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

Before Administrative Judge
Peter Bloch, Presiding Officer

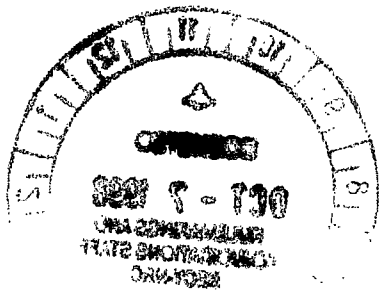
Administrative Judge
Thomas D. Murphy, Special Assistant

In the Matter of	
HYDRO RESOURCES, INC. 2929 Coors Road, Suite 101 Albuquerque, NM 87120	Docket No. 40-8968-ML ASLBP No. 95-706-01-ML

HRI'S OPPOSITION TO INTERVENORS' JOINT MOTION FOR RECONSIDERATION OF PRESIDING OFFICER'S MEMORANDUM AND ORDER OF SEPTEMBER 22, 1998

I. Introduction

Intervenors appear determined to employ any means at their disposal to ensure that HRI is prevented from ever engaging in in situ leach mining for uranium in the State of New Mexico. Because their case cannot succeed on the law or on factual merit, they misuse the regulatory process to engage HRI in a war of attrition, knowing that the battle drains HRI of money and resources and spooks the capital markets on which HRI depends for development funding. In response to HRI's request that this proceeding would be more efficient if it were bifurcated to focus the parties' dispute on only those issues that are ripe for adjudication now, Intervenors urged that



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"the entire case is ready to be heard"[1/] and that "all issues . . . are ripe for adjudication now and should be heard by the Presiding Officer."[2/] Now that the Presiding Officer has ordered the proceedings bifurcated and narrowed the issues to be adjudicated, Intervenors have decided that **ten months** is "the minimum amount of time required by Intervenors to participate in this proceeding in a meaningful way. . . ."[3/] Intervenors' arguments in support of delay strain credulity and their lengthy participation in these proceedings and voluminous contributions to the record belie the disingenuousness of their pleas. As discussed at greater length below, Intervenors are not entitled to reconsideration of the Presiding Officer's September 22 Order and their Motion, which is brought purely for the purpose of further delaying these proceedings and is without support in law or fact, must be denied.

II. Argument

A. Intervenors Are Not Entitled to Reconsideration of the September 22 Order.

1. No Controlling Principle of Law Has Changed or Been Overlooked.

Intervenors state correctly that a party seeking reconsideration of a decision of the Presiding Officer must demonstrate that "there is some decision or some principle of law which would have a controlling effect and which has been overlooked or that there has been a misapprehension of the facts."[4/] Intervenors' Motion rambles fourteen pages to say essentially this: we have failed to retain and/or prepare our experts and these experts cannot or will not get prepared

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[1/] Endaum's and SRIC's Response to Scheduling Briefs at 2.

[2/] Marilyn Morris's and Grace Sam's Response to Briefs Filed by HRI and NRC Staff at 2.

[3/] Intervenors' Joint Motion for Reconsideration (hereinafter, "Joint Motion") at 1.

[4/] Joint Motion at 4; citing Georgia Power Co. (Vogtle Electric Generating Plant, Units 1 and 2), LBP-94-31, 40 NRC 137, 139 (1994).

between September 22, 1998 and February 1, 1999. Intervenors' Motion fails to cite any controlling principle of law that has been overlooked and fails to demonstrate that there has been any misapprehension of the facts.

Intervenors cite In the Matter of Baltimore Gas & Electric Company (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI 98-19, 47 N.R.C. _ (1998) as authority for revisiting the hearing schedule established by the Presiding Officer. A closer look at Calvert Cliffs, however, shows Intervenors' reliance to be misplaced. Calvert Cliffs does not effect a change in the law and does not exert a "controlling effect" in the instant case.

In Calvert Cliffs, the Atomic Safety and Licensing Board (the "Board") responded to a petition for intervention filed in early August by issuing a Memorandum and Order on August 20 establishing a September 11 deadline for filing contentions. On August 21, the petitioner asked the Board for an enlargement of time until December 1, within which to file its contentions. The Board denied this request. The Commission, stating that "[W]e ordinarily do not review interlocutory Board orders denying extensions of time," considered the Board's denial of petitioner's request for an extension "as an exercise of our general supervisory jurisdiction over agency adjudications."[5/]

Noting that the proceeding was in "the threshold stage" and that the filing deadlines contained in the NRC's Notice of an Opportunity for a Hearing were stated "somewhat ambiguously," the Commission granted an extension of ***nineteen days*** to allow petitioner's experts to complete their review. The Commission explained that it acted "[T]o ensure that" petitioner

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[5/] Calvert Cliffs, CLI-98-19.

would have "an adequate opportunity to introduce matters of safety or environmental concern into the Calvert Cliffs proceeding."[6/]

Without more to rely on, Intervenors seem to suggest that Calvert Cliffs somehow compels the result they seek. Intervenors appear to overlook the conclusion of the extremely brief Commission Order:

> **"[O]ur decision today to relax the Board's . . . deadline by no means suggests any dissatisfaction with the Board's handling of the matter. The Board acted entirely reasonably both in establishing the . . . deadline and . . . in refusing to extend it, particularly in refusing to extend it until November, as (petitioner) originally requested. We urge the Board to continue its effort to move this proceeding forward expeditiously. . . . Finally, for the reasons given by the Board itself in its August 27th order, it possesses considerable authority to modify general deadlines set out in our rules and we expect it to continue to exercise that authority when appropriate."[7/]**

Thus, contrary to Intervenors' assertions, the Commission's Order in Calvert Cliffs does not dictate that this hearing schedule should be determined by Intervenors' preferred schedule for preparing their experts and does not warrant reconsideration of the Presiding Officer's September 22 Order.[8/]

[6/] Id.

[7/] Id. (emphasis added). In a footnote, the Commission observes approvingly that the enlarged time will result in petitioner's having had 134 days since Federal Register notice that BG&E's application had been accepted for docketing, 112 days since public notice of the beginning of the NEPA public scoping process, and 84 days since publication of Notice of Opportunity for Hearing. By comparison, the February 1, 1999 date for initiating the **first phase** of the instant hearing provides Intervenors with 1,422 days since the Notice of Availablity and Notice of Opportunity for Hearing were published in the Federal Register offering members of the public an opportunity to comment on the draft envirnmental impact statement and request an adjudicatory hearing on the licensing application. See 59 Fed. Reg. 56557 (Nov. 14, 1994).

[8/] It bears mention that Calvert Cliffs involved a formal adjudicatory hearing on a reactor license conducted pursu-

Footnote continued on next page

2. There Has Been No Misapprehension of Relevant Facts.

Intervenors assert three factual bases allegedly warranting reconsideration and compelling further delay in this proceeding: 1) that "the Presiding Officer misconceives the February 1 deadline as a "balancing" of the schedules proposed by Intervenors, HRI and the Staff';" 2) the Presiding Officer's remarks during the September 17 scheduling conference regarding the Commission's mandate that licensing hearings be completed expeditiously; and 3) Intervenors' determination that they cannot "prepare testimony and briefs in time to meet the February 1 deadline."[9/] Again, Intervenors fail to satisfy the NRC standard for reconsideration and fall entirely short of justifying the delay they seek.

Scheduling is a matter within the discretion of the Presiding Officer.[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/] Notwithstanding Intervenors' views on the subject,[13/]the Presiding Officer's disinclination to adopt a hearing schedule which "splits the difference" between the schedule proposed by Intervenors and that proposed by HRI and NRC Staff

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Footnote continued from previous page

ant to Subpart G. In the instant case, a Subpart L proceeding intended to be informal and expeditious, Intervenors already have been extended considerably more than nineteen days beyond the reasonable hearing schedule requested by NRC Staff and concurred in by HRI.

[9/] Joint Motion at 5-6.

[10/] See 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).

[11/] Public Service Co. of New Hampshire, supra.

[12/] Wisconsin Electric Power Co., supra.

[13/] See Joint Motion at 5-6.

hardly seems a "misconception" on the part of the Presiding Officer. Intervenors do not even attempt to explain how the balance employed by the Presiding Officer might constitute an abuse of his discretion.[14/]

Next, Intervenors devote a single paragraph to the notion that they are somehow entitled to additional time because of the Presiding Officer's remark that the Commission would like to see licensing proceedings completed within ten months. Apparently, not even Intervenors put much stock in this suggestion, summoning no authority or argument in its support.[15/] The record reflects that Intervenors' long-time participation in this proceeding easily exceeds ten months and, arguably, exceeds thirty months.[16/]

Finally, Intervenors' Motion devotes approximately seven pages to bemoaning how their lawyers' and experts' busy schedules make it impractical for Intervenors to abide by the ordered hearing schedule.[17/] Lawyers and experts having very busy schedules is hardly a phenomenon unique to this proceeding and is not cause for delaying this hearing.[18/]

[14/] Joint Motion at 5-6. Intervenors seem to suggest that the Presiding Officer fairly balances competing scheduling concerns only by adopting a schedule incorporating a mid-range of the various proposals. Intervenors' suggested approach tends to reward parties seeking delay and derogates the Presiding Officer's role in governing these proceedings.

[15/] Intervenors cite Calvert Cliffs for the proposition that the Commission seeks completion of these proceedings within thirty months. However, as discussed elsewhere herein, Calvert Cliffs does not support Intervenors' request for delay.

[16/] For example, SRIC participated in the Churchrock UIC permit hearing in 1994. Petitions to intervene were filed approximately fourteen months ago.

[17/] See Joint Motion at 6-12.

[18/] See, e.g., Allied General Nuclear Services (Barnwell Nuclear Fuel Plant Separation Facility), ALAB-296, 2 NRC 671, 684-85 (1975) (The convenience of litigants may be considered but may not be dispositive in scheduling proceedings).

Intervenors' argument in this regard is particularly galling. Intervenors have elected to bring this challenge to HRI's license, imposing significant burdens on HRI, the NRC Staff, and the Presiding Officer. Now, some fourteen months after choosing to assert challenges to nearly every imaginable aspect of HRI's license,[19/] Intervenors want to delay this proceeding another ten months because going forward in February is inconvenient. Intervenors' tactics are outrageous and must not be countenanced.

First, Intervenors complain that Intervenors Morris and Sam "did not retain counsel until this past summer, and they have just begun their search for expert consultants."[20/] This is inexcusable. "The fact that a party has failed to retain counsel in a timely manner is **not grounds for seeking a delay in the commencement of hearings.**"[21/] HRI should not be prejudiced because some Intervenors did not bother to retain counsel for a year. Intervenors audaciously add that they still are seeking to retain additional experts and that this is a reason to further delay these proceedings.[22/] Again, HRI respectfully submits that Intervenors have had ***at least a year*** to retain experts; their failure to do so should not be allowed to inure to HRI's extreme detriment.

Intervenors summarize the woefully busy schedules of each of their experts and report that some will require hundreds of hours to complete their review, some have not yet begun their

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[19/] And having been involved in this matter to some degree for much longer than that. See ftnt.15, supra.

[20/] Joint Motion at 7.

[21/] NRC Staff Practice and Procedure Digest, Office of General Counsel, U.S. NRC (1997); citing Offshore Power Systems (Manufacturing License for Floating Nuclear Power Plants), LBP-75-67, 2 NRC 813,816 (1975) (emphasis added).

[22/] Joint Motion at 10.

review, and all will require many months to prepare because they also have other work to do.[23/] Intervenors also declare their intention to seek out additional experts. HRI fully expects that Intervenors will reprise these arguments in support of a request for additional delay some months from now after these additional experts are retained.[24/]

Adding insult to injury, Intervenors complain that requiring them to go forward with the hearing more than a year after they petitioned for it "will excessively tax the resources of Intervenors and their Counsel."[25/] They complain that ENDAUM's president has another job, that a SRIC staff member goes to school, that Diane Curran is litigating other cases, and that Intervenors are "non-profit organizations, whose resources are not unlimited."[26/] With all due respect, Intervenors' hand-wringing should not warrant sympathy and does not warrant further delays in this proceeding.[27/]

[23/] Astonishingly, Intervenors state that Mr. Wallace may require as many as *600 hours* to complete his tasks and report that he can devote not more than eight hours a week to this process. Joint Motion at 8. If that is true, Mr. Wallace may require 75 weeks or more to complete his review. This is particularly amazing in light of Mr. Wallace' long-term prior involvement in this matter. Mr. Wallace previously has filed affidavits totaling more than 50 pages and claimed, as early as January 1998, to already have reviewed most of the technical record compiled in this matter. See Affidavit of Michael G. Wallace, filed in support of Endaum and SRIC's Stay Motion (January 13, 1998); Reply Affidavit of Michael G. Wallace, filed in support of Endaum and SRIC's Reply Brief (March 4, 1998).

[24/] Joint Motion at 10.

[25/] Id.

[26/] Id.

[27/] Throughout their brief, Intervenors suggest that additional time should be afforded because each of the parties intends to retain their own experts and present testimony and written evidence. To the extent that the Presiding Officer sympathizes with Intervenors' position and to ensure the proper dispatch of this proceeding, the Presiding Officer could consider consolidating the Intervenors' presentations, as they share the same interests raise substantially the same issues. The Presiding Officer, on his own initiative or on motion, may consolidate intervenors for the purpose of restricting duplicative or repetitive evidence and argument. 10 C.F.R. § 2.714(f). Parties with substantially similar interests and positions may be ordered to consolidate their presentation of evidence and other participation in hearings pursuant to 10 C.F.R. § 2.715a. Intervenors admit on page 7 of their brief that they intend to prepare joint filings whenever possible. Thus, the Presiding Officer could consolidate the Intervenors in this proceeding for the sake of efficiency and to address Intervenors' scheduling concerns without further delay of this hearing.

Intervenors decided to challenge HRI's license, decided the multiple grounds upon which to base their challenge, and petitioned vigorously for a hearing; they are not entitled to relief (and to further prejudice HRI) because they now find themselves inconvenienced by the process they initiated. HRI's president, Richard Clement, Jr., and Mark S. Pelizza, Vice-President, Health and Human Safety & Environmental Affairs, Uranium Resources, Inc.(URI), parent company to HRI and URI Texas, also are caught between having to devote significant time to this matter and having to work full-time at running a business. HRI's lawyers, like Intervenors' lawyers, also carry full case-loads in addition to this matter, including an ongoing litigation presently before Judge Bloch. HRI, a for-profit entity, also does not have unlimited resources to devote to this matter and does not enjoy the luxury of repeatedly exhorting the faithful to contribute to this war chest.[28/]

III. Conclusion

Distilled to its essence, Intervenors' agenda is to beat HRI into submission, to battle for so long and at such cost that HRI folds its tent and goes away. Intervenors seek to do that primarily by attempting to reopen and challenge every aspect of HRI's Environmental Impact Statement finalized in February 1997 and known to Intervenors, in draft form, since 1994. Having set this machinery in motion, Intervenors now want to make sure they have ample time to enjoy the ride. Intervenors have failed to satisfy NRC's standard for reconsideration: that "there is some decision or some principle of law which would have a controlling effect and which has been overlooked

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[28/] See, e.g., article attached hereto as Exhibit 1. Interestingly, Intervenors' limited resources seemingly place no limit upon the hundreds of hours that Intervenors estimate their experts must devote to this matter.

or that there has been a misapprehension of the facts."[29/] Consequently, reconsideration of the Presiding Officer's September 22 Order setting forth a hearing schedule is not appropriate.

For all of the foregoing reasons, HRI respectfully requests that Intervenors' Joint Motion for Reconsideration be DENIED.

Respectfully submitted this 6th day of October, 1998.

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[29/] Joint Motion at 4; citation omitted.

CENTER NOTES

Crownpoint uranium update: Judge's ruling favors residents

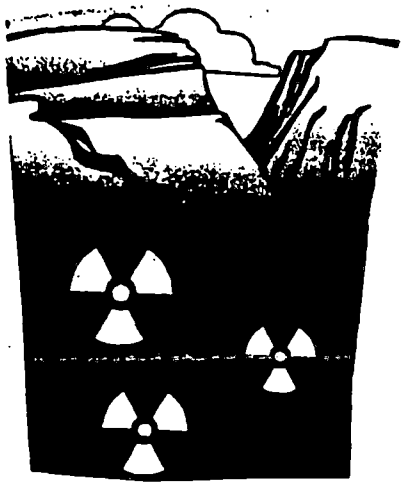
Recent rulings by a U.S. Nuclear Regulatory Commission (NRC) administrative law judge have paved the way for two New Mexico–based groups and two Navajo women to challenge the construction and operation of three new uranium solution mines proposed in northwestern New Mexico. The rulings also give residents of the affected Navajo communities an opportunity to express "local sentiment" about the mines before the convening of a formal evidentiary hearing.

In an order issued May 13, Atomic Safety and Licensing Board Judge Peter B. Bloch granted the requests of Eastern Navajo Diné Against Uranium Mining (ENDAUM), Southwest Research and Information Center (SRIC), and Grace Sam and Marilyn Morris of Pinedale, New Mexico, for a hearing on three uranium in situ leach (ISL) mines proposed by Hydro Resources, Inc. (HRI). Bloch also ruled that the vast majority of ENDAUM's and SRIC's 13 "areas of concern" about the project were "germane" to the substance of the upcoming hearing.

In a separate order issued July 13, Bloch said he would travel to Crownpoint, New Mexico, where two of the mines and a uranium processing plant would be located, to hold a prehearing scheduling conference, conduct visits to the proposed mining sites, tour the affected communities, and take oral statements from local residents. These events were requested in a joint motion filed by attorneys for ENDAUM, SRIC, and Ms. Morris on July 8 and are likely to be held in mid-September.

Bloch's orders are important victories for ENDAUM, SRIC, Ms. Sam and Ms. Morris, who first requested an evidentiary hearing in late 1994 and since have campaigned for the administrative proceedings to be held in the communities where the mines would be located.

Bloch's May 13 order means that ENDAUM and SRIC and Ms. Sam and Ms. Morris (who are mother and daughter, respectively) are now official "intervenors" who can legally challenge



a source materials license issued by the NRC staff to HRI on January 5.

HRI proposes to mine uranium by injecting a chemical solution into a uranium–bearing rock formation that is a high–quality, regional aquifer and the sole source of drinking water for an estimated 15,000 people in "Navajo Country" in northwestern New Mexico. The uranium would be produced from a site near Church Rock and at two sites in and near Crownpoint. Solution mining at the two Crownpoint sites would come within 2.5 miles and about one–half mile of one of Crownpoint's two main municipal water supply wells.

The uranium–rich mining solution would be processed into "yellowcake," a metal oxide used to make fuel pellets for nuclear power reactors, at a plant in Crownpoint. The plant site is located within one and-a-half miles of homes, churches, schools, a regional medical center, and numerous offices and businesses. NRC has called such close proximity of the ISL mines and processing plant to places where people live and work "unprecedented." (For more details, see *THE WORKBOOK* Vol. 23, No. 1, Spring 1998, p. 40; also Vol. 22, No. 2, Summer 1997, pp. 52–62; and Vol. 21, No. 2, Summer 1996, p. 100.)

In ruling that ENDAUM, SRIC, Ms. Sam and Ms. Morris have "standing" to intervene, Judge Bloch found that "anyone who uses a substantial quantity of water personally or for livestock from a resource that is reasonably contiguous to either the injection or [uranium] processing sites has suffered 'injury in fact.'" ENDAUM's standing "was affirmed because four individuals used water that could be affected by in situ injection mining," Bloch wrote. He also noted that one ENDAUM member, Larry J. King, who filed an affidavit in support of ENDAUM's hearing petition, actually lives and grazes cattle on a portion of HRI's proposed Church Rock mine site.

Bloch "admitted" SRIC on the grounds that staff member Raymond Morgan and board of directors member LaLora Charles obtain water from the Crownpoint municipal water system for domestic and agricultural uses; and he admitted Ms. Sam and Ms. Morris because they obtain water from wells that could be affected by the solution mining at the Church Rock site.

ENDAUM President Mitchell Capitan hailed the judge's hearing order in a letter to ENDAUM members in June. The NRC, he said, has "agreed to let us testify before [the Licensing Board] about our concerns regarding the in situ leach mining that HRI is proposing here in Crownpoint and Church Rock ... [N]ow is our big chance to come before this judge, ... to pull together as a community and to stop this ... project."

In pressing for a prehearing site visit and tour, scheduling conference, and oral statements in the affected communities, attorneys for the intervenors argued in their July 8 motion that President Clinton's 1994 Executive Order on Environmental Justice, NRC's own Environmental Justice Strategy, and "the uniquely hazardous characteristics of HRI's proposed mining activities" make holding all proceedings in the case in the affected communities necessary "to ensure that the citizens of this area are properly informed about, and have an opportunity to participate in, the decisions which may affect them so significantly."

In his July 13 order, Judge Bloch said his decision to hold the scheduling conference and other prehearing events in Crownpoint was "influenced by the

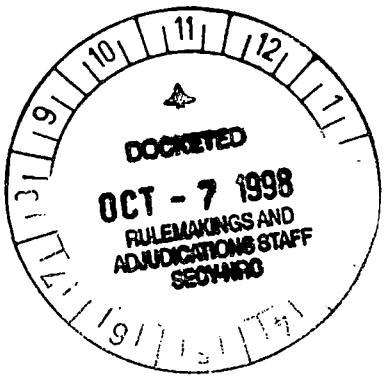
consideration that the visit will not delay the case and that further visits to the site are not assured." Under NRC's procedural rules for hearings on uranium ISL licenses, an actual, physical hearing at or near the location where mining would take place is not automatically granted, but is left up to the discretion of Licensing Board judges.

Attorneys for ENDAUM, SRIC, and Ms. Morris said in their July 8 motion that the intervenors will argue during the upcoming prehearing conference that a full oral hearing in the community is warranted, that the hearing should address all three mining sites and not just a portion of the Church Rock site as HRI has requested, and that the intervenors should not be required to file formal contentions as are required by NRC in nuclear plant licensing proceedings.

ENDAUM and SRIC are represented before the Licensing Board by attorneys Douglas Meiklejohn of the New Mexico Environmental Law Center (NMELC) in Santa Fe and Diane Curran of the Washington, D.C., firm of Harmon, Curran, Spielberg and Eisenberg. Grace Sam and Marilyn Morris are represented by attorneys for DNA–Peoples Legal Services, a private legal aid agency that serves the Navajo Nation.

Editor's Note: As the actual evidentiary hearing gets closer, ENDAUM, SRIC and NMELC continue to need funds to cover staff costs, attorneys' costs and fees, and expert witness fees. Donations to the groups' Intervention Fund are tax-deductible if made payable to SRIC, P.O. Box 4524, Albuquerque, NM, 87106. ENDAUM, SRIC and NMELC are grateful to the dozens of individual donors who have contributed to the Fund to date, and wish to acknowledge the critical support of the project by several foundations, including the Angelica Foundation, Jessie Smith Noyes Foundation, the Lannan Foundation's Indigenous Communities Program, Public Welfare Foundation, Ruth Mott Fund, and the Turner Foundation. ENDAUM and SRIC also extend their heartfelt gratitude to Susan Jordan, a former NMELC attorney who has represented the groups before the NRC since November 1996.

– Chris Shuey, Community Water, Wastes and Toxics Program



UNITED STATES OF AMERICA
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Before Administrative Judge
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Suite 101	)	ASLBP No. 95-706-01-ML
Albuquerque, New Mexico 87120	)	
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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing documents (HRI's Opposition To Intervenors' Joint Motion For Reconsideration Of Presiding Officer's Memorandum And Order Of September 22, 1998) in the above-captioned proceeding have been served on the following by Facsimile or as otherwise indicated (or, in the instances where a fax number is not available, as indicated by an asterisk, by Certified Mail, Return Receipt Requested) on this 6th day of October, 1998.

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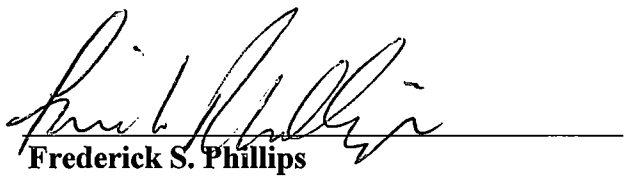

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