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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
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**INTERVENORS' PETITION FOR REVIEW OF PRESIDING
OFFICER'S PARTIAL INITIAL DECISION LBP-99-9**

Pursuant to 10 C.F.R. §§ 2.786, 2.1253, Intervenors Eastern Navajo Diné Against Uranium Mining ("ENDAUM") and Southwest Research and Information Center ("SRIC") hereby petition for review of the Partial Initial Decision, LBP 99-9, served via first class mail February 19, 1999.¹ The Commission should take review because LBP 99-9 is based on legal errors, clearly erroneous findings of fact, and poses new legal issues. In addition, the Commission should take review because this adjudication is the first to review a materials license application for an ISL operation, and thus it raises substantial and important questions of law, policy and/or discretion, resolution of which is in the public interest.

I. SUMMARY OF DECISION.

Hydro Resources Inc. ("HRI") has applied for a source and byproduct materials license to build and operate several in situ leach ("ISL") mines and a uranium mill in

¹ The standards for Commission review in 10 C.F.R. § 2.786(b)(4) have been incorporated into Subpart L proceedings in 10 C.F.R. § 2.1253. See *Babcock and Wilcox (Pennsylvania Nuclear Service Operations, Parks Township, Pa.)* CLI -95-4, 41 NRC 248, 249 (1995).

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Church Rock and Crownpoint, New Mexico. The NRC Staff issued a Final Environmental Impact Statement ("FEIS") for the Crownpoint Uranium Project ("CUP") in February of 1997. *Hydro Resources Inc.*, LBP 98-9, 47 NRC 266 (1998). HRI received an operating license from the Staff on January 5, 1998. License No. SUA-1508. The license allows mining on all four sites for which HRI seeks permission (Church Rock Sections 8 and 17, Unit 1, and Crownpoint), conditioning operations on compliance with certain license conditions. The CUP is proposed for an area of cultural significance, rich in evidence of paleoIndian, Anasazi and Pueblo Indian settlements and currently settled by Navajos. *See Eastern Navajo Diné Against Uranium Mining's and Southwest Research and Information Center's Brief in Opposition to Hydro Resources, Inc.'s Application for a Materials License with Respect to: Compliance with the National Historic Preservation Act, Native American Graves Protection and Repatriation Act, and Related Cultural Resource Issues 6-8, 46-47 (December 7, 1998) ("Cultural Resources Presentation").*

Intervenors raised several concerns about NHPA, NAGPRA and related cultural resources issues with respect to HRI's project, which were admitted as germane. LBP 98-9, 47 NRC at 282, n.s 60-62. Intervenors filed the Cultural Resources Presentation on December 7, 1998. HRI filed its response on January 11, 1999.² The NRC Staff

² *Hydro Resources Inc.'s Response to Eastern Navajo Diné Against Uranium Mining's and Southwest Research and Information Center's December 7, 1998 Brief in Opposition to Hydro Resources, Inc.'s Application for a Materials License with Respect to Compliance with the National Historic Preservation Act, Native American Graves Protection and Repatriation Act and Related Cultural Resource Issues (January 11, 1999).*

responded on January 19, 1999.³ On February 19, 1999, the Presiding Officer issued LBP 99-9, denying Intervenor's any relief. *Id.* at 12.

II. LBP-99-9 CONTAINS LEGAL ERRORS AND RELIES ON MATERIAL FACTUAL ERRORS.

A. The Presiding Officer Made Several Legal Errors in Finding that HRI's License Violates Neither the National Historic Preservation Act Nor the National Environmental Policy Act with Respect to Cultural Resource Issues.

ENDAUM and SRIC contend in their presentation that by licensing HRI's project before the Section 106 review under the NHPA is complete, the Staff violates 36 C.F.R. § 800.3(c), which requires the Section 106 process to be complete before a license is issued and before groundbreaking activities start. Cultural Resources Presentation at 38-39.

While phased compliance may sometimes be acceptable, it is not in this instance, because the 106 review process is incomplete for any part of the project; only nondestructive planning activities are permitted during phased compliance but HRI's license permits ground disturbance at all three sites; HRI plans on operating at all three sites within five years; and the Staff has unlawfully delegated its NHPA obligations to HRI in the license. *Id.* at 39-44.

The Presiding Officer ignores the merits of these arguments. LBP-99-9 appears to rely instead on a prior decision of the former Presiding Officer in denying a stay motion (LBP-98-5) and on an interlocutory appeal decision of the Commission denying a stay

³ NRC Staff's Response to ENDAUM and SRIC Presentation on NHPA and NAGPRA Issues (January 19, 1999).

(CLI-98-8), stating the "merits of those issues were similar to those asserted here." LBP-99-9 at 2-4. This attempt to apply collateral estoppel is legal error for two reasons. First, LBP-98-5 and CLI-98-8 did not decide the merits of ENDAUM's and SRIC's NHPA claim; those decisions considered the factors under 10 C.F.R. § 2.788(e).⁴ Second, because ENDAUM and SRIC did not have the opportunity to fully litigate their claims in a stay motion, the issue cannot be precluded from this hearing.⁵

The Presiding Officer erroneously finds that ENDAUM and SRIC did not address the stay motion decisions,⁶ did not explain why 36 C.F.R. §800.3(c) does not bar phased compliance with NHPA,⁷ and did not acknowledge the Navajo Nation Historic Preservation Department agreed that five-year review of segments was appropriate.⁸ There is no need to address the stay motions since the standard is different; however, on

⁴ As former Presiding Officer B. Paul Cotter pointed out in LBP-98-5, "for the purposes of meeting the Commission's requirements for a stay, the focus is not on methodology but on whether construction activities could wreak actual damage on cultural resources that have not been inventoried and adequately addressed in mining plans." LBP 98-5 at 8, 47 NRC 119, 124-125 (1998). The Commission in CLI-98-8 plainly stated that the basis of its ruling on the stay motion was that the alleged harm was not irreparable or immediate. CLI-98-8 at 6.

⁵ See *United States v. Utah Construction & Mining Co.*, 384 U.S. 394, 421-422 (1966) (administrative agency decision can have res judicata effect when agency is "acting in a judicial capacity" and "parties have had an adequate opportunity to litigate".) See also *Safety Light Corporation* (Bloomsburg Site Decommissioning and License Renewal Denials), LBP-95-9, 41 NRC 412, 442-3 (1995) (collateral estoppel requires identity of parties, identity of issues, and issue materiality); *Safety Light Corporation* (Bloomsburg Site Decommissioning and License Renewal Denials), LBP-92-16A, 36 NRC 18, 21 (1992) (collateral estoppel requires "a mutuality in the quality and extensiveness of procedures that arguably is lacking between proceedings conducted pursuant to Subpart L, on the one hand, and Subpart G on the other.").

⁶ LBP-99-9 at 4.

⁷ LBP-99-9 at 5-6, citing Cultural Resources Presentation at 3, 11.

⁸ LBP-99-9 at 6.

pages 38-44 of the Cultural Resources Presentation, ENDAUM and SRIC present arguments on phased compliance and on what the five year review actually means in this case. The Presiding Officer erred in not considering and not adopting ENDAUM's and SRIC's arguments on this issue.⁹

LBP-99-9 incorrectly argues that the Intervenors did not cite a regulatory standard that requires compliance with the standard practices identified by their experts that would justify analyzing the defects in process identified by these experts. LBP-99-9 at 5. Intervenors, however, cite 16 U.S.C. § 470(f) (federal agency must, prior to the issuance of a license, take into account the effect of the undertaking on objects eligible for inclusion in the National Register), and 30 C.F.R. §§ 800.4, 800.5 (agency must identify historic properties, evaluate the eligibility for inclusion in the National Register, determine whether action will have an adverse effect, and if so, determine ways to reduce those adverse effects) as the regulatory standard. Cultural Resource Presentation at 12-13. Specifically, Intervenors present evidence that the Staff has failed to make a reasonable and good faith effort to identify historic properties, citing 16 U.S.C. § 470(f), 36 C.F.R. §§ 800.4, 800.5 and 800.9, and the National Park Service Guidelines in Bulletin 38, and failed to apply appropriate criteria to determine any adverse effect on identified properties, citing 36 C.F.R. § 800.9. Cultural Resource Presentation at 13-38.

⁹ The Staff has also violated NHPA by not providing the Advisory Council on Historic Preservation an opportunity to comment. Cultural Resources Presentation at 44.

These standard guidances are the presumptive norm.¹⁰ The Presiding Officer errs by expecting Intervenors to demonstrate why the Staff should be required to follow the regulations and guidances, when in fact, the Staff, which has no agency technical expertise in cultural resource preservation, should explain why it has deviated from them. By analogy, NRC regulatory guidances are the standard, and when an applicant seeks to deviate from the standard, it must demonstrate that the deviation is appropriate. *See Gulf States Utilities Company*, ALAB-444, 6 NRC 760, 772-773 (1977).

LBP-99-9 reverses the burden of proof in this proceeding, a legal error. As stated above, the decision requires intervenors to demonstrate why HRI and the Staff need to follow the regulations and standard guidance implementing NHPA. LBP-99-9 at 5. Even though Intervenors filed their initial presentation first, the Presiding Officer finds fault with the presentation for not rebutting HRI's and Staff's arguments that they completed the proper planning steps and showing "why those steps were insufficient." *Id.* Intervenors explained where HRI and the Staff are in the planning process; they have yet to complete the process of identifying all objects eligible for listing in the National Register and determining effect, which are the first two steps in the process. *See Cultural*

¹⁰ Dr. Klara Kelley testifies for the intervenors that she routinely applies Section 106 of the NHPA, Bulletin 38, the Navajo Nation Cultural Resources Protection Act of 1988 and the Navajo Nation Policy to Protect Traditional Cultural Properties, and in her professional opinion the cultural resource documentation for the project is inadequate, incomplete, fragmented and internally inconsistent. Cultural Resource Presentation, Exhibit 1 at 2-3. She applies Bulletin 38 and the other guidance throughout her testimony. *See Id.* at 6, 11, 14, 15. Mr. William Dodge testifies that Bulletin 38 is the accepted standard for Section 106 compliance on traditional cultural properties and the Tenth Circuit federal court of appeals has cited Bulletin 38 as authority for federal agencies. *Id.* at Exhibit 2 at 7. Mr. Dodge is a consultant in NHPA compliance and refers to the relevant regulations and guidance throughout his testimony as well. Exhibit 2 at 1, 10, 11, 15, 16, 21, 22, 25.

Resource Presentation at 13-34; Exhibit 1 at 6-19; Exhibit 2 at 9-26. The Staff jumped the gun in issuing a finding of no effect for Church Rock and Crownpoint Section 12. *Id.* It is clear error to ignore Intervenors' substantial evidence that the identification process and effect assessment is incomplete.

The Presiding Officer also committed legal error in refusing to consider the merits of ENDAUM's and SRIC's general NHPA and NGPRA claims, which warrant revocation of the entire license.¹¹

LBP-99-9 violates the requirement of the National Environmental Policy Act, 42 USC § 4321, *et seq.* (1994) ("NEPA") that federal agencies review the impacts of proposed actions before making decisions on those actions. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989). LBP-99-9's rejection of the Intervenors' areas of concern relating to NEPA is error. LBP-99-9 incorrectly asserts that NEPA requirements have been met because the FEIS "discussed" impacts on cultural resources before the license was issued. LBP-99-9 at 11. This ignores the fact that the FEIS was prepared while the NRC's process for identifying and considering impacts on cultural properties pursuant to section 106 of the National Historic Preservation Act (16 USC §470f) was still in the initial identification phase. *See*

¹¹ *See* LBP-99-9 at 9-10. General licensing issues, as well as Section 8 issues, are within the subject matter of this proceeding. Memorandum and Order (Scheduling and Partial Grant of Bifurcation) at 2-3 (September 22, 1998). Bifurcation of this hearing constitutes illegal segmentation under the National Environmental Policy Act. *See* Petition for Interlocutory Review of Memorandum and Order (Scheduling and Partial Grant of Motion for Bifurcation) of September 22, 1998 and Request for Stay (October 7, 1998).

Intervenors' Cultural Resources Brief at 52-53. The FEIS purports to set forth a plan¹², not the data needed for an evaluation of impacts on cultural resources.

Moreover, consideration of impacts by the Staff is not the only requirement of NEPA. Another central function of NEPA is to ensure that relevant information about a proposed project is made available to the public. *Methow Valley*, 490 U.S. at 349. This requirement has not been met because the information provided in the FEIS is not complete and because other information that was used by the Staff is not set forth in the FEIS. LBP-99-9 points out that the report of the Museum of New Mexico ("MNM") was completed before the Staff issued a license to HRI. LBP-99-9 at 11. That report came out after the FEIS, however, and the information in the report is not in the FEIS, nor was the report publicly circulated like an FEIS. It therefore cannot be used to support NEPA compliance. *See Methow Valley*, 490 U.S. at 349.

B. LBP-99-9 Contains Material Factual Errors.

The Presiding Officer makes several clear errors of fact in LBP-99-9. First, the Presiding Officer errs in stating that "[n]either Section 8 nor the land on which Section 8 fluids will be processed is either tribal land or federal land." LBP-99-9. This assertion is clearly erroneous. The U.S. Environmental Protection Agency has asserted jurisdiction on behalf of the Navajo Nation over Section 8 pursuant to the Safe Drinking Water Act,

¹² LBP-99-9 itself states that the FEIS recommends a "cultural resources management plan" for "surveys of lease areas", "identification of protection areas", and "archaeological testing" and "monitoring". LBP-99-9 at 11.

because there is a dispute over tribal and state jurisdiction. Intervenors' Groundwater Presentation, legal brief at 14-15, 58 at n.18. The land on which Section 8 fluids will be processed is likely to be tribal or federal land. See ENDAUM's and SRIC's liquid waste presentation at 52 (November 9, 1998); FEIS at 4-11. Section 17 is tribal trust land. See ENDAUM and SRIC's Environmental Justice Presentation, Exhibit 1-L, land status map. The flat mesa lands of Sections 8 and 12, in Church Rock, are federal land. *Id.* Section 16 is state land; however, HRI has argued that it is federal land and Mr. Larry King's grazing lease on Section 16 is administered by the Bureau of Indian Affairs. *Id.*, Liquid waste presentation at 36; Environmental Justice presentation at Exhibit 4-D. These errors are material because they are the basis for the Presiding Officer's decision that NAGPRA is inapplicable and Intervenors' claims under NAGPRA. NAGPRA does apply, and the Staff has failed to meet its requirements. Cultural Resource Presentation at 45-49.

Second, the Presiding Officer states that the Church Rock effluents will be treated at the Crownpoint site. LBP-99-9 at 10. The Presiding Officer appears to have incorrectly assumed that because Crownpoint Section 12 is a proposed land application area for Crownpoint, it must also be used for Church Rock. In fact, land application is only proposed for either Section 17, Section 16, or flat mesa land on Sections 8 or 12 in Church Rock. Cultural Resources Presentation at 19. This error is material because the Presiding Officer, even though he finds that NHPA has been satisfied for Crownpoint Section 12, and Church Rock Section 8, has not approved all areas that would be

impacted by mining on Section 8. Operations at Church Rock Section 8 will impact other areas for which the Section 106 process has not been attempted.¹³

III. THIS PETITION MEETS THE STANDARD FOR REVIEW.

The Commission may exercise discretionary review, "giving due weight to the existence of a substantive question with respect to: (I) an error or conflict of material fact, (ii) a necessary legal conclusion in error or without governing precedent, (iii) a substantial and important question of law, policy or discretion, (iv) prejudicial procedural error, or (v) any other consideration which the Commission may deem to be in the public interest. 10 C.F.R. § 2.786(b)(4).


As demonstrated above, LBP 99-9 contains significant errors of law and fact, thus warranting review. Review is also warranted because this is the first time that an application for an ISL mine materials license has been adjudicated in an informal Subpart L proceeding. Because the project area is of great cultural significance, all of the issues raised herein raise important questions of law and policy and review by the Commission lies within the public interest.

V. CONCLUSION

For the foregoing reasons, Intervenors respectfully request the Commission grant review of LBP-99-9 and reverse the decision.

¹³ LBP-99-9 also errs in concluding that the NMSHPO and the NNHPD concur in a "no effect" finding for traditional cultural properties at Church Rock; that Ernest Becenti is a qualified expert; and that Abie Francisco's testimony does not identify traditional cultural properties or conflict with Mr. Becenti's testimony. LBP-99-9 at 9.

Respectfully Submitted,



Johanna Matanich

Douglas Meiklejohn

Lila Bird

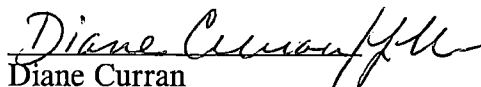
Douglas Wolf

NM ENVIRONMENTAL LAW CENTER Washington DC 20009

1405 Luisa Street, Suite 5

Santa Fe NM 87505

(505) 989-9022



Diane Curran

HARMON, CURRAN, SPIELBERG,
& EISENBERG, LLP

2001 "S" Street, Suite 430

Washington DC 20009

(202) 328-3500

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_____)	
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2929 Coors Road)	
Suite 101)	ASLBP No. 95-706-01-ML
Albuquerque, NM 87120)	
_____)	

CERTIFICATE OF SERVICE

I hereby certify that:

On March 11, 1999, I caused to be served copies of the following:

**INTERVENORS' PETITION FOR REVIEW OF PRESIDING OFFICER'S
PARTIAL INITIAL DECISION LBP-99-9**

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 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
Staff

Shirley Ann Jackson, Chairman
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Greta J. Dicus, Commissioner
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Nils J. Diaz, Commissioner
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Edward McGaffigan, Jr.,
Commissioner
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Jeffrey S. Merrifield, Commissioner
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Administrative Judge
Peter B. Bloch*
Atomic Safety and Licensing Board
Mail Stop - T-3 F23
U.S. Nuclear Regulatory Commission
Washington D.C. 20555

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

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

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

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

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

Diane Curran
HARMON, CURRAN, SPIELBERG &
EISENBERG, LLP*
2001 "S" Street, N.W., Suite 430
Washington DC 20009

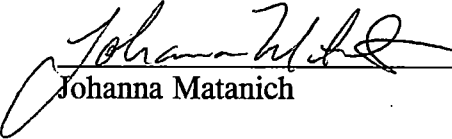
Brit Clapham, Acting Attorney General
Steven J. Bloxham, Esq.
Navajo Nation Department of Justice
P.O. Drawer 2010
Window Rock, AZ 86515

Anthony J. Thompson
Frederick Phillips
David Lashway
SHAW, PITTMAN, POTTS &
TROWBRIDGE*
2300 "N" Street, N.W.
Washington, D.C. 20037-1128

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

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

Dated at Santa Fe, New Mexico,
March 11, 1999,



Johanna Matanich