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May 10, 1999
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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
BEFORE THE COMMISSION

OFFICE OF SECRETARY
RULEMAKING AND
ADJUDICATIONS STAFF

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

**ENDAUM'S AND SRIC'S REPLY IN RESPONSE TO HRI'S AND THE NRC
STAFF'S RESPONSES TO PETITIONS FOR REVIEW OF LBP-99-10
(PERFORMANCE BASED LICENSING ISSUES) AND LBP-99-13
(FINANCIAL ASSURANCE FOR DECOMMISSIONING)**

INTRODUCTION

Pursuant to the Commission's May 3, 1999 Order, Intervenor Eastern Navajo Diné Against Uranium Mining ("ENDAUM") and Southwest Research and Information Center ("SRIC") hereby reply to the Responses filed by Hydro Resources, Inc. ("HRI") and the Nuclear Regulatory Commission Staff ("Staff") to ENDAUM's and SRIC's Petition for Review of LBP-99-10, the Partial Initial Decision on performance based licensing ("PBL") issues, and to the Responses filed by HRI and the NRC Staff to ENDAUM's and SRIC's Petition for Review of LBP-99-13, the Partial Initial Decision on financial assurance for decommissioning issues. This reply incorporates the reply testimony of Dr. Michael F. Sheehan, attached as Exhibit A ("Sheehan Reply").

ARGUMENT

- I. HRI'S AND THE STAFF'S RESPONSES TO THE PERFORMANCE-BASED LICENSING PETITION FOR REVIEW ARE WITHOUT MERIT.**

U.S. NUCLEAR REGULATORY COMMISSION
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Contrary to HRI's and the Staff's inaccurate assertions, the Presiding Officer did not address material issues raised by ENDAUM and SRIC. There is no basis for HRI's and the Staff's allegation that issues not addressed by the Presiding Officer are not material because they lack merit.¹ HRI's March 25, 1999 PBL Response at 4; Staff's March 22, 1999 PBL Response at 5-6. An argument is material if it would be considered by a reasonable individual in reaching a decision. Cf. Consumers Power Company (Midland Plant, Units 1 and 2), ALAB-774, 16 N.R.C. 897, 910 (1982). The issues raised by ENDAUM and SRIC but not considered in LBP-99-10 would be considered by a reasonable individual in reaching a decision, and they therefore are material.² There is also no merit to the Staff's assertion that two of the issues raised by ENDAUM and SRIC in their Petition for Review were not raised below.³ Staff's PBL Response at 4-5. Finally, there are no grounds for the Staff's incorrect assertion that

¹ ENDAUM and SRIC do not waive their positions that their arguments that were not addressed by the Presiding Officer have merit.

² These issues include ENDAUM's and SRIC's arguments that performance based licensing violates the Atomic Energy Act and the Administrative Procedures Act because there is no regulation or policy adopted pursuant to those statutes authorizing such licensing. Also not addressed by LBP-99-10 were arguments by ENDAUM and SRIC that HRI's license violates the Administrative Procedures Act because the license is so confused and self-contradictory that it is arbitrary and capricious, and that the license violates the National Environmental Policy Act by eliminating NRC review of changes in the Project before those changes are made.

³ ENDAUM's and SRIC's arguments as to Condition 10.6 of HRI's License (SUA-1508) and the methods to be used for liquid waste disposal are examples from the record below that support ENDAUM's and SRIC's position asserted previously that the performance based license leaves decisions to HRI.

the Presiding Officer ruled that the incorporation into HRI's license of the internal contradictions in HRI's application is not germane.⁴ Staff's PBL Response at 4.

II. HRI'S AND THE NRC STAFF'S RESPONSES TO THE FINANCIAL ASSURANCE PETITION FOR REVIEW ARE WITHOUT MERIT.

HRI and the Staff argue incorrectly that the issue of financial assurance is not ripe for review because the Staff is still evaluating HRI's financial assurance plan.⁵ HRI's April 13, 1999 Financial Assurance Response at 3; Staff's April 14, 1999 Financial Assurance Response at 4. The issue of financial assurance for decommissioning was admitted as germane by the Presiding Officer. LBP-98-9, 47 NRC at 282. Neither the Presiding Officer nor the Staff explains when Intervenors' germane concerns regarding financial assurance will be heard by the Board. By deferring the issue indefinitely, Intervenors' right to a meaningful opportunity for hearing under Section 189(a) of the Atomic Energy Act is violated.⁶

⁴ The Presiding Officer, in LBP-98-9, ruled that ENDAUM's and SRIC's area of concern about HRI's application being "disjointed, incoherent, and contradictory" was not germane, but he also ruled that ENDAUM's and SRIC's area of concern on performance based licensing is germane. Hydro Resources, Inc., LBP-98-9, 47 N.R.C. 261 at 280-281. ENDAUM and SRIC argue here that the performance based license issued to HRI violates applicable law and regulations because it incorporates the inconsistent and self-contradictory terms of the application. That issue is germane.

⁵ NRC Staff claims that although the Presiding Officer issued LBP-99-13, this left uncertain the adequacy of HRI's financial assurance plan. NRC Staff's Response to Petitioners' (*sic*) Motion for Leave to File a Reply at 3, (April 28, 1999).

⁶ HRI's and the Staff's argument that LBP-99-13 leaves a remaining financial assurance issue to be decided at some point in the future, possibly even after the conclusion of the hearing, is not based on any language contained in LBP-99-13, or any reference to NRC

An applicant is required to submit a financial assurance plan along with its environmental report ("ER") under Criterion 9 of Appendix A to 10 C.F.R. Part 40 ("Criterion 9"). Further, 10 C.F.R. § 40.36 requires a financial assurance plan and a surety before licensing. 10 C.F.R. § 40.36(a),(b). HRI admits that a financial assurance plan does not exist although HRI submitted its ER's six years ago and a license was issued in January, 1998. HRI Financial Assurance Response at 3; Sheehan Testimony at 3-4. Because the Presiding Officer failed to review the adequacy of HRI's financial assurance plan and because the plan is inadequate, HRI's license is therefore not protective of public health and safety.

HRI's financial assurance documents⁷ are analyzed in the attached reply of Dr. Michael Sheehan. Sheehan's Reply is incorporated herein. Exhibit A. None of HRI's new financial assurance information satisfies the requirements of Criterion 9 or §

regulations or case law. After a partial initial decision is issued, the Commission assumes jurisdiction over the matter. *See* 10 C.F.R. § 2.1251(a) (stating that an initial decision is the final action of the Commission unless the Commission takes sua sponte review or a party petitions for Commission review.) *See also* 10 C.F.R. § 2.1209(e) (granting the Presiding Officer the power to "reopen a closed record for the reception of further information at any time **prior to initial decision** in accordance with § 2.734." (emphasis added)).

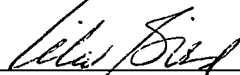
⁷ The financial assurance plan apparently includes documents submitted in April, 1999, even though the NRC Staff failed to seek leave from the Commission to reopen the record in this proceeding for the purpose of admitting revised HRI financial assurance documents. *See* Philadelphia Electric Company (Limerick Generating Station, Units 1 and 2), ALAB-823, 22 NRC 773 (1985) (jurisdiction over a motion to reopen record after two of several partial initial decisions have been issued is with the Commission.) Nevertheless, on April 8, 1999, the Staff submitted additional financial assurance documents into the record, after the Commission assumed jurisdiction. The Commission denied Intervenors' motion to strike.

40.36. HRI's financial assurance plan covers only Section 8 operations despite the fact that during mining operations at Section 8, yellowcake slurry will be transported from Church Rock to the Crownpoint Plant for final processing. COP Rev. 2.0 at 39. The omission of the Crownpoint Plant from HRI's financial assurance plan violates Criterion 9. Sheehan Testimony at 1-2. Moreover, Criterion 9 requires that a surety be in place sufficient to cover the costs of decommissioning and reclamation for all areas "expected to be disturbed before the next license renewal." Sheehan Testimony at 2. HRI's source materials license is due for renewal in 2002. HRI plans to begin mining and processing operations at all sites within 5 years. COP Rev. 2.0, Figure 1.4-1. HRI's financial assurance plan must therefore cover all sites. HRI's financial assurance forms do not provide dollar values and it is uncertain if HRI has the funds to meet the required sureties or its trust obligations. Sheehan at 3-4, Exhibit A-1.

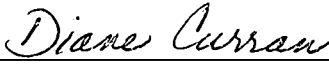
CONCLUSION AND REQUEST FOR RELIEF

For these reasons and the reasons set forth in ENDAUM's and SRIC's Petitions for Review, LBP-99-10 and LBP-99-13 should be reversed.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

I hereby certify that:
On May 10, 1999, I caused to be served copies of the following:

**ENDAUM'S AND SRIC'S REPLY IN RESPONSE TO HRI'S AND THE NRC
STAFF'S RESPONSES TO PETITIONS FOR REVIEW OF LBP-99-10
(PERFORMANCE BASED LICENSING ISSUES) AND LBP-99-13
(FINANCIAL ASSURANCE FOR DECOMMISSIONING).**

upon the following persons by U.S. mail, first class, and in accordance with the requirements of 10 C.F.R. § 2.712. Service was also made via facsimile and e-mail to the parties marked below by an asterisk. The envelopes were addressed as follows:

Office of the Secretary
U.S. Nuclear Regulatory Commission*
Washington, D.C. 20555-0001
Attn: Rulemakings and Adjudications
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U.S. Nuclear Regulatory Commission
Washington, DC 20555

Shirley Ann Jackson, Chairman
U.S. Nuclear Regulatory Commission
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Edward McGaffigan, Jr.,
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Dated at Santa Fe, New Mexico
May 10, 1999,



Lila Bird

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
BEFORE THE COMMISSION**

In the Matter of:

HYDRO RESOURCES, INC.

2929 Coors Road, Suite 101

Albuquerque, NM 87120

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) **Docket No. 40-8968-ML**
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)
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WRITTEN TESTIMONY OF MICHAEL F. SHEEHAN, Ph.D.

On behalf of Eastern Navajo Dine Against Uranium Mining ("ENDAUM") and the Southwest Research and Information Center ("SRIC"), Michael F. Sheehan, Ph.D., submits the following reply testimony in response to the NRC Staff's submission of HRI's Draft Performance Bond, Performance Guarantee Bond, and Trust Agreement and responses filed by HRI and the Staff to Intervenors' petition for review of LBP-99-13, financial assurance concerns.

May 7, 1999

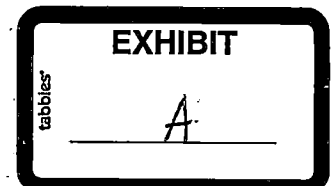
OSTERBERG & SHEEHAN

PUBLIC UTILITY ECONOMISTS

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TESTIMONY OF MICHAEL F. SHEEHAN

Q.1. PLEASE STATE YOUR NAME AND QUALIFICATIONS.

A.1. My name is Michael F. Sheehan. I am a partner in the firm of Osterberg & Sheehan, Public Utility Economists, of Scappoose, Oregon and Mount Vernon, Iowa. My qualifications and experience with issues related to finance, project economics, and environmental risk were set forth in the testimony I submitted in support of Intervenors' Presentation in Opposition to HRI's Application for a Materials License with Respect to: Financial Assurance for Decommissioning, filed on January 11, 1999. My resume was provided as Exhibit 1 to that testimony.

Q.2. WHAT MATERIALS HAVE YOU REVIEWED IN PREPARATION FOR YOUR TESTIMONY?

A.2. In addition to the materials listed in my January 11, 1999 testimony, I have reviewed the material submitted by the Staff on April 8, 1999, and the draft performance bond, draft performance guarantee bond, and draft trust agreement forms, submitted by HRI, on March 19, 1999.

Q.3. WHAT CONCLUSIONS HAVE YOU REACHED FROM YOUR REVIEW OF THE MARCH 19 DOCUMENTS?

A.3. There are four major problems with the financial assurance forms submitted by HRI on March 19, 1999: First, HRI's forms are not drafted to provide the coverage required by the NRC rules. Contrary to the requirements of 10 C.F.R. Part 40, Appendix A, Criterion 9 (and arguably §40.36), on their face the HRI assurances cover only operations at Church Rock Section 8 and not the rest of the CUP locations, including

1 particularly the Crownpoint mill and processing facility also licensed in SUA-1508.
2 **Second**, the dollar value of the sureties in the case of the performance bond and the
3 performance guarantee bond are not specified, and there is serious doubt that HRI has
4 the cash to obtain the required sureties or fund its trust obligation. **Third**, the
5 documents specify the wrong beneficiary; and **finally**, the documents do not satisfy the
6 requirements of Criterion 9 or §40.36, both of which require the establishment of a
7 decommissioning plan *prior* to licensing.

8
9 **Q.4. WHY DO YOU SAY THAT HRI'S MARCH 19TH DOCUMENTS ONLY APPLY TO CHURCH ROCK SECTION 8?**

11 A.4. Both performance bonds and the Trust Agreement (e.g. Section 3) deal solely with
12 activities associated with the New Mexico Environment Department's (NMED's)
13 discharge permit DP-558. NMED confirms that this discharge permit covers only
14 Church Rock Section 8, while the other areas and activities licensed under SUA-1508,
15 including mining at Section 17, Unit 1, and Crownpoint, and the central milling
16 operation at Crownpoint are not covered. This is contrary to the Criterion 9
17 requirement that:

18 "This will yield a surety that is at least sufficient *at all times* to
19 cover the costs of decommissioning and reclamation of *the areas*
20 *that are expected to be disturbed before the next license*
21 *renewal.*" (Emphasis added). 10 CFR Part 40 Appendix A,
22 Criterion 9.

23
24 Moreover, Criterion 9 allows the consolidation of financial sureties with those required
25 by state agencies with concurrent jurisdiction if and only if:

26 "Such arrangements are considered adequate * * * and that the
27 portion of the surety which covers *the mill, mill tailings site and*

1 *associated areas* and the long term funding charge is clearly
2 identified and committed for use in accomplishing those
3 activities." (Emphasis added). 10 CFR Part 40 Appendix A,
4 Criterion 9.

5 None of the three form documents submitted by HRI cover--and certainly do not break
6 out coverage--for any of the other CUP mining sites nor the central processing plant at
7 Crownpoint covered by HRI's application and the license.

8
9 **Q.5. FROM A FINANCIAL POINT OF VIEW ARE THE FORMS SUBMITTED BY**
10 **HRI ADEQUATE TO PROVIDE FINANCIAL ASSURANCE?**

11 A.5. No they are not.

12 **No Bond Amount Specified** For each of the performance bonds, the bonding
13 company only obligates itself for the amount specified in the line titled "Total penal
14 sum of bond." See the first full paragraph in each of the bond documents. The amount
15 of the bond in each case is crucial for determining whether the surety will be adequate
16 to guarantee the availability of funds for decommissioning, reclamation and restoration,
17 especially in the event--as here--that the licensee is in poor financial condition. These
18 lines are blank and no amount has been specified.

19 **No "Commission-approved cost estimates in a Commission-approved plan"**

20 Criterion 9 requires that while the actual sureties must be in force before the
21 "commencement of operations," the decommissioning funding plan must be submitted
22 *at the same time the ER is submitted.* HRI submitted an ER for Church Rock in 1988
23 and a revised Church Rock ER in 1993, but the funding plan remains incomplete.
24 1988 Church Rock Environmental Report, Hearing Record ACN 8805200344; 1993
25 Church Rock Project Revised Environmental Report, Hearing Record ACN
26

1 9304130415. ERs for Unit 1 and Crownpoint were submitted in 1992. Crownpoint
2 Project Technical Report, Hearing Record ACN 9509080094; Unit 1 Environmental
3 Assessment, Hearing Record ACN 9509080065. It is impossible to determine whether
4 the proposed sureties would be sufficient without being able to see whether the sureties
5 are the same as the "Commission-approved cost estimates in a Commission-approved
6 plan." It is impossible to determine sufficiency from forms blank as to amount.

7 **Trust Agreement** The trust agreement form has the same problems as the bond forms
8 (deals only with Churchrock Section 8, no amount specified, etc.) with the additional
9 disability that its funding is dependent on ongoing payments from HRI. This means
10 that the ability of the trust fund to fund environmental protection and remediation is
11 dependent on HRI's financial condition on an ongoing basis. Given HRI's current
12 condition and prospects this is no protection at all. As I explained in my January 11,
13 1999 testimony, HRI and its parent company are hard pressed to continue operating, let
14 alone undertake development at Church Rock. My conclusions were further confirmed
15 when Uranium Resources Inc.'s independent accountants filed a report with the
16 company's 10-K filing with SEC, stating several factors "raised substantial doubt
17 concerning the ability of the Company to continue as a going concern." Exhibit A-1.
18 In light of this, a fund-as-you-go surety is not adequate to protect the public interest.
19 **Incorrect beneficiary** EPA Region IX has determined NMED does not have
20 regulatory jurisdiction over Section 8.¹ Nevertheless HRI lists NMED as the only

¹ HRI has challenged EPA's determination and the matter is currently awaiting decision at the Tenth Circuit.

1 beneficiary on all three documents. This undermines the efficacy of the sureties and
2 violates Criterion 9, which only allows sureties made to other beneficiaries if those
3 beneficiaries are agencies with concurrent jurisdiction.

4
5 **Q.6. PLEASE SUMMARIZE YOUR CONCLUSIONS ON WHETHER THE MARCH**
6 **19 SURETY FORMS ARE ADEQUATE IN LIGHT OF HRI'S FINANCIAL**
7 **CONDITION.**

8
9 A.6. They are clearly not adequate for at least the following reasons. First, for a firm in
10 HRI's condition it is especially important that the Commission assure itself that not
11 only is the dollar value of the surety specified and adequate, but that the applicant is
12 financially able to acquire the sureties described. Here not only are the surety amounts
13 not filled in, there is no mention of the cost to HRI of the appropriate bonds. Given a
14 company in HRI's financial condition, it is not sufficient to have HRI simply to proffer
15 the *form* of surety they might buy if they had the money; HRI needs to show the dollar
16 amount of the sureties, the price of the sureties to a company in its financial condition,
17 and then demonstrate that it has the money to obtain the sureties. Otherwise the surety
18 forms are no more than just pieces of paper.

19
20 **Q.7. DOES THIS COMPLETE YOUR TESTIMONY?**

21
22 A.7. Yes it does.
23
24
25

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Law Judge Bloch

In the Matter of:)

HYDRO RESOURCES, INC.)
2929 Coors Road, Suite 10)
Albuquerque, NM 87120)

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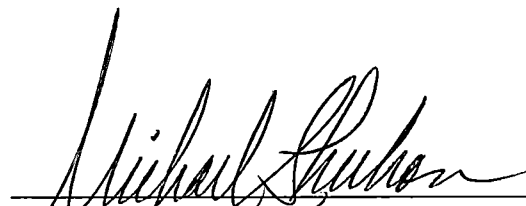
STATE OF OREGON)
County of Columbia) ss:

AFFIDAVIT OF MICHAEL F. SHEEHAN

I, Michael F. Sheehan, being sworn, depose and say as follows:

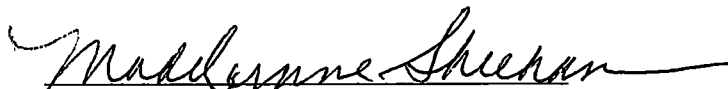
The attached prefiled written testimony was prepared by me or under my direct supervision for submission in the above captioned proceeding. The statements contained in this testimony are true and correct to the best of my knowledge, information and belief.

FURTHER AFFIANT SAYETH NOT.


Michael F. Sheehan

Subscribed and sworn to before me May 7, 1999.




Notary Public for Oregon

REPORT OF INDEPENDENT PUBLIC ACCOUNTANTS

To the Shareholders and Board of Directors of
Uranium Resources, Inc.:

We have audited the accompanying consolidated balance sheets of Uranium Resources, Inc. (a Delaware Corporation) and subsidiaries as of December 31, 1998 and 1997, and the related consolidated statements of operations, shareholders' equity, and cash flows for each of the three years in the period ended December 31, 1998. These consolidated financial statements and the schedule referred to below are the responsibility of the Company's management. Our responsibility is to express an opinion on these consolidated financial statements and schedule based on our audits.

We conducted our audits in accordance with generally accepted auditing standards. Those standards require that we plan and perform the audit to obtain reasonable assurance about whether the financial statements are free of material misstatement. An audit includes examining, on a test basis, evidence supporting the amounts and disclosures in the financial statements. An audit also includes assessing the accounting principles used and significant estimates made by management, as well as evaluating the overall financial statement presentation.

We believe that our audits provide a reasonable basis for our opinion.

In our opinion, the financial statements referred to above present fairly, in all material respects, the financial position of Uranium Resources, Inc. and subsidiaries as of December 31, 1998 and 1997, and the results of its operations and its cash flows for each of the three years in the period ended December 31, 1998, in conformity with generally accepted accounting principles.

The accompanying financial statements have been prepared assuming the Company will continue as a going concern. The Company has incurred operating losses in 1998 and 1997 due largely to a significant decline in the market price of uranium. Further, the Company has limited capital resources available to support its ongoing operations until such time, if ever, the Company is able to resume full-scale operations. These factors among others discussed in Note 2, raised substantial doubt concerning the ability of the Company to continue as a going concern. The financial statements do not include any adjustments relating to the recoverability and classification of asset carrying amounts or the amount and classification of liabilities that might result should the Company be unable to continue as a going concern.

Our audits were made for the purpose of forming an opinion on the basic financial statements taken as a whole. The schedule listed in the index of financial statements is presented for purposes of complying with the Securities and Exchange Commission's rules and is not part of the basic financial statements. The schedule has been subjected to the auditing procedures applied in the audits of the basic financial statements and, in our opinion, fairly state in all material respects the financial data required to be set forth therein in relation to the basic financial statements taken as a whole.

/s/ Arthur Andersen LLP

ARTHUR ANDERSEN LLP

Dallas, Texas

February 26, 1999

