INTERNATIONAL URANIUM (USA) CORPORATION

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May 13, 1999

Dr. Shirley A. Jackson
Chairman
U.S. Nuclear Regulatory Commission
Two White Flint North
Rockville, Maryland 20852-2738

Re: State of Utah's Efforts to Regulate Uranium Recovery Operations

Dear Chairman Jackson:

I am writing to you because proposed regulations recently published by the State of Utah Department of Environmental Quality (Utah DEQ) pose a direct challenge to NRC's jurisdiction over uranium recovery operations in the State and threaten the integrity of the Commission's Agreement State program. These regulations, when finalized, would purport to allow Utah DEQ to license and regulate uranium recovery operations involving alternate feed materials, despite the fact that Utah is not authorized to regulate such activities under the terms of its Agreement with NRC under Section 274 of the Atomic Energy Act (AEA). In other words, the State of Utah is attempting through its proposed regulations to arrogate to itself authority over the regulation of uranium recovery operations in the State, even though such authority can lawfully be exercised only by NRC. These actions by the State warrant a strong and immediate response from NRC.

Background

As you probably are aware, for several years Utah authorities have sought to restrict or otherwise regulate the processing of alternate feed materials at the White Mesa Mill near Blanding, Utah. To accomplish this objective, the State has pursued a strategy of intervening in NRC licensing proceedings to oppose amendments to the Mill's license that would allow certain alternate feed materials to be processed there. Utah first adopted this strategy in the early 1990s, when the Mill was operated by Umetco Minerals Corporation. At that time, Utah intervened in licensing proceedings in order to block Umetco from processing material from Teledyne Wah Chang, in Oregon, as an alternate feed at the Mill. *See In the Matter of Umetco Minerals Corporation*, ASLBP No. 92-666-01 (April 12, 1993). More recently the State has intervened in licensing proceedings pertaining to two current license amendments that allow the Mill to process as alternate feed certain FUSRAP material from the Ashland 1 and Ashland 2 sites in

Tonawanda, New York.[1] In both of these Ashland proceedings, Utah has asserted that the material proposed for processing does not qualify as alternate feed and, therefore, should not be approved for processing at the Mill. In February of this year, the Presiding Officer in the Ashland 2 proceeding decided in favor of NRC Staff and IUSA, upholding the Staff's determination that the Ashland 2 material qualifies as an alternate feed material and therefore can be processed as an alternate feed at the Mill. *In the Matter of International Uranium (USA) Corporation*, LBP-99-5 (February 9, 1999). A copy of that decision is included here as Attachment 1. Utah has appealed this decision to the Commission. Meanwhile, the Ashland 1 litigation has been held in abeyance pending the results of the Ashland 2 appeal.

Over the past several months, political pressure has been applied in an effort to restrict the Mill's ability to process alternate feeds. This new offensive has been pursued on several different fronts. First, ostensibly in response to lobbying from Envirocare of Utah, Inc., a bill was introduced in the Utah legislature in February of this year (H.B. 324) which would have effectively prevented the Mill from processing certain types of alternate feeds for uranium recovery. Specifically, the proposed legislation would have subjected the Mill to State siting requirements applicable to low level radioactive waste disposal facilities if the value of source material extracted from an alternate feed did not exceed the fees charged for processing the material. The legislation also would have required the Mill to obtain a radioactive materials license from the State prior to processing such alternate feed material. This bill was ultimately defeated in the Utah Senate, after an intensive lobbying effort by IUSA and others. A copy of the bill is included here as Attachment 2.

Second, in an extraordinary display of disregard for the administrative process, State officials have injected themselves into the contractual relationship between IUSA and the United States Army Corps of Engineers (USACE) in an apparent attempt to discourage USACE from utilizing IUSA's capacity to process as alternate feed certain FUSRAP materials being administered by USACE on behalf of the Department of Energy (DOE). Specifically, in a March 15, 1999 letter to Louis Caldera, Secretary of the Army, the Director of Utah DEQ's Division of Radiation Control, William Sinclair, suggested that IUSA's processing of the Ashland 1 and Ashland 2 FUSRAP materials at the Mill constitutes "sham disposal" and is inconsistent with NRC's Alternate Feed Policy.[2] Copies of Mr. Sinclair's letter and IUSA's response to that letter are included here as Attachment 3. In a similar vein, we understand that Utah officials have also telephoned USACE officials responsible for administering the FUSRAP program, as well as some of USACE's prime contractors, to suggest that IUSA's processing of

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[1] *In the Matter of International Uranium (USA) Corporation*, Docket No. 40-8681-MLA-5 (Ashland 1); *In the Matter of International Uranium (USA) Corporation*, Docket No. 40-8681-MLA-4 (Ashland 2). The Mill is now owned and operated by International Uranium (USA) Corporation (IUSA).

[2] *Final Position And Guidance On The Use Of Uranium Mill Feed Material Other Than Natural Ores*, 60 Fed. Reg. 49,296 (September 22, 1995).

FUSRAP materials would not be consistent with NRC's Alternate Feed Policy and would therefore be regulated as low level radioactive waste disposal under State law. These statements and insinuations by Utah State officials ignore the fact that, as stated above, NRC Staff in the Ashland 1 and Ashland 2 license amendments, and the Presiding Officer in the Ashland 2 proceeding, found that the FUSRAP materials qualify as alternate feed and can be processed at the Mill for the recovery of uranium, consistent with NRC's Alternate Feed Policy. They also ignore the fact that wastes generated from processing approved alternate feed materials qualify as 11e.(2) byproduct material and are not subject to regulation as low level radioactive waste.

Utah's most recent effort to restrict IUSA's processing of alternate feed materials at the Mill comes in the form of proposed regulations that were published in the Utah State Bulletin on May 1, 1999.[3] Under these proposed regulations, IUSA's Mill would be regulated by Utah DEQ's Division of Radiation Control as a commercial radioactive waste disposal facility (and the Mill would be subject to State licensing, and, presumably, siting, groundwater protection and reclamation requirements) if it were to process alternate feed material with an average uranium or thorium content of less than .05%. An exception would be made in instances where the Mill could demonstrate, *to the satisfaction of the State*, that uranium or other materials could be "economically" recovered from the alternate feed, without taking into account the value of any fees received for processing the material. In addition, materials that the State determines to qualify as "byproduct material" would be excluded from operation of the rule; however the State has indicated that it would *not* be bound by NRC's determinations in deciding whether a material qualifies as byproduct material. (Thus, for example, the State has indicated to IUSA that it would not consider the Ashland 2 FUSRAP material to qualify as byproduct material, even though NRC Staff concluded that the Ashland 2 material *is* byproduct material. *See In the Matter of International Uranium (USA) Corporation*, Docket No. 40-8681-MLA-4, NRC Staff Response to Written Presentations By State of Utah and International Uranium (USA) Corporation (January 29, 1999) Affidavit of Joseph J. Holonich at 7-8.) Consequently, under Utah's proposed regulations, an NRC-licensed uranium mill that is processing feed material that NRC Staff has determined qualifies as "alternate feed" under the Commission's Alternate Feed Policy might nevertheless be subject to regulation by the State as a commercial radioactive waste disposal facility, even if the alternate feed were determined by NRC Staff to qualify as 11e.(2) byproduct material. Simply put, the State is proposing to regulate as commercial radioactive waste disposal uranium recovery activities that are licensed and regulated by NRC under 10 C.F.R. Part 40.

At their core, the proposed regulations represent an attempt by Utah to decide whether certain materials can be processed as alternate feeds for the recovery of uranium in the State,

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[3] *Utah State Bulletin*, Vol. 99, No. 9 at 24-29 and 31-33 (Environmental Quality, Radiation Control R313-12-3, Definitions, and R313-25-36, Alternate Feed Materials at Uranium Mills). A copy of the State's proposed regulations is included here as Attachment 4.

regardless of whether or not NRC determines under its Alternate Feed Policy that the materials can be processed as an alternate feed. As Utah DEQ explains in the Rule Analysis for the proposed regulations:

> This rule would set state standards for processing of such alternate feed materials by establishing a minimum source material content.

Thus, the State is attempting to assert the authority to decide what types of materials may be processed as ore for the recovery of source material, even though, as discussed in greater detail below, such authority belongs exclusively to NRC. IUSA believes that Utah's proposed regulations are improper and unlawful. In particular, we believe the proposed regulations are outside the scope of Utah's authority as delineated in its Agreement with NRC under AEA Section 274, inconsistent with Utah's Agreement State obligations, and in direct conflict with NRC's regulations.

The Proposed Regulations Are Outside The Scope Of Utah's Authority As Delineated In Its Agreement With NRC

Utah's proposed regulations constitute a direct attack on NRC's jurisdiction to regulate uranium recovery operations and are clearly outside the scope of the State's authority. Under Section 274 of the AEA, as amended by the Uranium Mill Tailings Radiation Control Act (UMTRCA), the Commission may enter into agreements with individual states under which NRC may discontinue its authority to regulate source, special nuclear and byproduct material within the state. *See* 42 U.S.C. § 2021(b). The Agreement between Utah and NRC under AEA Section 274 discontinues NRC authority in a number of areas. However, the Agreement explicitly provides that NRC *retains* its authority to regulate "[t]he extraction or concentration of source material from source material ore and the management and disposal of the resulting byproduct material."[4] Thus, authority over uranium recovery operations was not ceded to Utah by NRC but was deliberately withheld from the State.

Nevertheless, under Utah's proposed regulations, the *State Division of Radiation Control*, not NRC, would decide whether certain materials could be processed at the Mill as ore for the recovery of uranium (i.e., whether materials containing less than 0.05% uranium could be processed at the Mill as an alternate feed), regardless of NRC's determinations under its Alternate Feed Policy. In other words, even where NRC determines, pursuant to its Alternate Feed Policy, that a material may be processed as an alternate feed material for the recovery of uranium at an NRC-licensed uranium mill (i.e., that a material qualifies as source material ore), the State may decide, under its proposed regulations, that the material in question does not constitute ore but is instead waste. Furthermore, under the proposed regulations, the State could

[4] Agreement, Article II, ¶ E (as amended, May 9, 1990) (included as Attachment 5).

regulate the processing of this NRC-approved alternate feed material (and the disposal of the resulting tailings) as commercial waste disposal, even though under NRC's regulations and guidance, these activities would be regulated as uranium recovery operations. Under the State's proposed regulations, Utah, not NRC, would be regulating the extraction of uranium from source material ore and the management and disposal of the resulting byproduct material, and Utah would be substituting its own commercial waste disposal regulations for the uranium recovery regulations that NRC would apply to these activities. This usurpation of authority by the Utah DEQ's Radiation Control Division flies in the face of the Agreement between NRC and the State, under which, as stated above, NRC retains the authority to regulate "[t]he extraction or concentration of source material from source material ore and the management and disposal of the resulting byproduct material." Clearly, Utah does not have the authority under the terms of its Agreement with NRC to impose its own regulatory regime on uranium recovery operations involving materials that NRC determines to qualify as alternate feed materials.

Moreover, to the extent that Utah's proposed regulations would impose licensing requirements on facilities processing ores containing less than 0.05% source material, those regulations are precluded by the AEA. Specifically, Congress, in Section 62 of the AEA, provided that *no* license shall be required for the transfer, receipt or possession of source material in quantities that NRC determines to be "unimportant." The language of this section is mandatory, stating that:

> Licenses *shall not* be required for quantities of source material which, in the opinion of the Commission, are unimportant.

42 U.S.C. § 2092 (emphasis added).[5] NRC has determined that source material present in mixtures at less than 0.05% by weight constitute "unimportant quantities" for which regulation is unwarranted. *See* 10 C.F.R. § 40.13(a). Utah's attempts to regulate and impose licensing requirements on these unimportant quantities of source material in alternate feed material (or, for that matter, in conventional ore) are in direct conflict with the mandatory language of Section 62 of the AEA, which prohibits the imposition of licensing requirements on quantities of source material that NRC deems to be "unimportant."[6]

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[5] *See* memorandum from Neil D. Naiden, Acting General Counsel AEC to H.L. Price, Director, Division of Licensing and Regulation, dated December 7, 1960, in which the Acting AEC General Counsel concluded that the language of Part 62 is mandatory and does not allow the licensing of "unimportant quantities" of uranium.

[6] It must be noted that although the receipt and possession of ores containing "unimportant" quantities of uranium is not subject to licensing under AEA Section 62, Congress specifically intended that the tailings and wastes generated as a result of processing ores containing less than 0.05% source material would be regulated as 11e.(2) byproduct material. *See, Uranium Mill Tailings Radiation Control Act of 1978, Hearings on H.R. 11698, H.R. 12229, H.R. 12938, H.R. 12535, H.R. 13049 and H.R. 13650*, Subcomm. On Energy and Power, House Comm. On Interstate and Foreign Commerce, 95th Cong. (1978) at 343 (Testimony of then-Chairman Joseph M. Hendrie). Thus, processing ores containing less than 0.05% source material for the extraction of uranium would be subject to licensing by virtue

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The Proposed Regulations Are Inconsistent With Utah's Agreement State Obligations

Utah's proposed regulations are not only outside the scope of the State's authority, as just discussed, but they also are incompatible with NRC's regulations. Under AEA Section 274, an Agreement State's program for the regulation of AEA materials *must* be compatible with NRC's program. 42 U.S.C. § 2021(c). In particular, NRC has designated "basic radiation protection standards" and "definitions" as Category A program elements for Agreement States, which must be essentially identical to NRC's in order to provide uniformity in the regulation of AEA-regulated material on a nationwide basis. See Adequacy and Compatibility of Agreement and State Programs, Directive 5.9. Part I(a), February 27, 1998.

As discussed, under the Agreement between NRC and Utah, authority over uranium recovery operations (and the management and disposal of associated byproduct material) was expressly retained by NRC and was deliberately withheld from the State. On the other hand, the Agreement does provide for the discontinuation of NRC's authority over "the land disposal of source, byproduct and special nuclear material received from other persons." Therefore, activities that fall within this latter category are subject to regulation by the State. The regulations that have been proposed by Utah are intended to circumvent the division of authority reflected in the Agreement between NRC and the State. Specifically, the proposed regulations would address NRC-approved alternate feed material (which NRC regulates as ore under 10 C.F.R. Part 40) and the tailings generated from extracting uranium from that material (which NRC regulates as 11e.(2) byproduct material under 10 C.F.R. Part 40) and treat those materials as if they were wastes "received from other persons" for purposes of "land disposal" (which NRC would regulate under 10 C.F.R. Part 61).

Utah is attempting to use its Part 61 authority, which was ceded by NRC in its Agreement with Utah, to reach materials that are properly regulated under Part 40, the authority for which NRC did *not* cede to Utah in its Agreement with the State. This effort on the part of Utah to regulate NRC-approved alternate feed material and associated tailings as wastes under the State's Part 61 authority is clearly incompatible with NRC's regulatory program, under which these materials would be regulated as ore and 11e.(2) byproduct material subject to regulation under Part 40. As such, the proposed regulations conflict with Utah's Agreement State obligations under AEA Section 274. Because Utah's proposed regulations are incompatible with NRC's

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of AEA Section 81, which imposes licensing requirements on the production and possession of byproduct material. 42 U.S.C. § 2111. Since, as indicated above, under the terms of the Agreement between Utah and NRC, the authority to regulate byproduct material from the extraction of uranium is retained by NRC, and has not been ceded to the State, the State is without authority under AEA Section 81 to regulate byproduct material generated from the processing of ore containing "unimportant" quantities of uranium.

regulations, the Commission is authorized to revoke or suspend its Agreement with the State, pursuant to AEA Section 274j. and Article VII of the Agreement.

The Proposed Regulations Are In Direct Conflict With NRC's Regulations

Even if Utah were authorized under the terms of its Agreement with NRC to regulate uranium recovery operations in the State, the regulations that have been proposed by Utah would be preempted because they conflict with federal law and would frustrate Congress' intent and purpose in enacting the AEA and UMTRCA. The courts have made clear that in circumstances where the operation of State law would frustrate the purposes and objectives of Congress, or where State law and federal law conflict, State law will be preempted.[7]

First, Utah's proposed regulations would directly conflict with NRC's regulations pertaining to uranium recovery operations. Under NRC's regulations and guidance, material that is approved by NRC for use as an alternate feed at a licensed uranium mill constitutes "ore" and the tailings and other wastes generated from processing this ore constitute 11e.(2) byproduct material. 60 Fed. Reg. 49296-97 (September 22, 1995); 57 Fed. Reg. 20525, 20531-33. This 11e.(2) byproduct material is to be disposed of in the mill's tailings impoundment along with the tailings generated from processing "conventional" ore, where they would be subject to NRC's siting, reclamation, groundwater, and other requirements. *Id.* Utah's proposed regulations would directly conflict with NRC's regulations. Under the proposed regulations, some NRC-approved alternate feed materials would not be considered "ore" by the State of Utah and, therefore, the tailings generated from processing these alternate feeds would not be considered 11e.(2) byproduct material; instead, these materials would be regulated by the State as commercial radioactive waste. In other words, Utah's proposed regulations would circumvent the Agreement between NRC and the State by characterizing materials that NRC has determined qualify as ore and 11e.(2) byproduct material to be commercial radioactive waste and by imposing Utah's commercial waste disposal requirements on uranium recovery activities that are licensed by NRC and that, under the terms of the Agreement between NRC and the State, are subject to NRC's siting, reclamation, groundwater, and other requirements.

In addition, Utah's proposed regulations would frustrate Congress's purpose and intent in enacting UMTRCA. Congress, when it enacted UMTRCA, created a coordinated federal regime for the comprehensive regulation of 11e.(2) byproduct material. Under this regime, three federal agencies (NRC, the Department of Energy (DOE) and the Environmental Protection Agency (EPA)) share responsibility for regulating all aspects of 11e.(2) material. It is evident from the legislative history, and from the statute itself, that Congress' purpose in creating this comprehensive and pervasive federal scheme of regulation was twofold: first, Congress wanted to ensure that uranium mill tailings (and 11e.(2) byproduct material generally) would be

[7] *English v. General Electric Co.*, 496 U.S.. 72, 78-79 (1990).

regulated according to uniform national standards. Thus, as Congress explained when it enacted UMTRCA:

> Without the authorities included in H.R. 13650 [which would eventually be enacted into law as UMTRCA], the conditions addressed by the remedial program would be left without remedy, *and the authority of the Commission to establish uniform national standards for waste disposal from uranium mills would not be clear.*[8]

By imposing licensing requirements on uranium recovery operations that are in addition to and different from those imposed by NRC, Utah's proposed regulations are in direct conflict with federal law. Moreover, the proposed regulations frustrate the intent of Congress by creating multiple layers of inconsistent regulatory requirements, as opposed to the "uniform, national" system that Congress intended.

Congress' second purpose in enacting UMTRCA was to ensure that uranium mill tailings would be stabilized, disposed of, and controlled in a safe, timely, and environmentally sound manner.[9] DOE has stated that it would be reluctant to accept title to and custody over mill tailings sites that are subject to State regulatory requirements that are different than, and operate in addition to, those imposed by NRC.[10] Thus, by threatening to impose an additional layer of regulation on uranium recovery operations and one that differs from NRC's regulations, Utah's proposed regulations threaten to delay the ultimate closure of the Mill's tailings impoundment and impede transfer of the site to DOE for long term surveillance – all in contravention of Congress' intent.

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[8]H.R. Rep. No. 95-1480, Part I at 12 (1978) (emphasis added). The legislative history is replete with statements indicating that Congress intended to create a uniform national system of regulation for 11e.(2) material. *See id.* Part II at 45; Hearing on H.R. 13382, H.R. 12938, H.R. 12535, and H.R. 13049 Before the Subcomm. On Energy and the Environment of the House Comm. On Interior and Insular Affairs, 95th Cong. 95-30 at 130 (1978)(statement of Joseph M. Hendrie, Chairman).

[9]*See, e.g.*, 42 U.S.C. § 7901(a).

[10]Under the License Termination/Site Transfer Protocol between DOE and NRC, DOE will not take title to a tailings disposal site, and NRC will not terminate the license for a site, if there are any outstanding "issues" with respect to State regulatory authorities. Similarly, in situations where there is even a possibility that a State might seek to impose additional remediation requirements on top of those required by NRC, DOE might feel compelled not to accept title, since to do so would be inconsistent with the statutory directive in AEA Section 83 that such transfers to DOE are to be accomplished at no cost to the government. This reluctance on the part of DOE would likely be compounded by the concerns raised by the Federal Facilities Compliance Act, which requires that federal facilities comply with all State requirements "respecting the control and abatement of solid waste disposal and management." 42 U.S.C. § 6961(a).

Conclusion

IUSA is aware that some of the issues raised in this letter have been brought before the Commission recently in more theoretical contexts (for example, in the White Paper submitted by NMA). IUSA is now being forced to confront these issues in a very real and concrete way, in the form of proposed regulations that the State of Utah intends to enforce against us. If Utah is successful in promulgating and enforcing these proposed regulations, the implications for IUSA will be considerable; indeed, the continued viability of IUSA's operations at the Mill would be thrown into doubt. The implications for NRC are equally large. If Utah is allowed to promulgate and enforce these proposed regulations, the integrity of NRC's program for regulating uranium recovery operations will be undermined, and the viability of the Agreement State program will be threatened

In light of all of the foregoing, we urgently request that the Commission take immediate steps to prevent the State of Utah from adopting and ultimately enforcing its proposed regulations. Specifically, we request that the Commission direct its Staff to submit comments to Utah DEQ for inclusion in the rulemaking record associated with the proposed regulations. NRC should point out in its comments that (i) the proposed regulations exceed the scope of Utah's authority; (ii) the proposed regulations are incompatible with Utah's Agreement State obligations; and (iii) the regulations proposed by the State conflict with NRC's regulation of uranium recovery operations under the AEA and would frustrate Congress' purpose and intent in enacting the AEA as amended by UMTRCA and, therefore, would be preempted. In addition, NRC should make plain that, if the Utah DEQ promulgates and attempts to enforce the proposed regulations, NRC will take swift action to suspend or revoke Utah's Agreement State status, based upon the incompatibility of State and Federal programs.

In order to be included in the rulemaking record, NRC's comments on the proposed rule must be submitted to the State no later than June 1, 1999.[11] If you have any questions regarding the concerns expressed in this letter, or if you wish to discuss this matter further, please call or have one of your staff call me at 303-628-7798. Thank you for your consideration.

Sincerely,

Earl E. Hoellen
President and Chief Executive Officer

[11] *Utah State Bulletin*, Vol. 99, No. 9 at 24-29 and 31-33 (Environmental Quality, Radiation Control R313-12-3, Definitions, and R313-25-36, Alternate Feed Materials at Uranium Mills).

NRC - IN BP

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OFFICE OF THE SECRETARY
CORRESPONDENCE CONTROL TICKET

PAPER NUMBER: CRC-99-0465 LOGGING DATE: May 17 99

ACTION OFFICE: EDO

AUTHOR: EARL HOELLEN
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ADDRESSEE: CHAIRMAN JACKOSN

LETTER DATE: May 13 99 FILE CODE: MHS 11 Uran. Mill

SUBJECT: STATE OF UTAH'S EFFORTS TO REGULATE URANIUM RECOVERY OPERATIONS

ACTION: Direct Reply

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SPECIAL HANDLING: SECY TO ACK

CONSTITUENT:

NOTES: ENCLS TO: EDO

DATE DUE: May 31 99

SIGNATURE: DATE SIGNED:
AFFILIATION:

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of

INTERNATIONAL URANIUM (USA) CORPORATION (IUSA)
(Receipt of Material from Tonawanda, New York)

Docket No.(s) 40-8681-MLA-4

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LTR IUSA TO CHAIRMAN DTD 5/13 have been served upon the following persons by U.S. mail, first class, except as otherwise noted and in accordance with the requirements of 10 CFR Sec. 2.712.

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Dated at Rockville, Md. this
8 day of June 1999

Adrian T. Byrdsong
Office of the Secretary of the Commission

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of INTERNATIONAL URANIUM (USA) CORPORATION (IUSA) (Request for Material License Amendment)	Docket No.(s) 40-8681-MLA-5

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LTR IUSA TO CHAIRMAN DTD 5/13 have been served upon the following persons by U.S. mail, first class, except as otherwise noted and in accordance with the requirements of 10 CFR Sec. 2.712.

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Docket No.(s)40-8681-MLA-5
LTR IUSA TO CHAIRMAN DTD 5/13

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Dated at Rockville, Md. this
8 day of June 1999

Office of the Secretary of the Commission