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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

'98 AUG 31 P 6:23

BEFORE THE PRESIDING OFFICER

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

In the Matter of)	
)	Docket No. 40-8968-ML
HYDRO RESOURCES, INC.)	
(2929 Coors Road, Suite 101)	Re: Leach Mining and Milling License
Albuquerque, New Mexico 87120)	

NRC STAFF'S RESPONSE TO JULY 30 ORDER

INTRODUCTION

The Presiding Officer issued an unpublished order on July 30, 1998,¹ which requested Eastern Navajo Dine Against Uranium Mining (ENDAUM), Southwest Research and Information Center (SRIC), Marilyn Morris, Grace Sam (collectively, "Intervenors"), Hydro Resources, Inc. (HRI), and the Staff to file by August 31, 1998, "summaries of positions on matters in LBP 98-9."² July 30 Order, at 3.

The Staff's position regarding various suggestions made by the Presiding Officer in the May 13 Order is discussed below in Section A. Generally, the Staff objects to using procedures

¹ "Memorandum and Order (Postponement of Site Visit and Prehearing Conference Until September 15-17; Provisional Agenda)" (unpublished) (July 30 Order). The prehearing conference will now be held on September 17, 1998, in Crownpoint, New Mexico. See July 30 Order, at 3.

² See LBP-98-9, 47 NRC ____ (May 13, 1998) (May 13 Order), which found that ENDAUM, SRIC, Ms. Morris, and Ms. Sam had standing to intervene, and found that several of their stated concerns were germane to this proceeding.

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here which are not part of the 10 C.F.R. Part 2, subpart L provisions,³ as in the Staff's view, use of such procedures is not necessary to achieve a fair hearing in this proceeding. Other matters requiring discussion are set forth below in Section B.

BACKGROUND

In accordance with the schedule proposed in the May 13 Order, at 37-38, the Staff identified and distributed copies of the hearing file to the parties as reflected in the Staff's letter dated June 11, 1998. Motions for reconsideration of the May 13 Order led to the Presiding Officer's July 1, 1998, order, pursuant to which the prehearing conference was to have been held on July 22, 1998, at NRC headquarters in Rockville, Maryland.⁴ To prepare for this conference, the parties had been requested to file briefs "stating the facts and arguments they intend to present at the conference" concerning the following agenda items:

[1.] The extent to which HRI and the Staff are prepared to demonstrate the invalidity of the allegations that the Intervenor may develop within their areas of concern. Are HRI and the Staff prepared to proceed [with a 10 C.F.R. Part 2, Subpart L hearing⁵] with respect to all or a portion of the planned mining and extraction activities?

[2.] The plan of analysis that Intervenor plan to implement in order to prepare [10 C.F.R. § 2.714(b)] contentions or written presentations within their areas of concern.

³ Should the Presiding Officer conclude to the contrary that use of 10 C.F.R. Part 2, Subpart G procedures are necessary in this proceeding, he must seek the Commission's approval to use those procedures here pursuant to 10 C.F.R. § 2.1209(k).

⁴ See "Memorandum and Order (HRI Motion for Reconsideration and Motion for Partial Clarification)" (unpublished) (July 1 Order), slip op. at 4.

⁵ The Staff assumes this is the intended meaning, since the Staff does not engage in the performance of mining activities.

[3.] Whether or not to require Intervenor to prepare formal [10 C.F.R. § 2.714(b)] contentions.

[4.] A discussion of proposals for the fair and efficient scheduling of the resolution of this case.

July 1 Order, at 4.⁶

In response to the July 1 Order, the Intervenor by joint motion dated July 8, 1998,⁷ requested the Presiding Officer to (1) hold the conference in Crownpoint, New Mexico, as part of a three-day site visit to the larger Crownpoint/Church Rock area; (2) make a record of statements to be taken from local residents during the three-day site visit; and (3) conduct a subsequent "evidentiary hearing" in Crownpoint at some unspecified future date.⁸ See July 8 Motion, at 2, and 10-14.

The Presiding Officer then issued an unpublished order on July 13, 1998, granting the requests to hold the conference in Crownpoint, New Mexico, and to conduct a site visit to the larger Crownpoint/Church Rock area.⁹ The July 13 Order reiterates the May 13 Order's request

⁶ As indicated above, the July 30 Order refers back to the May 13 Order, but makes no reference to the intervening orders of July 1 and July 13. The extent to which these intervening orders still apply is thus not clear. The Staff nonetheless discusses agenda item 1 in Section B 4, *infra*. Agenda items 2-4 are addressed in Section A 1, *infra*.

⁷ "Joint Motion of ENDAUM, SRIC, and Marilyn Morris (nee Sam) For Change of Location and Date of Scheduling Conference, Request For Site Visit and Public Meeting, Request For Amendment and Clarification of Scheduling Conference Agenda and Request For Expedited Consideration" (July 8 Motion).

⁸ Neither 10 C.F.R. § 2.1235, nor any other 10 C.F.R. Part 2, Subpart L procedure, provides a basis for holding an "evidentiary hearing" in Crownpoint. Such a hearing would not be authorized by the Subpart L procedures which govern this proceeding.

⁹ 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 1-2, and 4-5.

(see May 13 Order, at 34) that the parties identify legal issues "that may be decided by legal briefs rather than by factual presentations," and to file briefs which identify "legal issues to be determined solely by consideration of briefs." July 13 Order, at 5.

The July 13 Order also clarified that the July 1 Order was not a final denial of HRI's bifurcation motion (see July 13 Order, at 2 n.1), which had been filed as part of HRI's motion for reconsideration of the May 13 Order. The Presiding Officer stated that "argument about whether to phase or bifurcate the trial of this case" will be heard as part of the upcoming conference in New Mexico. July 13 Order, at 2 n.1.¹⁰ Subsequently, on July 30 and August 19, 1998, the Presiding Officer changed the date for the scheduling conference, site visit and limited appearance sessions to September 15-17, 1998.¹¹

DISCUSSION

A. Summary of Staff Positions on Proposals Made in May 13 Order

1. No Need for Contentions on Germane Concerns; Proposed Schedule

The May 13 Order, at 27-32, listed 22 areas of concern identified by ENDAUM and SRIC in their joint August 1997 second amended hearing request, and found 19 of the concerns to be germane to this proceeding.¹² In doing so, the Presiding Officer noted that "it is not necessary

¹⁰ The bifurcation issue thus remains open. The Staff supports limiting adjudication at present to concerns regarding HRI mining on Section 8 at its Church Rock site, as more fully explained in "NRC Staff's Response To HRI's Motions For Reconsideration And For Bifurcation," dated June 26, 1998.

¹¹ Memorandum and Order (Postponement of Visit and Prehearing Conference until September 15-17; Provisional Agenda), dated July 30, 1998; Notice (Limited Appearance; Prehearing Conference; Other Events), dated August 19, 1998.

¹² The May 13 Order, at 33-34, discussed four areas of concern identified by Marilyn Morris and Grace Sam which are in addition to those concerns raised by ENDAUM and SRIC.
(continued...)

to determine the merits of a concern in order to determine that it is germane," and contrasted the informal standard he used in deciding this question with the more rigorous standard applicable to admitting contentions under 10 C.F.R. § 2.714. May 13 Order, at 28. The Staff agrees with the distinction drawn by the Presiding Officer between finding that a concern is germane, and ruling on the merits of a concern. As discussed below, the merits of germane concerns should be determined by the Presiding Officer based on written presentations filed pursuant to 10 C.F.R. § 2.1233.

However, the Staff sees no need to insert into this proceeding an intermediate step by which Intervenors would file contentions prior to making their written presentations. The Presiding Officer suggested that Intervenors file 10 C.F.R. § 2.714(b) contentions before submitting 10 C.F.R. § 2.1233 written presentations. *See* May 13 Order, at 28; and July 1 Order, at 3. While the Staff agrees that filing contentions might be a way of narrowing issues, such use of 10 C.F.R. Part 2, Subpart G procedures here would not be authorized without first obtaining the Commission's approval pursuant to § 2.1209(k). Only the Commission has the authority to order use of 10 C.F.R. Part 2, Subpart G procedures (*e.g.*, filing of 10 C.F.R. § 2.714 contentions) in Subpart L hearings. *See* 52 Fed. Reg. 20091 (May 29, 1987). The Statement of Considerations (SOC) for the final Subpart L rules described the substantial procedural differences between Subpart L proceedings and the trial-type adjudications provided for by Subpart G. In Subpart L proceedings, there is no discovery and cases are to be decided by the presiding officer "based solely upon a 'hearing file' ... and written presentations by the parties." SOC, 54 Fed. Reg. 8269

¹²(...continued)

The Presiding Officer found two of these four additional concerns to be germane to this proceeding, and explained that the merits of the germane concerns remain to be determined. *Id.*

(February 28, 1989). Adoption of the Subpart L rules was based in part on the Commission's generic finding that in most cases, "materials licensing actions do not involve substantial hazards to public health and safety." *Id.*, at 8271, col. 3. Intervenors' bare assertion that "the uniquely hazardous characteristics of HRI's proposed mining activities" justify use of Subpart G procedures (July 8 Motion, at 8) provides an insufficient basis to override the Commission's generic finding.

Rather than incur the further delays inherent in referring matters to the Commission, a better approach would be for the Presiding Officer to issue an order requiring Intervenors to submit written presentations pursuant to 10 C.F.R. § 2.1233. As required by 10 C.F.R. § 2.1233 (c) and (d), such Intervenor submittals would have to detail the bases for claiming that the license application is deficient, and identify what information in the hearing file they rely on¹³ "to support or illustrate each omission or deficiency complained of." This level of specificity would help narrow issues,¹⁴ particularly if the Presiding Officer further set a page limit for the written presentations using his general power to control "the course of the hearing and the conduct of the participants." 10 C.F.R. § 2.1209(a). HRI and the Staff could then file their written presentations, also subject to any page limitations specified by the Presiding Officer in the order.

¹³ ENDAUM and SRIC previously stated that the Staff's December 1997 Safety Evaluation Report (SER) and the HRI license issued in early January 1998 contain new information not covered by their 187-page joint filing made in August 1997. *See* "ENDAUM'S and SRIC'S Third Amended Hearing Request and Petition to Intervene," dated January 16, 1998 (Third Request), at 18. The Third Request did not identify the new information, or how it supports their claims, in violation of a previous scheduling order. *See* LBP-97-23, 46 NRC 311 (1997) (any amended hearing request was to be based on "any new information found in the SER").

¹⁴ Issues to be decided now could be further narrowed depending on how the pending bifurcation motion is decided.

The May 13 Order, at 37-38, set forth a tentative filing schedule for further submittals, which was tied to the distribution date of the hearing file. The Staff identified and distributed copies of the hearing file to the parties as reflected in the Staff's letter dated June 11, 1998. In light of the delays associated with (1) the need to rule on the motions for reconsideration regarding the May 13 Order; (2) the still unresolved motion to bifurcate the proceeding made by HRI; and (3) the difficulties in setting a date for the conference currently scheduled for September 17, 1998, the Staff suggests that the Presiding Officer's tentative schedule be adjusted to account for these delays.¹⁵

2. Proposal To Brief Legal Issues Apart From Factual Presentations

The May 13 Order, at 34, invites the parties to identify "legal issues that may be decided by legal briefs rather than by factual presentations." The term "factual presentation" is not used in the 10 C.F.R. Part 2, Subpart L procedures which govern this proceeding. The wording of 10 C.F.R. § 2.1233, which contains provisions for filing written presentations, appears to allow for submittal of both legal argument and factual material.¹⁶ These written presentations should be used here to decide the merits of germane concerns, whether those concerns are factual or legal in nature.

Additionally, to the extent that the Presiding Officer's proposal may be viewed as imposing a duty on the parties to file 10 C.F.R. § 2.749 motions for summary disposition on

¹⁵ For example, Intervenor, HRI and the Staff could be required to submit their written presentations by October 30, November 30 and December 7, 1998, respectively.

¹⁶ Written presentations are described as consisting of "arguments and documentary data, informational material, and other supporting written evidence." 10 C.F.R. § 2.1233(a).

selected legal issues, such motions are now disfavored by the Commission. *See* Policy On Conduct of Adjudicatory Proceedings, 63 Fed. Reg. 41872, at 41873-74 (August 5, 1998).

Accordingly, rather than adding a separate filing requirement to this proceeding, the Staff urges the Presiding Officer to rely on the Subpart L procedures which were designed to adjudicate all materials licensing cases.

3. Statements To Be Made By Members of the Public

The May 13 Order, at 36-37, references the Presiding Officer's intention to invite members of the public to address him during the site visit on matters of "local sentiment,"¹⁷ and further states that "[I]f important substantive concerns come to my attention, I may ask that a party provide a response for the record." As to this latter proposal for on-the-spot responses by parties, the Presiding Officer should clarify that providing such responses would be discretionary rather than mandatory. Assuming that members of the public will make statements which pertain to concerns ruled germane to this proceeding, the "record" for deciding the merits of those concerns will be the written presentations filed pursuant to 10 C.F.R. 2.1233, not the "record" generated during the limited appearance sessions.¹⁸

Accordingly, during the limited appearance sessions, parties should not be required to respond "for the record."

¹⁷ The July 30 Order, at 1, clarifies that these will be "limited appearance" statements taken pursuant to 10 C.F.R. § 2.1211.

¹⁸ Oral presentations by parties in Subpart L proceedings are governed by 10 C.F.R. § 2.1235. Under Subpart L, a presiding officer has discretion to require such oral presentations "only in those rare 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.

B. Summary of Staff Positions on Other Matters

1. Scope of Proceeding

The Presiding Officer "concluded that this proceeding must examine the HRI application." May 13 Order, at 19. The Staff agrees that the license application, insofar as it concerns HRI mining activities on Section 8 at the Church Rock site, should be a central focus of the proposed Phase 1 of this proceeding. HRI's *in situ* leach (ISL) mining license was issued by the Staff pursuant to 10 C.F.R. § 40.32, which the parties agree provides a "reasonable assurance" standard by which the Presiding Officer should judge the merits of HRI's license application.

2. Schedule For Providing New Information

The May 13 Order, at 35, requested HRI and the Staff to file a schedule whereby the Presiding Officer and Intervenors "will be informed as early as feasible about substantial new information" developed by HRI or the Staff. Any such information pertaining to HRI's 10 C.F.R. Part 40 licensed activities would necessarily be docketed in correspondence between HRI and the Staff. Such correspondence becomes part of the hearing file in this proceeding pursuant to 10 C.F.R. § 2.1231 (b) - (c), and would thus be provided to the Presiding Officer and Intervenors on a timely basis. A more specific description as to just when new information, if any, will be submitted by HRI, is dependant on future events. Accordingly, no meaningful schedule can be provided at this time.

3. Adequacy of Information Already Submitted by HRI

Based on his reading of HRI's license, the Presiding Officer concluded that the Staff has "not yet been persuaded by [HRI] that it already has the information with which to design and implement safe, environmentally appropriate operations." May 13 Order, at 20. Out of the 62 license conditions in HRI's license, the Presiding Officer identified five which "indicate information the Staff must still be provided before the requested license activities may be authorized." *Id.*, at 19.¹⁹ The Staff would not have issued a license to HRI in January 1998 if the Staff had similarly concluded that there was such a lack of information.

The level of technical detail to which this part of the May 13 Order seemingly refers cannot be known until production facilities are ready to begin operations. ISL uranium recovery operations are conducted in stages on a well-field by well-field basis. Each uranium ore body is unique, and additional site-specific information about the surrounding ISL well field area is gained only as more injection, production, and monitor wells are drilled prior to operation. While ISL license applicants must demonstrate the general feasibility of conducting ISL mining in a geographic area in a safe and environmentally acceptable manner, more detailed information is not available on a well-field-specific basis until a given well field is ready to be brought into operation. In conducting its licensing review, the Staff thus does not require an ISL applicant to provide fully-detailed information on all planned well fields. Rather, at the pre-operational stage, the Staff determines (1) whether enough hydro geologic information is known about the general

¹⁹ The five conditions in HRI's license cited by the Presiding Officer concern: (1) financial surety requirements; (2) injection well operating pressures; (3) groundwater pump tests; (4) submittal of waste retention pond design information; and (5) replacement of Crownpoint water supply wells. *See* May 13 Order, at 19-20. These conditions are discussed *infra*.

area in question to justify issuing a license; and (2) whether the mining methods to be used are consistent with established ISL techniques.

ISL mining methods are well established, and the Staff has regulated ISL operations for almost 20 years. Contrary to what the May 13 Order suggests, the information submitted by HRI in its license application provided an adequate basis for the Staff to issue HRI a 10 C.F.R. Part 40 license.

The five license conditions cited in the May 13 Order are discussed separately below.

a. Financial Surety Requirements

These requirements are set forth in HRI License Condition 9.5. The required "surety arrangement" contains "surety amounts" which must be updated annually to reflect changes in the estimated costs of decommissioning, reclamation, and groundwater restoration. These cost estimates change over time as well fields are placed in or removed from production, and reclamation of well fields is completed.

With no well fields in production, none of the requirements of HRI License Condition 9.5 are applicable yet. The financial surety requirements of HRI License Condition 9.5 thus have no relationship to the issue of whether HRI submitted enough information to justify issuance of a license. However, before HRI may inject any lixiviant, HRI will be required to have in place an NRC-approved surety amount, or HRI will not be authorized to begin production. Additionally, once the initial NRC-approved surety amount is determined (based in part on the cost of restoring a well field using nine pore volumes of water; *see* FEIS, at 4-40), HRI's license will be amended. If it is believed that the surety amount is inadequate, the amendment will be subject to challenge at that time in a separate licensing proceeding.

b. Injection Well Operating Pressures

The applicable requirements are set forth in HRI License Condition 10.3, which states in full as follows:

Injection well operating pressures shall be maintained at less than formation fracture pressures, and shall not exceed the well's mechanical integrity test pressure.

This condition indicates there will be a range of acceptable operating pressures, since these pressures will vary from well field to well field due to differing local conditions. HRI has already conservatively calculated a general formation fracture pressure, applicable to all three sites. See Chapter 4 of the HRI project's Final Environmental Impact Statement (NUREG-1508), at 4-24 (discussing "rupture pressure" under the heading "Well Field Injection Pressures"). Before any lixiviant is injected at the Church Rock site, the accuracy of this general calculation of formation fracture pressure will be checked by the results of the step-rate injection (fracture) test required by HRI License Condition 10.31.²⁰ Moreover, the required pressure range for any given injection well will also depend on the results of that well's mechanical integrity test, which obviously cannot be conducted until the injection well has been built and is ready for operation. No HRI injection wells have yet been built.

²⁰ HRI License Condition 10.31 states as follows:

Prior to the injection of lixiviant at the Church Rock site, the licensee shall conduct a Westwater Canyon aquifer step-rate injection (fracture) test within the Church Rock site boundaries, but outside future well field areas. One such test at the Unit 1 or Crownpoint site shall also be performed before lixiviant injection begins at either of these sites.

Fracture tests are not conducted within well field areas in order to avoid creating new excursion pathways.

The resultant lack of well-field-specific information, however, does not mean that HRI lacks the necessary degree of hydro geologic information about the general area to be able to design and implement safe, environmentally acceptable ISL operations. HRI has already submitted this hydro geologic information. *See* Affidavit of William H. Ford, attached as Staff Exhibit 9 to the Staff's February 20, 1998 opposition to the joint ENDAUM/SRIC stay motion (Staff Exhibit 9), at ¶¶ 9-10. The purpose of HRI License Condition 10.3 is to provide reasonable assurance that before any lixiviant is pumped into an injection well, the proper operating pressure for that injection well will have been determined. While the fulfillment of this condition for each injection well in each well field will help ensure that no lixiviant excursions occur, HRI cannot comply with this condition until there is an injection well to test.

Accordingly, the inclusion of License Condition 10.3 in HRI's license does not support a finding that there is a reasonable doubt whether HRI will be able to conduct ISL mining operations safely and in an environmentally acceptable manner.

c. Groundwater Pump Tests

The applicable requirements are set forth in HRI License Condition 10.23, which states as follows:

Prior to injection of lixiviant in a well field, groundwater pump tests shall be performed to determine if overlying aquitards are adequate confining layers, and to confirm that horizontal monitor wells for that well field are completed in the Westwater Canyon aquifer.

As discussed in NUREG-1508 sections 4.3.1.1 through 4.3.1.3 (under the heading "Ground-water Impacts of ISL Mining" for the Crownpoint, Unit 1, and Church Rock sites, respectively), the Staff already has a general indication from preliminary groundwater pump tests that the overlying

aquitards form adequate confining layers at each of the sites.²¹ HRI License Condition 10.23 requires this determination of adequate vertical confinement to be made on a well-field-specific basis, once the production and injection wells are in place, and the well field is ready for operation. As indicated by HRI License Condition 10.23, a well field is not ready for operation until the necessary monitor wells are drilled, and are determined to be properly placed by the results of groundwater pump tests. These tests obviously cannot be conducted until the monitor wells have been drilled. No HRI monitor wells are in place yet.

However, as discussed above for HRI License Condition 10.3, the resultant lack of well-field-specific information does not mean that HRI lacks the necessary degree of hydro geologic information about the general area to be able to design and implement safe, environmentally acceptable ISL operations. Consistent with past practice regarding other ISL license applicants, the Staff issued HRI its license based on the determination that the hydro geologic data already submitted adequately characterizes the areas to be mined. *See Ford Affidavit, Staff Exhibit 9, ¶¶ 7-11.* The purpose of HRI License Condition 10.23 is to confirm, before any lixiviant is pumped into a well field, that (1) local rock layers above the area to be mined will provide adequate vertical confinement of lixiviant; and (2) monitor wells are properly placed to detect any horizontal excursions of lixiviant. The fulfillment of this condition for each well field will help ensure that if any lixiviant excursions occur, they will not go beyond the well field boundaries.

Accordingly, the presence of License Condition 10.23 in HRI's license does not support

²¹ NUREG-1508 uses the term "vertical confinement" to describe the same concept, stating the need for HRI to "conduct additional pumping tests from production or injection wells to test the vertical confinement of a well field." NUREG-1508, at 4-18.

a conclusion that there is a reasonable doubt whether HRI will be able to conduct ISL mining operations safely and in an environmentally acceptable manner. The information required by this condition will supplement the more general data previously submitted. If the supplemental data does not adequately confirm the accuracy of the more general data on which the Staff based its licensing decision, injection of lixiviant into the well field being evaluated will not be authorized.

d. Waste Retention Pond Design Information

The applicable requirements are set forth in HRI License Condition 10.26, under which HRI will be required to submit pond-specific design data. As indicated in the Staff's December 1997 Safety Evaluation Report, at 27, design requirements for retention ponds in general, and at ISL facilities in particular, are well known and present no significant engineering challenges. HRI will not know the specific locations and design details of the ponds to be built until it decides which of several proven groundwater restoration approaches it will rely on, but HRI's preliminary engineering analyses of potential floods at the Church Rock, Unit 1, and Crownpoint sites have already demonstrated that generally, potential erosion problems²² can be adequately addressed. *See* SER, at 27. The fact that HRI has not yet decided which groundwater restoration approach to use--and hence has not yet submitted pond-specific design data--does not undermine the Staff's determination that HRI will be able to design and implement safe, environmentally acceptable ISL operations.

Similar to the situation discussed above regarding HRI License Condition 10.23, the

²² With respect to these erosion concerns, the Staff has confirmed by site visits to Church Rock, Crownpoint, and Unit 1 that there are "no anomalous site conditions requiring unique design features" to mitigate such concerns, and that "routine hydraulic design features" will adequately address such concerns. SER, at 27.

applicability of HRI's preliminary analyses of potential floods to specific pond sites will be verified by later submittals. The engineering requirements at issue concern ways in which water can be safely stored and contained, and apply equally to any activity requiring control of surface water bodies. These requirements thus have no direct relationship to the issue of whether HRI has the technical ability and knowledge to safely extract uranium using ISL methods. Additionally, once the required design data is submitted and one or more designs are approved, HRI's license will be amended. If it is believed that the submitted pond designs are inadequate, the amendment will be subject to challenge at that time in a separate licensing proceeding.

e. Replacement of Crownpoint Water Supply Wells

The applicable requirements are set forth in HRI License Condition 10.27. This condition becomes effective should HRI later decide to conduct ISL mining at its Crownpoint site.²³

With the exception of the Crownpoint mining unit, the Staff has found that the control of mining solutions and use of monitoring wells to provide early detection of excursions are acceptable approaches for groundwater protection. Well replacement provides an additional measure of defense to protect Crownpoint drinking water wells from the effects of undetected excursions. The condition very conservatively assumes that (1) HRI will lose control of ISL mining solutions, and (2) the monitoring wells will fail to detect the resultant lixiviant excursion, thereby preventing timely corrective actions. Even if an excursion occurred and went undetected, the Staff determined that due to groundwater flow rates, the excursion effects would not reach

²³ This condition does not apply to the processing of licensed material in the central facility located at Crownpoint. This condition was made part of the HRI license due to the proximity of Crownpoint drinking water wells to Crownpoint areas on which ISL well fields could be placed.

the Crownpoint drinking water wells for hundreds of years. *See* Ford Affidavit, Staff Exhibit 9, ¶¶ 20-26.

Absent the replacement of the wells in question, or a license amendment, no ISL mining will occur at Crownpoint. Unlike the license conditions discussed above, finding new locations for Crownpoint water wells is an action entirely unrelated to the technical aspects of ISL mining. Additionally, independently from the NRC, other federal, state, and local authorities must cooperate with HRI before the water wells can be replaced.

Accordingly, the presence of License Condition 10.27 in HRI's license does not support a conclusion that there is a reasonable doubt whether HRI will be able to conduct ISL mining operations safely and in an environmentally acceptable manner.

In summary, the fact that HRI's license contains the particular conditions discussed above does not support the May 13 Order's findings regarding the adequacy of the information submitted to date by HRI.

4. Burden of Demonstrating the Invalidity of Intervenor Concerns

As explained above, one of the agenda items set forth in the July 1 Order was whether HRI and the Staff were prepared to demonstrate the invalidity of concerns raised by the Intervenor. Pursuant to 10 C.F.R. § 2.1237(b), HRI, not the Staff, has the burden of proof in this proceeding, as it is the licensee whose license application is at issue here. The Staff agrees that 10 C.F.R. § 40.32 is the standard applicable here for issuing licenses, and that HRI must "demonstrate that it has met the regulatory requirements with respect to the areas of concern submitted by Intervenor and found to be germane." July 1 Order, at 3. By doing so, HRI would "demonstrate an adequate assurance of safety and protection of the environment." *Id.*

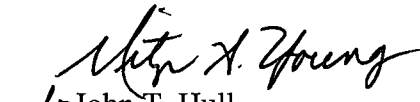
The extent to which HRI will be able to meet its burden in this proceeding will depend on the written presentations to be submitted by the Intervenors. As it has done to date, the Staff will evaluate filings made by the parties and come to its own conclusions as to the merits of the filings in this proceeding.

CONCLUSION

Accordingly, for the reasons set forth above, the Staff requests the Presiding Officer to:

(1) reject the proposal to require Intervenors to file contentions; (2) bifurcate the proceeding; (3) adopt the Staff's proposed schedule for filing written presentations regarding Phase 1 of the proceeding; (4) reject the proposal to separately brief legal issues; and (5) clarify that at the limited appearance sessions, oral responses by parties will be discretionary rather than mandatory. Additionally, should the Presiding Officer decide that use of 10 C.F.R. Part 2, Subpart G procedures are necessary here, the Staff requests the Presiding Officer to seek the Commission's approval to do so pursuant to 10 C.F.R. § 2.1209(k).

Respectfully submitted,


for John T. Hull
Counsel for NRC Staff

Dated at Rockville, Maryland
this 31st day of August 1998

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED
USNRC

'98 AUG 31 P6:23

BEFORE THE PRESIDING OFFICER

In the Matter of

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Docket No. 40-8968-ML
(Leach Mining License)

OFFICE OF SECRETARY
RULEMAKING AND
ADJUDICATIONS STAFF

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S RESPONSE TO JULY 30 ORDER" 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 31st day of August 1998:

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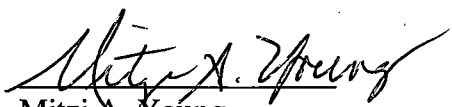
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