RAS 10555

October 5, 2005

UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

INTERVENORS' PETITION FOR REVIEW OF LBP-05-26

Pursuant to 10 C.F.R. § 2.1253 and § 2.786, Intervenors Eastern Navajo Diné Against Uranium Mining ("ENDAUM"), Southwest Research and Information Center ("SRIC"), Grace Sam and Marilyn Morris (hereinafter collectively "Intervenors") hereby petition for review of LBP-05-26, the Presiding Officer's Partial Initial Decision (Phase II Cultural Resources Challenges to In Situ Leach Mining License) (September 16, 2005). The Commission should take review because LBP-05-26 is based on legal error and substantial factual errors.

I. BACKGROUND AND SUMMARY OF DECISION

A. Background

On January 5, 1998, the Nuclear Regulatory Commission ("NRC") Staff issued Hydro Resources, Inc. ("HRI") a source and material license authorizing HRI to conduct *in situ* leach mining on four sites in Crownpoint and Church Rock in the Navajo Nation,

New Mexico: Section 8 and Section 17 in Church Rock and Crownpoint and Unit 1 in Crownpoint.

In September 1998, the former Presiding Officer, Peter Bloch, bifurcated this proceeding, ordering that only issues relevant to Section 8 and "any issue that challenged the validity of the license issued to HRI" would be considered. Memorandum and Order at 2 (Sept. 22, 1998) (unpublished). Litigation on issues relevant to HRI's proposed operations at Church Rock Section 8 concluded in December, 2004. LBP-04-3, 59 NRC 84, 109 (2004). In 2005, pursuant to the Commission's order, CLI-01-04, 53 NRC 31 (2001), the parties submitted evidentiary presentations and briefs concerning cultural resources pertaining to HRI's proposed mining operations at Section 17 in Church Rock and Unit 1 and Crownpoint in the town of Crownpoint, New Mexico. See LBP-04-3, 59 NRC at 109. The NRC Staff's NHPA review regarding Section 8 were upheld in LBP-99-9, 49 NRC 136 (1999). The Presiding Officer's decision was upheld by the Commission in CLI-99-22, 50 NRC 3 (1999).

B. Summary of LBP-05-26

This Petition seeks Commission review of LBP-05-17, which decided that Intervenors' arguments against the NRC Staff's Phased Compliance approach was barred by the law of the case doctrine because the former Presiding Officer and the Commission had previously considered the issue of whether the NRC Staff could take a phased approach in conducting a cultural resources review pursuant to the National Historic Preservation Act ("NHPA"). 16 U.S.C. § 470 *et seq.* Both entities concluded a phased approach was permissible under the NHPA. LBP-99-09, 49 NRC at 142, *aff'd* CLI-99-22, 50 NRC at 12-13. LBP-05-26. slip op. at 15-16.

The Presiding Officer further found that the NRC Staff's NHPA review for Sections 17 and 12, Crownpoint and Unit 1 was adequate under the NHPA regulations that were in effect at the time. *Id.* at 30 and 33-34. With respect to Section 17 and 12, the Presiding Officer found, "that the Staff satisfied the NHPA's consultation requirements". *Id.* at 30. With respect to Crownpoint and Unit 1, the Presiding Officer found that, "[i]n 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." *Id.* at 23, 33

Finally, the Presiding Officer found that the Final Environmental Impact Statement ("FEIS") adequately considered the impact of HRI's mining on cultural resources by taking the requisite "hard look" as required under the National Environmental Policy Act ("NEPA"). The Presiding Officer found that the "hard look" required by NEPA was not to be equated with completion of the NHPA review. *Id.* slip op. at 34-35. Finally, the Presiding Officer found that Intervenors' argument was not barred by the law of the case doctrine because, unlike in the previous Commission decision where the NRC Staff's NHPA review was completed for Section 8 mining operations, in this case the issue is whether, in regard to Unit 1 and Crownpoint, whether the FEIS in "adequate in the *absence* of a completed NHPA review for those sites". *Id.* at 35. (emphasis in original).

II. THE COMMISSION SHOULD GRANT REVIEW OF LBP-05-26

Pursuant to 10 C.F.R. §§ 2.1253 and 2.786(b)(4)(i), (ii) and (iii), the Commission

should exercise its discretion to take review of LBP-05-26, because it contains "errors of material fact", "necessary legal conclusion[s]" which are "in error", and a "substantial and important question of law, policy or discretion has been raised".

A. The Presiding Officer Erred By Finding Intervenors' Arguments Related To NRC Staff's Phased Approach Were Barred By The Law Of The Case Doctrine.

The law of the case doctrine provides that ordinarily, a decision of an appellate tribunal should be followed in subsequent phases of a case where the particular question at issue was "actually decided or decided by necessary implication." LBP-05-26, slip op. at 16, *citing Safety Light Corp. (Bloomsburg Site Decontamination)*, CLI-92-09, 35 NRC 156, 159-60 & n.5 (1992). However, a tribunal should, "refrain from applying this doctrine where 'changed circumstances or public interest factors dictate'". *Id. quoting Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation)*, CLI-04-27, 61 NRC 145, 154 (2004). Further, a changed circumstance would include situations in which the "intervening controlling authority makes reconsideration appropriate." *Id. citing 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, 1196097 (11th Cir.) *cert. denied*, 510 U.S. 1012 (1993); *United States v. Bell*, 998 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).

Additionally, the doctrine of the law of the case also "permits a change of position if it appears that the court's original ruling was erroneous." *DeLong Equip. v. Washington Mills Electro Minerals Corp.*, 990 F.2d 1186, 1197 (11th Cir. 1993) *quoting DiLaura v. Power Auth. Of the State of N.Y.*, 982 F.2d 73, 77 (2d Cir. 1992) *quoting*

Petitions of the Kinsman Transit Co., 388 F.2d 821, 825 n. 9 (2d Cir. 1968). "We have also recognized that this exception [to the law of the case doctrine] may apply 'in those rare situations where newly emergent authority, although not directly controlling, nevertheless offers a convincing reason for believing that the earlier panel, in light of the neoteric developments, would change its course.'" *Cohen v. Brown University*, 101 F.3d 155, 168 (1st Cir. 1996) *quoting Irving v. United States*, 49 F.3d 830, 833-34 (1st Cir. 1995).

In this case, intervening authority makes reconsideration of the prior decision appropriate. Further, this new authority makes clear that the tribunals' previous rulings were erroneous. Previous decisions in this case regarding NHPA compliance have relied upon the old regulations' ambiguous treatment of a 'phased approach' in order to uphold the NRC Staff's actions. In fact, the Commission has stated as much, holding that, "[t]he statute itself contains no such prohibition [against phased compliance], federal case law suggests none, and the supporting regulations are ambiguous on this matter." CLI-98-8, 47 NRC 314, 323-4 (1998) (emphasis added). Therefore, since the old regulations were ambiguous and the new regulations provide the needed clarity, this new authority makes reconsideration of the prior decisions appropriate and Intervenors' argument should not be barred by the law of the case doctrine. Alternatively, the law of the case doctrine should not be applied because the "newly emergent authority, although not directly controlling, nevertheless offers a convincing reason for believing that the earlier panel, in light of the neoteric developments, would change its course". *Irving*, 49 F.3d 830, 833-34.

This position is supported by case law. *See generally United States v. Connor*, 926 F.2d 81, 83 (1st Cir. 1991) (*stare decisis* need not always be applied woodenly, especially where new matters are brought to the court's attention); *Aldens, Inc. v. Miller*, 610 F.2d 538, 541 (8th Cir. 1979) ("Although we are not bound by another circuit's decision, we adhere to the policy that a sister circuit's reasoned decision deserves great weight and precedential value."), *cert. denied*, 446 U.S. 919 (1980); *Cohen v. Brown University*, 101 F.3d 155, 168 (1st Cir. 1996) ("The law of the case doctrine is a prudential rule of policy and practice, rather than "an absolute bar to reconsideration [] or a limitation on a federal court's power. *quoting United States v. Rivera-Martinez,* 931 F.2d 148, 150-51 (1st Cir.) *cert. denied,* 502 U.S 862 (1991). Thus we have not construed the doctrine as "an inflexible straitjacket that invariably requires rigid compliance." *quoting Northeast Utils. Serv. Co. v. Federal Energy Regulatory Comm'n,* 55 F.3d 686, 688 (1st Cir. 1995).) As case law makes clear, the law of the case doctrine should not be applied woodenly, Intervenors' arguments related to NRC Staff's phased approach should not be barred by the law of the case doctrine.

B. The Presiding Officer Misconstrues Intervenors' Argument With Respect To The Significance Of The Change In The NHPA Regulations.

In 2000, the regulations enacting the NHPA were revised in compliance with amendments to the NHPA in 1992. 65 Fed. Reg. 77,698. The amendment regarding the regulation governing phased compliance is germane in this case. The previous regulation, 36 C.F.R. § 800.3(c), mentioned "phased" compliance, but was ambiguous as to the term's meaning. Notably, the revised regulations in 2000 removed 36 C.F.R. § 800.3(c) and replaced it with a much more elaborate discussion of "phased identification and evaluation at 36 C.F.R. § 800.4(b)(2). *See* King Declaration at ¶ 37.

However, the Presiding Officer finds in LBP-05-26 that, "the new regulations are not entitled to retroactive application and, thus, are not relevant here." LBP-05-26, slip op. at 18. This sentiment is echoed in footnote 10, "[i]nvalidating 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." *Id.* at 18-19, footnote 10. However, the Presiding Officer misconstrues Intervenors' position. Intervenors' position is that the new regulations clarify the old regulations, the regulations that this Commission characterized as "ambiguous". Intervenors' do not seek the retroactive application of the new regulations, but rather, urge that the new regulations clarify the intent of the old regulations, which the Commission characterized as "ambiguous". This position is supported in the Declaration of Thomas F. King. Dr. King was previously employed with the Advisory Council on Historic Preservation ("ACHP"). King Declaration at ¶ 3. Thus, Dr. King is in a unique position to comment on the intent of the new regulations. In Dr. King's expert opinion, the new regulations were drafted, in part, to clarify what "phased identification and evaluation" actually entail. King Declaration at ¶ 42.

C. The Presiding Officer Erred By Finding The NRC Staff's NHPA Review Under The Old Regulations Was Adequate.

As stated above, the new regulations provide guidance to the interpretation of the old regulations. Previous Commission decisions relied upon ambiguity of the old regulations to uphold the NRC Staff's phased compliance NHPA review. CLI-98-8, 47 NRC 314, 323-4 (1998). However, the new regulations shed new light on this ambiguous area. They make clear that the NRC Staff's phased compliance approach is not what the ACHP intended, even in large complex projects.

As is described more fully in the following section, phased compliance, as approved in this case, suffers from a focus on the mining sites as autonomous areas, and not as one contiguous landscape, as is envisioned by the NHPA. *See generally* 16 U.S.C. § 470(b).

D. The Presiding Officer Erred By Finding That The FEIS Adequately Considers The Impact Of HRI's Mining On Cultural Resources.

Courts have held that federal agencies must take a "hard look" at all of the significant consequences of their actions. *Baltimore Gas & Electric Co. v. Natural Resources Defense Council*, 462 U.S. 87,97 (1983). In order to take a hard look, the NRC Staff must "[f]ully consider the impacts of [its proposal] on the physical, biological, social, and economic impacts of the human environment." 40 C.F.R. § 1508.14.

In order to take the requisite hard look, all consequences of the proposed project must be examined. Indeed, "significance cannot be avoided by ... breaking [an action] down into small component parts." 40 C.F.R. § 1508.27(b)(7). Eventual mining on all sites is reasonably foreseeable, yet [f]ew project-specific data exists." FEIS at 3-68. This arrangement cannot be what the drafters of NEPA had in mind. The Presiding Officer finds that, "the 'hard look' required by NEPA is not to be equated with completion of the NHPA review." LBP-05-26, slip op. at 35. However, this type of coordination between reviews is expected to be coordinated as appropriate. 36 C.F.R. § 800.8. ("Agencies should consider their section 106 responsibilities as early as possible in the NEPA process, and plan their public participation, analysis, and review in such a way that they can meet the purposes and requirements of both statutes in a timely and efficient manner. The determination of whether an undertaking of a "major Federal action significantly affecting the quality of the human environment," and therefore requires preparation of an

... EIS under NEPA, should include consideration of the undertaking's likely effects on historic properties.")

Additionally, the division of NHPA regulations and NEPA regulations does not conceptually make sense. In essence, the Presiding Officer has held that each of the sites can be analyzed individually. However, case law has held that in order to take the requisite hard look, cumulative effects must be analyzed by adding the action to other past, present, and reasonably future actions..." 40 C.F.R. § 1508.7. However, by failing to complete the NHPA review, it would be impossible for the NRC Staff to adequately consider the impacts of the HRI in situ mining by "adding the action to other past, present, and reasonably future action..." because the full impact will not be known until the NHPA process is completed for all sites. *Id.* The Presiding Officer cites the NRC Staff's recognition of the possibility of cultural resources discovery during HRI's development and operation mines. LBP-05-26, slip op. at 39. The decision holds that since HRI's archeological monitor, "who must be present during all earth-disturbing activities, including construction, drilling, and reclamation procedures," could halt the work in the event of a cultural discovery, the hard look as required by NEPA was satisfied. *Id.* at 39 and 41. However, this does not satisfy NEPA. If cultural discoveries are made during the course of HRI's operations, they "would be evaluated for their significance pursuant to applicable laws." *Id.* at 39. However, the problem with this approach is that the project will never again be considered as a whole. A significant archeological find could occur on each of the different mining sites and they would not be considered together. In other words, their discovery and significance would not be given a hard look.

The fundamental problem with this approach becomes clear when comparing the above situation to NEPA case law. NEPA requires that "where several actions have a cumulative or synergistic environmental effect, this consequence must be considered in an EIS." *City of Tenakee Springs v. Clough*, 915 F.2d 1308, 1312 (9th Cir. 1990) *citing Sierra Club v. Penfold*, 857 F.2d 1307, 1320-21 (9th Cir. 1988). This analysis is an aspect of the hard look requirement. Using this approach, courts have held that timber sales cannot be taken piecemeal. If they are reasonably foreseeable, they must be considered in one EIS. *See Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1214 (9th Cir. 1998). In the same way, cultural resources cannot be reviewed, as discovered, on a site-by-site basis. This approach does not satisfy NEPA's hard look requirement.

III. CONCLUSION

For the foregoing reasons, Intervenors respectfully request that the Commission grant review of LBP-05-26 and reverse.

Respectfully submitted this 5th day of October, 2005.

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HYDRO RESOURCES, INC.	)	ASLBP No. 95-706-01-ML
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CERTIFICATE OF SERVICE

I hereby certify that copies of "Intervenors' Petition For Review Of LBP-05-26 in the above-captioned proceeding have been served on the following by U.S. Mail, first class, or, as indicated by an asterisk, by electronic mail and U.S. Mail, first class, this 5th day of October 2005:

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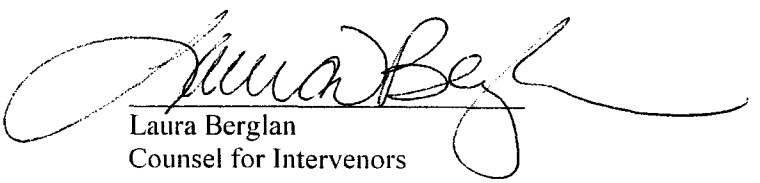

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October 5, 2005

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Dear Madam or Sir:

Please find enclosed for filing "Intervenors Grace Sam's, Marilyn Morris', Eastern Navajo Diné Against Uranium Mining's and Southwest Research and Information Center's Petition for Review of LBP-05-26". Copies of the enclosed have been served on the parties indicated on the certificate of service.

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Sincerely,

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