UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE PRESIDING OFFICER

In the Matter of	)	
	)	
ENERGY FUELS NUCLEAR, INC.	)	Docket No. 40-8681-MLA
	)	
(White Mesa Uranium Mill; Alternate Feed Material)	)	

NRC STAFF'S RESPONSE TO THE REQUESTS FOR HEARING FILED BY (1) THE NATIVE AMERICAN PEOPLES HISTORICAL FOUNDATION, (2) WESTWATER NAVAJO COMMUNITY, (3) NORMAN BEGAY, AND (4) THE UNITED STATES DEPARTMENT OF ENERGY (NEVADA OPERATIONS OFFICE)

INTRODUCTION

On April 2, 1997 (reissued April 8, 1997), the NRC Staff ("Staff") granted an application filed by Energy Fuels Nuclear, Inc. ("EFN" or "the Licensee") to amend Source Material License No. SUA-1358 (Amendment No. 1), to permit the receipt and processing of certain specified alternate feed material at the Licensee's White Mesa Mill. Requests for hearing were then filed concerning this amendment by (1) the Native American Peoples Historical Foundation (filed on April 16, 1997, as modified April 25, 1997), (2) the Westwater Navajo Community (filed on April 30, 1997), and (3) Norman Begay (filed on April 30, 1997). In addition, on May 2, 1997, the United States Department of Energy (Nevada Operations Office) (DOE/NV), submitted a letter stating that it has an interest in the license amendment at issue herein, and requesting that it be

allowed to participate in any proceeding that may be held concerning the subject amendment.

In accordance with 10 C.F.R. § 2.1205, the NRC Staff ("Staff") hereby files its response to these requests for hearing.[1] For the reasons set forth below, the Staff respectfully submits that the requests for hearing filed by Mr. Begay, the Native American Peoples Historical Foundation and the Westwater Navajo Community fail to establish that the requestors have standing to participate in this proceeding and, in the absence of any further information, the requests should be denied at this time.[2]

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[1] Pursuant to 10 C.F.R. § 2.1205(g), the Staff's response to the hearing request of the Native American Peoples Historical Foundation was due to be filed within 10 days of the designation of the Presiding Officer, *i.e.*, on or before May 9, 1997; and the Staff's responses to the hearing requests of Norman Begay and the Westwater Navajo Community appear to have been due to be filed by May 16 and May 20, respectively. Due to some confusion arising from the indirect and delayed service of these requests for hearing and a misunderstanding as to the response deadlines, the Staff inadvertently failed to file its responses within the allotted time. The Staff regrets any inconvenience which may have been caused by this oversight, and respectfully requests leave to file the instant response at this time. Staff Counsel has spoken with Mr. Norman Begay, who stated that he does not oppose the granting of this request. Staff Counsel attempted without success to reach Counsel for the Licensee (Rich Munson, Esq.), the Native American Peoples Historical Foundation (Winston Mason), and the Westwater Navajo Community (Lula Jim Katso) prior to the filing of this response, and is therefore unable to state their positions with respect to this request.

[2] In the event that the Presiding Officer determines to afford the requestors an opportunity to amend their requests for hearing in order to demonstrate their standing to participate in this proceeding, the Staff requests that it be afforded an opportunity to respond to those submittals, as may then be appropriate.

DISCUSSION

Pursuant to 10 C.F.R. § 2.1205(e), persons who request a hearing concerning a license amendment that is subject to 10 C.F.R. Part 2, Subpart L (like the instant materials license amendment), must "describe in detail":

> (1) The interest of the requestor in the proceeding;
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> (2) How that interest may be affected by the results of the proceeding, including the reasons why the requestor should be permitted a hearing, with particular reference to the factors set out in paragraph (h) of this section;
>
> (3) The requestor's areas of concern about the licensing activity that is the subject matter of the proceeding; and
>
> (4) The circumstances establishing that the request for hearing is timely . . . .

Further, pursuant to 10 C.F.R. § 2.1205(h), referenced in the regulation recited above, the Presiding Officer must determine "that the specified areas of concern are germane to the subject matter of the proceeding and that the petition is timely." In granting a request for hearing, the Presiding Officer must find "that the requestor meets the judicial standards for standing" and shall consider, among other factors:

> (1) The nature of the requestor's right under the Act to be made a party to the proceeding;
>
> (2) The nature and extent of the requestor's property, financial, or other interest in the proceeding; and
>
> (3) The possible effect of any order that may be entered in the proceeding upon the requestor's interest.

Id.

The requests for hearing submitted by the Native American Peoples Historical Foundation, by the Westwater Navajo Community, and by Norman Begay, appear to be timely and indicate the areas of concern those persons or entities may have with respect to the license amendment at issue herein, but fail to specify the particular manner in which those persons or entities may be affected by the instant license amendment. In brief, the requests for hearing fail to state the requestors' geographical proximity to the facility, and fail to demonstrate that the amendment at issue herein will result in injury in fact to an interest that is within the zone of interests protected by the Atomic Energy Act or the National Environmental Policy Act. *See, e.g., Atlas Corp.* (Moab, Utah Facility), LBP-97-9, 45 NRC ___ (May 16, 1997), slip op. at 13-21 (Attachment "A" hereto); *Energy Fuels Nuclear, Inc.* (Source Materials License No. SUA-1358), LBP-94-33, 40 NRC 151, 156 (1994) (Attachment "B" hereto); *Envirocare of Utah, Inc.* (Byproduct Material Waste Disposal License), LBP-92-8, 35 NRC 167, 173-79 (1992).[3] Nor have the requests for hearing demonstrated that the requestors personally have suffered or will suffer "injury-in-fact", in that they have not shown "a distinct and

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[3] The Staff notes that Mr. Begay previously requested a hearing concerning another license amendment at the licensee's White Mesa Mill, involving the proposed shipment of millions of tons of tailings to the mill from Monticello, Utah. In that proceeding, where the potential impacts of the amendment (especially transportation impacts) far exceeded the potential impacts here, Mr. Begay was found to have standing to request a hearing. *Energy Fuels Nuclear, Inc.* (Source Materials License No. SUA-1358), LBP-94-33, 40 NRC 151 (1994). That outcome, however, does not necessarily warrant a finding that Mr. Begay possesses standing in this proceeding, where he is required to demonstrate that the instant license amendment will result in injury-in-fact to his interests, and that those interests are within the zone of interests protected by statute.

palpable harm" which constitutes such injury in fact; that the injury can fairly be traced to the challenged action; and that the injury is likely to be redressed by a favorable decision in the proceeding. *See, e.g., Energy Fuels Nuclear, supra,* 40 NRC at 156; *Umetco Minerals Corp.* (Source Materials License No. SUA-1358), LBP-94-7, 39 NRC 112, 115 (1994); *Babcock and Wilcox* (Apollo, PA Fuel Fabrication Facility), LBP-93-4, 37 NRC 72, 80-81 (1993). Accordingly, these requests for hearing fail to demonstrate the requestors' judicial standing to request a hearing in this matter.[4]

Further, the requests for hearing filed by the Native American Peoples Historical Foundation and the Westwater Navajo Community fail to demonstrate that those entities have organizational standing to request a hearing herein; or that they have representational standing to request a hearing herein based upon the interests of any of their members; or that the organizations authorized the filing of hearing requests in their names or authorized the individuals who submitted those requests to represent them in this proceeding. *See, e.g., Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), ALAB-952, 33 NRC 521, 529-31 (1991); *Duke Power Co.* (Amendment to Materials License SNM-1773 -- Transportation of Spent Fuel From Oconee Nuclear Station for Storage at McGuire Nuclear Station), ALAB-528, 9 NRC 146, 151 (1979); *Sequoyah Fuels Corp.* (Source Material License No. SUB-1010),

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[4] Inasmuch as the requests for hearing fail to demonstrate the requestors' standing, no action need be taken at this time on DOE/NV's request to participate in any proceeding that may be held. However, the Staff notes that in the event that a hearing is held in this matter, the Staff would not oppose DOE/NV's participation as an interested governmental entity. *Cf.* 10 C.F.R. § 2.1211(b) (permitting participation in subpart L proceedings by representatives of any interested State, county or municipality, or agencies thereof).

LBP-91-5, 33 NRC 163, 164-65 (1991); *Northern States Power Co.* (Pathfinder Atomic Plant), LBP-89-30, 30 NRC 311, 313-17 (1989) (Subpart L proceeding).

CONCLUSION

In the absence of any further information, the requests for hearing filed by the Native American Peoples Historical Foundation, the Westwater Navajo Community and Norman Begay fail to demonstrate the requestors' standing to participate in this proceeding. Accordingly, the NRC Staff opposes the requests for hearing at this time.

Respectfully submitted,

Sherwin E. Turk
Counsel for NRC Staff

Dated at Rockville, Maryland
this 21st day of May 1997

ATTACHMENT "A"

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

LBP-97-9

ATOMIC SAFETY AND LICENSING BOARD PANEL

Before Presiding Officer:
G. Paul Bollwerk, III, Administrative Judge

Special Assistant:
Dr. Charles N. Kelber, Administrative Judge

In the Matter of	Docket No. 40-3453-MLA
ATLAS CORPORATION	ASLBP No. 97-723-02-MLA
(Moab, Utah Facility)	May 16, 1997

MEMORANDUM AND ORDER
(Denying Hearing Request)

Pro se petitioner John Francis Darke has filed a hearing request challenging Atlas Corporation's (Atlas) December 20, 1996 application to amend its 10 C.F.R. Part 40 license for its uranium milling facility in Moab, Utah. The amendment in question would modify License Condition (LC) 55 A.(3) of the Atlas license (No. SUA-917) to extend by four years -- until December 31, 2000 -- the completion date for placing a final radon barrier on the existing mill tailings pile at the Moab facility. Licensee Atlas opposes petitioner Darke's hearing request asserting, among other things, that he lacks standing and has failed to specify any litigable issues.

For the reasons stated below, I find petitioner Darke has not established his standing to intervene in this proceeding. Accordingly, I deny his hearing request.

I. BACKGROUND

A. Atlas Reclamation Plans for the Moab Facility

Atlas' Moab uranium milling facility, which is located on the west bank of the Colorado River approximately three miles northwest of Moab, Utah, ceased commercial operation in 1984. At present, on site at the facility is a 10.5-million-ton mill tailings pile that needs to be reclaimed (i.e., stabilized) for long-term disposal. This pile, which currently occupies approximately 130 acres of land and rises to a height of some 90 feet, is located within 750 feet of the Colorado River. See Office of Nuclear Materials Safety and Safeguards (NMSS), U.S. Nuclear Regulatory Commission (NRC), NUREG-1531, Draft Environmental Impact Statement [(EIS)] Related to Reclamation of the Uranium Mill Tailings at the Atlas Site, Moab, Utah (Jan. 1996) at 1-4, 2-1.

To comply with agency requirements regarding site stabilization, Atlas initially submitted an onsite reclamation plan in 1981, which the NRC staff approved the following year. Then, in 1988 Atlas submitted a license

amendment application that included a revised onsite reclamation plan. Staff review of that plan resulted in requests for additional information and redesign. Thereafter, in June 1992 Atlas submitted another revised onsite reclamation plan. In July 1993, the staff issued a notice of its intent to approve this Atlas reclamation plan and made available for public comment an environmental assessment regarding the proposed Atlas plan. See NMSS, NRC, NUREG-1532, Draft Technical Evaluation Report [(TER)] for the Revised Reclamation Plan for the Atlas Corporation Moab Mill (Jan. 1996) at 1-4.

Based on public comment, in October 1993 the staff withdrew the July 1993 notice of intent, and in March 1994 issued another notice declaring its intent to prepare a full-blown EIS. The staff also began a reevaluation of the entire revised Atlas reclamation plan. See id. As part of this reevaluation process, in March 1994 the staff also issued a notice that included an opportunity for a hearing on the revised Atlas reclamation plan. See 67 Fed. Reg. 16,665, 16,665 (1994). No hearing requests apparently were filed in response to this notice, however.

The staff finally issued a draft EIS and a draft TER on Atlas' proposed onsite reclamation plan in January 1996. A final TER regarding the plan was issued in March 1997, while

a final EIS apparently is not expected until the fall of 1997. See Licensee's Response (Apr. 7, 1997) at 2 & n.2 [hereinafter Atlas Response].

B. Atlas Request to Extend Radon Barrier Completion Date

Related to the approval of a reclamation plan for the Atlas facility is the item of central interest in this proceeding: the December 31, 1996 target date initially set for the placement of a final earthen cover on the Moab facility tailings to limit radon emissions to a flux of no more than twenty picocuries per meter squared per second (pCi/m^2s). This date came into play by reason of an October 1991 memorandum of understanding between the Environmental Protection Agency and the NRC that set out target dates for final radon barrier emplacement for a number of tailings impoundments, including the Atlas Moab facility. See 56 Fed. Reg. 55,434, 55,435 (1991). Subsequently, the December 31, 1996 date for final radon barrier emplacement at the Moab facility was incorporated into the Atlas license as LC 55 A.(3) by Amendment No. 17 issued on November 4, 1992.

Under LC 55 C., which also was adopted under Amendment No. 17, any request to revise the final radon barrier completion date specified in the license "must demonstrate that compliance was not technologically feasible (including

inclement weather, litigation which compels delay to reclamation, or other factors beyond the control of the licensee)." See Letter from Sherwin E. Turk, NRC Staff Counsel, to Presiding Officer and Special Assistant (Feb. 14, 1997) encl. 1, at 11 (License No. SUA-917, Amendment No. 27) [hereinafter Turk Letter]. Relying on this provision, see Atlas Response at 8-9, on December 20, 1996, Atlas asked to amend the Moab facility license to extend by four years the December 31, 1996 date specified in LC 55 A.(3) for final radon barrier completion. As the basis for this request, Atlas declared that (1) the December 1996 deadline was footed in the assumption the Moab facility reclamation plan would be approved in 1993, thereby allowing three years to perform construction work and still provide an adequate period for consolidation of affected materials placed in the impoundment before placement of the final radon barrier; and (2) because the agency EIS and TER were not completed, Atlas did not have the plan approval needed to begin construction. See Turk Letter, encl. 2, at 1-2 (Letter from Richard E. Blubaugh, Atlas Corp., to Joseph J. Holonich, NMSS, NRC (Dec. 20, 1996)).

C. Adjudicatory Proceeding Procedural Posture

On January 14, 1997, the staff issued a notice stating it had received the December 20 Atlas license amendment

application and was offering an opportunity for a 10 C.F.R. Part 2, Subpart L informal hearing on the licensee's request. See 62 Fed. Reg. 3313, 3313 (1997). In a one-page letter dated January 30, 1997, petitioner Darke asked for a hearing regarding the Atlas amendment request. See Letter from John Francis Darke to Secretary, NRC (Jan. 30, 1997) [hereinafter Darke Hearing Request]. Besides asserting the requested licensing action "is without factual or legal basis," petitioner Darke sought to have the matter heard under the rules for formal adjudicatory proceedings set forth in Subpart G of 10 C.F.R. Part 2. Id. Further, addressing his standing to become a party to such a proceeding, he stated only that the proposed amendment was "predominately adverse to the health and safety of the requestor and his family, who reside in the vicinity of the subject site." Id.

After being designated as presiding officer for this proceeding, see 62 Fed. Reg. 7279 (1997), on February 12, 1997, I issued an initial order. That order established a deadline for the staff to specify whether it wished to be a party to this proceeding. It also provided petitioner Darke with an opportunity to supplement his hearing petition to address more fully the issue of his standing and to explain in more detail his areas of concern regarding the Atlas

amendment request and his reasons for claiming that a formal adjudication under Subpart G was appropriate. See Presiding Officer Memorandum and Order (Initial Order) (Feb. 12, 1997) at 2-3 [hereinafter Initial Order].

In a February 21, 1997 response to this order, the staff declared that, in accordance with 10 C.F.R. § 2.1213, it would not participate as a party in this proceeding. See Letter from Sherwin E. Turk, NRC Staff Counsel, to Presiding Officer and Special Assistant (Feb. 21, 1997). Petitioner Darke responded to the initial order with two substantive filings.[1] In the first, submitted on February 24, 1997, he addressed the question of why this proceeding should be conducted under Subpart G formal procedures. See [First Response to Presiding Officer's Memorandum and Order Dated February 13, 1997] (Feb. 24, 1997) [hereinafter Darke February 24 Response]. In his second filing, dated March 3, 1997, petitioner Darke discussed his areas of concern regarding the proposed amendment and the basis for his standing to intervene in this proceeding. See [Second Response to Presiding Officer's Memorandum and Order Dated

[1] In addition, petitioner Darke filed a third pleading in which he provided corrections to the first two pleadings. See [Third Response to Presiding Officer's Memorandum and Order Dated February 13, 1997] (Mar. 13, 1997).

February 13, 1997] (Mar. 3, 1997) [hereinafter Darke March 3 Response].

On March 5, 1997, the staff submitted a letter declaring that, in accordance with 10 C.F.R. § 2.1205(m), the previous day it had issued the license amendment sought by Atlas, thereby revising LC 55 A.(3) to change the date for final radon barrier placement at the Moab facility to December 31, 2000. See Letter from Sherwin E. Turk, NRC Staff Counsel, to Presiding Officer and Special Assistant (Mar. 5, 1997). Although a petitioner may contest a staff determination to issue a license amendment during the pendency of a hearing, see 10 C.F.R. § 2.1263, petitioner Darke did not initiate such a challenge.

Thereafter, in a March 11, 1997 memorandum and order, I afforded petitioner Darke an opportunity make an additional submission addressing the issue of standing. See Presiding Officer Memorandum and Order (Permitting Additional Filing) (Mar. 11, 1997) at 2-3 [hereinafter Additional Filing Order]. He filed that pleading on March 24, 1997. See [Response to Presiding Officer's March 11, 1997 Memorandum and Order] (Mar. 24, 1997) [hereinafter Darke March 24 Response]. Atlas then submitted its response to all of petitioner Darke's prior filings, asserting he lacked standing and had failed to specify areas of concern germane

to the proceeding or to establish an adequate basis for his request that formal adjudicatory procedures be used. See Atlas Response at 4-11. In lieu of a prehearing conference/oral argument on these issues, I permitted petitioner Darke to file a reply to this Atlas response. See Presiding Officer Order (Permitting Reply Filing) (Apr. 11, 1997) at 2 [hereinafter Reply Filing Order]. Petitioner Darke did so on April 21, 1997. See [Response to Presiding Officer's April 11, 1997 Memorandum and Order] (Apr. 21, 1997) [hereinafter Darke Reply].

II. ANALYSIS

Section 2.1205 of title 10 of the Code of Federal Regulations makes it clear that to be admitted as a party in an informal adjudication under Subpart L of Part 2 regarding a licensee-initiated materials license amendment, the individual or organization filing a hearing/intervention request must establish three things: (1) the petitioner is a "person whose interest may be affected by the proceeding" within the meaning of section 189a(1)(A) of the Atomic Energy Act of 1954 (AEA), 42 U.S.C. § 2239(a)(1)(A), in that the petitioner has standing to participate in the proceeding consistent with the standards governing standing in judicial proceedings generally; (2) the petitioner has "areas of

concern" regarding the requested licensing action that are germane to the subject matter of the amendment proceeding; and (3) the hearing/intervention petition was timely filed. See 10 C.F.R. § 2.1205(e), (h). In addition, as petitioner Darke's hearing request illustrates, the petitioner may request that any proceeding be conducted employing procedures other than those set forth in 10 C.F.R. Part 2, Subpart L, governing informal adjudications, which could include use of the procedures for formal, trial-type adjudications set forth in Subpart G of Part 2. See id. § 2.1209(k).

A. Timeliness, Areas of Concern, and Additional Adjudicatory Procedures

As he seeks to address these threshold matters, petitioner Darke's various filings present a decidedly mixed bag. For instance, as he points out in his March 3 response, because he filed (i.e., mailed) his hearing request within eight days of Federal Register publication of the staff's notice of opportunity for hearing, petitioner Darke's hearing request clearly is timely. See Darke March 3 Response at 5.

So too, his hearing request, as supplemented by his filings of March 3 and March 24, sets forth "areas of concern" that are sufficient to support the grant of his hearing request. As the Commission has indicated, the

"areas of concern" specified in support of a hearing request under Subpart L "need not be extensive, but it must be sufficient to establish that the issues the requester wants to raise fall generally within the range of matters that properly are subject to challenge in such a proceeding." 54 Fed. Reg. 8269, 8272 (1989). Like the requirement that a Subpart G formal hearing petition must define the "specific aspect or aspects of the subject matter of the proceeding as to which petitioner wishes to intervene," 10 C.F.R. § 2.714(a)(2), the Subpart L direction to define "areas of concern" is only intended to ensure that the matters the petitioner wishes to discuss in his or her written presentation are generally within the scope of the proceeding. In this instance, petitioner Darke has made it apparent that, among other things, he wishes to address the validity of the reasons cited by licensee Atlas for requesting the amendment (i.e., whether completion under the prior schedule "was not technologically feasible" in accordance with LC 55 C. and 10 C.F.R. Part 40, App. A, Criterion 6A(1)) and the efficacy of the extended completion date, both of which are appropriate subjects for consideration relative to the license amendment in question. See Darke March 3 Response at 5-8.

On the other hand, petitioner Darke's request that Subpart G formal adjudicatory procedures be used for this proceeding is well off the mark. The Commission has indicated that such a request should involve consideration of whether, given the particular circumstances involved in the proceeding, permitting the use of additional, trial-type procedures such as oral cross-examination would add appreciably to the factfinding process. See Sequoyah Fuels Corp. (Sequoyah UF_6 to UF_4 Facility), CLI-86-17, 24 NRC 489, 497 (1986). Petitioner Darke has taken a different tack, asserting this proceeding should be held using Subpart G formal procedures because it does not involve the type of "licensee-initiated amendment" of a nuclear materials license to which Subpart L is applicable under 10 C.F.R. § 2.1201(a)(1). See Darke February 24 Response at unnumbered 2 ³. There is not the slightest doubt, however, that as a request for a revision to its 10 C.F.R. Part 40 source materials license, the Atlas amendment application falls squarely within that designation -- as opposed to being a 10 C.F.R. Part 2, Subpart B staff-imposed amendment that would be subject to the formal hearing procedures in Subpart G -- and thus properly is the subject of Subpart L informal procedures. Because petitioner Darke has made no other showing in support of his

request for the use of Subpart G formal procedures, I have no basis for recommending to the Commission that such procedures be used.

B. Standing to Intervene

My decision on petitioner Darke's request to convene a hearing thus comes down to the question whether he has made a showing sufficient to establish he has standing to intervene in this proceeding. To establish standing to participate as of right in an adjudicatory proceeding regarding an agency licensing action, an individual petitioner must demonstrate that (1) he or she has suffered or will suffer a distinct and palpable "injury in fact" within the "zone of interests" arguably protected by the statutes governing the proceeding (e.g., the AEA, the National Environmental Policy Act of 1969); (2) the injury is fairly traceable to the challenged action; and (3) the injury is likely to be redressed by a favorable decision. See Yankee Atomic Electric Co. (Yankee Nuclear Power Station), CLI-96-1, 43 NRC 1, 6 (1996). Further, while the petitioner bears the burden of establishing his or her standing, it also is clear under Commission caselaw that in making a standing determination a presiding officer is to "construe the petition in favor of the petitioner." Georgia

Institute of Technology (Georgia Tech Research Reactor, Atlanta, Georgia), CLI-95-12, 42 NRC 111, 115 (1995).

As was noted previously, in his initial hearing request petitioner Darke's only statement regarding his standing to intervene was that the Atlas amendment request was "predominately adverse" to his health and safety and that of his family, "who reside in the vicinity of the subject site." Darke Hearing Request at 1. In an effort to learn more about his standing claim, in my February 12 initial order I gave petitioner Darke an opportunity to supplement his hearing petition to address "in detail" the basis for his standing. Initial Order at 2-3. Petitioner Darke did discuss his standing further in his March 3 response, declaring in toto:

> That interest (the health and safety of the requestor and his family, who reside in the vicinity of the Moab facility) would be challenged by the granting of the amendment proposed by the Application as offered by the Applicant/Licensee submittal of December 20, 1996.
>
> The undersigned and his family would suffer direct harm, radiological and other wise by such granting.

Darke March 3 Response at 8-9.

After reviewing that pleading, I issued an additional order that described the parameters of the agency case law on standing, including the need for an individual petitioner

to make a specific showing of the "distance (in miles)" from the facility at which the petitioner either resides or engages in recreational or other activities, and permitted petitioner Darke to make a further filing on the subject. Additional Filing Order at 2-3. He made that submission on March 24, 1997, the substance of which is discussed below. Thereafter, although licensee Atlas in its April 7 response challenged petitioner Darke's asserted bases for standing, see Atlas Response at 5-8, and petitioner Darke had an opportunity to respond to any of the arguments in that response, see Reply Filing Order at 2, he made no further assertions concerning the grounds for his standing to intervene in this proceeding. See Darke Reply at 4.

Consequently, on the question of petitioner Darke's standing to intervene in this proceeding, the pertinent pleading is his March 24, 1997 response in which he provided essentially all the information now before me regarding the basis for his standing. In that filing, petitioner Darke declared that while he does not live within or on the boundary of the Moab facility, he and his family do undertake certain activities that establish his interests are affected by the facility such that he has standing to intervene in this proceeding. These include (1) obtaining potable water for drinking and cooking from "a source that

is within a short walk" of the Moab facility; (2) using fire fuel driftwood taken from the Colorado River, which flows by the Moab facility; (3) bathing with or in the waters of the Colorado River; (4) using a public telephone that is a "short walk" from the Moab facility; (5) undertaking various other activities, including recreational and educational activities, on public and private lands in "close proximity" to the Moab facility; and (6) using local transportation corridors in "close proximity" to the Moab facility. Darke March 24 Response at 2-3. Petitioner Darke also declared that certain structures, systems, or components found within or "nearby" the facility impede his use of the Colorado River in violation of 33 U.S.C. §§ 401-413 and that the facility precludes him from using certain "necessary" amenities provided by the Colorado River that are "proximate (a short walk)" from the facility. Id. at 4. Petitioner Darke then concluded that as a result of these various activities, he and his family "most probably intercept numerous overloaded exposure pathways (some radiological) which originate" within the Moab facility, thereby resulting in "direct harm" to him and to them. Id. at 4.

In its April 7, 1997 response to petitioner Darke's filings, licensee Atlas argued that he had failed to make any allegation of "injury in fact" sufficient to support a

finding that he has standing to be admitted as a party to this proceeding. According to Atlas, the tailings pile at the Moab facility has an interim cover that virtually eliminates windblown particulate emissions so that Atlas complies with the applicable agency dose limits in 10 C.F.R. §§ 20.1301-.1302. Licensee Atlas further declared that petitioner Darke's assertions regarding use of water from the Colorado River for drinking, cooking, and bathing are not sufficient because he has not indicated whether the source of this water is surface water or ground water and whether it is upstream or downstream from the Moab facility. Licensee Atlas also maintained petitioner Darke's concern about exposure pathways is "nonsense" that bears no relationship to the license amendment at issue. Atlas Response at 5-7.

To be sure, licensee Atlas' claim that "regulatory limits" are not being exceeded by offsite releases from the Moab facility is not, standing alone, sufficient to show that petitioner Darke lacks standing. As was noted recently in the face of a similar assertion, "[r]elative to a threshold standing determination, . . . even minor radiological exposures resulting from a proposed licensee activity can be enough to create the requisite injury in fact." General Public Utilities Nuclear Corp. (Oyster Creek

Nuclear Generating Station), LBP-96-23, 44 NRC 143, 158 (1996). As licensee Atlas' own annual dose calculations indicate, currently the facility does provide at least some radiological exposures to offsite individuals, albeit small. See Atlas Response, exh. C. Further, on this record there is nothing to suggest there is a reasonable expectation that such exposures will not occur during the additional period that is the subject of the license amendment. As such, the potential for offsite radiological impacts from the facility, and thus for injury in fact to offsite individuals, exists.

By the same token, a showing that there may be some offsite radiological impacts to someone is not enough to establish standing for petitioner Darke. As the Commission has made clear on a number of occasions, in the context of a proceedings other than those for the grant of a reactor construction permit or operating license, a petitioner who wants to establish "injury in fact" for standing purposes must make some specific showing outlining how the particular radiological (or other cognizable) impacts from the nuclear facility or materials involved in the licensing action at issue can reasonably be assumed to accrue to the petitioner. See, e.g., Yankee Atomic Electric Co. (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 247-48 (1996); 55 Fed. Reg.

36,801, 36,804 (1990); 54 id. at 8272. As I noted in my March 11, 1997 memorandum and order, see Additional Filing Order at 2, petitioners generally do this by quantifying the distance from the nuclear facility or materials at which they reside or engage in other activities they believe are likely to result in radiological impacts. See, e.g., Oyster Creek, LBP-96-23, 44 NRC at 157-59.

Petitioner Darke's problem in this instance is that he has failed to carry his burden to provide the specific information needed to establish his injury in fact.[2] Simply put, he has not shown any reasonable nexus between himself and any purported radiological impacts. Petitioner Darke certainly has made assertions about potential facility-related airborne and waterborne radiological contacts. He has not, however, delineated these with enough

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[2] Petitioner Darke also refers to impacts on his family in seeking to establish his standing to be a party to this proceeding. His ability to gain standing for himself based on injury in fact to the interests of his spouse or children (especially if those children are not minors) is problematic. See Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), ALAB-470, 7 NRC 473, 474 n.1 (1978) (mother cannot represent interests of nonminor son attending medical school in vicinity of proposed nuclear facility). Nonetheless, because petitioner Darke has not sought to establish his interests are based on circumstances different from those of the members of his family, I need not reach this issue.

concreteness to establish some impact on him that is sufficient to provide him with standing.[3]

For instance, petitioner Darke claims he may suffer radiological impacts as a result of drinking, bathing, and cooking with water from the Colorado River that flows next to the Moab facility. Yet, he has not provided any information that indicates whether these water-related activities are being conducted upstream or downstream from the facility, a fact critical to establishing whether these activities will provide the requisite injury in fact. So too, his description of his other activities near the facility are all quantified with vague terms such as "near," "close proximity," or "in the vicinity." Notwithstanding the Commission's general guidance to afford a liberal construction to petitioner hearing requests, I am unable to find these cryptic references adequate to establish the required nexus with any facility radiological impacts, particularly in light of the repeated guidance given

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[3] Petitioner Darke does refer to "numerous overloaded exposure pathways (some radiological)" emanating from the Moab facility that will harm him and his family, see March 24 Response at 4, apparently suggesting there also is a nonradiological component to his injury in fact. He has not, however, provided any detail about the nature of any purported nonradiological impacts so as to give me a basis for considering them in making a standing determination.

petitioner Darke about the need to make a specific showing in this regard.[4]

I thus conclude petitioner Darke has not met his burden of showing that Atlas' requested license amendment will result in injury in fact to him or his family.[5] Because he has failed to establish this element that is vital to demonstrating his standing to intervene in this proceeding, his hearing request must be dismissed.

III. CONCLUSION

In accordance with 10 C.F.R. § 2.1205(e), (h), petitioner Darke has established that his hearing request

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[4] In my initial order, I also advised petitioner Darke that it generally is the practice for participants making factual claims regarding the circumstances that establish standing to do so in affidavit form that is notarized or includes a declaration that the statements are true and are made under penalty of perjury. See Initial Order at 3. As licensee Atlas notes, petitioner Darke apparently has made no effort comply with this guidance. See Atlas Response at 5. Providing this assurance of the accuracy of factual representations about standing is important; nonetheless, because petitioner Darke appears pro se and generally is making representations about himself (rather than about other individuals), I am not dismissing this case because of his failure to comply with this instruction.

[5] As was noted above, see supra p. 16, petitioner Darke also has made assertions about facility-related impacts impairing his use of navigable waters in violation of 33 U.S.C. §§ 401-413. Besides suffering from the vagueness problem already identified, it is not apparent how this claim meets the standing requirement that any purported injury in fact come within the "zone of interests" that is being protected by the statutes governing this proceeding.

challenging applicant Atlas' December 20, 1996 license amendment application is timely and specifies areas of concern that are germane to the subject matter of the proceeding. Nonetheless, despite multiple opportunities to address the issue, for the reasons outlined above petitioner Darke has failed to meet his burden to establish his standing to intervene in this proceeding. Accordingly, I deny petitioner Darke's hearing request and terminate this proceeding.[6]

For the foregoing reasons, it is this sixteenth day of May 1997, ORDERED, that:

1. The January 30, 1997 hearing request of John Francis Darke is denied and this proceeding is dismissed.

2. In accordance with the provisions of 10 C.F.R. § 2.1205(o), as it rules upon a hearing request, this

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[6] In his pleadings, petitioner Darke repeatedly champions the need to establish a local public document room in the vicinity of the Moab facility. See, e.g., Darke Hearing Request at 1. Because I am denying his hearing request and terminating this proceeding, there is no cause for me to consider that entreaty further. Petitioner Darke does, of course, have toll-free access to information regarding the Moab facility through reference assistance and a public users' on-line data base provided in conjunction with the agency's Washington, D.C. public document room or he can seek facility-related documents through requests under the Freedom of Information Act, 5 U.S.C. § 552.

memorandum and order may be appealed to the Commission by filing an appeal statement that succinctly sets out, with supporting arguments, the errors alleged. To be timely, an appeal statement must be filed within ten days after this memorandum and order is served (i.e., on or before Monday, June 2, 1997).

G. Paul Bollwerk, III
ADMINISTRATIVE JUDGE

Rockville, Maryland

May 16, 1997

ATTACHMENT "B"

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD PANEL

Before Administrative Judges:

James P. Gleason, Presiding Officer
Thomas D. Murphy, Special Assistant

In the Matter of

Docket No. 40-8681-MLA-3
(ASLBP No. 94-693-02-MLA-3)
(Source Materials License No. SUA-1358)

ENERGY FUELS NUCLEAR, INC.

October 21, 1994

MEMORANDUM AND ORDER
(Petition for Hearing)

INTRODUCTION

The Petitioner, Norman Begay (Begay), opposes the issuance of a license amendment to Energy Fuels Nuclear (EFN) and requests a hearing.[1] The amendment would authorize EFN to dispose at its White Mesa Mill in Blanding, Utah, of 2.6 million cubic yards of uranium mill tailings now stored at a Department of Energy uranium processing site in Monticello, Utah. Although not stated in the filings, it appears the reason for the proposed amendment is that the White Mesa Mill would be accepting tailings produced elsewhere, an act not contemplated under its initial license.[2] Begay's challenge is to demonstrate that

[1] Request for Hearing (May 14, 1984). NRC Staff (Staff), pursuant to 10 C.F.R. § 2.1213, indicates its intention to participate if a hearing is granted. *See* Staff Response to Begay Hearing Request at 2 n.3 (June 10, 1994).

[2] Source Materials License No. SUA-1358. It should be noted also that the Staff states in its first Response that most (of the tailings) are clearly 11(e)(2) (byproduct) materials, although there has been some question as to the classification of the vanadium pile. Staff Response at 3 n.5.

the act of disposing of the remote tailings will affect him adversely in a way different from the activities already authorized at the White Mesa Mill. For his efforts, outlined below, the Presiding Officer finds that Begay has alleged such an impact and as a consequence has established threshold standing allowing party status in the proceeding.[3]

STANDARDS

Under the provisions of 10 C.F.R. § 2.1205, Begay is required to set forth his interest in the proceeding, how his interest would be affected by the issuance of the license amendment, and his "areas of concern" about the licensing activity that is the subject matter of the proceeding.[4] The Presiding Officer must determine whether Begay's specified areas of concern are germane to the subject matter of the proceeding and whether he meets the judicial standards for standing. Among other factors, the Presiding Officer must consider the nature of Begay's right under the Atomic Energy Act to be made a party to the proceeding; the nature and extent of his property, financial, or other interests in the proceeding; and the possible effect of any order that may be entered in the proceeding upon his interests.[5]

AREAS OF CONCERN

In Begay's hearing requests[6] and through counsel at an informational conference held on September 22 in Monticello, Utah, he outlines three areas of concern which he alleges are germane to granting EFN the right to import and dispose of 2.6 million cubic yard of tailings: First, that the license amendment will bring "irreparable loss of cultural and archeological resources"; second that, "groundwater and drinking water [will be contaminated by] . . . further development of the White Mesa Mill site"; and finally, that there are "increased risks associated with the transportation of the mill tailings along Highway 191 from Monticello to Blanding."[7] These concerns will be addressed *seriatim.*

Archeological and Religious Resources

The Presiding Officer is impressed by the gravity of Begay's concern for the antiquities, including human remains, that the EFN property and surrounding

[3] Both the Licensee and Staff have withdrawn their objections to Begay's hearing request. *See* Tr. 33, 36-37.
[4] 10 C.F.R. § 2.1205(d).
[5] 10 C.F.R. 2.1205(g).
[6] Norman Begay Hearing Request dated May 14, 1994, and Supplemental Hearing Request dated July 14, 1994.
[7] Tr. 10-11.

lands may contain. As a member and representative of the Ute Tribe,[8] Begay has intense cultural, emotional, and religious ties to the area known as White Mesa. It is not lost on the Presiding Officer that the entire area has been determined eligible for inclusion in the National Historic Register and that many of Begay's ancestors are buried in the area. Nor is the Presiding Officer less impressed by the importance to the Ute Tribe, as "host people,"[9] of the recently documented, ancient Hopi temple located within 3 miles (and within sight) of the White Mesa Mill. Begay adequately expressed that his life is tied to this site and to White Mesa itself by a "spiritual feeling."

As explained at the informational conference, the matter of burials and ancient sites is probably more important to the Ute people than historical monuments would be to others. The Ute people "have a concept of Mother Earth that when their people are buried, they return to the Mother Earth."[10] They have sacred rights and rituals that must be observed whenever a burial is discovered or disturbed in any way.[11] It is possible that the sacred rights of the Ute Tribe were violated in the past when ancient Native American habitation sites were surveyed, and in some cases excavated, as part of the development of the White Mesa Mill site. Members of the tribe learned recently of the whereabouts of the human remains and artifacts that were removed as a result of those activities.[12] Begay pleaded to the Presiding Officer, as a representative of the NRC, to "help us out."[13] But in this respect, we are mandated to follow the Commission's regulations.

As compelling as they may be, there is little the Presiding Officer can do to alleviate Begay's concerns for Native American archeological resources, because those concerns arose from the initial issuance of the source materials license, not from the proposed amendment to that license. Cell 4, the site chosen for the disposal of the DOE tailings, was surveyed for archeological resources prior to the opening of the White Mesa Mill. Those habitation sites considered significant by the State archaeologists were excavated and their artifacts removed, apparently to the State Historical Museum in Salt Lake City. Begay does not allege that there are more resources located under Cell 4. Moreover, Begay, through his counsel, seems to concede that no archeological resources are immediately affected by the importation of the DOE tailings:

[8] Begay became a member of the White Mesa Ute Tribal Counsel on October 1. Tr. 10.
[9] The role of the host people would be those occupying the land today who hold it for the benefit of all Native American tribes who occupied it in the past and who left their ancestors buried there or left holy sites. Tr. 13.
[10] Tr. 13.
[11] *Id.*
[12] Tr. 14.
[13] Tr. 28.

> If Energy Fuels is allowed to dispose of an additional 2.6 million yards of tailings, it would either fill up one or more, approximately one-and-a-half of the existing tailings ponds. If the market permits and they are able to process the full amount of ore which they are allotted or allowed under their license, they will have to build new tailings in addition to the area that has already been cleared and the areas where ponds have already been established. . . . I think we have to assume that they are going to process and produce as much as they are licensed to produce and if that means additional tailings ponds will be constructed, additional archeological sites will be disturbed or destroyed, that simply we have to assume today.[14]

Counsel acknowledges that any disturbance of archeological sites is linked to activities contemplated under the original source materials license and is not directly related to the importation of the DOE tailings.[15]

While no one can say whether the construction of the White Mesa Mill would have taken place given more vocal concern on the part of the Ute Tribe at that time,[16] we may not revisit the initial licensing of the plant today. The scope of this hearing request is limited to the future importation and disposal of mill tailings from a remote site, nothing more. Therefore, since that activity will not impact on any archeological or religious resources, in any degree more than they could have under the existing license, Begay's concerns for those resources are not, in this limited context, germane to the subject matter of this proceeding. His allegations, therefore, cannot support an opportunity for hearing in this instance.

Water Resources

Begay stated in his filings and at the informational conference that over the past 8 years his drinking water has become noticeably discolored and odorous.[17] He alleges that mandatory testing of the wells has indicated a steady increase within the past few years in the traces of copper and other minerals.[18]

As with the issue of archeological resources, we are constrained to view Begay's concern within the scope of the license amendment, not the EFN source materials license. It is evident that the water pollution complained of started years before the license amendment was contemplated. If it arose from activities at the White Mesa Mill, it arose as a result of activities under the original license — and those issues are not germane to this proceeding. Begay's proper

[14] Tr. 15-16.

[15] Conditions 15 and 16 of Source Materials License No. SUA-1358 specifically require EFN to avoid, where feasible, operations in certain archaeologically sensitive areas and to conduct archeological studies and/or recovery operations in other areas prior to disturbance. Moreover, archeological contractors must meet the approval of the State Historic Preservation Officer and certain standards under NRC oversight. Therefore, while these sites would be disturbed or destroyed, they would not be disregarded and lost.

[16] The President of the Ute Tribal Organization appears to have agreed to the construction of the White Mesa Mill at the time the original EIS was done in 1979. Tr. 35. *See also* Staff Response to Supplement to Request for Hearing Filed by Norman Begay, Attachment at FES A-57.

[17] Tr. 26.

[18] Begay Supplemental Response at 2.

recourse in this instance is not with this Presiding Officer. He may seek a 10 C.F.R. § 2.206 determination from the Director of the NRC, under the agency's simplified procedures, on the issue that the original source material license is in some manner failing to protect the public's health and safety.[19]

However, the water resources issue should not be completely ruled out of this proceeding. The Staff has had a public meeting with EFN on groundwater concerns[20] and EFN has requested Begay to step forward with information concerning well completion data.[21] It appears both sides would benefit from such information. It would therefore be prudent for Begay to put forth evidence detailing what specific effects the addition of 2.6 million cubic yards of tailings will have on his groundwater concerns even though it does not serve as a platform upon which to establish standing.

Transportation Issue

Begay alleges that the residents of the White Mesa community share their primary access road, Highway 191, with the White Mesa Mill.[22] Because of the high volume of heavy-equipment traffic expected to be generated by the movement of the tailings from Monticello (approximately 27 miles north of the mill), Begay states that his safety, and that of his family, will be threatened. In the Final Environmental Statement prepared for the issuance of the original source material license, transportation issues involving the White Mesa Mill were addressed. Heavy-truck traffic was estimated at approximately 68 round trips daily between area mines and buying stations serving the mill.[23] As the FES notes, this traffic would have been disbursed over several roads leading to the buying stations.

The FES estimates the impact of shipments of ore from the buying stations to the mill. Based on the lifetime milling capacity for the mill, it was estimated that it would take 30-ton-capacity ore trucks over 22,500 trips per year to deliver the ore to the mill. The FES further estimates that this amount of truck traffic would produce accidents involving trucks at the rate of 7.6 per year.[24]

At this point, we know little of the manner in which the Monticello tailings will be shipped to the White Mesa Mill. Counsel for Begay made an uncontested

[19] In this respect, any of the injuries Mr. Begay alleges from the activities of the White Mesa Mill that his counsel claims were not given due consideration by the NRC in its original licensing action could form the basis for a 10 C.F.R. § 2.206 petition, including those issues arising in a religious context.

[20] Staff electronic memorandum, Turk to Pierce, August 9, 1994.

[21] Tr. 33-34.

[22] Request for Hearing at 2.

[23] NUREG-0556, Final Environmental Statement Related to Operation of White Mesa Uranium Project (May 1979) at 4.8.5.

[24] *Id.* at 5.3.2.

statement at the informational conference that trucks carrying tailings would be "coming or going, empty or full, every three minutes."[25] Moreover, he stated that this transportation scenario might take place 24 hours a day over an uncertain time period.[26] What we do know is that if all 2.6 million cubic yards of tailings were moved in 30-ton trucks, as assumed in the FES, it would take approximately 86,666 round-trips between Monticello and the White Mesa Mill.[27] The FES based its analysis of transportation impacts on 22,667 round-trips per year.[28]

As stated before, the proposed license amendment must be viewed in light of activities already contemplated for the White Mesa Mill under its source materials license. If in fact there will only be 22,667 or fewer heavy-vehicle trips to the Mill each year, activities already contemplated under the Mill's license, Mr. Begay has shown nothing upon which to build a claim of injury. But this issue takes on a different light when viewed in terms of EFN's capability to move the Mill to full-capacity operation if the market for uranium picks up. In that light, the movement of tailings from Monticello could take place simultaneously with full-scale uranium production. In fact, any round-trips added to the highway would be beyond the assumptions used in the FES to calculate the impacts of heavy-equipment traffic under the source materials license. In this respect, Mr. Begay's concern clearly evolves as a possible consequence of the proposed amendment and not the existing source materials license. This is enough to bring the issue within the scope of this hearing and make it germane to the subject matter of the proceeding.

STANDING

In order to participate in this proceeding, Begay is required by 10 C.F.R. § 2.1205(d) to demonstrate that he also meets the judicial concepts of standing. He must show that the intended licensing action will cause injury in fact to an interest that is within the zone of interests protected by the Atomic Energy Act or the National Environmental Policy Act.[29] Further, Begay must establish (a) that he personally has suffered or will suffer a distinct and palpable harm that constitutes injury in fact; (b) that the injury can fairly be traced to the challenged action; and (c) that the injury is likely to be redressed by a favorable decision in the proceeding.[30]

[25] Tr. 21-22.
[26] *Id.*
[27] This assumes one cubic yard of tailings to equal one ton which could prove to be a conservative estimate.
[28] FES at 5.3.2.
[29] *See Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Unit 1), CLI-93-21, 38 NRC 87, 92 (1993).
[30] *See Georgia Power Co.* (Vogtle Electric Generating Plant, Units 1 and 2), CLI-93-16, 38 NRC 25, 32 (1993).

Since Begay has made no concrete demonstration that his archeological and groundwater concerns are germane to the license amendment, we need not address further those concerns in their relation to standing.

Begay and his family live in the White Mesa Native American community within 5 miles of the White Mesa Mill. Begay says he and his family use the road running past the entrance to White Mesa Mill every day to reach Blanding. Begay alleges that his and his family's safety will be placed at risk due to increased heavy-vehicle traffic on the highway and the resulting higher rates of traffic accidents. As has been postulated above, truck trips may be increased under the license amendment.

Highway 191 from Blanding to the White Mesa Mill site narrows from a four-lane, service-oriented road, to a two-lane road as it leaves the Blanding commercial district and heads toward the mill site. Begay states that the road is often covered by snow and ice in the winter months and trucks to the mill could easily run off the road.[31]

Begay has alleged a potential injury to the health and safety of his person and his family that is both concrete and particularized and the potential injury would be a direct result of the licensing decision at issue in this proceeding. Begay has, therefore, established the requisite showing to be allowed standing to participate in a hearing concerning the EFN license amendment.

ORDERED

1. The request for a hearing by Norman Begay on Energy Fuels Nuclear's application for a license amendment is granted.
2. Within 30 days, pursuant to 10 C.F.R. § 2.1231, the NRC Staff will furnish a hearing file to the Presiding Officer and parties in this proceeding.
3. Within 10 days of service of this Order, the other parties may appeal the Presiding Officer's decision.

It is so ORDERED.

James P. Gleason, Presiding Officer
ADMINISTRATIVE JUDGE

Rockville, Maryland
October 21, 1994

[31] Begay's concern also relates to the fact that his daughter rides a school bus from the White Mesa community to Blanding each school day. Tr. 22.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE PRESIDING OFFICER

In the Matter of	)	
	)	
ENERGY FUELS NUCLEAR, INC.	)	Docket No. 40-8681-MLA
	)	
(White Mesa Uranium Mill; Alternate Feed Material)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S RESPONSE TO REQUESTS FOR HEARING FILED BY (1) THE NATIVE AMERICAN PEOPLES HISTORICAL FOUNDATION, (2) WESTWATER NAVAJO COMMUNITY, (3) NORMAN BEGAY; AND (4) THE UNITED STATES DEPARTMENT OF ENERGY (NEVADA OPERATIONS OFFICE)" in the above-captioned proceeding have been served on the following by deposit into the United States mail or, as indicated by an asterisk, through deposit in the Nuclear Regulatory Commission's internal mail system this 21st day of May 1997:

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