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April 29, 1999
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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
BEFORE THE ATOMIC SAFETY AND LICENSING BOARD
OFFICE OF SECRETARY
OF PUBLIC AFFAIRS AND
ADJUDICATIONS STAFF

The Honorable Peter B. Bloch, Presiding Officer

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

**ENDAUM'S AND SRIC'S RESPONSE TO
HRI'S MOTION TO STRIKE**

INTRODUCTION

Intervenors Eastern Navajo Diné Against Uranium Mining ("ENDAUM") and Southwest Research and Information Center ("SRIC") hereby respond to HRI's Motion to Strike or in the Alternative for Leave to Object to ENDAUM and SRIC Reply to HRI and the Staff Presentations on Groundwater Issues (April 19, 1999) ("HRI Motion"). In response to the Presiding Officer's Memorandum and Order (Motions to Reply and Rebut) (March 24, 1999) ("March 24 Order"), ENDAUM and SRIC filed their Reply in Response to HRI's and the NRC Staff's Response Presentations on Groundwater Protection Issues (April 8, 1999) ("Intervenors' Reply").

ENDAUM and SRIC oppose HRI's Motion to strike their reply; HRI presents no supporting authority and Intervenors' Reply is within the scope authorized by the March 24 Order. ENDAUM and SRIC also oppose HRI's alternative request to file

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"objections" to their reply because such an exercise is entirely unnecessary.

I. HRI'S MOTION TO STRIKE IS WITHOUT FOUNDATION AS INTERVENORS' REPLY IS WITHIN THE SCOPE OF THE MARCH 24 ORDER.

HRI does not cite any legal authority for its motion to strike; in fact, there is none. Instead, HRI proffers three meritless arguments to strike Intervenor's reply, arguing: Intervenor "raise few issues addressing the subject of this proceeding - - Church Rock Section 8", the testimony is cumulative and repetitive with few exceptions, and Intervenor fails to show that HRI's license is inadequate to protect public health, safety or the environment. HRI Motion at 2. First, HRI does not provide any evidence that Intervenor has addressed issues that do not apply to Section 8 in Intervenor's Reply. Only on page 7, does HRI move to strike Dr. Staub's rebuttal of Mark Pelizza's testimony on groundwater restoration, because "it is not relevant to the issue of whether groundwater at Section 8 can be restored; the point of Mr. Pelizza's testimony is that groundwater can be restored after ISL mining." HRI Motion at 7. This argument is nonsensical; if groundwater generally cannot be restored after ISL mining, it most certainly cannot be restored at Section 8, where there is good quality groundwater.

Second, HRI's Motion argues that Intervenor's Reply and expert testimony is cumulative. HRI Motion at 6, 7, 8. Intervenor's Reply, however, is properly within the scope of the March 24 Order. The Presiding Officer authorized ENDAUM and

SRIC to reply "to specific new information" and to "contest the credibility of experts utilized by HRI or the Staff." March 24 Order at 1. He emphasized that "Intervenors may reply, as permitted, in order to permit them to make a 'full and true disclosure of the facts.'" Id. at 2. Intervenors' Reply properly contests the credibility of some HRI and Staff experts, and responds to new information. Intervenors' Reply at 3, 4, 5. As directed by the March 24 Order, Intervenors' experts identify in each instance, the specific new information to which he responds. For example, Dr. Abitz explains in response to question 4, on page 2 of his reply testimony, that the Staff made the assertion that Bison Basin was a successful commercial operation, for the first time in its presentation. The Staff made this argument, and attached new evidence on this subject as Ford Attachment C. Dr. Staub, in response to question 6 on page 8 of his Reply Testimony, addresses new information from Craig Bartels on the use of a composite mean to support the use of five standard deviations in establishing excursions.¹ Mr. Wallace, in response to question 4, on page 2-3 of his Reply Testimony, explains that he is responding to HRI's novel and ill-advised attempt to create a contradiction between sand channels and pump test studies.²

¹ HRI argues that because the more general topic of standard deviations was previously discussed by Dr. Abitz, Dr. Staub's response to the new information should be stricken. Such an approach directly contradicts the March 24 Order.

² HRI's claim that Intervenors' Reply is cumulative is difficult to understand, considering, for example, that Mr. Wallace submitted a new model of bleed rates at the Project to analyze lixiviant control. Wallace Reply at 13-19.

HRI attempts to dismiss some arguments by Dr. Staub and Mr. Wallace because they do not address new facts. HRI Motion at 8, 9. The March 24 Order directed the Intervenors, however, to respond to *new information*, in the interest of a full disclosure of the facts. Intervenors have accordingly responded to some new analyses and approaches by HRI, which are new information. As many of the new analyses by HRI distorted the record, Intervenors' response was in the interest of a full disclosure of the facts. Intervenors' Reply may also reiterate certain basic truths that were previously explained in Intervenors' initial presentation, but again, such references were necessary to clarify the facts in the context of a reply.

Third, HRI argues that Intervenors fail to show that HRI's license is inadequate to protect public health, safety or the environment. HRI Motion at 2. While Intervenors have demonstrated that HRI's license is inadequate, even if HRI's claim were true, this is not a valid grounds to strike Intervenors' reply. In essence, HRI has asked the Presiding Officer to strike a filing because HRI disagrees with it. Importantly, HRI, in referencing the public health, safety and environment standard, is reciting the burden HRI itself shoulders in this proceeding. Yet HRI complains that Intervenors have not met that standard. HRI and the Staff have the burden of proof in this proceeding, not the Intervenors.

The reasons offered by HRI to strike Intervenors' Reply are thus without merit, and the motion should be denied.

II. HRI'S ALTERNATIVE REQUEST TO FILE OBJECTIONS TO INTERVENORS REPLY IS ALSO WITHOUT FOUNDATION.

HRI's alternative request to file a surrebuttal to Intervenor's Reply in order to "file substantive objections to the additional testimony" should not be granted. HRI Motion at 9. Because the Intervenor's and HRI's interests are adverse, any objections filed by HRI would be beside the point. Moreover, if HRI truly believes that Intervenor's Reply is merely cumulative, HRI's objections will also be running over old ground. See HRI Motion at 2, 5, 7, 9. HRI's Motion itself runs that direction. Even in HRI's Motion, it devotes a page and a half of its motion to discussing, not Intervenor's Reply, but Intervenor's initial presentation.³ HRI Motion at 2-4.⁴

³ HRI has the audacity to claim that Intervenor's "ignored the fact that HRI already has an aquifer exemption for Churchrock Section 8." HRI Motion at 3. On the contrary, Intervenor's carefully explained in their initial presentation, that Region IX of the Environmental Protection Agency ("EPA") has determined that the State of New Mexico's underground injection control program does not have jurisdiction over Section 8, so the state's aquifer exemption, approved by Region VI EPA, is invalid. Intervenor's Amended Groundwater Presentation at 14-15 (January 18, 1999). Region IX EPA administers the Navajo UIC program on Section 8. HRI also cites the EPA regulations on aquifer exemptions as if those regulations create a per se aquifer exemption. HRI Motion at note 6. Rather, Region IX EPA will have the discretion to issue an aquifer exemption if HRI applies for one. See Amended Groundwater Presentation at 59-65. Moreover, HRI does not qualify for an aquifer exemption under the regulations. Id.

⁴ On page 5 of HRI's Motion, HRI expresses its intent to object to Dr. Abitz' Reply Testimony by citing its response presentation for an argument that there are no private wells near Section 8. Thus, HRI admits it would simply reiterate its response presentation in an objection. In any event, Intervenor's initial presentation establishes that there is a domestic well within 1.5 miles of the Church Rock site. Intervenor's Amended Groundwater Presentation at 9.

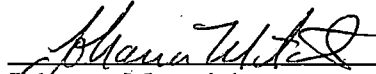
HRI specifically requests the chance to surrebut Intervenor's demonstration that certain HRI witnesses are not qualified. HRI had the obligation to state sufficient grounds to qualify its witnesses when it proffered their testimony. Should the Presiding Officer have additional doubt about rejecting this testimony, Intervenor submit it would be more appropriate to convene an oral hearing and voir dire the witnesses.

At this point in the proceeding, HRI's request to file objections is extraordinary, and HRI has not enunciated a particular reason that would justify leave to file objections. While HRI carries the burden of proof, the schedule of this proceeding dictates that Intervenor's Reply is logically the last pleading on groundwater, aside from any inquiries by the Presiding Officer. Intervenor filed their written presentation on groundwater protection first, without the benefit of reviewing HRI's presentation. HRI filed its presentation in response to the Intervenor's presentation. As described above, HRI would only repeat its response presentation arguments in objections.

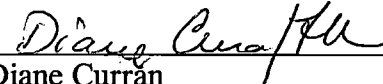
CONCLUSION

For the foregoing reasons, the Presiding Officer should deny HRI's Motion to Strike, or in the Alternative for Leave to Object. Intervenor's Reply is within the scope authorized by the March 24 Order. HRI's alternative request to file "objections" is both unreasonable and unnecessary.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that:

On April 29, 1999, I caused to be served copies of the following:

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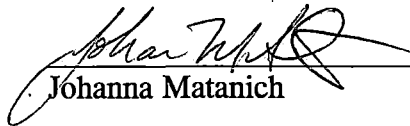
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