

RAS 10354

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

DOCKETED
USNRC

August 19, 2005 (12:36pm)

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

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
ASLBP No. 95-706-01-ML

**INTERVENORS' REPLY TO HYDRO RESOURCES INC.'S AND THE
NUCLEAR REGULATORY COMMISSION STAFF'S RESPONSES IN
OPPOSITION TO INTERVENORS' WRITTEN PRESENTATION WITH
RESPECT TO NEPA ISSUES FOR CHURCH ROCK SECTION 17, UNIT 1 AND
CROWNPOINT.**

August 19, 2005

TABLE OF CONTENTS

INTERVENORS' REPLY TO HYDRO RESOURCES INC.'S AND THE NUCLEAR REGULATORY COMMISSION STAFF'S RESPONSES IN OPPOSITION TO INTERVENORS' JOINT PRESENTATION WITH RESPECT TO NEPA ISSUES FOR CHURCH ROCK SECTION 17, UNIT 1 AND CROWNPOINT.

| | | |
|------|--|----|
| I | INTRODUCTION | 2 |
| II | BACKGROUND AND PROCEDURAL HISTORY | 2 |
| A. | Factual Background | 2 |
| B. | Procedural Background | 3 |
| C. | Licensing Board and Commission NEPA Decisions | 4 |
| 1. | <u>LBP-99-30, 50 NRC 77 (1999)</u> | 4 |
| 2. | <u>CLI-00-12, 52 NRC 1 (2000)</u> | 5 |
| 3. | <u>CLI 01-04, 53 NRC 31 (2001)</u> | 6 |
| 4. | <u>LBP 99-15, 49 NRC 261 (1999)</u> | 7 |
| 5. | <u>LBP 04-23, 60 NRC 448 (2004)</u> | 8 |
| 6. | <u>CLI 04-39, 60 NRC 657 (2004)</u> | 8 |
| III. | ARGUMENT | 8 |
| A. | HRI's and the NRC Staff's Law of the Case Arguments Should Be Rejected | 9 |
| B. | To Bar Intervenor's Arguments would Violate the Commission's Ruling in CLI-01-04 | 10 |
| 1. | <u>The Commission's review of Licensing Board decisions is binding and cannot be overruled by a lower administrative entity.</u> | 10 |
| 2. | <u>CLI-01-04 specifically limited the Presiding Officer's ruling in LBP-99-30 to Section 8</u> | 11 |
| a. | <u>The Commission found the ruling in LBP 99-30 that the FEIS was adequate in discussion of cumulative impacts</u> | |

| | | |
|-----|--|----|
| | <u>to be limited to Section 8</u> | 12 |
| b. | <u>The Commission found the ruling in LBP 99-30 that the FEIS was adequate in discussion of radioactive air Emissions to be limited to Section 8</u> | 14 |
| c. | <u>The Commission found the Presiding Officer's examination of the FEIS cost/benefit analysis to be limited to Section 8</u> | 14 |
| d. | <u>The Commission found the LBP-99-30 ruling on FEIS adequacy in discussion of alternatives to be limited to Section 8</u> | 15 |
| C. | To Bar Intervenors' Arguments would Violate the Presiding Officer's February 3, 2005 Scheduling Order..... | 16 |
| D. | To Bar Intervenors' Arguments would Not Allow for Sufficient, Full and Fair Review of FEIS Adequacy | 17 |
| 1. | <u>Insufficiencies of the FEIS, particularly for Section 17, Unit 1 and Crownpoint, must be specifically examined</u> | 17 |
| 2. | <u>The FEIS should be analyzed as it is written</u> | 19 |
| E. | Changed Circumstances Require that the Law of the Case Doctrine Not be Applied Here | 19 |
| F. | The Presiding Officer should exercise his Discretion to examine FEIS Adequacy for Section 17, Unit 1 and Crownpoint..... | 21 |
| IV. | CONCLUSION..... | 21 |

TABLE OF AUTHORITIES

NUCLEAR REGULATORY COMMISSION AND ATOMIC ENERGY COMMISSION DECISIONS

| | |
|---|--------------------------|
| <u>In the Matter of Hydro Resources, Inc.</u> , CLI 01-04, 53 NRC 31 (2001)..... | 6, 7, 11, 12, 13, 14, 15 |
| <u>In the Matter of Hydro Resources, Inc.</u> , CLI 04-27, 61 NRC 145, 154 (2004)..... | 20 |
| <u>In the Matter of Hydro Resources, Inc.</u> , CLI-00-12, 52 NRC 1, (2000)..... | 5 |
| <u>In the Matter of Hydro Resources, Inc.</u> , LBP 04-23, 60 NRC 448 (2004)..... | 8 |
| <u>In the Matter of Hydro Resources, Inc.</u> , LBP 05-17, slip op. (2005). | 2, 20 |
| <u>In the Matter of Hydro Resources, Inc.</u> , LBP 99-15, 49 NRC 261 (1999):..... | 8 |
| <u>In the Matter of Hydro Resources, Inc.</u> , LBP 99-30, 50 NRC 77(1999)..... | 4, 5, 11 |
| <u>In the Matter of Hydro Resources, Inc.</u> , Order (February 3, 2005) | 16 |
| <u>In the Matter of Hydro Resources, Inc.</u> , Order at 6 (May 25, 2001) (unpublished). | 2 |

NAVAJO NATION CODE

| | |
|---------------------------|----|
| CAP-18-05, § 1302(a)..... | 20 |
|---------------------------|----|

FEDERAL COURT CASES

| | |
|--|---|
| <u>Aetna Life Ins. Co. v. Wharton</u> , 63 F.2d 378, 379 (8 th Cir. 1933)..... | 8 |
| <u>DeLong Equipment Co. v. Washington Mills Electro Minerals Corp.</u> , 990 F.2d 1186, 1196 (11 th Cir. 1993)..... | 9 |
| <u>Williamsburg Wax Museum v. Historic Figures, Inc.</u> , 810 F.2d 243, 250 (D.C. Cir. 1987) | 8 |

August 19, 2005

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

Before Administrative Judges:

E. Roy Hawken, 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
ASLBP No. 95-706-01-ML

**INTERVENORS' REPLY TO HYDRO RESOURCES INC.'S AND THE
NUCLEAR REGULATORY COMMISSION STAFF'S RESPONSES IN
OPPOSITION TO INTERVENORS' WRITTEN PRESENTATION WITH
RESPECT TO NEPA ISSUES FOR CHURCH ROCK SECTION 17, UNIT 1 AND
CROWNPOINT.**

Pursuant to the Presiding Officer's May 25, 2001 Order outlining procedures for litigation on phase II of the above-captioned proceeding, Intervenor Eastern Navajo Diné Against Uranium Mining ("ENDAUM"), Southwest Research and Information Center ("SRIC"), Grace Sam, and Marilyn Morris hereby submit their Reply to Hydro Resources Inc.'s Response In Opposition To Intervenor's Written Presentation Regarding Environmental Impact Statement Adequacy (July 28, 2005) ("HRI Response"), and the NRC Staff's Response To Intervenor's Written Presentation On NEPA Issues (August 12, 2005) ("Staff Response") with respect to the law of the case arguments raised in those submissions.

I. INTRODUCTION

In their Responses, Hydro Resources, Inc.'s ("HRI") and the NRC Staff ("Staff") argue that the law of the case doctrine should bar Intervenor's EIS adequacy arguments for the Church Rock Section 17, Unit 1 and Crownpoint. Intervenor is permitted 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).¹ The current Presiding Officer has also recognized that Intervenor has 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).² Based on the arguments below, HRI's and the Staff's arguments seeking to bar Intervenor's EIS adequacy arguments for Church Rock Section 17, Unit 1 and Crownpoint 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").

¹ NRC Staff's Response was filed on August 12, 2005, therefore this Reply is timely filed under the scheduling order (within 7 days of the filing of the last-in-time response for which a notice was filed).

² Although the former Presiding Officer's scheduling order allows Intervenor 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 response 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 Intervenor's arguments.

HRI plans to construct well fields at each mine site and inject lixiviant, composed of bicarbonate ion complexing agents and dissolved oxygen, through wells into an ore zone. See FEIS §§2.1.1 - 2.1.1.2 at 2-3 and 2-5. Uranium compounds, already present in the aquifer in an insoluble form, would then become oxidized and react with the lixiviant to form either a soluble uranyl tricarbonate complex or a bicarbonate complex, called “pregnant lixiviant”. FEIS §2.1.1.2 at 2-5. HRI proposes that the uranium enriched pregnant lixiviant would be pumped from production wells to the satellite processing plants for uranium extraction by ion exchange. See FEIS § 2.1.1.2 at 2-6.

B. Procedural Background

In their Second Amended Request for Hearing, Petition to Intervene, and Statement of Concerns (August 15, 1997) (ACN 9709080068) (“Second Amended Petition to Intervene”), ENDAUM and SRIC argued that the FEIS contains inadequate statements of purpose and need, and that the FEIS fails to adequately quantify, qualitatively describe, or weigh the costs and benefits of license issuance. Id. at 150. The FEIS also failed to evaluate the costs and benefits of alternatives in the cost-benefit analysis. Id. ENDAUM and SRIC further explained that the FEIS inadequately evaluates the no action alternative and the action alternatives. Id. at 159-163. ENDAUM and SRIC stated their concern that the FEIS does not adequately consider mitigation for the significant adverse impacts of the project. Id. at 139-140. Lastly, ENDAUM and SRIC allege that significant new information and substantial changes in the proposed action warrant supplementation of the DEIS and the FEIS. Id. at 178-183.

ENDAUM, SRIC, Grace Sam, Marilyn Morris and HRI filed Intervenor’s Joint Motion for Change in Schedule of Written Presentations (January 18, 2005) (ACN ML

050350263). The Presiding Officer issued an Order (Revised Schedule for Written Presentations) on February 3, 2005 (ACN ML 050410382). The order described the agreement by the parties in which Intervenor waived their right to litigate certain remaining areas of concern. The order also set out a briefing schedule for the remaining areas of concern. Intervenor agreed, in the Joint Motion, to forego presenting any new evidence with respect to the sixth area of concern (i.e., adequacy of EIS (cumulative impacts, mitigation actions)) and to submit a pleading which incorporates by reference Intervenor's arguments raised with respect to the adequacy of the EIS for Section 8, thereby preserving those arguments with respect to Section 17, Unit 1, and Crownpoint.

C. Licensing Board and Commission NEPA Decisions

1. LBP-99-30, 50 NRC 77 (1999)

The Presiding Officer issued LBP 99-30, Partial Initial Decision Concluding Phase 1 (Groundwater, Cumulative Impacts, NEPA and Environmental Justice), after Intervenor filed their presentation on NEPA Issues, HRI and the Staff filed their responses, and parties responded to the questions set forth in In the Matter of Hydro Resources, Inc., Memorandum and Order (Questions) (April 21, 1999) (unpublished).

In LBP 99-30, in examining whether an FEIS was required, the Presiding Officer found that the Staff's decision to prepare an EIS was consistent with its responsibility under 10 C.F.R. § 51.20. 50 NRC 77, 112 (1999).

The Presiding Officer concluded that the ISL mining project on Church Rock Section 8, with the license conditions imposed by the Staff of the Commission, does not pose a credible threat to the environment or to human health and safety and further concludes that the FEIS and the findings made in this proceeding, both in prior decisions

and in this one, take the “hard look” required for NEPA determinations, for consideration of cumulative impacts, and for environmental justice. Id.

The Presiding Officer found that failure to address Intervenor’s arguments on groundwater in the FEIS was not an error, as the Presiding Officer had found Intervenor’s groundwater arguments erroneous in LBP-99-30. Id. at 113.

The Presiding Officer also found that the FEIS performed an adequate cost/benefit analysis, and gave adequate consideration to cumulative impacts, relocation of individuals, radioactive air emissions, secondary benefits, waste disposal issues, and cultural impacts. Id. at 114, 117, 119-120. The Presiding Officer found that no supplementation of the FEIS was needed with respect to performance-based licensing and new alternatives. Id. at 116.

The Presiding Officer reserved for a subsequent phases of the case questions concerning mitigation, particularly the impact of the change in the order of mining and whether the Crownpoint municipal water supply is adequately protected. Id. at 117.

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

In CLI-00-12, the Commission rejected the Intervenor’s petition for review of LBP-99-30, regarding the technical issues including those issues pertaining to groundwater. In the Matter of Hydro Resources, Inc., CLI-00-12, 52 NRC 1, 3-5 (2000). The Commission specifically stated that: “[t]he remainder of LBP-99-30 deals with NEPA, environmental justice and other issues that the Commission still is considering and does not resolve here.” 52 NRC at 2.

In CLI-00-12, the Commission also denied petitions for review of decisions regarding air emissions, LBP-99-18 and LBP-99-19.

3. CLI 01-04, 53 NRC 31 (2001)

In CLI-01-04, the Commission granted review of LBP-99-30, which addressed NEPA and environmental justice concerns. The Commission found no material error in LBP-99-30 and affirmed the decision. The Commission observed, although it retained discretion to undertake a *de novo* factual review, it was not inclined to disturb fact-specific findings by the Presiding Officer with which the Commission agreed or had no strong basis to second guess. 53 NRC 31, 45 (2001).

The Commission did examine in detail specific issues raised by the briefs regarding NEPA issues and the Petition for Review of LBP-99-30. The Commission found no reason to disturb the Presiding Officer's conclusions that the burden of proof was not misplaced, the FEIS project purpose and need was accurate, cost-benefit analysis was sufficient, the FEIS estimate of secondary benefits was sufficient, and that the FEIS land use and liquid waste disposal discussion was sufficient. *Id.* at 47-50.

The Commission also found that neither performance based licensing, new alternatives, nor the inclusion of a staff affidavit in LBP-99-30 warranted FEIS supplementation. *Id.* at 51-52.

The Commission did not reverse the Presiding Officer on the adequacy of the FEIS alternatives analysis, but did make additional comments. The Commission stated FEIS could have done a better job articulating final conclusions on the alternative chosen, but did find that the FEIS and the Presiding Officer's decision rejected the no action alternative because the impacts of the project were found acceptable. The Commission addressed the Presiding Officer's analysis of Alternative 2, which would have restricted operations to fewer of the potential mine sites. The Commission found that the Presiding

Officer's decision did not fully address Alternative 2 because the hearing focused only upon Church Rock Section 8. The Commission stated that in the resumed hearing Intervenor may raise arguments as to whether the additional sites should not have been approved and included in the license. Id. at 54-57.

The Commission addressed cumulative impacts, holding that analysis of cumulative impacts means examining whether the sum may be greater than its parts in terms of environmental effects of a proposed project, and found that given the bifurcated hearing, it is unclear whether there are any significant cumulative impacts from all the sites examined together. The Commission affirmed the Presiding Officer's findings on the cumulative impacts on Section 8 alone, but instructed the Presiding Officer, as the proceedings continued, to consider the impacts of Section 8 along with those of the other sections, "to assure that all potential inter-regional cumulative effects have been adequately considered and discussed in the FEIS." Id. at 59. The Commission did note that if HRI were to abandon plans to mine the other sections, no further cumulative impacts review would need to be litigated.

The Commission also affirmed the Presiding Officer's decision regarding Church Rock radiological information provided in the DEIS that was left out of the FEIS, and on the issue of the burden of proof on the cumulative impacts issue. Id. at 62.

The Commission also addressed environmental justice, finding that the FEIS sufficiently identified the project's environmental justice implications for Section 8. Id. at 64-70.

4. LBP 99-15, 49 NRC 261 (1999)

In LBP 99-15, a decision by the Presiding Officer regarding Radioactive Air

Emissions, the Presiding Officer ordered that parties answer six questions including question 6: "Has the FEIS adequately addressed the combined impacts of radiation from the project and from elevated levels of radiation in the area of the project?" 49 NRC 261, 269 (1999).

5. LBP 04-23, 60 NRC 448 (2004)

In LBP 04-23, the Presiding Officer ruled that Intervenorors have not met the applicable regulatory standard for requiring the FEIS to be supplemented, and denied Intervenorors' supplementation motions. The Presiding Officer found that the requirements of NEPA have been satisfied and that the Intervenorors did not present a prima facie case that the SEP represents a "significant new circumstance" such that a supplement to the existing FEIS is warranted.

6. CLI 04-39, 60 NRC 657 (2004)

In CLI 04-39, the Commission denied Intervenorors' Petitions for Review of LBP 04-23.

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. HRI's and the NRC Staff's Law of the Case Arguments Should Be Rejected.

In their Responses, HRI and the NRC Staff argue that Intervenor's EIS adequacy arguments for Section 17, Unit 1 and Crownpoint should be barred by the law of the case doctrine. See, HRI Response, Section VI, A.; See Staff Response 5-38.

HRI stated, in its response, "with respect to Intervenor's 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." HRI Response at 23. HRI here clearly recognizes that the fact of a bi-furcated hearing process necessarily means that site-specific issues will arise. Obviously, site-specific issues must be adjudicated specifically and cannot be barred by the law of the case doctrine.

HRI also argues that Intervenor's supplementation arguments should be barred by the law of the case doctrine. See HRI Response, Sections VI E 4, E 5.

The NRC Staff argues that Intervenor presented the same arguments as were presented in Intervenor's prior NEPA presentation, and that therefore they should be barred by the law of the case. Staff Response at 6. The NRC Staff also argues that there are project-wide issues which were addressed in the first phase of the proceeding and

were denied by the Presiding Officer and Commission. *Id* at 6. The NRC Staff also argues that specific NEPA arguments were previously rejected by the Presiding Officer. *Id* at 10-38.

HRI's and the NRC Staff's law of the case arguments should be rejected for the following reasons. First, to bar Section 17, Unit 1 and Crownpoint arguments regarding NEPA would be to violate the Commission's decision in CLI-01-04. Second, to bar Section 17, Unit 1 and Crownpoint arguments regarding NEPA would be to violate the Presiding Officer's February 2, 2005 scheduling order. Third, FEIS adequacy for Section 17, Unit 1, and Crownpoint must be specifically adjudicated. Fourth, in this subsequent proceeding there has been a change in controlling authority, such that the law of the case doctrine does not apply. Finally, even if the law of the case doctrine does apply, the Presiding Officer should exercise his discretion to examine Intervenor's evidence and the FEIS adequacy for Section 17, Unit 1 and Crownpoint, and make a determination as to the validity of HRI's license for those sites in order to avoid a manifest injustice.

B. To Bar Intervenor's Arguments would Violate the Commission's Ruling in CLI-01-04.

1. The Commission's review of Licensing Board decisions is binding and cannot be overruled by a lower administrative entity.

HRI argues that the licensing board has only the jurisdiction and power which the Commission delegates to it. See HRI's Response at 21. HRI also argues that the licensing board has the power to provide initial reviews of license applications in contested proceedings, but does not possess the power to overrule Commission holdings. *Id* at 22.

The Commission, in CLI-01-04, affirmed the Presiding Officer's decision in LBP-99-30 regarding EIS adequacy. The Commission did, however, limit that decision to

Section 8. The Commission explicitly instructed the Presiding Officer to examine particular issues for the remaining three proposed mining sites.

Under the rules articulated above by HRI concerning Licensing Board jurisdiction, the Commission's rule limiting LBP-99-30 to Section 8 and instructing the Presiding Officer to make additional findings for the remaining three proposed sites, cannot be overruled by the Licensing Board. CLI-01-04 both limited the ruling in LBP-99-30 to Section 8 and constituted a grant of power to the Licensing Board to further examine the EIS adequacy for the remaining three proposed sites.

2. CLI-01-04 specifically limited the Presiding Officer's ruling in LBP-99-30 to Section 8.

In LBP-99-30, the Presiding Officer rejected Intervenor's arguments on NEPA issues. See LBP-99-30, 50 NRC 77 (1999). In CLI-01-04, the Commission affirmed the Presiding Officer's ruling in LBP-99-30 on NEPA issues. See CLI-01-04, 53 NRC 31 (2001). But in so affirming, the Commission specifically limited the ruling in LBP-99-30 to Section 8 throughout the decision, for example: "We find no reason now to disturb the Presiding Officer's finding that the FEIS's discussion of the air and groundwater impacts to the Church Rock Section 8 area is adequate." 53 NRC at 45. (emphasis added).

The Commission found that "...the intervenors' petition for review simply raises no new NEPA-centered argument casting doubt on the adequacy of the FEIS's discussion of the various possible impacts to *Section 8*." *Id* at 46 (emphasis added). The law of the case doctrine is inapplicable here as the particular question at issue, the adequacy of the FEIS for Section 17, Unit 1 and Crownpoint, was not actually decided by the Licensing Board, as per the Commission's review in CLI-01-04.

NRC Staff argued that Intervenor's have presented the same arguments in their June 25 Brief as they presented earlier with respect to Section 8. Staff Response at 6. Even if these arguments are the same, the law of the case doctrine does not bar *arguments* – under the law of the case doctrine a decision of an appellate body is followed throughout subsequent phases of a case. The question is not whether an argument has been made before, but whether there is a previous rule of law which must be applied under the law of the case doctrine. Here, as LBP-99-30 was limited to Section 8 by the Commission's decision in CLI-01-04, there is no prior law to apply to the examination of the adequacy of the FEIS for the remaining three sites.

- a. The Commission found the ruling in LBP 99-30 that the FEIS was adequate in discussion of cumulative impacts to be limited to Section 8.

Because this proceeding was bifurcated, discussion of cumulative impacts became difficult and confusing. The Presiding Officer, although presented with arguments regarding all four sections limited his analysis to Section 8, "declined to consider any argument on impacts from the other sites". 53 NRC at 58-59. Instead he emphasized that the scope of the initial hearing had been narrowed to "the Church Rock area." The Commission notes that the Presiding Officer did consider the past, present, and future impacts to Section 8 and whether these impacts would have significant cumulative effects and found that "The Presiding Officer was not persuaded that Section 8's radiological impacts would in any way result in unacceptable cumulative impacts. He therefore agreed with the FEIS's conclusion that the Section 8 project's impacts would not be a significant addition to the overall radiological impacts in the area." 53 NRC at 61. The decision by

the Presiding Officer on this issue therefore does not extend to any analysis of the cumulative effect of mining on Section 17, Unit 1 and Crownpoint.

In CLI 01-04, the Commission found that: “The Presiding Officer’s exclusive focus upon Section 8 [in LBP 99-30] does not address any possible inter-regional effects of mining operations on the four proposed sites: Church Rock Section 8, Church Rock Section 17, Unit 1 and Crownpoint. And inter-regional impacts are a key focus of cumulative impacts analyses.” 53 NRC at 59. The Commission instructed that: “In the resumed hearing, the Presiding Officer must consider the impacts of Section 8 along with those of the other sections, to assure that all potential inter-regional cumulative effects have been adequately considered and discussed in the FEIS.” 53 NRC at 59. The Commission specifically instructed the Presiding Officer to hear and consider the cumulative impacts of all four proposed mine sites, in order to examine whether all potential cumulative effects were analyzed in the FEIS. To bar such arguments would be to violate the Commission’s ruling in CLI-01-04.

The doctrine of law of the case applies to specific decisions and those issues decided by necessary implication. But it does not apply here, as FEIS cumulative impacts analysis adequacy for Section 17, Unit 1 and Crownpoint has not been decided and therefore cannot be barred by law of the case. Issues in the remaining sites were explicitly not decided by the Presiding Officer or the Commission (see above). The Presiding Officer limited his findings on cumulative impacts to Section 8 and this was affirmed by the Commission. For the doctrine of law of the case to apply, a decision must have been made that can then apply to subsequent phases of the case. Here no decision was made, so there is no law of the case to apply. In fact, to the contrary, the Commission explicitly

authorized future argument by the Intervenor on issues pertaining to the remaining sites: “In the resumed hearing, however, the intervenors may raise any of their arguments that go to whether the Unit 1, Crownpoint, or Church Rock Section 17 sites should not have been approved and included in the license.” 53 NRC at 57. The Commission also explicitly authorized the Licensing Board to hear these future arguments regarding cumulative impacts.

- b. The Commission found the ruling in LBP 99-30 that the FEIS was adequate in discussion of radioactive air emissions to be limited to Section 8.

In LBP-99-30, the Presiding Officer found that the FEIS adequately addressed the radioactive air emissions from the proposed project. The Commission, in CLI-01-04, upheld the decision by the Presiding Officer, holding that “We find no reason to disturb the Presiding Officer’s finding that the FEIS’s discussion of the air and groundwater impacts *to the Church Rock Section 8 area* is adequate.” 53 NRC at 45. (emphasis added). Although the Commission upheld the Presiding Officer’s determination of FEIS adequacy on radioactive air emissions, it restricted the determination to Church Rock Section 8 specifically. As this decision was not on FEIS radioactive air emissions analysis adequacy for Church Rock Section 17, Unit 1 and Crownpoint, the decision does not act to bar Intervenor’s arguments as presented in Intervenor’s Presentation with respect to NEPA issues for Church Rock Section 17, Unit 1 and Crownpoint.

- c. The Commission found the Presiding Officer’s examination of the FEIS cost/benefit analysis to be limited to Section 8.

The Commission explicitly held in CLI 01-04 that a decision on the complete cost/benefit analysis for the entire CUP has not been made: “...throughout this decision,

the Commission has emphasized that *there has yet to be a final agency adjudicatory decision on the cost/benefit balance for the entire project, given that the hearing so far focused only upon section 8.*" 53 NRC at 56. (emphasis added).

The Commission found the Presiding Officer's examination of the FEIS cost/benefit analysis to be partial or preliminary.

In many respects, then, the Presiding Officer's cost/benefit assessment can be said to have been merely partial or preliminary, for he had only examined the various costs --- air emissions, groundwater, etc. -- associated with Section 8. If the resumed hearing on the other project sites brings to light any significant finding bearing on the overall project's costs, the FEIS cost/benefit analysis may need to be modified. It remains to be determined, then, whether the potential costs of one or more of the other project sites may require revision of the FEIS's cost/benefit conclusions.

53 NRC at 51.

Therefore, the Commission limited the Presiding Officer's decision on FEIS cost/benefit analysis adequacy to Section 8. Since the decision was limited, it does not apply to the other proposed sites, and therefore cannot be barred under the law of the case doctrine.

- d. The Commission found the LBP-99-30 ruling on FEIS adequacy in discussion of alternatives to be limited to Section 8.

The Commission found that the Presiding Officer's discussion of FEIS alternatives analysis, particularly alternative 2, was incomplete because the focus was on Section 8 exclusively: "The Presiding Officer's discussion of project alternatives, also, necessarily was limited because of his focus upon Section 8...Because the hearing focused only upon Church Rock Section 8, the Presiding Officer's decision does not address the sundry project configurations offered by Alternative 2." 53 NRC 56-57. The

FEIS alternatives analysis adequacy could not be fully addressed as the hearing was focused on Section 8. The sufficiency of the alternatives analysis was not fully adjudicated as the Commission limited the Board's decision to Section 8 specifically. Since the decision was limited, it does not extend to the other proposed sites, and therefore cannot be barred under the law of the case doctrine.

C. To Bar Intervenor's Arguments would Violate the Presiding Officer's February 3, 2005 Scheduling Order.

Pursuant to a joint motion of the Intervenor and HRI, in which the NRC staff concurred, the Presiding Officer issued a Scheduling order on February 3, 2005. Order (Revised Schedule for Written Presentations) on February 3, 2005 (ACN ML 050410382). This order confirmed the proposed new schedule in the joint motion and that the Intervenor would waive their right to litigate particular areas of concern for each of the three proposed remaining mining sites (liquid water disposal/surface water protection; financial and technical qualifications/ environmental justice) as well as waive their right to litigate air emission controls for the Unit 1 and Crownpoint sites. The Order also confirmed the agreement Intervenor made to forego presenting any new evidence with respect to the adequacy of EIS (cumulative impacts, mitigation actions) and to file a pleading "incorporating by reference their arguments raised with respect to the adequacy of the EIS for Section 8, thereby preserving those arguments with respect to Section 17, Unit 1, and Crownpoint." Order (February 3, 2005).

HRI and the NRC Staff now argue that such arguments are barred by the law of the case doctrine. However, they agreed that Intervenor would file such a pleading by agreeing to the joint motion which resulted in the February 3, 2005 scheduling order. Any

concern about the appropriateness of these arguments should have been raised at that time. The order explicitly permits Intervenor to make EIS adequacy arguments for the proposed remaining three mine sites. To bar such arguments would be to act in violation of the joint motion and the resulting Presiding Officer's Scheduling Order.

D. To Bar Intervenor's Arguments would Not Allow for Sufficient, Full and Fair Review of FEIS Adequacy.

As addressed above, LBP 99-30 and CLI 01-04 examined the adequacy of the EIS for Section 8, but did not determine the adequacy of the EIS in regards to the remaining sites. The FEIS itself is inconsistent in its analysis of the four proposed mining sites. In order to decide the sufficiency of the FEIS, the analysis in the FEIS for the additional three sites must be examined.

1. Insufficiencies of the FEIS, particularly for Section 17, Unit 1 and Crownpoint, must be specifically examined.

The individual proposed sites are inconsistently examined in the FEIS.

Throughout the document the analysis changes in terms of examining each site separately or generalizing about the sites. The physical characteristics of each site vary and, the FEIS does not consistently take this into account. The environmental consequences of mining each site vary, yet the FEIS cumulative impacts analysis does not take this into account. To comprehensively evaluate the FEIS adequacy, the adequacy of the analysis on the three remaining proposed mining sites must be examined.

Intervenor has argued previously, most recently in Intervenor's Written Presentation with Respect to NEPA Issues for Church Rock Section 17, Unit 1 and Crownpoint (June 27, 2005), that the FEIS incorrectly analyzes the health physics and

radiological air impacts of the CUP, particularly in misrepresenting or omitting data for specific proposed sites.

For example, FEIS Section 4.6.1.1 analyzes the health physics and radiological impacts for Crownpoint and Unit 1; however, section 4.6.1.2, which analyzes health physics and radiological air impacts for Church Rock, repeatedly and incorrectly applies the Crownpoint and Unit 1 data in section 4.6.1.1 to Church Rock. FEIS at 4-82 – 4-86. Additionally, the FEIS wrongly lumps Church Rock and Crownpoint together in characterizing general background radon levels as averaging 150 mrem/year for “this part of New Mexico.” FEIS at 4-72. Existing radon levels at Church Rock are ten times those reported at Crownpoint, as reported in the DEIS. This was not accurately reported in the FEIS.

The FEIS also ignores the history of the area, particularly that Church Rock was heavily mined, where Crownpoint had less past mining activity. The distinction between existing levels of radiation at Church Rock and Crownpoint is necessary for both the decision maker and the public in evaluating the safety of the CUP. This was not adequately addressed in the FEIS.

The FEIS's treatment of existing gamma radiation is similarly deficient. Although the DEIS acknowledges that elevated gamma radiation levels were recorded “near the old Church Rock mine shaft and ore storage areas, and represent pre-existing site contamination from other mining activity” (DEIS, 3-20), the FEIS contains no discussion of gamma radiation.³ The FEIS includes only the vague and uninformative statement that “[r]adiological effects during project construction would include natural

³ HRI comments, in their most recent brief, that gamma radiation does differ among the proposed sites, “It is also likely that the gamma radiation associated with Section 9 is different compared to the Crownpoint

background plus remnant radiation stemming from previous mining and milling activities near the Church Rock site." FEIS, 4-73.

The cumulative impacts section of the FEIS perpetuates misinformation provided earlier in the FEIS. The cumulative impacts section states that the total population dose from "background sources" for the population of 76,500 people within a 50 mile radius of the Project is about 17,000 mrem/yr. FEIS, 4-124. This is equivalent to about 222 mrem/yr. per individual. The FEIS's cumulative impacts section provides no information about the much higher non-background levels in the Church Rock area.

To comprehensively evaluate the FEIS adequacy, the adequacy of the analysis for the three remaining proposed mining sites must be specifically examined. LBP-99-30 should not act to bar further decisions on the adequacy of the FEIS analysis for Church Rock Section 17, Unit 1 and Crownpoint.

2. The FEIS should be analyzed as it is written.

In certain parts of its analysis the FEIS is broken down into specific sections for Crownpoint, Unit 1 and Church Rock. *See* sections of Affected Environment, FEIS 3-1. Adjudications as to the adequacy of this FEIS analysis should be made in this way –the remaining three sections should be examined in the same way that Section 8 was examined. To analyze and adjudicate the adequacy of all FEIS analysis for all proposed mining sites together would be to overlook individual examinations of issues present in parts of the FEIS.

**E. Changed Circumstances Require that the Law of the Case Doctrine
Not be Applied Here.**

site, but such variation is common among prospective ISL sites." HRI's Response in Opposition to Intervenor's Written Presentation Regarding Environmental Impact Statement Adequacy, 28. Such difference must be more closely examined.

As the Presiding Officer noted in LBP 05-17, an adjudicative body should, in a proper exercise of discretion, refrain from applying law of the case doctrine where “changed circumstances or public interest factors dictate”. LBP 05-17 citing Private Fuel Storage, CLI 04-27, 61 NRC 145, 154 (2004). The Presiding Officer continues: “Changed circumstances include a situation where, for example, intervening controlling authority makes reconsideration appropriate...” The passage of the Diné Natural Resources Protection Act (“DNRPA”) in 2005 by the Navajo Nation Council is such a changed circumstance. Relating to Resources and Diné Fundamental Law; Enacting the Diné Natural Resources Protection Act of 2005; Amending Title 18 of the Navajo Nation Code, CAP-18-05, § 1303 (April 29, 2005). Specifically, the DNRPA constitutes intervening controlling authority which bears on this matter.

Unlike an executive order or a local referendum (which were discussed in the FEIS), the DNRPA bans all uranium mining and processing, including ISL mining, within Navajo Indian Country. DNRPA at § 1303 (“Prohibition of Uranium Mining. No person shall engage in uranium mining and uranium processing on any sites within Navajo Indian Country.”). Navajo Indian Country is defined within the statute as “all lands within the territorial jurisdiction of the Navajo Nation as defined in 7 N.N.C. § 254 and 10 U.S.C. § 1151.” CAP-18-05, § 1302(a). This includes trust lands, allotted lands, and dependent Indian communities.

Section 17, Unit 1 and most of Crownpoint fall within the definition of Navajo Indian Country. The FEIS analysis of the Navajo Nation’s legal position on uranium mining is now incorrect, as uranium mining is now banned by the DNRPA within Navajo Indian Country. This issue now requires additional analysis which requires FEIS

supplementation. The FEIS cost/benefit analysis would also change, as if the mining is barred within the Navajo Nation costs/benefits would differ from those originally analyzed. As uranium mining and processing is now banned by the Navajo Nation within Indian country, no tax or other benefits would be felt by the Navajo Nation by the project. If any number of the mine sites are now banned from operation by the DNRPA, the entire FEIS analysis would differ from the analysis done for the four sites.

The law of the case doctrine should not bar arguments regarding the adequacy of the FEIS for Church Rock Section 17, Unit 1 and Crownpoint, as the DNRPA constitutes a changed circumstance and new controlling authority.

F. The Presiding Officer should exercise his Discretion to examine FEIS Adequacy for Section 17, Unit 1 and Crownpoint.

Finally, even if the law of the case doctrine does apply, the Presiding Officer should exercise his discretion to examine Intervenor's evidence and the FEIS adequacy for Section 17, Unit 1 and Crownpoint, and make a determination as to the validity of HRI's license for those sites in order to avoid a manifest injustice.

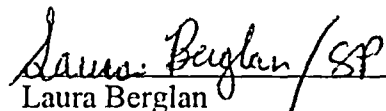
IV. CONCLUSION

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

Dated: August 19, 2005



Sarah Piltch
Eric D. Jantz
Douglas Meiklejohn
New Mexico Environmental Law Center
1405 Luisa Street, Suite 5



Laura Berglan
DNA-People's Legal Services, Inc.
PO Box 765
Tuba City, Arizona 86045
(928) 283-3211

Santa Fe, New Mexico 87505
(505) 989-9022

Attorneys for ENDAUM and SRIC

Attorneys for Grace Sam and
Marilyn Morris

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

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

| | | |
|-------------------------------|---|------------------------|
| In the Matter of |) | |
| |) | Docket No. 40-8968-ML |
| HYDRO RESOURCES, INC. |) | ASLBP No. 95-706-01-ML |
| (P.O. Box 777 |) | |
| Crownpoint, New Mexico 87313) |) | |

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' Written Presentation with Respect to NEPA Issues For Church Rock Section 17, Unit 1 and Crownpoint" in the above-captioned proceeding have been served on the following by U.S. Mail, first class, and via email to those persons indicated by an asterisk this 19th day of August, 2005:

Administrative Judge, E. Roy Hawken*
Presiding Officer
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Two White Flint North
11545 Rockville Pike
Rockville, MD 20852
Email: erh@nrc.gov

E-mail: rbrett@usgs.gov

Office of the Secretary*
Attn: Rulemakings and Adjudications Staff
U.S. Nuclear Regulatory Commission
One White Flint North
11545 Rockville Pike
Rockville, MD 20852
E-mail: hearingdocket@nrc.gov

Administrative Judge*
Richard F. Cole, Special Assistant
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Two White Flint North
11545 Rockville Pike
Rockville, MD 20852
Email: rfcl@nrc.gov

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

Administrative Judge, Robin Brett *
2314 44th Street, N.W.
Washington, D.C. 20007
Fax: (703) 648-4227

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

Susan C. Stevenson-Popp*
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Two White Flint North
11545 Rockville Pike
Rockville, MD 20852
E-mail: scs2@nrc.gov

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

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

Anthony J. Thompson, Esq.*
Christopher Pugsley, Esq.*
Thompson & Simmons, PLLC
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

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

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

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

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

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

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, Suite 5
Flagstaff, AZ 86001
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

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


Allison Dellinger
New Mexico Environmental Law Center



August 19, 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

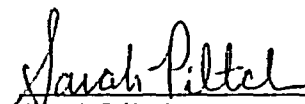
Re: In the Matter of: Hydro Resources, Inc.; Docket No: 40-8968-ML

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' Written Presentation With Respect to NEPA Issues For Church Rock Section 17, Unit 1 and Crownpoint". 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 cover to 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,



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

Enclosures

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