RAS 10324

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	)	ASLBP No. 95-706-01-ML
Crownpoint, NM 87313	)	
	)	

INTERVENORS' REPLY TO HYDRO RESOURCES INC.'S AND THE NUCLEAR REGULATORY COMMISSION STAFF'S RESPONSES IN OPPOSITION TO INTERVENORS'PRESENTATION ON RADIOACTIVE AIR EMISSIONS.

August 12, 2005

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Pursuant to the Presiding Officer's May 25, 2001 Order outlining procedures for litigation on phase II of the above-captioned proceeding, Intervenors Eastern Navajo Diné Against Uranium Mining ("ENDAUM") and Southwest Research and Information Center ("SRIC") (collectively, "Intervenors") hereby submit their reply to Hydro Resources Inc.'s Response In Opposition To Intervenors' Written Presentation Regarding Air Emissions (July 29, 2005) ("HRI Response"), and the NRC Staff's Written Presentation on Radiological Air Emissions (April 29, 2005) ("Staff Response") with respect to the law of the case arguments in those submissions. Intervenors have the opportunity to reply to HRI's and the Staff's law of the case arguments pursuant to the former Presiding Officer's scheduling order. Order at 6 (May 25, 2001) (unpublished).

The current Presiding Officer has also recognized that Intervenors have the opportunity to reply to HRI's and the Staff's law of the case arguments. LBP-05-17, slip op. at 12, n.4 (2005).[1]

I. INTRODUCTION

In their Responses, Hydro Resources, Inc.'s ("HRI") and the NRC Staff ("Staff") argue that a number of Intervenors's arguments regarding radioactive air emissions from HRI's Church Rock Section 17 site are barred by the law of the case. Additionally, both HRI and the Staff advance several arguments that the former Presiding Officer, Judge Bloch's, decision regarding the definition of "background radiation" in 10 C.F.R. Part 20 is not barred by the law of the case. Based on the arguments below, HRI's and the Staff's arguments should be rejected.

II. BACKGROUND AND PROCEDURAL HISTORY

A. Factual Background

HRI has applied for and received materials license SUA-1508 to conduct in situ leach ("ISL") mining at Sections 8 and 17 in Church Rock, Navajo Nation, New Mexico, and at two sites in Crownpoint, Navajo Nation, New Mexico, "Unit 1" and "Crownpoint." HRI plans to conduct ISL mining in the Westwater Canyon Member of the Morrison Formation. NUREG-1508, Final Environmental Impact Statement to Construct and Operate the Crownpoint Solution Mining Project, Crownpoint, New Mexico at xix (1997) (ACN 9703200270, NB 10) ("FEIS").

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[1] Although the former Presiding Officer's scheduling order allows Intervenors to respond to either collateral estoppel or law of the case arguments that HRI or the Staff might argue, the current Presiding Officer concluded that the law of the case is the applicable doctrine of repose in this phase of the proceeding. LBP-05-17, slip op. at 10, n.3. In their Responses, neither HRI nor the Staff argued that collateral estoppel applied to Intervenors' arguments.

HRI's operations at Section 17 will result in radioactive air impacts. The radiological impacts will result from dissolved radon gas present in the mining solution that escapes from the wellfields and ion exchange columns in the processing plants. FEIS at 4-3. Radon could also be released through disposal of process wastewater. Id. at 2-15. HRI proposes to minimize radon releases from process wastewater disposal by removing radon from the wastewater and placing it in holding tanks using a vacuum pump. Id. HRI would then compress the radon and dissolve it in the lixiviant injection system, thereby causing it to be re-circulated in the mining solution. Id. Additionally, HRI proposes to greatly minimize radon releases from the production bleed and restoration streams in a similar manner. Letter from Mark Pelizza to Ramon Hall (Feb. 23, 1994) (ACN 9509060072, NB 7).

HRI's Church Rock Section 17 is also the site of the Old Church Rock Mine, an underground mine, which was most recently owned and operated by United Nuclear Corporation ("UNC") prior to UNC selling the property to HRI. Hydro Resources, Inc., Prior Reclamation Inspection Report and Recommendation for Release or Permit Requirement, Introduction (Sept. 18, 1995), attached to Intervenors Eastern Navajo Diné Against Uranium Mining's and Southwest Research and Information Center's Written Presentation in Opposition to Hydro Resources, Inc.'s Application for a Materials License with Respect to Radiological Air Emissions at Section 17 (June 13, 2005) ("Intervenors' Air Emissions Presentation") as Exhibit G.

B. Procedural Background

1. Licensing Board Decision on Areas of Concern.

In their Second Amended Request for Hearing, Petition to Intervene, and Statement of Concerns, ENDAUM and SRIC presented concerns with HRI's ability to control radioactive air emissions and its air contamination model assumptions. Id. at 109-115 (Aug. 15, 1997) ("Petition to Intervene") (ACN 9703080068). In LBP-98-9 the Presiding Officer admitted Intervenors' area of concern with respect to radioactive air emissions as germane. In the Matter of Hydro Resources, Inc., LBP-98-9, 47 NRC 261, 282 (1998).

Additionally, Intervenors Marilyn Morris and Grace Sam, by letter, also requested a hearing on HRI's license application. Letter from Grace and Marilyn Sam to Secretary of the U.S. Nuclear Regulatory Commission requesting hearing (December 14, 1994) (ACN 9412220100) ("Sam Letter"). In their letter requesting a hearing, the Sams identified as an area of concern the fact that HRI's application did not address how existing contamination on the Church Rock site would be cleaned up. Sam Letter at 2. The Presiding Officer determined that this generalized concern was not germane. LBP-98-9, 47 NRC at 283. Marilyn Morris, formerly Marilyn Sam, later clarified that her and Grace Sam's generalized concern about existing contamination encompassed the Crownpoint Uranium Project's Final Environmental Impact Statement's failure to address the cumulative impacts of existing contamination at the Church Rock site. Marilyn Morris' Motion for Reconsideration at 4 (June 5, 1994) (ACN 980690124) ("Morris Motion for Reconsideration").

2. Licensing Board and Commission Air Emissions Decisions

a. LBP-99-19, 49 NRC 421 (1999)

The Presiding Officer issued his partial initial decision on radioactive air emissions "at Church Rock Section 8" in LBP-99-19. In the Matter of Hydro Resources, Inc., LBP-99-19, 49 NRC 421, 424 (1999). In that decision, the Presiding Officer rejected HRI's and the Staff's argument that "background radiation" includes radiation from source and byproduct material, whether or not it is regulated by the Commission. Id. at 426. The Presiding Officer also rejected HRI's argument that source and byproduct material on the Church Rock property should not be considered in HRI's control. Id. at 427.

The Presiding Officer likewise rejected Intervenors' calculation of offsite radon doses from HRI's Section 8 operations. Specifically, the Presiding Officer rejected the Intervenors' use of a "worst case scenario". Id. Additionally, the Presiding Officer found that the Intervenors had failed to show how the existing elevated levels of radon onsite have an impermissible impact on individuals offsite. Id.

The Presiding Officer specifically left for a later time the question of whether source and byproduct material on Section 17 posed a significant health risk. Id. at 427. Additionally, the Presiding Officer did not determine whether radiation released from the underground mine on Section 17 may be excluded from background. Id.

b. CLI-00-12, 52 NRC 1 (2000)

In CLI-00-12, the Commission rejected the Intervenors' petition for review of LBP-99-19. In the Matter of Hydro Resources, Inc., CLI-00-12, 52 NRC 1, 3 (2000). In

so doing, the Commission noted that the Intervenors did not identify any clearly erroneous factual finding or important legal error requiring Commission correction. Id.

III. ARGUMENT

The law of the case doctrine provides that the decision of an appellate body is the law of the case being adjudicated and should be followed in all subsequent phases of that case, in both the trial and appellate tribunals. Aetna Life Ins. Co. v. Wharton, 63 F.2d 378, 379 (8th Cir. 1933). The law of the case covers not only the specific issue decided, but also those issues decided by necessary implication. Williamsburg Wax Museum v. Historic Figures, Inc., 810 F.2d 243, 250 (D.C. Cir. 1987). However, if the evidence submitted in subsequent phases of litigation in a case is substantially different in material respects from that presented earlier in the litigation, the rule of the law of the case should not be applied. Aetna Life Ins. Co. v. Wharton, 63 F.2d at 379. Additionally, the law of the case can be disregarded if there is a change in controlling authority, new evidence, or the need to avoid manifest injustice. DeLong Equipment Co. v. Washington Mills Electro Minerals Corp., 990 F.2d 1186, 1196 (11th Cir. 1993). Moreover, the law of the case doctrine directs a court's discretion but does not limit its power. Id. at 1197.

A. Intervenors' Air Emissions Arguments are Not Barred by LBP-98-9.

In its response to Intervenors' Air Emissions Presentation, the Staff argues that Intervenors' air emissions concerns based on existing levels of radon and gamma radiation at Church Rock Section 17 are barred by the law of the case doctrine because Grace Sam and Marilyn Morris raised a concern about existing contamination at HRI's Church Rock site, which was subsequently found not to be germane. Staff Response at 9. The Staff states that when Grace Sam and Marilyn Morris initially requested a hearing in

this proceeding, one of the issues they raised was that the Crownpoint Uranium Project does not address how existing contamination in and around HRI's Church Rock site would be remediated thus frustrating progress in cleaning up existing contamination. Id. at 2-3; Staff Exhibit 3 at 2. The Staff notes that ENDAUM and SRIC did not raise a similar concern in their petition to intervene in this proceeding. Id. at 3. The Presiding Officer subsequently rejected Ms. Sam's and Ms. Morris' area of concern regarding existing contamination at Church Rock as not germane. In the Matter of Hydro Resources, Inc., LBP-98-9, 47 NRC at 268 and 283. The Staff argues that because the issue of existing contamination at Church Rock has already been raised and rejected by the Presiding Officer, any attempt by Intervenors to incorporate any aspect of existing contamination at Church Rock Section 17 into their radioactive air emission arguments is barred by the law of the case. Staff Response at 10.

The Staff's argument that Intervenors' radiological air emissions are barred by the law of the case is without merit. Ms. Sam's and Ms. Morris' concern regarding remediation of existing contamination at the Church Rock site was a generalized concern unrelated to how HRI calculated total effective dose equivalent ("TEDE") for radioactive air releases. See, Sam Letter at 2. Moreover, as Ms. Morris' subsequent motion for reconsideration clarifies, Ms. Sam's and Ms. Morris' area of concern encompassed how the FEIS analyzed cumulative impacts. Morris Motion for Reconsideration at 4. Ms. Sam's and Ms. Morris' area of concern did not encompass how HRI calculated TEDE or whether it complied with the NRC's regulatory limits on radioactive air emissions. Thus, the issue of how HRI calculated TEDE or whether it complied with Part 20 regulatory limits was not considered by the Presiding Officer when he concluded that Ms. Sam's

and Ms. Morris' area of concern regarding the cumulative impacts of existing contamination at the Church Rock site. Intervenors' arguments in their Air Emissions Presentation regarding how "background radiation" is defined implicating existing contamination at Section 17 is not barred by the law of the case.

B. The Intervenors' Radiological Air Emissions Arguments are not Barred by LBP-04-23.

Without explicitly saying so, the Staff implies that Intervenors' arguments regarding radiological air emissions are barred by the law of the case because another former Presiding Officer, Judge Moore, found that in the context of Intervenors' request to have the FEIS supplemented to account for additional impacts of HRI's proposed ISL mines on the proposed Springstead Estates Project housing development to be located near HRI's Church Rock sites were without merit. Staff Response at 14. However, like the Staff's argument that Intervenors' radiological air emission arguments are barred by the Presiding Officer's decision in LBP-98-9, the Staff's assertion that Intervenors' air emissions arguments are barred by the Presiding Officer's decision in LBP-04-23 is without merit.

In May of 2004, Intervenors moved the Commission and the Presiding Officer to require the Staff to supplement the FEIS. See generally, Intervenors' Motion to Supplement the Final Environmental Impact Statement for the Crownpoint Uranium Project Church Rock Section 8 (May 14, 2004) (ACN ML 041420145); Intervenors' Motion to Supplement the Final Environmental Impact Statement for the Crownpoint Uranium Project Church Rock Section 17 (May 14, 2004) (ACN ML 041450289). In determining that the proposed Springstead Estates Project was not a sufficient new circumstance to warrant supplementing the FEIS, Judge Moore found:

> [T]he FEIS adequately evaluates the processes to be utilized by HRI to minimize the emission of airborne effluents. [A]s discussed in Section II.B.2.a., above, the FEIS also examines the radiological levels of airborne emissions at various higher-risk locations and finds them to be within regulatory limits. Thus, because the FEIS has taken the requisite "hard look" at the possible effects of airborne effluents form the Church Rock operations and HRI's actions to mitigate them, I find that no further supplementation of the FEIS is necessary.

LBP-04-23, 60 NRC 441,458 (2004). The Presiding Officer is clearly evaluating HRI's radioactive air emissions in the context of the National Environmental Policy Act, i.e., whether the NRC took the requisite "hard look" at the impacts of the radioactive air emissions from HRI's proposed Church Rock operations. This standard is much different from the standards required by 10 C.F.R. Part 20, which require that a licensee demonstrate compliance with specific numerical radiation release limits. See, 10 C.F.R. § 20. 1301(a)(1). Judge Moore was not presented with the question of whether HRI could comply with the regulatory limit in Part 20 or whether its total effective dose equivalent calculations were technically supportable. Because this question was not presented to Judge Moore and he therefore could not have decided it, Intervenors' arguments regarding radioactive air emissions are not barred by the law of the case.

C. The Former Presiding Officer's Determination Regarding "Background Radiation" is not Dicta.

Both HRI and the NRC Staff assert that Judge Bloch's construction of "background radiation" is dicta and therefore not subject to the law of the case as argued by Intervenors. HRI Response at 15, Staff Response at 11. HRI contends that Judge Bloch's decision regarding the construction of "background radiation" as used in Part 20 was simply a "discussion" of his "thoughts" on the interpretation of "background radiation". HRI Response at 15. Likewise, the Staff argues that because Judge Bloch

noted that "it has not yet been determined whether radiation released from the underground mine at Section 17 may be excluded from background", his construction of "background radiation" is dicta and is excluded from the law of the case doctrine. Staff Response at 11, citing LBP-99-19, 49 NRC at 427. HRI's and the Staff's arguments that Judge Bloch's construction of "background radiation" for the purposes of applying 10 C.F.R. Part 20 is dicta and should be excluded from application of the law of the case doctrine are without merit.

The U.S. Court of Appeals has noted that "[d]icta are 'statements and comments in an opinion concerning some rule of law or legal proposition not necessarily involved nor essential to determination at the case at hand.'" Rohrbaugh et. al. v. Celotex et. al., 53 F.3d 1181, 1184 (10th Cir. 1995), quoting Black's Law Dictionary at 454 (6th ed. 1990). Therefore, to be excluded from the law of the case, Judge Bloch's regarding "background radiation" could not have been essential to the determination of the issues before him.

However, construction of the term "background radiation" is a necessary precondition to determining whether HRI's operations exceed regulatory limits for airborne radioactive emissions. The Part 20 regulations provide in relevant part:

> (a) Each licensee shall conduct operations so that –
> (1) The total effective dose equivalent to individual members of the public from the licensed operation does not exceed 0.1 rem (1 mSv) in a year, exclusive of the dose contributions from *background radiation*...

10 C.F.R. § 20.1301(a)(1), emphasis added. By the plain language of the regulation, before being able to determine the total effective dose equivalent to the public, a licensee must first 1) understand the definition of "background radiation" and 2) what dose contribution should be attributed to background radiation and thus excluded from its calculations. Therefore, even if no radiation at a site can be attributed to non-background

sources, as Judge Bloch determined was the case at Section 8, the licensee must still determine that fact before calculating TEDE for its operations.

Judge Bloch understood this when he rejected HRI's construction of "background radiation" and held that for the purposes of determining TEDE, "background radiation" does not include radiation from source or byproduct material. LBP-99-19, 49 NRC at 426. Moreover, the Staff concedes as much when it stated "Judge Bloch correctly noted the 10 C.F.R. § 20.1003 definition of "background radiation" is a key to properly applying 10 C.F.R. § 20.1301(a)(1). Staff Response at 10, citing LBP-99-19, 49 NRC at 425. Because the definition of "background radiation" is a necessary precondition to calculating TEDE, any challenge to the former Presiding Officer's construction of "background radiation" is barred by the law of the case.[2]

D. The Former Presiding Officer's Determination Regarding "Background Radiation" is not Clearly Erroneous and Will Not Cause Manifest Injustice.

Finally, both HRI and the Staff argue that Judge Bloch's construction of "background radiation" is erroneous and thus not subject to the law of the case. HRI Response at 15-19; Staff Response at 11-14. However, both HRI's and the Staff's arguments are without merit and should be rejected.

[2] The Staff also argues that the Commission's denial of Intervenors' Petition for Review of LBP-99-19 is no indication of its views on the merits. Staff Response at 13-14. However, refusal to grant discretionary review does indicate that at the very least the interests of justice and the purposes for which the power to grant a hearing was given does not warrant review. People v. Leroy Triggs, 506 P.2d 232, 236 (S.Ct. Cal, 1973). The purpose of Commission review is to correct legal error and address important questions of policy. 10 C.F.R. § 2.786. Because the Commission did not grant review of LBP-99-19, it clearly did not see any clear legal errors or important policy questions that warranted review. Moreover, the Presiding Officer applied the law of the case doctrine in an identical situation where the Commission declined review of Judge Bloch's decision on groundwater issues. See e.g., LBP-05-17, slip op. at 50-51 Judge Bloch's construction of "background radiation" is therefore law of the case.

1. HRI Does Not Demonstrate that Judge Bloch's Construction of "Background Radiation" is Clearly Erroneous and Will Cause Manifest Injustice.

a. HRI's Challenge to Judge Bloch's Construction of "Background Radiation" is Without Merit.

The law of the case doctrine does not preclude reconsideration of previously decided issues in extraordinary circumstances such as when new evidence is available, a supervening new law has been announced, or the earlier decision was clearly erroneous and would create manifest injustice. Africa v. City of Philadelphia, 158 F.3d 711, 718 (3rd Cir. 1998). When presented with the question of whether a previous decision of a tribunal is clearly erroneous, a court owes deference to the previous decision. Id. at 720. Additionally, the party alleging that the prior decision is erroneous must show that the prior decision was clearly wrong *and* that adherence to that decision would create manifest injustice. Id. at 20-721, emphasis added.

"Background Radiation" is defined in Part 20 of 10 C.F.R. as:

> [r]adiation 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.

Id. at § 20.1003.

Here, HRI argues that Judge Bloch's determination that "regulated by the Commission" as it appears in 10 C.F.R. § 20.1003 applies only to "special nuclear materials" and not "source materials" or "byproduct materials" is incorrect because 1) there are no special nuclear materials or byproduct materials that are not licensed by the

Commission and 2) there are classes of source material that are not regulated by the Commission. HRI Response at 16-17. Therefore, HRI asserts that while Judge Bloch's construction may be grammatically sound, it is somehow legally erroneous. Id. at 16.

HRI's argument fails to show that Judge Bloch's construction of "background radiation" is clearly erroneous. Although there may not be classes of nuclear material or byproduct material that are not regulated by the Commission, Judge Bloch's construction of § 20.1003 is reasonable. The Presiding Officer's interpretation that the clause "regulated by the Commission" applies only to "special nuclear materials" is simply an acknowledgment that the clause "regulated by the Commission" emphasizes the status of "special nuclear materials." This interpretation of the regulations is not unreasonable.

Moreover, HRI provides no explanation why § 20.1003 is not drafted to reflect HRI's interpretation of the regulation. If the Commission had wanted to draft the regulation to reflect the construction HRI advocates, it could have easily drafted the regulation to read "'Background radiation'" does not include source material regulated by the Commission, byproduct material, or special nuclear material." HRI's bare disagreement with Judge Bloch's construction of "background material" is not sufficient grounds to revisit Judge Bloch's decision. In the Matter of Hydro Resources, Inc., LBP-05-17, slip op. at 34.

b. HRI's Argument that Judge Bloch's Construction of "Background Radiation" Improperly Encompasses Mine Waste is Without Merit.

Additionally, HRI argues that because the materials located on the surface at Section 17 and in the underground mine workings are the result of mining, which the NRC does not regulate, this material is mine waste and is therefore background radiation. However, as Intervenors argued in their air emissions presentation, the material on the

surface and in the underground mine workings at Section 17 falls squarely under the regulatory definition of "source material" or "byproduct material". See, Intervenors' Air Emissions Presentation at 15-18.

c. HRI Fails to Allege that Manifest Injustice Will be Done.

Finally, HRI does not allege that manifest injustice will be done if Judge Bloch's interpretation of "background radiation" is followed. As noted above, before a tribunal will revisit an existing decision under the "clearly erroneous" exception to the law of the case doctrine, the party alleging that the prior decision is clearly erroneous must also show that a manifest injustice will result. Africa v. City of Philadelphia, 158 F.3d at 718. HRI has not alleged that any manifest injustice will result and its argument that Judge Bloch's interpretation of "background radiation" is clearly erroneous must be rejected. Consequently, HRI's challenges to Judge Bloch's construction of "background radiation" are barred by the law of the case.

2. The Staff Does Not Demonstrate that Judge Bloch's Construction of "Background Radiation" is Clearly Erroneous and Will Cause Manifest Injustice.

The NRC Staff also argues that Judge Bloch's construction of "background radiation" is incorrect because 1) it is grammatically flawed 2) it is internally inconsistent in that it would extend NRC jurisdiction over radiation from any source material, whether regulated by the Commission or not and thus conflicts with the first sentence of 10 C.F.R. § 20.1003 which includes naturally occurring radioactive material in background radiation. As with HRI's arguments that Judge Bloch's interpretation of "background radiation" is clearly erroneous, the Staff's arguments are without merit.

a. The Presiding Officer's Construction of "Background Radiation" is Correct.

The Staff argues that Judge Bloch's interpretation of "background radiation" is premised on faulty grammatical construction. Staff Response at 12, n.10. The Staff asserts that in the second sentence of the definition of background, the clause "regulated by the Commission" does apply to the antecedent noun, but that the antecedent noun is not "special nuclear materials" but simply "materials", which is in turn modified by three adjectives, "source", "byproduct" and "special nuclear." Id. Thus, the Staff argues, "regulated by the Commission" modifies source material, byproduct material, and special nuclear material. Id.

However, the Staff's construction of § 20.1003 ignores the fact that "source", "byproduct" and "special nuclear" are not simply adjectives, but when combined with the word "material", have their own specific regulatory definitions under § 20.1003. There is no such definition for "material" alone. Thus, from a regulatory standpoint, "source", "byproduct" and "special nuclear" cannot be separated from the word "material." Therefore, from a purely grammatical standpoint, Judge Bloch's construction of "background radiation" is not clearly erroneous.

b. The Presiding Officer's Interpretation of "Background Radiation" is Internally Consistent.

The Staff also argues that Judge Bloch's interpretation of "background radiation" leads to the conclusion that all source material whether or not regulated by the Commission is part of background radiation and therefore conflicts with the first sentence in the definition of "background radiation" which includes naturally occurring radioactive materials. Staff Response at 12-13.

However, Judge Bloch's construction of "background radiation" is not internally inconsistent in light of the regulatory definition of "source material." "Source material" is defined as:

> (1) Uranium or thorium or any combination of uranium or thorium in any physical or chemical form; or
> (2) Ores that contain, by weight, one twentieth of 1 percent (0.05 percent), or more, of uranium, thorium, or any combination of uranium and thorium. Source material does not include special nuclear material.

10 C.F.R. § 20.1003. By definition, uranium in its natural state i.e., within ore, is only source material when it occurs in concentrations of 0.05 percent or more by weight. The regulatory definition of "source material" is therefore self-limiting. Any uranium ore that falls outside this regulatory definition would not be "source material" and would be naturally occurring radioactive material. Radiation from uranium ore considered naturally occurring radioactive material would therefore be excluded from TEDE calculations. The Staff's assertion that radiation from *any* outcropping of uranium ore would thus be subject to inclusion in TEDE calculations is without merit. Judge Bloch's construction of "background radiation" is therefore not clearly erroneous and is the law of the case.

IV. CONCLUSION

For the foregoing reasons, HRI's and the Staff's law of the case arguments should be rejected.

Dated August 12, 2005

Eric D. Jantz
Douglas Meiklejohn
Sarah Piltch
New Mexico Environmental Law Center
1405 Luisa Street, Suite 5
Santa Fe, New Mexico 87505
(505) 989-9022

Counsel for Intervenors

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CERTIFICATE OF SERVICE

I hereby certify that copies of "Intervenors' Reply to Hydro Resources, Inc.'s and the Nuclear Regulatory Commission Staff's Responses in Opposition to Intervenors' Presentation on Radioactive Air Emissions" the above-captioned proceeding have been served on the following by U.S. Mail, first class, or, as indicated by an asterisk, by electronic mail and U.S. Mail, first class, this 12th day of August 2005:

Administrative Judge, E. Roy Hawkens*
Presiding Officer
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Mail Stop T-3 F23
Washington, D. C. 20555
Email: erh@nrc.gov

Administrative Judge*
Richard F. Cole, Special Assistant
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Mail Stop T-3 F23
Washington, D. C. 20555
Email: rfc1@nrc.gov

Jep Hill, Esq.
Jep Hill and Associates
P.O. Box 30254
Austin, TX 78755

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

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

John T. Hull*
Tyson R. Smith
U.S. Nuclear Regulatory Commission
Office of the General Counsel
Mail Stop O-15D21
Washington, DC 20555
Fax: 301-415-3725
Email: jth@nrc.gov
Email: trs1@nrc.gov

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

Anthony J. Thompson, Esq.*
Christopher Pugsley, Esq.*
Anthony J. Thompson, P.C.
1225 19th Street, N.W., Suite 300
Washington, D. C. 20036
Fax: (202) 496-0783
E-mail: ajthompson@athompsonlaw.com
E-mail: cpugsley@athompsonlaw.com

Office of the Secretary*
Attn: Rulemakings and Adjudications Staff
U.S. Nuclear Regulatory Commission
Mail Stop: OWFN-16 C1
Washington, D. C. 20555
E-mail: hearingdocket@nrc.gov
Administrative Judge, Robin Brett *
2314 44th Street, N.W.
Washington, D.C. 20007
Fax: (703) 648-4227
E-mail: rbrett@usgs.gov

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

William Zukosky *
DNA-People's Legal Services, Inc.
201 East Birch Ave., Ste 5
Flagstaff, AZ 86001-5215
E-mail: wzukosky@dnalegalservices.org

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

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

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

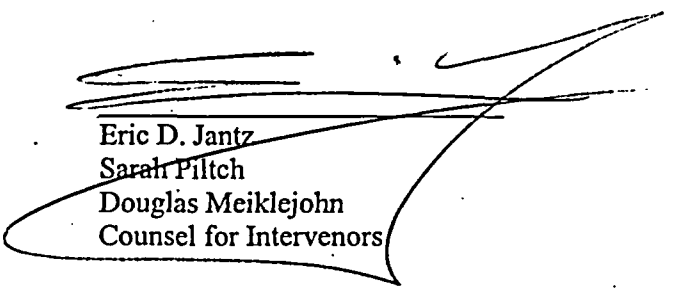
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Mail Stop: T-3 F23
Washington, D. C. 20555

David C. Lashway, Esq. *
Hunton & Williams, LLP
1900 K Street, NW
Washington, D.C. 20006-1109
E-mail: dlashway@hunton.com

Geoffrey H. Fettus *
Natural Resources Defense Counsel
1200 New York Ave, N.W.
Suite 400
Washington, D.C. 20005
E-mail: gfettus@nrcdc.org

Susan C. Stevenson-Popp *
ASLB Panel
U.S. NRC
Mail Stop T-3 F23
Washington, DC 20555
E-mail: scs2@nrc.gov

Karen Valloch*
E-mail: ksv@nrc.gov



Eric D. Jantz
Sarah Piltch
Douglas Meiklejohn
Counsel for Intervenors

NEW MEXICO
ENVIRONMENTAL LAW CENTER

August 12, 2005

BY ELECTRONIC MAIL AND U.S. FIRST CLASS MAIL

U.S. Nuclear Regulatory Commission
Office of the Secretary
Attn: Rulemaking and Adjudications Staff
One White Flint North
11545 Rockville Pike
Rockville, MD 20852

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

Dear Sir or Madam:

Please find enclosed for filing "Intervenors' Reply to Hydro Resources, Inc.'s and the Nuclear Regulatory Commission Staff's Responses in Opposition to Intervenors' Presentation on Radioactive Air Emissions". Copies of the enclosed have been served on the parties indicated on the enclosed certificate of service. Additionally, please return a file-stamped copy of the enclosed filing in the attached self-addressed, postage prepaid envelope.

If you have any questions, please feel free to contact me at (505) 989-9022. Thank you for your attention to this matter.

Sincerely,

Eric D. Jantz
Sarah Piltch
Douglas Meiklejohn
New Mexico Environmental Law Center
Attorneys for Intervenors

1405 Luisa Street, Suite 5, Santa Fe, New Mexico 87505
Phone (505) 989-9022 Fax (505) 989-3769 nmelc@nmelc.org