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'98 SEP 10 A10:52

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE PRESIDING OFFICER

In the Matter of

HYDRO RESOURCES, INC.

2929 Coors Road, Suite 101

Albuquerque, New Mexico 87120

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Docket No. 40-8968-ML

(Leach Mining License
and Milling License)

NRC STAFF'S RESPONSE TO SEPTEMBER 2 INTERVENOR BRIEFS

INTRODUCTION

Pursuant to earlier orders issued by the Presiding Officer concerning the upcoming scheduling conference in New Mexico, intervenors Eastern Navajo Dine Against Uranium Mining (ENDAUM) and Southwest Research and Information Center (SRIC) filed a joint brief dated September 2, 1998, as did intervenors Marilyn Morris and Grace Sam.¹ As discussed below,² the Staff (1) objects to the schedules proposed in the SRIC and Morris Briefs; and (2) continues to support bifurcating this proceeding.

¹ See "ENDAUM'S and SRIC's Scheduling Conference Brief" (SRIC Brief); "Scheduling Conference Brief of Marilyn Morris and Grace Sam" (Morris Brief).

² This response brief is limited to five pages, in accordance with the July 13, 1998 order. See "Memorandum and Order (Announcing Scheduling Conference in Crownpoint, New Mexico, August 25-27; Reporting on Content of July 10 Scheduling Conference)" (unpublished) (July 13 Order), at 5.

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DISCUSSION

A. Proposed Schedules Would Improperly Prolong This Proceeding

The schedule set forth in the SRIC Brief proposes splitting consideration of the concerns raised into ten parts, and its provisions allowing for reply briefs and oral presentations would result in continuous litigation before the Presiding Officer lasting into the year 2000. *See* SRIC Brief, at 32. Similarly, the Morris Brief calls for a series of filings and oral presentations as late as October 1999, and foresees the need for additional proceedings beyond that date. *See* Morris Brief, at 16-19. Adopting either of these schedules would cause the type of costs and delays which the 10 C.F.R. Part 2, Subpart L, regulations were meant to prevent in materials licensing actions. *See Kerr-McGee Corporation* (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).³

The proposals for oral presentations are not in accordance with the governing provisions of 10 C.F.R. § 2.1235(a), which allow for such presentations only when the presiding officer determines they are "necessary to create an adequate record."⁴ Decisions on whether to allow oral

³ Procedures endorsed by the Commission in the cited decisions (which were issued when hearing procedures to be used in materials cases were determined by the Commission on a case-by-case basis) were 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).

⁴ The Statement of Considerations accompanying Subpart L's promulgation states that a presiding officer has discretion to require 10 C.F.R. § 2.1235 oral presentations "only in those rare (continued...)"

presentations would be premature at this time, since written presentations have not yet been submitted.

B. Intervenor Arguments Against Bifurcation Lack Merit

The bulk of the September 2 briefs are devoted to arguments against the proposed bifurcation of this proceeding. *See* SRIC Brief, at 6-27; Morris Brief, at 2-13.⁵ As discussed below, these conclusory arguments are either unresponsive to points previously made in support of bifurcation,⁶ fail to address previous NRC decisions,⁷ or otherwise lack adequate supporting authority.⁸

⁴(...continued)

instances in which the written presentations leave unresolved issues." 54 Fed. Reg. 8269, 8274 col. 3 (February 28, 1989). "Only if the presiding officer found that the written presentations were insufficient to create an adequate record would oral presentations be permitted." *Id.*, at 8269, col. 2.

⁵ In light of the scheduling proposals discussed *supra*, the adoption of which would effectively bifurcate this proceeding into eight or ten parts, the arguments against bifurcating this proceeding ring hollow.

⁶ *See, e.g.*, SRIC Brief, at 25-27, and Morris Brief, at 7-8, arguing that bifurcation would not conserve resources, but failing to address the estoppel doctrine raised in the "NRC Staff's Response To HRI's Motions For Reconsideration And For Bifurcation," dated June 26, 1998 (June 26 Response), at 15-16.

⁷ The due process arguments (SRIC Brief, at 16-18) fail to address the law of this case (*see* LBP-98-5, 47 NRC 119, 134-35 (1998)), and otherwise ignore previous agency 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. Similarly, the environmental justice argument (SRIC Brief, at 18) ignores the law of this case (*see* LBP-98-5, 47 NRC at 136-37), as does the Morris Brief, at 11-13. The continued reliance on Executive Order 12898 is misplaced, as that Order fails "to create any substantive or procedural rights or any right of judicial review in any person or entity." LBP-98-5, 47 NRC at 136. *Accord, Louisiana Energy Services* (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77, 102 and n.19 (1998)(Executive Order 12898, by its own terms, establishes no new legal rights or remedies). Moreover, the statement that bifurcation will deter the hearing participation of "low-income, Native American people" living near the project site (Morris Brief, at 12) appears to refer to persons who are not parties to this proceeding.

⁸ For example, no authority is cited supporting partial license revocation on issues for which "more information is needed before the hearing can go ahead." SRIC Brief, at 16.

The SRIC Brief, at 8-11, argues that bifurcation would delay consideration of the full scope of material issues, including whether a license was properly issued to Hydro Resources, Inc. (HRI) pursuant to 10 C.F.R. § 40.32, thus preventing "meaningful" participation by the intervenors in the proceeding. However, no explanation is provided concerning why the proposed phase 1, focused on whether mining should be allowed on Section 8 at HRI's Church Rock site, would improperly impair intervenor hearing rights regarding that site. Given the present uncertainty whether HRI will ever mine any of its other sites, litigating issues such as the potential proximity of Unit 1 well fields to Crownpoint drinking water wells would risk wasting adjudicatory resources on questions which may never be ripe for decision.⁹ The SRIC Brief, at 12, makes only the conclusory statement that "postponing portions of the hearing would effectively deprive Intervenors of their entitlement to a hearing on all material licensing issues not addressed in the initial hearing on Section 8."

The SRIC Brief, at 19-25, citing *Cady v. Morton*, 527 F.2d 786, 795, contends that bifurcation would constitute an improper segmentation of HRI's project, but the argument never comes to grips with the fact that, prior to issuing a license to HRI, the Staff prepared and published an environmental impact statement (EIS) covering the entire project.¹⁰ Such action was in

⁹ The argument that the entire license is ripe for review because further agency action is not required (*see* SRIC Brief, at 15 n.12) is framed as if HRI now has the unconditional right to mine any of its sites. As discussed in the "NRC Staff's Response To July 30 Order," at 10-17, the license contains conditions requiring HRI to submit confirmatory data for Staff approval before injection of lixiviant would be authorized, and this data will not be available until HRI drills its mining wells. Consideration of issues regarding Unit 1 or Crownpoint well fields, when such fields may never be built, would thus be doubly premature.

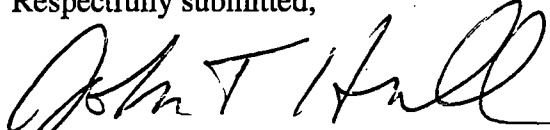
¹⁰ Prior to the February 1997 EIS publication date, the Staff properly rejected HRI's request to separately license the Church Rock site. *See* SRIC Brief, at 19-20. The fact that there are not
(continued...)

accordance with the *Cady* holding. Moreover, the SRIC Brief, at 22 n.18, fails to discuss post-*Cady* case law cited by the Staff in the June 26 Response, at 14, holding that once a comprehensive EIS is issued, the project may be completed in stages.¹¹

CONCLUSION

Accordingly, for the reasons set forth above, the Staff requests the Presiding Officer to: (1) reject the proposed schedules set forth in the SRIC and Morris Briefs; and (2) bifurcate the proceeding.

Respectfully submitted,



John T. Hull
Counsel for NRC Staff

Dated at Rockville, Maryland
this 9th day of September, 1998

¹⁰(...continued)

separate EISs "or other environmental analyses for each of the mining sites" (*id.*, at 20) defeats rather than supports the segmentation argument.

¹¹ The segmentation arguments of Ms. Morris and Ms. Sam are similarly faulty. *See* Morris Brief, at 4-7. Therein, cases are cited which hold that an EIS must consider the entire project in question, which these intervenors acknowledge is just what the Staff did regarding HRI's project. *See id.*, at 13. These cases do not hold that a proceeding cannot be litigated in phases.

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RULEMAKINGS AND
ADJUDICATIONS STAFF

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HYDRO RESOURCES, INC.)

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Docket No. 40-8968-ML

(Leach Mining License)

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S RESPONSE TO SEPTEMBER 2 INTERVENOR BRIEFS" 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 with double asterisks by facsimile transmission, this 9th day of September 1998:

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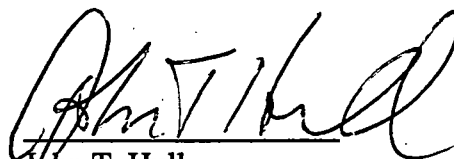
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