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

'98 JAN 15 P4:46

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

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

Administrative Judge
Thomas D. Murphy, Special Assistant

In the Matter of)	
)	
HYDRO RESOURCES, INC.)	Docket No. 40-8968-ML
12750 Merit Drive)	
Suite 1210 LB12)	ASLBP No. 95-706-01-ML
Dallas, TX 75251)	
)	January 15, 1998

ENDAU' T'S AND SRIC'S MOTION FOR STAY, REQUEST FOR PRIOR
HEARING, AND REQUEST FOR TEMPORARY STAY

Introduction

Pursuant to 10 C.F.R. §§ 2.1263 and 2.788, Petitioners Eastern Navajo Dine Against Uranium Mining ("ENDAUM") and Southwest Research and Information Center ("SRIC"), request the Presiding Officer stay the effectiveness of the Nuclear Regulatory Commission ("NRC" or "Commission") Staff's issuance of a materials license to Hydro Resources Inc. ("HRI") for an in situ leach ("ISL") mine and milling operation in Church Rock and Crownpoint, New Mexico, pending the completion of (a) a hearing on the application and (b) historic properties review. Petitioners further request that the Presiding Officer immediately "grant a temporary stay to preserve the

status quo without waiting for filing of any answer." 10 C.F.R. § 2.788¹.

On December 31, 1997, the Presiding Officer denied Petitioners' housekeeping stay motion without prejudice to their right to seek a 10 C.F.R. § 2.1263 stay. The procedural history of this matter is described in that order. The Staff issued a materials license to HRI on January 5, 1998.

Petitioners are Entitled to a Prelicensing Hearing

Under the Commission's regulations, the Atomic Energy Act § 189(a), 42 U.S.C. § 2239(a), and the due process clause of the U.S. Constitution, Petitioners are entitled to a prelicensing hearing on this application, because it poses significant hazards to the health, safety, and property of the members of ENDAUM and SRIC. Although "a prelicensing hearing is not necessarily required" for every source materials license because the agency processes thousands of materials licenses every year and the vast majority of those involve "substantially less hazard" than power reactors, the Commission has recognized that the particular circumstances of a case may entitle interested persons to a prelicensing hearing. Notice of Proposed Rule, Informal Hearing Procedures for Materials Licensing Adjudications, 52 Fed. Reg. 20089, 20090 (May 29, 1987). In this case, the licensing action poses a significant threat to the health, safety, and property of Petitioners' members, as discussed *infra* pp. 5-7.

¹ Pursuant to 10 C.F.R. § 2.788(f), Petitioners have made "all reasonable efforts to inform the other parties of the application" for temporary stay by serving this motion by overnight delivery to counsel for the Staff, the Applicant, and all petitioners/intervenors who have known street addresses to ensure receipt contemporaneously with filing.

Moreover, HRI is likely to take actions, such as the injection of lixiviant, before a hearing is completed which cannot be reversed in the event that Petitioners prevail in the hearing. See *infra* pp. 5-7. In addition, the NRC has a special duty under its trust obligation to Native Americans and Executive Order 12898 on Environmental Justice, 59 Fed. Reg. 7629, 7630 (February 16, 1994), to ensure that Native Americans, such as the members of ENDAUM and SRIC, receive a meaningful hearing before a license authorizing activities that threaten their health, environment, and property takes effect. See Second Amended Request at 171-177, 184-186. Consequently, a prelicensing hearing is required in this case.

Petitioners Satisfy the Stay Standard

The four factors governing the issuance of a stay under 10 C.F.R. §§ 2.1263 and 2.788 dictate the issuance of a stay here.

(a) There is a strong likelihood that Petitioners will prevail on the merits. Petitioners have a strong -- indeed, virtually certain -- likelihood of showing that the NRC violated Section 106 of the National Historic Preservation Act, 16 U.S.C. § 470f, by issuing the license before completing the Section 106 review process.² It is beyond

² Section 106 and implementing regulations of the Advisory Council on Historic Preservation require federal agencies to take into account the effect of any "undertaking," such as the issuance of a license, on historic sites in consultation with the State Historic Preservation Officer (SHPO), Indian tribes and other interested parties "prior to issuance of any license" and to provide the Advisory Council on Historic Preservation "a reasonable opportunity to comment" on the effects of the proposed undertaking. 16 USC 470f (emphasis added); 36 CFR 800.3.

Petitioners counsel advised the NRC Staff by facsimile on December 23, 1997, that the Staff's intended issuance of the license at the current stage in the Section 106 process would violate the NHPA. Letter from Susan G. Jordan to Joseph J. Holonich, attached hereto as

dispute that an agency must complete the Section 106 review "*prior* to the issuance of any license" effectuating the undertaking. 16 U.S.C. § 470f (emphasis added). In flagrant violation of this requirement, the NRC has issued a license while it is still in the early steps of Section 106 review. Affidavit of William A. Dodge, ¶¶ 23-29 (January 9, 1997), Exhibit 2 hereto.³ This violation is not remedied by license condition 9.12, which merely asserts that Section 106 will be complied with and repeats boilerplate procedures from Section 106 regulations (36 C.F.R. § 800.11) concerning the treatment of artifacts discovered where Section 106 review has been properly completed. By itself, the NRC Staff's violation of the NHPA constitutes sufficient grounds for issuance of a stay. *Attakai v. U.S.*, 746 F.Supp. 1395, 1408-1409 (D.Ariz. 1990). Moreover, this violation is an "extraordinary case" which warrants an immediate temporary stay to preserve the status quo. 10 C.F.R. § 2.788(f).

In addition, Petitioners have a strong likelihood of success on their other claims, as demonstrated by their Second Amended Request, which is incorporated herein by

Exhibit 1. The Staff has not responded to counsel's letter.

³ Moreover, to the limited extent that the Staff has conducted a Section 106 review, it is abysmally inadequate to satisfy the requirements of the NHPA. The Staff has failed to properly consult with the appropriate tribes, interested parties including Petitioners, and the Navajo Nation SHPO; has improperly excluded from review areas that will be disturbed by activities authorized by the license; and has relied on cultural resource reports, which do not comply with Section 106, National Park Service Bulletin 38, Navajo Nation requirements, and professional standards. See Dodge Affidavit ¶¶ 30-43; Affidavit of Klara B. Kelley, Ph.D. (January 8, 1998), attached hereto as Exhibit 3; Letter from Susan G. Jordan to Joseph J. Holonich (December 23, 1997), Exhibit 1; Second Amended Request 118-126.

reference.⁴ Petitioners' likelihood of success on the merits is also supported by the expert affidavits submitted herewith.⁵

(b) Issuance of the license poses an immediate threat of irreparable injury to Petitioners. As discussed above, the Staff's blatant violation of the NHPA constitutes sufficient grounds for issuance of a stay, and thus the Presiding Officer may grant a stay without considering the other factors. In any event, Petitioners have demonstrated an immediate threat of irreparable injury.

First, the NRC Staff's failure to appropriately identify and evaluate the potential effects to historical and cultural resources prior to issuing the license constitutes implied irreparable damage sufficient to warrant a stay. *Colorado River Tribes v. Marsh*, 605 F. Supp. 1425, 1440 (C.D. Calif. 1985).

Second, upon commencement of mining, immediate and irreparable injury will

⁴ While the Licensing Board has held that unsupported reliance on statements of concern is insufficient showing, *Babcock and Wilcox (Apollo, Pennsylvania Fuel Fabrication Facility)*, LBP-92-31, 36 NRC 255, 263-264 (1992), Petitioners' statement of their areas of concerns go far beyond the typical generalized statements of concerns by providing detailed supporting factual and legal bases that demonstrate a strong likelihood of success on the merits.

⁵ These affidavits further substantiate Petitioners' concerns, inter alia, that the license fails to protect groundwater quality (Concerns ## 3 and 4), Affidavit of Richard J. Abitz (January 9, 1998), Exhibit 4 hereto, Affidavit of Michael Wallace (January 13, 1998), Exhibit 12 hereto; that the license application is disjointed and incomplete (Concern 2), see, e.g., Abitz Affidavit ¶¶ 7-11, Wallace Affidavit ¶¶ 5-10; and that HRI and the Staff violate Environmental Impact Statement and Report requirements (Concern 12), by inter alia, understating the significance of environmental impacts and failing to provide adverse information, Abitz Affidavit, Wallace Affidavit, Dodge Affidavit, Exhibit 2 hereto, Kelley Affidavit, Exhibit 3 hereto.

occur to the health and environment of ENDAUM and SRIC members.⁶ At all three mining sites, mining will rapidly contaminate the groundwater which is either currently a drinking water source or is of sufficient quality to provide a future drinking water source. Abitz Affidavit, ¶¶ 11-13; Second Amended Request at 34-35, 40 n.21, 71-72.⁷ The members of ENDAUM and SRIC whose drinking water comes from those wells will suffer irreparable injury to their health from drinking the contaminated water. See Abitz Affidavit, ¶¶ 20, 26; Wallace Affidavit, ¶¶ 16, 27, 42, 46; Second Amended Request at 3-12 and 34-35 and affidavits cited therein; ENDAUM member affidavits, Exhibits 6-10 hereto. Because HRI's proposed groundwater restoration will leave contaminants in the groundwater at concentrations exceeding ~~and~~ their existing low concentrations and drinking water standards, the harm to their drinking water source and environment is irreparable. Abitz Affidavit, ¶¶ 27-40.

Third, HRI's land application of wastewater poses a threat of irreparable injury to the health of Larry J. King, an ENDAUM member, and to his property. Mr. King resides within the Church Rock project area and grazes cattle under a permit for lands

⁶ Even though HRI needs approvals from other agencies to commence mining (see *infra* n.10), these other approvals may issue before this adjudication is completed. Moreover, under 10 C.F.R. § 12.1263, this is Petitioners' last opportunity to seek a stay of license issuance.

⁷ Although the license prohibits mining at the Crownpoint site before the Crownpoint municipal water supply wells are relocated (License Condition 10.27), the license places no such constraint on mining at the Unit 1 site located 2.5 miles west of Crownpoint. Contaminants mobilized by mining at the Unit 1 site will rapidly migrate to the Crownpoint drinking water supply wells, escaping detection by HRI's grossly inadequate monitoring scheme, and cause the drinking water supply wells to exceed safe concentrations of uranium and exceed drinking water standards for other contaminants. Abitz Affidavit, ¶¶ 11-13, 14-26, Exhibit 4 hereto; Wallace Affidavit, ¶¶ 13-16, Exhibit 5 hereto.

within the Church Rock mining site and on which HRI intends to land apply wastewater. Affidavit of Larry J. King (October 8, 1997), ¶¶ 4-5, Exhibit 10 hereto; King Family Grazing Permit, Exhibit 11 hereto. Contrary to the Staff's analysis, the radiation dose from land application of wastewater to local residents, such as Mr. King, is likely to exceed regulatory limits. Affidavit of Marvin Resnikoff (January 13, 1998), ¶¶ 5, 12-24, Exhibit 13 hereto.⁸

Moreover, well before additional approvals are obtained and mining commences, actual irreparable injury will result from activities in preparation for mining and processing, such as ground clearing, construction of access roads, and digging of trenches for installation of wellfield process fluid trunk lines and gathering lines at all three sites, and construction of foundations and buildings for the satellite processing facilities at the Church Rock and Unit 1 sites.⁹ At the Church Rock site, these ground-disturbing activities will release soil contamination from previous mining and thereby cause irreparable injury to the health and property of ENDAUM member

⁸ The Staff recommends that HRI compensate grazing permit holders for interruption of grazing during project construction and operation." Recommendation 14 in attachment to letter from Joseph J. Holonich, NRC, to Richard F. Clement, Jr., HRI (December 20, 1996), in FEIS Appendix C. Even if this recommendation were binding, it would not render the harm to Mr. King reparable because permit holders would not be compensated for the permanent contamination of their land, Mr. King would not be compensated for the lost use and enjoyment of his homesite lands, and damages are inadequate to compensate Mr. King for precluding his planned continuation of his family's 60-year traditional use and occupation of Sections 16 and 17. See King Affidavit, ¶ 5; King family Grazing Permit, Exhibit 11 hereto.

⁹ See FEIS at 2-26 and 2-28. Approximately 90 percent of the Church Rock site and about 70 percent of the Unit 1 and Crownpoint sites would be disturbed during project construction and operation. Id. The license does not prohibit ground disturbing preparation activities before HRI obtains other permits and approvals needed to mine.

Larry J. King. Resnikoff Affidavit, ¶ 27, Exhibit 13 hereto. At all three sites, such ground disturbance would destroy, damage, or disturb archaeological and traditional cultural resources; thus, because these resources have not been adequately identified and no valid treatment plan is in place to protect them, irreparable harm to these resources will result from initial ground disturbance. Dodge Affidavit, ¶¶ 2, 28, 44, Exhibit 2 hereto; Kelley Affidavit, ¶¶ 22, 26-30, Exhibit 3 hereto.

(c) Issuance of a stay is in the public interest. Unquestionably, the public interest lies in issuance of a stay. At issue is the protection of the Crownpoint municipal water supply wells, the sole source of drinking water for 5,000 to 15,000 people. Second Amended Request at 17. The public interest would be ill-served by allowing the project to proceed before an evidentiary hearing on the significant risks that mining at Crownpoint and Unit 1 poses to the lifeline of these communities.

The Presiding Officer must also be "mindful" that "advancement of the public interest" lies in preserving cultural and archaeological resources. *Colorado River Tribes v. Marsh*, 605 F. Supp. at 1440. If mining is allowed to proceed before completion of an adequate Section 106 process, the American public will lose the "means by which to better understand the history and culture of the American Indians" (*id.*) that has existed since pre-Columbian times. Kelley Affidavit at ¶ 27.

Finally, a stay will serve the public interest by ensuring that Petitioners are not effectively deprived of their right to a prior hearing. See *supra*, pp. 2-3. The Native

Americans affected by the licensed activities have lived, worked, and worshipped on land in the Church Rock and Crownpoint area for generations. They have raised valid and well-substantiated concerns that the licensed activities will threaten their lives and health, destroy their sacred places, and deprive them of their livelihoods for generations to come. The NRC itself has acknowledged the environmental hazards of the project by preparing an EIS. The NRC's commitment to implement Executive Order 12898 resolves that the agency will ensure that Native Americans affected by such hazardous projects receive a meaningful opportunity to participate. To allow hazardous and irreversible actions by HRI, before a hearing has been conducted, would make a mockery of that commitment.

(d) Any harm to any other party is outweighed by the foregoing factors in this case. A stay pending completion of this adjudication would cause no undue harm to HRI. First, Uranium Resources Inc. ("URI"), HRI's parent corporation which will sell the yellowcake produced by this project, can meet its delivery obligations through its routine practice of purchasing uranium through long-term contracts and on the spot market to meet its delivery obligations,¹⁰ or by production from its other mines. For example, URI has said that it may accelerate production activities scheduled to begin in 1998 at its Vasquez Texas mine if a possible hearing on expansion of its Kingsville

¹⁰ See Uranium Resources, Inc., Annual Report on Securities and Exchange Commission ("SEC") Form 10-K for the Fiscal Year Ended December 31, 1996, at 1-2, Exhibit 22 to Second Amended Request.

Dome Texas mine delays that project. URI SEC Form 10-Q for Quarter Ended September 30, 1997, Exhibit 5 hereto.

Second, although HRI may obtain all of the various permits it needs before this hearing is concluded, it is likely to be some time before that occurs.¹¹ Thus, issuance of a stay will not, by itself, cause immediate harm to HRI.

Nor would the stay harm the Staff. The only burden imposed on the Staff by the stay would be completion of the Section 106 process prior to license issuance -- a burden already imposed by statute. 16 U.S.C. § 470f.¹²

Conclusion and Request for Relief

For the foregoing reasons, Petitioners request (1) a stay of the date of effect of the license issuance pending completion of (a) a hearing in this matter, and (b) completion of the Section 106 process, and (2) an immediate, temporary stay before

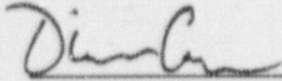
¹¹ Before HRI can commence mining and hence generate revenue, it must obtain several additional permits and approvals, including Class III injection well permits and aquifer exemptions from the United States Environmental Protection Agency ("USEPA") for mining operations within Indian Country, and similar authorizations for any operations that may be determined to be outside Indian Country. FEIS at 1-5; Consolidated Operations Plan Revision 2.0 (August 15, 1997) at 8-10; Second Amended Request at 87-89, 164-168. Such permits either have not yet been applied for, are still being processed, or are in litigation. In August 1997, HRI and the New Mexico Environment Department petitioned the United States Court of Appeals for the Tenth Circuit for review of USEPA's determination that USEPA has jurisdiction to issue injection well permits for the Church Rock site. *HRI, Inc. v. USEPA*, No. 97-9556 (August 27, 1997); *New Mexico Environment Department v. USEPA*, No. 97-9557 (August 27, 1997). HRI and NMED have sought and obtained an extension of the briefing schedules in those cases such that briefing will be completed in late February 1998.

¹² The Eastern Navajo Allottees Association is not a party and hence it is inappropriate to consider whether a stay would harm the association. In any event, the payments to the allottees depend on final approval by the Bureau of Indian Affairs according to affidavits submitted with their intervention petition, and payments based on production will depend on whether HRI receives the additional permits necessary to mine. The interests of all other petitioners in receiving a hearing on their concerns would be served by a stay.

any answer is filed pending a decision on this motion.

DATED: January 15, 1998

Respectfully submitted,



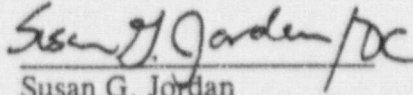
Diane Curran

HARMON, CURRAN & SPIELBERG

2001 "S" Street, Suite 430

Washington DC 20009

(202) 328-3500



Susan G. Jordan

Douglas Meiklejohn

Douglas W. Wolf

NEW MEXICO ENVIRONMENTAL

LAW CENTER

1405 Luisa Street, Suite 5

Santa Fe NM 87505

(505) 989-9022

INDEX OF EXHIBITS

- 1 Letter from Susan G. Jordan to Joseph J. Holonich (December 23, 1997)
- 2 Affidavit of William A. Dodge (January 9, 1998)
- 3 Affidavit of Klara B. Kelly, Ph.D. (January 8, 1998)
- 4 Affidavit of Richard J. Abitz (January 9, 1998)
- 5 URI SEC Form 10-Q for Quarter Ended September 30, 1997
- 6 Affidavit of Mitchell W. Capitan (January 7, 1998)
- 7 Affidavit of Grace A. Tsosie (January 11, 1998)
- 8 Affidavit of Calvin Murphy (January 7, 1998)
- 9 Affidavit of Herbert Enrico Sr. (January 8, 1998)
- 10 Affidavit of Larry J. King (October 8, 1997)
- 11 King Family Grazing Permit (issued October 1, 1994)
- 12 Affidavit of Michael G. Wallace (January 13, 1998)
- 13 Affidavit of Marvin Resnikoff (January 13, 1998)



(VIA FACSIMILE AND U.S. MAIL)

December 22, 1997

Joseph J. Holonich, Chief
Uranium Recovery Branch
Division of Waste Management
Office of Nuclear Material Safety and Safeguards
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Re: Matter of the Application of Hydro Resources Inc., Docket No. 40-8968-ML

Dear Mr. Holonich:

As you are aware, we represent Eastern Navajo Diné Against Uranium Mining ("ENDAUM") and the Southwest Research and Information Center ("SRIC"), who have requested an evidentiary hearing in the matter of the Application of Hydro Resources Inc. ("HRI"), Docket No. 40-8968-ML.

By letter of August 20, 1997, we provided you with a copy of ENDAUM and SRIC's Second Amended Request for Hearing, Petition to Intervene, and Statement of Concerns ("Second Amended Request") which was filed with the Atomic Safety and Licensing Board. In our accompanying letter, we asked you to supplement and circulate for comment the Final Environmental Impact Statement ("FEIS") for the HRI project to reflect new information and to correct a number of deficiencies in the FEIS that are discussed in the Second Amended Request, including but not limited to the new information that the NRC intends to issue HRI a performance-based license; significant changes in the wellfield boundaries; HRI's intended construction of a an electric substation to serve the project, which is not evaluated in the FEIS; and incomplete and inaccurate cultural resources information. See, e.g., Second Amended Request at 180-183. The NRC has not responded to our August 20, 1997 request for a supplemental FEIS.

Moreover, the FEIS errata sheet that the Staff issued in November 1997, fails to correct significant errors in the FEIS depiction of existing ground water quality raised in our Second Amended Request and request for supplementation. Revised FEIS Table 3.13 "Crownpoint site water quality data, Westwater Canyon aquifer" does not correct FEIS Table 3.13's gross exaggeration of existing groundwater contaminant concentrations resulting from the improper inclusion of data from wells that yielded anomalously high concentrations. See Second Amended Request at 59-60 and note 45 (discussing radium-226 concentrations as an example). Even if the Staff's revised calculations turn out to be correct for the sample data obtained from

the wells cited, the revised table remains invalid because anomalously high concentrations were not discarded from the data set.

In providing you with the Second Amended Request, we also put the NRC on notice that ENDAUM and other petitioners in the HRI licensing proceeding are "parties likely to have knowledge of or concerns with historic properties in the area" (36 C.F.R. § 800.4(a)) and have not been contacted by the NRC to participate in the National Historic Preservation Act § 106 (16 U.S.C. § 470f) process for the HRI licensing. ENDAUM and SRIC's concerns and knowledge of the project and surrounding area that will be affected -- including lands in which they have property interests -- are detailed in their Second Amended Request (see, e.g., pp. 3-12, earlier petitions for hearing filed with the Licensing Board and served on the Staff, and supporting affidavits of their members filed and served therewith. Yet the NRC has still not invited ENDAUM or SRIC to participate in the § 106 process as interested parties. By this letter, ENDAUM and SRIC reiterate to you their qualification as concerned and knowledgeable interested parties and their desire to officially participate as consulting parties.

In addition, the Second Amended Request informed you of our position that issuance of the license before completion of the § 106 process would violate § 106 and 36 C.F.R. § 800.3(c). Second Amended Request at 125-126. The Staff's announcement on December 5, 1997, that it would issue the license in 30 days heightens our concern that the license will issue prior to completion of the § 106 process.

Please immediately advise me in writing (1) if we are incorrect that the NRC Staff does not intend to supplement the FEIS to address the significant new information and deficiencies that we identified; (2) whether you will consult with ENDAUM and SRIC as interested parties in the NHPA § 106 process, and (3) whether you intend to issue the license for the project without completing the NHPA § 106 process with regard to the area of potential effect of all activities authorized for the five-year license period. Thank you for your prompt attention.

Sincerely,



Susan G. Jordan

cc by U.S. Mail:

Shirley Ann Jackson, NRC
Claudia Nissley, Advisory Council on Historic Preservation
Glenna Dean/Lynn Sebastian, NMSHPO
Alan Downer, NNHPD
Leigh Kuwanwisiwma, Hopi HPD
Joe Dishta, Zuni HHPO
Ron Shutiva, Governor, Acoma Pueblo
Roland Johnson, Governor, Laguna Pueblo
Roy Bernal, AIPC
Felicia Marcus, USEPA Region IX
Ephraim Leon-Guerrero, USEPA Region IX