

DOCKETED
USNRC

October 13, 1998

'98 OCT 13 P2:36

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD PANEL

SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

Before Administrative Judges:
Peter B. Bloch, Presiding Officer
Thomas D. Murphy, Special Assistant

SERVED OCT 13 1998

In the matter of

HYDRO RESOURCES, INC.
(2929 Coors Road
Suite 101
Albuquerque, New Mexico 87120)

Docket No. 40-8968-ML

Re: Leach Mining
and Milling License

ASLBP No. 95-706-01-ML

MEMORANDUM AND ORDER
(Reconsideration of the Schedule for the proceeding)

On September 30, 1998, Intervenors Eastern Navajo Diné Against Uranium Mining (ENDAUM), Southwest Research and Information Center (SRIC), and Marilyn and Grace Sam (collectively: Intervenors) filed a joint motion asking that the Presiding Officer reconsider his decision requiring Intervenors to file their evidentiary presentations by February 1, 1999, and asking that the date be extended to August 1, 1999. (Intervenors' Reconsideration at 1-2).¹

¹Intervenors (1) claim they cannot meet the February 1, 1999 deadline, (2) present, for the first time, more detailed information concerning their proposed schedule, and (3) argue that the Commission's decision in *Baltimore Gas & Electric Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-18, 48 NRC ____ (September 17, 1998), justifies the relief requested. See Motion at 1-2, 6-16.

19630

On the same date, Intervenors filed a Request for Directed Certification of Bifurcation Order. (Intervenors' Bifurcation.)²

So-called Bifurcation. Let me first consider Intervenors' Bifurcation, which contains a request for certification of an issue to the Commission. I consider this motion to be wholly without merit. The decision whether to refer a ruling or certify a question to the Commission is entirely within the discretion of the Presiding Officer. A ruling *should* be referred to the Commission only when a prompt decision is necessary to prevent detriment to the public interest or unusual delay or expense.³ 10 C.F.R. § 2.730 states:

(f) Interlocutory appeals to the Commission. No interlocutory appeal may be taken to the Commission from a ruling of the presiding officer. When in the judgment of the presiding officer prompt decision is necessary to prevent detriment to the public interest or unusual delay or expense, the presiding officer may refer the ruling promptly to the Commission, and notify the parties either by announcement on the record or by written notice if the hearing is not in session.⁴

Thus, § 2.730(f) generally precludes interlocutory appeals but allows referrals to be made to the Commission as a discretionary matter in only the most compelling circumstances.⁵

²Hydro Resources, Inc. (HRI) filed an opposition to Intervenors' Reconsideration on October 6, 1998 (HRI Reconsideration) and an opposition to Intervenors' Bifurcation on October 8, 1998 (HRI Bifurcation). The Staff of the Nuclear Regulatory Commission (Staff) filed an opposition to Intervenors' Reconsideration on October 6, 1998 (Staff Reconsideration) and an opposition to Intervenors' Bifurcation on October 8, 1998 (Staff Bifurcation).

³Request at 3 (emphasis added).

⁴10 C.F.R. § 2730(f) (emphasis added).

⁵See e.g. Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 2 and 3), ALAB-742, 18 NRC 380, 383 n.7 (1983), citing Public Service Co. of New

Intervenors somehow completely ignore the NRC's general ban on interlocutory appeals. Moreover, contrary to Intervenors' assertion, the Presiding Officer **may** refer the ruling to the Commission if he deems it appropriate, but is not required to do so.⁶

HRI is correct when, at pp. 1-2 of HRI's Bifurcation, it summarizes the effect of my scheduling decision on this case:

ENDAUM and SRIC (jointly, hereinafter "Intervenors") may submit written presentations with respect to "any aspect of the HRI license concerning operations at Church Rock Section 8 or with respect to the transportation or treatment of materials extracted from Section 8," but are precluded from presenting concerns relating to Church Rock Section 17, Unit 1, or the Crownpoint sections at this time.⁷ Under the Order, Intervenors may also raise "any issue that challenges the validity of the license issued to HRI."⁸

The purpose for my September 22 Order was to provide a reasonable and efficient way to proceed with this litigation by taking first those issues that relate either to HRI's license or to the first site that it plans to operate. Intervenors have not persuaded me that this way of proceeding is inefficient. They claim to be prepared to proceed with their entire case now, but

Hampshire (Seabrook Station Units 1 and 2), ALAB-271, 1 NRC 478, 483-86 (1975); Sequoyah Fuels Corp. and General Atomics (Gore, Oklahoma Site), CLI-94-11, 40 NRC 55, 59 (1994); Sequoyah Fuels Corp. and General Atomics (Gore, Oklahoma Site), CLI-94-12, 40 NRC 64 (1994).

⁶See e.g., Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-421, 6 NRC 25, 27 (1977), and, Consolidated Edison Co. of N.Y., Power Authority of the State of N.Y. (Indian Point, Unit 3), LBP-82-23, 15 NRC 647, 650 (1982). (Recognizing authority to certify questions to Commission and that authority should be exercised sparingly.)

⁷Memorandum and Order, Scheduling and Partial Grant of Motion for Bifurcation, at 2-3 (September 22, 1998) (unpublished).

⁸Id. at 3.

they have not shown why the procedural order is incorrect in establishing an order in which to determine the issues in this case.

No decision has yet been made concerning possible delay in determining any of the issues in this case. At the end of this phase of litigation, I will then determine whether to proceed immediately with the remainder of the case or to wait until there is greater confidence that HRI will undertake injection mining at the other sites.

HRI is also correct when, at pp. 9-10 of HRI's Bifurcation, it states:

Intervenors misunderstand the September 22 Order. The order in no way segments the NEPA process, but rather merely sets a logical schedule for reviewing all of Intervenors' concerns pertaining to the HRI license, including the environmental impact statement drafted by NRC. The purpose of the Order is merely to schedule issues for consideration beginning with those that are presently ripe for review, particularly activities related to Section 8 and any issues pertinent to the project generally.

Scheduling arrangements are not novel and are within the discretion of the Presiding Officer.⁹ As pointed out by the Presiding Officer in the September 22 Order, "the absence of rigid scheduling criteria established by statute or regulation suggests that adjudicatory boards are to decide for themselves under all the circumstances when

⁹See 10 C.F.R. § 2.1209; see also Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-295, 2 NRC 668 (1975); Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Unit 1), ALAB-719, 17 NRC 387, 391 (1983) (citations omitted); Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 & 2), ALAB-841, 24 NRC 64, 95 (1986). See, also, Staff's Bifurcation at 6:

As discussed below, however, the decision to conduct this proceeding in phases is basically a scheduling order, which is a matter of discretion of the presiding officer and should not be disturbed absent extraordinary circumstances. See Virginia Electric Power & Co. (North Anna Power Station, Units 1 and 2), ALAB-584, 11 NRC 451, 467 (1980); Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-841, 24 NRC 64, 95 (1986).

hearings should be held on specific issues."¹⁰ The Presiding Officer's scheduling determinations will not be altered absent a "truly exceptional situation"¹¹ and are reviewed only for an abuse of discretion.¹² Thus, the Presiding Officer's scheduling arrangement is not novel but, rather like in every other ASLBP proceeding, merely organizes sequentially the manner in which matters will be addressed. Surely, Intervenors realize the impracticality of attempting to address all issues surrounding HRI's license simultaneously. . . .

While considering the matters before me, I have concluded that there is a relationship between "bifurcation" or efficient scheduling and the appropriateness of deadlines suggested by Intervenors for their written presentations. Since the subjects Intervenors will cover before February 1 are limited because of my scheduling order, this should represent a reduced workload for Intervenors -- although they have not explicitly addressed that question in the analysis plan they filed in support of their request for a changed filing schedule. In particular, Intervenors will not have to present any information prior to February 1, 1999 unless it relates to the invalidity of the entire license or to operations on Church Rock Section 8.

Since Intervenors argue forcefully that "bifurcation" is improper, they must believe that the outstanding scheduling order prevents them from presenting a substantial portion of their case at this time. They have not explained what portion of their case would be deferred in this way, so they have not demonstrated that all the work they describe as necessary must indeed be completed before February 1, 1999.

¹⁰Order at 2, citing, Potomac Electric Power Company (Douglas Point Nuclear generating Station, Units 1 and 2), ALAB-277, 1 NRC 539 (1975).

¹¹Public Service Co. of New Hampshire, supra.

¹²Wisconsin Electric Power Co., supra.

I have examined Intervenor's analysis plan and I find that it does not justify the schedule they seek. For example, Intervenor "Expert 1" apparently has not done even preliminary work to determine whether there is a deficiency in HRI's license amendment. Intervenor's Reconsideration at 10. "Expert 2" is an air emissions expert who has not yet begun reviewing the license amendment or compiling background radiation rates.

"Expert 3," Michael G. Wallace, has already begun his work and has outlined an ambitious program of analysis in cooperation with "other geotechnical experts." It would appear that he might be able to expedite his work by consultation with Staff and HRI experts, who seem to have demonstrated a cooperative spirit and might voluntarily save him time in learning about the hearing record.¹³ I note that Mr. Wallace estimates that his minimum time requirement is 200 hours but he states that he cannot spend more than eight hours per week so that it will take 25 weeks. Although the work he outlines may be valuable, the pace is not acceptable and must be increased either by expanding the weekly effort or finding other ways to work with the other geotechnical experts (or volunteer clerical assistance) in order to save time. *Id.* at 11-12.

"Expert 4" is a geochemist, also estimating a need to work 200 hours at no more than eight hours per week. The geochemist's first task is to review and "summarize" all the geochemical work done to date. Without having first done that, the geochemist is already

¹³In my experience, the Staff will often contribute to efficiency in handling a case by cooperating with a party in explaining the basis for its decisions. My brief encounter with HRI officials persuades me that they may also be inclined to cooperate in this way if they are asked to do so.

planning "his/her" own geochemical model of lixiviant reactions and aquifer recovery and will also cooperate in modeling excursion scenarios. At this time, before completing his review, the expert does not know whether there are existing models that might make it unnecessary to develop his own models from scratch.

"Expert 5" is an in situ leach mining expert who has not begun substantial work and whose relationship to the other experts cannot yet be specified. Id. at 13. "Expert 6" is an economist concerned about cost/benefit features of the EIS. This expert will be reviewing uranium market conditions and cost and financial information. The number of hours of analysis has not been specified but the economist states that it will be difficult to complete this work by mid-January. Id. at 13-14. In addition, Intervenors are still seeking to hire a risk/assessment specialist, environmental health specialist/toxicologist, and an emergency response expert. Id. at 14. It is to be noted that the Hearing Record was designated on June 11, 1998 and it appears that only Mr. Wallace has accomplished any substantial review before October 1998.

I find that the amount of work completed to date and the rate of work planned for the future do not represent diligent pursuit of this case. In addition, I find, at this time, that there is insufficient precision about what Intervenors will include in their analysis to justify the extended schedule that is sought. Consequently, I have decided to deny the request for a further extension of time.

However, I will provide a twenty-one day period, after Intervenors have completed required findings, for them to be permitted to present detailed reasons demonstrating that the present time schedule has unfairly restricted them. At that time, they should demonstrate due

diligence and should show why they believe there are genuine issues of fact, for which relief may be granted, that require further analysis. They should indicate the analytical tasks they plan to complete, show in detail why the tasks were not previously completed, and provide completion milestones and propose dates to complete intermediate tasks. At that time, I will determine whether Intervenors have been unfairly prejudiced in presenting their case and I will determine whether to permit a further extension of time for filing written presentations.

ORDER

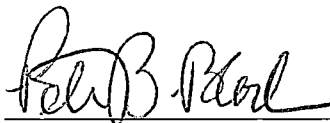
For all the foregoing reasons and upon consideration of the entire record in this matter, it is this 13th day of October, 1998, ORDERED, that:

1. Eastern Navajo Diné Against Uranium Mining (ENDAUM), Southwest Research and Information Center (SRIC), Request for Directed Certification of Bifurcation Order, September 30, 1998, is *denied*.

2. Eastern Navajo Diné Against Uranium Mining (ENDAUM), Southwest Research and Information Center (SRIC), and Marilyn and Grace Sam Joint Motion for Reconsideration of Presiding Officer's Memorandum and Order of September 22, 1998, filed September 30, 1998, is *denied*, except as ordered below in paragraph 3. The Order of September 22, 1998 remains in effect.

3. On or before February 22, 1999, Eastern Navajo Diné Against Uranium Mining (ENDAUM), Southwest Research and Information Center (SRIC), and Marilyn and Grace Sam

may *show cause*, pursuant to guidelines established above, why they should have additional time to file written presentations in this case.



Peter B. Bloch, Administrative Judge
Presiding Officer

Rockville, Maryland

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of
HYDRO RESOURCES, INC.

Docket No.(s) 40-8968-ML

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB M&O--RECONSID. OF SCHEDULE have been served upon the following persons by U.S. mail, first class, except as otherwise noted and in accordance with the requirements of 10 CFR Sec. 2.712.

Office of Commission Appellate
Adjudication
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Administrative Judge
Peter B. Bloch
Presiding Officer
Atomic Safety and Licensing Board Panel
Mail Stop - T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555

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

John T. Hull, Esq.
Mitzi A. Young, Esq.
Office of the General Counsel
Mail Stop - O-15 B18
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Diane Curran, Esq.
Harmon, Curran, Spielberg & Eisenberg
2001 S Street, N.W., Suite 430
Washington, DC 20009

Douglas Meiklejohn, Esq.
New Mexico Environmental Law Center
1405 Luisa Street, Suite 5
Santa Fe, NM 87505

Jep Hill, Esq.
Attorney for Hydro Resources, Inc.
Jep Hill & Associates
P.O. Box 2254
Austin, TX 78768

Herb Yazzie, Attorney General
Steven J. Bloxham, Esq.
Navajo Nation Department of Justice
P.O. Box 2010
Window Rock, AZ 86515

Docket No.(s)40-8968-ML
LB M&O--RECONSID. OF SCHEDULE

Mervyn Tilden
Mary Lou Jones
Zuni Mountain Coalition
P.O. Box 39
San Rafael, NM 87051

Lila Bird
Executive Director
Water Information Network
P.O. Box 4524
Albuquerque, NM 87106

Lori Goodman
Dine' CARE
Navajo Nation
10 A Town Plaza, S-138
Durango, CO 81301

Wm. Paul Robinson
Chris Shuey
Southwest Research and Information
Center
P.O. Box 4524
Albuquerque, NM 87106

Mitchell Capitan, President
ENDAUM
P.O. Box 471
Crownpoint, NM 87313

Jon J. Indall, Esq.
Joseph E. Manges, Esq.
Comeau, Maldegen, Templeman
& Indall, LLP
P.O. Box 669
Santa Fe, NM 87504

Grace Sam
P.O. Box 85
Church Rock, NM 87311

Anthony J. Thompson, Esq.
Shaw, Pittman, Potts and Trowbridge
2300 N Street, NW
Washington, DC 20037

Bernadine Martin
P.O. Box #370
Crownpoint, NM 87313

Mervyn Tilden
P.O. Box 457
Church Rock, NM 87311

Roderick Ventura
Samuel D. Gollis
DNA - People's Legal Services, Inc.
P.O. Box 306
Window Rock, AZ 86515

Dated at Rockville, Md. this
13 day of October 1998

Adria T. Byrdson
Office of the Secretary of the Commission