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OFFICE OF SECRETARY  
RULEMAKING AND  
ADJUDICATIONS STAFF

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE PRESIDING OFFICER

In the matter of )

) Docket No. 40-8968-ML

HYDRO RESOURCES, INC. )

2929 Coors Road, Suite 101 )

Re: Leach Mining and Milling License

Albuquerque, New Mexico 87120 )

NRC STAFF'S RESPONSE TO ENDAUM AND SRIC PRESENTATION  
ON NHPA AND NAGPRA ISSUES

INTRODUCTION

On December 7, 1998, Intervenors Eastern Navajo Diné Against Uranium Mining (ENDAUM) and Southwest Research and Information Center (SRIC) filed a joint written presentation on various cultural resource issues,<sup>1</sup> pursuant to 10 C.F.R. § 2.1233. In accordance with the Presiding Officer's Memorandum and Order (Scheduling and Partial Grant of Motion for Bifurcation), dated September 22, 1998 (unpublished) (September 22 Order), and the subsequent Joint Notice of Modification of Schedule for Written Presentations dated November 5, 1998, this December 7 filing is part of a series of written presentations on issues involving the proposed in situ leach (ISL) uranium mining by licensee Hydro Resources, Inc. (HRI). Pursuant to the September 22 Order (as later modified by the Presiding Officer), HRI filed its response to this December 7 filing on January 11, 1999; the Staff hereby submits its response to these filings.

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<sup>1</sup> The ENDAUM and SRIC December 7 brief regarding the National Historic Preservation Act, 16 U.S.C. §§ 470-470w-6 (NHPA), the Native American Graves Protection and Repatriation Act, 25 U.S.C. § 3001 *et seq.* (NAGPRA), and other cultural resource issues, will be referred to as SRIC's NHPA Brief.

As discussed below, the Staff finds that SRIC's NHPA Brief does not support action being taken against HRI's 10 C.F.R. Part 40 license, issued on January 5, 1998, or any of the other relief sought by SRIC and ENDAUM. *See* SRIC's NHPA Brief, at 54.

### BACKGROUND

Many of the issues now argued in SRIC's NHPA Brief have already been litigated in this proceeding following the January 15, 1998 filing of "ENDAUM's and SRIC's Motion For Stay, Request For Prior Hearing, and Request For Temporary Stay" (Stay Motion).<sup>2</sup> As stated in the February 20, 1998 "NRC Staff's Response To Motion For Stay, Request For Prior Hearing, and Request For Temporary Stay" (Staff's Stay Response), the Staff's NHPA review process formally began by sending a letter to New Mexico's State Historic Preservation Officer (SHPO) dated October 2, 1996 (October SHPO letter).<sup>3</sup> As described in the October SHPO letter and the attachments listed therein, the initial NHPA focus was on the first five years of HRI's mining operations. This phased approach was in accordance with the SHPO's expressed preference. *See* October SHPO letter, at 1. The Navajo Nation, among other Native

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<sup>2</sup> In response to the Stay Motion, which argued that the January 5, 1998 license issuance was unlawfully premature under NHPA section 106, 16 U.S.C. § 470f, the Presiding Officer imposed a temporary stay on the effectiveness of HRI's license on January 23, 1998. *See* LBP-98-3, 47 NRC 7 (1998). As discussed *infra*, this stay was subsequently lifted (as was an additional stay imposed by the Commission), after the Presiding Officer concluded that ENDAUM and SRIC had failed to make a strong showing on their NHPA claim.

<sup>3</sup> The October SHPO letter, and the October 31, 1996 response to that letter from the Navajo Nation Historic Preservation Department (NNHPD), are reproduced in Appendix C to the February 1997 Final Environmental Impact Statement, NUREG-1508 (FEIS).

American groups, was identified as an interested party in the NHPA process.<sup>4</sup> *Id.*, at 3. Copies of the October SHPO letter were sent to federal agencies and interested parties, including the Navajo Nation, on October 2, 1996.

By letter dated October 31, 1996 (NNHPD Response), Alan Downer, the NNHPD Director, agreed that incremental NHPA review of HRI's project in five-year segments was appropriate, and he committed the NNHPD to reviewing reports on Navajo traditional cultural properties (TCPs) as those reports were submitted.<sup>5</sup> *See* NNHPD Response, at 1. Mr. Downer further acknowledged that HRI's archaeological contractor would be in charge of seeing that the necessary TCP identifications were made within the initial five-year project area. *See id.*, at 2.

The Staff then sent Mr. Downer a summary of the NHPA process to be followed, and the work to be done by HRI's consultant concerning the identification of TCPs, by letter dated January 31, 1997 (a copy of which is reproduced in FEIS Appendix C). This letter closed with a request for "any direction or advice about advancing the [NHPA] review process and comments about the intended or ongoing survey work." The Staff received no response,

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<sup>4</sup> The Navajo Nation later entered into an agreement with the U.S. Department of the Interior (National Park Service), dated March 24, 1997, under which the Navajo Nation assumed NHPA responsibilities over "tribal lands," as that term is defined in the agreement. *See* Staff's Stay Response, Exhibit 1. The Navajo Nation, HRI, and New Mexico are still before the U.S. Court of Appeals for the Tenth Circuit, in litigation concerning whether HRI's ISL mining project lands are entirely within "Indian Country," as that term is defined in 18 U.S.C. § 1151. *See* ENDAUM/SRIC August 1997 second amended hearing request, Exhibit 25, regarding this dispute.

<sup>5</sup> As discussed, *infra*, after the FEIS was published in February 1997, the Museum of New Mexico's Office of Archaeological Studies authored a report (MNM Report), excerpts of which (at 15-22, and 159-61) were attached to the Staff's Stay Response as Exhibit 2.



verbal or otherwise, to this request. *See* affidavit of Robert Carlson, attached as Exhibit 3 to the Staff's Stay Response, at ¶8.

On June 19, 1997,<sup>6</sup> the Staff sent Mr. Downer a copy of the MNM Report, which had been received from HRI in April 1997. The MNM Report documented the presence of archaeological sites at HRI's Churchrock property, but found no TCPs. *See* Staff's Stay Response Exhibit 2, at 159-61. The Staff asked for NNHPD review and comment on the MNM Report, but received no response, verbal or otherwise, to this request. *See* Staff's Stay Response Exhibit 3, at ¶9. On November 20, 1997, the New Mexico SHPO's office concurred with the MNM Report's findings. *See* Staff's Stay Response, Exhibit 8.

As referenced *supra*, at 2 and n.2, in January 1998, the Staff issued HRI's license, ENDAUM and SRIC filed their Stay Motion, and the Presiding Officer imposed a temporary stay. The Presiding Officer revoked the temporary stay and denied the Stay Motion on April 2, 1998, finding that the phased NHPA compliance as described above "does not appear to violate the statute," and that ENDAUM and SRIC had accordingly failed to make a strong showing on their NHPA claim. LBP-98-5, 47 NRC 119, 125 (1998) (April Stay Decision).

On April 11, 1998, "ENDAUM's and SRIC's Petition For Review of LBP-98-5" (Review Petition) was filed with the Commission, and on April 16, 1998, the Commission issued an order imposing another temporary stay, pending its consideration of the Review

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<sup>6</sup> By letters of this same date, full copies of the MNM report were also sent for review and comment to (1) the New Mexico SHPO; (2) Roger Anyon, Director of the Pueblo of Zuni Heritage and Historic Preservation Office; and (3) Leigh Jenkins, Director of the Hopi Cultural Preservation Office. No response to these letters was received from Messrs. Anyon or Jenkins. *See* Staff's Stay Response Exhibit 3, at ¶10.



Petition. See CLI-98-4, 47 NRC 111 (1998). The Commission denied the Review Petition and lifted its temporary stay on June 5, 1998. See CLI-98-8, 47 NRC 314 (1998). Therein, the Commission did not reach the merits of the question whether NHPA section 106, 16 U.S.C. § 470f, requires completion of the NHPA process prior to the issuance of a license, but did state that it was "skeptical of whether the alleged NHPA injury will occur at all, much less immediately", citing HRI License Condition 9.12<sup>7</sup> and various HRI commitments to adhere to NHPA's requirements. CLI-98-8, 47 NRC 314, at 321-22 and nn. 8-10. The Commission also noted the lack of any clear identification of TCPs in affidavits of William Dodge and Dr. Klara Kelley (submitted in support of the January 1998 Stay Motion as Exhibits 2 and 3),<sup>8</sup> and the ambiguity of the NHPA regulations on which ENDAUM and SRIC relied to support their argument. See CLI-98-8, 47 NRC at 322-24 and nn. 11 and 17.

Earlier, by letters dated May 20, 1998, the Staff had sought comment from the SHPO, NNHPD, and others<sup>9</sup> regarding the Staff's proposed determination of no effect relating to historic properties found on Section 8 of HRI's Church Rock site, and on Section 12, a land

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<sup>7</sup> HRI License Condition 9.12 states in part that before engaging in any construction activity not previously assessed by the NRC, HRI must conduct a cultural resource inventory, and otherwise act in compliance with NHPA.

<sup>8</sup> The Presiding Officer (then Judge Cotter) summarized these affidavits, and the rebuttal affidavits filed by HRI and the Staff, in his April Stay Decision. See LBP-98-5, 47 NRC 119, at 121-24. As discussed, *infra*, the "testimony" of Dr. Kelley and Mr. Dodge (see SRIC's NHPA Brief, Exhibits 1 and 2) simply repeats most of their January 1998 affidavit statements.

<sup>9</sup> Other organizations to which these May 20, 1998 letters were sent include the Pueblo of Acoma, the All Pueblo Indian Council, the Hopi Cultural Preservation Office, the Pueblo of Zuni Heritage and Historic Preservation Office, and the Pueblo of Laguna. Copies of these letters are included in Attachment B of Exhibit 2 to SRIC's NHPA Brief. None of the above Native American organizations submitted comments on the proposed determination of effect.

parcel about two miles north of Crownpoint. As stated in the Staff's May 20, 1998, letter to the SHPO (May SHPO Letter), the Staff's determination of no effect was based on the results reported in the MNM Report. The SHPO and the NNHPD conditionally concurred with the Staff's determination of no effect by letters dated June 3, 1998, and June 24, 1998, respectively (copies of these concurrence letters are included in Attachment C of Exhibit 2 to SRIC's NHPA Brief). Based on these concurrences, the Staff advised HRI by letter dated July 10, 1998 (a copy of this letter forms Attachment D of Exhibit 2 to SRIC's NHPA Brief) that pursuant to the NHPA and the Navajo Nation Cultural Resources Protection Act (NNCRPA), the cultural resources protection process was concluded with respect to Church Rock Sections 8 and 17, and Crownpoint Section 12.

#### DISCUSSION

##### A. Staff Has Complied With NHPA Requirements

As reflected above, the Staff has acted in compliance with NHPA's requirements, and NHPA issues have already been litigated in this proceeding. SRIC's NHPA Brief adds little to the arguments previously filed.<sup>10</sup> For example, the testimony of Dr. Klara Kelley and William Dodge, attached to SRIC's NHPA Brief as Exhibits 1 and 2, largely repeat on a word

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<sup>10</sup> ENDAUM's and SRIC's legal argument on the question of whether a license may be issued prior to completion of the NHPA Section 106 process (*see* SRIC's NHPA Brief, at 42-44), and other issues (*see id.*, at 14, 33, and 40), cites the same opinions and makes the same contentions previously considered by the Presiding Officer and the Commission in the decisions lifting the temporary stays, and fails to show that there were any errors in those decisions. For example, ENDAUM and SRIC do not rebut the Commission's finding that HRI License Condition 9.12 is protective of NHPA values, and that a showing of NHPA injury was therefore unlikely ever to be made. *See* CLI-98-8, 47 NRC 314, at 321-22 and n. 8.

for word basis their January 1998 affidavits referenced above,<sup>11</sup> and still fail to show that the 167-page MNM Report is inadequate, or otherwise fails to meet NHPA requirements. Moreover, much of SRIC's NHPA Brief and the supporting testimony address NHPA issues at the Unit 1 and Crownpoint sites, rather than at the Church Rock site, contrary to the September 22 Order, at 2-3.<sup>12</sup> For these and other reasons as discussed further below, the Presiding Officer should reject ENDAUM's and SRIC's NHPA arguments.

1. Faulty Analysis of NHPA Regulations

ENDAUM and SRIC rely on various NHPA regulations (*see* SRIC's NHPA Brief, at 14, 31-35, and 39-44), arguing in part that the Staff improperly failed to consult with the Advisory Council on Historic Preservation (ACHP). As shown below, the Staff complied with the pertinent NHPA regulations, concluding the NHPA section 106 process with respect to the areas surveyed in the MNM Report, and was thus not required to consult with the ACHP regarding those areas.

ENDAUM's and SRIC's analysis of the NHPA regulations fails to consider 36 C.F.R. § 800.4(d) and 36 C.F.R. § 800.5(b). The first of these provisions applies when no historic properties are found, and states that after properly documenting and noticing such a finding, the government agency "is not required to take further steps in the section 106 process."

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<sup>11</sup> Presiding Officers are authorized to strike portions of written presentations found to be cumulative. *See* 10 C.F.R. § 2.1233(e).

<sup>12</sup> By Order dated October 23, 1998, the Commission denied the ENDAUM and SRIC joint petition to review the September 22 Order, endorsing as it did so the parties' efforts to first focus on issues relevant to Section 8 at HRI's Church Rock site, and leaving for later resolution "issues that relate solely to the [HRI] project's remaining phases" at Unit 1 and Crownpoint. *Hydro Resources, Inc.*, CLI-98-22, 48 NRC \_\_\_, slip op. at 2.



36 C.F.R. § 800.4(d). The latter provision applies when historic properties are present, but it is found that the undertaking will have no effect on such properties. In this situation, after properly documenting and noticing such a finding, the government agency is not required to take any further steps in the section 106 process unless the SHPO "objects within 15 days of receiving such notice." 36 C.F.R. § 800.5(b).<sup>13</sup>

Pursuant to these NHPA regulations, the Staff's May SHPO Letter, the May 1998 letter Staff sent to the NNHPD, and the concurrences thereto (as referenced, *supra*, at 6), concluded the NHPA Section 106 process with respect to the areas surveyed in the MNM Report. The Staff was thus not required to consult with the ACHP regarding these areas. The Staff's May 20, 1998 letter to the NNHPD (part of Attachment B to Dodge Testimony) stated in pertinent part as follows:

Pursuant to 36 C.F.R. § 800.4(d), the NRC staff considers the NHPA Section 106 process to be concluded with respect to the [Church Rock] Section 17 area surveyed in the OAS [MNM] Report, based on the finding that no historic properties are located within Section 17.

Letter to NNHPD, at 1. Similarly, the May SHPO Letter (also part of Attachment B to Dodge Testimony) stated in pertinent part as follows:

The NRC staff has applied 36 C.F.R. § 800.5 ... and proposes to determine that any HRI undertakings on Sections 8 [at Church Rock] and 12 [at Crownpoint]

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<sup>13</sup> In Mr. Dodge's description of the "Section 106 four step compliance process," he too omits any reference to 36 C.F.R. § 800.4(d). See Dodge Testimony, at 7-9. In his one-sentence description regarding 36 C.F.R. § 800.5(b) (*id.*, at 8), he fails to mention that the NHPA process may be concluded absent any objection made by the SHPO, and later seems to assume that the NHPA section 106 process always progresses to step four consultations. See *id.*, at 17. Contrary to Mr. Dodge's statements there, the NHPA regulations require that a memorandum of agreement be entered into by the consulting parties only when it is found that an undertaking will have adverse effects on historic properties. See 36 C.F.R. § 800.5(e)(4). Here, no such finding has been made.

... would have no effect on the historic properties located therein. The NRC staff seeks your concurrence on this proposed finding of no effect ...

If your office so concurs, or does not otherwise submit any objections to the NRC staff's proposed determination, then pursuant to 36 C.F.R.

§ 800.5(b), the staff would consider the NHPA process to be concluded with respect to Sections 8 and 12.

May SHPO Letter, at 1, and 3. As referenced, *supra*, at 6, the SHPO's June 3, 1998 response to the May SHPO Letter, and the NNHPD's June 24, 1998 response, raised no objections to the Staff's finding of no effect. In this situation, given the lack of any historic properties on Section 17, and the lack of any effect on the historic properties located on Sections 8 and 12, no ACHP consultation was required pursuant to 36 C.F.R. § 800.4(d) and 36 C.F.R. § 800.5(b). *See also* 36 C.F.R. §§ 800.5(c)-(e) (specifying when ACHP consultation is required).<sup>14</sup>

Accordingly, the Presiding Officer should reject the SRIC and ENDAUM arguments that the Staff improperly failed to consult with the ACHP, and that the Staff otherwise did not comply with the NHPA in issuing HRI its license.

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<sup>14</sup> SRIC and ENDAUM make the unsupported contention that the Staff "concedes it has not finished the § 106 review process" at HRI's Church Rock site. SRIC's NHPA Brief, at 40. As shown above, this contention is erroneous. However, the Staff did emphasize to HRI that additional undertakings on lands not surveyed in the MNM Report would require separate NHPA and/or NNCRPA consultations. *See* Attachment D of Dodge Testimony (Staff's letter to HRI dated July 10, 1998), at 2, ¶ 1. In expressing his opinion that all potentially affected areas must be surveyed "up front" (Dodge Testimony, at 14), in compliance with what Mr. Dodge believes to be "the spirit of the Section 106 review process" (*id.*, at 25), Mr. Dodge fails to show that separate surveys, if they are later required, would not adequately protect any historic properties that may be present.

2. SRIC's NHPA Brief Mis-characterizes Supporting Opinion Testimony

ENDAUM and SRIC begin their NHPA argument by mis-characterizing the Dodge Testimony as it relates to HRI's Church Rock site. *See* SRIC's NHPA Brief, at 13. There, citing Mr. Dodge's testimony at 9-10, ENDAUM and SRIC allege that the Staff incorrectly concluded that the NHPA process was completed at Church Rock, based on Mr. Dodge's opinion that the Staff never properly completed the early steps of the NHPA process (*i.e.*, the identification and evaluation of historic properties for inclusion in the National Register). However, Mr. Dodge holds this opinion only with respect to Crownpoint and Unit 1, stated as follows:

For the Crownpoint and Unit 1 areas ... , the NRC has just started the Section 106 process, namely steps 1 and 2 (identification and evaluation of eligibility). For these areas, the NRC has made no determination regarding whether or not there are adverse effects on any historic or cultural properties.

Dodge Testimony, at 9-10. Referencing copies of the May SHPO Letter sent to various officials, Mr. Dodge then acknowledges that with respect to Sections 8 and 17 at Church Rock, the Staff has "made a determination regarding the effects of the Crownpoint Project on historic properties." Dodge Testimony, at 10.

ENDAUM and SRIC are also wrong in stating that "at this stage in the process" an HRI plan to manage cultural resources is "premature,"<sup>15</sup> and cannot properly be prepared "until historic properties are completely identified." SRIC's NHPA Brief, at 13, *citing* Dodge Testimony, at 17. There, Mr. Dodge refers to a May 1996 letter indicating that HRI had given

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<sup>15</sup> Another charge that the Staff's 1998 finding of no effect was "premature" (SRIC's NHPA Brief, at 19, *citing* Dodge Testimony, at 10 and 17), is similarly unsupported.



the Hopi Tribe a copy of HRI's management plan.<sup>16</sup> ENDAUM and SRIC must address the record as it now stands, rather than looking backward to 1996,<sup>17</sup> well before the MNM Report on which HRI and the Staff rely was issued.

3. Vague Opinions of Dr. Kelley and Mr. Dodge Entitled Little Weight

As indicated above, much of ENDAUM's and SRIC's NHPA argument relies on the opinions of Dr. Kelley and Mr. Dodge (*see, e.g.*, SRIC's NHPA Brief, at 13, 19, 28-29, and 37-38), neither of whom give any indication that they have actually visited the areas surveyed in the MNM Report. As discussed below, their opinions are entitled to little, if any, weight in this proceeding.

Dr. Kelley states that the MNM Report "contains many factual errors," but she does not identify what these errors are. Kelley Testimony, at 7 (repeating verbatim ¶ 10 of her January 1998 affidavit). This is an example of the general vagueness previously noted by the Commission. *See* CLI-98-8, 47 NRC at 322 and n.11.<sup>18</sup>

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<sup>16</sup> In addressing HRI's plan to manage cultural resources, Mr. Dodge's testimony simply repeats verbatim ¶ 28 from his one-year-old January 1998 affidavit. This portion of testimony is a representative example of how ENDAUM, SRIC, Mr. Dodge and Dr. Kelley offer procedural critiques, but fail to identify any TCPs or missed archaeological sites on areas for which HRI has had NHPA surveys performed.

<sup>17</sup> Piecemeal references back to the record as it existed in 1996 (*see, e.g.*, SRIC's NHPA Brief, at 20 n.9, 20-23, 24-26, 28, and 36) are misleading, as they fail to take into account the MNM Report and other NHPA-related actions that HRI and the Staff have since taken. The extended critique of the "Becenti Report," *id.*, at 20-23, is followed by only a brief discussion of the much longer and more significant MNM Report. *Id.*, at 23-24.

<sup>18</sup> The opinions of Abie Francisco, proffered by ENDAUM and SRIC as another expert witness (*see* SRIC's NHPA Brief, Exhibit 3), are, if anything, even more vague than those of Dr. Kelley and Mr. Dodge, in failing to identify the specific locations of any TCPs in the survey areas discussed in the MNM Report. *See* SRIC's NHPA Brief, at 22-23.

Similarly vague is Dr. Kelley's opinion regarding two "cultural landscapes, the Muddy Water and Kin Yaa'a archaeological complexes", the locations of which are not specified. Kelley Testimony, at 17. Dr. Kelley's opinion regarding these landscapes continues as follows:

Based on my own work as a consultant with [NNHPD] Chaco Protection Sites and Traditional Culture sections, my opinion is that Muddy Water and Kin Yaa'a should be researched as a single landscape. These two complexes together seem to consist of a more-or-less continuous distribution of archaeological features. It is further my opinion that postcolumbian features attributed to Navajos in this area should be included in the complex. Navajo ceremonial tradition links Navajos to both precolumbian and postcolumbian features in the complex.

*Id.*, at 18 (repeating verbatim ¶ 29 of her January 1998 affidavit). No indication whatsoever is given regarding any spatial relationship between these complexes and areas where HRI's mining-related activities will occur.

Mr. Dodge states that the Staff has not considered "the effects of land application of uranium-tainted wastewater on historic and cultural resources in the proposed land application area." Dodge Testimony at 14. Mr. Dodge identifies neither the supposedly threatened resources, nor the areas where they may be found. The MNM Report, at 126-161, reflects the detailed NHPA survey performed on Crownpoint Section 12. If this is the area Mr. Dodge is referring to, he offers no criticism of the MNM Report's findings regarding Section 12. Later, in referring generally to the MNM Report, Mr. Dodge states that it does not "consider the

presence of non-Navajo TCPs,"<sup>19</sup> but admits that it does examine previously-found archaeological sites, and describes new archaeological sites. Dodge Testimony, at 19 (a verbatim repetition of his January 1998 affidavit, at ¶ 35). Mr. Dodge also states here that the MNM Report "addresses identification" of Navajo TCPs (*id.*), an apparent effort to avoid stating that no Navajo TCPs were found in the survey area. See Staff's Stay Response, Exhibit 2 (MNM Report excerpts), at 159-160.

Mr. Dodge concludes his testimony by stating that it was clear to him, based on unspecified information relayed to him in telephone conversations with various officials, that "they did not understand the [May SHPO] letter to constitute a determination that there are no TCPs in the area." Dodge Testimony, at 26. Aside from the hearsay nature of these statements, and even assuming they are being reported accurately, Mr. Dodge does not make clear whether he too is of the same opinion. Assuming Mr. Dodge has read the May SHPO Letter, it is hard to believe that he would hold such an opinion. The May SHPO Letter (included in Attachment B of Dodge Testimony), a copy of which was sent to the NNHPD and others on the distribution list, states that "no traditional cultural properties were identified at or near any of the project areas identified above (Sections 8, 17, and 12)." May SHPO Letter, at 1. In the same letter, the Staff further stated that its finding of no effect was based, in part, on the following:

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<sup>19</sup> However, Mr. Dodge provides no evidence that any such TCPs are actually located on Church Rock Sections 8 and 17, or on Crownpoint Section 12, the areas surveyed in the MNM Report. He states only that such TCPs "may exist within the project area." Dodge Testimony, at 20.



As discussed in the OAS [MNM] Report, adequate consultation with local traditional practitioners has occurred and no traditional cultural properties have been identified in or near Sections 8, 17, and 12.

*Id.*, at 2, bullet 4. Mr. Dodge's vague hearsay testimony fails to explain, and directly contradicts, these statements in the May SHPO Letter.

Accordingly, due to the vague nature of Dr. Kelley's and Mr. Dodge's opinions, many of which have not been updated since January 1998, the Presiding Officer should give them little, if any, weight in this proceeding.

4. SRIC's NHPA Brief Discusses Topics Outside Phase 1's Scope

As discussed *supra*, at 7 and n.12, Phase 1 of this proceeding concerns HRI's proposed ISL mining operations on Church Rock Section 8. Much of the ENDAUM and SRIC NHPA argument and supporting opinion testimony regard other areas instead. *See* SRIC's NHPA Brief, at 15-18, 27, 34 n.12, 35 (reference to Chaco Culture National Historical Park and other unspecified sites outside HRI's project area), and 38 (reference to Kin Yaa'a and Muddy Water complexes); SRIC's NHPA Brief, Exhibit 1 (Dr. Klara Kelley's testimony), at 5, 7-9, and 13; and SRIC's NHPA Brief, Exhibit 4 (Mitchell Capitan's testimony).

Accordingly, pursuant to the September 22 Order, at 2-3, the above-cited portions of ENDAUM's and SRIC's NHPA argument should not be considered at this time.

5. Staff Has Properly Interacted With The Navajo Nation

To support its conclusory charge that the Staff has breached "its obligation to consult with the Navajo Nation," ENDAUM and SRIC rely on President Clinton's Memorandum, dated April 29, 1994, titled *Government to Government Relations With Native American*

*Tribal Governments*. SRIC's NHPA Brief, at 32-33. ENDAUM and SRIC neglect to note that the April 29, 1994, memorandum contains the following sentence:

This memorandum is intended only to improve the internal management of the executive branch and is not intended to, and does not, create any right to administrative or judicial review, or any other right or benefit or trust responsibility, substantive or procedural, enforceable by a party against the United States, its agencies or instrumentalities, its officers or employees, or any other person.

59 Fed. Reg. 22951, at 22952 (May 4, 1994). The memorandum thus provides no legal basis supporting ENDAUM's and SRIC's argument.<sup>20</sup>

Moreover, as summarized at 2-6, *supra*, the Staff has properly sought input from the NNHPD during the NHPA Section 106 process, and has committed itself to doing so in the future as well. See Staff's letter to the NNHPD, dated May 20, 1998 (part of Attachment B to Dodge Testimony) at 2. Thus, the ENDAUM and SRIC charge that the Staff has failed to properly consult with the Navajo Nation lacks a factual basis as well as a legal one.

Accordingly, as shown above, the ENDAUM and SRIC NHPA arguments (SRIC's NHPA Brief, at 12-44), and supporting testimony, lack an adequate basis. The Staff therefore requests the Presiding Officer to reject these arguments.

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<sup>20</sup> A much more detailed and accurate legal analysis of the special relationship between Native Americans and the federal government was provided earlier in this proceeding by Judge Cotter. See April Stay Decision, LBP-98-5, 47 NRC 119, at 135-37.

B. NAGPRA's Consultation and Concurrence Requirements Not Applicable

ENDAUM and SRIC argue that the Staff's January 1998 license issuance violated the NAGPRA's consultation and concurrence requirements. *See* SRIC's NHPA Brief, at 45-49.<sup>21</sup> As discussed below, these NAGPRA requirements apply only to the intentional excavation of Native American burials,<sup>22</sup> and the removal therefrom of cultural items. One of the purposes of the protective fencing to be placed around historical properties in the vicinity of any HRI mining activities is to avoid possible disruption of unknown burial sites. *See* Attachment D of Dodge Testimony (Staff's letter to HRI dated July 10, 1998), at 2-3, ¶¶ 2-3. While treatment protocols, consistent with the NAGPRA, may be developed should unknown burial sites be encountered during mining-related activities (*see id.*, at 2-3, ¶ 3),<sup>23</sup> this protective condition does not convert HRI's ISL operations into an archaeological expedition.<sup>24</sup>

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<sup>21</sup> This portion of SRIC's NHPA Brief repeats, in nearly verbatim fashion, arguments submitted in the August 1997 "Petitioners ENDAUM and SRIC's Second Amended Request For Hearing, Petition to Intervene, and Statement of Concerns," at 127-131.

<sup>22</sup> The only new item in SRIC's NHPA Brief regarding the NAGPRA is a brief reference to the "Route 11 Report" (SRIC's NHPA Brief, at 46), which apparently is ENDAUM and SRIC Exhibit 5, "Archaeological Nature And Extent Testing At Seventeen Sites Along Navajo Route 11(A)1, Mariano Lake To Navajo Route 9." This is a draft report (*see* Exhibit 5, at 1), and the Staff therefore objects to receiving it in this proceeding. Moreover, this report concerns an area many miles away from HRI's Church Rock site. *See id.*, at 5 (Figure 1.1). Thus, even if Exhibit 5 were a final report, it could not properly be considered at this time for the reasons discussed in Section A 4, *supra*.

<sup>23</sup> The wording of this portion of the Staff's July 1998 letter to HRI is based on HRI's prior commitment, as stated in its August 1997 Consolidated Operations Plan (COP), Section 1.7, "Cultural Resources Management," at 23.

<sup>24</sup> The contention that HRI will be engaging in "archaeological work" (SRIC's NHPA Brief, at 47, *citing* HRI's COP, at 23), is misleading. The COP's discussion there about the need for an archaeologist occurs in the context of precautions to be taken to ensure that any  
(continued...)



The NAGPRA requires only that consultation with the affected tribe take place prior to the "intentional removal from or excavation of Native American cultural items from Federal or tribal lands." 25 U.S.C. § 3002(c). NAGPRA's implementing regulations apply to intentional disturbances such as would occur during archaeological excavations (*see* 43 C.F.R. § 10.3), and prior to such disturbances various consultation and concurrence requirements may be applicable. *See* 43 C.F.R. § 10.5. However, HRI's planned activities fall within the scope of 43 C.F.R. § 10.4, which applies when inadvertent discoveries of "human remains, funerary objects, sacred objects, or objects of cultural patrimony" are made. 43 C.F.R. § 10.4(b). The 43 C.F.R. § 10.5 advance consultation and concurrence requirements applicable to intentional excavations are obviously not applicable to inadvertent discoveries, and 43 C.F.R. § 10.4 contains no such requirements. No doubt this is why 43 C.F.R. § 10.4 is not cited by ENDAUM and SRIC. *See* SRIC's NHPA Brief, at 45-49.

Accordingly, ENDAUM and SRIC have shown no legal basis on which the Presiding Officer could rule that Staff's January 1998 license issuance violated the NAGPRA, or its implementing regulations.

C. MNM Report and FEIS Addressed Cultural Resource Impacts

ENDAUM and SRIC argue that the Staff's FEIS, issued in February 1997, failed to adequately address the cultural resource impacts arising from issuance of a Part 40 license to HRI. *See* SRIC's NHPA Brief, at 50-54. As discussed below, this argument fails to provide the Presiding Officer with any legal basis to support action being taken against HRI's license.

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<sup>24</sup>(...continued)  
construction activities will not disturb previously unidentified human remains or other cultural resources.

Even assuming that the FEIS discussion of cultural resource impacts (summarized in SRIC's NHPA Brief, at 52-53) was somehow deficient, this discussion was supplemented by the subsequent MNM Report, and the federal action being evaluated by the FEIS (*i.e.*, the Staff's proposed issuance of a license to HRI) did not occur until January 1998, well after the MNM Report had been distributed for comment, and the SHPO's concurrence had been obtained. *See supra*, at 4 and n.6. The Staff's action in issuing HRI a license was thus a fully-informed one, meeting the central requirement of the National Environmental Policy Act, 42 U.S.C. §§ 4321 *et seq.* (NEPA).<sup>25</sup>

SRIC's and ENDAUM's argument provides no basis to conclude that the HRI license was issued before sufficient information was collected, or to conclude that all reasonable steps had not been taken to collect information. SRIC and ENDAUM complain that the opinions of Mr. Francisco were not taken into account (*see* SRIC's NHPA Brief, at 53), but reference to his testimony shows his limited understanding of ISL mining impacts, and provides no new information.<sup>26</sup> The related argument regarding lack of sufficient effort to collect information

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<sup>25</sup> The Supreme Court decisions ENDAUM and SRIC cite (*see* SRIC's NHPA Brief, at 50-51) emphasize NEPA's procedural (as opposed to substantive) nature, requiring only that agency actions be properly informed ones. *See Baltimore Gas & Electric Company v. Natural Resources Defense Council*, 462 U.S. 87, 97 (1983); and *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349-50 (1989). *See also* 40 C.F.R. § 1500.1(1).

<sup>26</sup> Mr. Francisco states that he has "seen uranium and it blows from the wind and can be spread all over." Francisco Testimony, at 3. ISL mining does not produce the type of dry tailings piles subject to dispersal by wind. *See* Staff's Stay Response, Exhibit 10, ¶ 30; and the December 16, 1998 "NRC Staff's Response To Intervenor Presentations On Liquid Waste Disposal Issues," at 10 and n.12, and 28-29. Mr. Francisco also states his belief that the loss of herbs is "the result of coal and uranium mining." Francisco Testimony, at 4. Assuming this loss has occurred, this impact is due to past mining activities, which the FEIS took into account. *See* FEIS, at 4-124 to 4-125.

from various Native American groups (*see* SRIC's NHPA Brief, at 53-54, and n. 85), is belied by the record. As referenced at 4 and n.6, *supra*, in June 1997, the Director of the Pueblo of Zuni Heritage and Historic Preservation Office, and the Director of the Hopi Cultural Preservation Office, were given copies of the MNM Report and the opportunity to provide comments on it, but they chose not to do so. Additionally, at the same time, officials of the Pueblo of Laguna and the Pueblo of Acoma were contacted, offering to provide them with copies of the MNM Report,<sup>27</sup> but they did not respond. Moreover, the FEIS statement that no TCPs were known to exist within the boundaries of HRI's project<sup>28</sup> (*see* FEIS, at 4-109), was confirmed by the more detailed MNM Report with respect to Church Rock Sections 8 and 17, and Crownpoint Section 12. *See* Staff's Stay Response, Exhibit 2 (MNM Report excerpts).

Accordingly, the Presiding Officer should reject SRIC's and ENDAUM's NEPA argument, as it fails to provide any legal basis to support action being taken against HRI's license.

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<sup>27</sup> *See* HRI Hearing File letters dated June 18, 1997, accession numbers 9706230387 and 97062303879.

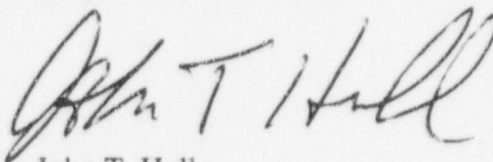
<sup>28</sup> ENDAUM and SRIC have noted the large amount of cultural resources information collected by HRI and the Staff in 1996, on which the pertinent FEIS discussion was based. *See* SRIC's December 1998 PBL Brief, at 22-23 and nn. 15, 16, and 18 (referencing Staff's Request for Additional Information No. 24, and HRI's responses thereto).



CONCLUSION

The Staff has considered all of the arguments made by SRIC and ENDAUM in SRIC's NHPA Brief. As discussed above, as shown by the information in the hearing file, and as demonstrated by HRI in its January 11, 1999 filing on cultural resource issues, SRIC and ENDAUM have failed to identify any matters supporting the relief they request. Accordingly, the Staff requests the Presiding Officer to deny the relief sought.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "John T. Hull". The signature is fluid and cursive, with the first name "John" and last name "Hull" being clearly legible, and "T." in the middle.

John T. Hull  
Counsel for NRC Staff

Dated at Rockville, Maryland  
this 19th day of January, 1999

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE PRESIDING OFFICER

In the Matter of )

HYDRO RESOURCES, INC. )

2929 Coors Road, Suite 101 )

Albuquerque, New Mexico 87120 )

) Docket No. 40-8968-ML

) (Leach Mining and Milling License)

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RULEMAKING AND  
ADJUDICATIONS STAFF

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S RESPONSE TO ENDAUM AND SRIC PRESENTATION ON NHPA AND NAGPRA ISSUES" in the above-captioned proceeding have been served on the following by U.S. Mail, first class, or, as indicated by a single asterisk through deposit in the Nuclear Regulatory Commission's internal mail system, or, as indicated by double asterisks, via e-mail, this 19th day of January, 1999:

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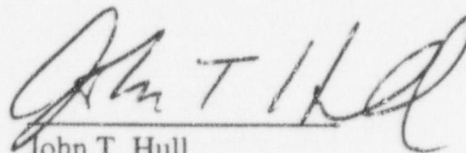
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A handwritten signature in dark ink, appearing to read "John T. Hull", is written over a horizontal line.

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