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

Before Chief Administrative Judge
B. Paul Cotter, Jr., Presiding Officer

Administrative Judge
Thomas D. Murphy, Special Assistant

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

HRI'S RESPONSE TO PETITIONERS' MOTION FOR STAY

On January 5, 1998, the Nuclear Regulatory Commission (NRC or Commission) issued Source Material License SUA-1508 to Hydro Resources, Inc. (HRI) for the company's Crownpoint Uranium Project (CUP) authorizing HRI to conduct in-situ leach (ISL) mining at the CUP. On January 15, 1998, Eastern Navajo Dine against Uranium Mining (ENDAUM) and Southwest Research and Information Center (SRIC), Petitioners in the above-referenced case, moved the Presiding Officer to stay the effectiveness of HRI's license, to rule that a hearing is required prior to the issuance of the license, and to grant a temporary stay to preserve the *status quo*. As explained more fully below, the Presiding Officer should deny all relief sought in Petitioners' Motion.

I Introduction

HRI's license authorizes the company to develop the CUP in a *phased approach*.[1] Under the terms of that license, HRI may first begin to develop one of its Church Rock properties (Section 8), however, prior to conducting any mining activities at Section 8, HRI must resolve its underground injection control (UIC) permitting issues with the Environmental Protection Agency (EPA) and its

[1] *See* Clement Aff. at ¶¶ 6-8.

state water rights issues. Additionally, before commencing any activities at the other Church Rock property (Section 17), at Unit 1, or at Crownpoint, HRI must satisfy specific preconditions in the license.

Accordingly, because HRI cannot proceed with actual uranium recovery operations at this time, Petitioners claims of immediate and irreparable harm are meritless. Specifically, almost every issue raised in Petitioners Motion (and exhibits attached thereto) relates to alleged potential impacts at Crownpoint, Unit 1, and to a limited extent Section 17 at Church Rock, but its license prohibits HRI from proceeding with any recovery activities at these locations until it has completed a commercial scale restoration demonstration at Section 8.[2] Moreover, petitioners fail to satisfy the four stay criteria with regard to Church Rock Section 8, the *only property* that HRI can begin mining under its NRC license anytime in the near future.

II Petitioners' Motion fails to demonstrate that Petitioners are entitled to the relief sought.

Petitioners have failed to satisfy their burden of showing why their motion should be granted based upon the four factors provided in NRC's Rules of Practice.[3] These rules require the moving party to make "a *strong showing* that it is likely to prevail on the merits" and that it "will be irreparably injured unless a stay is granted."[4] The movant must also address whether granting the stay would harm other parties, and where the public interest lies.[5] Petitioners have failed to meet this

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2 License Condition 10.29.

3 *Umetco Minerals Corp.*, 36 NRC 112, 115-16 (1992).

4 10 C.F.R. § 2.788 (emphasis added). As the full Commission has ruled, "[t]he stringent four-part standard . . .makes it difficult for a party to obtain a stay of any aspect of a Licensing Board Proceeding." *Sequoyah Fuels*, 40 NRC 1 (1994).

5 10 C.F.R. § 2.788.

burden because they have not "come forth with more than general or conclusory assertions" with respect to these four showings.[6]

a. Likelihood of success on the merits

Petitioners have not satisfied their burden of making a *strong showing* that they are likely to succeed on the merits. In trying to convince the Board that they prevail on this primary factor for a stay showing, Petitioners rely almost exclusively on their National Historic Preservation Act[7] claim. In this context, Petitioners' assert that they have a strong "indeed virtually certain" likelihood of showing a violation by NRC of section 106 of the NHPA.[8] An analysis of the NHPA requirements demonstrates that Petitioners have overstated their case by failing to address thoroughly the statute and relevant regulations.

NHPA § 106 requires federal agencies to take into account the effect of any "undertaking" on "any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register [of Historic Places.]"[9] To comply with this requirement, federal agencies must, in consultation with the State Historic Preservation Officer (SHPO) and the Advisory Council on

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6 *Babcock and Wilcox,* 36 NRC 255 (1992).

7 16 U.S.C. § 470f.

8 Stay Request at 3. Petitioners cite *Attakai v. U.S.*, 746 F. Supp. 1395 (D. Ariz. 1990), for the proposition that the NRC's alleged violation of NHPA by itself constitutes sufficient grounds for issuance of a stay. That case, however, is irrelevant to this case because it involved the Department of Interior's failure to conduct an adequate Section 106 review before commencing actual construction of fences and livestock watering facilities on Indian lands. In contrast, HRI's proposed project is still in the planning stages, and no construction has taken place. As detailed below, the NRC staff and HRI will complete Section 106 review for each phase of the proposed project before initiating any actual construction.

9 16 U.S.C. § 470f.

Historic Preservation (the Council), determine whether any "historic properties" are located in the area of potential effects and address adverse effects, if any, on such properties.

Despite Petitioners' contention that an agency must complete the Section 106 review prior to the issuance of any license, NHPA regulations grant federal agencies considerable *flexibility* in implementing the Section 106 review and explicitly provide for phased review:

> Section 106 requires the Agency Official to complete the section 106 process prior to . . . the issuance of any license or permit. *The Council does not interpret this language to bar an Agency Official from expending funds on or authorizing non-destructive planning activities preparatory to an undertaking before complying with section 106, or to prohibit phased compliance at different stages in planning.*[10]

The Council also noted that "the procedures for the Agency Official set forth in these regulations may be implemented by the Agency Official in a *flexible manner* reflecting different program requirements, *as long as the purposes of section 106 . . . are met.*"[11] Accordingly, phased compliance with NHPA § 106 is permitted and HRI's license requires NRC to complete the Section 106 review before HRI undertakes any actual construction activities. Section 9.12 of the license requires NRC to conduct an extensive cultural resource inventory before any construction activities not previously assessed by NRC as follows:

> All disturbances associated with the proposed development will be completed in compliance with the National Historic Preservation Act of 1966, as amended, and its

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[10] 36 C.F.R. § 800.3(c) (emphasis added). Relying on this provision, the Ninth Circuit in *Yerger v. Robertson*, 981 F. 2d 460 (9th Cir. 1992), held that the issuance of an order by the U.S. Forest Service requiring removal of several resort buildings from a National Forest before the completion of the historical resources review process was permitted under the NHPA. The Court held that a condition in the order (virtually identical to that in Section 9.12 of HRI's license) provided that the actual removal work would not be initiated until the Section 106 consultation process was complete. The Court further noted that 36 C.F.R. § 800.3(c) granted flexibility to federal agencies to adjust the review process in such a manner.

[11] 36 C.F.R. § 800.3(b) (emphasis added). In the preamble to these regulations, the Council expressed its intent that "its regulations primarily be of assistance to Federal agencies in complying with section 106 and *not be the source of unwarranted litigation regarding insubstantial procedural details.*" 51 Fed. Reg. 31115, 31117 (1986) (emphasis added).

implementing regulations (36 C.F.R. Part 800), and the Archaeological Resources Protection Act of 1979, as amended, and its implementing regulations (43 C.F.R. Part 7).

This provision complies fully with the NHPA and provides sufficient safeguards to ensure that potential impacts to "historic properties" will be considered before any construction begins.

Moreover, to date, NRC staff and HRI have cooperated closely in conducting a detailed cultural resources review of areas that will be potentially impacted by the first phase of the proposed development.[12] And contrary to Petitioners' assertions about the inadequacy of the Section 106 review for the proposed project, HRI has made diligent efforts to consult with all appropriate parties and has complied with all relevant standards in conducting its review.[13] Petitioners have a strong, *"indeed virtually certain"* likelihood of *losing* on this claim.[14]

b Irreparable injury

Petitioners have failed to show how a refusal to grant a stay will cause them irreparable injury. The affidavits of Richard Clement, Mark Pelizza and Craig Bartels, demonstrate that Petitioners' claims of immediate and irreparable injury are based on a misunderstanding of the ISL recovery process, erroneous assumptions, and speculation. Thus, Petitioners do not satisfy their burden of

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[12] Affidavit of Eric Blinman, ¶¶ 7-29.

[13] *Id. See also* Affidavit of Lorraine Heartfield ¶¶ 21-36.

[14] In their Motion for a Stay, Petitioners make general allegations that they are likely to prevail on their other claims. Such general allegations provide no basis for granting a stay. For example, Petitioners claim that HRI's license application is disjointed and incomplete. However, Petitioners have provided no basis for rejecting NRC Staff's determination that the application was complete and that it provided the information required to make a licensing decision. Because the stay request merely lists these issues, without explaining "in any specific or meaningful way why [Petitioners] will likely prevail on the merits" they do not satisfy this stay criterion. *Kerr-McGee*, 31 NRC 263 (1990). Generalized complaints cannot stand in the face of presumed agency expertise and discretion.

establishing "irreparable injury that is *both great and certain.*"[15] Their general and conclusory allegations that HRI "may take actions that cannot be reversed" does not satisfy the requirement.[16] Rather, Petitioners are required to show that if the CUP proceeds in accordance with the phases required by the license, and if Petitioners were to prevail on its claims, petitioners *could not obtain relief.*[17] This Petitioners have failed to do.

Petitioners try to make much of potential impacts to drinking water. These claims lack merit. As NRC is aware, before HRI can begin mining, EPA must approve an underground injection control (UIC) permit and an aquifer exemption for the project. Because HRI currently has an aquifer exemption for Section 8 of Church Rock, *by definition* there is no drinking water there.[18] Moreover, before HRI can begin mining at Section 17, Unit 1 or Crownpoint, the company must secure a UIC permit and aquifer exemption for those projects. Like the aquifer exemption for Section 8, these aquifer exemptions will ensure that there can be no significant impact on drinking water sources.[19]

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15 *Babcock and Wilcox*, 36 NRC 355 (punctuation omitted) (emphasis added).

16 *Babcock and Wilcox*, 36 NRC 255. Petitioners claim that the NRC staff's alleged failure to adequately evaluate the potential effects of the proposed development to historical and cultural resources constitutes "*implied* irreparable damage" sufficient to warrant a stay, citing *Colorado River Tribes v. Marsh*, 605 F. Supp. 1425, 1440 (C.D.Ca. 1985). However, that case makes it crystal clear that the doctrine of *implied* irreparable damage applies *only* to cases involving a violation of the National Environmental Protection Act (NEPA). *Id.* at 1439. Under this doctrine, where a petitioner demonstrates a *substantial* NEPA violation, the violation will be deemed to constitute irreparable injury and an injunction will issue without detailed consideration of traditional equity principles. This doctrine therefore is not applicable to the NHPA, and we note that the doctrine has been adopted only by the Ninth Circuit so that it is unlikely to apply in this forum.

17 *Cleveland Electric Illuminating Co.*, 22 NRC 743, 1985 NRC Lexis 24, *11 (1985).

18 EPA's regulations provide that an exempted aquifer is one that "does not currently serve as a source of drinking water" and "cannot now and will not in the future serve as a source of drinking water." 40 C.F.R. § 146.4. As noted by Mark Pelizza, the water in the ore zone contains very high levels of *naturally occurring* radionuclides. For example, radon levels are far in excess of state or federal groundwater standards. Pelizza Aff. at ¶ 18. One way to show that the aquifer cannot now and will not in the future serve as a source of drinking water is to demonstrate that the aquifer contains commercially producible minerals. 40 C.F.R. § 146.4(b)(1).

19 HRI notes that, yet again, Petitioners direct their allegations of claims of drinking water contamination to Unit 1 and Crownpoint. *See, e.g., Wallace* Aff. at ¶ 16 (concerns with Unit 1 and Crownpoint).

Petitioner's affiant Resnikoff claims that land application of wastewater poses a threat of immediate and irreparable injury through excess exposure to radiation[20] and supports his conclusion by assuming that HRI will *only* restore by groundwater sweep *and* will land apply *all* of its wastewater. These assumptions, on which Resnikoff bases his dose calculations, are erroneous. Final decisions about wastewater disposal need not, will not, and, indeed, cannot be made until HRI has assessed, among other things, the mix of the uranium market conditions, technical and cost considerations.[21]

Similarly, Resnikoff's general allegation of "immediate and irreparable" harm resulting from land disturbance in preparation for uranium recovery development is based on the assumption that HRI will construct roads and build a processing facility on Section 17, *which is the only portion of the CUP with existing soil contamination.*[22] HRI has no intention of performing any such activities on Section 17.[23] The only activity that will occur on that property is the installation of wells and some trenching, activities that will cause little, if any, soil disturbance beyond that involved in ranching or farming activities.[24]

Further, Petitioners claim to have demonstrated an *"immediate* threat of irreparable injury"[25] is belied by their public acknowledgment that there is *no immediate threat*. As a representative of SRIC

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20 Stay Request at 6.

21 Clement Aff. at ¶ 12.

22 Pelizza Aff. at ¶ 21.

23 Pelizza Aff. at ¶ 21.

24 As prior NRC caselaw has noted, "the limited amount and kind of site work . . . scheduled during the period the appeals are pending vitiates [Petitioners'] claim of irreparable injury." *Kerr-McGee*, 31 NRC 263, 1990 NRC Lexis 9, *13 (1990).

25 Stay Request at 5.

stated to the press, "It's not like tomorrow [HRI's] going to start producing uranium. . . . They've got to jump through a number of hoops."[26] Similarly, Petitioners claims of irreparable harm are undercut by their acknowledgment that HRI must await its UIC permit before beginning operations.[27]

ISL mining has been conducted on a commercial scale in the United States for twenty years and HRI's proposed operating procedures and license conditions reflect the experience gained by HRI and other producers during that time. ISL operations have generated no significant environmental problems, and Petitioners can point to no instances of any actual harm to public health. Rather, Petitioners throw a laundry list of speculative allegations before the Board[28] that do not constitute the "imminent, irreparable injury required for staying a licensing decision."[29]

c Harm to other parties

As the Board has noted, where a Petitioner fails to satisfy its burden on the first two factors, it is unnecessary to give lengthy consideration to the other factors.[30] However, with regard to the third factor, Petitioners nevertheless have failed to make the required showing concerning harm to "*other*" parties. Although Petitioners claim that HRI would not be harmed because the company must await

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26 Gallup, NM *Independent*, p.1, January 10, 1998 (attached to this Response).

27 Stay Request at 10, n.11. In this regard, the Atomic Safety and Licensing Appeal Board has noted that a Petitioner's claim that the licensee would not be harmed by a stay because it might not be able to move forward with operations "necessarily undercut [Petitioners] claims, under the Second Stay criterion, of irreparable harm to its own interest." *Philadelphia Electric Co.*, 21 NRC 1995, 1985 NRC Lexis 77, *15 (1985).

28 For some of their claims of immediate and irreparable injury Petitioners rely on their concerns in their hearing petition. This provides an insufficient basis for a stay request. *Babcock & Wilcox*, 36 NRC 255 (1992).

29 *Cleveland Electric Illuminating Co.*, 22 NRC 743, 1985 NRC Lexis 24, *10, n. 20 (1985); *see also*, *Public Service of New Hampshire*, 31 NRC 219, 1990 NRC Lexis 15, *84 (1990).

30 *Sequoyah Fuels Corporation and General Atomics,* 40 NRC 1 (1994). *See also*, *Babcock and Wilcox*, 36 NRC 255 (irreparable injury is so central that failing to demonstrate it requires a particularly strong showing relative to the other factors).

other approvals (such as an underground injection control permit) anyway before commencing uranium recovery operations, Petitioners ignore the substantial harm a stay would cause to HRI's ability to attract investors.[31] Moreover, Petitioners have failed to meet their burden on the two most important factors, even a showing that the stay might *benefit* HRI (which it would not) will not justify granting the motion.[32]

d The public interest

Finally, Petitioners have not met their burden of demonstrating that the *public interest* lies in granting their motion. Although Petitioners claim that the public interest lies in preserving cultural and archaeological resources, this claim provides little support for a stay request. As described above, there is a statutory process under the NHPA for protecting these resources, and NRC and the licensee are in full compliance. Similarly, Petitioners' claim that the public interest lies in preserving their right to a hearing prior to a licensing action lacks merit. Indeed, the Commission has noted that its Rules of Practice "do[] not preclude, *and in fact contemplate[]*, the grant of a license by the NRC staff prior to any initial decision in any proceeding convened as a result of a hearing request."[33] In that notice the Commission expressly recognized that there is an interest in the "right *of the applicant* to a reasonably prompt administrative assessment of and determination about its application so it can go forth with its planned activities."[34] Moreover, the Commission has acknowledged the governmental

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31 Clement Aff. at ¶¶ 14-15. It is appropriate to consider this type of harm to the licensee when ruling on a stay request. *Babcock & Wilcox*, 36 NRC 255, 1992 NRC Lexis 50, *21 (1992).

32 *Sequoyah Fuels*, 40 NRC 1.

33 52 Fed. Reg. 20089, 20090 (emphasis added).

34 *Id. See* Clement Aff. at ¶ 15 noting that HRI has spent $6.5 million dollars over the past ten years in the NRC licensing process.

interest in avoiding administrative delay.[35] Accordingly, the public interest lies in *denying* Petitioners' Motion.

III Petitioners are not entitled to a pre-licensing hearing

As noted directly above Petitioners have provided no reason that would justify a prelicensing hearing on this license. Because Petitioners have not made the strong showing required to obtain a stay, the Presiding Officer should deny Petitioners Stay Request and Request for Prelicensing Hearing.

V Conclusion

For the aforementioned reasons, HRI respectfully requests that the Presiding Officer deny all relief sought in Petitioners' Motion.

Respectfully submitted the 26th day of January, 1998.

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[35] *Id.* Similarly, in the Preamble to the Final Rule, the Commission acknowledges that it "contemplates that when the staff is able to reach a positive conclusion about the safety and environmental consequences of a proposed licensing request, it will take action despite a pending hearing request." 54 Fed. Reg. 8269, 8273 (1989).