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USNRC

October 5, 1999

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OFFICE OF SECRETARY
RULEMAKINGS AND ADJUDICATIONS STAFF

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE PRESIDING OFFICER

In the Matter of	)	
	)	Docket No. 40-8968-ML
HYDRO RESOURCES, INC.	)	
P.O. Box 15910	)	(Leach Mining and Milling License)
Rio Rancho, New Mexico 87174	)	

NRC STAFF'S RESPONSE BRIEF

INTRODUCTION

On September 14, 1999, in response to the Presiding Officer's request for scheduling briefs,[1] Hydro Resources, Inc. (HRI) requested that this proceeding be placed in abeyance. *See* HRI's "Motion To Place Hearing In Abeyance" (Abeyance Motion), at 1-3. On September 28, 1999, Intervenors Eastern Navajo Dine Against Uranium Mining (ENDAUM), and Southwest Research and Information Center (SRIC) filed a joint response opposing the Abeyance Motion,[2] in which they proposed a schedule to conclude the proceeding, and alternatively moved for revocation of HRI's license with respect to the Section 17, Unit 1, and Crownpoint mining sites. *See* SRIC's Response Brief, at 13-14.

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[1] *See* LBP-99-30, "Partial Initial Decision Concluding Phase I (Groundwater, Cumulative Impacts, NEPA and Environmental Justice)," 50 NRC __ (August 20, 1999 slip op.) (August 20 Order), at 77-78.

[2] *See* "Intervenors ENDAUM's and SRIC's Response to HRI's Motion to Hold Hearing in Abeyance and Proposed Litigation Schedule for Section 17, Unit 1, and Crownpoint; Or, in the Alternative, Motion to Revoke HRI's License for Section 17, Unit 1, and Crownpoint" (SRIC's Response Brief), at 1-13.

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By filing dated September 27, 1999, counsel for Intervenors Marilyn Morris and Grace Sam filed a similar response opposing the Abeyance Motion,[3] which included a schedule to conclude the proceeding, and alternatively moved for revocation of HRI's license with respect to the Section 17, Unit 1, and Crownpoint mining sites. *See* Sam's Response Brief, at 19-20.

For the reasons discussed below, the Staff requests the Presiding Officer to (1) grant the Abeyance Motion; and (2) deny the Interveners' alternative motions for revocation of HRI's license with respect to the Section 17, Unit 1, and Crownpoint mining sites.

BACKGROUND

As set forth in SRIC's Response Brief, at 3-4, after extensive argument, the Presiding Officer granted HRI's June 4, 1998 bifurcation motion. *See* "Memorandum and Order (Scheduling and Partial Grant of Motion for Bifurcation)," dated September 22, 1998 (unpublished) (September 22 Order). Therein, the Presiding Officer ruled that during Phase I of the proceeding, the Intervenors could submit written presentations, within the scope of their germane concerns, regarding: (1) any issue that challenged the validity of the license issued to HRI; (2) any aspect of the license concerning operations on Church Rock Section 8; and (3) any aspect of the license concerning transportation or treatment of materials extracted from Section 8. *See* September 22 Order, at 2-3. The Presiding Officer stated that following the conclusion of Phase I, he would decide whether other issues regarding the Section 17, Unit 1, and Crownpoint

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See "Intervenors Marilyn Morris and Grace Sam's Response to HRI's Motion to Place Hearing in Abeyance, Proposed Schedule for Phase II, and Motion to Revoke HRI's License for Section 17, Crownpoint, and Unit 1" (Sam's Response Brief), at 1-18. Contrary to the procedures established for service of pleadings, an electronic copy of Sam's Response Brief was not served on counsel for Staff, who had no knowledge of its existence until receiving a paper copy on October 1, 1999. Nevertheless, to avoid further prolonging this proceeding, the Staff is not seeking an extension of its October 5 response date.

mining sites "would be determined immediately or would be placed in suspense because they are not yet ripe for determination." *Id.*, at 3.

On October 13, 1998, after considering objections to the September 22 Order, the Presiding Officer affirmed it, noting the Intervenors' belief that the September 22 Order "prevents them from presenting a substantial portion of their case at this time," but that they had not "explained what portion of their case would be deferred in this way." "Memorandum and Order (Reconsideration of the Schedule for the proceeding)" (unpublished) (October 13 Order), at 5.

The Commission then denied, as premature, ENDAUM's and SRIC's petition for interlocutory review, declining to disturb the Presiding Officer's bifurcation approach as reflected in the September 22 and October 13 orders. *See* CLI-98-22, 48 NRC 215, 218 (1998). In doing so, the Commission continued to stress the need for "fair, but speedy, decisionmaking [sic]," stating that it expected the Presiding Officer "to continue to manage the case with an eye toward a prompt resolution of all outstanding issues." *Id.*, at 217, and 218.

DISCUSSION

In response to the Presiding Officer's previous ruling that following the conclusion of Phase I he would decide whether other issues regarding Section 17, Crownpoint, and/or Unit 1 "would be determined immediately or would be placed in suspense because they are not yet ripe for determination" (September 22 Order, at 3), HRI states that at this time it "does not intend to go forward with operations" at these sites. Abeyance Motion, at 2. As discussed further below, given HRI's stated intent at this time not to conduct ISL mining operations at its Section 17, Crownpoint, or Unit 1 sites, the Intervenors had to show that issues related to those sites are nonetheless ripe for determination. No such showing is made.

ENDAUM and SRIC state that "there are numerous issues common to all of the mining sites, which are most efficiently addressed in a single proceeding rather than in separate proceedings," but fail to explain, from a health and safety standpoint, why those issues must be litigated now. SRIC's Response Brief, at 8. This lack of discussion evidences the same problem which the Presiding Officer identified nearly a year ago, when he noted that these Intervenors had not "explained what portion of their case would be deferred" by bifurcating the proceeding. October 13 Order, at 5.[4]

The 10 C.F.R. Part 2, Subpart L, regulations were meant to prevent, in materials licensing proceedings, unjustified costs and delays. *See Kerr-McGeeCorporation* (West Chicago Rare Earths Facility), CLI-82-2,15 NRC 232,261-62 (1982), *aff'd. sub nom. City of West Chicago v. NRC,* 701 F.2d 632 (7th Cir. 1983) (noting agency's interest in reducing costs and delays incurred in the adjudication of materials cases); *accord, Sequoyah Fuels* Corp. (Sequoyah UF6 to UF4 Facility), CLI-86-17, 24 NRC 489, 498-99 (1986) (use of informal procedures in a materials case prevents additional delays and expenses inherent in trial-type adjudications). The procedures endorsed by the Commission in these decisions, made when hearing procedures to be used in materials cases were determined by the Commission on a case-by-case basis, were later codified in the Subpart L regulations as a means to reduce the delays and expenses of trial-type adjudications. *See* 52 Fed. Reg. 20089-91 (May 29, 1987); and 54 Fed. Reg. 8269-71 (February 28, 1989).

Moreover, in this proceeding, the Commission has already emphasized the importance of promptly resolving the outstanding issues. *See* CLI-98-22, *supra*, 48 NRC at 217-18. Because

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[4] ENDAUM's and SRIC's renewed argument that deferral violates their hearing rights under the Atomic Energy Act (*see* SRIC's Response, at 6-8), is addressed in Section A, *infra*.

the Intervenors have failed to identify any health and safety reasons requiring additional hearings at this time, the Abeyance Motion should be granted.

A. ENDAUM's and SRIC's Deferral Argument Lacks Merit

ENDAUM's and SRIC's argument that the deferral of further adjudication (which would result if the Abeyance Motion is granted) would violate the hearing requirements of the Atomic Energy Act (AEA) relies on *Union of Concerned Scientists v. NRC,* 735 F.2d 1437 (D.C.Cir. 1984), *cert. denied,* 469 U.S. 1132 (1985) (*Concerned Scientists*), and AEA section 189(a)(1), 42 U.S.C. § 2239(a)(1)(A). *See* SRIC's Response Brief, at 6. ENDAUM's and SRIC's reliance on *Concerned Scientists* is misplaced, since this decision concerned the two-step licensing procedure applicable to nuclear power plants. *See Concerned Scientists*, 735 F.2d at 1438-39. The court cited, but expressed no disagreement with, *City of West Chicago v. NRC, supra,* regarding AEA hearing requirements in materials licensing cases.[5]

Moreover, as previously discussed by the Staff,[6] in licensing *in situ* leach (ISL) mining operations, detailed information is not available on a well-field-specific basis until the well field is ready to be brought into production. The consequent absence of technical detail comports with the general licensing standards of 10 C.F.R. § 40.32, under which the Staff, in evaluating HRI's license application, determined (1) that sufficient hydro geologic information is known about the general area in question to justify issuing a license; and (2) that the mining methods to be used are

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[5] *See Concerned Scientists*, 735 F.2d at 1444, n.12. *See also* LBP-98-5, 47 NRC 119, 134-35 (1998) (noting that materials licenses may be issued prior to any hearing in Subpart L proceedings, and ruling that ENDAUM and SRIC had failed to establish their right under the AEA to a prelicensing hearing).

[6] *See* "NRC Staff's Response to HRI's Motions for Reconsideration and for Bifurcation," dated June 26, 1998, at 4-13.

consistent with established ISL techniques. Pursuant to 10 C.F.R. § 40.32, ISL license applicants must still demonstrate the general feasibility of conducting ISL mining in a geographic area in a safe and environmentally acceptable manner. However, in evaluating ISL license applications, the Staff does not require an ISL applicant to provide fully-detailed information on all planned well fields, since such information is not then available. *Cf. Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), ALAB-179, 7 AEC 159, 178 n.32 (1974) (in licensing nuclear plant, little value in considering decommissioning methods many years before the fact, at a time when decommissioning knowledge base low).

Accordingly, ENDAUM's and SRIC's deferral argument does not support their requested denial of the Abeyance Motion.

B. Intervenors' Due Process Arguments Lack Merit

Intervenors Marilyn Morris and Grace Sam rely principally on *Matthews v. Eldridge,* 424 U.S. 319 (1976), in arguing that granting the Abeyance Motion would deny them procedural due process of law by invading their constitutionally protected liberty and property interests. *See* Sam's Response Brief, at 13-18, claiming that radiation from HRI's proposed mining would create a risk of death or illness by causing harm to their cattle, and contaminating the local air and water. As discussed below, their due process argument is flawed, and does not form a basis for denying the Abeyance Motion.

Counsel for Intervenors Marilyn Morris and Grace Sam filed 56 pages of argument regarding their radiation concerns, in briefs dated November 9, 1998, December 11, 1998, and February 19, 1999. The Presiding Officer considered these arguments, and found that the concerns were not sufficiently substantiated to merit relief. *See* LBP-99-1, 49 NRC 29 (ruling on liquid waste concerns); LBP-99-10, 49 NRC 145 (ruling on performance-based licensing concerns); and

LBP-99-30, 50 NRC __ (slip op.) (ruling on environmental justice and NEPA concerns). These Intervenors were thus given full opportunity to make their case, on these and other issues related to their radiation concerns, and now fail to show how their constitutional rights have been violated. Their due process arguments fail to address the law of this case *(see* LBP-98-5, 47 NRC 119, 134-35 (1998)), and otherwise ignore previous NRC due process analyses. *See, e.g., Kerr-McGee,* supra, CLI-82-2, 15 NRC 232, at 247-62; and *Sequoyah,* supra, CLI-86-17, 24 NRC 489, at 495-98.

Moreover, the Staff views *City of West Chicago v. NRC, supra,* as controlling on the question of whether Marilyn Morris and Grace Sam have constitutionally protected liberty and property interests at stake here. In *City of West Chicago,* the court reviewed the NRC's 1981-82 approval of a 10 C.F.R. Part 40 licensee's decommissioning plan, under which the licensee began storing contaminated material onsite, including tailings from the milling of thorium ore produced from 1967 to 1973. *See* 701 F.2d at 637. In addressing the City's argument that the NRC wrongfully denied it a formal, trial-type adjudication,[7] the court stated in pertinent part as follows:

> The City argues that the NRC proceedings deprived it of liberty or property interests without due process of law. Yet generalized health, safety and environmental concerns do not constitute liberty or property subject to due process protection.

City of West Chicago v. NRC, supra, 701 F.2d at 645 (citations omitted). These Intervenors do not cite, or otherwise show, why this decision is not controlling here.

Accordingly, Marilyn Morris' and Grace Sam's due process argument does not support their requested denial of the Abeyance Motion.

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[7] During the fall of 1981, the City and the licensee were allowed to submit written arguments only. *See Kerr-McGee Corporation, supra,* CLI-82-2,15 NRC 232, at 241-44.

ENDAUM's and SRIC's due process argument is quite perfunctory, vaguely claiming that undefined "liberty interests" will be violated if "a prompt hearing on all the issues raised with regard to HRI's already existing license" is not held. SRIC's Response Brief, at 12, *citing Armstrong v. Manzo,* 380 U.S. 545 (1965). This argument does not support the requested denial of the Abeyance Motion, for the same reasons discussed above with respect to Marilyn Morris' and Grace Sam's due process argument.

C. Intervenors' Segmentation Arguments Lack Merit

Both sets of Intervenors contend that granting the Abeyance Motion would violate the rule against segmenting a major federal action, developed by courts construing the National Environmental Policy Act (NEPA). *See* SRIC's Response, at 9-12; Sam's Response, at 3-9. As discussed below, these arguments do not support the requested denial of the Abeyance Motion.

Granting the Abeyance Motion will not improperly bifurcate the proceeding so as to violate the rule against segmentation, which prohibits an agency from dividing a project into segments for purposes of avoiding the NEPA requirement to prepare an environmental impact statement. *See Taxpayers Watchdog, Inc. v. Stanley,* 819 F.2d 294, 298-99 (D.C. Cir. 1987). Similarly, the segmentation rule requires that if several foreseeable projects may occur in the same geographic region, the projects should be evaluated in a single environmental impact statement. *See City of Tenakee Springs v. Clough*, 915 F.2d 1308, 1312 (9th Cir. 1990).

The Staff met these requirements in February 1997, when it issued NUREG-1508, the final environmental impact statement (FEIS) for HRI's proposed ISL mining project. The FEIS evaluated the impacts of ISL mining at HRI's Church Rock, Unit 1, and Crownpoint sites. Once an adequate FEIS covering an entire project is issued, as is the case here, the project may be completed in stages. *See Cronin v. U.S. Dept. of Agriculture,* 919 F.2d 439, 447-48 (7th Cir.

1990), *citing Marsh v. Oregon Natural Resources Council,* 490 U.S. 360 (1990). The Intervenors have not shown that a phased development of HRI's project will violate the segmentation rule, or any other NEPA requirement.

The only NEPA case cited by ENDAUM and SRIC in support of their segmentation argument does not even concern segmentation. *See Calvert Cliffs Coordinating Committee v. U.S. Atomic Energy Commission,* 449 F.2d 1109 (D.C. Cir. 1971). There, the court was addressing agency rules (later amended in response to the court's decision) implementing NEPA, which related to decisions on whether the Commission should issue construction permits or operating licenses for nuclear reactors. *See Calvert Cliffs,* 449 F.2d at 1115-16, n. 14, and 1127-29. The Intervenors do not explain what bearing this decision has on the question of segmentation.

Marilyn Morris and Grace Sam argue that the Presiding Officer was required to look at all NEPA issues which the parties raised, not just those related to Section 8. *See* Sam's Response, at 4-5, *citing* 10 C.F.R. 51.104(a)(3). However, their argument in this regard overlooks the provisions of 10 C.F.R. 51.104(a)(2), which states in pertinent part that consideration of NEPA issues is subject to "the [applicable] provisions of part 2 of this chapter," which include in this proceeding the Subpart L rules. No legal authority is cited showing that bifurcation is prohibited by the Subpart L rules.

On the issue of segmentation, Marilyn Morris and Grace Sam additionally argue that while past licensing proceedings have been segmented, "the segmentation has occurred only by issue, not by geographical site." Sam's Response, at 8, *citing Long Island Lighting Company* (Shoreham Nuclear Power Station Unit 1), LBP-83-30, 17 NRC 1132, 1136 (1983); and *Pennsylvania Power and Light Company and Allegheny Electric Cooperative, Incorporated*

(Susquehanna Steam Electric Station, Units 1 and 2), LBP-80-18, 11 NRC 906, 908 (1980). However, these nuclear reactor licensing cases involved plants located at a single geographic site. It is therefore hardly surprising that these cases did not involve segmentation by geographic site. By contrast, ISL mining operations by their very nature involve the development of several well fields on different sites. Moreover, the question of why segmentation by issue would be proper for nuclear plants, while segmentation by geographic site for ISL operations would be improper under NEPA, is left unanswered.

Accordingly, for the reasons stated above, the Intervenors' segmentation arguments do not support the requested denial of the Abeyance Motion.

D. Intervenors' Administrative Procedures Act Arguments Lack Merit

Marilyn Morris and Grace Sam convert their NEPA segmentation argument into a related contention that granting the Abeyance Motion would be arbitrary and capricious under the Administrative Procedures Act (APA), as such action would depart from the Board's previous segmentation-by-issue rulings in *Shoreham* and *Susquehanna, supra*. *See* Sam's Response, at 9-13. Even assuming *arguendo* that these Board decisions represent binding precedent in reactor cases (they do not), the Presiding Officer here is conducting the first NRC adjudication pertaining to an ISL mining license. Thus, even though certain actions here may have no precedent in NRC case law, such actions cannot reasonably be viewed as arbitrary and capricious. Moreover, in direct contradiction of the claim that the Presiding Officer in his September 22 Order failed to provide any legal justification for bifurcating the proceeding (*see* Sam's Response, at 12), the Presiding Officer in fact cited *Potomac Electric Power Company* (Douglas Point Nuclear

Generating Station, Units 1 and 2), ALAB-277, 1 NRC 539 (1975), as authority. *See* September 22 Order, at 2.[8]

ENDAUM and SRIC make only a brief APA argument, asserting that postponement of "significant portions of this proceeding" would frustrate "the mandate of the APA" to hold timely hearings. SRIC's Response Brief, at 9, *citing* 5 U.S.C. § 558(c), and *North American Van Lines, Inc. v. U.S. Interstate Commerce Commission*, 412 F.Supp. 782, 793 (N.D. Ind. 1976). These citations establish that the timing of agency proceedings is judged by a reasonableness standard, but the APA does not require an agency to prematurely decide issues. Adjudicating issues pertaining to HRI's Section 17, Crownpoint, or Unit 1 sites would be premature at this point, since, as discussed above, HRI has no present plans to mine these sites. Moreover, detailed information regarding ISL mining is not available on a well-field-specific basis until the well field is ready to be brought into production, as discussed in Section A, *supra*. Therefore, delaying adjudication of issues pertaining to HRI's Section 17, Crownpoint, and Unit 1 sites is not unreasonable, and does not violate the APA.

Accordingly, for the reasons stated above, the Intervenors' APA arguments do not support the requested denial of the Abeyance Motion.

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Inexcusably, counsel for Marilyn Morris and Grace Sam failed to note the Presiding Officer's citation to *Douglas Point,* even though counsel quoted the very sentence for which *Douglas Point* was cited as authority. *See* Sam's Response, at 12. The Appeal Board in *Douglas Point* found that both the AEA and NEPA "are singularly free of provisions purporting to fix the precise time at which evidence is to be gathered and findings made. Just as clearly, the Commission's regulations do not attempt to dictate such matters." *Douglas Point, supra*, 1 NRC at 544 (footnote omitted).

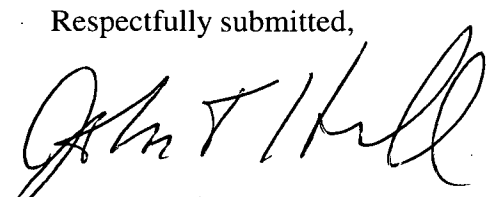
E. Intervenors' License Revocation Arguments Lack Merit

Both sets of Intervenors conclude their briefs by arguing that if the Presiding Officer grants the Abeyance Motion, he should also revoke HRI's license to the extent that it authorizes future ISL mining at HRI's Section 17, Crownpoint, and Unit 1 sites. *See* SRIC's Response, at 13-14; Sam's Response, at 19-20. The Intervenors do not identify any legal authority supporting such a revocation of HRI's license. Therefore, their revocation requests should be denied.

CONCLUSION

Accordingly, for the reasons set forth above, the Staff requests the Presiding Officer to (1) grant the Abeyance Motion; and (2) deny the Intervenors' alternative motions for revocation of HRI's license with respect to the Section 17, Unit 1, and Crownpoint mining sites.

Respectfully submitted,



John T. Hull
Counsel for NRC Staff

Dated at Rockville, Maryland
this 5th day of October 1999

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RULEMAKINGS AND
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UNITED STATES OF AMERICA
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BEFORE THE PRESIDING OFFICER

In the Matter of	)	
	)	Docket No. 40-8968-ML
HYDRO RESOURCES, INC.	)	
P.O. Box 15910	)	
Rio Rancho, New Mexico 87174	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S RESPONSE BRIEF" in the above-captioned proceeding have been served on the following by U.S. Mail, first class, or as indicated by a single asterisk through deposit in the Nuclear Regulatory Commission's internal mail system, or as indicated by double asterisks via e-mail, this 5th day of October 1999:

Administrative Judge
Peter B. Bloch*
Presiding Officer
Atomic Safety and Licensing Board
Mail Stop T-3 F23
U.S. Nuclear Regulatory Commission
Washington, D. C. 20555
Fax: 301-415-5595
E-mail: pbb@nrc.gov

Administrative Judge
Thomas D. Murphy*
Special Assistant
Atomic Safety and Licensing Board
Mail Stop T-3 F23
U.S. Nuclear Regulatory Commission
Washington, D. C. 20555

Jep Hill, Esq.
Jep Hill and Associates
816 Congress Avenue
Austin, Texas 78701

Diane Curran, Esq.** Harmon, Curran, Spielberg,
& Eisenberg, L.L.P.
1726 M Street, N.W., Suite 600
Washington, D. C. 20036
Fax: 202-328-3500
Email: dcurran@harmoncurran.com

Richard F. Clement, Jr., President
Hydro Resources, Inc.
P.O. Box 15910
Rio Rancho, New Mexico 87174

Mitchell W. Capitan, President
Eastern Navajo-Diné Against
Uranium Mining
P.O. Box 471
Crownpoint, New Mexico 87313

Douglas Meiklejohn, Esq.**
Geoffrey H. Fettus, Esq.
New Mexico Environmental Law Center
1405 Luisa Street, Suite 5
Santa Fe, New Mexico 87505
Fax: 505-989-3769

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

Anthony J. Thompson, Esq.**
Counsel for Hydro Resources, Inc.
Shaw, Pittman, Potts & Trowbridge
2300 N Street, N.W.
Washington, D. C. 20037-1128
Fax: 202-663-8007

Secretary* (2)
Attn: Rulemakings and
Adjudications Staff
Mail Stop: OWFN-16 C1
U.S. Nuclear Regulatory Commission
Washington, D. C. 20555

Office of Commission Appellate
Adjudication*
Mail Stop: OWFN-16 C-1
U.S. Nuclear Regulatory Commission
Washington, D. C. 20555

Adjudicatory File* (2)
Atomic Safety and Licensing Board
Mail Stop: T-3 F23
U.S. Nuclear Regulatory Commission
Washington, D. C. 20555

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

Eric D. Jantz**
DNA-People's Legal Services, Inc.
P. O. Box 116
Crownpoint, New Mexico 87313
Fax: 505-786-7275
E-mail: hn1413@handsnet.org

Administrative Judge
Robin Brett
U.S. Geological Survey
917 National Center
Reston, VA 20192

John T. Hull
Counsel for NRC Staff