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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

OFFICE OF THE CHIEF OF STAFF
RULEMAKING AND REGULATORY
ADDITIONAL STAFF

The Honorable Peter B. Bloch, Presiding Officer

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
MOTION IN THE ALTERNATIVE FOR LEAVE TO SUBMIT REPLY BRIEF
AND REBUTTAL TESTIMONY IN RESPONSE TO HRI'S RESPONSE
PRESENTATION ON ENVIRONMENTAL JUSTICE**

INTRODUCTION

Pursuant to 10 C.F.R. § 2.1233(d), Intervenors Eastern Navajo Diné Against Uranium Mining ("ENDAUM") and Southwest Research and Information Center ("SRIC") hereby move for leave to reply to the initial presentation filed by Hydro Resources, Inc. ("HRI") regarding environmental justice issues.¹

FACTUAL BACKGROUND

On February 19, 1999, Intervenors served their initial presentation on environmental justice issues via e-mail and overnight delivery. Eastern Navajo Diné

¹ This motion is an alternative to ENDAUM's and SRIC's March 29, 1999 Motion to Strike HRI's Responses to Intervenors' Presentations on Environmental Justice and NEPA Issues. ENDAUM and SRIC request that the Presiding Officer consider this motion only if ENDAUM and SRIC's Motion to Strike is denied.

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U.S. NUCLEAR REGULATORY COMMISSION
RULEMAKING & ADJUDICATIONS STAFF
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OF THE COMMISSION

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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: Environmental Justice Issues ("Intervenors' Presentation"). The presentation included expert testimony from Dr. Robert Bullard, Dr. Christine Benally, and Dr. Douglas Brugge. Intervenors' Presentation, Exhibits 1, 2.

On March 25, 1999, after the deadline for filing its response, HRI filed Hydro Resources, Inc.'s Response to Intervenors' Brief Regarding Environmental Justice ("HRI Response"). HRI's presentation is supported primarily by the affidavit from Stan L. Albrecht. Affidavits are also provided by Richard F. Clement, Jr., Ernest Becenti, Sr., and by holders of allottee royalty interests Annie Julian, Ben Benally, Janice Perry, Paul D. Yazzie, Sr., Alice House, Wilbert Ernest Johnson, Gladys J. Yazzie, Timmy Julian, Paul C. Homer, Deniece L. Johnson, Francis Nez, Danny Charley, and Irma Julian.

ARGUMENT

I. STANDARD FOR REBUTTAL PRESENTATIONS.

The NRC's Subpart L regulations generally provide that after a party has filed its initial presentation, leave must be obtained to file any further presentations, subject to the discretion of the Presiding Officer. 10 C.F.R. § 2.1233(d). In the context of formal adjudications, the Appeal Board has held that the Presiding Officer's discretion is subject to the limited "right" to present rebuttal testimony where it is needed for "full and true disclosure of the facts." *Long Island Lighting Co.* (Shoreham Nuclear

Power Station, Unit 1), ALAB-787, 20 NRC 1097, 1178 (1984) (upholding Licensing Board's decision to require parties to conduct cross-examination, redirect examination, and re-cross examination in depositions, with deposition transcripts to be filed in lieu of testimony). As the Presiding Officer has recognized, the requirement to base a decision on a complete and accurate record is no less vital for this proceeding. Memorandum and Order (Motions to Reply and Rebut) (March 24, 1999) (granting ENDAUM and SRIC leave to reply to new information and to contest the credibility of experts related to groundwater concerns) at 2. The opportunity to file reply presentations is also required in order to ensure that the burden of proof is properly allocated to HRI on health and safety issues and to HRI and the Staff on environmental issues.² An opportunity for reply briefs and rebuttal testimony should be provided.

II. ENDAUM AND SRIC SHOULD BE GRANTED LEAVE TO FILE A REPLY PRESENTATION CONCERNING THE QUALIFICATIONS AND TESTIMONY OF HRI'S "EXPERT" STAN ALBRECHT.

HRI relies heavily on the testimony of Stan Albrecht in its response to Intervenors' Presentation on environmental justice issues. *See* HRI's Response at 13, 14, 17, and 25. Intervenors seek the opportunity to contest Stan Albrecht's credentials because there is nothing in the record to indicate that he is qualified to testify on environmental justice issues. HRI failed to submit a resume demonstrating

² *See Louisiana Energy Services* (Claiborne Enrichment Center), LBP-96-25, 44 NRC 331 (1996) for a discussion of the allocation of the burden of proof.

Albrecht's qualifications and did not provide any other evidence indicating that he is qualified to testify on environmental justice issues. The only information about any of his publications is the vague references to unlisted publications that are made in Albrecht's two affidavits. HRI's Response, Exhibit 1 at 1, Exhibit (unnumbered) at 1. These references are not sufficient to establish his qualifications concerning environmental justice issues. There also is nothing in the record to indicate that Mr. Albrecht has any experience in low income or minority communities or that he is qualified by training or experience to testify about the impacts of projects on such communities.

Because there is nothing in the record to indicate that Mr. Albrecht is qualified to provide the testimony that is asserted in his affidavits, the Presiding Officer should strike Mr. Albrecht's testimony. If the Presiding Officer does not strike the testimony, the Presiding Officer should grant ENDAUM and SRIC an opportunity to reply so that they may address in writing Mr. Albrecht's lack of credentials.

Alternatively, the Presiding Officer should permit ENDAUM and SRIC to conduct *voir dire* to determine Mr. Albrecht's qualifications. ENDAUM and SRIC request that any hearing held for that purpose be conducted in Crownpoint because that is the community in which the Crownpoint Uranium Project and its impacts would occur. ENDAUM and SRIC further request that following a hearing for *voir dire* they be permitted to reply so that they may address the information gained during the *voir dire* as well as the substance of the testimony provided by Mr. Albrecht.

Finally, the information presented by HRI in the testimony of Mr. Albrecht is being presented for the first time. ENDAUM and SRIC therefore should be given an opportunity to reply to this new information.

III. ENDAUM AND SRIC SHOULD BE GRANTED LEAVE TO FILE A REPLY PRESENTATION TO ADDRESS FACTUAL AND LEGAL ERRORS IN HRI'S INITIAL PRESENTATION, AND TO RESPOND TO ADDITIONAL INFORMATION.

ENDAUM and SRIC seek an opportunity to reply so that they may respond to material factual statements made for the first time in HRI's presentation or that rely on new information not previously disclosed in the record. Intervenors seek to respond to new arguments on environmental justice issues contained in the affidavits from Stan Albrecht; Intervenors also seek to respond to new information carrying no evidentiary weight in affidavits from holders of allottee royalty interests and in the affidavits of Richard F. Clement, Jr. and Ernest Becenti. HRI Response, Exhibits 1, 3 - 15, and 17.

The affidavits of Anne Julian, Ben Benally, Janice Perry, Paul Yazzie, Alice House, Wilbert Ernest Johnson, Gladys Yazzie, Timmy Julian, Paul Homer, Deniece Johnson, Frances Nez, Danny Charley, and Irma Julian have no probative value. If permitted to reply, ENDAUM and SRIC will demonstrate that the issue is not whether the proposed mining is popular among allottees, who stand to gain financially if the Project proceeds, but whether the final environmental impact statement adequately examined the environmental justice effects of the Project. The statements

presented by these witnesses should be treated by the Presiding Officer as limited appearance statements made pursuant to 10 C.F.R. § 2.1211(a) and similar to those made at the hearing conducted in Crownpoint in September, 1998.³

Similarly, ENDAUM and SRIC should be able to reply so that they may respond to the affidavit of Richard Clements. There is nothing in the record to indicate that Mr. Clements is an expert on environmental justice, and his assertions about meetings that he has had with members of the community are irrelevant. The issue is the environmental justice impacts of the Project on the community, not the extent to which HRI has or has not talked to people in the community. ENDAUM and SRIC also should be able to address the resolutions filed with Mr. Clement's affidavit, which are of questionable evidentiary weight. If they are permitted to reply, ENDAUM and SRIC will point out that the resolutions do not address the issues in this proceeding, that the Church Rock resolution is more than five years old, and that the Church Rock Land Board and McKinley County Commission resolutions are both signed by people who have pecuniary interests in the Project.

ENDAUM and SRIC would point out as well that if the Presiding Officer intends to consider these resolutions, he ought also to consider the resolutions passed against the Project by the Pinedale, Littlewater, Standing Rock, and Smith Lake

³ It is illuminating that the majority (7 of 13) of the allottees' affidavits indicate that they are in favor of the proposed mining *only if it can be done safely*. See affidavits of Annie Julian at 1, Janice Perry at 1, Wilbert Ernest Johnson at 1, Gladys Yazzie at 2, Timmy Julian at 1, and Irma Julian at 2.

Chapters. The resolutions against the mining passed by the Navajo Tribal Utility Authority, the Crownpoint Healthcare Facility Safety Committee, Eastern Navajo Health Board, and the Eastern Navajo Advisory Council on Aging are already in the record. ENDAUM and SRIC also would point out the recent election of ENDAUM President Mitchell Capitan as President of the Crownpoint Chapter.

In addition, ENDAUM and SRIC should be given an opportunity to respond to the affidavit of Ernest Becenti, whose testimony has little credibility. His claim that he is a member of the "McKinley County Commissioners Court" [HRI's Response at 18; Becenti affidavit at 1] is inaccurate since there is no such court. His assertion that he is a medicine man is similarly lacking in credibility. *See* ENDAUM and SRIC's Brief in Opposition to HRI's Application with Respect to: Compliance with the National Historic Preservation Act, Native American Graves Protection and Repatriation Act and Related Cultural Resource Issues at 21-22 and supporting Exhibit 3, the affidavit of Abie Francisco.

ENDAUM and SRIC seek leave to reply to a number of other factual claims which are unsupported and/or erroneous. For instance, HRI wrongly asserts that "the Church Rock Section 8 project is more than four miles from Church Rock and Crownpoint, where the environmental justice population resides," and that therefore, "an environmental justice analysis of demographic data is not required." HRI's Response at 10. In fact, there are 87 residences (representing at least 350 individuals) that are within a 2.5 mile radius of the Church Rock Section 8 site. Intervenors'

Presentation, Exhibit 1, Testimony of Dr. Robert Bullard at 25.

ENDAUM and SRIC also seek leave to reply to assertions by HRI which are based on legal error. For example, citing the Final Environmental Impact Statement⁴ at xxi, HRI inaccurately claims that "there will be no environmental justice impact" at the Church Rock Section 8 mining site because "potential significant impacts of the proposed project can be mitigated." HRI Response at 9. If given the opportunity to reply, ENDAUM and SRIC will demonstrate that the mitigative measures proposed by the NRC are not adequate to protect public health and safety at Church Rock Section 8. Intervenors' Presentation at 29-31.

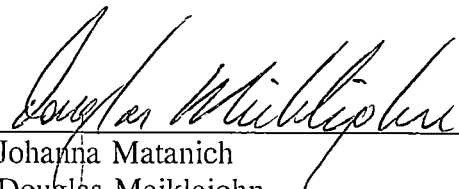
CONCLUSION

For the foregoing reasons, ENDAUM and SRIC should be allowed to reply to HRI's Response. Otherwise, the result will be an incomplete and inaccurate record that is insufficient to allow a meaningful decision on the adequacy of HRI's application. Such a result is unfair, and would effectively place the burden of proof on the Intervenors. For the foregoing reasons, ENDAUM's and SRIC's Motion for Leave to Reply should be granted.

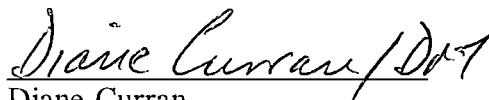
⁴ NUREG-1508, Final Environmental Impact Statement to Construct and Operate the Crownpoint Uranium Solution Mining Project, Crownpoint, New Mexico (February, 1997) ("FEIS") (ACN 9703200270).

Dated: April 5, 1999.

Respectfully Submitted,



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Before Administrative Judge Peter B. Bloch, Presiding Officer

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HYDRO RESOURCES, INC.)	Docket No. 40-8968-ML
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Suite 101)	ASLBP No. 95-706-01-ML
Albuquerque, NM 87120)	

CERTIFICATE OF SERVICE

I hereby certify that:

On April 5, 1999, I caused to be served copies of the following:

**ENDAUM'S AND SRIC'S MOTION FOR LEAVE TO SUBMIT REPLY BRIEF
AND REBUTTAL TESTIMONY IN RESPONSE TO HRI'S RESPONSE
PRESENTATION ON ENVIRONMENTAL JUSTICE**

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:

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