LBP-05-26

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

DOCKETED 09/16/05

Before Administrative Judges:

SERVED 09/16/05

E. Roy Hawkens, Presiding Officer
Dr. Richard F. Cole, Special Assistant
Dr. Robin Brett, Special Assistant

In the Matter of	Docket No. 40-8968-ML
HYDRO RESOURCES, INC. P.O. Box 777 Crownpoint, New Mexico 87313	ASLBP No. 95-706-01-ML September 16, 2005

PARTIAL INITIAL DECISION
(Phase II Cultural Resources Challenges To In Situ Leach Uranium Mining License)

I. INTRODUCTION

In November 1994, the NRC Staff issued a "Notice of Opportunity for Hearing" concerning an application by Hydro Resources, Inc. (HRI) to construct and operate an in situ leach (ISL) uranium mining project in New Mexico. In response, timely requests for hearing were filed by the Eastern Navajo Diné Against Uranium Mining, the Southwest Research and Information Center, Grace Sam, and Marilyn Morris [hereinafter referred to collectively as the Intervenors], asserting that HRI's license application had numerous defects and should not be granted. The then-Presiding Officer held the hearing requests in abeyance until the Staff completed its review of HRI's license application.

On January 5, 1998, the Staff granted HRI a 10 C.F.R. Part 40 materials license (SUA-1508) to perform ISL mining at the following four sites in McKinley County, New Mexico: Section 8 and Section 17 in Church Rock, and Crownpoint and Unit 1 in Crownpoint. Shortly thereafter, in May 1998, the then-Presiding Officer granted the Intervenors' hearing requests, and this protracted litigation ensued.

Although HRI has held its license for nearly eight years, it has not yet started mining operations at any of the four sites due, in part, to profitability concerns related to the fluctuating

price of uranium. This litigation nevertheless has gone forward, focusing first – in what was characterized as Phase I – on issues specific to mining operations at Section 8, because HRI represented that this was the first section it would mine.

In February 2004, the then-Presiding Officer completed adjudicating the Intervenors' Phase I challenges to HRI's license (LBP-04-03, 59 NRC 84 (2004)). The Commission, on appeal, sustained the validity of HRI's license insofar as it relates to prospective mining operations at Section 8 (CLI-04-33, 60 NRC 581 (2004)).

This litigation then entered Phase II, which involves the Intervenors' challenges to HRI's license insofar as it authorizes mining at the other three sites. For efficiency, the Intervenors' challenges were grouped into the following four categories: (1) groundwater protection and restoration, and surety estimates; (2) cultural resources; (3) air emission controls; and (4) adequacy of environmental impact statement.

The instant decision resolves the issues embodied in the second category of Phase II challenges – i.e., cultural resources.[1] The Intervenors claim that HRI's license to perform ISL uranium mining at Section 17, Unit 1, and Crownpoint is invalid because the NRC Staff allegedly failed, in derogation of the National Historic Preservation Act and the National Environmental Policy Act, to consider the impact that ISL mining will have on cultural resources at the mining sites. For the reasons set forth below, I find – with the concurrence of Dr. Richard Cole and Dr. Robin Brett, who have been appointed as Special Assistants – that HRI has demonstrated that the Intervenors' challenges relating to cultural resources do not provide a basis for invalidating HRI's license.

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[1] On July 20, 2005, this Board issued a decision on the first category of Phase II challenges (groundwater protection and restoration, and surety estimates), concluding that the Intervenors' challenges did not provide a basis for invalidating HRI's license to perform ISL uranium mining at Section 17, Crownpoint, and Unit 1 (LBP-05-17, 61 NRC __ (2005) (petition for review filed Aug. 9, 2005)).

II. BACKGROUND

The Intervenors contend that HRI's license to perform ISL uranium mining at Section 17, Unit 1, and Crownpoint is invalid. First, they argue that the license violates the National Historic Preservation Act, because the NRC Staff's phased compliance approach toward cultural resources review is impermissible and, in any event, the cultural resources reviews that the Staff has conducted to date are inadequate. Second, they argue that the license violates the National Environmental Policy Act, because the NRC Staff failed adequately to address cultural resources issues in the Final Environmental Impact Statement. To compass fully the issues raised by the Intervenors, as well as this Board's resolution of those issues, it is helpful to be acquainted with (1) the statutory and regulatory frameworks that underlie the Intervenors' arguments, (2) HRI's mining sites, and the cultural resources reviews that have been conducted at those sites, and (3) the relevant administrative proceedings in this case. These topics are addressed below.

A. THE RELEVANT STATUTORY AND REGULATORY FRAMEWORKS

1. The National Historical Preservation Act And Its Implementing Regulations

In the National Historical Preservation Act (NHPA), Congress declared that preserving this Nation's historical heritage "is in the public interest so that its vital legacy of cultural, educational, aesthetic, inspirational, economic, and energy benefits will be maintained and enriched for future generations of Americans" (16 U.S.C. § 470(b)(4)). To effect this goal, Congress enacted NHPA section 106 (id. § 470f), which, as relevant here, requires a federal agency to consider the impact its granting of a license will have on property that is listed in, or eligible for being listed in, the National Register of Historic Places (ibid.), which is a registry for sites, structures, and objects that have historic significance (id. § 470a(a)(1)(A)). Section 106 states in relevant part (id. § 470f):

> [T]he head of any Federal department or independent agency having authority to license any undertaking shall, . . . prior to the issuance of any license, . . . take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register. . . .

In the NHPA, Congress created the Advisory Council on Historic Preservation (ACHP) and charged it with enforcing section 106 and promulgating implementing regulations (16 U.S.C. § 470s). These implementing regulations are in 36 C.F.R. Part 800.[2] They establish a procedure that requires an agency to: (1) consult with the State Historic Preservation Officer to identify historic properties within the licensed area (36 C.F.R. § 800.4);[3] (2) consult with the State Historic Preservation Officer to assess the potential adverse effects on historic properties of granting the license (id. § 800.5); and (3) create a plan to mitigate any potential adverse effect (ibid.). If the agency determines either that there are no historic properties within the licensed area or that such properties will not be affected by licensed activities, and if there is no timely objection to that determination, the license may be issued (id. §§ 800.4(d), 800.5(d)).

The regulations further provide that the section 106 procedures "may be implemented by the Agency Official in a flexible manner reflecting differing program requirements, as long as the purposes of section 106 of the Act and these regulations are met" (36 C.F.R. § 800.3(b)). To this end, the regulations permit "phased compliance" with section 106 that is "consistent with

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[2] Although these regulations were amended effective January 11, 2001 (see 65 Fed. Reg. 77,698 (2000)), we deal here with the regulations in effect in January 1998 when the NRC Staff granted HRI's license. See infra Part III.A.1.

[3] The State Historic Preservation Officer "coordinates State participation in the implementation of the [NHPA] and is a key participant in the section 106 process" (36 C.F.R. § 800.1(c)(1)(ii)). An Indian tribe may participate in the process "in lieu of the State Historic Preservation Officer with respect to undertakings affecting its lands" (id. § 800.1(c)(2)(iii)). As will be discussed infra, in the instant case, the Staff has completed the NHPA review for Sections 8 and 17 at Church Rock, as well as for a section of property located at the Unit 1 site (Section 12) and a section of property located at the Crownpoint site (Section 24). The record indicates that Sections 8, 12, and 24 are state property over which the New Mexico State Historic Preservation Office exercises NHPA authority, and Section 17 is tribal land over which the Navajo Nation Historic Preservation Department exercises NHPA authority. See infra Part II.B.

the . . . schedule for the undertaking" (id. § 800.3©)). As the regulations state (ibid.) (emphasis added):

> *The Council does not interpret [the NHPA] . . . to prohibit phased compliance at different stages in planning.* The Agency Official should ensure that the section 106 process is initiated early in the planning stages of the undertaking, when the widest feasible range of alternatives is open for consideration. *The Agency Official should establish a schedule for completing the section 106 process that is consistent with the planning and approval schedule for the undertaking.*

2. The National Environmental Policy Act

The National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321 et seq., requires that a federal agency "take a 'hard look' at the environmental consequences" of a major federal action before taking that action (Baltimore Gas & Elec. Co. v. Natural Res. Def. Council, Inc., 462 U.S. 87, 97 (1983)). To demonstrate compliance with this standard, an agency generally prepares a "detailed statement" (42 U.S.C. § 4332(2)©)) – i.e., an Environmental Impact Statement – which establishes that the agency has made a reasonable and good faith effort to consider the values NEPA seeks to protect. As relevant here, the agency's assessment of environmental impacts requires an assessment of historic and cultural resources. See 40 C.F.R. § 1502.16(g); cf. 10 C.F.R. Part 51.

B. HRI'S MINING SITES, AND THE STAFF'S INQUIRY INTO THE IMPACT OF ISL MINING ON CULTURAL RESOURCES AT THOSE SITES

HRI's license, SUA-1508 (Intervenors' Exhibit A), authorizes it to perform ISL mining at four proximately clustered sites in McKinley County, New Mexico: Sections 8 and 17 near the town of Church Rock, and Crownpoint and Unit 1 near the town of Crownpoint.[4]

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[4] HRI's ISL uranium mining process, briefly explained, will involve two principal steps. First, HRI will inject a leach solution called "lixiviant" – which is a mixture of groundwater charged with oxygen and bicarbonate – through a well into a targeted zone containing uranium oxide. The uranium oxide, which occurs as small mineral grains within a sandstone host rock, dissolves when it comes into contact with the lixiviant solution. HRI will also operate production wells located in a pattern around each injection well. The production wells create a reduced pressure in the mined region by withdrawing slightly more water from the ground than is inject-

(continued...)

Sections 8 and 17 are adjacent properties about six miles north of the town of Church Rock, and they consist primarily of undeveloped range land (FEIS at 2-25 to 2-26, 3-55). Section 8 covers 160 acres, of which about 144 acres may be disturbed during mining construction and operation, and Section 17 covers 200 acres, of which about 180 acres may be disturbed (id. at 2-26, 3-55).

Crownpoint and Unit 1 are, respectively, on the edge of the town of Crownpoint and about two miles west thereof. The Crownpoint site covers 912 acres, of which about 638 acres may be disturbed during mining construction and operation (FEIS at 2-28). The Unit 1 site – which consists primarily of undeveloped range land – covers 1,920 acres, of which about 1,536 acres may be disturbed during mining construction and operation (id. at 2-26, 3-54).

HRI plans to develop and operate these four mining sites in phases over a twenty-year period. In the mid-1990s, when it was applying for its license, HRI envisioned that during the first phase – i.e., the first five-year period – it would (1) develop and operate mines at Sections 8 and 17 at Church Rock, (2) build a support facility on a portion of the Unit 1 site called Section 12, and (3) build a processing facility on a portion of the Crownpoint site called Section 24. See

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[4](...continued)
ed, thus containing the horizontal spread of the pregnant lixiviant (i.e., the lixiviant that now contains dissolved uranium oxide), and causing it to flow toward the production wells where it is pumped to the surface. See Final Environmental Impact Statement To Construct and Operate the Crownpoint Uranium Solution Mining Project, Crownpoint, New Mexico, NUREG-1508 at 2-2 to 2-5 (Feb. 1997) [hereinafter FEIS].

The second step of the ISL mining process occurs after the pregnant lixiviant is pumped to the surface. HRI will pipe the pregnant lixiviant through columns of ion exchange resin, and the uranium oxide will attach to the resin. Upon leaving the ion exchanger, the now-barren lixiviant will be re-charged as necessary with oxygen and bicarbonate, and it will then be re-injected into the ore zone to repeat the leaching cycle. When the ion exchange capacity of a column of resin is depleted, that column is taken off-line and the uranium oxide is chemically stripped from the resin. The resulting uranium oxide slurry is filtered and dried to produce the finished product – uranium oxide concentrate, or yellowcake – which is packaged and stored for final shipment. See FEIS at 2-5 to 2-12.

FEIS at 2-26 to 2-27; Attachment C to HRI Exhibit A at ii; Intervenors' Exhibit K at 1; Attachment S to NRC Staff Exhibit 1.

The Staff's NHPA inquiry formally began on October 2, 1996, when it sent a letter to the New Mexico State Historic Preservation Office (NMSHPO) requesting assistance in determining whether the proposed HRI ISL mining project "would affect properties eligible for, or listed on the National Register of Historic Places, pursuant to Section 106 of the [NHPA]" (Intervenors' Exhibit K at 1; see also NRC Staff Exhibit 1, at 3). The Staff explained that the mining project "includes a large area of land and phased development over a 20-year period" (Intervenors' Exhibit K at 1).

In light of HRI's plan to develop its mining sites in phases over a long period of time, the NMSHPO had "expressed a preference for [conducting the NHPA review of] this project incrementally" (Intervenors' Exhibit K at 1; see also NRC Staff Exhibit 4, at 7). The Staff therefore stated that the initial NHPA review would focus on the first five years of HRI's mining operations, which would consist of the mining sites at Sections 8 and 17, and the support and processing sites at, respectively, Section 12 at the Unit 1 site, and Section 24 at the Crownpoint site (Intervenors' Exhibit K at 1-2).

The Staff informed the NMSHPO that HRI had prepared cultural resource management plans that sought to avoid disturbing any cultural resources – a goal that is achievable in ISL mining, because the placement of ISL wells is "flexible, and with some distance limitations, slant drilling practices can provide access to subsurface areas that are beneath sensitive surface features" (Attachment D to NRC Staff Exhibit 1, at 2; see also Attachment G to NRC Staff Exhibit 1, at 1, 8-14; Attachment H to NRC Staff Exhibit 1, at 1, 6-11; HRI Exhibit A at 4). Additionally, HRI hired a cultural resource consultant who sought preliminary information about tradi-

tional cultural properties[5] from the Navajo, the Hopi, the Zuni, the Laguna, the Acoma, and the All Indian Pueblo Council, and HRI averred that a local ethnographer would thoroughly investigate this information (Intervenors' Exhibit K at 1-2). Finally, the NRC Staff advised the NMSHPO that HRI would notify these local tribal groups about the NHPA review process and give them the opportunity to participate (id. at 3).

On October 2, 1996, the NRC Staff sent letters about HRI's proposed ISL mining to: (1) the Navajo Nation Historic Preservation Department; (2) the Navajo Nation's Crownpoint Chapter; (3) the Navajo Nation's Church Rock Chapter; (4) the Pueblo of Laguna; (5) the All Pueblo Indian Council; (6) the Pueblo of Acoma; (7) the Hopi Cultural Preservation Office; and (8) the Pueblo of Zuni Heritage and Historic Preservation Office. See Appendix C to FEIS. This letter included a copy of the October 2, 1996 consultation letter that the Staff sent to the NMSHPO, and it provided the tribal groups with a name, address, and telephone number of an NRC official for purposes of discussing the NHPA review (see ibid.).

Shortly thereafter, the Navajo Nation – through the Navajo Nation Historic Preservation Department (NNHPD) – assumed the consulting functions of a State Historic Preservation Office under the NHPA with respect to Section 17, which consists of tribal lands. See supra note 3; NRC Staff Exhibit 2; Attachment N to NRC Staff Exhibit 1, at 1. On October 31, 1996, the NNHPD stated its agreement with a phased NHPA review process that correlated to HRI's phased development plans (Appendix C to FEIS; see also NRC Staff Exhibit 4, at 7).

The Staff continued its consultations with the NNHPD and other tribal groups, apprising them of the status of the NHPA review process, HRI's cultural resource management plans, the surveys to be conducted by the archaeological research firm licensed by New Mexico and the

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[5] A "traditional cultural property" is property that is eligible for inclusion in the National Register of Historic Places based on its "association with cultural practices or beliefs of a living community that (a) are rooted in that community's history, and (b) are important in maintaining the continuing cultural identity of the community" (FEIS at 3-67).

Navajo Nation, HRI's procedures for identifying traditional cultural properties, and HRI's policy of "total avoidance" of cultural resources (Appendix C to FEIS, Letter from Joseph J. Holonich, Chief, Uranium Recovery Branch, to Dr. Alan S. Downer, NNHPD (Jan. 31, 1997)). The Staff requested "any direction or advice about advancing the [NHPA] review process and comments about the intended or ongoing survey work" (id. at 3). See also, e.g., Attachments L and O to NRC Staff Exhibit 1.

In February 1997, the NRC Staff published the FEIS, which contained a general discussion of cultural resources in the region (FEIS at 3-65 to 3-68), as well as a tailored examination of historical activities and cultural resources at HRI's proposed mining sites for the past 12,000 years (id. at 3-68 to 3-73). Additionally, the FEIS described the ongoing cultural resource surveys at the mining sites (id. at 3-73 to 3-77) and HRI's "avoidance policy" that would prevent the disturbance of cultural resources (id. at 4-110). The FEIS concluded that "the proposed project has minimal potential to result in significant impacts on cultural resources" (id. at 4-112).

In April 1997, HRI sent the NRC Staff a cultural resources report authored by the Museum of New Mexico's Office of Archaeological Studies [hereinafter the MNM Report] for Sections 8, 17, and 12. The MNM Report noted the presence of archaeological sites at Sections 8 and 12 that were eligible for inclusion in the National Register of Historic Places, but found no traditional cultural property at any of the sites. See Attachment K to NRC Staff Exhibit 1, at 17-22, 122-23. On June 19, 1997, the NRC Staff forwarded copies of the MNM Report to the NMSHPO, the NNHPD, and several tribal groups. See Attachment L to NRC Staff Exhibit 1.

On May 20, 1998, the NRC Staff sent a consultation letter to the NMSHPO for purposes of making a final NHPA determination regarding the effect of HRI's ISL mining operations on Sections 8 and 12 (Intervenors' Exhibit I at 1). The Staff informed the NMSHPO that it agreed with the MNM Report's conclusion that the archaeological sites identified therein were eligible

for inclusion in the National Register of Historic Places (ibid.). The Staff further advised that it proposed to determine that HRI's undertakings on Sections 8 and 12 would have no effect on any historical site, because: (1) HRI agreed to erect fences around the sites to preclude intrusion during any ground-disturbing activity, and the fences would remain in place until after the reclamation process was concluded following completion of mining (Intervenors' Exhibit I at 2); (2) all ground-disturbing activities within the vicinity of the archaeological sites identified in the MNM Report would be monitored by an archaeologist, who would have authority to stop ground-disturbing activity if previously undetected subsurface cultural resources were identified (ibid.); and (3) "adequate consultation with local traditional practitioners has occurred and no traditional cultural properties have been identified in or near Sections 8, 17, and 12" (ibid.). The Staff sought the NMSHPO's concurrence on the proposed "no effect" finding, stating that "[i]f your office so concurs, or does not otherwise submit any objections to the NRC Staff's proposed determination, then pursuant to 36 C.F.R. § 800.5(b), the Staff would consider the NHPA process to be concluded with respect to Sections 8 and 12" (Intervenors' Exhibit I at 2-3). The Staff sent a copy of this letter to the NNHPD and numerous tribal groups (Attachments N and O to NRC Staff Exhibit 1).

On May 20, 1998, the NRC Staff also sent a consultation letter to the NNHPD for purposes of making a final NHPA determination regarding the effect of HRI's ISL mining operations on Section 17 (Attachment N to NRC Staff Exhibit 1, at 1). The Staff informed the NNHPD that it agreed with the MNM Report's conclusion that "no historic properties (i.e., cultural properties as defined in the Navajo Nation Cultural Resources Protection Act) eligible for listing in the National Register of Historic Places or in the Navajo Nation Register of Cultural Properties and Cultural Landmarks are located within Section 17" (ibid.). Having concluded that Section 17 contained no historic properties, the Staff advised the NNHPD that it considered the

NHPA review process to be complete for that site, and it sought the NNHPD's approval for HRI to proceed with its operations (id. at 1-2).

The NMSHPO and the NNHPD concurred with the Staff's NHPA determinations for, respectively, Sections 8 and 12, and Section 17. See Attachments P and Q to NRC Staff Exhibit 1.

Finally, on May 13, 1999, the NRC Staff sent another consultation letter to the NMSHPO, this time for purposes of rendering a final NHPA determination regarding the effect of HRI's mining operations on Section 24 (Attachment S to NRC Staff Exhibit 1, at 1). Attached to the consultation letter was a letter dated April 29, 1998 by Dr. Eric Blinman (the primary author of the MNM Report), which concluded that (Attachment to Attachment S to NRC Staff Exhibit 1, at 2): (1) "there are no current traditional uses . . . by the Navajo community" in the relevant area of Section 24, and, accordingly, HRI's first phase activities "should not pose any constraint on current cultural practice"; and (2) "there are no cultural resource issues associated with first phase developments at [Section 24] at the HRI Crownpoint facility." Based on Dr. Blinman's letter, the NRC Staff found that HRI's activities at Section 24 "would have no effect" on historic properties, and the Staff sought the NMSHPO's concurrence (Attachment S to NRC Staff Exhibit 1, at 2). The NRC Staff also sent a copy of this letter and its attachment to the NNHPD. See Attachment S to NRC Staff Exhibit 1.

The NMSHPO concurred with the Staff's "no effect" finding for Section 24. See Attachment U to NRC Staff Exhibit 1, at 2.

On July 8, 1999, the NRC Staff advised HRI that the NHPA review was concluded with respect to Sections 8 and 17 at Church Rock, Section 12 at Unit 1, and Section 24 at Crownpoint (see 36 C.F.R. §§ 800.4(d), 800.5(d)), and that HRI's mining operations could proceed "to the extent authorized" by HRI's license (Attachment W to NRC Staff Exhibit 1, at 1).

HRI's license contains a condition, License Condition (LC) 9.12, that (1) prohibits HRI from performing any construction or development activities at any site until the NRC Staff has completed an appropriate NHPA review for that site, and (2) ensures the protection of any newly discovered cultural artifacts. LC 9.12 states (Intervenors' Exhibit A at 4):

> Before engaging in any construction activity not previously assessed by the NRC, the licensee shall conduct a cultural resource inventory. All disturbances associated with the proposed development will be completed in compliance with the National Historic Preservation Act of 1966, as amended, and its implementing regulations (36 C.F.R. Part 800), and the Archaeological Resources Protection Act of 1979, as amended, and its implementing regulations (43 C.F.R. Part 7).
>
> In order to ensure that no unapproved disturbance of cultural resources occurs, any work resulting in the discovery of previously unknown cultural artifacts shall cease. The artifacts shall be inventoried and evaluated in accordance with 36 C.F.R. Part 800, and no disturbance shall occur until the licensee has received written authorization to proceed from the State and Navajo Nation Historic Preservation Offices.

C. THE ADMINISTRATIVE PROCEEDINGS IN THIS CASE CONCERNING CULTURAL RESOURCES

1. Phase I[6]

Although HRI has neither begun mining operations nor announced a schedule for commencing such operations, it declared during the course of this litigation that it would eventually begin mining at Section 8. Accordingly, in an unpublished order issued in September 1998, the then-Presiding Officer granted HRI's request to bifurcate this litigation, focusing initially in Phase I on the Intervenors' challenges relating to Section 8 and the overall validity of the license, leaving those issues relating to mining at the other three sites (Section 17, Unit 1, and Crownpoint) open and subject to later litigation in Phase II. See CLI-01-04, 53 NRC 31, 40

[6] This case is being litigated pursuant to the NRC's since-superseded procedural rules in 10 C.F.R. Part 2, Subpart L, which were amended in 2004. See 69 Fed. Reg. 2,182 (Jan. 14, 2004). Because the new rules apply only to proceedings noticed on or after February 13, 2004, they do not apply here.

(2001) ("[i]t is sensible to decide the most time-sensitive issues first, as the Presiding Officer did here when he examined Section 8-related issues initially").

During Phase I, the Intervenors raised numerous challenges to the validity of HRI's license insofar as it authorizes mining operations at Section 8, and many of these challenges have been addressed by the Commission.[7] For present purposes, however, the only challenges that need be recounted are those in which the then-Presiding Officer and the Commission addressed issues implicating cultural resources.

From the outset, the Intervenors repeatedly have asserted that the NRC Staff's cultural resources review violated the NHPA and NEPA. For example, in January 1999, the Intervenors moved to stay the effectiveness of HRI's license, arguing that, because the NRC Staff issued the license before completing the NHPA review for all the prospective mining sites, HRI's mining-related activities posed a serious risk of irreparable harm to archaeological sites and traditional cultural properties. See LBP-98-05, 47 NRC 119, 120-21 (1998). The then-Presiding Officer denied the motion. He concluded that the Intervenors failed to satisfy the standards for obtaining a stay, because they had "not demonstrated a legal or practical bar" to a phased compliance approach, nor had they shown a "threat of irreparable injury" arising from this approach (id. at 125, 126). The Commission affirmed. See CLI-98-08, 47 NRC 314 (1998).

Thereafter, the Intervenors – having failed in their efforts to stay the effectiveness of HRI's license – sought to have the license declared invalid on the grounds that it violated the NHPA and NEPA. See LBP-99-09, 49 NRC 136, 137 (1999). First, they argued that HRI's

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[7] See, e.g., CLI-04-14, 59 NRC 250 (2004) (financial assurance plan); CLI-01-04, 53 NRC 31 (2001) (NEPA and environmental justice issues); CLI-00-12, 52 NRC 1 (2000) (groundwater, radioactive air emissions, technical qualifications); CLI-00-08, 51 NRC 227 (2000) (financial qualifications); CLI-99-22, 50 NRC 3 (1999) (NHPA and performance-based licensing issues).

license violated the NHPA because (1) the phased NHPA review approach used by the Staff was unlawful, and (2) the Staff's NHPA review was not sufficiently thorough in any event (ibid.). Second, they argued that the license violated NEPA because the FEIS failed adequately to address impacts on cultural resources (ibid.). The then-Presiding Officer rejected these arguments. First, he ruled that HRI's phased approach to compliance with the NHPA was lawful (49 NRC at 142) (citing 36 C.F.R. § 800.3©)), and, moreover, he found that the Staff's cultural resources review with regard to HRI's prospective mining operations at Section 8 and processing operations at Section 24 satisfied NHPA requirements (49 NRC at 140-43). The Presiding Officer likewise rejected the Intervenors' contention that the FEIS inadequately addressed cultural resource issues (id. at 143-44), ruling that this claim was "without basis" (id. at 143). The Commission affirmed. See CLI-99-22, 50 NRC 3 (1999).

In February 2004, the then-Presiding Officer completed adjudicating the Phase I issues (LBP-04-03, 59 NRC 84 (2004)), and the Commission, on appeal, sustained the validity of HRI's license insofar as it involves prospective mining operations at Section 8 (CLI-04-33, 60 NRC 581 (2004)), thus ending Phase I of this case.

2. Phase II

In Phase II of this case, the Intervenors challenge HRI's license insofar as it authorizes mining at Section 17, Unit 1, and Crownpoint. At this stage of their Phase II challenge, they argue that the license is invalid because it was issued in derogation of the dictates of the NHPA and NEPA regarding the protection of cultural resources. More specifically, the Intervenors contend that: (1) the NRC Staff's phased NHPA review approach violates the NHPA and, in any event, the Staff's NHPA review was inadequate; and (2) the FEIS fails to address cultural resources adequately, in violation of NEPA. See Intervenors' Written Presentation in Opposi-

tion to [HRI's] Application for a Materials License with Respect to Cultural Resources Issues (Apr. 28, 2005) [hereinafter Intervenors' Written Presentation].

HRI and the NRC Staff responded to these challenges with written presentations arguing that HRI's license complies with the cultural resources review requirements in the NHPA and NEPA. See HRI's Response in Opposition to Intervenors' Written Presentation Regarding Historic and Cultural Resource Preservation (June 17, 2005) [hereinafter HRI's Response]; NRC Staff's Response to Intervenors' Presentation on Cultural Resource Issues (June 24, 2005) [hereinafter NRC Staff's Response].

For the reasons set forth below, I conclude that HRI has met its burden of demonstrating that its license complies with the requirements of the NHPA and NEPA regarding cultural resources.

III. ANALYSIS

A. THE INTERVENORS' ASSERTION THAT NRC STAFF ISSUED HRI's LICENSE IN VIOLATION OF THE NHPA LACKS MERIT

1. The Intervenors' Attack On The Staff's Phased Compliance Approach To The NHPA Is Barred By Law Of The Case Doctrine

The Intervenors contend that the NRC Staff violated the NHPA in issuing HRI's license without first completing the section 106 cultural resources review for the entire project. A phased compliance approach to section 106 in this case, argue the Intervenors, is not permitted by the NHPA regulations. See Intervenors' Written Presentation at 11-12.

The law of the case doctrine poses an insuperable obstacle to this argument. See NRC Staff's Response at 13; HRI's Response at 20. Pursuant to law of the case doctrine, 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" (Safety Light Corp. (Bloomsburg Site Decontamination), CLI-92-09, 35 NRC 156,

159-60 & n.5 (1992)). However, this doctrine – which is designed to promote repose and judicial economy – does not limit a tribunal's power (Arizona v. California, 460 U.S. 605, 618 (1983)), and it "should not be applied woodenly in a way inconsistent with substantial justice" (United States v. Miller, 822 F.2d 828, 832-33 (9th Cir. 1987)). Thus, a tribunal should – in a proper exercise of discretion – refrain from applying this doctrine where "changed circumstances or public interest factors dictate" (Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-04-27, 61 NRC 145, 154 (2004) (internal quotation marks omitted)). Changed circumstances include a situation where, for example, intervening controlling authority makes reconsideration appropriate, or substantially different evidence is adduced at a subsequent stage of the proceeding. See, e.g., In re Rainbow Magazine, Inc., 77 F.3d 278, 281 (9th Cir. 1996); DeLong Equip. Co. v. Washington Mills Electro Minerals Corp., 990 F.2d 1186, 1196-97 (11th Cir.), cert. denied, 510 U.S. 1012 (1993); United States v. Bell, 988 F.2d 247, 251 (1st Cir. 1993); Lyons v. Fisher, 888 F.2d 1071, 1075 (5th Cir. 1989), cert. denied, 495 U.S. 948 (1990).

In the instant case, there is no dispute that the former Presiding Officer and the Commission already considered the precise issue raised here by the Intervenors – i.e., whether the Staff may take a phased approach in conducting a cultural resources review pursuant to the NHPA – and the Presiding Officer and the Commission resolved this issue in the affirmative (LBP-99-09, 49 NRC at 142, aff'd, CLI-99-22, 50 NRC at 12-13). As the Commission unambiguously stated (50 NRC at 13 n.37) (quoting CLI-98-08, 47 NRC at 323-24 (footnotes omitted):

> [W]e are not convinced by [Intervenors'] argument that the NRC and HRI are prohibited from taking a "phased review" approach to complying with the NHPA . . . . The statute itself contains no such prohibition, federal case law suggests none, and the supporting regulations are ambiguous on the matter, even when read in the light most favorable to [Intervenors].

In short, the Commission squarely concluded that "phased compliance [with the NHPA] is acceptable under applicable law" (50 NRC at 13). The Intervenors are precluded by law of the case doctrine from resurrecting that issue unless they can show that changed circumstances counsel against the doctrine's application. As discussed below, the Intervenors are unable to make such a showing.

First, the Intervenors argue that the NHPA's recently revised regulations – which became effective January 11, 2001[8] – constitute a changed circumstance that counsels against applying law of the case doctrine, because the new regulations allegedly demonstrate that the phased compliance approach permitted by HRI's license is unlawful (Intervenors' Written Presentation at 12, 17). The new regulatory provision addressing phased compliance states in pertinent part: "Where alternatives under consideration consist of corridors or large land areas, or where access to properties is restricted, the agency official may use a phased process to conduct identification and evaluation efforts" (36 C.F.R. § 800.4(b)(2)). The Intervenors argue that this new regulation makes clear that where – as here – alternatives regarding large land areas are no longer under consideration because the operational sites have been selected, phased compliance is prohibited (Intervenors' Written Presentation at 12), and the entire NHPA review process must be completed prior to issuance of the license (id. at 18). Because the Staff failed, in alleged violation of the new regulations, to complete the NHPA review process for all the mining sites before issuing HRI's license, and because the review process remains incomplete, the Intervenors argue that the license is invalid, and that such a conclusion is not precluded by law of the case (ibid.).

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[8] The NRC Staff notes that the NHPA's implementing regulations were also revised on June 17, 1999. See NRC Staff's Response at 13-14 & n.11 (citing 64 Fed. Reg. 27,044 (May 18, 1999)). Because the Intervenors' argument focuses on the revisions that became effective on January 11, 2001 (Intervenors' Written Presentation at 3, 4, 16 (citing 65 Fed. Reg. 77,698 (Dec. 12, 2000)), I limit my analysis to the most recent revisions.

This argument lacks merit. The Commission determined that the Staff's issuance of a license in January 1998 that permitted phased compliance with the NHPA was "acceptable under applicable law" (50 NRC at 13). The Intervenors' invitation to revisit that determination in light of the new regulations founders on the fact that the new regulations are not entitled to retroactive application and, thus, are not relevant here.[9]

"The presumption against the retroactive application of new laws is an essential thread in the mantle of protection that the law affords the individual citizen" (Lynce v. Mathis, 519 U.S. 433, 439 (1997); accord Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208 (1988)). This principle, which seeks to limit the Sovereign's ability to make arbitrary changes in the law, finds expression in several provisions of our Constitution, including the Due Process Clause, which protects the public's interest "in fair notice and repose that may be compromised by retroactive legislation" (Lynce, 519 U.S. at 439-40 & n.12 (quoting Landgraf v. USI Film Products, 511 U.S. 244, 266 (1994)).[10]

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[9] I emphasize that I need not, and do not, construe the new regulations. Rather, for the limited purpose of determining the applicability of the law of the case doctrine, I assume (without deciding) the correctness of the Intervenors' assertion that the phased compliance approach toward NHPA review in HRI's license is unlawful under the new regulations. But cf. HRI Exhibit A at 5, 8-10 (arguing that the new regulations do not proscribe phased compliance here); HRI Exhibit B at 6-7 (same); HRI Exhibit C at 8 (same). Notably, the Intervenors do not argue that the NHPA erects an immutable bar to phased compliance in all circumstances. To the contrary, they concede that phased compliance is "often necessary" on "large and complex projects" (Intervenors' Exhibit B at 13). Cf. NRC Staff Exhibit 1, at 13 (NRC Staff member observes that HRI's phased mining operation "may fairly be viewed as a large and complex project").

[10] Invalidating HRI's 1999 license on the ground that the Staff allegedly failed to comply with NHPA regulatory requirements that came into existence three years later unquestionably would constitute a retroactive application of the new regulations. See National Mining Ass'n v. Department of Labor, 292 F.3d 849, 860 (D.C. Cir. 2002) ("If a new regulation is substantively inconsistent with a prior regulation [or] prior agency practice, . . . it is retroactive as applied to pending claims."); see also Martin v. Hadix, 527 U.S. 343, 357-58 (1999) (quoting Landgraf, 511 U.S. at 270) (The "inquiry into whether a [regulation] operates retroactively demands a common sense, functional judgment about 'whether the new provision attaches new legal consequences to events completed before its enactment.' This judgment should be

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Because "[r]etroactivity is not favored in the law" (Georgetown Univ. Hosp., 488 U.S. at 208), statutes and regulations "will not be construed to have retroactive effect unless their language requires this result" (ibid.). In other words, new laws are presumptively construed as applying prospectively, and this presumption is only overcome when a clear expression of contrary intent is embodied in the statutory or regulatory text. I find no such expression in the text of the new NHPA regulations. Nor does the history of the new regulations suggest that they were intended to be applied retroactively. To the contrary, the regulatory history persuasively suggests that the ACHP intended the regulations to be applied prospectively (65 Fed. Reg. at 77,703),[11] a conclusion that is consistent with the fact that the ACHP declared in December 2000 that the effective date of the regulations would be delayed until January 11, 2001 (id. at 77,698). See Criger v. Becton, 902 F.2d 1348, 1351 (8th Cir. 1990) ("a delayed effective date on a regulation . . . certainly is evidence that cuts against retroactive application").

Moreover, it is well established that a congressional grant of rulemaking authority does not include the power to promulgate retroactive rules unless Congress expressly confers such power (Georgetown Univ. Hosp., 488 U.S. at 208; National Mining Ass'n, 292 F.3d at 859). Here, the Intervenors have provided no evidence that Congress authorized the ACHP to promulgate retroactive regulations. Absent such evidence, the NHPA regulations may not be applied retroactively. Cf. 5 U.S.C. § 551(4) (Administrative Procedure Act defines "rule" as an agency statement of "future effect").

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[10](...continued)
informed and guided by 'familiar considerations of fair notice, reasonable reliance, and settled expectations.'").

[11] In response to public comments inquiring about the impact of the new regulations on agreements regarding program alternatives that were executed before the effective date of the new regulations, the ACHP declared that "[s]uch agreements are still valid and will continue to be in effect according to their terms" (65 Fed. Reg. at 77,703).

Under these circumstances, acceding to the Intervenors' request to disregard law of the case in order to apply the new regulations retroactively would implicate due process concerns, contravene congressional and administrative intent, and ignore principles of regulatory construction. This I decline to do. See Curators of the Univ. of Missouri, CLI-95-01, 41 NRC 71, 102 & n.23 (1995) (refusing to apply new Commission regulations retroactively to an already-pending license application).

Nor do I accept the Intervenors' invitation to disregard law of the case in light of several judicial decisions that allegedly "make clear that . . . [HRI does] not qualify for phased compliance" (Intervenors' Written Presentation at 12). The decisions on which the Intervenors rely (id. at 14) – Mid States Coalition for Progress v. Surface Transp. Bd., 345 F.3d 520 (8th Cir. 2003), and Pit River Tribe v. Bureau of Land Mgmt., 306 F. Supp. 2d 929 (E.D. Cal. 2004) – are inapposite. Unlike this case, both those cases involved *prospective* application of the *new* NHPA regulations. The Intervenors' reliance on those decisions is tantamount to arguing that the new regulations should be applied retroactively. For the reasons stated above, that argument is not tenable.[12]

Finally, the Intervenors argue that the law of the case doctrine does not preclude a conclusion that the regulations bar phased compliance here, because there is no material difference between the new and old regulations in their treatment of phased compliance. The new regulations, assert the Intervenors, simply clarify what the old regulations already provided;

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[12] Relying on Mid States Coalition for Progress, the Intervenors state that the Staff, in lieu of completing the NHPA review for the entire project prior to issuing the license, might have developed a Programmatic Agreement in consultation with the ACHP (Intervenors' Written Presentation at 14-16). "Since the NRC Staff has failed to comply fully with the requirements of the NHPA and has not completed the alternative Programmatic Agreement," the Intervenors argue that HRI's license was "issued in violation of the NHPA" (id. at 16). This argument lacks merit because: (1) the new NHPA regulations applied in Mid States Coalition for Progress do not apply retroactively to this case; and (2) under law of the case doctrine, the Staff's phased compliance approach in this case did not violate the NHPA.

namely, that phased compliance in the circumstances of this case is not permissible. In support of this argument, the Intervenors point to regulatory history stating that the new regulations "retained the core elements of the section 106 process that have been its hallmark since 1974" (Intervenors' Written Presentation at 17) (quoting 65 Fed. Reg. at 77,699). Additionally, the Intervenors aver that:

> [The] *Highlights of Changes* section of the new rule further clarifies that the ACHP does not view the addition of 36 C.F.R. § 800.4(b)(2) [the regulatory provision addressing phased compliance] as a "major change" as it is not described in that section. Thus, one is left to assume that the ACHP considers the addition of [section 800.4(b)(2)] a "technical or informational edit."

Ibid. Thus, according to the Intervenors, the issuance of HRI's license is invalid under the new regulations, and because there is no significant difference between the new and old regulations in their treatment of phased compliance, HRI's license is perforce invalid under the old regulations (id. at 17-18).

This argument is unavailing. If – as the Intervenors assert – the new regulations dictate that HRI is ineligible for phased compliance, then the new regulations are – contrary to the Intervenors' contention – manifestly different than the old regulations that the Commission construed and applied in its 1999 decision. In that decision, the Commission examined the former regulatory language, which permitted "phased compliance" that is "consistent with the . . . schedule for the undertaking" (36 C.F.R. § 800.3(b)), and the Commission concluded that this language – even read in the light most favorable to the Intervenors – did not prohibit phased compliance for HRI's mining project (50 NRC at 13 n.37).[13] The Commission observed that phased compliance was not prohibited by the NHPA (50 NRC at 13 n.37; 47 NRC at 323 & n.15), nor was it prohibited by case law (50 NRC at 13 n.37). The Commission also noted case

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[13] Notably, the Intervenors' own witness, Dr. Thomas King, concedes that the regulatory language in 36 C.F.R. § 800.3(b) did not prohibit phased compliance for HRI's mining project. See Intervenors' Exhibit B at 16-17 (stating that the language in section 800.3(b) "permit[ted] readers to interpret such [phased compliance] as acceptable").

law that supported phased compliance with the NHPA review process. See 47 NRC at 324 n.16 (citing City of Grapevine v. Department of Transp., 17 F.3d 1502, 1508-09 (D.C. Cir.), cert. denied, 513 U.S. 1043 (1994) (rejecting claims that completion of the NHPA review process was required prior to agency approval of a project, where the agency's approval was conditioned on its subsequent completion of that process)).[14] Moreover, the administrative record in this case revealed that, under the old regulations, "[p]hased section 106 review [was] a common practice" (LBP-98-05, 47 NRC 119, 124 (1998)), and the phased compliance approach proposed for HRI's project was endorsed by both the New Mexico State Historic Preservation Office and the Navajo Nation Historic Preservation Department (ibid.).

The Commission thus concluded that HRI's phased compliance with NHPA was lawful (50 NRC at 13). That conclusion – which was consistent with statute, regulations, case law, and administrative practice – was eminently reasonable.

If, as the Intervenors contend, a different conclusion is required by the new regulations (but see supra note 9), then the new regulations have changed the legal landscape, which means they cannot be given retroactive effect absent clear evidence that (1) Congress authorized NHPA to issue retroactive regulations, *and* (2) NHPA intended the regulations to be applied retroactively. Because neither of these conditions is satisfied, the new regulations are not relevant to this proceeding.

The new regulations do not, therefore, constitute a circumstance that militates against applying law of the case doctrine. And pursuant to that doctrine, the Intervenors' challenge to the Staff's phased compliance approach must be rejected, because – as the Commission

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[14] See also Walsh v. United States Army Corps of Eng'rs, 757 F. Supp. 781 (W.D. Tex. 1990) (district court, in denying a motion for preliminary injunction, holds that federal agency did not violate NHPA by issuing a permit authorizing construction of a dam and reservoir prior to completing NHPA review).

already has adjudged – "phased compliance [with the NHPA in this case] is acceptable under applicable law" (50 NRC at 13).

2. The Intervenors' Assertion That The Staff's NHPA Review For Sections 17 And 12 Was Inadequate Under The Old Regulations Lacks Merit

The Intervenors argue that, even if the new regulations do not apply here and even if phased compliance was permissible, the cultural resources review conducted by the Staff for Sections 17 and 12 was inadequate, thus rendering HRI's license invalid (Intervenors' Written Presentation at 20). This argument lacks merit.[15]

Preliminarily, it should be noted that, during Phase I of this litigation, the Intervenors argued that the Staff's performance of the NHPA review for Section 8 (the prospective mining site) and Section 24 (the processing site) was inadequate. The former Presiding Officer disagreed. In the course of analyzing the adequacy of the Staff's NHPA review, the Presiding Officer found that the Staff: (1) performed NHPA planning that "complied step-by-step with regulatory directions" (49 NRC at 140); (2) "followed a [statutory review] process that is authorized by the regulations" (ibid.); (3) adequately identified historic properties considered eligible for inclusion in the National Register of Historic places and considered the effect of Section 8 mining operations on such properties in consultation with the affected tribal groups (id. at 141-42); and (4) fulfilled its NHPA responsibilities after obtaining the concurrence of the NMSHPO and NNHPD that the mining would have "no effect" on any cultural resources (ibid.). In short, the

[15] There is a substantial question as to the correctness of the Intervenors' claim that HRI's license must be invalidated if the Staff's NHPA review for Sections 17 and 12 was invalid. In this regard, it must be remembered that the Commission already sustained the validity of the Staff's NHPA review for Sections 8 and 24 in Phase I of this litigation (supra Part II.C.1). Because the Commission has ruled that (1) HRI may proceed with mining operations at Section 8, and (2) phased compliance with the NHPA is permissible, it would seem that – if it were determined that the NHPA review for Sections 17 and 12 were inadequate – the proper remedy would be to direct that the deficiencies be corrected rather than to direct that the license be invalidated. I need not reach this remedial issue, however, because I find that the Staff's NHPA review was adequate.

Presiding Officer concluded that the NRC Staff complied with NHPA requirements "with respect to [Section 8 and] the portion of the Crownpoint site [Section 24] on which effluents from the Church Rock site will be treated" (id. at 143). The Commission affirmed (50 NRC at 6).

Because the Staff's procedural methodology for conducting its NHPA review for Sections 8 and 24 was identical in omnibus with the procedural methodology of its NHPA review for Sections 17 and 12 (supra Part II.B), one might logically conclude that, because the cultural resources review for Sections 8 and 24 complied with the NHPA, the cultural resources review for Sections 17 and 12 likewise complied with the NHPA. The following analysis confirms the correctness of this conclusion.

a. The Intervenors argue that the NRC Staff's NHPA consultation with tribal groups was inadequate. In support of this argument, they point to a letter dated February 22, 1996 that HRI sent to several tribal groups that (Intervenors' Exhibit L): (1) informed the tribal groups that HRI intended to engage in ISL uranium mining at the Church Rock and Crownpoint sites; (2) advised them of its cultural resources management plan; and (3) requested that they notify HRI of traditional cultural properties that might be located in or near the proposed mining sites. The Intervenors complain that this "form letter" from HRI was an "insult[]" to Native American sovereignty and an inadequate attempt by the NRC Staff to initiate the NHPA process, because it was "sent on HRI letterhead," it "[made] no mention of the involvement of the NRC Staff," and it failed to mention the initiation of the "section 106 consultation under the NHPA" (Intervenors' Written Presentation at 21-22).

The Intervenors' complaint fails to state a colorable claim for two alternative reasons. First, even assuming arguendo that a tribal group would perceive HRI's letter as an "insult" to its sovereignty, case law indicates that insensitivity to a tribal group does not, standing alone, violate the NHPA. Cf. Muckleshoot Indian Tribe v. United States Forest Serv., 177 F.3d 800,

807 (9th Cir. 1999) (that an agency "could have been more sensitive to the needs of the Tribe" does not, by itself, violate the NHPA).[16]

Second, and more fundamentally, the Intervenors' complaint is based on the erroneous premise that HRI's letter of February 22, 1996 represented the Staff's initiation of the NHPA consultation process with the tribal groups. Contrary to the Intervenors' understanding, the Staff initiated its NHPA consultation process with tribal groups in a letter dated October 2, 1996 that was sent on NRC letterhead from the NRC Acting Chief of the Uranium Recovery Branch to the NNHPD, the Pueblo of Zuni Heritage and Historic Preservation Office, the Hopi Cultural Preservation Office, the Pueblo of Acoma, the Pueblo of Laguna, the All Pueblo Indian Council, the Crownpoint Chapter of the Navajo Nation, and the Church Rock Chapter of the Navajo Nation (see Appendix C to FEIS; NRC Staff Exhibit 1, at 3-4). In this consultation letter, the NRC (Appendix C to FEIS): (1) advised the tribal groups that it was reviewing HRI's application for a license to conduct ISL mining; (2) informed them that it was initiating the section 106 review process under NHPA; (3) acknowledged their potential interest in the section 106 consultations; and (4) provided a name, address, and telephone number for purposes of Staff consultation.

Additionally, in this consultation letter, the Staff provided the tribal groups with a copy of the NHPA consultation letter it sent to the NMSHPO, which included a comprehensive discussion of the section 106 process and how HRI and the Staff proposed to comply with NHPA requirements (Appendix C to FEIS; Intervenors' Exhibit K). This letter was accompanied by eight attachments, including: (1) maps of the mining sites; (2) a summary of the proposed project; (3) a Cultural Resources-Environmental Assessment And Management Plan for HRI's

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[16] This is not to suggest that insensitivity by an agency official to tribal groups should be condoned. To the contrary, an agency official "should be sensitive to the special concerns of Indian tribes in historic preservation issues" (36 C.F.R. § 800.1(c)(2)(iii)). In the instant case, I find that the NRC Staff complied with this regulatory admonition.

proposed ISL mining operations at Crownpoint, Unit 1, and Church Rock; (4) an Archaeological Protection Program for the Church Rock Mine-Survey and Preservation of the Archaeological Antiquities; and (5) a Bibliography of Archaeological Surveys and Cultural Resource Management Plans for the sites. See Attachments C-J to NRC Staff Exhibit 1.

Plainly, the NRC Staff's consultation letter to the tribal groups suffers none of the alleged flaws that the Intervenors ascribe to HRI's letter of February 22, 1996.

b. The Intervenors also challenge the adequacy of the Staff's consultation with tribal groups on the alleged ground that – aside from HRI's "form letter" of February 22, 1996 – tribal groups were neither consulted nor given an opportunity to participate in the NHPA review process (see Intervenors' Written Presentation at 21-22). The record refutes this assertion.[17]

For example, by letter dated October 31, 1996, the NNHPD – which exercised NHPA consultation functions for Section 17 on behalf of the Navajo Nation (supra note 3; Attachment N to NRC Staff Exhibit 1; NRC Staff Exhibit 2) – responded to the NRC Staff's initial consultation letter, agreeing to a phased NHPA review approach and acknowledging that HRI's archaeological contractor, in consultation with the NNHPD, would be responsible for identifying traditional cultural properties (Appendix C to FEIS).

On January 31, 1997, the Staff sent the NNHPD another consultation letter that summarized the NHPA review process, HRI's cultural resource management plans, the surveys to be conducted by the archaeological research firm licensed by New Mexico and the Navajo Nation, HRI's procedures for identifying traditional cultural properties, and HRI's policy of "total

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[17] The Intervenors – by characterizing HRI's letter to the tribal groups as a "form letter" (Intervenors' Written Presentation at 22) – appear to suggest that letters relating to the NHPA review process are deficient based solely on the fact that they are substantively identical. However, as HRI witness Dr. Eric Blinman observes, the letters criticized by the Intervenors had the same purpose and, hence, the same content: "[i]t would [have been] irresponsible to provide different information to each tribe, or to simply make cosmetic changes so that the letter would appear 'different'" (HRI Exhibit A at 4).

avoidance" of cultural resources. See Appendix C to FEIS. The Staff also sent this letter to the Pueblo of Zuni Heritage and Historic Preservation Office, the Hopi Cultural Preservation Office, the Pueblo of Acoma, the Pueblo of Laguna, the All Pueblo Indian Council, and the Navajo Nation Crownpoint and Church Rock Chapters, and it requested "direction or advice about advancing the [NHPA] review process and comments about the intended or ongoing survey work" (id. at 3).

In April 1997, HRI completed its cultural resources report – i.e., the MNM Report, which was prepared by the Museum of New Mexico's Office of Archaeological Studies – for Sections 8, 17, and 12 (Attachment K to NRC Staff Exhibit 1). The MNM Report was grounded on numerous research materials, including a report prepared by Ernest Becenti, Sr., who had been a Navajo traditional practitioner for over 30 years and also had been president of the Navajo Nation Church Rock Chapter (id. at 18). Mr. Becenti's report – which was based on interviews and a "walking tour of the private lands, Navajo Nation Trust lands, Navajo allotment lands, and Bureau of Land Management lands within the project areas of Church Rock and Crownpoint" (ibid.) – concluded that "no significant sacred and traditional sites were found" (ibid.). Janet Spivey – an ethnohistorian for the Museum of New Mexico Office of Archaeological Studies who assisted in the preparation of the MNM Report (ibid.) – confirmed the veracity of Mr. Becenti's report and augmented his investigations with additional material, including numerous interviews of "knowledgeable Navajo traditional practitioners" and tribal leaders "representing all the involved communities" (ibid.).[18] No traditional cultural properties were identified (Attachment C

[18] The individuals interviewed by the Museum of New Mexico's ethnohistorian, Ms. Spivey, represent – both individually and collectively – a rich repository of traditional and cultural tribal knowledge. For example, she interviewed a 77-year-old Native American traditional practitioner who had been practicing for nearly half a century, a 75-year-old traditional practitioner who lived in the area his entire life, a 67-year-old traditional practitioner who has been practicing for 25 years, a 67-year-old traditional practitioner who learned traditional practice from his grandmother, and an 84-year-old traditional practitioner. Additionally, she interviewed numer-

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to HRI Exhibit A at 159, 160). As to Section 17, the MNM Report concluded that nothing was "eligible for inclusion in the National Register of Historic Places" (Attachment K to NRC Staff Exhibit 1, at 123; see also Attachment N to NRC Staff Exhibit 1, at 1). As to Sections 8 and 12, the MNM Report concluded that, notwithstanding the existence of historic sites, HRI's operations could be conducted with no effect on such sites (see Attachment C to HRI Exhibit A at 159-61; Intervenors' Exhibit I at 1).

On June 19, 1997, the NRC Staff sent the MNM Report to the NNHPD, the Pueblo of Zuni Heritage and Historic Preservation Office, the Hopi Cultural Preservation Office, and the NMSHPO, advising them that the MNM Report would serve as a basis for the Staff's NHPA determination and soliciting their comments. Additionally, by letters dated June 18, 1997, the NRC Staff offered copies of the MNM Report for review to the All Pueblo Indian Council, the Pueblo of Acoma, and the Pueblo of Laguna. See Attachment L to NRC Staff Exhibit 1; see also NRC Staff Exhibit 3, at 5.

On May 20, 1998, the NRC Staff sent consultation letters to the NMSHPO and NNHPD for purposes of making a final NHPA cultural resources review determination regarding Sections 8, 12, and 17. See Intervenors' Exhibit I; Attachment N to NRC Staff Exhibit 1. As to Sections 8 and 12, the Staff sought the NMSHPO's concurrence on a proposed NHPA finding of "no effect," stating that "[i]f your office so concurs, or does not otherwise submit any objections

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[18](...continued)
ous tribal leaders and officials, including the Navajo Nation Smith Lake Chapter President, the Navajo Nation Pinedale Chapter Vice President, the Navajo Nation Little Water Chapter President, Vice President, Treasurer, Manager, and former Secretary, the Navajo Nation Crownpoint Chapter President, the Navajo Nation Church Rock Chapter President, and the Navajo Nation Dalton Pass Chapter President. See Attachment K to NRC Staff Exhibit 1, at 18-22, 122-23, 154. None of the individuals interviewed by Ms. Spivey expressed a concern that HRI's proposed mining project would interfere with any known traditional cultural activities. See id. at 122-23, 154; see also HRI Attachment C to Exhibit A at 159, 160.

. . ., then pursuant to 36 C.F.R. § 800.5(b), the Staff would consider the NHPA process to be concluded" (Intervenors' Exhibit I at 2-3). As to Section 17, the Staff sought the NNHPD's approval for HRI to proceed with its operations, based on the Staff's proposed NHPA finding that "no historic properties (i.e., cultural properties as defined in the Navajo Nation Cultural Resources Protection Act) eligible for listing in the National Register of Historic Places or in the Navajo Nation Register of Cultural Properties and Cultural Landmarks are located within Section 17" (Attachment N to NRC Staff Exhibit 1, at 1).

Additionally, on May 20, 1998, the Staff sent consultation letters to the same seven tribal groups previously consulted (i.e., Pueblo of Zuni Heritage and Historic Preservation Office, the Hopi Cultural Preservation Office, the Pueblo of Acoma, the Pueblo of Laguna, the All Pueblo Indian Council, and the Navajo Nations' Crownpoint and Church Rock Chapters), seeking comments regarding the Staff's proposed NHPA determinations. See Attachment O to NRC Staff Exhibit 1.

The NNHPD and the NMSHPO concurred with the Staff's proposed NHPA determinations (Attachments P and Q to NRC Staff Exhibit 1), and no tribal group opposed or otherwise commented on those determinations (NRC Staff Exhibit 1 at 9).

Finally, on May 13, 1999, the NRC Staff sent a consultation letter to the NMSHPO seeking concurrence on a proposed NHPA determination that HRI's operations would have "no effect" on historic properties at Section 24. See Attachment S to NRC Staff Exhibit 1. The Staff also sent a copy of this letter to the NNHPD (ibid.). On June 17, 1999, the NMSHPO concurred with the Staff's "no effect" determination (Attachment U to NRC Staff Exhibit 1, at 2). There is no record evidence that the NNHPD opposed or otherwise commented on that determination.

The above evidence persuasively demonstrates that – contrary to the Intervenors' assertion – tribal groups were adequately consulted during the NHPA review process. In

particular, the Staff (1) closely coordinated its NHPA review with the NNHPD, which – on behalf of the Navajo Nation – performed the consultation function of the State Historic Preservation Office, (2) obtained relevant NHPA information from numerous tribal leaders and traditional practitioners, and (3) conscientiously provided tribal groups with updated information regarding the cultural resources review, as well as a meaningful opportunity to participate in the review process. I find that the Staff satisfied the NHPA's consultation requirements for Sections 17 and 12. See 36 C.F.R. §§ 800.1(c)(2)(iii), 800.4(d), 800.5(b).[19]

c. Contrary to the Intervenors' contention (Intervenors' Written Presentation at 22, 24), the decision in Pueblo of Sandia v. United States, 50 F.3d 856 (10th Cir. 1995), does not vitiate the conclusion that the NHPA review in this case has been adequate. In Pueblo of Sandia, the Tenth Circuit held that the Forest Service violated the NHPA, because its efforts to

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[19] The Intervenors assert that the NHPA consultations in this case were especially inadequate with regard to the Hopi, Laguna, Acoma, and Zuni Tribes (Intervenors' Written Presentation at 22). This assertion is baseless. It cannot be reconciled with the record evidence showing that the Staff kept these tribes apprised of the NHPA review process and provided them with a continuing opportunity to participate in that process. See, e.g., Attachments L and O to NRC Staff Exhibit 1; Appendix C to FEIS at 3. Additionally, the Staff's consultation efforts were supplemented by HRI's efforts to consult with the interested tribes regarding cultural resources. See 36 C.F.R. § 800.1(c)(1)(i) (in performing NHPA review, agency may "use the services of . . . applicants, consultants, or designees"). As a Staff member explained (NRC Staff Exhibit 1, at 10):

> HRI sent requests to the Interested Tribes in letters dated February 22, 1996 (Exhibit L to the Intervenors' Written Presentation). The NRC Staff was also aware of the attempts of HRI's cultural resources contractor (Dr. Lorraine Heartfield) to contact the Interested Tribes. See Exhibit N to the Intervenors' Written Presentation. Additionally, an NRC cultural resource contractor, Ms. Susan Schexnayder, made attempts to elicit [traditional cultural properties] information from the Interested Tribes. In October 1995, Ms. Schexnayder met with tribal officials from the NNHPD, the Navajo Nation's Crownpoint, Church Rock, and Pinedale Chapters, the Pueblo of Acoma, the Pueblo of Hopi, and the Pueblo of Zuni. See [NRC Staff Exhibit 4, at 6].

See also NRC Staff Exhibit 4, at 4 ("[i]n her capacity as cultural resources consultant to HRI, Dr. Heartfield has had numerous interactions with . . . the directors of cultural resource programs of the Hopi, Zuni, and Acoma, and the All Pueblo Council").

identify historic properties in Las Huertas Canyon in the Cibola National Forest "were neither reasonable nor in good faith" (50 F.3d at 857). The facts there, however, are distinguishable in material respects from the instant facts.

First, in Pueblo of Sandia, the court held that the Forest Service acted unreasonably when it failed to investigate the existence of traditional cultural properties, even though it knew that the affected sites probably contained such properties (id. at 860-62). In contrast, the investigatory efforts by HRI and the Staff in the instant case to identify historic properties on Sections 17 and 12 were reasonable and thorough (supra Part III.A.2). Second, in Pueblo of Sandia, the court held that the Forest Service failed to act in good faith, because it improperly withheld material information from the State Historic Preservation Officer, thereby precluding him from making an informed decision regarding the existence of traditional cultural properties (50 F.3d at 862). Here, in sharp contrast, there is no suggestion that the Staff withheld relevant information from the NMSHPO or the NNHPD or otherwise impeded them in the performance of their NHPA responsibilities. I thus conclude that Pueblo of Sandia is not apposite here.

The Intervenors nevertheless assert that the facts here are similar to Pueblo of Sandia, because the Staff learned in March 1996 that the Pueblo of Zuni may "have places of traditional and cultural importance within the [Crownpoint] project area" (Intervenors' Exhibit O), but the Staff failed to investigate this information (Intervenors' Written Presentation at 23-24). This assertion lacks merit. It ignores that on June 19, 1997, the Staff sent a consultation letter to the Pueblo of Zuni Heritage and Historic Preservation Office (as well as to the NMSHPO, the NNHPD, and the Hopi Cultural Preservation Office) that included a copy of the April 1997 MNM Report and that sought comments on the findings therein. See Attachment L to NRC Staff Exhibit 1. Among its findings, the MNM Report states that of the Navajo, Hopi, Laguna, Acoma, and Zuni Tribes, "[o]nly the Navajos have demonstrated current traditional uses" of the areas in

and around where HRI plans to conduct ISL mining (Attachment K to NRC Staff Exhibit 1, at 17). The Staff received no challenges regarding this finding (NRC Staff Exhibit 3, at 5), nor did the Staff receive any challenges regarding the MNM Report's extensive discussion of the investigatory efforts expended to determine the existence of traditional cultural properties (Attachment K to NRC Staff Exhibit 1, at 17-22). Finally, the Staff did not receive comments from any tribal group in response to its consultation letter of May 20, 1998 – which was sent to the Pueblo of Zuni Heritage and Historic Preservation Office, the Hopi Cultural Preservation Office, the Pueblo of Acoma, the Pueblo of Laguna, the All Pueblo Indian Council, and the Navajo Nation Crownpoint and Church Rock Chapters – seeking comments regarding the Staff's proposed NHPA finding of "no effect" on Section 12, and its proposed NHPA finding of no historic properties on Section 17. See Attachment O to NRC Staff Exhibit 1; NRC Staff Exhibit 1, at 9. Given the above evidence, the Intervenors' attempt to compare the Staff's investigatory efforts with those of the agency in Pueblo of Sandia is rejected.[20]

d. Finally, the Intervenors contend that the Staff's NHPA review is inadequate for HRI's operations at Unit 1 and Crownpoint, alleging that "further studies should be completed [at both sites] to confirm that all cultural properties are identified to ensure that the NRC Staff is aware of the full cultural impact of the license issuance" (Intervenors' Written Presentation at 25; see also id. at 26-27). This argument, however, is simply a rehashed version of the Inter-

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[20] In a related vein, the Intervenors attack the Staff's NHPA conclusion that HRI's mining operations will have "no effect" on Section 17, alleging that the MNM Report fails to "consider the presence of non-Navajo Traditional Cultural Properties" (Intervenors' Written Presentation at 25). This allegation is incorrect. As discussed above in text, the MNM Report expressly considered the presence of non-Navajo Traditional Cultural Properties, and it concluded that the Navajo alone had demonstrated current traditional uses in the vicinity of HRI's proposed project. Moreover, the Staff provided non-Navajo tribal groups with several opportunities to comment on, or challenge, that conclusion, but they declined to do so. The Staff reasonably inferred from their silence that the non-Navajo tribal groups agreed with that conclusion (NRC Staff Exhibit 3, at 5). See INS v. Lopez-Mendoza, 468 U.S. 1032, 1043 (1984) (in civil proceedings, an administrative official is permitted to draw a reasonable "inference from the silence of one who is called upon to speak").

venors' challenge to the Staff's phased approach to NHPA review in this case. For the reasons discussed supra Part III.A.1, that argument lacks merit.

Moreover, contrary to the Intervenors' suggestion (Intervenors' Written Presentation at 25-27), the fact that the Staff has not completed the NHPA review process for HRI's entire proposed undertaking does not give rise to an inference that HRI's mining operations pose a threat to cultural resources. LC 9.12 states that before "engaging in any construction activity not previously assessed" by the NRC Staff in its NHPA review process, HRI "shall conduct a cultural resource inventory." LC 9.12 further states that all "disturbances associated with the proposed development" must be in compliance with the NHPA and its implementing regulations. Thus, as HRI and the NRC Staff both attest (e.g., HRI Response at 30; NRC Staff Response at 32-34), the NHPA review process will be performed and completed for each relevant site *before* HRI commences any construction activity at that site. This review process, coupled with HRI's implementation of its "avoidance policy," will ensure the identification and protection of cultural resources. See FEIS at 4-112; see also Attachment G to NRC Staff Exhibit 1, at 27; Attachment H to NRC Staff Exhibit 1, at 28.

Additionally, HRI's license provides for the protection of cultural resources that may be discovered during construction or mining operations. LC 9.12 requires the cessation of any work that results in the discovery of previously unknown cultural artifacts. Such "artifacts shall be inventoried and evaluated in accordance with 36 C.F.R. Part 800, and no disturbance shall occur until the licensee has received written authorization to proceed from the State and Navajo Nation Historic Preservation Offices."

In short, although the NHPA review process remains to be completed in a phased approach for the Unit 1 and Crownpoint sites, the licensing conditions imposed by the NRC Staff assure compliance with the NHPA and, correlatively, protection of cultural resources.[21]

B. THE INTERVENORS' ASSERTION THAT THE FEIS FAILS ADEQUATELY TO CONSIDER THE IMPACT OF HRI's MINING ON CULTURAL RESOURCES LACKS MERIT

The Intervenors claim that the Staff's issuance of HRI's license to engage in ISL mining at Section 17, Unit 1, and Crownpoint violated NEPA. In support of this claim, they point out that the FEIS was published before the Staff completed the NHPA review for those sites and, accordingly, before all the cultural resources were identified and evaluated (Intervenors' Written Presentation at 29). Further, the FEIS allegedly "focuses on only the impacts to cultural resources that result from physical damage and only covers sites that have been discovered within the project" (ibid.). In short, the Intervenors argue that the Staff failed, in violation of NEPA, to take the requisite "hard look" at *all* the effects this project will have on cultural resources prior to issuing the license (id. at 28-29). For the following reasons, I conclude that this argument lacks merit.[22]

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[21] As HRI correctly asseverates, its *future* cultural resources reviews will be performed in compliance with the NHPA regulations that are in effect at the time the reviews are conducted. See HRI Exhibit A at 13; HRI Exhibit B at 6.

[22] HRI requests that this argument be stricken because, insofar as the Intervenors challenge the adequacy of the FEIS, they allegedly exceed the scope of the specific area of concern in this proceeding, which is limited to issues relating to cultural resources (HRI's Response at 31). I find that the Intervenors' argument falls well within the scope of this proceeding and, therefore, deny HRI's request.

I also decline the Staff's invitation (NRC Staff's Response at 46) to rule that the Intervenors' argument is barred by law of the case doctrine. The Staff is correct in stating that during Phase I of this proceeding, the Commission rejected the Intervenors' argument that the cultural resources review embodied in the FEIS was inadequate because it was completed before the Staff completed the NHPA review for the relevant sites (see 50 NRC at 13-14). However, the Commission's decision was guided by the fact that – unlike the present case – the Staff's NHPA review in the prior case for Section 8 mining operations was "completed and released

(continued...)

Contrary to the Intervenors' understanding, the "hard look" required by NEPA is not to be equated with completion of the NHPA review. Although an agency may coordinate and, where practicable, integrate its NEPA and NHPA review efforts (see 10 C.F.R. § 51.70(a); 36 C.F.R. § 800.14(a)), the two statutes impose separate and distinct obligations. See, e.g., Preservation Coalition, Inc. v. Pierce, 667 F.2d 851, 859 (9th Cir. 1982). There is no requirement in NEPA, or in the NRC's regulations implementing NEPA (10 C.F.R. Part 51), to complete the NHPA review in order to satisfy the obligations imposed by NEPA.

Rather, an agency satisfies its obligation under NEPA to take a "hard look" at the impacts a project will have on cultural resources when it engages in informed and reasoned decisionmaking that is guided by the objective of "preserv[ing] important historic [and] cultural . . . aspects of our national heritage" (42 U.S.C. § 4331(b)(4)). Specifically, an agency must rea-

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[22](...continued)
before NRC issued the license" (id. at 13) and was part of the administrative record considered by the Commission. Because the NHPA review in the prior proceeding did not reveal any new information that "present[ed] a 'seriously different' view of the environmental impacts" that had been considered by the Staff in the FEIS, the Commission rejected the Intervenors' assertion that the Staff's cultural resources review under NEPA was unlawful (id. at 14). Thus, the issue in the prior proceeding was whether the FEIS for Section 8 mining operations was adequate in light of the subsequently completed NHPA review that confirmed the Staff's assessment of environmental impacts in the FEIS. By contrast, the issue here with regard to Unit 1 and Crownpoint is whether the FEIS was adequate in the *absence* of a completed NHPA review for those sites; plainly law of the case doctrine does not bar consideration of that issue.

Nor does law of the case doctrine bar the Intervenors' argument with regard to Section 17, because resolving the legitimacy of the FEIS for Section 17 requires looking beyond the evidence considered by the Commission in the Phase I decision and considering evidence that is specific to this Phase II proceeding (i.e., the NHPA and NEPA reviews for Section 17). However, applying the rationale from the Commission's Phase I decision (50 NRC at 14), I find no legal flaw in the Staff's NEPA review with regard to Section 17, because the Intervenors do not allege that the NHPA record for that site reveals any new information that presented a seriously different view of the environmental impacts that had been considered by the Staff in the FEIS, nor does my review of the record reveal any such information. See, e.g., Attachments I, J, K, N, and Q to NRC Staff Exhibit 1. Moreover, the analysis above in text (infra Part III.B) – which concludes that the Staff took the requisite "hard look" at cultural resources when it performed its NEPA review for Unit 1 and Crownpoint – applies with equal force to the Staff's NEPA review for Section 17.

sonably (1) consider the historic and cultural resources in the affected area, (2) assess the impact of the proposed action, and reasonable alternatives to that action, on cultural resources, (3) disseminate the relevant facts and assessments for public comment, and (4) respond to legitimate concerns. See generally Hughes River Watershed Conservancy v. Johnson, 165 F.3d 283, 288 (4th Cir. 1999); Citizens Against Burlington, Inc. v. Busey, 938 F.2d 190, 194-96 (D.C. Cir.), cert. denied, 502 U.S. 994 (1991); Duke Energy Corp. (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-03-17, 58 NRC 419, 431 (2003). Here, a review of the FEIS shows that the NRC Staff took the requisite "hard look."

First, the Staff provided a lengthy discussion of cultural resources (FEIS at 3-65 to 3-77). It defined "culture" for purposes of the FEIS, and it explained the criteria for identifying "cultural resources" that are eligible for inclusion in the National Register of Historic Places (id. at 3-66). It further defined the three categories of cultural resources that are pertinent to the NEPA process – archaeological resources, historical resources, and traditional cultural resources – and it explained that a traditional cultural resource is deemed to be a traditional cultural property if it is eligible for inclusion in the National Register because of its "association with cultural practices or beliefs of a living community that (a) are rooted in that community's history, and (b) are important in maintaining the continuing cultural identity of the community" (id. at 3-67).

Notably, the Staff recognized that traditional cultural property may be difficult to recognize, because (FEIS at 3-67):

> A traditional ceremonial location may look like merely a mountaintop, a lake, or a stretch of river; a culturally important neighborhood may look like any other aggregation of houses, and an area where culturally important economic or artistic activities have been carried out may look like any other building, field of grass, or piece of forest in the area.

Because of the difficulty in identifying and evaluating traditional cultural property, and because such property may not come to light through the conduct of archaeological, historical, or architectural surveys, the Staff emphasized that "it is essential to involve in the assessment both traditional practitioners, who make use of such resources, and trained professionals, who can make an independent assessment of their importance" (id. at 3-68).

The Staff then provided a "broad overview of human development in the project region" (FEIS at 3-68), discussing cultural resources linked to the Paleo-Indian and Archaic Periods from 10,000 to 400 BC (id. at 3-68 to 3-69), cultural resources linked to the Basketmaker cultures from 400 BC to 750 AD (id. at 3-69), cultural resources linked to the Anasazi culture from 700 to 1300 AD (id. at 3-69 to 3-70), cultural resources linked to the Pueblo IV culture from 1300 to 1540 AD (id. at 3-70 to 3-71), and cultural resources from the Spanish Period in 1540 AD through the American Period in 1846 to the present (id. at 3-71 to 3-73).

The Staff explained that NEPA's cultural resources review, coupled with the NHPA review, "appropriately reflects the goal of avoiding adverse impacts upon Native American cultures" (FEIS at 3-73). Recognizing that HRI's proposed ISL mining project would occur on land "rich in cultural artifacts," the Staff discussed the cultural resource surveys that were being conducted pursuant to the NHPA. These included "archaeological surveys of areas within the proposed project sites that have not previously been surveyed," as well as a "detailed traditional culture property survey, which is being conducted by professional archaeologists and ethnographers with input from local Native American practitioners and residents and which builds on the preliminary traditional cultural property assessment work conducted for this EIS" (ibid.). The results of these surveys, stated the Staff, will be reviewed by the NMSHPO and the NNHPD, and other tribal groups will be invited to participate in the review process (id. at 3-74).

Additionally, the Staff described the results of the completed traditional cultural property surveys and the preliminary surveys at each of HRI's proposed mining sites – Crownpoint (FEIS at 3-74 to 3-76), Unit 1 (id. at 3-76 to 3-77), and Sections 8 and 17 at Church Rock (id. at 3-77). It bears emphasizing that – although additional surveys will be conducted for purposes of the NHPA review (LC 9.12) – for purposes of the NEPA review, the Staff had the benefit of archaeological and traditional cultural properties surveys from all of HRI's proposed mining sites (FEIS at 3-69 to 3-77; Attachment J to NRC Staff Exhibit 1).

The comprehensive information discussed above provided the foundation for the Staff's consideration of the potential impacts of HRI's project (and alternatives) on cultural resources, which is discussed in the FEIS chapter on environmental consequences, monitoring, and mitigation (FEIS at 4-109 to 4-112). Contrary to the Intervenors' assertion, the Staff's consideration of impacts to cultural resources was not limited to those that "result from physical damage" (Intervenors' Written Presentation at 29). The FEIS reveals that the Staff also discussed numerous potential impacts, including those that can result from simply "moving an artifact from its original location. Such movement destroys the archaeological 'context' in which the artifact might have been better understood as a component of the overall culture" (FEIS at 4-109).

Nor is there merit to the Intervenors' assertion that the Staff, in its assessment of impacts on cultural resources, only considered "sites that have been discovered within the project" (Intervenors' Written Presentation at 29). The Staff recognized the possibility that "subsurface artifacts or unmarked graves could be discovered" during HRI's development and operation of its mines (FEIS at 4-110). In that event, HRI's archaeological monitor – who must be present during all earth-disturbing activities, including construction, drilling, and reclamation procedures – would halt work in the area, and the artifacts or human remains would be evaluated for their significance pursuant to applicable laws, including the Archaeological Resources

Protection Act, NHPA, American Indian Religious Freedom Act, Native American Graves Protection and Repatriation Act, Navajo Nation Cultural Resources Protection Act, Navajo Nation Policy to Protect Traditional Cultural Properties, and the Navajo Nation Policy for the Protection of Jishchaa', Human Remains, and Funerary Items, as well as policies of Puebloan tribes claiming descent from the Anasazi culture in the event Anasazi gravesites are discovered (ibid.).

The Staff observed that the "primary potential threats to cultural resources from HRI's proposed project are earth moving, incidental pedestrian and vehicle traffic, and looting following site identification" (FEIS at 4-110). But the Staff determined that the potential for adverse impacts "would be reduced or eliminated" by HRI's "total avoidance" policy in its cultural resource management plan, which seeks as a "principal objective . . . to avoid all cultural resources" (ibid.). The Staff described the procedural outline of HRI's "total avoidance" policy as follows (ibid.):

> [T]he policy calls for inventory of all project areas for cultural resources (a process currently under way), site demarcation, and development of specific avoidance procedures. Cultural resources identified in the lease areas would be recognized (and demarcated if appropriate) as protection zones where human activity would be prohibited. This policy is regarded as feasible because ISL mining allows considerable flexibility in the layout of facilities. Any construction or drilling activity requiring subsurface disturbances . . . would be preceded by archaeological testing and an archaeological monitor would be present during construction and reclamation activities.

Notably, the Staff concluded that, "[a]ssuming HRI's successful implementation of the policy of avoidance[,] . . . the proposed project has minimal potential to result in significant impacts on cultural resources" (FEIS at 4-112; accord id. at 4-126).

The Staff promulgated the Draft Environmental Impact Statement (DEIS) for public comment, and it adequately responded to all comments relating to cultural resources (FEIS at A-47 to A-52). For example, in response to a comment that criticized the DEIS for "inadequate treatment of and disregard for potential impacts on Native American culture" (id. at A-47), the Staff

explained that (id. at A-48): (1) the Staff would ensure that HRI complies with all statutory requirements that provide protection for Native American culture; (2) Native American tribes that have members in the project area or that have cultural affiliations with groups that historically occupied or used the area will be given the opportunity to help identify and protect any artifacts or traditional cultural property recovered during operation of the proposed project; (3) HRI would adhere to a cultural resources management plan that averted harming cultural property through a "total avoidance" policy, and all persons admitted to the site would be trained on required protective measures toward cultural resources; (4) HRI contracted with a consultant approved by the NMSHPO and the NNHPD to conduct surveys to determine whether traditional cultural properties are located in or near the sites, and the consultant worked with all interested Native American tribes to identify such properties; and (5) representatives of each tribe were asked to identify any traditional cultural properties – including rock art, rock formations, or view-sheds – that their tribes considered sacred or culturally important.

The Staff also responded to comments regarding (1) the consultation requirements under the NHPA, the Native American Graves Protection and Repatriation Act, and other federal and Navajo Nation laws (FEIS at A-48 to A-49), and (2) potential interference with Navajo religious beliefs and traditional cultural values (id. at A-50 to A-51).

Finally, the FEIS shows that – contrary to the Intervenors' assertion (Intervenors' Written Presentation at 7) – the Staff expressly considered the impact of HRI's operations on the ability of traditional practitioners to gather herbs. A representative from each tribe was specifically asked to identify any plants that were used medicinally or ceremonially, and it was determined that no such plants existed at the proposed sites (FEIS at A-48, A-51). See also Attachment K to NRC Staff Exhibit 1, at 18 (MNM Report states that the traditional practitioners who were

interviewed stated that cultural herbs were "outside of the proposed project areas"); accord id. at 20, 21, 22; Intervenors' Exhibit N at 4.

The above evidence demonstrates that the Staff took a "hard look" at the impacts of HRI's project on cultural resources. The Staff explained the purpose of its inquiry, described its methods for conducting the inquiry, identified cultural resources in and near the project area, considered HRI's proposed project and alternatives, discussed mitigation measures, provided the DEIS for public comments, responded to those comments, and ultimately concluded that HRI's project posed no significant risk of harm to cultural resources.

Although the Staff recognized that additional work was necessary to complete the NHPA review (FEIS at 3-74, 4-112), it concluded that its cultural resources review satisfied NEPA's "hard look" requirement. I agree.

My conclusion finds support in the rationale of the Commission's recent decision in Duke Energy Corp. (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-03-17, 58 NRC 419 (2003). There, the Commission – in the context of a license renewal proceeding – denied a petition for review in which an intervenor challenged the Board's rejection of a contention that the Staff failed to take a "hard look" at certain environmental consequences. The Commission stated (58 NRC at 431):

> To litigate a NEPA claim, an intervenor must allege, with adequate support, that the NRC Staff has failed to take a "hard look" at significant environmental questions – i.e., the Staff has unduly ignored or minimized pertinent environmental effects. Here, given the extensive discussion [devoted to environmental questions] in the EISs, [the intervenor's] suggestion that the NRC has not given the issue a "hard look" borders on the frivolous.

In the instant case, as in Duke Energy Corp., the Staff's comprehensive treatment of cultural resource issues in the FEIS negates any notion that the Staff "unduly ignored or minimized" the effect of HRI's proposed mining on cultural resources (58 NRC at 431). Accordingly,

the Intervenors' assertion that the Staff failed to take a "hard look" at cultural resources issues must be rejected.

IV. CONCLUSION

For the foregoing reasons, I find – with the concurrence of Special Assistants Dr. Richard Cole and Dr. Robin Brett – that HRI has carried its burden of demonstrating that the Intervenors' challenges relating to cultural resources do not provide a basis for invalidating HRI's license to perform ISL uranium mining at Section 17, Unit 1, and Crownpoint.

Pursuant to 10 C.F.R. §§ 2.786(b) and 2.1253, a party wishing to challenge this decision before the Commission must file a petition for review within fifteen days after service of this decision. Any other party to this proceeding may, within ten days after service of a petition for review, file an answer supporting or opposing Commission review (id. § 2.786(b)(3)). The filing of a petition for review is mandatory for a party seeking to exhaust its administrative remedies before seeking judicial review (id. §§ 2.786(b)(1) and 2.1253). If no party files a petition for review of this decision, and if the Commission does not review it sua sponte, this decision constitutes the final action of the Commission thirty days after its issuance (id. § 2.1251(a)).

It is so ORDERED.

BY THE PRESIDING OFFICER[23]

/RA/

E. Roy Hawkens
ADMINISTRATIVE JUDGE

Rockville, MD
September 16, 2005

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[23] Copies of this Partial Initial Decision were sent this date by internet email or facsimile transmission to all participants or counsel for participants.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of	)	
	)	
HYDRO RESOURCES, INC.	)	Docket No. 40-8968-ML
	)	
	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB PARTIAL INITIAL DECISION (PHASE II CULTURAL RESOURCES CHALLENGES TO IN SITU LEACH URANIUM MINING LICENSE) (LBP-05-26) have been served upon the following persons by U.S. mail, first class, or through NRC internal distribution.

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Office of the Secretary of the Commission

Dated at Rockville, Maryland,
this 16th day of September 2005