 1. Subsequently, the Presiding Officer revised the schedule for written presentations based on the Intervenors' decision not to pursue certain areas of concern. "Order (Revised Schedule for Written Presentations)," dated February 3, 2005 (unpublished) (February 3 Order), at 1. This order left intact Parts 2 and 3 of the November 5 Order relating to the format and content of the written presentations. *Id.*, at 3. The April 28 Brief is thus part of a series of planned written presentations for the Section 17, Unit 1 and Crownpoint sites. In accordance with the February 3 Order, other written presentations will be submitted later on concerns regarding air emission controls and the adequacy of the FEIS.

On June 17, 2005, HRI submitted its response to the April 28 Brief. *See* "[HRI's] Response in Opposition to Intervenors' Written Presentation Regarding Historic and Cultural Resource Preservation" (HRI's Response). Included as exhibits to HRI's Response were affidavits of Drs. Eric Blinman, Lorraine Heartfield and Leslie Wildensen, marked as Exhibits A, B and C, respectively.

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[6] *See* "NRC Staff's Response to Petition For Review of LBP-99-9" (March 22, 1999) (LL9903240058).

[7] The Commission termed its action as one which only partially affirmed LBP-99-9, because it did not rule on the portions of LBP-99-9 relating to bifurcation issues. *See* CLI-99-22, 50 NRC at 5 and n.2. But the Commission fully affirmed LBP-99-9's NHPA findings.

SUMMARY

In Section I.A below, the Staff discusses the law of the case doctrine. Section I.B sets forth the cultural resource rulings made to date in this proceeding. In Section I.C, the Staff shows why the present NHPA regulations – as amended in 1999 and thereafter – are not entitled to retroactive application.

The Section II discussion more specifically addresses each of the Intervenors' NHPA areas of concern (*see* April 28 Brief, at 11-27), which may be summarized as follows.

As part of their general claim that the amended NHPA regulations should be applied retroactively, the Intervenors argue that the Commission's previous ruling that the NHPA does not prohibit the phased compliance approach being used here (*see* CLI-98-8, 47 NRC 314, 323-4 (1998) is no longer controlling due to changed circumstances. *See* April 28 Brief, at 12. In this regard, the Intervenors rely on 36 C.F.R. § 800.4(b)(2) – the portion of the amended NHPA regulations containing the Advisory Council on Historic Preservation's (ACHP's) new and expanded discussion of phased compliance. *See* April 28 Brief, at 12-14. Next, the Intervenors assert that the programmatic agreement (PA) requirements of the NHPA regulations are applicable here, and argue that because such an agreement was not entered into with the ACHP, HRI's license was issued in violation of the NHPA. *See* April 28 Brief, at 14-16. The Intervenors further claim that (1) Native American groups were insulted by the lack of a government-to-government relationship; and (2) the Staff's involvement in the NHPA process was not disclosed to these groups. *See* April 28 Brief, at 21-22. A related concern is that early in the consultation process, the Staff failed to adequately consult with the Hopi, Laguna, Acoma and Zuni tribes regarding the identification of traditional cultural properties (TCPs), and thereby erred in issuing HRI its license in January 1998. *See* April 28 Brief, at 22-24. The Intervenors also claim that the Staff's May 1998 finding that HRI's undertaking would have no effect on historic properties (on Church Rock Sections 8 and 17, and Crownpoint Section 12) was premature; and that the presence of non-

Navajo TCPs had not been adequately considered, making the NHPA consultation process incomplete at that time. *See* April 28 Brief, at 24-25.

In Section III below, the Staff responds to the Intervenors' arguments that the FEIS failed "to take the requisite hard look at the environmental consequences of this action" with respect to cultural resources. April 28 Brief, at 29. The Intervenors also argue that the FEIS is inadequate because the NHPA Section 106 process was still ongoing at the time the FEIS was issued. *Id*.

DISCUSSION

I. Preliminary Issues Related to Cultural Resource Areas of Concern

A. Law of the Case Doctrine

As more fully discussed in the NRC Staff's recent filing responding to the Intervenors' groundwater concerns (*see* "NRC Staff's Written Presentation on Groundwater Protection, Groundwater Restoration, and Surety Estimates" (April 29, 2005), at 6-7), the doctrines of res judicata, collateral estoppel, law of the case, and laches are generally applicable in NRC adjudicatory proceedings, signifying adherence to the fundamental precept of common law adjudication that once an issue is determined in a proceeding, that issue is conclusively resolved.[8] The law of the case doctrine provides that when a court decides upon a rule of law or makes a factual determination, that decision should continue to govern the same issues in subsequent stages of the same case. *Safir v. Dole*, 718 F.2d 475, 480-81 (D.C.Cir. 1983). The doctrine encompasses the court's explicit decision, as well as those issues decided by necessary implication. *Williamsburg Wax Museum, Inc. v. Historic Figures, Inc.*, 810 F.2d 243, 249 (D.C.Cir. 1987). For those areas of concern which fall within the scope of the NHPA findings and rulings

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[8] *See e.g.*, *Alabama Power Co.* (Joseph M. Farley Nuclear Plant, Units 1 and 2), CLI-74-12, 7 AEC 203, 203-204 (1974) (res judicata and collateral estoppel); *Safety Light Corp.* (Bloomsburg Site Decontamination), CLI-92-9, 35 NRC 156, 159-160 (1992) (law of the case); *Houston Light and Power Co.* (South Texas Project, Units 1 and 2), CLI-77-13, 5 NRC 1303, 1321 (1977) (laches).

previously made by the Presiding Officer and the Commission (discussed further in Section I.B below), the Presiding Officer should reject the Intervenors' present concerns to the extent that they are contrary to those prior determinations.

B. Previous Cultural Resource Rulings in this Proceeding

As stated above in the Background Section, the Presiding Officer's NHPA findings in LBP-99-9 were affirmed by the Commission in CLI-99-22. The Intervenors thus must now show that the Section 8 NHPA findings – and the related cultural resource rulings – are not equally applicable to the Section 17, Unit 1 and Crownpoint sites. As discussed below, the Intervenors have failed to make this showing, and their cursory summary of the previous rulings in LBP-99-9 and CLI-99-22 (*see* April 28 Brief, at 9-11, 19 and 27) do not fully meet the following briefing requirements governing this round of written presentations:

> [E]ach of the Intervenors' 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).

In his NHPA decision, Judge Bloch first set forth the earlier NHPA rulings made by the former Presiding Officer and Commission regarding the motions for a stay. *See* LBP-99-9, 49 NRC at 138-39. In 1998, the Presiding Officer had rejected the argument that HRI was required to have in place its entire cultural resource inventory and protection plan prior to receiving its ISL license. Noting HRI's argument that the phased NHPA process fit within the framework of its planned phased development of ISL fields – under which no ISL mining may occur on a land parcel until that parcel has been subject to a full cultural resources survey – the Presiding Officer found that HRI's phased approach to NHPA compliance adequately protected against damage occurring to any cultural resources. *See* LBP-98-5, 47 NRC at 123-25. The Presiding Officer further found that

phased compliance did not appear to violate the NHPA, noting that both the Navajo Nation Historic Preservation Department (NNHPD) and the New Mexico State Historic Preservation Officer (SHPO) had agreed to the phased compliance approach, and that other interested parties had not objected to use of this approach. *Id.*, at 125. In later denying the Review Petition with respect to LBP-98-5 and lifting its temporary stay, the Commission rejected the Intervenors' argument that HRI "must defer all its activities until after the NRC has completed the NHPA review" for the entire undertaking. CLI-98-8, *supra*, 47 NRC at 319. The Commission found that the NHPA does not prohibit use of the phased compliance approach. *Id.,* at 323-324 and n.16, *citing City of Grapevine v. Dept. of Transportation*, 17 F.3d 1502, 1508-09 (D.C.Cir. 1994), *cert. denied*, 513 U.S. 1043 (1994).[9]

In reviewing the merits of the Intervenors' later NHPA written presentation, Judge Bloch similarly found that 36 C.F.R. § 800.3(c) of the ACHP regulations (then in effect) authorized phased compliance. *See* LBP-99-9, 49 NRC at 140. In making this finding which rejected the argument that 36 C.F.R. § 800.3(c) required completing the NHPA Section 106 process prior to issuing a license, Judge Bloch noted that the Intervenors had improperly omitted from their argument the second sentence of 36 C.F.R. § 800.3(c). *See* LBP-99-9, 49 NRC at 140. The provision of 36 C.F.R. § 800.3(c) omitted by the Intervenors stated as follows:

> The [ACHP] does not interpret [NHPA Section 106] to bar an Agency Official from expending funds on or authorizing non-destructive planning activities preparatory to an undertaking before complying with section 106, or to prohibit phased compliance at different stages in planning.

Judge Bloch then adopted the following NRC Staff analysis as part of his NHPA findings:

> ENDAUM's and SRIC's analysis of the NHPA regulations fails to consider 36 C.F.R. § 800.4(d) and 36 C.F.R. § 800.5(b) [then in effect]. The first of these provisions applies when no historic properties are found, and states that after properly documenting and noticing such a finding, the government agency "is not required

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[9] As discussed *infra*, the Intervenors cite several federal cases in the April 28 Brief, but do not cite the *City of Grapevine* decision.

> to take further steps in the section 106 process." 36 C.F.R. § 800.4(d). The latter provision applies when historic properties are present, but it is found that the undertaking will have no effect on such properties. In this situation, after properly documenting and noticing such a finding, the government agency is not required to take any further steps in the section 106 process unless the SHPO "objects within 15 days of receiving such notice." 36 C.F.R. § 800.5(b).
>
> In Mr. Dodge's [a formerly-proffered Intervenor expert on NHPA issues[10]] description of the "Section 106 four step compliance process," he too omits any reference to 36 C.F.R. § 800.4(d). *See* Dodge Testimony, at 7-9. In his one-sentence description regarding 36 C.F.R. § 800.5(b) (*id.*, at 8), he fails to mention that the NHPA process may be concluded absent any objection made by the SHPO, and later seems to assume that the NHPA section 106 process always progresses to step four consultations. Contrary to Mr. Dodge's statements there, the NHPA regulations require that a memorandum of agreement be entered into by the consulting parties only when it is found that an undertaking will have adverse effects on historic properties. *See id.*, at 17; *see* 36 C.F.R. § 800.5(e)(4) [then in effect]. Here, no such finding has been made.

LBP-99-9, 49 NRC at 140-41 and n.7. Judge Bloch also found that with respect to HRI's Church Rock Section 8 and 17 sites, and its Crownpoint irrigation site on Section 12 (a land parcel located about two miles north of Crownpoint), no traditional cultural properties (TCPs) – including no non-Navajo TCPs – had been identified. *Id*., at 141-42. Based on the above findings, and the fact that the SHPO and the NNHPD had concurred in the Staff's determination that HRI's undertaking on Sections 8, 17 and 12 would have no effect on the cultural resources identified, Judge Bloch concluded that the consultation process had been properly completed, and that "HRI and the Staff have fulfilled their NHPA responsibilities." *Id*., at 142.

In addition to not having identified the above findings as required by the November 5 Order, the Intervenors do not completely discuss the Commission's affirmance of these findings in CLI-99-22. There, the Commission found no reason to consider Judge Bloch's NHPA findings in detail, stating that the Intervenors "have offered no compelling argument" against phased compliance, and that they had "failed to identify any significant defect in the Staff's NHPA compliance." CLI-99-22,

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[10] The previously-submitted testimony of Mr. William Dodge is attached to the April 28 Brief as Exhibit J .

50 NRC at 12. The Commission reiterated its previous stay ruling that phased compliance is not prohibited by the NHPA. *Id*., at 12-13 and n. 37, *citing*
CLI-98-8, 47 NRC at 323-24. Finally, like Judge Bloch, the Commission found it significant that the SHPO and the NNHPD had concurred in the Staff's conclusion "that there would be 'no effect' on all cultural resources" identified within HRI's Church Rock Section 8 and 17 sites, and its Section 12 irrigation site at Crownpoint. CLI-99-22, 50 NRC at 13 n. 38, *citing*
LBP-99-9, 49 NRC at 142.

In CLI-01-04, the Commission briefly addressed the portion of LBP-99-30, 50 NRC 77, that dealt with NEPA and cultural resources. *See* CLI-01-04, 53 NRC 31, 45-46 (2001). The Commission again found no basis to question any of Judge Bloch's rulings on cultural resource issues. *Id*., at 46.

The Intervenors fail to show why the above NHPA rulings pertaining to Section 8 do not apply equally to HRI's Church Rock Section 17 site, and to its Unit 1 and Crownpoint sites. Requiring that such a showing be made for each area of concern which the Intervenors now pursue is consistent with the judicial rule that legal determinations made in a proceeding should continue to govern the same issues in subsequent stages of the same proceeding. *See Safir v. Dole*, 718 F.2d at 480-81.

Similarly, the Intervenors make no attempt to distinguish or even address the Presiding Officer's or Commission's prior NEPA rulings pertaining to cultural resource issues. The Intervenors again argue that the FEIS failed "to take the requisite hard look at the environmental consequences of this action" and that the FEIS is inadequate because the Section 106 process was ongoing at the time the FEIS was issued. *Compare* Intervenors' December 1998 Brief, at 50-54 *to* April 28 Brief at 28-29. In concluding that "the Intervenors' NEPA claims are without basis," the Presiding Officer stated that:

In the FEIS, the NRC Staff recommended that HRI implement a final cultural

> resources management plan for all mineral operating lease areas and other lands affected by license activities pursuant to National Historic Preservation Act-Section 106 review and consultation processes. FEIS at 4-111, 112. The NRC Staff's recommended cultural resources management plan would include archaeological and traditional cultural property surveys of lease areas, identification of protection areas where human activity would be prohibited, and archaeological testing before subsurface disturbance occurs. The plan would also include archaeological monitoring during ground disturbing construction, drilling and operation activities. Both the FEIS and the license require that if unidentified cultural resources or human remains are found during project activities, the activity would cease, protective action and consultation would occur, and artifacts and human remains would be evaluated for their significance. Id. HRI agreed to these recommendations.

LBP-99-9, 49 NRC at 143-144. Although the Presiding Officer's decision that the FEIS was adequate was made in the Section 8 phase of the proceeding, the FEIS encompasses all of the project areas, including Section 17, Unit 1 and Crownpoint. The Presiding Officer's factual findings from LBP-99-9 (e.g., HRI will implement cultural resource management plan, activity will cease if unidentified cultural resources are discovered, etc.) apply equally to Section 17, Unit 1 and Crownpoint. Since the FEIS was acceptable with respect to Section 8 and the Intervenors have introduced no evidence to suggest that the Staff's discussion of impacts at the other project areas is deficient, the adequacy of the Staff's treatment of cultural resource impacts in the FEIS is the law of the case. Therefore, the Presiding Officer's legal conclusion that the FEIS adequately addressed cultural resource issues must apply with equal force for Section 17, Unit 1 and Crownpoint. *See Safir v. Dole*, 718 F.2d 475, 480-81 (D.C.Cir. 1983).

The Commission also addressed the Intervenors' concerns "that the FEIS sets out a plan for identifying cultural resource impacts but does not contain a complete evaluation of the proposed action's impacts on cultural resources." CLI-99-22, 50 NRC at 13. The Commission recognized that while the Museum of New Mexico's report did not come out until April 1997 – after the FEIS was published – this report was circulated to interested parties for comment in June 1997. *Id*., at 13 n. 41. Thus, "the public had access to the relevant information and the agency decision makers considered that information" before a license was issued to HRI in January 1998. *Id*., at 14. The

Commission accordingly found no "legal flaw" with the post-FEIS release and consideration of the April 1997 report on cultural resources, and concluded that the Staff's approach was acceptable because "the overall record for the licensing action includes a complete analysis" of the cultural resource impacts. *Id*.

The Commission's conclusion that the Staff's NEPA approach to cultural resource impacts is acceptable is the law of the case. This conclusion certainly applies with equal force to Church Rock Section 17 and Crownpoint Section 12, because those sites were discussed along with Church Rock Section 8 in the Museum of New Mexico's April 1997 report. Logically, the Commission's NEPA conclusion on cultural resources should also apply to the other Unit 1 and Crownpoint sites (which later may be subject to ISL mining) because the scope of the FEIS included all of HRI's proposed mining sites and the approach that the Presiding Officer and the Commission found acceptable for Section 8 is the same approach that the Staff used for Section 17, Unit 1 and Crownpoint. Accordingly, the Intervenors' NEPA arguments should be rejected.

For all of the reasons discussed above, the Intervenors' attempts to argue settled NHPA and NEPA issues must be rejected, pursuant to the law of the case doctrine.

C. Present NHPA Regulations Are Not Entitled to Retroactive Application

The Intervenors in their April 28 Brief do not discuss the law of the case doctrine (summarized in Section I.A above), and do not discuss the above-described NHPA and NEPA rulings in any detail. In effect, they seek to nullify these previous rulings by the retroactive application of the amended NHPA regulations (which first became effective on June 17, 1999).[11] Based on the Commission's analysis of a similar argument (*see Curators of the University of Missouri*, CLI-95-1, 41 NRC 71 (1995)), the Presiding Officer here should refuse to give the

[11] *See* 64 Fed. Reg. 27044, *et seq*. (May 18, 1999). The Intervenors focus instead on a later set of amended NHPA regulations which became effective on January 11, 2001. *See, e.g.,* April 28 Brief, at 3, 4 and 16, *citing* 65 Fed. Reg. 77698, *et seq*. (Dec. 12, 2000).

amended NHPA regulations any retroactive effect.

Absent an expressed intent in the rulemaking documents, the Commission will refuse to give an NRC regulation retroactive effect. *See Curators,* 41 NRC at 102 (refusing to apply a new rule's requirement that license applications include an emergency plan to applications pending before the rule's effective date). The axiom that unless Congress specifies otherwise, statutes have no retroactive effect applies equally to federal agency regulations. *Id*. The Commission further specified that this axiom applies to procedural as well as substantive requirements. *Id*., at 102 n. 23, *citing Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994).[12]

Significantly, in amending the NHPA regulations, the ACHP stated, in response to questions regarding the status of pre-existing PAs, that such agreements "are still valid and will continue to be in effect according to their terms." 65 Fed. Reg. 77698, 77703 (Dec. 12, 2000). Even though no PAs were entered into here – because no findings of adverse effect have been made – the above-quoted ACHP statement clearly indicates that the amended NHPA regulations were not to apply retroactively.[13] The effective date of these amended regulations (January 11, 2001), and the above-quoted statement accompanying the rulemaking, provide the type of "direction to the contrary" that the Commission referenced in refusing to give NRC regulations retroactive effect. *Curators*, 41 NRC at 102.

Furthermore, retroactive application of the NHPA regulations would create the type of problems that the presumption against retroactivity was designed to prevent. Since HRI, the NRC

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[12] In *Landgraf,* the Court refused to give retroactive effect to a statute when doing so would impair rights a party possessed when it acted, increase liability for past conduct, or impose new duties with respect to completed transactions. *See* 511 U.S., at 280.

[13] The Staff notes that a grant of rulemaking authority to a federal agency does not encompass the power to promulgate retroactive rules absent an express grant of such power by Congress. *See Bowen v. Georgetown Univ. Hospital*, 488 U.S. 204, 208 (1988). Here, the Intervenors have provided no evidence that Congress authorized the ACHP to promulgate retroactive regulations. Indeed, the Administrative Procedure Act (APA) specifically defines a rule as an agency statement of future effect. 5 U.S.C. § 551(4).

Staff, the SHPO, and the NNHPD concluded consultation on some project areas and set forth a framework for completing consultations on the remaining areas, application of the new regulations could impose new duties with respect to those completed transactions. Such a factor weighs against applying requirements retroactively. *See Landgraf, supra,* 511 U.S. at 280.

The Intervenors' argument for retroactive application of the amended NHPA regulations here is based on the unfounded premise that the Staff's issuance of a license to HRI in January 1998 violated the NHPA regulations then in force,[14] and that the Staff thereby "subjected themselves [sic] to the new regulations," and should thus "be held" to them. April 28 Brief, at 17-18, *citing Preservation Coalition of Erie County v. Federal Transit Administration*, 356 F.3d 444 (2nd Cir. 2004). The central issue of this decision was not which set of NHPA regulations the agency had to follow, but whether attorney fees had been properly awarded to the "prevailing party" by the federal district court.[15] *Id*., at 449-56 (a case involving a development project at the terminus of the historic Erie Canal). As discussed further below, contrary to the Intervenors' assertion (April 28 Brief, at 17), the NRC Staff's NHPA consultation here does not present a set of "similar circumstances" to those in the cited case.

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[14] There has been no such finding. To the contrary, as discussed above, both the Presiding Officer and Commission have found the Staff's NHPA (and NEPA) approaches acceptable.

[15] In this posture, there was no need for the appeals court to analyze the NHPA regulations to see whether they were intended to apply retroactively, or whether they had an impermissible retroactive effect. Instead, the court was focused solely on whether the attorney fees awarded by the district court was allowed (as opposed to required) by the amended NHPA regulations.

In *Erie County*, after an FEIS was published in February 1999, a buried Erie Canal wall was discovered which led to a modification of the undertaking and resulted in new consultations with the SHPO – which did not conclude until August 1999. *See Preservation Coalition of Erie County,* 356 F.3d at 454. The fact that new consultations with the SHPO were not completed until after the amended NHPA regulations first became effective in June 1999 was the key basis for the court's finding that the amended NHPA regulations could be applied for the purpose of awarding attorney fees. *Id*.[16]

Here, there have been no new discoveries of historic properties, no modification of the undertaking, and no new consultations with the SHPO. The Presiding Officer should accordingly find that *Preservation Coalition of Erie County* does not support the Intervenors' argument for retroactive application of the amended NHPA regulations.

The Intervenors admit that the amended NHPA regulations on which they rely "did not substantially change" the consultation process under NHPA Section 106. April 28 Brief, at 4. Moreover, the Intervenors' NHPA expert acknowledges that the NHPA regulations established in 1986 (which he helped write) are the ones "which were in force" when the Staff "began compliance with Section 106." King Affidavit, at ¶ 3.

For all of the above reasons, the Presiding Officer should reject the Intervenors' effort to retroactively apply the amended NHPA regulations, and should find that the only NHPA regulations properly at issue here are those that were in effect at the time HRI's license was issued in January 1998.

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[16] The Intervenors' statement that "all consultation occurred prior to the publication of the new ACHP regulations" (April 28 Brief, at 18, *citing Preservation Coalition of Erie County,* 356 F.3d at 448) appears to have been made with reference to the ACHP's December 2000 rulemaking, which the court did not address.

II. Staff Has Complied With NHPA Requirements[17]

Below, the Staff shows that the NHPA's requirements have been complied with, and that the NHPA Section 106 consultation process is complete with respect to planned ISL mining at Church Rock Sections 8 and 17, related irrigation activities at Crownpoint Section 12, and HRI's planned operation of its processing facility at Crownpoint Section 24. This facility will be used to dry and package the uranium yellowcake slurry to be transported from the Church Rock Section 8 and 17 sites once ISL mining there begins. With respect to other land parcels at HRI's Unit 1 and Crownpoint sites which may later be subject to ISL mining, the NHPA consultation process will be continued as HRI's undertaking moves forward, using an approach that the Commission found consistent with the NHPA. As also discussed below, the NHPA cases cited by the Intervenors involve undertakings which were found to result in adverse effects on historic properties[18] – a circumstance not present here – and the Presiding Officer should accordingly find that these cases are not persuasive authority in this proceeding. The Presiding Officer should thus reject all of the Intervenors' NHPA areas of concern.

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[17] This Section II discussion addresses Intervenor arguments I and II. *See* April 28 Brief, at 11-27.

[18] *See, e.g., Friends of Atglen-Susquehanna Trail, Inc. v. Surface Transportation Board,* 252 F.3d 246 (3d Cir. 2001); and *Muckleshoot Indian Tribe v. U.S. Forest Service*, 177 F.3d 800 (9th Cir. 1999). In *Friends*, the undertaking involved the abandonment of a railroad line which the parties recognized would adversely affect the bridges thereon. *See Friends of Atglen-Susquehanna Trail,* 252 F.3d at 253, and 256. Similarly, in *Muckleshoot,* there was no dispute that the undertaking at issue – a land transfer, in which an Indian tribe's ancestral transportation route was on federal government land being transferred to a private corporation for logging purposes – would adversely affect the historic route. *See Muckleshoot Indian Tribe v. U.S. Forest Service*, 177 F.3d at 807-08. The appeals court found that the NHPA's mitigation requirements had not been satisfied. *Id.*, at 805.

A. Chronology of Staff's NHPA Consultation Process

The Staff's NHPA consultation process formally began by sending a letter (*see* Intervenors' Exhibit K) to the SHPO on October 2, 1996.[19] The Staff identified the initial NHPA focus as being on the first five years of HRI's mining operations, a phased approach in accordance with the SHPO's expressed preference. *See* Intervenors' Exhibit K, at 1. The Navajo Nation, among other Native American groups, was identified as an interested party in the NHPA process,[20] and the NHPA steps which had been taken to date by HRI were described. *Id*., at 1-3. As shown in the attachments to the Staff's October 2 letter, HRI's undertaking for NHPA consultation purposes was identified as covering (a) portions of Sections 8 and 17 at the Church Rock site; (b) portions of Sections 29, 19, 24, 25 and all of Section 12 at the Crownpoint site; and (c) portions of Sections 15, 16, 21, 22 and 23 at the Unit 1 site.[21] *See* Staff Exhibit 1, Attachments C-F.

Also on October 2, 1996, copies of the above-described letter to the SHPO were sent to the following ten interested parties: (1) the NNHPD; (2) the Navajo Nation's Crownpoint Chapter; (3) the Navajo Nation's Churchrock Chapter; (4) the Pueblo of Laguna; (5) the All Pueblo Indian Council; (6) the Pueblo of Acoma; (7) the Hopi Cultural Preservation Office; (8) the Pueblo of Zuni Heritage and Historic Preservation Office; (9) the federal Bureau of Land Management's office at

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[19] This letter is Exhibit K of the April 28 Brief, but Exhibit K does not include any of the letter's eight attachments (referenced in Exhibit K as Attachments A-H). Copies of these eight items are marked as Attachments C-J to Staff Exhibit 1.

[20] The Navajo Nation later entered into an agreement with the U.S. Department of the Interior (National Park Service), dated March 24, 1997, under which the Navajo Nation assumed NHPA responsibilities over "tribal lands," as that term is defined in the agreement. A copy of this 1997 agreement is attached hereto as Staff Exhibit 2.

[21] A somewhat more detailed description of these various Sections of land is set forth in the HRI letters dated February 22, 1996, which are attached as Exhibit L of the April 28 Brief. Note that for the Crownpoint site, these 1996 letters do not list the portion of Section 25, and all of Section 12, which are now part of HRI's lease areas.

Albuquerque, NM; and (10) the federal Bureau of Indian Affairs office at Gallup, NM.[22]

By letter dated October 31, 1996 (NNHPD Response),[23] Alan Downer, the NNHPD Director, agreed that incremental NHPA review of HRI's project in five-year segments was appropriate, and he committed the NNHPD to reviewing reports on Navajo TCPs as those reports were submitted. *See* NNHPD Response, at 1. Mr. Downer further acknowledged that HRI's archaeological contractor would be in charge of seeing that the necessary TCP identifications were made within the initial five-year project area. *See id.,* at 2.

The Staff then sent Mr. Downer a summary of the NHPA process to be followed, and the work to be done by HRI's consultant concerning the identification of TCPs, by letter dated January 31, 1997 (a copy of which is reproduced in FEIS Appendix C, together with a list of this letter's addressees). As shown in FEIS Appendix C, copies of this January 1997 letter were sent to the Pueblo of Zuni Heritage and Historic Preservation Office, the Hopi Cultural Preservation Office, the Pueblo of Acoma, the Pueblo of Laguna, the All Pueblo Indian Council, and the Navajo Nation's Crownpoint and Churchrock Chapters. This letter closed with a request for "any direction or advice about advancing the [NHPA] review process and comments about the intended or ongoing survey work." As stated in the previously-filed affidavit of Staff project manager Robert Carlson[24] (a complete copy of his 1998 affidavit is attached hereto as Staff Exhibit 3), the Staff received no response from the NNHPD, verbal or otherwise, to this request. *See* Staff Exhibit 3, at ¶ 8. Nor is there any indication in the record that any of the other Native American groups listed above responded to the Staff's January 1997 letter.

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[22] A copy of this October 2, 1996 letter and its list of interested parties is reproduced in FEIS Appendix C.

[23] The NNHPD Response (letter dated October 31, 1996) is reproduced in FEIS Appendix C.

[24] Excerpts of this affidavit are attached to the April 28 Brief as Exhibit H.

The FEIS was published in February 1997, and in April 1997 HRI forwarded to the Staff a cultural resources report authored by the Museum of New Mexico's Office of Archaeological Studies (MNM Report).[25] The MNM Report documented the presence of archaeological sites, but found no TCPs at the Church Rock Section 8 and 17 sites, and no TCPs at the Crownpoint Section 12 site.

By letters dated June 19, 1997, the Staff requested that the SHPO and NNHPD review and provide comments on the MNM Report, and forwarded them copies. By further letters dated June 19, 1997, copies of the MNM Report were also sent for review and comment to the Hopi Cultural Preservation Office and the Pueblo of Zuni Heritage and Historic Preservation Office. Additionally, by letters dated June 18, 1997, the Pueblo of Laguna, the Pueblo of Acoma, and the All Pueblo Indian Council were offered copies of the MNM Report to review. Copies of these June 18-19, 1997 letters are grouped together and marked as Attachment L to Staff Exhibit 1. Neither the Hopi Cultural Preservation Office, nor the Pueblo of Zuni Heritage and Historic Preservation Office, commented on the MNM Report (*see* Staff Exhibit 3, at ¶ 10), and there is no record that the June 18 letters produced any response.[26]

By letter dated November 20, 1997 (a copy of which is marked as Attachment M to Staff Exhibit 1), the SHPO concurred with the MNM Report's findings.

On May 20, 1998, the Staff sent a NHPA consultation letter to the SHPO (a copy of which is attached as Exhibit I to the April 28 Brief) with respect to Church Rock Section 8 and Crownpoint Section 12. Based on the MNM Report, the Staff found that the archaeological sites on Sections 8 and 12 qualified as historic properties, and that no TCPs had been identified on Sections 8 and

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[25] Pages 7-9, and 13 of the MNM Report (cited in some documents as the OAS Report) are attached to the April 28 Brief as Exhibit F. Further excerpts of the MNM Report (pages 13-14, 17-22, 122-23, and 154, marked as Attachment K to Staff Exhibit 1) are discussed in Staff Exhibit 1.

[26] The letters dated June 18, 1997, carry accession numbers LL9706230354, LL9706230387, and LL9706230389.

12. *See* Intervenors' Exhibit I, at 1. Based in part on HRI's agreement to fence off the archaeological sites on Sections 8 and 12, the Staff determined that any HRI undertakings there would have no effect on the archaeological sites, and sought the SHPO's concurrence pursuant to 36 C.F.R. § 800.5(b) (which was then in force). *See* Intervenors' Exhibit I, at 2-3. More specifically, this letter stated in pertinent part as follows:

> The NRC staff has applied 36 C.F.R. § 800.5 ... and proposes to determine that any HRI undertakings on Sections 8 and 12 ... would have no effect on the historic properties located therein. The NRC staff seeks your concurrence on this proposed finding of no effect ...
>
> If your office so concurs, or does not otherwise submit any objections to the NRC staff's proposed determination, then pursuant to 36 C.F.R. § 800.5(b), the staff would consider the NHPA process to be concluded with respect to Sections 8 and 12.

Intervenors' Exhibit I, at 1, and 3. In this same letter, with respect to TCPs, the Staff further stated that its finding of no effect was based on the following:

> As discussed in the [MNM] Report, adequate consultation with local traditional practitioners has occurred and no traditional cultural properties have been identified in or near Sections 8, 17, and 12.

Id., at 2 (bullet 4).

Also on May 20, 1998, the Staff sent a separate NHPA consultation letter to the NNHPD with respect to Church Rock Section 17 – Navajo Nation tribal trust land over which the NNHPD has NHPA authority. *See* Attachment N to Staff Exhibit 1, at 1. Based on the MNM Report the Staff found that no historic properties are present on Section 17, and pursuant to 36 C.F.R. § 800.4 (d) (which was then in force) the Staff considered that NHPA's Section 106 process was concluded with respect to Section 17. More specifically, this letter stated in pertinent part as follows:

> Pursuant to 36 C.F.R. § 800.4(d), the NRC staff considers the NHPA Section 106 process to be concluded with respect to the Section 17 area surveyed in the [MNM] Report, based on the finding that no historic properties are located within Section 17.

Attachment N to Staff Exhibit 1, at 1.

By further letters dated May 20, 1998, the Staff forwarded copies of the above-described SHPO and NNHPD consultation letters to the same seven Native American organizations previously consulted,[27] seeking comment from them on (a) the no effect findings on Sections 8 and 12; (b) the finding that no historic properties are present on Section 17; and (c) the finding that no TCPs were present on Sections 8, 12 and 17. There is no record that the Native American groups contacted submitted any comments on the Staff's proposed findings.

In response to the May 20 NHPA consultation letters, the SHPO and the NNHPD conditionally concurred with the Staff's findings by letters dated June 3, 1998, and June 24, 1998, respectively (copies of these concurrence letters are marked as Attachments P and Q to Staff Exhibit 1). Based on these concurrences, the Staff advised HRI by letter dated July 10, 1998 (a copy of this letter is marked as Attachment R to Staff Exhibit 1) that pursuant to the NHPA and the Navajo Nation Cultural Resources Protection Act (NNCRPA), the cultural resources protection process was concluded with respect to Church Rock Sections 8 and 17, and Crownpoint Section 12.

On May 13, 1999, the Staff sent another NHPA consultation letter to the SHPO (on which the NNHPD and others were copied) with respect to Crownpoint Section 24. *See* Attachment S to Staff Exhibit 1. Included therein is a copy of an April 29, 1998 letter and two Figures which Dr. Eric Blinman (the primary author of the 1997 MNM Report) sent to HRI, and which the Staff forwarded to the SHPO as part of its 1999 consultation. As indicated in Dr. Blinman's Figures 1 and 2, HRI's Crownpoint processing facility is sited within HRI's Compound, which in turn is sited

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[27] The seven Native American organizations contacted in May 1998 were: (1) the Navajo Nation's Crownpoint Chapter; (2) the Navajo Nation's Churchrock Chapter; (3) the Pueblo of Laguna; (4) the All Pueblo Indian Council; (5) the Pueblo of Acoma; (6) the Hopi Cultural Preservation Office; and (7) the Pueblo of Zuni Heritage and Historic Preservation Office. Copies of the seven letters are grouped together and marked as Attachment O to Staff Exhibit 1.

within the southeast quarter of Section 24. As depicted in Dr. Blinman's Figure 2, there are three fenced archaeological sites located along the western edge of HRI's Compound, outside the immediate area of the Crownpoint processing facility. HRI's Crownpoint processing facility will be used to dry and package the uranium yellowcake slurry to be transported from the Church Rock Section 8 and 17 sites once ISL mining there begins. *See* Attachment S to Staff Exhibit 1 (Staff's May 13, 1999 letter), at 1. Based on Dr. Blinman's April 29, 1998 letter, the Staff found that HRI's use of its Crownpoint processing facility to dry and package yellowcake would have no effect on the three fenced archaeological sites, and the Staff sought the SHPO's concurrence pursuant to 36 C.F.R. § 800.5(b) (which was then in force). *See* Attachment S to Staff Exhibit 1 (Staff's May 13, 1999 letter), at 1-2.

On June 17, 1999, the NM SHPO concurred with this finding of no effect. *See* Attachment U to Staff Exhibit 1, at 2 (containing the SHPO's concurrence stamp on a copy of the Staff's May 13, 1999 consultation letter).

By letter dated June 7, 1999 (a copy of which is marked as Attachment T to Staff Exhibit 1), the NNHPD had responded to the Staff's 1999 NHPA consultation letter to the SHPO. The NNHPD asserted that Section 24 is under the general jurisdiction of the Navajo Nation, and that Section 24 is an area within "a dependent Indian community," making it subject to the NNHPD's NHPA jurisdiction. Attachment T, at 1. The Staff disagreed with these jurisdictional claims in a letter dated June 25, 1999 (a copy of which is marked as Attachment V to Staff Exhibit 1), noting therein that (1) the three archaeological sites are on private land owned by HRI (unlike the situation at Church Rock Section 17, which is tribal trust land); and (2) that a 1998 Supreme Court decision[28] had narrowly construed the "dependent Indian community" term so that the town of Crownpoint "cannot properly be regarded" as being such a community. Attachment V, at 1.

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[28] The decision referred to by the Staff is *Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520 (1998).

Based on the SHPO's concurrence, the Staff advised HRI by letter dated July 8, 1999 (a copy of which is marked as Attachment W to Staff Exhibit 1) that pursuant to 36 C.F.R. § 800.5(b) the NHPA process was concluded with respect to the three archaeological sites on Crownpoint Section 24, and that operation of the uranium processing facility there could proceed "to the extent authorized" by HRI's license. Attachment W, at 1.

B. The Intervenors' NHPA Concerns Are Without Basis

A comparison of the above chronology with the Intervenors' index of attachments (*see* April 28 Brief, at vi-vii) clearly shows the limited and inadequate consideration the Intervenors have given to the existing record of the Staff's NHPA consultation process. With respect to the Staff's NHPA consultation letters, the Intervenors reference only the initial such letter from October 1996 (Intervenors' Exhibit K)[29] and the May 1998 consultation letter to the SHPO. *See* Intervenors' Exhibit I.[30] Furthermore, the Intervenors do not discuss the Staff's 1999 NHPA consultation with the SHPO pertaining to Crownpoint Section 24.

The Intervenors' proffered NHPA expert is Dr. King, who reviewed an even more limited subset of the existing NHPA record in this proceeding. *See* King Affidavit, at ¶ 7. For example, while he states in ¶ 7.a that he reviewed FEIS Appendix C (containing copies of the Staff's NHPA consultation letters through January 1997), he did not review any of the several NHPA consultation letters mailed by the Staff after the FEIS was issued in February 1997, even though one such letter – the May 1998 letter to the SHPO – is attached as an exhibit to the April 28 Brief. Dr. King also reviewed only one of the several legal decisions issued by the Presiding Officer and Commission pertaining to NHPA and related cultural resource issues in this proceeding. *See* King Affidavit, at

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[29] As noted above, Intervenors' Exhibit K is incomplete because it does not include Attachments A-H referenced therein.

[30] As discussed further below, the Intervenors mistakenly describe this letter as also pertaining to Church Rock Section 17. *See* April 28 Brief, at 24-25.

¶ 7.h. Dr. King's opinions should therefore be given little, if any, weight by the Presiding Officer.[31]

Thomas Morris, the Intervenors' other proffered expert (on Navajo tradition and Navajo medicine), also performed a limited review of the record. Although the Intervenors state that the declaration of Mr. Morris "explains and provides the factual basis for his opinion that the NRC Staff's documentation of traditional cultural properties is inaccurate and under-inclusive" (April 28 Brief, at 2), Mr. Morris did not review the MNM Report (*see* Morris Affidavit, at ¶ 9), which set forth the TCP investigation performed. *See* Attachment K to Staff Exhibit 1, at 17-22. Mr. Morris' statements are mostly either generalized complaints unrelated to HRI's undertaking (*see* Morris Affidavit, at ¶¶ 10-15), or are ambiguous in that he does not identify any specific sites or TCPs that would be adversely affected by the undertaking. *Id.*, at ¶ 16 ("Traditional Practitioners fear gathering herbs from the areas affected by uranium mining due to the possible effects the disturbance may have on the healing properties of the herbs."). Moreover, to the extent Mr. Morris' descriptions relate to past uranium mining in the area, those effects are already discussed in the FEIS. *See e.g.*, FEIS at 4-124 to 4-125. On the whole, Mr. Morris' statements are another example of the Intervenors' general vagueness that the Commission has previously noted. *See* CLI-98-8, 47 NRC at 322 n.11 (stating that Intervenors "provide the Commission with only a few general claims that many traditional cultural properties may be affected" by the undertaking). Therefore, as with Dr. King, Mr. Morris' opinions should be given little, if any, weight by the Presiding Officer.

As discussed further below, the Intervenors' failure to adequately address the existing NHPA hearing record undermines the factual and legal bases for their NHPA areas of concern.

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[31] Dr. King's opinions are further discussed in Staff Exhibit 1.

1. Church Rock Section 17[32]

The NHPA consultation process is complete for Church Rock Section 17. The Intervenors acknowledge that the MNM Report constituted a complete cultural resource inventory for Section 17, and was the basis for the Staff's May 1998 Section 17 findings. *See* April 28 Brief, at 24. However, they claim these findings are irrelevant because "the entire NHPA process" had not been fully completed before HRI's license was issued, thereby putting HRI's entire undertaking in violation of the NHPA. *Id.*, at 18. As discussed above in Section I.B, the Commission previously rejected the Intervenors' similar argument that HRI "must defer all its activities until after the NRC has completed the NHPA review" for the entire undertaking. CLI-98-8, *supra*, 47 NRC at 319. The Commission found that the NHPA does not prohibit use of the phased compliance approach. *Id.,* at 323-324. Even more significantly, when the Commission later evaluated a more complete HRI hearing record – which included the Staff's May 1998 Section 17 findings – the Commission reiterated its stay ruling that phased compliance is not prohibited by the NHPA. *See* CLI-99-22, *supra*, 50 NRC at 12-13 and n. 37. The Commission found that the Intervenors had "offered no compelling argument" against phased compliance, and that they had "failed to identify any significant defect in the Staff's NHPA compliance." *Id.*, at 12.

Based on this law of the case, the Presiding Officer should accordingly reject the Intervenors' renewed argument that HRI's license was issued in violation of the NHPA.

With respect to the Staff's NHPA consultation process, the Intervenors admit that the Staff's October 1996 letter to the SHPO initiated this process (*see* April 28 Brief, at 21), but they then focus on HRI's earlier February 1996 letters (*see* Exhibit L of the April 28 Brief) as support for the claims that (1) Native American groups were insulted by the lack of a government-to-government relationship; and (2) the Staff's involvement in the NHPA process was not disclosed. *See* April 28

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[32] This section addresses Intervenor arguments I.A (pages 11-18) and II.A (pages 20-25) of the April 28 Brief.

Brief, at 21-22, *citing Pueblo of Sandia v. U.S.,* 50 F.3d 856 (10th Cir. 1995). The Presiding Officer should reject this area of concern for two reasons. First, the Intervenors fail to explain why, in light of the subsequent letters sent by the Staff in October 1996 and June 1997 to the same Native American groups HRI had previously contacted, the Exhibit L letters now have any relevance. Second, *Pueblo of Sandia* did not involve a "similar set of facts" (April 28 Brief, at 22) to the facts established by the hearing record in this proceeding. In *Pueblo of Sandia* (also cited by the Intervenors in their December 1998 Brief, at 33), the federal agency had been given sworn statements regarding the presence of TCPs, but these statements were not forwarded to the SHPO until after the SHPO's concurrence on a finding that there were no TCPs in the project area. *See Pueblo of Sandia,* 50 F.3d at 858-59. When provided with the sworn statements, the SHPO's concurrence was withdrawn. *Id*., at 862. No such agency misconduct is present here.

Equally unfounded is the related concern that the Staff failed to adequately consult with the Hopi, Laguna, Acoma and Zuni tribes regarding the identification of TCPs, and thereby erred in issuing HRI its license in January 1998. *See* April 28 Brief, at 22-24. As set forth above in the Section II.A chronology, letters dated June 18-19, 1997 – ignored by the Intervenors – were sent to the Hopi, Laguna, Acoma and Zuni tribes, either enclosing copies of the April 1997 MNM Report and seeking comment on its findings, or offering to send copies of the Report. Among its findings, the MNM Report states that of the Navajo, Hopi, Laguna, Acoma and Zuni tribes, "[o]nly the Navajos have demonstrated current traditional uses" of the areas in and around where HRI plans to conduct its ISL mining. MNM Report, at 17. Pages 17-22 of the MNM Report set forth an extensive discussion of the TCP investigation that was performed – an investigation that the Intervenors do not challenge – and no comments on the MNM Report's findings were received from the tribes consulted in June 1997. *See* Staff Exhibit 3, at ¶¶ 10-11. Moreover, while Dr. King states that he reviewed the MNM Report (*see* King Affidavit, ¶ 7.c), the rest of his affidavit is silent regarding the MNM Report's findings.

Accordingly, the Presiding Officer should reject the concern that the Hopi, Laguna, Acoma and Zuni tribes were not adequately consulted regarding the identification of TCPs prior to the issuance of HRI's license.

For the same reasons, the Presiding Officer should reject the related concerns that the Staff's May 1998 finding of no effect on historic properties (on Church Rock Sections 8 and 17, and Crownpoint Section 12, based on the MNM Report) was premature; and that the MNM Report did not consider the presence of non-Navajo TCPs, making the NHPA consultation process incomplete at that time. *See* April 28 Brief, at 24-25. As stated above, the Intervenors have ignored the June 1997 consultation letters the Staff sent to the non-Navajo tribes, and thus fail to show what more the Staff could reasonably have done to elicit information from such tribes after receiving no responses to those letters. Additionally, the MNM Report sets forth an extensive discussion of the TCP investigation that was performed, and neither Intervenors' counsel nor their NHPA expert cite that discussion, or otherwise challenge the thoroughness of the TCP investigation reflected in the MNM Report. The Presiding Officer should therefore reject the concerns regarding non-Navajo TCPs.

As discussed below, the Presiding Officer should also reject the Intervenors' argument that due to changed circumstances, previous rulings in this proceeding are no longer controlling. As discussed above in Section I.B, and as the Intervenors acknowledge (*see* April 28 Brief, at 12), the Commission previously found in this proceeding that the NHPA does not prohibit the phased compliance approach being used here. *See* CLI-98-8, 47 NRC 314, at 323-4. The Intervenors argue that "circumstances have changed" after this Commission decision was issued (April 28 Brief, at 12), but they fail to substantiate this argument. In support, they state in part that "Congress has enacted amendments to the NHPA" (*id.*), but as they state elsewhere these amendments to the statute were enacted in 1992, and did not pertain to the issue of phased compliance. *Id.*, at 3, and 16. *See also* King Affidavit, at ¶ 36.

In further support of their changed circumstances argument, the Intervenors rely on 36 C.F.R. § 800.4(b)(2) – the portion of the amended NHPA regulations containing the ACHP's new and expanded discussion of phased compliance. *See* April 28 Brief, at 12-14. These new phased compliance provisions state in pertinent part as follows:

> Where alternatives under consideration consist of corridors or large land areas, or where access to properties is restricted, the agency official may use a phased process to conduct identification and evaluation efforts. ... The process should establish the likely presence of historic properties within the area of potential effects for each alternative … through background research, consultation and an appropriate level of field investigation, taking into account the number of alternatives under consideration, the magnitude of the undertaking and its likely effects, and the views of the [historic preservation officers] and any other consulting parties.

36 C.F.R. § 800.4(b)(2).

Even assuming (contrary to Section I.C above) this amended NHPA regulation is entitled to retroactive application, the fact that the ACHP promulgated it shows that the NHPA (at least in the ACHP's view) does not prohibit phased compliance. For if the NHPA statute contained such a prohibition, no phased compliance – regardless of the circumstances – could be authorized by the NHPA regulations. The Intervenors also fail to show that HRI's undertaking would not qualify for phased compliance under 36 C.F.R. § 800.4(b)(2). *See* Staff Exhibit 1, at ¶ 26.

The Intervenors fail to address these points, and fail to discuss why CLI-98-8 (and the other pertinent rulings discussed in Section I.B above) should no longer be controlling. Instead, they cite *Mid States Coalition for Progress v. Surface Transportation Board*, 345 F.3d 520 (8th Cir. 2003), which discusses 36 C.F.R. § 800.4(b)(2). *See* April 28 Brief, at 13-14, and 20. But contrary to the Intervenors' claim, *Mid States* does not present "similar circumstances" (April 28 Brief, at 13) to the issuance of HRI's license. For unlike here, in *Mid States* historic sites that would be adversely affected by the undertaking had been identified, and the licensing action there had been taken in the face of the ACHP's unwillingness to sign a PA on how to mitigate the undertaking's adverse

effects. *See Mid States Coalition for Progress,* 345 F.3d at 554-55.[33] The Presiding Officer should accordingly find that the cases cited by the Intervenors do not support their changed circumstances argument.

The Intervenors also erroneously assert that the PA requirements of the NHPA regulations are applicable here, and rely on this unfounded premise to conclude that because such an agreement was not completed, HRI's license was issued in violation of the NHPA. *See* April 28 Brief, at 14-16. This Intervenor argument is similar to the one previously made to and rejected by Judge Bloch, in that it omits from consideration some of the regulatory steps in the NHPA consultation process. As discussed above in Section I.B, Judge Bloch ruled in LBP-99-9 that the Intervenors' analysis of the NHPA regulations failed to consider the provision which applies when – as is now the case not only with respect to HRI's undertaking on Church Rock Sections 8 and 17 and Crownpoint Section12, but on Crownpoint Section 24 as well – historic properties are identified but it is found that the undertaking will have no adverse effect on such properties. As long as the federal agency properly documents and notices such a finding, it is not thereafter required to take further steps in the NHPA section 106 consultation process absent objection from the SHPO. *See* LBP-99-9, 49 NRC at 140-41, *citing* 36 C.F.R.
§ 800.5(b).

The equivalent of former 36 C.F.R. § 800.5(b) is now found at 36 C.F.R. § 800.5(d)(1) – which is part of the amended NHPA regulations on which the Intervenors rely. Similar to
36 C.F.R. § 800.5(b), the amended regulation states that when no adverse effect is found, and such a finding is properly documented, this "fulfills the agency official's responsibilities under

[33] Similarly inapposite is *Pit River Tribe v. Bureau of Land Management*, 306 F. Supp.2d 929 (E.D. Cal. 2004) (cited at p.14 of the April 28 Brief). There, the ACHP had become involved in preparing a memorandum of agreement among the parties because it was found that the undertaking – siting of a power transmission line – would have direct and significant effects on the tribe's traditional cultural values, and its cultural and archaeological resources. *See Pit River Tribe,* 306 F. Supp.2d at 936 n.1, 943, and 945.

section 106 and this part." 36 C.F.R. § 800.5(d)(1). Only if an adverse effect is found does the NHPA step-by-step process continue under the amended regulations. *See* 36 C.F.R. § 800.5(d)(2). Thus, assuming *arguendo* (contrary to Section I.C above) that the amended NHPA regulations are entitled to retroactive application, the Presiding Officer should nonetheless now rule – consistent with LBP-99-9 and CLI-99-22 – that the consultation process was properly completed with respect to HRI's undertaking on Church Rock Section 17, and Crownpoint Sections 12 and 24, and that HRI and the Staff have accordingly completed their NHPA responsibilities with respect to those sites.

Moreover, in a case relied upon by the Intervenors in support of their PA argument (*see* April 28 Brief, at 16), a federal court applied the same set of NHPA regulations as did Judge Bloch in LBP-99-9, explaining that only where the federal agency finds that the undertaking at issue will have adverse effects does the ACHP become involved in seeking ways to mitigate such effects. *See Walsh v. United States Army Corps of Engineers*, 757 F.Supp. 781, 789 (W.D. Texas 1990) (involving a water project having the adverse effect of inundating several historic properties). This decision is instructive here because contrary to the Intervenors' argument, even if HRI's undertaking were found to have adverse effects on historic propertuies, entry into a PA would only be one option to address such effects. *Id*. Furthermore, despite the permit in that case having been issued prior to the completion of the NHPA Section 106 process, the court nonetheless found no violation of the NHPA or of the 36 C.F.R. Part 800 regulations. *See Walsh,* 757 F.Supp. at 787-89.[34] The Presiding Officer should accordingly find that *Walsh* does not support the Intervenors' PA argument.

Finally, regarding the amended NHPA regulations, the Staff notes that in promulgating them, the ACHP emphasized that the NHPA and its implementing regulations do not dictate

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[34] The Intervenors also cited *Walsh* in their initial NHPA presentation, and, unlike here, recognized the court's finding of no NHPA violation. *See* December 1998 Brief, at 42.

whether an undertaking should be approved, but instead merely provide "a process that assures that the Federal agency takes into account" an undertaking's effects on historic properties. 65 Fed. Reg. 77698, at 77715 col. 2 (Dec. 12, 2000). The first step in the process requires Federal agencies "to identify the historic properties that may be affected by the undertaking." *Id*., at 77715 col. 3. The NRC Staff has fully met that requirement, under both the old and the amended NHPA regulations.

For all of the reasons set forth above, the Presiding Officer should reject the Intervenors' NHPA areas of concern with respect to Church Rock Section 17.

2. Unit 1 Site[35]

In an apparent effort to bolster their argument that HRI's license with respect to all sites should now be invalidated, the Intervenors state that the Staff's NHPA consultation process is "project-wide," as opposed to relating to "site-specific locations." April 28 Brief, at 25. *See also id*., at 18. To the contrary, as shown in the Section II.A chronology set forth above, the consultation process has been completed for Church Rock Sections 8 and 17, and Crownpoint Sections 12 and 24. These areas were all subject to site-specific cultural resource surveys, and the Staff's site-specific findings of no effect were documented and concurred in by the proper NHPA authorities. By contrast, a detailed cultural resource survey on HRI's Unit 1 site remains to be done, and the Staff has accordingly made no site-specific NHPA findings with respect to Unit 1. Thus, the Staff agrees with the Intervenors that "further studies should be completed to confirm that all cultural properties are identified" at the Unit 1 site prior to any ISL mining taking place there. April 28 Brief, at 25. *See also* Staff Exhibit 1, at ¶ 20. But as discussed above in Section I.B, Judge Bloch and the Commission on review endorsed the phased NHPA consultation process being used here, and rejected the request to invalidate HRI's license. Thus, the fact that the NHPA consultation process

[35] This section addresses Arguments I.B (page 18) and II.B (page 25) of the April 28 Brief.

has not yet been completed for Unit 1 does not mean that HRI's license must now be invalidated.

As stated above in the Staff's introduction to its Section II discussion, with respect to the Unit 1 land parcels the NHPA consultation process will be continued as HRI's undertaking moves forward. Pursuant to HRI license condition 9.12, a final cultural resources survey of the Unit 1 land parcels will be performed, the survey results will be reviewed by the Staff, and the necessary consultations with the SHPO and the NNHPD will be conducted. HRI recognizes the continued applicability of license condition 9.12 (*see* HRI Response, at 15), and acknowledges the fact that each of its ISL mining sites "will be subject to cultural resource investigations." *Id*., at 30, *quoting* HRI Exhibit A ¶ 8 (affidavit of Dr. Blinman). *See also id*., at ¶ 23 (cultural resources will be investigated as later phases of HRI's undertaking occur).

To the extent that the Intervenors incorporate by reference their Section 17 NHPA areas of concern to their Unit 1 argument, the Staff similarly incorporates by reference here its response to the Section 17 NHPA areas of concern. Accordingly, based on the arguments set forth above in this Section II.B.2, the Presiding Officer should reject all of the Intervenors' NHPA areas of concern with respect to Unit 1.

3. Crownpoint Sites[36]

As in their Unit 1 argument, the Intervenors apparently seek to bolster their argument that HRI's license with respect to all sites should now be invalidated by claiming that the Staff's NHPA consultation process is "project-wide," as opposed to relating to "site-specific locations." April 28 Brief, at 26. *See also id*., at 18. To the contrary, as shown in the Section II.A chronology set forth above, the consultation process has been completed for Church Rock Sections 8 and 17, and Crownpoint Sections 12 and 24. These areas were all subject to site-specific cultural resource surveys, and the Staff's site-specific findings of no effect were documented and concurred in by

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[36] This section addresses Arguments I.C (page 18) and II.C (pages 25-27) of the April 28 Brief.

the proper NHPA authorities. By contrast, detailed cultural resource surveys on HRI's Crownpoint Sections 29, 19 and 25 remain to be done, and the Staff has accordingly made no site-specific NHPA findings with respect to these Crownpoint parcels on which ISL mining may later occur. Thus, the Staff agrees with the Intervenors that "additional studies should be completed to ensure that all cultural resources are properly identified" at the Crownpoint sites prior to any ISL mining taking place at those sites. April 28 Brief, at 27. *See also* Staff Exhibit 1, at ¶ 20. But as discussed above in Section I.B, Judge Bloch and the Commission on review endorsed the phased NHPA consultation process being used here, and rejected the request to invalidate HRI's license. Thus, the fact that the NHPA consultation process has not yet been completed for all of the Crownpoint sites does not mean that HRI's license must now be invalidated.

As stated above in the Staff's introduction to its Section II discussion, with respect to HRI's Crownpoint Sections 29, 19 and 25, the NHPA consultation process will be continued as HRI's undertaking moves forward. Pursuant to HRI license condition 9.12, a final cultural resources survey of these Crownpoint land parcels will be performed, the survey results will be reviewed by the Staff, and the necessary consultations with the SHPO and the NNHPD will be conducted. As stated above, HRI recognizes the continued applicability of license condition 9.12 (*see* HRI Response, at 15), and acknowledges the fact that each of its ISL mining sites "will be subject to cultural resource investigations." *Id*., at 30, *quoting* HRI Exhibit A ¶ 8. *See also id*., at ¶ 23 (cultural resources will be investigated as later phases of HRI's undertaking occur).

The Intervenors note that the 1992 Marshall report – excerpts of which are attached to the April 28 Brief as Exhibit E – covers portions of Crownpoint Sections 19, 25 and 29, but does not cover Crownpoint Section 24. *See* April 28 Brief, at 26. However, the Intervenors fail to address any of the more recent NHPA documents pertaining to Crownpoint Section 24, which are discussed in Section II.A, above. The claim that the 1992 Marshall report may have "overlooked" important cultural resources at Crownpoint (April 28 Brief, at 26) is mere speculation, and lacks relevance because further Crownpoint NHPA surveys remain to be done before any ISL mining could take place at Crownpoint.

To the extent that the Intervenors incorporate by reference their Section 17 NHPA areas of concern to their Crownpoint argument, the Staff similarly incorporates by reference here its response to the Section 17 NHPA areas of concern. Accordingly, based on the arguments set forth above in this Section II.B.3, the Presiding Officer should reject all of the Intervenors' NHPA areas of concern with respect to the Crownpoint sites.

In short, the Intervenors' NHPA arguments and supporting testimony lack an adequate legal and factual basis. Based on the Section II arguments set forth above, the Presiding Officer should reject all of the Intervenors' NHPA areas of concern pertaining to each of HRI's sites at Church Rock Section 17, Unit 1 and Crownpoint.

4. Summary of Previous Evidence and Decisions Regarding Cultural Resources

a. Staff Evidence Regarding Cultural Resources

As discussed in the Background Section above, the Staff has previously submitted five briefs in this proceeding regarding cultural resources: (1) "NRC Staff's Response to Motion for Stay, Request for Prior Hearing, and Request for Temporary Stay" (February 20, 1998); (2) "NRC Staff's Response to Petition For Review [of LBP-98-5]" (April 23, 1998); (3) "NRC Staff's Response to Request For Stay Pending Review of LBP-98-5" (April 23, 1998); (4) "NRC Staff's Response to

ENDAUM and SRIC Presentation on NHPA and NAGPRA Issues" (Jan. 19, 1999); and (5) "NRC Staff's Response to Petition For Review of LBP-99-9" (March 22, 1999).

b. Summary of Presiding Officer Decisions Regarding Cultural Resources[37]

In revoking the temporary stay and denying the Intervenors' motion for a stay, the Presiding Officer rejected the argument that HRI was required to have in place its entire cultural resource inventory and protection plan prior to receiving its ISL license, finding instead that HRI's phased approach to NHPA compliance adequately protected against damage occurring to any cultural resources. *See* LBP-98-5, 47 NRC at 124-25. The Presiding Officer found that the phased compliance process did not appear to violate the NHPA, and that Intervenors ENDAUM and SRIC had accordingly failed to make a strong showing on their NHPA claim. *Id.*, at 125. The Presiding Officer further noted that both the NNHPD and the SHPO had agreed to the phased compliance approach, and that other interested parties had not objected to use of this approach. *Id.*, at 125.

In reviewing the merits of the Intervenors' later NHPA written presentation, Judge Bloch found that 36 C.F.R. § 800.3(c) (then in effect) authorized phased compliance. *See* LBP-99-9, 49 NRC at 140. Judge Bloch also found that with respect to HRI's Church Rock Section 8 and 17 sites, and its Crownpoint irrigation site on Section 12, no TCPs – including no non-Navajo TCPs – had been identified. *Id.*, at 141-42. Based on the above findings, and the fact that the SHPO and the NNHPD had concurred in the Staff's determination that HRI's undertaking on Sections 8, 17 and 12 would have no effect on the cultural resources identified, Judge Bloch concluded that the consultation process had been properly completed, and that "HRI and the Staff have fulfilled their NHPA responsibilities." *Id.*, at 142.

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[37] A more complete discussion of these decisions is set forth above in the Background Section, and in Section I.B.

c. Summary of Commission Decisions Regarding Cultural Resources[38]

The Commission denied the Intervenors' Petition for Review of the Presiding Officer's decision in LBP-98-5 and lifted its temporary stay, stating that it was "skeptical of whether the alleged NHPA injury will occur at all, much less immediately." CLI-98-8, 47 NRC 314, 321-22 and n.8 (1998).

In CLI-99-22, the Commission affirmed LBP-99-9. The Commission found no reason to consider Judge Bloch's NHPA findings in detail, stating that the Intervenors "have offered no compelling argument" against phased compliance, and that they had "failed to identify any significant defect in the Staff's NHPA compliance." CLI-99-22, 50 NRC at 12. The Commission reiterated its previous stay ruling that phased compliance is not prohibited by the NHPA. *Id.*, at 12-13 and n. 37, *citing* CLI-98-8, 47 NRC at 323-24.

d. Comparison of Section 8 to Section 17, Unit 1 and Crownpoint

There are no relevant differences among Church Rock Sections 8 and 17, Unit 1, and Crownpoint that support the Intervenors' cultural resource areas of concern. The Staff's approach to the NHPA Section 106 consultation process, approved by both the Presiding Officer and the Commission, is the same at all of the project areas. The primary difference between the sites is procedural and not substantive, in that the Section 106 process is complete for Church Rock Sections 8 and 17, and Crownpoint Sections 12 and 24, but is ongoing for Unit 1 and the other Crownpoint sections where ISL mining may later occur. The Commission found that for Section 8, "the overall record for the licensing action includes a complete analysis" of the cultural resource impacts. CLI-99-22, 50 NRC at 14. The Intervenors have identified no concerns which should prevent the Presiding Officer from now making similar findings with respect to Church Rock Section 17, and Crownpoint Sections 12 and 24. At Unit 1 and Crownpoint Sections 19, 25 and 29, the

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[38] A more complete discussion of these decisions is set forth above in the Background Section, and in Section I.B.

requirement to complete the Section 106 process prior to the start of ISL mining (*see* HRI license condition 9.12) operates to protect NHPA values at those sites. The Intervenors have not articulated any persuasive reason for treating the Staff's NHPA approach to Section 17, Unit 1 and Crownpoint differently than the Staff's approved approach for Church Rock Section 8. Accordingly, the Presiding Officer should uphold the Staff's phased NHPA compliance process.

III. Staff Has Complied With NEPA Requirements[39]

A. Church Rock Section 17

The Intervenors argue the FEIS failed "to take the requisite hard look at the environmental consequences of this action" with respect to cultural resources. April 28 Brief, at 29. The Intervenors also argue that the FEIS is inadequate because the NHPA Section 106 process was still ongoing at the time the FEIS was issued. *Id*. These arguments have been raised before. *Compare* Intervenors' December 1998 Brief, at 50-54 *to* April 28 Brief at 28-29.

The Intervenors' current arguments ignore the Presiding Officer and Commission rulings (discussed in Section I.B above) which rejected their previous NEPA cultural resource arguments regarding the adequacy of the FEIS and the ongoing Section 106 process. *See* LBP-99-9, 49 NRC at 143-144; CLI-99-22, 50 NRC at 13-14. The Presiding Officer found, and the Commission agreed, that the Staff adequately considered cultural resource issues in the FEIS despite the fact that the Section 106 process was still ongoing at the time. LBP-99-9, 49 NRC at 143-144; CLI-99-22, 50 NRC at 13-14. Here, the Intervenors allege that the same defect (*i.e.*, incomplete Section 106 consultation at the time the FEIS was issued) exists in the Staff's FEIS with respect to Section 17, Unit 1 and Crownpoint. However, the adequacy of the FEIS with respect to cultural resources and the independence of the NEPA and NHPA Section 106 processes are the law of the case. Thus, the Intervenors' arguments should be rejected.

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[39] This Section III discussion addresses Intervenor argument III. *See* April 28 Brief, at 28-30.

In addition, the hearing record clearly indicates that the Staff has given cultural resources issues the requisite "hard look" required by NEPA. As the Intervenors note, (April 28 Brief, at 28) an agency has taken a 'hard look' when it engages in reasoned decisionmaking by, for example, soliciting opinions from experts, giving careful scientific scrutiny to issues raised, and responding to all legitimate concerns. *See e.g.*, *Hughes River Watershed Conservation v. Johnson*, 165 F.3d 283, 288 (4th Cir. 1999). The Staff has done exactly that. As demonstrated below, the FEIS was developed after obtaining information from professional surveys regarding cultural resources, analyzing issues identified during the Staff's review, examining the options for avoidance of potential impacts, and responding to public comments. Staff Exhibit 1, at ¶¶ 29-31; FEIS at A-47 through A-52.

The FEIS includes a lengthy discussion of cultural resources in the chapter on the affected environment. *See* FEIS, at 3-65 to 3-67. The section includes a discussion of past human habitation in the region of the project to provide a baseline against which potential impacts to cultural resources will be assessed. *Id.*, at 3-65. The Staff explains its definition of "culture", the meaning of "significance" with respect to NEPA and NHPA, and describes both "archeological" and "historic" properties. *Id.*, at 3-66, 3-67. The Staff also includes a discussion of the definition of "traditional cultural properties" along with guidelines for evaluating such properties. *See id.*, at 3-67, *citing* Parker and King.[40] The Staff's baseline includes the results of archeological surveys for artifacts from periods extending back 12,000 years. *See* FEIS, at 3-68 to 3-73. The FEIS also described the results of surveys which were ongoing at that time, including "a detailed traditional culture property survey, which is being conducted by professional archeologists and ethnographers with input from local Native American practitioners and residents and which builds on the preliminary traditional cultural property assessment work conducted for this EIS." *Id.*, at 3-73.

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[40] This reference is to National Register Bulletin 38, co-authored by the Intervenors' proffered expert, Dr. King. *See* King Affidavit, at ¶ 3.

Additionally, the results of the completed TCP survey as well as the preliminary TCP survey are described for each of the four project areas. *See id.*, at 3-74 to 3-77.

These archeological and TCP surveys provide the foundation for the FEIS' analyses of potential impacts to cultural resources.[41] *See* FEIS, at 3-68 to 3-77; Staff Exhibit 1, at ¶ 30. The information from the cultural resource surveys in the FEIS is more than adequate for purposes of analyzing impacts under NEPA. Staff Exhibit 1, at ¶ 29. While compliance with NEPA and the NHPA may rely on the same survey information, the two statutes impose <u>separate</u> and <u>distinct</u> obligations on federal agencies.[42] *See* 36 C.F.R. § 801.6. Moreover, there is no requirement under NEPA, nor in the NRC's regulations implementing NEPA (10 C.F.R. Part 51), to address cultural resource impacts by performing a NHPA Section 106 review. Here, the FEIS contains the information necessary to satisfy NEPA's hard look requirement for Sections 8 and 17, Unit 1 and Crownpoint; NEPA does not require more. Yet, as the Staff notes (*see, e.g.,* Staff Exhibit 1, at ¶ 20), additional information is necessary to complete the NHPA Section 106 consultation process for all project areas.[43] Nevertheless, the status of the NHPA process in each project area has no bearing on the overall acceptability of the Staff's NEPA documentation. Accordingly, the Presiding Officer should again reject the Intervenors attempts to bind the completion of Section 106 review to the adequacy of the FEIS.

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[41] The FEIS reflects surveys that were completed at <u>all</u> four project areas, Sections 8 and 17, Unit 1, and Crownpoint. FEIS, at 3-68 to 3-77.

[42] Although the NHPA and NEPA impose separate and distinct obligations, the amended NHPA regulations do allow for integration of NHPA into the NEPA process. *See* 36 C.F.R. § 800.8. Under these regulations, the Staff may elect to satisfy the NHPA by, among other things, notifying the SHPO that the Staff plans to address cultural resources through the NEPA process and by providing a copy of the Draft EIS to the SHPO for comments. *Id.* However, at the time HRI's license was issued, the NHPA regulations did not include the explicit option of integrating the statutory obligations into one process. In any event, the Staff has met its NEPA and NHPA obligations here by separately addressing each set of requirements. With respect to the Intervenors' current arguments, the Staff has completed its NEPA responsibilities by issuing the FEIS, even though the NHPA process is still ongoing.

[43] License Condition 9.12 ensures that the Section 106 process will be complete before mining begins at any particular ISL mining site.

The potential impacts of the project (and alternatives) on cultural resources are discussed in detail in the FEIS chapter on environmental consequences, monitoring, and mitigation. *Id*., at 4-109 to 4-112, *see also*, Staff Exhibit 1, at ¶ 29. Contrary to the Intervenors' assertions that the "FEIS focuses only on the impacts to cultural resources that result from physical damage and only covers sites that have been discovered within the project" (April 28 Brief, at 29), the FEIS discusses impacts that can result from simply moving artifacts (thereby destroying its archeological "context"), from incidental pedestrian or vehicle traffic, or from looting. FEIS, at 4-109; 4-110. The FEIS also describes a process for addressing cultural resources if they are subsequently identified. *Id*.; Staff Exhibit 1, at ¶ 31. The Staff determined that "the potential for adverse impacts of the proposed project on cultural resources would be reduced or eliminated by the policy set forth in HRI's preliminary cultural resource management plans." FEIS, at 4-110. The Staff noted that the policy's principle objective is avoidance of cultural resources, but also includes procedures for inventory, demarcation and avoidance of any discovered cultural resources. *Id*. The policy also includes a provision that construction or drilling activities requiring subsurface disturbances would be preceded by archeological testing and an archeological monitor would be present during construction and reclamation activities. *Id*.; Staff Exhibit 1, at ¶ 31. HRI also agreed to the recommendations made in the FEIS by the Staff. FEIS, at 4-111; 4-112.

Finally, the Staff addressed public comments submitted during preparation of the FEIS. *See* FEIS, at A-47 to A-52. The Staff responded to comments regarding the treatment of potential impacts to cultural resources, including TCPs and culturally important plants. *Id*., at A-47, A-48, and A-51. The Staff discussed consultation requirements, including those under NHPA Section 106 and those of Navajo Nation laws. *Id*., at A-48, and A-49. The Staff also addressed comments regarding Navajo religious beliefs and Navajo traditional cultural values. *Id*., at A-50.

In short, the Staff has taken the requisite hard look at the impacts of the project on cultural resources. The Staff fully explained its course of inquiry, its methods of analysis, and its reasoning

regarding mitigation. The Staff also responded to public comments. Although the Staff recognized that additional work was necessary to comply with NHPA Section 106 (*see* FEIS, at 4-112), the discussion of cultural resources in the FEIS is more than adequate to satisfy NEPA's hard look requirement. Accordingly, the Intervenors' arguments that the FEIS fails to adequately address cultural resources should be rejected.

B. Unit 1

The Intervenors state that "the NRC Staff's violation of the NEPA is project wide, rather than site specific." April 28 Brief, at 29. The Intervenors incorporate by reference their Section 17 NEPA areas of concern to their Unit 1 argument, and the Staff similarly incorporates by reference here its response (set forth in Section III.A) to the Section 17 NEPA areas of concern.

The Staff's treatment of cultural resources in the FEIS was approved by the Presiding Officer (LBP-99-9, 49 NRC at 143-144) and the Commission (CLI-99-22, 50 NRC at 14) with respect to Section 8 and applies equally to Unit 1. In addition, although the NHPA Section 106 process is not yet complete for Unit 1, the Staff has taken the hard look at the impacts of the project on cultural resources at Unit 1 necessary to satisfy NEPA. The surveys described in the FEIS for Unit 1 (*see* 3-76 to 3-77) provide the baseline against which potential impacts to cultural resources were analyzed and cultural resource management plans were designed. The surveys, analysis and management plans for Unit 1 discussed in the FEIS demonstrate the Staff's reasoned decisionmaking and satisfy NEPA. Further, the Commission has previously held that completion of the Section 106 process is not required prior to issuance of the FEIS and the satisfaction of NEPA. *See* CLI-99-22, 50 NRC at 13-14. Thus, the Intervenors' arguments are barred by the law of the case. Accordingly, the Intervenors' arguments that the FEIS fails to adequately address cultural resources at Unit 1 should be rejected.

C. Crownpoint

As in their Unit 1 argument, the Intervenors state that "the NRC Staff's violation of the NEPA

is project wide, rather than site specific." April 28 Brief, at 29. The Intervenors incorporate by reference their Section 17 NEPA areas of concern to their Crownpoint argument, and the Staff similarly incorporates by reference here its response (set forth in Section III.A) to the Section 17 NEPA areas of concern.

The Staff's treatment of cultural resources in the FEIS was approved by the Presiding Officer (LBP-99-9, 49 NRC at 143-144) and the Commission (CLI-99-22, 50 NRC at 14) with respect to Section 8 and applies equally to Crownpoint. In addition, although the Section 106 process is not yet complete for Crownpoint, the Staff has taken the hard look at the impacts of the project on cultural resources at Crownpoint necessary to satisfy NEPA. The surveys described in the FEIS for Crownpoint (*see* 3-74 to 3-76) provide the baseline against which potential impacts to cultural resources were analyzed and cultural resource management plans were designed. The surveys, analysis and management plans for Crownpoint discussed in the FEIS demonstrate the Staff's reasoned decisionmaking and satisfy NEPA. Further, the Commission has previously held that completion of the Section 106 process is not required prior to issuance of the FEIS and the satisfaction of NEPA. *See* CLI-99-22, 50 NRC at 13-14. Thus, the Intervenors' arguments are barred by the law of the case.

Accordingly, the Intervenors' arguments that the FEIS fails to adequately address cultural resources at Crownpoint should be rejected.

D. Summary of Previous Evidence and Decisions Regarding NEPA and Cultural Resources

1. Staff Evidence Regarding NEPA and Cultural Resources

As discussed in the Background Section above, the Staff has previously submitted five briefs in this proceeding regarding cultural resources: (1) “NRC Staff’s Response to Motion for Stay, Request for Prior Hearing, and Request for Temporary Stay” (February 20, 1998); (2) “NRC Staff’s Response to Petition For Review [of LBP-98-5]" (April 23, 1998); (3) “NRC Staff’s Response to Request For Stay Pending Review of LBP-98-5" (April 23, 1998); (4) “NRC Staff’s Response to ENDAUM and SRIC Presentation on NHPA and NAGPRA Issues” (Jan. 19, 1999); and (5) “NRC Staff’s Response to Petition For Review of LBP-99-9" (March 22, 1999).

2. Summary of Presiding Officer Decisions Regarding NEPA and Cultural Resources[44]

The Presiding Officer found the Staff’s FEIS adequate with respect to impacts on cultural resources. LBP-99-9, 49 NRC at 143-144. The Presiding Officer stated that the “Intervenors’ NEPA claims are without basis” and noted that the FEIS discussed cultural resource impacts, recommended implementation of a cultural resource management plan, and discussed certain procedures that would be followed if unidentified cultural resources were discovered. *Id*. The Presiding Officer concluded by noting that there were “no ‘deficiencies’ in the Section 106 process for Church Rock Section 8; Intervenors merely refuse to accept the ‘phased review’ of the project which is permitted by law.” *Id*., at 144.

The Presiding Officer also briefly addressed the adequacy of the FEIS with respect to cultural resources in LBP-99-30. LBP-99-30, 50 NRC 77, 114 (1999). There, the Presiding Officer again found “no reason to believe that there will be substantial adverse impacts on cultural resources.” *Id*.

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[44] A more complete discussion of these decisions is set forth above in the Background Section, and in Section I.B.

3. Summary of Commission Decisions Regarding NEPA and Cultural Resources[45]

The Commission affirmed the Presiding Officer's decision with respect to impacts on cultural resources and NEPA. CLI-99-22, 50 NRC at 13-14. The Commission addressed the Intervenors' concerns "that the FEIS sets out a plan for identifying cultural resource impacts but does not contain a complete evaluation of the proposed action's impacts on cultural resources." *Id.*, at 13. The Commission recognized that some supporting documents for Section 8 were completed after the FEIS was published, but concluded that the Staff's approach was acceptable because "the overall record for the licensing action includes a complete analysis" of the cultural resource impacts. *Id.*, at 14. The Commission noted that "the public had access to the relevant information and the agency decision makers considered that information before a final decision on the matter was reached." *Id.* The Commission found "no flaw" with the later release and consideration of additional information on cultural resources. *Id.*

Finally, in CLI-01-04, the Commission briefly addressed the portion of LBP-99-30, 50 NRC 77, that dealt with NEPA and cultural resources. 53 NRC at 45-46. The Commission found no basis to revisit LBP-99-30's fact-based conclusions on cultural resources. *Id.*, at 46.

4. Comparison of Section 8 to Section 17, Unit 1 and Crownpoint

The Staff's treatment and consideration of cultural resource issues at all four project areas follow the same approach approved previously by the Presiding Officer and Commission. *See e.g.*, CLI-99-22, 50 NRC at 14. The FEIS contains sufficient information and discussion to satisfy the agency's NEPA obligations and demonstrates that the Staff took a hard look at the potential impacts to cultural resources at all project areas. The Intervenors have identified no factual differences or concerns which should prevent the Presiding Officer from now making a similar

[45] A more complete discussion of these decisions is set forth above in the Background Section, and in Section I.B.

NEPA finding with respect to Church Rock Section 17, Unit 1 and Crownpoint. Moreover, the FEIS addressed cultural resources at all four project areas and, as discussed *supra*, Section III.A, the status of the NHPA process in each project area has no bearing on the overall acceptability of the Staff's NEPA documentation. Accordingly, there are no relevant differences among Church Rock Sections 8 and 17, Unit 1 and Crownpoint that support the Intervenors' area of concern regarding NEPA and cultural resources. Consequently, the law of the case must apply.

CONCLUSION

Based on the above, the Staff requests that the Presiding Officer reject the Intervenors' NHPA and NEPA areas of concern with respect to cultural resources.

Respectfully submitted,

/RA/

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/RA/

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Dated at Rockville, Maryland
this 24th day of June, 2005

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE PRESIDING OFFICER

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

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S RESPONSE TO INTERVENORS' PRESENTATION ON CULTURAL RESOURCE ISSUES" in the above-captioned proceeding have been served on the following persons by deposit in the United States mail; through deposit in the Nuclear Regulatory Commission's internal system as indicated by an asterisk (*); and by electronic mail as indicated by a double asterisk (**), on this 24th day of June, 2005 (a pound sign (#) designates those parties also served with hard copies of all exhibits and attachments).

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