RAS 10226

THOMPSON & SIMMONS, PLLC.
1225 19th Street, N.W., Suite 300
Washington, D. C. 20036
202.496.0780/202.496.9111
Fax: 202.496.0783

440 Meadow Street,
Waterbury, Connecticut 06702

ANTHONY J. THOMPSON
ajthompson@athompsonlaw.com
Admitted in D.C. and Virginia

CHARLES T. SIMMONS
csimmons@athompsonlaw.com
Admitted in CT and D.C.

CHRISTOPHER S. PUGSLEY
cpugsley@athompsonlaw.com
Admitted in MD

July 28, 2005

BY ELECTRONIC MAIL, U.S. FIRST CLASS MAIL

U.S. Nuclear Regulatory Commission
Office of the Secretary
Attn: Rulemaking and Adjudications Staff
Mail Stop: OWFN-16C1
Washington, DC 20555

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

Dear Sir or Madam:

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

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

Sincerely,

Anthony J. Thompson, Esq.
Christopher S. Pugsley, Esq.
Thompson & Simmons, PLLC.
Counsel of Record to HRI

Enclosures

(hydro resourcesCOVERLETTTER 7-28-05.doc)

Template=SECY-021

SECY-02

TABLE OF CONTENTS

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:
E. Roy Hawkens, Presiding Officer
Dr. Richard F. Cole, Special Assistant
Dr. Robin Brett, Special Assistant

In the Matter of:	
Hydro Resources, Inc. P.O. Box 777 Crownpoint, NM 87313	Docket No.: 40-8968-ML Date: July 28, 2005

HYDRO RESOURCES, INC.'S RESPONSE IN OPPOSITION TO INTERVENORS' WRITTEN PRESENTATION REGARDING ENVIRONMENTAL IMPACT STATEMENT ADEQUACY

I. INTRODUCTION

Hydro Resources, Inc. (HRI), by its undersigned counsel of record, hereby submits this Response in Opposition to Intervenors' Written Presentation Regarding Environmental Impact Statement Adequacy with respect to HRI's Nuclear Regulatory Commission (NRC) source material license to operate an *in situ leach* (ISL) uranium recovery facility at Church Rock and Crownpoint, New Mexico. For the reasons discussed below, HRI respectfully requests that the Presiding Officer reject each of Intervenors' arguments regarding environmental impact statement (EIS) adequacy for the remaining Crownpoint Uranium Project (CUP) sites.

II. BACKGROUND AND PROCEDURAL HISTORY

HRI applied for an NRC source material license to operate an ISL uranium recovery facility at the CUP consisting of the Church Rock Sections 8 and 17, Unit One, and Crownpoint uranium recovery sites. On November 14, 1994, NRC Staff prepared a

draft environmental impact statement (DEIS) and published a notice in the Federal Register detailing its availability. *See* 59 Fed. Reg. 56,557 (November 14, 1994). This Federal Register notice provided potentially affected parties with an opportunity to request a hearing in accordance with 10 CFR § 2.1205. On December 21, 1994, several parties filed hearing requests with NRC, and a Presiding Officer was designated by the Atomic Safety and Licensing Board. *See* 59 Fed. Reg. 66,979 (January 8, 1995). However, the Presiding Officer held all aspects of this proceeding, including final determinations of standing for a hearing, in abeyance until NRC Staff completed its review of HRI's license application and issued its final environmental impact statement (FEIS). On February 29, 1997, NRC Staff issued its FEIS and, on January 5, 1998, NRC Staff approved HRI's license application and granted HRI License No. SUA-1508.

On May 13, 1998, the Presiding Officer permitted several parties, including the Eastern Navajo Dine Against Uranium Mining (ENDAUM), the Southwest Research Information Center (SRIC), and Grace and Marilyn Sam (hereinafter the "Intervenors"), to intervene to challenge HRI's license under NRC's 10 CFR Part 2, Subpart L provisions for "informal hearings." *See In the Matter of Hydro Resources, Inc.* (Crownpoint Uranium Project), LBP-98-9, 47 NRC 261 (May 13, 1998). Additionally, in September of 1997, NRC Staff requested leave to participate as a party in the hearing process in accordance with 10 CFR §§ 2.1213 & 2.1237. During the hearing, the Presiding Officer bifurcated the proceeding to address HRI's four (4) proposed uranium mining sites separately: (1) Church Rock Section 8; (2) Church Rock Section 17; (3) Unit One; and (4) Crownpoint.

A. Environmental Impact Statement Adequacy Area of Concern

On February 19, 1999, Intervenors submitted their written presentation regarding the adequacy of HRI's and NRC Staff's FEIS. *See In the Matter of Hydro Resources, Inc.: Eastern Navajo Dine Against Uranium Mining's and Southwest Research and Information Center's Brief With Respect to NEPA Issues Concerning Project Purpose and Need, Cost/Benefit Analysis, Action Alternatives, No Action Alternative, Failure to Supplement EIS, and Lack of Mitigation* (February 19, 1999) (ACN 9902240094). On March 25, 1999, HRI responded to Intervenors' written presentation. *See In the Matter of Hydro Resources, Inc.: Hydro Resources, Inc.'s Response to ENDAUM and SRIC's Brief With Respect to NEPA Issues Concerning Project Purpose and Need, Cost/Benefit Analysis, Action Alternatives, No Action Alternative, Necessity to Supplement EIS, Mitigation, and Cumulative Impacts* (March 25, 1999) (ACN LL990329022). Then, on April 1, 1999, NRC Staff submitted its response to Intervenors' written presentation. *See In the Matter of Hydro Resources, Inc.: NRC Staff's Response to Intervenor Presentations on NEPA Issues (Purpose, Need, Cost/Benefit, Alternatives, and Supplementation* (April 1, 1999).

On August 20, 1999, the Presiding Officer issued LBP-99-30 in which HRI's NRC license with respect to EIS adequacy issues was upheld. *See In the Matter of Hydro Resources, Inc.* (Partial Initial Decision), LBP-99-30, 50 NRC 77 (August 20, 1999). In response to LBP-99-30, on September 3, 1999, Intervenors submitted a Petition for Review to the Commission requesting that the Presiding Officer's decision be reversed. *See In the Matter of Hydro Resources, Inc.: Intervenors' Petition for Review of Partial Initial Decisions LBP-99-18, LBP-99-19, and LBP-99-30* (September 3, 1999). HRI and

NRC Staff submitted responses to Intervenors' Petition for Review. After reviewing Intervenors' Petition for Review and opposing briefs from HRI and NRC Staff, the Commission granted review of Intervenors' Petition for Review and upheld the Presiding Officer's findings in LBP-99-30. *See In the Matter of Hydro Resources, Inc.* (Memorandum and Order), CLI-00-12, 52 NRC 1 (July 10, 2000).

On November 5, 2004, the Presiding Officer issued a scheduling order requiring HRI and Intervenors to proceed with litigation of all germane areas of concern regarding the three remaining CUP sites: (1) Church Rock Section 17; (2) Unit One; and (3) Crownpoint. On January 19, 2005, the Presiding Officer approved a joint motion filed by Intervenors and HRI to amend the briefing schedule as set forth in the Presiding Officer's November 5, 2004 Order. After approving the parties' requested amendments to the briefing schedule, on February 3, 2005, the Presiding Officer issued a new scheduling order reflecting such amendments. More specifically, as agreed by the parties, the new scheduling order eliminated three germane areas of concern from this proceeding (i.e., environmental justice, financial and technical qualifications, and liquid waste disposal and surface water protection) and limited one additional area of concern (i.e., air emissions) to the Church Rock Section 17 site. Further, with respect to the EIS adequacy area of concern, Intervenors are not permitted to present any new arguments outside the scope of those previously submitted for the Church Rock Section 8 uranium recovery site.

On June 24, 2005, Intervenors submitted their written presentation regarding EIS adequacy issues for each of the three remaining CUP uranium recovery sites. In response to Intervenors' EIS adequacy written presentation, HRI hereby submits this response and

respectfully requests that the Presiding Officer reject each of Intervenors' arguments regarding EIS adequacy for the remaining CUP sites.

III. ENVIRONMENTAL IMPACT STATEMENT ADEQUACY DECISIONS FOR THE CHURCH ROCK SECTION 8 URANIUM RECOVERY SITE

A. LBP-99-30: 50 NRC 77 (August 20, 1999)

In LBP-99-30, the Presiding Officer, after reviewing applicable National Environmental Policy Act (NEPA) law and addressing whether an EIS was required for the CUP, summarily rejected each of Intervenors' arguments regarding potential EIS inadequacies.

Initially, the Presiding Officer addressed Intervenors' allegation that the FEIS provides an inadequate statement of purpose and need for the CUP and that NRC Staff's cost/benefit analysis was insufficient. The Presiding Officer rejected Intervenors' allegation stating that:

> "I...find no basis for disturbing the Staff's FEIS conclusion that it is desirable to initiate a project that creates minimum risks to public health and safety and to the environment and that increases local economic activity."

50 NRC at *79.

The Presiding Officer further held that, "[p]roviding that the Staff prepares an adequate FEIS, the purpose of NEPA is fully met." *Id.* at *84.

The Presiding Officer also addressed the issue of the FEIS' assessment of air emissions at the Section 8 site. Intervenors argued that air emissions at Section 8 will exceed NRC standards. The Presiding Officer disagreed stating that "I am satisfied that the FEIS has given adequate consideration to possible radioactive air emissions." *Id.* at *81.

Further, with respect to evaluation of alternatives, Intervenors' argued that the FEIS developed two new alternatives that required re-assessment. However, as noted by the Presiding Officer, these alternatives "did not...involve any substantial change in the description of the project." *Id.* at *85. These alternatives did "pursue further analysis of the proposed project, including the evaluation of some fresh alternatives and the evaluation of some license conditions that helped to improve safety and reduce risk to the environment." 50 NRC at *85. Thus, the Presiding Officer concluded that "this further Staff analysis did not require a further circulation of the FEIS for comment. Nor was it necessary to develop further alternatives for evaluation." *Id.* The Presiding Officer also determined that, with respect to whether a change in the order of ISL uranium recovery activities at Church Rock Sections 8 and 17 requires an FEIS supplement, "Intervenors' will need to raise some question concerning how the change in the order of mining will affect drinking water." *Id.* at *86 (emphasis omitted).

With respect to proposed mitigative measures, including a license condition requiring Crownpoint municipal water wells to be moved prior to commencement of uranium recovery at Crownpoint, Intervenors alleged that the FEIS failed to properly assess potential impacts from such measures. The Presiding Officer rejected Intervenors' allegation stating that multiple concurrences will be required prior to the movement of the Crownpoint municipal wells, much less the initiation of ISL uranium recovery operations. Thus, the question of whether uranium recovery activities would be permitted was not ripe for discussion.

Finally, the Presiding Officer rejected each of Intervenors' arguments regarding cumulative impacts and segmentation issues and concluded that:

> "Intervenors have not provided any analysis or testimony that leads me to conclude that the Staff has not adequately analyzed and weighted the past and future cumulative impacts and segmentation issues associated with licensing HRI to conduct ISL operations at Section 8."

Id. at *98

B. CLI-01-04: 53 NRC 31 (January 31, 2001)

In CLI-01-04, the Commission reviewed Intervenors' Petition for Review of LBP-99-30, as well as several procedural issues. Initially, the Commission stated that "our decision does not revisit fact findings by the Presiding Officer with which we agree or have no strong basis to second guess." 53 NRC at *28. More specifically, with respect to the FEIS' assessment of air emissions from the Section 8 site, the Commission concluded that:

> "[t]hese claims are rooted directly in specific, technical, health and safety issues resolved in HRI's favor by earlier Presiding Officer decisions. The Commission previously considered these earlier decisions on air emissions...and found them to be free of any clear, significant error."

Id. at *30.

Next, the Commission reviewed Intervenors' allegations regarding the CUP's purpose and need. The Commission held that it generally does not evaluate uranium market conditions, including supply and demand, and that "[r]egardless of the current market price for uranium or shifting market scenarios...*it remains in the national interest to maintain a domestic uranium production capacity.*" *Id* at *36 (emphasis added).

With respect to cost/benefit analysis, the Commission determined that it was not within their purview to force a licensee to either act or take no action on a project solely based on economic conditions. *Id.* at *38. Further, the Commission determined that there were "no compelling reasons to disturb the Presiding Officer's conclusion." The

Commission did note, however, that "[i]f the resumed hearing brings to light any significant new finding bearing on the overall projects' costs, the FEIS cost/benefit analysis may need to be modified." *Id.* at *42.

Then, with respect to FEIS land use issues, the Commission determined that HRI's license contemplates the potential use of land application as a liquid waste disposal methodology. 53 NRC at *44. However, the Commission, in addressing the possibility of disruption of cattle grazing on Section 16, stated, "this remains only a possibility." *Id.* Further, the Commission stated that land application is not currently permitted by HRI's NRC license and can only be used after requesting a "detailed license amendment," including the submission of a plan for such land application. *Id.* at *44. Since this license amendment would be subject to further environmental review if proposed, the Commission held that the question need not be addressed. *Id.*

Finally, with respect to EIS supplementation and alternatives issues, the Commission found that Intervenors' objection to performance-based licensing was without merit. The Commission determined that HRI's License Condition 9.4 specifically requires a license amendment for any action that would be inconsistent with FEIS analyses. *Id.* at *47. Thus, the Commission concluded that performance-based licensing changes would not fall outside the scope of the FEIS and, thus, do not require a supplement to the existing FEIS. *Id.* The Commission also rejected Intervenors' allegations regarding alternatives and agreed with the Presiding Officer that "the alternatives in the final EIS were well within the 'spectrum' and 'range' of alternatives discussed in the draft EIS." *Id.* at *49.

C. Presiding Officer's Ruling on Intervenors' Motions to Supplement the FEIS: 2004 NRC LEXIS 230 (October 22, 2004)

On October 22, 2004, the Presiding Officer issued a decision regarding Intervenors' most recent attempt to request supplementation of the FEIS with respect to Church Rock Sections 8 and 17 based on the potential development and construction of the Springstead Estates Project (SEP). The SEP is a housing development project proposed for constructed in Church Rock, New Mexico approximately two miles from the southernmost restricted site boundary of the Church Rock Section 17 uranium recovery site. The Presiding Officer reviewed written submissions, including testimony, from all parties and determined that the SEP did not warrant FEIS supplementation.

Intervenors claimed that groundwater pumping for the SEP would result in imbalance in HRI's wellfields and potential contamination of drinking water supplies. Intervenors' claims were rejected as the Presiding Officer stated:

> "the SEP is, at best, in a conceptual stage and that it is totally speculative as to which, if any, aquifer would supply the SEP with water should the housing development ever be built."

2004 NRC LEXIS at *21.

Further, the Presiding Officer stated that:

> "the existing hydrologic and geological characteristics of the sites make it highly unlikely that excursions and migrations due to combined groundwater pumping at the SEP and Church Rock sites would occur...."

Id.

In addition, the Presiding Officer concluded that Intervenors' theory of the existence of "pipeline faults" that potentially could result in vertical excursions of lixiviant is without merit. Indeed, the Presiding Officer found that:

> "Intervenors' affiant offers no technical data to counter the findings in the FEIS. Absent a showing...of significant new circumstances of information related to the purported Pipeline fault and its relation to potential vertical excursions, I find that no supplementation of the FEIS on this matter is required."

Id. at *26-27.

Intervenors' allegation regarding the potential impacts of air emissions and an inadequate radiological assessment on the SEP also was rejected. The Presiding Officer held that Intervenors failed to present any evidence to support their claims and that "the FEIS adequately evaluates the processes to be utilized by HRI to minimize the emission of airborne effluents." *Id.* at *36. The Presiding Officer also found that the FEIS took the required "hard look" at potential air emissions effects and, thus, did not require a supplement. *Id.*

Finally, with respect to potential SEP impacts resulting from transportation of recovered uranium to the processing plant, the Presiding Officer held that "I am satisfied that the issue of traffic patterns and accident rates has been adequately addressed by the FEIS." *Id.* at *37. Therefore, Intervenors' request to supplement the FEIS based on the potential existence of the SEP was rejected.

D. <u>Commission Ruling on Intervenors Petitions for Review Regarding Supplementation of the FEIS: CLI-04-39, 2004 NRC LEXIS 259 (December 14, 2004)</u>

On December 14, 2004, the Commission reviewed and denied Intervenors' Petition for Review of the Presiding Officer's decision in LBP-04-23 regarding the necessity of supplementing the FEIS for the CUP.

The Commission began its analysis by noting that a FEIS only requires a supplement when information is raised demonstrating a "seriously different picture of the environmental impact[s]" from a proposed project. *See* 2004 NRC LEXIS at *3.

According to the Commission:

> "[t]he intervenors' petitions for review do not identify any clearly erroneous factual or legal conclusion in the Presiding Officer's decision, nor provide any other reason warranting review."

Id. at *4.

More specifically, the Commission held that the Presiding Officer was not in error by requiring Intervenors to present "a basis for their motion to supplement the FEIS." *Id.* at *5. Further, the Commission determined that there were no environmental justice considerations raised by the proposed SEP warranting FEIS supplementation. *Id.* at *7-8. The Commission also found that the Presiding Officer's concurrence with NRC Staff's decision not to supplement the FEIS because "the proposed housing development [SEP] would not significantly alter the environmental analysis and conclusions of the FEIS" was not in error. *Id.* at *9-10.

IV. SUMMARY OF EVIDENCE REGARDING ENVIRONMENTAL IMPACT STATEMENT ADEQUACY ISSUES AT CHURCH ROCK SECTION 8 URANIUM RECOVERY SITE

A. *Hydro Resources, Inc.'s Response to ENDAUM and SRIC's Brief With Respect to NEPA Issues Concerning Project Purpose and Need, Cost/Benefit Analysis, Action Alternatives, No Action Alternative, Necessity to Supplement EIS, Mitigation, and Cumulative Impacts* (March 25, 1999) (ACN LL990329022)

On March 25, 1999, HRI submitted its response to Intervenors' written presentation regarding EIS adequacy issues for the Church Rock Section 8 uranium recovery site. This response included the text of HRI's written presentation, one attached exhibit containing an academic article and one attached expert affidavit from Mr. Mark S. Pelizza regarding environmental reports.

With respect to the written presentation itself, HRI presented a number of arguments in opposition to those arguments offered by Intervenors. First, HRI argued

that HRI voluntarily chose to engage in the EIS process to provide a more complete environmental review of the CUP and that review resulted in NRC Staff taking the required "hard look" at potential environmental impacts. HRI noted that the Presiding Officer reviewed the FEIS and held that Intervenors' allegations fell short of demonstrating that NRC Staff failed to take a "hard look" at potential environmental impacts as required by NEPA.

Next, HRI argued that the FEIS' preferred alternative (i.e., HRI's proposed action with license conditions that impose additional health and safety measures) would result in negligible or non-existent potential adverse environmental impacts. HRI also argued that the Presiding Officer reviewed this analysis and concurred with NRC Staff's findings. Despite Intervenors' contention that additional alternatives for uranium production should have been evaluated, HRI asserted that NEPA does not require an evaluation of every conceivable alternative when determining whether a proposed action should be pursued.

Then, HRI argued that Intervenors thoroughly mischaracterized the factual record regarding project costs and benefits. Intervenors characterized the CUP as a "large industrial complex" that would significantly affect a "rural agricultural community." HRI disagreed with this allegation and asserted that the CUP requires minimal use of land and construction of facilities such that Intervenors' characterization was erroneous.

Further, HRI argued that the FEIS' statement of purpose and need was adequate. HRI noted that NRC Staff considered several potential alternatives and determined that the reasoning for the proposed or preferred action (i.e., the CUP with some health and safety modifications) was to fulfill a "statutory responsibility to protect public health and

safety and the environment in matters related to source nuclear material." *See* FEIS at 1-3. This argument was supported by HRI"s assertion that the FEIS cost/benefit analysis adequately evaluated potential environmental costs versus the potential economic and socioeconomic benefits of the CUP. HRI stated that the FEIS properly evaluated secondary benefits and that the potential costs associated with the CUP will only be incurred in tandem with the economic and socioeconomic benefits.

With respect to the FEIS' consideration of alternatives, HRI argued that NRC Staff is not required to evaluate every conceivable alternative for a given project and that many alternatives that are remote or speculative should be discounted readily. HRI also stated that Intervenors have failed to articulate any potential environmental harm that could not be remediated and that each of their allegations represented nothing more than speculation.

HRI countered Intervenors' allegation that the "no action" alternative was not adequately addressed by stating that courts routinely allow assessments of such alternatives in cursory or summary fashion. Since discussions of "no-action" alternatives are often limited in discussion, HRI asserted that NRC Staff's assessment of the CUP's "no action" alternatives was sufficient.

Intervenors' argument regarding supplementation and re-circulation of the FEIS for public comment was addressed by HRI. HRI argued that the alternatives posited by NRC Staff in the FEIS were well-within the spectrum of those proffered in the DEIS. Additionally, HRI argued that Intervenors failed to demonstrate how the preferred alternative would cause environmental impacts that were not assessed in the DEIS.

Finally, HRI argued that the FEIS adequately addressed mitigation measures and cumulative impacts. Intervenors' allegation that mitigation measures regarding well placement and groundwater standards was refuted due to the presence of performance requirements in HRI's license and their failure to offer an example of a "deferred" analysis other than surety. Further, HRI argued that Intervenors' only example of land use mitigative measures, potential for interference with livestock grazing, was not an issue because such interference would only be temporary and compensation was available. HRI also stated that cumulative impacts were adequately addressed in the FEIS as NRC Staff properly identified the proposed locations of the CUP, the potential impacts associated with the "preferred" alternative, and the potential cumulative impacts of the CUP over the life of the project.

1. Affidavit of Mr. Mark S. Pelizza (ACN LL990329022)

In support of its written presentation, HRI offered the affidavit of Mr. Mark S. Pelizza, which contained his expert opinion regarding the preparation of environmental reports for ISL uranium recovery facilities. Initially, Mr. Pelizza's affidavit offered the opinion that, with the exception of the CUP, modern ISL uranium recovery facilities merely require environmental assessments (EAs) rather than EISs. Mr. Pelizza's opinion was supported by Table 1 detailing the environmental review conducted by NRC for ISL uranium recovery projects since 1980. This Table demonstrated that only one project, other than the CUP, required an EIS after 1980. According to Mr. Pelizza, as the ISL uranium recovery industry and regulators gained knowledge of the potential impacts of ISL uranium recovery, it was determined that the more comprehensive EIS was not required.

Further, Mr. Pelizza opined that the CUP's EIS was performed only to meet Bureau of Indian Affairs (BIA) requirements and that, in 1988, NRC contemplated an EA for the Church Rock location. However, when HRI reached an agreement to lease "Indian lands" at Unit One for ISL uranium recovery, the EIS process was implicated. Thus, HRI agreed to proceed with a more comprehensive environmental review of the CUP.

B. ***Hydro Resources, Inc.'s Response to Intervenors' Motions to Supplement the Final Environmental Impact Statement for Sections 8 and 17 and to Re-Open and Supplement the Record*, (June 21, 2004) (ACN 041820083)**

On June 21, 2004, HRI responded to Intervenors' motions to supplement the FEIS for the Church Rock Section 8 and 17 sites and to re-open and supplement the record for the Section 8 site. This brief included the text of HRI's legal argument and two (2) expert affidavits from Mr. Mark S. Pelizza and Mr. Craig S. Bartels.

HRI's legal argument was focused on several issues. First, HRI presented the standard of review for supplementing an EIS under NEPA. This legal standard requires that federal agencies prepare an EIS for every major federal action significantly affecting the quality of the human environment. This environmental review is subject to a rule of reason and is generally covered in 10 CFR Part 51 of NRC's regulations.

Applying this standard of review to Intervenors' arguments, HRI demonstrated that the FEIS with respect to the Section 8 and 17 sites does not require supplementation. First, with respect to the proposed Springstead Estates Project (SEP), HRI argued that Intervenors failed to present any evidence demonstrating that the CUP would cause significant impacts on the proposed SEP. Initially, HRI stated that the SEP has not

proceeded past the conceptual stage and, thus, does not constitute a significant, new circumstance warranting an FEIS supplement.

Next, HRI argued that available technical data regarding groundwater and geology at the Section 8 and 17 sites do not indicate that CUP ISL uranium recovery operations would cause adverse impacts to groundwater at the SEP. HRI stated that, if constructed, the SEP would be located two (2) miles *upgradient* from the Church Rock sites and that Intervenors failed to provide any evidence demonstrating that CUP operations would lead to adverse groundwater impacts. Further, HRI stated that geological and hydrological data for the SEP location demonstrates that groundwater impacts would not occur. This data also supported HRI's argument that the SEP would experience no adverse impacts from surface water.

Then, HRI argued that the proposed SEP, if constructed, would not suffer any adverse impacts from airborne radiological exposures. HRI argued that the FEIS assessed all potential airborne radiological exposures at the restricted site boundaries (i.e., fence-line) and determined that doses would be a fraction of NRC regulatory limits. Further, HRI stated that a continuous air monitoring and containment system would be operating during licensed ISL uranium recovery activities and that no member of the public at the SEP would receive an impermissible dose.

HRI also argued that Intervenors' arguments with respect to transportation and environmental justice issues were without merit. HRI stated that the FEIS evaluated potential impacts due to transportation of uranium from recovery sites to the Crownpoint processing plant and determined that no significant impacts exist. HRI also stated that the proposed SEP, if constructed, would not be along HRI's transport route and, thus, it

would not be reasonable to expect potential risks to exceed those already assessed. Environmental justice concerns are also not relevant because the FEIS already addressed potential impacts to minority and low-income populations, and Intervenors provided no evidence to demonstrate that such populations would encounter different risks from those already addressed.

Lastly, HRI addressed Intervenors' motion to re-open the Section 8 administrative record. After providing a brief summary of the relevant standard of review, HRI argued that Intervenors' failed to demonstrate that the proposed SEP represents a significant, new issue of public health and safety warranting re-opening of the administrative record. HRI also argued that the proposed SEP would not materially alter the result of the Presiding Officer's consideration of the FEIS' adequacy had the issue been raised previously. At this point, HRI reiterated the substantive arguments described above.

1. Affidavit of Mr. Mark S. Pelizza (ACN 041820083)

In support of its legal brief regarding FEIS supplementation. HRI submitted the Affidavit of Mr. Mark S. Pelizza, which described potential adverse impacts to the proposed SEP in response to Intervenors' myriad arguments. Mr. Pelizza' affidavit began with a brief discussion of the Navajo Nation's comments on the proposed SEP's Department of Housing and Urban Development (HUD) environmental assessment (EA). Mr. Pelizza stated that the effects of past uranium mining on the SEP would be negligible because the FEIS evaluated potential doses to humans at the restricted site boundaries and beyond and determined that doses would be a fraction of NRC limits.

Next, Mr. Pelizza stated that the SEP had not yet proceeded past a conceptual stage of development. Reasons for this statement included the lack of timetable for

development and the absence of the necessary specifics for development of a residential community. Mr. Pelizza also stated that Intervenors' failed to note that ISL uranium projects often are close to population centers and are able to protect public health and safety using generally acceptable industry technologies and methodologies. Also, Mr. Pelizza stated that Intervenors' claims that additional businesses may follow development of the SEP are far too speculative to warrant a supplement to the FEIS.

Then, Mr. Pelizza states that Intervenors failed to provide any credible or substantial evidence demonstrating that the proposed SEP would suffer potential adverse impacts not previously addressed in the FEIS. As a general proposition, Mr. Pelizza states that Intervenors' testimony fails to provide anything more than unsubstantiated opinion regarding potential adverse impacts. He stated that Intervenors fail to address, much less refute, HRI's proposed effluent monitoring system or the FEIS' analyses of potential adverse impacts from radon or gamma radiation. Mr. Pelizza also stated that the proposed SEP is located upwind from the Church Rock sites and would not experience radiological doses from CUP operations. Further, Mr. Pelizza stated that the proposed SEP is located further from the Church Rock sites than previously assessed FEIS receptors, it would be unreasonable to believe that the proposed SEP would suffer greater potential adverse impacts than those of the previously assessed receptors.

Mr. Pelizza stated that Intervenors fail to provide evidence regarding irrigation, land use or land application demonstrating that a supplement to the FEIS was necessary. He states that Intervenors' arguments are mere speculation and are unsubstantiated. For example, Mr. Pelizza noted that HRI did not develop a plan for irrigation or land application beyond what was developed in the FEIS and, thus, Intervenors offered no

reason to create an FEIS supplement. He also noted that HRI's license requires a detailed license application should land application become the preferred alternative for disposal of wastewater. Thus, Intervenors cannot expect a supplement to the FEIS based on something that is subject to a license amendment application at a later date.

Mr. Pelizza then goes on to assess Intervenors' arguments regarding surface water impacts, transportation risks, and environmental justice issues. As discussed in the FEIS, Mr. Pelizza stated that potential impacts to surface water are negligible and topography does not promote such impacts. Further, with respect to transportation risks, Mr. Pelizza noted that the FEIS assessed potential impacts on the transport route and, based on the proposed SEP's location off of the transport route, potential adverse impacts would be negligible. Finally, Mr. Pelizza stated that environmental justice issues such as low income or minority populations were addressed in the FEIS and Intervenors failed to provide any evidence demonstrating that an FEIS supplement was warranted.

2. Affidavit of Mr. Craig S. Bartels (ACN 041820083)

In support of its legal brief regarding FEIS supplementation, HRI submitted the Affidavit of Mr. Craig Bartels, which describes geologic and hydrological conditions at the Church Rock sites and provides analysis of potential impacts to groundwater for the proposed SEP in response to Intervenors' testimony.

After briefing discussing his professional qualifications, Mr. Bartels stated that no factual water use information is available for the SEP and, thus, its development is far too speculative to warrant a supplement to the FEIS. Since no high volume water user can use water without conducting the necessary studies and assessments and those

assessments have not been completed, Mr. Bartels argued that the proposed SEP could not represent a significant new circumstance warranting a supplement to the FEIS.

Next, Mr. Bartels stated that the production of water from the Cow Springs aquifer would not influence CUP operations or result in adverse impacts to groundwater at the proposed SEP. His analysis demonstrated that the Westwater and Cow Springs aquifers have little hydraulic connection and that Intervenors' affiant failed to provide any evidence that the Cow Springs aquifer could produce 400 gallons of water per minutes as claimed. Mr. Bartels also stated that Intervenors presented unsubstantiated and unreasonable allegations regarding the potential for water production in the Westwater and Dakota aquifers near the proposed SEP. Mr. Bartels reiterated that the speculative nature of the proposed SEP and the lack of site-specific data prevented any meaningful analysis of the project.

Then,. Mr. Bartels provides an analysis of Intervenors' testimony that the pumping of groundwater at the proposed SEP would influence groundwater movement at the Church Rock sites. Mr. Bartels presents a "particle tracking" model demonstrating that the natural migration of groundwater and the upgradient location of the proposed SEP would prevent the movement of groundwater towards pumping wells for the proposed SEP. Mr. Bartels also stated that Intervenors' claim that Crownpoint municipal wells have altered the original direction of groundwater flow is grossly exaggerated. Even if Intervenors' claim were accurate, Mr. Bartels stated that it would still take over 800 years for Church Rock waters to reach the SEP. Further, Mr. Bartels stated that the safety measures described and assessed in the FEIS will be initiated when ISL uranium

recovery operations commence and will prevent any migration of groundwater to SEP water sources.

In support of his statements, Mr. Bartels offered a refutation of Intervenors' "pipeline" theory of groundwater migration. Mr. Bartels stated that Intervenors' theory is unsubstantiated and contrary to industry experience based on fluvial systems. Further, Mr. Bartels stated that the FEIS addressed issues of the collapse of Section 17 underground mine workings and that no adverse impacts would be realized from such an occurrence. Mr. Bartels also refuted Intervenors' claim that the water in the mining area would be of good quality as HRI would not mine there if that was true.

V. STANDARD OF REVIEW

A. Scope of Licensing Board Review

Normally, the Licensing Board is charged with compiling a factual record in a proceeding, analyzing the record, and making a determination based upon the record. The Licensing Board performs the important task of judging factual and legal disputes between parties and has the responsibility for appraising *ab initio* the record developed before it and for formulating the agency's initial decision based on that appraisal. *See Wisconsin Electric Power Co.* (Point Beach Nuclear Plant, Unit 2), ALAB-78, 5 AEC 319, 322 (1972). A Licensing Board is not required to do independent research or conduct *de novo* review of an application in a contested proceeding, but may rely upon uncontradicted Staff and applicant evidence. *See Consumers Power Co.* (Midland Plant, Units 1 & 2), ALAB-123, 6 AEC 331, 334-35 (1973).

With respect to the jurisdiction of the Licensing Board, a Licensing Board has only the jurisdiction and power which the Commission delegates to it. *See e.g., Public*

Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-316, 3 NRC 167 (1976). While the Licensing Board possesses the power to provide initial reviews of license applications in contested proceedings, it does not possess the power to overrule Commission holdings. Where a matter has been considered by the Commission, it may not be reconsidered by a Board. *Virginia Electric & Power Co.* (North Anna Nuclear Power Station, Units 1 & 2), ALAB-584, 11 NRC 451, 463-65 (1980). A Licensing Board for an operating license proceeding is also limited to resolving matters that are raised therein as *legitimate* contentions by the parties or by the Board *sua sponte. See e.g., Dairyland Power Cooperative* (LaCrosse Boiling Water Reactor), LBP-88-15, 27 NRC 576, 579 (1988) (emphasis added).

B. Law of the Case Doctrine

The law of the case doctrine is generally applicable in NRC adjudicatory proceedings. *Safety Light Corp.* (Bloomsburg Site Decontamination), CLI-92-9, 35 NRC 156, 159-160 (1992). As stated by the Presiding Officer in LBP-05-17, the law of the case doctrine "establishes that the decision of an appellate tribunal should ordinarily be followed in all subsequent phases of that case, provided that the particular question in issue was 'actually decided or decided by necessary implication." *In the Matter of Hydro Resources, Inc.* (Crownpoint Uranium Project), LBP-05-17, (July 20, 2005) *quoting Safety Light Corp.* (Bloomsburg Site Decontamination), CLI-92-09, 35 NRC 156, 159-160 & n.5 (1992). When court decides that a rule of law or a factual determination is applicable in a stage of a proceeding, then that rule or determination is equally applicable in subsequent stages of the proceeding. *Safir v. Dole*, 718 F.2d 475, 480-81 (D.C. Cir. 1983). Law of the case decisions include the court's explicit decision, as well as those

decided by implication. *Williamsburg Wax Museum, Inc. v. Historic Figures, Inc.*, 810 F.2d 243, 249 (D.C. Cir. 1987).

VI. ARGUMENT

A. The FEIS Adequately Addresses and Analyzes Potential Cumulative Environmental Impacts

Intervenors' first argument centers on the claim that the FEIS does not adequately assess potential cumulative environmental impacts posed by the CUP from radiological air emissions from the Church Rock Section 17 site, from groundwater, and from land use impacts at each of the remaining CUP sites. Each of these arguments is without merit and will be addressed in turn below.

Prior to assessing specific EIS arguments, HRI asserts that the FEIS is not intended to be a detailed site-specific assessment of each of the CUP uranium recovery sites. In fact, the FEIS is a *generic* assessment of the potential health and safety and environmental impacts of the proposed CUP, since issues such as the FEIS statement of purpose and need and the assessment of alternatives apply to the *entire* CUP and not just individual sites. These issues were evaluated by Judge Bloch and, as stated above, he concluded:

> "I...find no basis for disturbing the Staff's FEIS conclusion that it is desirable to initiate a project that creates minimum risks to public health and safety and to the environment and that increases local economic activity."

50 NRC at *79.

Thus, with respect to Intervenors' EIS adequacy arguments for the remaining CUP sites, unless there is some site-specific issue that presents starkly different potential adverse

impacts from those associated with the Section 8 site, the law of the case doctrine should apply. Further, HRI also incorporates its March 25, 1999 written presentation, expert affidavit and all legal and technical arguments therein by reference.

1. Potential Cumulative Impacts Are Properly Assessed

As a general proposition, the FEIS presents an extensive and meaningful cumulative effects evaluation. First, NRC Staff has identified the areas in which the CUP's potential impacts would be felt. The FEIS describes the Church Rock sites and outlines the total acreage that could be affected on the basis of past, present, and future activities. *See e.g.*, FEIS at ¶ 4.13.2. Second, NRC Staff have addressed all of the impacts that could be expected due to the proposal; the FEIS covers a significant breadth of potential cumulative impacts issues as it describes the potential impacts to air, geology and soil, groundwater, surface water, transportation risk, health physics and radiological impacts, ecology, land use, socioeconomics, aesthetics, cultural resources, and environmental justice. *See id.* at ¶ 4.13, pp. 4-120-127. Moreover, NRC Staff considered a variety of other past, proposed, and reasonably foreseeable actions that have or potentially may impact the sites such as "ISL uranium mining; road construction and maintenance; irrigation, farming, and livestock grazing; urban and residential development; and State, Federal, and Tribal management of land, water and wildlife." *Id.* at ¶ 4.13, p. 4-120. Finally, NRC Staff has evaluated the overall impact of potentially accumulating individual impacts. *See id.* at ¶ 4.13. Thus, NRC Staff has determined that there are no adverse cumulative impacts from the proposed CUP.

i. CUP Radiological Health and Air Quality Impacts Are Adequately Assessed

First, Intervenors' claim that existing FEIS radiation levels and supporting data for the Church Rock Section 17 site are inaccurate is without merit. Intervenors reiterate several arguments from their written presentation regarding the Section 8 site with respect to misrepresentation of air quality data and alleged impermissible averaging of existing radiation levels between Church Rock and Crownpoint. Intervenors' Written Presentation at 22-24. Intervenors also raise a concern regarding misrepresentation of background radiation at the Church Rock Section 17 site. *Id.* at 24-25. Further, Intervenors claim that potential radiological impacts due to past uranium mining and milling are not properly assessed. *See id.*

The FEIS contains adequately detailed information concerning existing and continuing releases of radioactivity at the CUP sites, specifying that early mining operations resulted in exposures to releases of radioactivity but noting that proposed activities will cause significantly less releases of radioactivity. *See* FEIS at ¶ 4.13.6, p. 4-124-25. The FEIS also properly evaluates the potential health impacts of past uranium mining at Section 17, and it provides an accurate assessment of the potential impacts the CUP would have on radiation levels in the area. *See id.* at ¶ 4.13.6 at, p. 4-124-25 (noting that the CUP would make a minor contribution to cumulative impacts in terms of health physics and radiological impacts). Therefore, the FEIS health and radiological analyses satisfies NEPA.

With respect to background radiation at the Church Rock Section 17 site,[1] Intervenors misinterpret the meaning of the term "background radiation," as defined in 10 CFR Part 20. As discussed in HRI's June 28, 2005 written presentation, "background radiation" is defined as:

> "radiation from cosmic sources; naturally occurring radioactive material, including radon (except as a decay product of source or special nuclear material); and global fallout as it exists in the environment from the testing of nuclear explosive devices or from past nuclear accidents such as Chernobyl that contribute to background radiation and are not under the control of the licensee. 'Background radiation' does not include radiation from source, byproduct, or special nuclear materials *regulated by the Commission.*"

10 CFR § 20.1003 (2005).

Intervenors support Judge Bloch's grammatical "discussion" that the clause "regulated by the Commission" applies only to special nuclear material and not to source or byproduct material. This argument is flawed because it assumes that the clause "regulated by the Commission" applies only to special nuclear material and, further, it also appears to assume that there are classes of special nuclear material "not regulated by the Commission." The second assumption is patently false as there can be no special nuclear material that is *not* regulated by the Commission, because, by definition, special nuclear material is created through Atomic Energy Act of 1954 (AEA)-licensed activities. The first assumption also fails because *all* byproduct material, like special nuclear material, is created by AEA-licensed activities (i.e., uranium milling or processing or materials made radioactive during the production of special nuclear material). Since there is no *de minimis* quantity of byproduct material, all byproduct material is subject to

[1] HRI also incorporates its June 28, 2005 written presentation regarding air emissions at the Section 17 site by reference.

regulation by the Commission. The first assumption further fails if there are classes of *source material* that are *not* regulated by the Commission. *Source material* is defined as:

> "(1) Uranium or thorium, or any combination of uranium and thorium in any physical or chemical form; or (2) Ores which contain, by weight, one-twentieth of one percent (0.05 percent), or more, or uranium, thorium, or any combination of uranium and thorium."

42 U.S.C. § 2014(z) (2005).

With this definition in mind, Section 62 of the AEA, as amended, creates a class of *source material* termed "unimportant quantities" and states that "licenses *shall not* be required for quantities of source material which, in the opinion of the Commission, are unimportant."[2] 42 U.S.C. § 2092 (2005) (emphasis added). Thus, based on the AEA, there is a class of uranium *source material* that is not *licensable* and, thus, not regulated by the Commission. Since there cannot be either byproduct or special nuclear material which is *not* regulated by the Commission and since there can be uranium source material that is, and is not, *licensable*, Judge Bloch's grammatical interpretation is *legally* and *clearly* erroneous.

Since, as stated by Mr. Pelizza, the uranium source material at the Section 17 site is below the 0.05 percent, by weight, threshold for *licensable* source material, no license is required for such uranium *source material*, and this material is not regulated by the Commission. This material is, therefore, naturally occurring radioactive material and, as such, any dose therefrom is part of background radiation.

---

[2] On December 7, 1960, the Atomic Energy Commission's (AEC's) Acting General Counsel issued an interpretation of Section 62's language: "The requirements contained in this provision would appear to be *mandatory*." Letter to H. L. Price, Director, Division of Licensing and Regulation from Neil D. Maiden, Acting General Counsel, Atomic Energy Commission, *Re: Mill Tailings* (December 7, 1960) (emphasis added). This document is attached as Exhibit A.

Finally, since the materials located on the surface at Section 17 and in the underground mine workings are the result of *mining*, which NRC does not regulate, this material is mine waste and is part of background radiation at the site. NRC has not regulated uranium ore at the mining site, either in the mine, on ore storage pads at the mine or during transport to a mill facility regardless of its ore grade (i.e., even if greater than 0.05 percent, by weight) until it reaches the milling facility.[3] Further, since only uranium *milling* can create 11e.(2) byproduct material and Section 17 activities were limited exclusively to *mining* activities, none of the material on the surface or in the underground mine workings at Section 17 can be regulated by the Commission as 11e.(2) byproduct material.

In any event, existing radiation at the Church Rock sites is included in HRI's license application and, in accordance with HRI's NRC license and the COP, radiation will be measured again before operations begin at the site. Any radiation observed at that time will establish background levels against which operational impacts will be measured. *See* SUA-1508, License Conditions 9.8 & 10.30. It is likely that background gamma radiation will be elevated due to the presence of the naturally occurring radioactive materials (i.e., mine waste) noted above. *Id.* It is also likely that the gamma radiation associated with Section 8 is different compared to the Crownpoint site, but such variation is common among prospective ISL sites. *Id.*

---

[3] NRC's Generic Environmental Impact Statement on Uranium Milling (NUREG-0706) (GEIS) at A-89 provides a discussion of NRC's regulatory authority over uranium *milling*. Based on this discussion and to the best of HRI's knowledge, regulation uranium ore at a mining site, or such ore in transport to a uranium milling is and has not been regulated by NRC. *See* United States Nuclear Regulatory Commission, NUREG-0706, *Generic Environmental Impact Statement on Uranium Milling*, Volume 1, A-89 (September 1980).

While Intervenors are correct that radiation was not measured at the nearest residence in the early pre-operational baseline studies, they ignore the fact that the residence at issue did not exist at that time. Intervenors also fail to mention that monitoring of this residence is required under HRI's license. *See* SUA-1508, License Condition 9.8 & 10.30.

Finally, the FEIS statement that "radiological effects during project construction would include natural background plus remnant radiation from previous mining and milling activities near the Church Rock site" reflects the original site condition. Remnant radiation is solely due to natural background and does not contain any residuals from previous mining or milling activities that can be considered source or byproduct material. Furthermore, since the radiation arising from the site is background, it does not contribute to the TEDE from licensed operations. In any event, as noted above, pursuant to its license, HRI must again measure radiation at the site to ensure compliance prior to commencing operations. *See* COP 9.5; *see also* SUA-1508, License Conditions 9.8 & 10.30. Thus, based on this and Intervenors' failure to properly assess "background radiation," no misrepresentation of radiation is contained in the FEIS and Intervenors' argument should be rejected.

2. Cumulative Potential Groundwater Resource Impacts Are Properly Assessed

Intervenors allege that the FEIS does not properly assess potential cumulative groundwater impacts from the CUP. The FEIS properly evaluates potential cumulative impacts to groundwater from past mining and milling activities. As stated by NRC Staff in their April 1, 1999 written presentation, the FEIS provides an adequate analysis of these potential impacts:

> "Past actions that have contributed to cumulative impacts on groundwater in the region include underground uranium mining at the Church Rock site, which would have dewatered the Westwater Canyon aquifer and the Brushy Basin "B" Sand aquifer in the area of the existing workings and may have had some dewatering effects on the Dakota Sandstone aquifer."

See NRC Staff April 1, 1999 Written Presentation at 5 *quoting* FEIS at 4-123. Further, the FEIS concluded that while there may be some temporary impacts on groundwater levels from the CUP, "these impacts would be less than the effect of past underground mining activities on water levels." FEIS at 4-123.

The FEIS contains specific, detailed analyses of potential groundwater impacts from past mining activities (i.e., "past actions that have contributed to cumulative impacts on groundwater in the region include the underground uranium mining...." *See id.* 4.13.3, p. 4-123 (explaining in detail associated events that may have affected groundwater quality during and since the underground mining). It also accurately depicts the potential impacts of the proposed CUP, conceding that the CUP could contribute to cumulative impacts on groundwater in the region *but recognizing that license conditions imposed by NRC would mitigate these potential impacts. See id.* at ¶ 4.13.3, p. 4-121-22 (emphasis added). Since any potential impacts will be mitigated, there is no merit to Intervenors' charge that the combined impact of past and proposed activities on groundwater is not adequately addressed.

i. FEIS Water Quality Data is Accurate

The FEIS' water quality data is accurate in light of the pre-operational status of the CUP. HRI accumulated baseline groundwater data and submitted such data to NRC Staff for review. However, as is the case with many aspects of ISL uranium recovery projects, the pre-operational stage (i.e, the preliminary *Site Characterization* phase) of

such projects does not permit gathering of more specific, detailed groundwater data until the project moves to the *Operations* stage. When the CUP proceeds to the *Operations* phase, additional water quality data will be collected an analyzed to ensure that all performance criteria are satisfied.[4]

Further, in LBP-99-30, the Presiding Officer determined that the water quality data for the Church Rock Section 8 site was accurate and provided the proper foundation for the FEIS' analysis. Further, the Presiding Officer provided a "blanket" statement that "Intervenors' arguments on groundwater are invalid....[and] that failure to address these erroneous arguments...in the FEIS was not an error." *See In the Matter of Hydro Resources, Inc.* (Partial Initial Decision), LBP-99-30, 50 NRC 77, *79 (August 20, 1999). Thus, Intervenors' argument on this issue should be rejected.

3. Cumulative Potential Land Use Impacts Are Adequately Assessed

With respect to livestock grazing by Mr. King and Mr. Capitan, as stated above, the FEIS assessed the potential cumulative impacts on land use scenarios at the Church Rock and Crownpoint sites. In its analysis, the FEIS notes that potential impacts to land would be short-lived, consisting primarily of interference with grazing rights. FEIS at 4-118. The FEIS also notes that grazing rights permitees can be compensated for such temporary interference. *Id.* Thus, Intervenors' allegations on this issue should be rejected.

---

[4] As discussed in HRI's written presentation regarding groundwater issues, the *Site Characterization* and *Operations* phase of ISL uranium recovery projects are described in NRC's *Standard Review Plan for In Situ Leach Uranium Extraction License Applications* (NUREG-1569) at § 2.0 & 5.0 (June 2003).

B. The FEIS' Statement of Purpose and Need Are Adequate

Intervenors allege that the FEIS' statement of purpose and need is inadequate. Intervenors claim that the statement of purpose and need is defined too narrowly and that it results in a flawed EIS analysis of alternatives. Intervenors' Written Presentation at 34-35.

With respect to the FEIS' statement of purpose and need, the NRC's primary purpose[5] in reviewing license applications is not to determine the economic, business or other "validity" of the proposed project; NRC's primary purpose is its "health and safety mission...." Speech of NRC Chairman Jackson, October 26, 1998. "[T]he NRC input to a domestic energy strategy is also focused, not on promoting or discouraging the role of nuclear power as part of the domestic energy mix, but rather on ensuring safety in the civilian use of nuclear energy." Speech of Chairman Jackson, November 6, 1998. NRC stated that NRC's regulatory purpose for its proposed action of issuing HRI an NRC license and the need for NRC action was "to fulfill its statutory responsibility to protect public health and safety and the environment in matters related to source nuclear material." FEIS at 1-3. Thus, since the FEIS' statement of purpose and need defines a purpose that mirrors NRC's statutory responsibility to properly regulate licensed activities, Intervenors' allegation on this issue should be rejected. Furthermore, since the statement of purpose and need is adequate, Intervenors' allegation that this statement resulted in an inadequate assessment of alternatives must also fail.

---

[5] Under the AEA statutory scheme, licensees have the primary responsibility to propose license applications or license amendments and, as an independent regulatory agency, NRC can only approve, disapprove or approve with conditions to assure adequate protection of public health and safety. *See* 49 Fed. Reg. 9352, 9353 (March 12, 1984). Since it is NRC's responsibility to *respond* to license application proposals, an EIS' statement of purpose essentially is defined by such applicant or licensee proposals.

C. The FEIS' Consideration of Alternatives and Mitigation Measures is Adequate

Intervenors allege that the FEIS' consideration of alternatives and mitigation is inadequate. Intervenors claim that the FEIS does not explain why alternatives other than the preferred alternative were rejected and does not assess the "no action" alternative. Intervenors Written Presentation at 38-39. Intervenors also allege that a proper cost/benefit analysis is not performed and that impacts from proposed mitigation measures are not properly assessed. *Id.* at 39-42.

First, as a general proposition, NEPA does not require NRC to ferret out and evaluate every conceivable alternative, but merely to weigh all of the reasonable alternatives. *See e.g., Strycker's Bay Neighborhood Council v. Karlen*, 444 U.S. 223, 227-228 (1980). The agency must include only those environmental alternatives that are readily identifiable by the agency considering the time and resources available to complete the EIS. *See Natural Resources Defense Council, Inc. v. Morton*, 458 F.2d 827, 837 (D.C. Cir. 1972). The agency has discretion to decide when the information it has is sufficient to authorize a license. *See State of Alaska v. Andrus*, 580 F.2d 465 (D.C. Cir. 1978). These cases are consistent with the understanding that the agency must make decisions while discounting remote or speculative possibilities. *See id.*

Finally, Intervenors consistently fail to articulate any significant potential environmental harm, not readily addressed through remediation or other mitigation measures, that is reasonably likely to occur. HRI's sister company, Uranium Resources, Inc., (URI) has operated in Texas for over twenty-five (25) years with a good environmental record with Texas regulatory agencies. URI"s past activities have resulted in consistent findings of no significant public health and safety or environmental impacts.

Further, ISL uranium recovery, in general, is an extremely low-risk activity that, since 1982, generally has not required the preparation of an EIS. As Judge Bloch previously indicated, Intervenors have not pointed to any significant adverse impacts from ISL uranium recovery anywhere in the United States that has taken place in the last thirty years. Thus, Intervenors persistent attacks on the FEIS' alternatives are misguided and should be rejected.

Intervenors' also claim that FEIS alternatives, including the "no action" alternative, were not adequately assessed. Courts have determined that there often is not much to say about the subject (i.e., "no action" alternative) and that even a simple two paragraph explanation is sufficient. *See Farmland Preservation Association v. Goldschmidt*, 611 F.2d 233, 239 (8th Cir. 1979). Here, the "no action" alternative requires nothing more than such a summary assessment, since if the applicant has made an adequate licensing proposal, NRC must address it. Since there are potentially an unlimited number of alternatives to most proposed facilities, general treatment of some is appropriate provided the EIS has taken the requisite "hard look" when considered in its totality. *See Strahan v. Linnon*, 967 F. Supp. 581 (D. Mass. 1997). As asserted by HRI on many occasions, the FEIS has satisfied the requisite "hard look" standard because it was compiled in collaboration with NRC, BIA and the Bureau of Land Management (BLM) and resulted from an initial draft document and multiple requests for additional information (RAIs) from each agency to HRI. Further, the Presiding Officer reviewed the FEIS and stated:

> "Indeed, I have reviewed the FEIS carefully and I am impressed by its attention to technical detail and its thoughtful consideration of environmental risks. Intervenors have failed to demonstrate any significant deficiencies."

In the Matter of Hydro Resources, Inc. LBP-99-1, (February 3, 1999).

This assessment of the FEIS continues to hold today and should not be disregarded. Thus, the FEIS adequately addressed alternatives and Intervenors argument to the contrary should be rejected.

With respect to proposed mitigation measures, well locations and operational specifics cannot be discussed in the FEIS for any site, because they will not be known until delineation, drilling, and well-siting actually is underway. For example, should HRI seek to develop the Crownpoint mine zone, specific new well locations will be surveyed and appropriate well specifications will be developed by license condition. Whatever the precise well locations may be, the FEIS requires that replacement wells for the Crownpoint area provide adequate water supplies. *See* FEIS at 4-62. The FEIS also requires that well placement will be coordinated with all relevant federal and Navajo regulatory agencies. *Id.* As noted, HRI's license incorporates these performance requirements based on the FEIS' analyses. *See* SUA-1508, License Condition 10.27.

Intervenors also complain that some mitigation measures allow analyses to be deferred until after licensing and that potential land use impacts may have negative socioeconomic effects. Intervenors incorporate their previous concern regarding deferral of surety plans by reference and raise concerns regarding livestock grazing. With respect to surety, this issue has been fully briefed by the parties and the Commission determined that such plans be submitted and litigated. HRI's restoration action plan (RAP) for Section 8 has been approved with one exception and briefs on RAPs for the remaining three sites have been approved by NRC Staff and endorsed by the Presiding Officer, with one small exception. *See generally* LBP-05-17. Further, the concept of deferring the

implementation of surety until just prior to commencing operations has been approved and endorsed by the Commission.

With respect to livestock grazing by Mr. King and Mr. Capitan, as stated above, the FEIS notes that potential impacts to land would be short-lived, consisting primarily of interference with grazing rights and that grazing rights permitees can be compensated for such temporary interference. *Id.* Thus, Intervenors' allegations on this issue should be rejected.

D. The FEIS' Cost/Benefit Analysis is Adequate

Intervenors claim that the cost/benefit analysis performed by NRC Staff in the FEIS is inadequate. Specifically, Intervenors claim that the FEIS fails to provide a comparative analysis of the costs and benefits of the CUP. Intervenors' Written Presentation at 40. This failure allegedly creates a failure to determine whether the proposed benefits of the CUP outweigh its costs. *Id.*

While NEPA does not mandate a cost/benefit analysis, it is generally regarded as calling for some sort of weighing of the environmental costs against the economic, technical or other public benefits of a proposed action. *See e.g., Idaho By and Through Idaho Public Utilities Commission v. ICC,* 35 F.3d 585, 595 (D.C. Cir. 1994). Further, the FEIS is intended to weigh reasonably anticipated benefits against reasonably foreseeable costs to determine if the project benefits outweigh the costs. Where, as here, the reasonably foreseeable project environmental costs are minimal and/or "the potential significant impacts of the proposed projects can be mitigated," then the quantum of benefit necessary to outweigh such costs is correspondingly small.

NRC Staff devotes five (5) pages to discussing the benefits of the proposed CUP. *See* FEIS at 5-1 to 5-6. The FEIS observes that, as a private venture, HRI's proposed project would not "have a direct public purpose." *Id.* at 5-1. Then, the FEIS states that the project would provide a domestic source of uranium which would be used to generate electricity and provide a public benefit. *Id.* Noting that "the viability of the [uranium mining] industry is a Federal concern and that there is a public interest in the uranium supply," the FEIS concludes that the proposed project would have the public benefit of helping to offset a domestic supply deficit at more than 30 million pounds annually. *Id.* As discussed in HRI's Section 8 written presentation, industry sources estimate that a significant deficit in uranium production exists and, given the resurgence of the price of uranium, this deficit exists and will continue. Thus, the public benefit of a stable domestic uranium industry and supply, the national energy security, and the relatively clean electricity provided thereby arguably are underestimated by the FEIS. In addition, NRC Staff's comparison of the costs and benefits of the CUP is evidenced in their decision to endorse HRI"s license application with specific additional requirements. Thus, Intervenors' arguments on this issue should be rejected.

Further, as stated above, Judge Bloch already has held that the cost/benefit analysis, along with other *generic* FEIS analyses for the entire CUP, is sufficient:

> "I...find no basis for disturbing the Staff's FEIS conclusion that it is desirable to initiate a project that creates minimum risks to public health and safety and to the environment and that increases local economic activity."

50 NRC at *79.

Thus, since the cost/benefit analysis was conducted with respect to the entire CUP and not individual sites, the law of the case doctrine should apply to Judge Bloch's determination.

E. The FEIS Does Not Require Supplementation

Intervenors contend that, for a variety of reasons, the FEIS should be supplemented to include potential impacts from several recent or potential occurrences. As a general proposition, the standard for a supplemental EIS is based on the same "rule of reason" and "hard look" standards that are required for an EIS in the first instance. The policy behind the EIS process is to ensure that "the agency will not act on incomplete information only to regret its decisions after it is too late to correct." *See Marsh v. Oregon Natural Resources Council*, 490 U.S. 360 (1989). The type of changes in a project that would trigger the need for supplementation and recirculation are those that will affect the quality of the human environment in a significant way that was not already considered. *See id.* "Not every change requires [a supplemental EIS]; only those changes that cause effects which are significantly different from those already studied require supplementary consideration." *Davis v. Latschar, supra*, 1998 U.S. Dist. LEXIS 21086 at *24 *quoting Corridor H. Alternatives, Inc. v. Slater*, 982 F. Supp. 24, 30 (D.D.C. 1997).

1. The Concept of Performance-Based Licensing Does Not Require Supplementation of the FEIS

Intervenors allege that the fact that HRI's NRC license is performance-based necessarily warrants FEIS supplementation. The concept of performance-based licensing is generally accepted by NRC Staff in the ISL uranium recovery industry and has been endorsed by the Commission in its 1996 Strategic Assessment Rebaselining Initiative.[6]

The concept of performance-based licensing was developed for ISL uranium recovery operations in 1994. Since implementing this policy, performance-based license conditions (PBLCs) have been incorporated in at least four uranium recovery licenses, including at least three ISL licenses.

As a "general statement of policy," rather than a "substantive rule," performance-based licensing does not require public notice and comment.[7] Source material licenses are not required to accept a performance-based license condition in their licenses nor is NRC Staff required to incorporate such a condition in each license issued. Thus, as a general agency policy, performance-based licensing is not subject to notice and comment and, thus, does not warrant supplementation or recirculation of the FEIS for comment.

Further, the magnitude of the decisions HRI may make under its PBLC is indeed minimal. While specific license conditions and the COP impose *mandatory* requirements on HRI, the PBLC permits HRI to make changes to its operations without seeking a license amendment *but only to the extent that such changes are consistent with all license*

---

[6] *See* United States Nuclear Regulatory Commission, *Strategic Planning Framework*, 9-11 (Sept. 16, 1996).

[7] *See Public Citizen, Inc. v. NRC*, 940 F.2d 679, 681-682 (D.C. Cir. 1991) ("In determining whether an agency statement is a substantive rule, which requires notice and comment, or a policy statement, which does not, the ultimate issue is 'the agency's intent to be bound.'" (citation omitted)).

conditions and applicable regulations and do not result in any degradation in the licensee's commitments to protection of public health, safety, and the environment. These changes must be approved by HRI's Safety and Environmental Review Panel (SERP), fully documented, and reported to NRC annually. This documentation is also subject to NRC inspection and, if not properly presented, could result in enforcement action. Thus, the performance-based concept does not implicate an issue warranting FEIS supplementation.

2. FEIS Evaluated Alternatives Do Not Warrant Supplementation

Intervenors allege that the alternatives assessed in the FEIS differ from those in the DEIS and, as a result, the FEIS should be supplemented to account for this difference and re-circulated for public comment. More specifically, Intervenors allege that, with respect to the FEIS, "only the first and fourth alternatives are substantially the same as the alternatives proposed in the DEIS." Intervenors' Written Presentation at 45. This differences are listed by Intervenors to demonstrate that further assessment of those particular FEIS alternatives is required. *Id.* at 45-46.

Generally, despite their insistence to the contrary, Intervenors do not explain how the changes in the FEIS alternatives are not within the "spectrum of alternatives that were discussed" in the DEIS. They merely list the differences without demonstrating how the changes are significant and rise to the level of changes in the potential impacts of the CUP. Intervenors fail to provide any substantial connection between the changes in the CUP and any significant potential impact on the protection of public health and safety or the environment beyond that which already has been considered.

For example, Intervenors attempt to differentiate between Alternative 3 of the FEIS and Alternative 2 of the DEIS. Despite the fact that Intervenors describe the differences as "propos[ing] certain very specific measures purported to reduce the adverse environmental impacts of the proposed project," both alternatives are essentially HRI's proposed CUP with additional health and safety requirements imposed by NRC Staff. Intervenors fail to demonstrate how the recommended alternative is likely to "cause effects which are significantly different from those already studied" in connection with DEIS Alternative 2. *Davis v. Latschar, supra.*, at *24. Thus, Intervenors' allegations regarding this issue should be rejected.

3. Sequence of Mining Does Not Require Supplementation

Intervenors claim that HRI's proposed ISL uranium recovery plan includes a change in mining sequence that necessitates a supplement to the FEIS. Intervenors allege that, by commencing mining at the Church Rock Section 8 site instead of Section 17 as envisioned in the DEIS, NRC Staff has permitted a substantial change in the CUP operation requiring a supplement to the FEIS. Intervenors' Written Presentation at 47. Intervenors also state that the change is not noted in the FEIS and that a safety analysis is required. *Id.*

As with their other arguments, Intervenors fail to point to one substantive reason why mining at Section 8 prior to Section 17 represents a "significant new circumstance" warranting FEIS supplementation. Intervenors do not point to any potential risk or impact posed by such a change outside the scope of what already has been assessed. In addition, as Intervenors concede, the change in mining sequence is noted in the COP Rev. 0.0, which was further revised in Rev. 2.0, and was accepted by NRC Staff. No health

and safety requirements, including license conditions or licensee commitments, were altered due to this change. Thus, without justification, Intervenors argument on this issue must fail.

4. The Proposed Springstead Estates Project Does Not Require Supplementation

Intervenors allege that the Springstead Estates Project (SEP), a proposed Fort Defiance Housing Corporation (FDHC) housing development in the Church Rock area, requires that the FEIS be supplemented to account for potential impacts to residents from CUP ISL uranium recovery activities. Intervenors claim that:

> "a supplement is required as the development of Springstead Estates is a significant new circumstance which is relevant to environmental concerns and bears on the proposed action."

Intervenors' Written Presentation at 48.

Intervenors' allegation extends to potential CUP impacts on the SEP from groundwater pumping, radiological air emissions from Section 17, traffic patterns and potential accidents, and environmental justice concerns. *Id.* at 48-50.

Initially, as part of the revised scheduling order for this proceeding, Intervenors agreed that no new arguments other than those for the Church Rock Section 8 site would be presented in support of their claim that the FEIS was inadequate. While Intervenors did raise the issue of FEIS supplementation in their written presentation for the Section 8 site, that argument was not supported by evidence of the SEP's proposed development. Thus, since the use of the proposed SEP was not part of their original Section 8 arguments, HRI respectfully requests that Intervenors' argument regarding FEIS supplementation due to the SEP be stricken.

In the event that this argument is not stricken, HRI asserts that the issue is governed by the law of the case doctrine.[8] On July 31, 2003, Intervenors requested that NRC Staff supplement the FEIS due to the potential existence of the proposed SEP in the Church Rock area.[9] NRC Staff responded to this request by stating that a supplement was not necessary. After the Presiding Officer issued LBP-04-03 and terminated the Section 8 litigation, on May 14, 2004, Intervenors filed separate motions requesting that the Licensing Board direct NRC Staff to supplement the FEIS for both Sections 8 and 17 based on the proposed SEP. Intervenors' request included an argument that the Section 8 and 17 sites should be considered jointly because of their close geographic proximity.

The Licensing Board directed Intervenors to file a request to re-open and supplement the record for Section 8 with the Commission and entertained their request with respect to Section 17. After the Commission remanded the Section 8 request to the Licensing Board based on the identical nature of the issues associated with the Sections 8 and 17 supplementation argument, the Licensing Board consolidated and entertained each of Intervenors' motions. *See In the Matter of Hydro Resources, Inc.* (Memorandum and Order), CLI-04-39, 2004 NRC LEXIS 259 (December 14, 2004). After reviewing all parties' briefs and supporting testimony, the Presiding Officer held that a supplement to the FEIS was not required. *See In the Matter of Hydro Resources, Inc.* (Ruling on Intervenors' Motions to Supplement the FEIS), 2004 NRC LEXIS 230 (October 22, 2004). Intervenors appealed this ruling to the Commission and their Petition for Review

---

[8] HRI hereby incorporates its June 21, 2004 legal brief and supporting expert affidavits regarding supplementation of the FEIS due to the SEP by reference. HRI notes for the record that, as stated above, the Licensing Board and the Commission have found that the proposed SEP does not warrant FEIS supplementation.

[9] *See* Letters from Eric D. Jantz to Mitzi A. Young and John T. Hull (July 31, 2003 & January 8, 2004) (ACN 040160454).

was summarily rejected. *See In the Matter of Hydro Resources, Inc.*, CLI-04-39, 2004 NRC LEXIS 259 (December 14, 2004). Given that Intervenors discuss Section 8 and 17 as a single unit in their argument and that the Licensing Board and the Commission already have ruled upon their request, HRI asserts that this argument is governed by the law of the case doctrine and should be rejected.

In the event that the law of the case doctrine does not apply, HRI asserts that the proposed SEP does not warrant FEIS supplementation. As stated in HRI's June 21, 2004 brief, the proposed SEP does not satisfy the requisite standards for FEIS supplementation as it does not implicate potential impacts that present a "seriously different picture of the environmental impact of the proposed project." *See e.g., Sierra Club V. Froehlke*, 816 F.2d 205, 210 (5th Cir. 1987). As a general proposition, the proposed SEP has not even moved beyond the conceptual "planning" stage and Intervenors have failed to demonstrate any adverse impacts should the SEP proceed to the construction stage. Thus, without more, Intervenors have failed to demonstrate that the proposed SEP rises to the level of a significant, new circumstance warranting FEIS supplementation.

More specifically, the substance of Intervenors arguments likewise fails to meet the standards for FEIS supplementation.[10] With respect to groundwater pumping, HRI asserted that there is little hydraulic connection between the Cow Springs and the Westwater aquifer and, as such, no potential impacts to groundwater used by the SEP, if constructed, will be realized. Further, the proposed SEP is upgradient from the Church Rock Section 8 and 17 sites and the NRC Staff-accepted groundwater model

[10] While it provides a brief synopsis of its substantive arguments in opposition to Intervenors' FEIS supplementation claim, HRI hereby incorporates, by reference, its arguments and expert testimony from its June 21, 2004 brief on this issue. As stated above, these arguments were accepted by both the Licensing Board and the Commission in its decisions on this issue.

demonstrates that no migration of lixiviant to potential SEP drinking water sources will occur because water traditionally does not run uphill.

With respect to radiological air emissions from the Section 17 site, the proposed SEP is located approximately two (2) miles *upwind* from the Section 17 site. In addition, the FEIS modeled potential air emissions and dose exposure scenarios for 17 airborne receptors near the Church Rock sites, including the restricted site boundaries and the nearest *downwind* residence and determined that no significant impacts will occur. Thus, as stated by Mr. Pelizza is his expert affidavit, "because the FEIS analysis shows no adverse radiological impact at boundaries and residences that are far more susceptible to potential exposure, it is unreasonable...that more distant receptors upwind would be impacted by radiation to a larger degree." *See* 2004 NRC LEXIS at *33 *quoting* June 21, 2004 Affidavit of Mark S. Pelizza at 28.

With respect to traffic patterns and accident scenarios, the FEIS adequately addresses potential impacts from the transportation of uranium from mining sites. As noted by the Presiding Officer in his 2004 decision on FEIS supplementation, the FEIS evaluates all potential accident risks associated with the transport route for Church Rock uranium, including those risks to Crownpoint, and all potential risks to the regional population surrounding the transport route. The FEIS' analysis concluded that no significant impacts due to transportation of uranium will occur.

Finally, with respect to environmental justice issues, the FEIS adequately evaluates potential impacts to the minority and/or low-income populations in the Church Rock area. More specifically, the FEIS evaluates the Church Rock sites within an 80 kilometer radius, which includes the area where the proposed SEP would be constructed.

Since the evaluated area is predominately inhabited by Native Americans, the FEIS provides an adequate assessment of environmental justice issues. Therefore, Intervenors allegations regarding FEIS supplementation based on the proposed SEP should be rejected.

5. The Dine Natural Resources Protection Act Does Not Warrant Supplementation

Finally, Intervenors argue that the FEIS should be supplemented based on the recent passage of the Dine Natural Resources Protection Act (NRPA). In summary, the NRPA effectively bans uranium mining and processing on land that is defined by statute to be Navajo Indian country. Intervenors allege that the NRPA raises questions of compliance with environmental quality standards and requirements that must be addressed in the FEIS. Intervenors' Written Presentation at 50. Based on this, Intervenors conclude that the NRPA constitutes a significant new circumstance warranting FEIS supplementation. *Id.*

By including the NRPA under the ambit of its supplementation argument, Intervenors expressly violate their agreement with HRI regarding the scope of arguments legitimately presented in their written presentation. The NRPA has not been raised in this proceeding previously and, despite its recent passage, should not be permitted in light of Intervenors' agreement with HRI, which was endorsed by the Presiding Officer. Thus, this argument should be stricken from Intervenors' written presentation.

If this argument is not stricken, as a general proposition, the NRPA and its potential legal or regulatory effects on HRI's CUP are separate and distinct from the validity of HRI's NRC license. The sole issue to be determine under the NRPA is whether or not the land on which HRI proposes to conduct NRC-licensed ISL uranium

recovery operations is indeed "Indian country." This issue reflects directly on the authority of the Navajo Nation to control ISL uranium recovery but *does not implicate NRC licensing authority*. Thus, the legal or regulatory effects of the NRPA on HRI's CUP are not within the scope of issues necessary to determine whether HRI's license should be upheld.

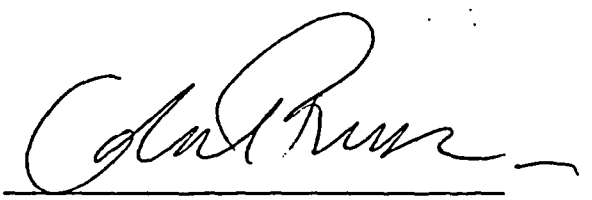
Further, while the FEIS discusses the Navajo Nation's legal position on the CUP, it is irrelevant to whether or not a license should be issued to HRI for ISL uranium recovery activities. This scenario is analogous to the requirement that HRI obtain United States Environmental Protection Agency (EPA) underground injection control (UIC) permits and aquifer exemptions prior to commencing operations. While such permits and exemptions are necessary to commence this NRC-licensed activity (i.e., ISL uranium recovery), this Licensing Board need not consider the legal effects of the status of those permits or of the NRPA on HRI's ability to conduct such an activity.

[THIS PAGE LEFT INTENTIONALLY BLANK]

VII. CONCLUSION

For the reasons discussed above, HRI respectfully requests that the Presiding Officer reject each of Intervenors' arguments regarding EIS adequacy.

Respectfully Submitted,



Anthony J. Thompson, Esq.
Christopher S. Pugsley, Esq.
Thompson & Simmons, PLLC
1225 19th Street, NW
Suite 300
Washington, DC 20036
(202) 496-0780
(telefax) (202) 496-0783
ajthompson@athompsonlaw.com
cpugsley@athompsonlaw.com

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:
E. Roy Hawkins, Presiding Officer
Dr. Richard F. Cole, Special Assistant
Dr, Robin Brett, Special Assistant

In the Matter of: Hydro Resources, Inc. P.O. Box 777 Crownpoint, NM 87313	)	Docket No.: 40-8968-ML Date: July 28, 2005

CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that a copy of the foregoing Hydro Resources, Inc.'s Response in Opposition to Intervenors' Written Presentation Regarding Environmental Impact Statement Adequacy in the above-captioned matter has been served upon the following via electronic mail and U.S. First Class Mail or "expedited service" as indicated by an asterisk on this 28th day of July, 2005.

Administrative Judge*
E. Roy Hawkens
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
11545 Rockville Pike
Mail Stop T3F23
Rockville, MD 20852
Email: erh@nrc.gov

Administrative Judge*
Richard F. Cole, Special Assistant
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
11545 Rockville Pike
Mail Stop T3F23
Rockville, MD 20852
Email: rfc1@nrc.gov

Office of the Secretary
Attn: Rulemakings and
Adjudications Staff
U.S. Nuclear Regulatory
Commission
Mail Stop: OWFN-16 C1
Washington, DC 20555
Email: hearingdocket@nrc.gov

Mark S. Pelizza, President
Uranium Resources, Inc.
650 S. Edmonds Lane
Lewisville, TX 75067
Email: mspelizza@msn.com

Office Manager
Eastern Navajo-Diné Against
Uranium Mining
P.O. Box 150
Crownpoint, New Mexico 87313

Jep Hill, Esq.
Jep Hill and Associates
P.O. Box 30254
Austin, TX 78755
Email: jep@jephill.com

Administrative Judge, Robin Brett*
2314 44th Street, NW
Washington, DC 20007
Email: rbrett@usgs.gov

Louis Denetsosie, Attorney General
Steven J. Bloxhalm, Esq.
Navajo Nation Department of Justice
P.O. Box 2010
Window Rock, AZ 86515

William Zukosky
DNA-Peoples' Legal Services, Inc.
201 East Birch Avenue, Suite 5
Flagstaff, AZ 86001-5215
Email:
wzukosky@dnalegalservices.org

Adjudicatory File
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Mail Stop: T-3F23
Washington, DC 20555

David C. Lashway, Esq.
Hunton & Williams, LLP
1900 K Street, N.W.
Washington, DC 20037
Email: dlashway@hunton.com

Geoffrey H. Fettus
Natural Resources Defense Counsel
1200 New York Avenue, NW
Suite 400
Washington, DC 20005
Email: gfettus@nrcdc.org

W. Paul Robinson
Chris Shuey
Southwest Research and
Information Center
P. O. Box 4524
Albuquerque, NM 87106

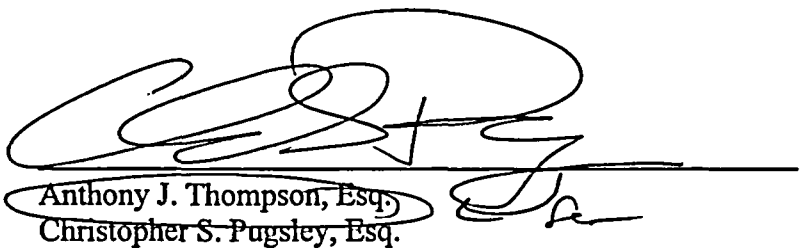
Eric Jantz, Esq.*
Douglas Meiklejohn, Esq.
Heather L. Green
Sarah Piltch
New Mexico Environmental Law
Center
1405 Luisa Street, Suite 5
Santa Fe, NM 87505
Email: ejantz@nmelc.org
Email: meikljhn@nmelc.org
Email: Hgreen@nmelc.org

Laura Berglan
DNA-People's Legal Services, Inc.
P.O. Box 765
Tuba City, AZ 86045
Email:
lberglan@dnalegalservices.org

Atomic Safety and Licensing Board
Panel
U.S. Nuclear Regulatory
Commission
Mail Stop: T-3 F23
Washington, DC 20555

Office of Commission Appellate
Adjudication
U.S. Nuclear Regulatory
Commission
Mail Stop: O-16G15
Washington, DC 20555-0001

John T. Hull, Esq.*
Tyson Smith, Esq.
U.S. Nuclear Regulatory Commission
Office of the General Counsel
11545 Rockville Pike
Mail Stop: O-15D21
Rockville, MD 20852
Email: jth@nrc.gov
Email: TRS1@nrc.gov



Anthony J. Thompson, Esq.
Christopher S. Pugsley, Esq.
Thompson & Simmons, PLLC.
1225 19th Street, N.W., Suite 300
Washington, DC 20036
Telephone: (202) 496-0780
Facsimile: (202) 496-0783
Email: ajthompson@athompsonlaw.com
Email: cpugsley@athompsonlaw.com

(hydro resourcesCERTIFICATEOFSERVICE 7-28-05.doc)

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:
E. Roy Hawkens, Presiding Officer
Dr. Richard F. Cole, Special Assistant
Dr. Robin Brett, Special Assistant

In the Matter of:	)	
	)	
Hydro Resources, Inc.	)	Docket No.: 40-8968-ML
P.O. Box 777	)	
Crownpoint, NM 87313	)	Date: July 28, 2005
	)	
	)	

HYDRO RESOURCES, INC.'S RESPONSE IN OPPOSITION TO INTERVENORS' WRITTEN PRESENTATION REGARDING ENVIRONMENTAL IMPACT STATEMENT ADEQUACY

INDEX OF ATTACHMENTS

1. **Letter from Neil D. Maiden, Acting AEC General Counsel (December 7, 1960)**

   This exhibit presents a letter prepared by Neil D. Maiden, Acting General Counsel of the Atomic Energy Commission (now "NRC") interpreting the language of Section 62 of the Atomic Energy Act of 1954 (AEA) with respect to the issuance of licenses for "unimportant quantities" of source material. This letter states that Section 62's provisions mandating that no licenses shall be issued for such quantities of source material are mandatory.

EXHIBIT A

OFFICIAL USE ONLY

APPENDIX "E"

OPTIONAL FORM NO. 10
5010-104

UNITED STATES GOVERNMENT

Memorandum

TO : H. L. Price, Director
Division of Licensing and Regulation

DATE: December 7, 1960

FROM : Neil D. Naiden, Acting General Counsel

SUBJECT: MILL TAILINGS

This memorandum is in response to your request for the views of this Office as to whether the Commission's regulatory authority and requirements may be applied to mill tailings which contain certain quantities of radium. I understand you have requested this opinion because inquiries have been received as to the regulatory jurisdiction of the Commission over the use of mill tailings for land fill, road building and similar purposes.

In a memorandum to you dated April 15, 1960, a copy of which is attached, we advised you that the exercise of Commission jurisdiction over the transfer of waste tailings by mill licensees to other parties under the circumstances described in that memorandum, for the purpose of assuring that the use of such wastes by the recipients will be consistent with public health and safety, would not be supported by the provisions of the Atomic Energy Act of 1954, as amended, as implemented by the definition of "source material" in Part 40, 10 CFR.

In your present inquiry you have requested that we consider the possibility of amendments to Part 40, 10 CFR, the purpose of which would be to extend the exercise of Commission jurisdiction to the use of mill tailings for the kinds of purposes referred to above. You have advised also that the quantities of uranium and thorium in the tailings do not constitute a hazard to health and safety and are not of significance to the common defense and security; and that any radiological health hazard presented by the tailings is due to the presence of radium and is not affected by the uranium or thorium residues in the tailings.

Source material is defined in § 11 x. of the Act as follows:

> "The term 'source material' means (1) uranium, thorium, or any other material which is determined by the Commission pursuant to the provisions of § 61 to

OFFICIAL USE ONLY

be source material; or (2) ores containing one or more of the foregoing materials, in such concentration as the Commission may by regulation determine from time to time."

Section 61 of the Act provides:

"Sec. 61. Source Material. - - The Commission may determine from time to time that other material is source material in addition to those specified in the definition of source material. Before making such determination, the Commission must find that such material is essential to the production of special nuclear material and must find that its determination that such material is source material is in the interest of the common defense and security, and the President must have expressly assented in writing to the determination. The Commission's determination, together with the assent of the President, shall be submitted to the Joint Committee and a period of thirty days shall elapse while Congress is in session (in computing such thirty days, there shall be excluded an adjournment of more than three days) before the determination of the Commission may become effective: Provided, however, That the Joint Committee, after having received such determination, may by resolution in writing waive the conditions of or all or any portion of such thirty-day period." (Underscoring added)

You have not advised, and we are not aware, of any reason to believe that radium "is essential to the production of special nuclear material"; or "that the determination that such material is source material is in the interest of the common defense and security." Accordingly, there would not appear to be any basis for amending the definition of source material in § 40.4 (h) of the proposed, revised Part 40 to include "radium" in the definition of source material.

We have also considered the possible argument that the definition of source material in § 11 x. of the Act furnishes a basis for applying the Commission's regulatory authority and requirements

(such as Part 20) to the mill tailings because the statutory definition of source material appears to specify that uranium and thorium, other than ores, are "source material" without regard to the quantity or concentrations involved.* If such an argument were valid, it might then be urged that the Commission should amend § 40.13 (a) of the proposed revised Part 40 to exclude mill tailings containing radium from the exemption contained in that paragraph.**

Such an argument, however, would ignore other provisions of the Atomic Energy Act, and the purpose of the Act as expressed in the Act and its legislative history.

Section 62 of the Act provides that ". . . licenses shall not be required for quantities of source material which, in the opinion of the Commission, are unimportant." The requirements contained in this provision would appear to be mandatory and not permissive.

The quoted provision of § 62 would also appear to require that the exemption from licensing requirements be made whenever the quantity of source material (i. e., uranium or thorium) is unimportant. There does not appear to be any basis for withholding the grant of an exemption for unimportant quantities of uranium or thorium because of the presence of materials which are not

---

* Section 40.4 (h) of the proposed, revised Part 40 would revise the regulatory definition of source material so as to make the text of the definition conform somewhat more closely with the text of the statutory definition in § 11 z.

** Paragraph (a) § 40.13, of the revised, proposed Part 40 provides that:

"(a) Any person is exempt from the regulations in this part and from the requirements for a license set forth in Section 62 of the Act to the extent that such person receives, possesses, uses, transfers, delivers, or imports into or exports from the United States source material in any chemical mixture, compound, solution, or alloy in which the source material is by weight less than 1/20 of 1% (0.05%) of the mixture, compound, solution or alloy."

themselves within the jurisdiction of the Atomic Energy Commission. Any other conclusion would permit the Commission to extend its regulatory jurisdiction to any materials in existence which contain even microscopic quantities of uranium or thorium.

In its action approving publication of the revised Part 40 for public comment, the Commission found that the quantities of uranium and thorium described in paragraph (a), § 40.13 are unimportant. No circumstances have been brought to our attention which would appear to furnish a basis for modifying that finding.

The foregoing views are consistent with the purposes of the Act, as expressed in the Act, and its legislative history (including the Atomic Energy Act of 1946 and its legislative history). It is a purpose of the Act to regulate [redacted] production and use of special nuclear material; the material from which special nuclear material is derived (i. e., source material), and radioactive material "yielded in or made radioactive by exposure to the radiation incident to the process of producing or utilizing special nuclear material" (i. e., "byproduct material"). See e. g., Senate report No. 1211, 79th Cong., 2d sess., pp. 18-19 on the bill which became the Atomic Energy Act of 1946. Nowhere in the Act or in its legislative history is there any suggestion of a purpose to regulate radioactive materials or other sources of ionizing radiation which do not stand in one of the foregoing relationships to special nuclear material.

Commission statements recognize that the Commission's jurisdiction over radiation hazards is limited to radiation hazards arising from source, special nuclear and byproduct materials; and that jurisdiction over radiation hazards from other sources of radiation lies with other agencies of the state or Federal governments. Moreover, in enacting § 274 of the Act, the Congress established a program "for discontinuance of certain of the Commission's regulatory responsibilities with respect to byproduct, source, and special nuclear materials, and the assumption

OFFICIAL USE ONLY

thereof by the states." (§ 274 a. (4)) Extension of the Commission's regulatory program to control of radiation hazards from radium in mill tailings would mark the Commission's entry into an area heretofore left to the states and would to this extent be inconsistent with the program and purposes established in § 274.

Attachment:
Memo dtd. April 15, 1960

[redacted]

Appendix "E"