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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION  
BEFORE THE COMMISSION

September 11, 2006 (4:57pm)

OFFICE OF SECRETARY  
RULEMAKINGS AND  
ADJUDICATIONS STAFF

In the Matter of )  
 )  
HYDRO RESOURCES, INC. )  
(PO Box 777, )  
Crownpoint, New Mexico 87313) )

Docket No. 40-8968-ML  
ASLBP No. 95-706-01-ML

**INTERVENORS' PETITION FOR REVIEW OF LBP-06-19**

**I. INTRODUCTION AND SUMMARY OF DECISION**

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 (collectively, "Intervenors") hereby petition for review of LBP-06-19, the Presiding Officer's Partial Initial Decision (Phase II Challenges to In Situ Leach Mining Materials License Regarding Adequacy of Environmental Impact Statement) (August 21, 2006). LBP-06-19 rejects Intervenors' challenges to the adequacy of the Final Environmental Impacts Statement ("FEIS") prepared by the U.S. Nuclear Regulatory Commission ("NRC" or "Commission") Staff in support of Hydro Resources, Inc.'s ("HRI's") license to perform *in situ* ("ISL") leach uranium mining operations at three sites in northern New Mexico: Section 17, Unit 1, and Crownpoint. The Commission should take review because LBP-06-19 violates NEPA and contains clear factual errors. 10 C.F.R. §§ 2.786(b)(4)(i) and (ii).

The litigation of safety and environmental issues relating to HRI's proposed ISL mine has occurred in two phases. First, under an unpublished September 22, 1998, bifurcation order by former Presiding Officer Peter Bloch, the parties litigated issues

relevant to Section 8 and “any issue that challenged the validity of the license issued to HRI.” Substantive Phase I NEPA issues were decided in LBP-99-30, which was affirmed in CLI-01-04, 53 NRC 31 (2001). CLI-01-04 also reversed the bifurcation order and ordered that the hearing process should resume with respect to all remaining sites. 53 NRC at 43. Thus, in “Phase II” of the proceeding, Intervenors presented evidence on safety and environmental issues with respect to Section 17, Unit 1, and Crownpoint.

Intervenors submitted their evidentiary presentation on Phase II NEPA issues on June 24, 2005.<sup>1</sup> Under an agreement between the parties that was approved by the Presiding Officer, Intervenors limited the evidence presented in NEPA Phase II to evidence that had been presented in Phase I.<sup>2</sup> Intervenors summarized the evidence and incorporated it by reference in order to assure completeness of the record of their NEPA challenges with respect to the entire mining project.

This Petition for Review addresses issues that: (a) arose after LBP-99-30 was decided, (b) concern cumulative environmental impacts, and/or (c) relate primarily to Church Rock Section 17 or Crownpoint. The petition does not address NEPA Phase II issues that were previously briefed by Intervenors in Phase I and decided in CLI-01-04, because no purpose would be served by briefing issues that already have been decided by the Commission. Nevertheless, for purposes of preserving their right of judicial appeal, Intervenors renew and preserve those arguments in relation to Phase II.

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<sup>1</sup> Intervenors Eastern Navajo Diné Against Uranium Mining’s, Southwest Research and Information Center’s, Grace Sam’s and Marilyn Morris’ Written Presentation in Opposition to Hydro Resources, Inc.’s application for a Materials License With Respect to: NEPA Issues for Church Rock Section 17, Unit 1 and Crownpoint (“Intervenors’ Presentation”).

<sup>2</sup> Intervenors’ Joint Motion for Change in Schedule of Written Presentations (January 18, 2005); Order (Revised Schedule for Written Presentations) at 2 (Feb. 3, 2005) (unpublished).

## **II. THE COMMISSION SHOULD GRANT REVIEW OF LBP-06-19**

### **A. The Presiding Officer Violated NEPA By Refusing To Require That The FEIS Be Supplemented.**

The Commission should review and reverse the Presiding Officer's determination that the FEIS need not be supplemented to address the change in the legal status of HRI's proposed mining project affected by the Navajo Nation's enactment of the Diné Natural Resources Protection Act ("DNRPA") on April 29, 2005. LBP-06-19 at 58-59. The DNRPA definitively prohibits uranium mining or processing within Navajo Indian Country. Intervenors' Presentation at 51. *See also* DNRPA § 1303, attached to Intervenors' Section 17 Air Brief as Exhibit O. Section 17 in Church Rock is tribal trust land and therefore Indian Country. HRI, Inc. v. EPA, 198 F.3d 1224, 1254 (10<sup>th</sup> Cir., 2000). Unit 1 and part of the Crownpoint site is allotted land and therefore Indian Country under 18 U.S.C. § 1151(c). FEIS at 2-27. Hence, HRI is prohibited by law from mining on at least two of its four proposed sites or conducting any operations in Indian Country. By failing to require supplementation of the FEIS to address this significant change in the legal requirements affecting the HRI mine, the presiding Officer violated 10 C.F.R. § 51.71(d). Moreover, the Presiding Officer erred in concluding that the DNRPA has no bearing on the environmental analysis in the FEIS. LBP-06-19 at 59 n.40. *See also* Intervenors' Presentation at 51.<sup>3</sup>

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<sup>3</sup> To the contrary, the effects of the DNRPA on the FEIS are major and obvious. First, because HRI's operations are effectively halved under the DNRPA, the FEIS's cost/benefit analysis is now erroneous and must be revisited. *See* FEIS at 5-1 – 5-7. Second, because HRI may dispose of liquid waste on a portion of Section 17 at Church Rock and from its Crownpoint and Unit 1 operations at T17N, R13W, Section 12, the northeast quarter of which is allotted land, and thus both tracts are Indian Country under the DNRPA, HRI will be prohibited from disposing its waste on those lands. The environmental effects of liquid waste disposal will therefore need to be re-evaluated. Finally, because the DNRPA substantially changes the allowed scope of HRI's project, the range of alternatives that should be considered must be re-evaluated.

Finally, the Presiding Officer erred in concluding that Intervenors waived their right to challenge this aspect of the FEIS by agreeing not to present new evidence regarding their NEPA claims in the Phase II briefing. LBP-06-19 at 58. While Intervenors agreed not to present new evidence regarding their claims, they did not agree to forego any discussion of new laws that might affect the adequacy of the FEIS. See discussion above at 2 and n.2. In any event, the Commission should grant review as a matter of important public policy.

**B. The Presiding Officer Erred in Approving the FEIS's Consideration of Cumulative Impacts of Airborne Radiation.**

The Commission should reverse the Presiding Officer's conclusion that the FEIS adequately considered the disparately severe cumulative environmental impacts of the proposed ISL mine on the human environment of Church Rock because it is contrary to established law and erroneous. Due to past uranium mining activity in Church Rock, ambient airborne radioactivity levels at Church Rock are ten times higher than at Crownpoint and 20 times higher than the national average for background radiation. Intervenors' 2005 NEPA Presentation at 22-23. Pursuant to 40 C.F.R. § 1508.27, it was unlawful for the FEIS to lump together the environmental impacts of radioactive airborne emissions in these two distinct locales. See also Anderson v. Evans, 314 F.3d 1006, 1021 (9<sup>th</sup> Cir. 2002) (rejecting NEPA analysis that evaluated only impacts of hunting on entire whale herd when impacts would affect geographically distinct subgroup).<sup>4</sup>

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<sup>4</sup> The Presiding Officer also erred in concluding that the dose from existing airborne radioactive emissions at Church Rock is "closer to the 225 mrem/year estimated in the FEIS, rather than the 1000 mrem/year alleged by the Intervenors." LBP-06-19 at 15. Given the fact that livestock grazing is a primary occupation of the Navajo residents in the area of Section 17, the Presiding Officer had no reasonable basis for concluding that a person would not be continually present on Section 17 during the operation of the HRI mine. See discussion in Section II.D. below. Moreover, the Presiding Officer's estimate of 225 mrem/year is invalid because it is based on the impermissible averaging of ambient airborne concentrations in two different locales. In any event, as discussed in Intervenors' Supplemental

The Presiding Officer's conclusion that the FEIS "took into account the background radiation" when analyzing the cumulative environmental impacts of HRI's operation at Section 17 [LBP-06-19 at 15] is inconsistent with NEPA and erroneous. As the Commission has recognized:

cumulative impacts analysis looks to whether the impacts from a proposed project will combine with the existing, residual impacts in the area to result in a significant 'cumulative' impact – where, in other words, the new impact is significantly enhanced by already existing environmental effects.

CLI-01-04, 53 NRC at 60-61. Contrary to CLI-01-04's requirement to consider combined impacts, the FEIS evaluated only the "incremental" impacts of airborne radiological emissions from HRI's operation at Church Rock. FEIS at 4-72. *See also id.* at 4-125 (proposed ISL mine "would result in a negligible increase in cumulative impacts..."). Nowhere does the FEIS or the DEIS discuss the combined impacts of airborne radiological emissions from HRI's operation and residues of past mining. The mere mention of elevated airborne radiation levels in the DEIS and FEIS, cited at pages 13 and 15 of LBP-06-19, does not amount to an evaluation of cumulative impacts. To the extremely limited extent that the FEIS discusses actual impacts of past mining activities, the descriptions of impacts are irrelevant and inconsistent. For instance, the FEIS refers to "the cumulative effect of the long history of uranium mining in the area and the large exposures to radon." *Id.* at 4-117. *See also* FEIS at 4-124 – 4-125. But the identified impacts consist only of cancers in uranium miners caused by past exposures to radiation. *Id.* The FEIS does not discuss the health effects on the general public of future exposures to ongoing elevated levels of airborne radioactivity during the operation of the HRI mine.

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Brief on Radioactive Air Emissions at 17-18 (December 7, 2005), record evidence shows that doses from gamma radiation and radon to Larry King, a local cattle rancher with fenced grazing land on Section 17, would significantly exceed the regulatory limit of 100 mrem/year if Mr. King spent as little as 11 hours/week in that area.

Moreover, the FEIS clearly implies that the residual contamination at Church Rock has been cleaned up. *Id.* at 4-125. This is not the case, as HRI has admitted.<sup>5</sup> The FEIS further speculates that residual radioactivity from previous mining activity “may be cleaned up as part of wellfield contamination.” FEIS at 4-117. This assertion is not only speculative but irrelevant to the issue of cumulative impacts during the mining operation. Moreover, LBP-06-19 ignores Intervenors’ evidence that in fact, cumulative health impacts of ongoing exposure to existing radiation emissions will be significant, especially in light of the vulnerability of the local population to adverse health impacts. *See, e.g.,* Intervenors’ Presentation at 31, citing Testimony of Christine Benally at 46-47.<sup>6</sup>

**C. The Presiding Officer Erred in Approving the FEIS’s Consideration of Cumulative Impacts on Ground Water Resources.**

The Commission should reverse LBP-06-19 because it approves a NEPA analysis that fails to take the requisite “hard look” at the cumulative environmental impacts of abandoned mine workings at the Church Rock site on the potential for migration of groundwater contaminants from HRI’s proposed mine. Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 374 (1989). In fact, the Presiding Officer himself

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<sup>5</sup> See Hydro Resources, Inc.’s Response in Opposition to Intervenors’ Written Presentation Regarding Air Emissions (July 29, 2005), Exhibit A, paragraphs 70.

<sup>6</sup> Intervenors note for the record their disagreement with the Presiding Officer’s holding that elevated airborne radiation levels at the Church Rock site constitute “background radiation.” LBP-06-19 at 17. Because this issue was decided by the Commission in CLI-06-14, it will not be re-visited here. Nevertheless, Intervenors challenge as erroneous the Presiding Officer’s assertion that “[t]he FEIS treats the radiological consequences of [mine] spoilage on Section 17 as background radiation...” LBP-06-19 at 13. This assertion is not borne out by the record, which shows gross inaccuracies and inconsistencies in the FEIS’s characterization of airborne radioactivity levels at Church Rock. In some instances, the FEIS uses the invented term “natural background” to describe all existing radiation emissions at Church Rock other than emissions from medical procedures. FEIS at 4-72, 4-124. Elsewhere, the FEIS describes airborne radioactivity levels at Church Rock as consisting of “natural background *plus* remnant radiation stemming from previous mining and milling activities near the Church Rock site.” FEIS at 4-73 (emphasis added). *See also id.* at 4-117. As a result the reader is left to wonder what radiation levels actually are being counted in the FEIS’s various discussions and tables depicting radiation levels at the Church Rock site. The FEIS’s inaccurate and inconsistent terminology is so confusing and misleading that by itself it constitutes grounds for revising the EIS. *Hughes Watershed Conservancy v. Glickman*, 81 F.3d 437, 446 (4<sup>th</sup> Cir. 1999).

conceded that the groundwater model on which the FEIS relied “improperly failed” to “take into account the possibility that old mine workings might extend into an ISL well field, which ‘may form preferential pathways for [contaminated] movement away from the well fields.’” LBP-06-19 at 23, quoting FEIS at 4-54.<sup>7</sup> By accepting the FEIS’s unexplained and unjustified failure to model the acknowledged potential for excursions in the old mine workings, the Presiding Officer violated 10 C.F.R. § 51.71’s requirement that environmental impacts must be quantified to the “fullest extent practicable.”

Moreover, the Presiding Officer’s reliance on monitoring as a compensatory measure is unfounded. Quoting the FEIS, the Presiding Officer states that “HRI’s monitoring program for vertical excursions would promptly detect any problems, and HRI would ‘proceed immediately to determine the cause of the leakage and reverse the trend.’” LBP-06-19 at 24, quoting FEIS at 4-55. But the FEIS itself concedes that “HRI has not specifically demonstrated” how it would seal off old mine workings to stop excursions. FEIS at 4-56. Thus, the Presiding Officer lacked any rational basis for his confidence that HRI can stop excursions once they are detected. Under the circumstances, the FEIS was required to discuss the cumulative impacts of contaminant excursions through old mine workings on the human environment, but it did not and a finding that the FEIS adequately analyzed the issue is erroneous.

**D. The Presiding Officer Violated NEPA in Finding That the FEIS Adequately Addressed Mitigation Measures for Crownpoint Municipal Water Wells.**

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<sup>7</sup> For the record, intervenors continue to challenge the Presiding Officer’s rejection of intervenors’ claim that the FEIS masks the significant impacts to groundwater quality of past mining activities by combining groundwater quality measurements from the mineralized ore zone and the high quality groundwater in the surrounding area. LBP-06-19 at 21, citing LBP-05-17 and CLI-06-01. The issue is not briefed here because it has already been addressed by the Commission.

The Presiding Officer violated NEPA in rejecting Intervenors' argument that the FEIS insufficiently discusses the proposed mitigation measure of relocating Crownpoint's municipal wells. LBP-06-19, slip. op. at 44-47. The FEIS's perfunctory description of mitigation measures does not satisfy NEPA. Okanagan Highlands Alliance v. Williams, 236 F.3d 468, 473 (9<sup>th</sup> Cir. 2000) (citations omitted). Mitigation measures must be supported by scientific studies and substantial evidence. Wyoming Outdoor Council v. Corps of Engineers, 351 F. Supp. 2d 1232, 1250 (D. Wy. 2005).

In this case, the FEIS only requires that HRI replace Crownpoint's municipal wells prior to injection of lixiviant. FEIS at 4-62. The replacement wells would be required to provide the same quantity of water as existing wells and meet EPA primary and secondary drinking water standards. *Id.* However, this mitigation measure is not supported by any data as to whether there are other locations in or near Crownpoint that might meet these criteria, which regulatory agency, if any, will be responsible for well relocation or oversight of well relocation, whether existing water infrastructure or new infrastructure will be needed and whether building such infrastructure is even feasible. In sum, the FEIS's discussion of this mitigation measure falls far short of NEPA's requirements.

**E. The Presiding Officer Erred in Finding That the FEIS Adequately Addressed Land use Impacts and Mitigation Measures.**

The Presiding Officer also violated NEPA in finding that the FEIS adequately addressed land use impacts and related mitigation measures. According to the Presiding Officer, the land being removed from grazing is small in comparison to the "vast desert" in which it is located, and no one would be prevented from raising livestock. LBP-06-19



at 28-31. Thus, the Presiding Officer concluded that the impacts of the HRI mine on Section 17 would be “minor and short-lived.” *Id.* at 29.

By failing to examine the environmental impacts of HRI’s operation on the specific locale of Section 17, the Presiding Officer violated 40 C.F.R. § 1508.27. He also erred by ignoring Intervenors’ evidence that the alleged vastness of the desert surrounding the HRI mine is immaterial to the lives of the Navajo people who live and work on Section 17. As demonstrated in Intervenors’ Presentation at 32, the residents of Section 17 have close historic and cultural ties to the specific land areas where they have lived their entire lives and where their families have lived for generations. Further, they make their living on the land by raising livestock, which is an integral part of their culture. *Id.* at 32-33. Because of their deep cultural ties to the land where they reside, as well as their high level of poverty, they are not highly mobile. *Id.* Clearly, an eight-year interruption in the ability of Navajo ranchers to use their culturally significant lands constitutes a significant adverse environmental impact to those Section 17 residents.

Moreover, the Presiding Officer violated NEPA by accepting the adequacy of monetary compensation and relocation as mitigation measures for the displacement caused by HRI’s mining operation. As discussed above in Section II.D, mitigation measures must be scientifically supported. The Presiding Officer ignored Intervenors’ evidence that monetary compensation does not suffice in this situation, where the residents of Section 17 are closely tied to their land by cultural tradition. As Dr. Bullard testified, relocation is so contrary to the Navajo way of life that it has been characterized by the Navajo as “disappearing.” Bullard Testimony at 37, cited in Intervenors’ Presentation at 32. LBP-06-19 and the FEIS must be rejected because they completely

fail to acknowledge the cultural and socioeconomic factors that render compensation and relocation inadequate as mitigation measures.


Additionally, the FEIS fails to address such logistical matters as who will relocate displaced families, how they will be relocated, and how tribal members unwilling to be relocated will be treated. This last point is critical because the FEIS notes that some allottees or tenants at Unit 1 may not wish to relocate voluntarily. FEIS at 4-94. Finally, this mitigation measure assumes temporary relocation, but does not consider what steps will be taken in the reasonably foreseeable event that land and groundwater is permanently contaminated. This paucity of analysis is clearly impermissible under NEPA. Wyoming Outdoor Council v. Corps of Engineers, *supra*, 351 F.Supp.2d at 1250; Okanagan Highlands Alliance v. Williams, *supra*, 236 F.3d at 473.

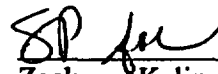
### III. CONCLUSION

For the foregoing reasons, Intervenor respectfully request that the Commission grant review of LBP-06-19 and reverse.

Dated September 11, 2006.

Respectfully Submitted,

  
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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

CERTIFICATE OF SERVICE

I hereby certify that copies of "Intervenors' Petition For Review of LBP-06-19" 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 11<sup>th</sup> day of September, 2006:

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September 11, 2006

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

Dear Sir or Madam:

Please find enclosed for filing "Intervenors' Petition for Review of LBP-06-19". Copies of the enclosed have been served on the parties indicated on the enclosed certificate of service. Additionally, please return a file-stamped copy of the first page in the attached self-addressed, postage prepaid envelope.

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

Sincerely,

  
\_\_\_\_\_  
Allison Dellinger

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Enclosures

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