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

OFFICE OF SECRETARY
RULEMAKING AND
ADJUDICATIONS STAFF

Before Administrative Judges:
Peter B. Bloch, Presiding Officer
Thomas D. Murphy, Special Agent

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

HYDRO RESOURCES, INC.'S RESPONSE
TO EASTERN NAVAJO DINÉ AGAINST URANIUM MINING'S AND
SOUTHWEST RESEARCH AND INFORMATION CENTER'S DECEMBER 7, 1998 BRIEF
IN OPPOSITION TO HYDRO RESOURCES, INC.'S APPLICATION FOR A MATERIALS
LICENSE WITH RESPECT TO
COMPLIANCE WITH THE NATIONAL HISTORIC PRESERVATION ACT,
NATIVE AMERICAN GRAVES PROTECTION AND REPATRIATION ACT AND
RELATED CULTURAL RESOURCE ISSUES

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INTRODUCTION

On September 17, 1998, a scheduling conference was held in Crownpoint, New Mexico,¹ to address how to proceed with the challenge brought by Eastern Navajo Dine' Against Uranium Mining ("ENDAUM"), Southwest Research and Information Center ("SRIC"), and Grace Sam and Marilyn Morris (jointly, hereinafter "Intervenors") to Hydro Resources, Inc.'s ("HRI's"), license to construct and operate in-situ leach ("ISL") uranium mining facilities on property in "Section 8," approximately six miles north of the town of Church Rock, New Mexico, "Unit 1"

¹ See Transcript of Prehearing Conference of Hydro Resources, Inc. ACN No. 9809280059 (Sept. 17, 1998).

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and "Crownpoint," near Crownpoint, New Mexico, a central processing operation at the "Crownpoint" site where yellowcake will be dried and packaged,² and in the northeast quarter of "Section 17" near Church Rock.³ Following the scheduling conference, on September 22, 1998, the Presiding Officer issued an Order granting, in part, HRI's, May 13, 1998 and June 4, 1998 requests⁴ for bifurcation of the licensing proceeding, such that Intervenor's are permitted to submit written presentations with respect to "any aspect of the HRI license concerning operations at Church Rock Section 8 or with respect to the transportation or treatment of materials extracted from Section 8," but are precluded from presenting concerns relating only to Church Rock Section 17, Unit 1, or the Crownpoint sections at this time. Under the September 22 Order, Intervenor's may also raise "any issue that challenges the validity of the license issued to HRI."⁵

In response to the September 22 Order, on September 30, 1998, Intervenor's filed a Joint Request for Directed Certification ("the Request") of the decision by the Presiding Officer to bifurcate the proceeding. HRI and NRC Staff filed responses opposing the Request on October 8, 1998. On October 7, 1998, Intervenor's filed a Petition for Interlocutory Review of Memorandum and Order (Scheduling and Partial Grant of Motion for Bifurcation) of

² U.S. Nuclear Regulatory Commission, Safety Evaluation Report, Hydro Resources, Incorporated, License Application for Crownpoint Uranium Solution Mining Project, McKinley County, New Mexico, Docket No. 40-8968 ("SER") ACN No. 9712310295 (Dec. 1997) at 1.

³ See Hearing Rec. ACN No. 9211300077 (Sept. 28, 1992).

⁴ See HRI's Request for Partial Clarification or Reconsideration of Presiding Officer's Memorandum and Order of May 13, 1998; and Request for Bifurcation of the Proceeding ACN No. 980609130 (June 4, 1998).

⁵ In support for his conclusion, the Presiding Officer recognized HRI's and the NRC Staff's argument that, unlike reactor licensing, the site specific nature, as well as well field by well field progression of in-situ leach mining projects results in many technical details concerning operations being determined only when a well field has been constructed and is ready to begin production. See September 22 Order at 2; Bifurcation Motion at 2-11; NRC Staff

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September 22, 1998 and Request of Stay (hereinafter, "the Petition") with the Commission. On October 23, 1998, the Commission denied Intervenor's request stating that the proceedings before the Presiding Officer should continue as scheduled.

In accordance with the November 5, 1998 Joint Notice of Schedule for Written Presentations, Intervenor's filed briefs on November 9, 1998 regarding liquid waste disposal issues to which HRI responded on December 9, 1998. NRC Staff responded on December 16, 1998. On December 7, 1998, in accordance with the November 5 schedule, Intervenor's ENDAUM and SRIC submitted a second brief arguing, in sum, that NRC Staff's issuance of a license to HRI violates: (1) the National Historic Preservation Act, 16 U.S.C. §§ 470f and 470a, and its implementing regulations, 36 C.F.R. § 800, (2) the Native American Graves Protection and Repatriation Act, 25 U.S.C. § 3001, et seq., and (3) the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321, et seq., ("NEPA"), as the Final Environmental Impact Statement ("FEIS") for the Crownpoint Uranium Project ("CUP")⁶ fails to adequately address the impacts on cultural resources and that, therefore, HRI's license should be revoked.⁷

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Response to HRI's Motions for Reconsideration and Bifurcation at 4-16 ACN No. 9807020189 (June 26, 1998)

⁶ NUREG-1508, "Final Environmental Impact Statement to Construct and Operate the Crownpoint Uranium Solution Mining Project, Crownpoint, New Mexico," Feb. 1997. NRC published a "Notice of Availability of Draft Environmental Impact Statement: Notice of Opportunity for Hearing" in the Federal Register on November 14, 1994, more than two years prior to the issuance of the FEIS. See, Hydro Resources, Inc., LBP 98-9, 47 NRC 261, 264 (1998) ACN No. 9703200270. Notably, Environmental Impact Statements generally have not been required in connection with ISL mining operations. In this case, allottees' land is under the jurisdiction of the Bureau of Indian Affairs ("BIA"), and BIA required that an EIS be prepared. Letter from Area Director, Bureau of Indian Affairs (June 18, 1992).

⁷ Eastern Navajo Dine Against Uranium Mining's and Southwest Research and Information Center's Brief in Opposition to Hydro Resources, Inc.'s Application for a Materials License With Respect to: Compliance with the National Historic Preservation Act, Native American Graves Protection and Repatriation Act and Related Cultural Resources Issues, at 3, (Dec. 7, 1998) ("ENDAUM and SRIC Phase II Brief").

Intervenors ENDAUM and SRIC misapprehend and misapply the facts and the law, consequently, their request should be denied.

ARGUMENT

I. NRC STAFF ADEQUATELY IDENTIFIED PROPERTIES ELIGIBLE FOR THE NATIONAL REGISTER AND TOOK INTO ACCOUNT THE EFFECTS OF HRI'S LICENSE ON HISTORIC PROPERTIES PURSUANT TO THE NATIONAL HISTORIC PRESERVATION ACT

The brunt of Intervenors' complaint is found on page 12 of their brief: "[t]he NRC Staff has failed to identify historic properties eligible for inclusion in the National Register of Historic Places and to adequately take into account the Project's effect on historic properties in consultation with the affected tribes, pueblos, and organizations." ENDAUM and SRIC Phase II Brief at 12. Intervenors claim is based on Section 106 of the National Historic Preservation Act, 16 U.S.C. §§ 470f, and its implementing regulations, 36 C.F.R. Part 800. NHPA Section 106 provides in relevant part, that a federal agency shall:

prior to the issuance of any license . . . take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register.

16 U.S.C. § 470f. As explained in detail below, NRC Staff completed the Section 106 process with respect to Church Rock Section 8 and concluded that operations would have "no effect" on "any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register." See Letter from J. Holonich, Chief, Uranium Recovery Branch, NRC to Lynne Sebastian, State Historic Preservation Officer, NM (May 20, 1998). To reach this determination, the Staff adequately identified historic properties considered eligible for inclusion in the National Register of Historic Places and considered the effect of Section 8 operations on historic properties in consultation with the affected tribes, pueblos, and organizations.⁸

⁸ Although, as referenced above, Intervenors ENDAUM and SRIC assert that NRC Staff failed to "adequately take into account the Project's effect on historic properties in consultation with the affected tribes, pueblos, and organizations," pursuant to the Presiding Officer's

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A. The NRC Staff Adequately Identified Historic Properties Pursuant to NHPA Section 106

On page 15 of their brief, Intervenor ENDAUM and SRIC assert that "NRC Staff has not made a reasonable and good faith effort to identify historic properties or traditional cultural properties that may be affected by HRI's project." ENDAUM and SRIC Phase II Brief at 15. In support of their claim, Intervenor argue that NRC Staff failed to adequately: (1) document cultural resources; (2) seek information from tribes and other parties with knowledge of cultural resources; (3) review existing information; and, (4) obtain the view of the historic preservation officer on identification. ENDAUM and SRIC Phase II Brief at 15, 24, 28, 29. Intervenor's claims are without merit for the reasons discussed below.

1. NRC Staff Adequately Documented Cultural Resources

On page 15 ENDAUM and SRIC look to the Affidavit of Klara B. Kelley, Ph.D. in support of their claim that the "dissipated and mixed nature of the review documentation undermines the reviewer's ability to assess its adequacy." ENDAUM and SRIC Phase II Brief at 15. Specifically, Dr. Kelley states that: "[d]ividing information among multiple documents makes review for compliance with applicable cultural resource management laws and policies more difficult" Kelley Affidavit at 4-5. Importantly, neither ENDAUM and SRIC nor Dr. Kelley actually state that NRC Staff review was inadequate but rather merely baldly assert that dividing the information makes review "more difficult" and "undermines the reviewer's ability to assess its adequacy." The mere fact that the NRC Staff determination is based on several

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September 22, 1998 Order, Intervenor may only raise issues concerning Church Rock Section 8 at this time. See September 22 Order at 2. Thus, HRI has focused its response on issues pertaining to Church Rock Section 8.

reports, does not, without more, lead to the conclusion that NRC Staff's review was inadequate. See Blinman Affidavit at ¶10. In addition, ENDAUM and SRIC ignore the fact that only two reports are relevant to Church Rock Section 8: Ernest C. Becenti Sr.'s report ("the Becenti Report")⁹ and Blinman, *Cultural Resources Inventory of Proposed Uranium Solution Extraction and Monitoring Facilities at the Church Rock Site and Proposed Surface Irrigation Facilities North of the Crown point Site, McKinley County, New Mexico* ("MNM Report").¹⁰ The Becenti Report is only one page in length with attachments and has been incorporated into the MNM report in its entirety. See MNM Report; see also Blinman Affidavit at ¶10.¹¹ Thus, as there is only one report that is truly relevant to Church Rock Section 8, the Intervenor's claim based on "multiple documents" is unfounded.

a. The License is Based on an Adequate Documentation of Cultural Resources at Church Rock Section 8

Turning to Church Rock Section 8 specifically, on page 18 of their brief, ENDAUM and SRIC assert that NRC Staff failed to adequately document cultural resources at Church Rock Section 8.¹² See ENDAUM and SRIC Phase III at 18. ENDAUM and SRIC rely on the

⁹ Becenti Report, Letter from Mark Pelizza, HRI, to J. Holonich, NRC, Attachment 6, Hearing Record ACN 9605080097 (May 30, 1996).

¹⁰ Hearing Record ACN 9704140140 (April 4, 1997).

¹¹ Specifically, Dr. Blinman states that once the irrelevant issues of Crownpoint and Unit 1 are removed from Dr. Kelley's discussions, only two potentially relevant documents remain: the summary letter and supporting forms of Mr. Becenti, and the MNM Report. The results of Mr. Becenti's traditional cultural property assessments are fully integrated into the MNM Report, and Mr. Becenti's supporting forms were distributed with his letter report. The MNM Report references to the role and substance of Mr. Becenti's report are clear and straight forward, and neither the NNHPD nor the NMSHPO has expressed any reservations or confusions concerning their ability to use these documents in their compliance reviews. The only way the documentation can be described as "mixed" is if the documentation for the partition under consideration is compared with the documentation for portions of the project that are scheduled for investigation at a future time. Blinman Affidavit at ¶10.

¹² ENDAUM and SRIC also claim that NRC Staff failed to adequately document cultural resources at Crownpoint, Unit 1, and liquid waste land application disposal sites. See ENDAUM and SRIC Phase III Brief at 15, 17, and 19. As Crownpoint and Unit 1 do not relate to Section 8

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Affidavit of William A. Dodge, attached to their motion as Attachment B. In his affidavit, Dodge concedes that the MNM report reexamines sites found during previous surveys, describes new archeological sites found, and addresses identification of Navajo traditional cultural properties ("TCPs"). Dodge goes on to complain, however, that the MNM Report does not consider the presence of non-Navajo TCPs. Dodge Affidavit at 19-20. Moreover, Dodge opines that "the NRC's 'no effects' finding of May 20, 1998 is applied only to archeological sites," not TCPs. Dodge Affidavit at 17. Dodge is mistaken.

As indicated in the consultation letter from NRC Staff to Lynne Sebastian, New Mexico State Historic Preservation Officer ("SHPO"), "no traditional cultural properties were identified at or near any of the project areas," i.e., Sections 8, 17, and 12. See Letter from J. Holonich, Chief, Uranium Recovery Branch, NRC to Lynne Sebastian, State Historic Preservation Officer, NM (May 20, 1998) at 1. Importantly, both the New Mexico State Historic Preservation Department ("NMSHPD") and the Navajo Nation Historic Preservation Department ("NNHPD") responded to NRC Staff consultation requests with letters concurring with the conclusion of NRC Staff that there would be "no effect" on all cultural resources within the parcels.¹³ Both the consultation request and the MNM Report make it clear that no traditional cultural properties were found within Church Rock Section 8.¹⁴ Thus, NRC Staff did consider the presence of non-Navajo TCPs but found none based on the MNM Report and response to consultation requests.

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and HRI does not intend land application of Section 8 liquid waste, these claims are untimely based on the Presiding Officer September 22 Order.

¹³ See Blinman Affidavit at ¶5.

¹⁴ Notably, the complete report of the archeological and traditional cultural property inventory results from the HRI project was provided to all concerned tribes concurrent with the NMSHPD and NNHPD review in compliance with the NHPA Section 106 process. See Blinman Affidavit at 14. No comments, requests for more information, or requests for more time were received either within the comment period or since. Id.

Moreover, since no traditional cultural properties were identified and since eligible archeological sites will be avoided,¹⁵ the concurrence of the NMSHPO and NNHPO as to “no effect” completes consultation on both archeological and traditional cultural property resources, see Blinman Affidavit at ¶5; thus, the “no effect” determination applies to both the archeological and traditional cultural property resources.

b. TCPs Were Adequately Documented at Section 8

Further with respect to Intervenor’s claims regarding inadequate documentation, on page 19 of their brief, ENDAUM and SRIC argue that NRC Staff inadequately documented TCPs at all sites. ENDAUM and SRIC Phase III Brief at 19 (emphasis added). In so far as this claim relates to Church Rock Section 8, it is readily dismissed.

The crux of ENDAUM’s and SRIC’s complaint here is that “the Becenti Report [upon which HRI and subsequently, NRC Staff, rely] is unreliable.” In support of this claim,

¹⁵ HRI’s license contains Condition 9.12 which states:

Before engaging in any construction activity not previously assessed by the NRC, the licensee shall conduct a cultural resource inventory. All disturbances associated with the proposed development will be completed in compliance with the National Historic Preservation Act of 1966, as amended, and its implementing regulations (36 CFR Part 800), and the Archaeological Resources Protection Act of 1979, as amended, and its implementing regulations (43 CFR Part 7).

In order to ensure that no unapproved disturbance of cultural resources occurs, any work resulting in the discovery of previously unknown cultural artifacts shall cease. The artifacts shall be inventoried and evaluated in accordance with 36 CFR Part 800, and no disturbance shall occur until the licensee has received written authorization to proceed from the State and Navajo Nation Historic Preservation Offices.

License No. SUA-1508, Hearing Record ACN 9801160066. Thus, in the event of a discovery of a TCP, HRI will halt work resulting in the discovery until it receives written authorization to proceed from the SHPO and the NNHPO.

Intervenors challenge the qualifications and credibility of Becenti and the thoroughness of his report. Id.

First, with respect to Becenti's qualifications, Becenti is deemed by Dodge to be unqualified to assert that there are no known traditional uses of the area by other Indian tribes. See Dodge Affidavit at 19. If any places within the project area had been actively visited by Pueblo peoples for traditional practices, e.g. shrines, their visits would have been known to the local Navajo community. This fact is echoed by Michael Marshall as cited by Dodge. On this basis, Becenti's assertion of the lack of non-Navajo traditional cultural properties is consistent with his investigation results. Moreover, as discussed above, the complete report of the archaeological and traditional cultural property inventory results from this project was provided to all concerned Indian tribes concurrent with the NMSHPD and NNHPD review in compliance with the NHPA Section 106 process. No comments, requests for more information, or requests for more time were received either within the comment period or since. See Blinman Affidavit at ¶17.

Second, with respect to Becenti's credibility, Intervenors assert that statements made by Becenti at the September 15, 1998 hearing were "irrational and call his qualifications as a witness into question." Id. This claim is based on paraphrased testimony of Becenti's where he stated that "he has a grandmother who is 114 years old, and a mother who is 110." Id. at 21 (emphasis in original). This attempt to discredit Becenti simply reflects ENDAUM and SRIC's lack of understanding of Navajo kinship. Navajo usage includes both grandmother and grandmother's sisters under the English category "grandmother," and the term is also often extended to include all women of that age group of the same clan. See Blinman Affidavit at ¶13. Thus, it is ENDAUM's and SRIC's lack of understanding that led them to wrongly conclude that Becenti is "irrational."

In further support of their challenge to Becenti's credibility, Intervenors state that

Becenti "appears to deny that the UNC Church Rock Tailing spill ever happened." ENDAUM and SRIC Phase III Brief at 21. Here again, ENDAUM and SRIC are mistaken as they mischaracterize Becenti's statement. Becenti's comments merely reflect the lack of observable consequences of the Church Rock spill, based on both his and his grandmother's observations. The statement does not suggest not that the spill never occurred as Intervenor suggests.

Outside support for Becenti's credibility comes from the NNHPD and from the results of MNM interviews that were independent of Becenti's work. Becenti's ability to conduct TCP inventories has not been questioned by the Navajo Nation. Blinman Affidavit at ¶12. Moreover, during the course of the MNM interview process, Becenti's high standing in the community was recognizable based on the deference paid to him by officials and knowledgeable individuals from both the Church Rock Chapter and other chapters. This fact is documented in the MNM Report and reflected in the Blinman Affidavit at ¶12.

Finally, following Intervenor's failed attempts to question the credibility of Becenti, Intervenor, relying on Dr. Kelley, assert that Becenti failed to include all the relevant information in his report, such as: the adverse effects two interviewees foresaw on their homesites, interviewees' concerns for possible adverse effects of the project on traditional Navajo homes, and interviewees' concerns regarding adverse effects from the project outside the project area. ENDAUM and SRIC Phase III Brief at 21-22.

With respect to the statements made by two interviewees regarding their homesites, the two statements are documented in the interview forms appended to the Becenti Report and thus, are incorporated therein. The statements were elicited by a question that followed a long list of specific types of potentially important traditional or sacred places that may or may not be present in any given area. Importantly, none of the few types of places identified by the respondents were within the Section 8 and 17 parcels, and most were in the distant hills to the north and west. Blinman Affidavit at ¶¶14-15. Thus, whether or not the responses were included in the text of

the Becenti Report is irrelevant here as none of the places identified by the respondents were within Section 8. In addition, Kelley does not provide any reason why the responses must be included in the text of the Becenti report or attempt to counter Becenti's decision that the perceived threats to TCPs were not specific, and therefore were not significant within the broader community standard that is the intended focus of TCP protections.

Intervenors' assertion, supported by Kelley, that the sacred qualities of the homesite were ignored by Becenti during the TCP property research is unfounded. The homesite is the domestic expression of Navajo worldview, and encompasses places that are and that become sacred through the life cycle of the resident family. Blinman Affidavit at ¶23. This sacredness has roots in Navajo culture, but its specific expression is usually known to the family alone or even to individuals within the family alone. Id. As time passes and memories of specific places fade or are lost, the sacredness of the specific place fades, although the sacredness of the underlying act is timeless. Id. Since TCPs are tied to specific places, only a family or an individual can express the presence and degree of importance of specific homesites places. Id. Importantly, Section 8 either does not have traceable resident Navajo families or there has been no resident family for a generation or more. Id. None of the descendant families or interviewed families expressed any knowledge or interest in specific homesite places within Section 8. Id. Since such homesite locations are sacred to families and individuals rather than to the community, to assert that the sacredness of domestic acts defines residential landscapes as sacred in perpetuity, without any expression of current interest, is a misinterpretation of the intent of TCP protections. Id.

With regard to whether Becenti questioned interviewees about concerns regarding adverse effects from the project outside the project area, even assuming arguendo that Becenti failed to ask the interviewees about this, MNM elicited comments during its investigation on the broader project and its effects outside the project area. Blinman Affidavit at ¶19. The vast

majority of comments pertained to the safety of transporting nuclear material on roads and highways, not the effect of the project on TCPs. Id.

Mr. Becenti's interpretations are also challenged by the testimony of Francisco, a medicine man and peer of Becenti. ENDAUM and SRIC Phase III Brief at 22. Francisco's testimony is that all qualities of the landscape are sacred. Id. While HRI does not dispute the cultural validity of this point of view, the purpose of TCP inventories is to consider the effects of development projects on traditional cultural practice, not on potential practice. Blinman Affidavit at ¶16. Although all plants may be sacred, only some plants from some specific locations are traditionally used for ceremonies. Id. Notably, Francisco does not assert that important gathering locations or important places are within Section 8, rather he asserts that all places may be important. Therefore, Becenti's statement that "no significant sacred and traditional site(s) were found" in the Becenti report remains accurate.

In further support for Intervenor's claims that NRC Staff inadequately documented TCPs at all sites, Kelley recites many of the same concerns regarding the MNM Report as those discussed above with respect to the Becenti Report. For example, Kelley claims that the MNM Report fails to question interviewees about concerns regarding adverse effects from the project outside the project area and "does not use the Navajo Nation interview forms at all." Kelley Affidavit at 10-12; ENDAUM and SRIC Phase II Brief at 23-24. The Museum of New Mexico always uses Navajo Nation questionnaires during TCP investigations on Navajo Nation lands. Blinman Affidavit at ¶18. The completed questionnaires are not included in MNM reports because they may contain confidential information that should not be distributed, but originals of the questionnaires were included in the package of consultation documents that were provided to NRC for transmittal to the NNHPD. Id. With respect to indirect effects of operations outside Section 8, as stated above, although the focus of the MNM investigation was explicitly on Sections 8, 17, and 12, MNM did elicit comments on the broader project all of which were

reported. Again, the vast majority of comments regarded concerns about the safety of transporting nuclear materials on the roads and highways. Id.

2. NRC Staff Sought Information from Tribes and Other Parties with Knowledge of Cultural Resources

In further support of their claim that "NRC Staff has not made a reasonable and good faith effort to identify historic properties or traditional cultural properties that may be affected by HRI's project," ENDAUM and SRIC argue that NRC Staff failed to adequately seek information from tribes and other parties with knowledge of cultural resources. ENDAUM and SRIC Phase II Brief 24. In support of this claim, Intervenor's argue that NRC Staff's efforts to obtain information from tribes, chapter officials, and residents and ceremonial practitioners were inadequate. We address each of these claims below.

a. Tribes

Contrary to ENDAUM's and SRIC's assertions, NRC Staff made significant steps to consult potentially affected tribes. ENDAUM and SRIC Phase III Brief at 24. As ENDAUM and SRIC admit, in January, 1996, the NRC Staff sent three Requests for Additional Information to HRI on the subject of cultural resources. Letter from Mark Pelizza, HRI, to J. Holonich, NRC, forwarding responses to RAI, questions 1-48 (questions 22, 23 and 24) Hearing Record ACN 9602220389 (February 20, 1996), a copy of HRI's responses to questions 22, 23 and 24 is attached to ENDAUM and SRIC Phase III Brief as Exhibit 8. RAI No. 24 sought reports from the Navajo, Hopi, Zuni, Acoma, Laguna and other potentially affected tribes describing the TCPs of each tribe at or near each of the three sites, in accordance with the National Park Service's National Register Bulletin 38, Guidelines for Evaluating and Documenting Traditional Cultural Properties. Id. at 7. HRI responded to all three RAIs by stating that its responses "will be the subject of additional work by our cultural resource contractor." Id. at 1. In May, 1996, HRI supplemented its answer to RAI 24, by submitting a report from Lorraine Heartfield, indicating

that the effort HRI made in contacting neighboring tribes "provided only limited response."

Pelizza Letter I.

NRC Staff then sent a request for additional information on RAI 24 (RAI #2/24). Pelizza Letter II. In response, HRI described a set of letters it sent to Zuni and Hopi Tribes, asking them to notify HRI of any traditional cultural practices at Churchrock, Crownpoint and Unit 1. Pelizza Letter II at 6; Letter from L. Heartfield, HRI cultural resources consultant to J. Saulsbury, ORNL, HRI's application to operate in situ leach uranium facilities near Crownpoint and Churchrock, NM, cultural resources open issue question 24 at 1, 3, Hearing Record ACN 9607290081 (July 23, 1996). HRI described letters sent to Acoma, Hopi, Zuni, Laguna, and the All Indian Pueblo Council, asking to be notified of any TCPs. Pelizza Letter II at 6. Lorraine Heartfield made follow-up telephone calls in the last week of July, 1996.

On October 2, 1996, Daniel Gillen, NRC Staff, wrote to officials at Navajo Nation Historic Preservation Department, Pueblo of Zuni Heritage and Historic Preservation Office, Hopi Cultural Preservation Office, the Pueblo of Acoma, the Pueblo of Laguna, the All Indian Pueblo Indian Council, the Crownpoint Chapter, the Church Rock Chapter, the BLM and the BIA, thanking them for their interest in the consultations being conducted for the Section 106 review process, and stating "We will keep you informed as the review process proceeds." Letter from D.Gillen, NRC to federal agencies and interested parties, at 1, Hearing Record ACN 961010079 (October 2, 1996). Subsequently, NRC wrote to the tribes and asked them to comment on the MNM Report.

Even assuming that Dodge's representation of his conversations with Dr. Glenna Dean of the New Mexico State Historic Preservation Division (NMSHPD) and Dr. Alan Downer of the NNHPD is correct, both the NMSHPD and NNHPD responded to NRC consultation requests with letters concurring with the recommendations of the NRC, based on Blinman 1997, that there would be "no effect" on all cultural resources within the parcels of the partition. Both the

consultation request and Blinman 1997 make it clear that no TCPs (other than traditional concerns that were coincident with archaeological sites) were found within Section 8. Since no TCPs were identified and since eligible archaeological sites are to be avoided, the concurrence of the two HPOs as to "no effect" completes consultation on both archaeological and TCP resources. Notably, Blinman points out in his affidavit that Downer may have been vague in his conversations with Dodge since review responsibility for this project had been delegated to Mr. Peter Noyes of the NNHPD office. Blinman Affidavit at ¶6. Questions concerning both the substance and process of the consultations should have been directed to Noyes since Dr. Downer would not have been familiar with the details of the consultations. Id. In any event, the regulatory correspondence between the NRC and the HPOs is clear: consultation has been completed for all aspects of cultural resources in Section 8.

b. Chapter Officials

Relying on the testimony of Kelley, ENDAUM and SRIC claim that "the only Church Rock Chapter official who was consulted was Earnest Becenti, an HRI consultant, who consulted himself." ENDAUM and SRIC Phase III Brief at 27; Kelley Affidavit at 8. ENDAUM and SRIC are wrong. Becenti was not the Church Rock Chapter president at the time of the MNM study, and MNM consulted with the then Chapter President, Mr. Herbert Benally. See MNM Report at 21.

c. Residents and Ceremonial Practitioners

ENDAUM and SRIC claim that efforts to identify knowledgeable individuals and traditional practitioners were inadequate. ENDAUM and SRIC Phase III Brief at 27-28; Kelley Testimony at 9. In support of their claim, ENDAUM and SRIC look to the testimony of Mitchell Capitan who states that he engages in Navajo traditional practices near the Crownpoint and on Section 22 of the Unit 1 mine sites, but has not been consulted by any researchers. Id.; Capitan

Testimony, Exhibit 4. Capitan's statement is irrelevant because it does not relate to Church Rock Section 8 or reflect the partitioning of the Section 106 process. See September 22 Order.

With regard to ceremonial practitioners, Francisco was not contacted concerning the Church Rock area because none of the inclusive or adjacent chapter officials provided his name as an individual who would be knowledgeable and who should be contacted. See Billin Affidavit at ¶21. Even if Francisco had been contacted, we presume that his statements concerning specific traditional uses in the Section 8 and 17 area would be similar to the content of his testimony attached to Intervenor's brief, i.e., although the landscape as a whole is sacred, he has no specific knowledge of significant traditional cultural properties within this partition of the project area.

3. NRC Staff Adequately Reviewed Existing Information

Intervenor ENDAUM and SRIC next assert that NRC Staff failed to adequately review existing information in support of their claim that the Staff has not made a reasonable and good faith effort to identify historic properties or traditional cultural properties that may be affected by HRI's project." ENDAUM and SRIC Phase II Brief at 28.

In sum, in Kelley's opinion, HRI's cultural resource researchers' failure to consult sufficient sources of relevant literature demonstrates a lack of reasonable and good faith effort. Kelley Affidavit at 6-7. Specifically, Kelley criticizes the MNM Report for not citing a series of general works on ethnography in the Handbook of North American Indians that provide background information on both Navajo and Pueblo cultures. These chapters do not contain any specific information that is relevant to any of the parcels. See Blinman Affidavit at ¶22. MNM researchers have access to these and many other references on Southwestern ethnography, but if there is no relevant information, citations to these references would be gratuitous. Id. Kelley also characterizes the MNM report as including serious errors, but none are described or identified.

Despite her extensive knowledge of Navajo culture and ethnography, Kelley has not identified any specific traditional cultural properties that were missed, either within or adjacent to the lands of Section 8.

4. NRC Staff Efforts to Obtain the View of the Historic Preservation Officer on Identification

Finally, Intervenor ENDAUM and SRIC assert that NRC Staff failed to adequately obtain the view of the Historic Preservation Officer in support of their claim that the "Staff has not made a reasonable and good faith effort to identify historic properties or traditional cultural properties that may be affected by HRI's project." ENDAUM and SRIC Phase II Brief at 29. In sum, ENDAUM and SRIC, relying on the affidavit of Dodge, claim that NRC Staff failed to recognize the "NNHPD as the appropriate HPO for the project" and "failed to recognize its authority to consult on all of the project areas." ENDAUM and SRIC Phase III Brief at 29. Intervenor ignore the SHPO's jurisdiction over the Section 8 section of the project.

Dodge's testimony implies that he has accepted the Navajo Nation position of sole responsibility for NHPA administration for the entire project. Dodge Affidavit, Exhibit D at 2. Dodge's position is ungrounded in law. By way of background, the Navajo Nation has asserted that it has sole jurisdiction over Section 8, including over NHPA issues. See HRI, Inc. v. U.S. EPA, 97-9556 (10th Cir. 1998) and, New Mexico Env. Dept. v. U.S. EPA, 97-9557 (10th Cir. 1998). Although the Navajo Nation has asserted jurisdiction over these lands, responsibility for NHPA review had been previously and formally delegated to the NMSHPD. The NMSHPD was initially given jurisdiction over NHPA consultations for all New Mexico lands in a substitution agreement with the Advisory Council. More recently, the NNHPD assumed jurisdiction over NHPA matters on Navajo Tribal lands; an assumption that was with the concurrence of both the NMSHPO and the Advisory Council. A legal framework does exist for the future assumption by the NNHPD of NHPA responsibilities for the state and private land inholdings, i.e., dependent

communities, within the greater Navajo Nation boundary. However, that legal framework has not been invoked formally and has not been accepted by all parties, so that no transfer of responsibility from the NMSHPD to the NNHPD has occurred. Blinman Affidavit at ¶8. Thus, until all parties are in agreement, NRC Staff must consult with different HPOs for different land statuses. Since Section 8 is owned in fee by HRI and is not within the jurisdiction of the Navajo Nation at the time the Section 106 process was completed for Section 8, the SHPO had authority over the Section 8 project and was consulted in accordance with NHPA. See Letter from Glenna Dean, NMSHPD, to J. Holonich, NRC (June 3, 1998) (concurring with the NRC Staff determination that project will have no effect).

B. The NRC Staff Considered Whether Section 8 Operations Will Have an Adverse Effect on Historic Properties, Including Cultural Landscapes

As discussed above, NRC Staff completed the Section 106 process with respect to Church Rock Section 8 and concluded that operations would have “no effect” on “any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register.” See Letter from J. Holonich, Chief, Uranium Recovery Branch, NRC to Lynne Sebastian, State Historic Preservation Officer, NM (May 20, 1998). To reach this determination, the Staff considered the effect of Section 8 operations on historic properties in consultation with the affected tribes, pueblos, and organizations. In challenging this conclusion, ENDAUM and SRIC reassert many of the same grievances discussed above, e.g., HRI’s consultants failed to ask interviewees about the impacts of the project on historic properties on-site and TCPs outside the project area. ENDAUM and SRIC Phase III Brief at 35-36. ENDAUM and SRIC also take issue with HRI’s policy of avoidance yet again ignore the strict mandate contained in License Condition 9.12 and HRI’s oft-repeated commitment to “comply fully with the NHPA prior to

conducting any land disturbance."¹⁶ Both the presence of the protective conditions in the license and HRI's commitments made the Commission "skeptical of whether the alleged NHPA injury will occur at all, much less immediately."¹⁷

ENDAUM and SRIC raise one claim, however, that is not addressed above, that is worthy of further discussion, yet can be readily dismissed. Relying on Kelley, ENDAUM and SRIC claim that NRC Staff has not considered all the effects of the project as it failed to consider effects on integrated cultural landscapes. ENDAUM and SRIC Phase III Brief at 37; Kelley Affidavit at 16. Specifically, Kelley states the project area may affect landscapes with qualities that make them significant to Navajo traditionalists, those of other tribes, or both. In addition, these landscapes as integrated wholes may contain as-yet untapped information about the past that can help answer research questions significant to cultural resource researchers, thereby making these landscapes eligible to the National Register of Historic Places under eligibility criterion d. *Id.* at 16. Simply avoiding archaeological sites "can nevertheless destroy the integrity of significant cultural landscapes." *Id.* Avoiding archaeological sites may still destroy

¹⁶ HRI's Response to Petitioners' Application for Review of LBP-98-5, dated April 23, 1998, at 6 (emphasis in original). See also *id.* at 8 (HRI "is committed to full compliance with the letter and spirit of the NHPA and therefore will not engage in any land disturbance that does not comply with the NHPA") (emphasis in original); HRI's Response to Petitioners' Application for Stay, dated April 23, 1998, at 3 n.9 ("the NRC staff and HRI will complete Section 106 review for each phase of the proposed project before initiating any actual construction"), 4 ("HRI has no intention of conducting any land disturbance activities in any part of the [Crownpoint Uranium Project] properties until the NHPA process has been completed for that piece of property"), 6 ("HRI's license would require the company to refrain from land disturbing activities until the NHPA process is complete No cultural resources will be disturbed in violation of the NHPA"), and 7 ("HRI's license forbids any ground disturbing activities that would violate the NHPA HRI has no intention of performing any ground disturbing activities in violation of the NHPA") (emphasis in original); HRI's Response to the Navajo Nation's Motion for Leave to File a Brief Amicus Curiae . . . , dated May 4, 1998, at 3 and n.6 ("HRI's license prohibits the company from conducting any land disturbing activities that are not in full compliance with the . . . NHPA"; "the company's commitment to a policy of 'total avoidance' of archaeological resources ensures that there will be no disturbance that will harm any cultural or archaeological resources" (emphasis in original)).

¹⁷ See *In the Matter of Hydro Resources Inc.*, 47 NRC 314, 1998 NRC LEXIS 26, *10 (June 5, 1998).

information and qualities that will compromise the significance of the sites as TCPs and compromise their eligibility to the National Register. Id. at 17-18.

Kelley states that the only HRI consultant that mentions cultural landscapes, Marshall, "under-represents the spatial and temporal extent and complexity of these landscapes." Id. at 18. As Kelley concludes, the Kin Yaa 'a and the Muddy Water complexes, as well as the postcolumbian features attributed to Navajos, should be researched as a single cultural landscape, because they consist of near continuous distribution of archaeological features. Id. at 18.

Both ENDAUM and SRIC and Kelley apply an extreme concept of cultural landscape as a criterion for defining and interpreting TCPs and the effects of undertakings on those properties. Cultural landscapes are viable concepts in the NHPA Section 106 review process, but Kelley's invocation of the concept in this case is an extremely over-broad interpretation of what constitutes a traditional cultural property. Blinman Affidavit at ¶26. If Kelley's interpretation were correct, it would exclude the entire landscape of the Church Rock and Crownpoint areas from any development. Her interpretation is not shared by a significant portion of the Navajo community, including traditional practitioners as represented by Becenti. Id. Moreover, such a broad definition of landscapes is not used during the routine evaluation of cultural resource information by the NNHPD as part of the NHPA Section 106 review process for other development projects, e.g., highway improvements, homesite locations, or utility installations. If the standards advocated in Kelley's testimony were applied, economic and social development of any sort would be curtailed, e.g., recently constructed college facilities within the "cultural landscape" of the Crownpoint community would have been barred. Noise, dust, traffic, and other elements of visual pollution from recent developments are comparable to or more extreme than any of these effects that may derive from the uranium mining facilities. Blinman Affidavit at ¶26.

Accordingly, HRI's cultural resource reports adequately consider the impacts on cultural resources inside and outside Section 8, including cultural landscapes.

II. THE NRC STAFF DID NOT VIOLATE THE NHPA BY AUTHORIZING ACTIVITY ON SECTIONS 8 BEFORE THE 106 REVIEW PROCESS IS COMPLETE FOR THE ENTIRE PROJECT

A. ENDAUM and SRIC Ignore the Phased Review of the Project

On pages 39-44 of their brief, ENDAUM and SRIC argue, in sum, that NRC Staff "violated the requirements under the regulations of the Advisory Council on Historic Preservation to complete the Section 106 process before a license is issued and before initiation of ground-disturbing activities." ENDAUM and SRIC Phase III Brief at 39-43. This claim is merely a reiteration of the claim made before the Presiding Officer during the "stay" proceedings in the early part of 1998. See In the Matter of Hydro Resources, Inc., 47 NRC 7 (Jan. 23, 1998); In the Matter of Hydro Resources, Inc., 47 NRC 119 (April 2, 1998); In the Matter of Hydro Resources, Inc., 47 NRC 314 (June 5, 1998). There, Intervenor's sought a stay based on a claim of irreparable harm due to the "phased review" of NHPA, i.e., NRC Staff issued a license to HRI permitting it to operate at Section 8 before completing the Section 106 process for the entire project.¹⁸ Id. In dismissing Intervenor's claim, the Commission stated:

[W]e are not convinced by petitioners' argument that the NRC and HRI are prohibited from taking a "phased review" approach to complying with the NHPA The statute itself contains no such prohibition,¹⁹ federal case law suggests none,²⁰ and the supporting

¹⁸ HRI's approach is to complete cultural resource inventories and preservation plans on various sections of the development prior to each section being developed instead of the whole inventory being completed on the whole development before mining commences. Id.

¹⁹ Section 470f of the statute provides, in relevant part, only that a federal agency shall, "prior to the issuance of any license . . . take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register."

²⁰ See City of Grapevine v. Department of Transportation, 17 F.3d 1502, 1508-09 (D.C. Cir.), cert. denied, 513 U.S. 1043 (1994) (rejecting claims that completion of the NHPA review

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regulations are ambiguous on the matter, even when read in the light most favorable to petitioners.²¹

In sum, Intervenor's argument that NRC Staff failed to comply with NHPA as the whole resource inventory and protection plan was not established before any mining development can begin fails based on the Commission's prior ruling on this matter.

B. NRC Staff Was Not Required to Provide the Advisory Council on Historic Preservation the Opportunity to Comment

ENDAUM and SRIC argue that "[t]he Staff has not even contacted the [Advisory Council on Historic Preservation] ACHP regarding the HRI license" in violation of NHPA and its implementing regulations. ENDAUM and SRIC Phase II Brief at 44; Dodge Affidavit at 10. Here again, ENDAUM and SRIC misunderstand the law.

The ACHP is informed of NHPA Section 106 consultations only when HPOs determine that there will be an adverse effect.²² Dodge asserts that failure to notify the Advisory Council concerning the cultural resources of Section 8 constitutes a failure to carry out the NHPA Section 106 consultation process. This observation simply calls into question his status as expert witness

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process was required prior to agency approval of a project, where the agency's approval was conditioned on its subsequent completion of that process).

²¹ Although section 800.3(c) of the Advisory Council on Historic Preservation's ("ACHP") regulations states that "Section 106 requires [a federal agency] to complete the section 106 process . . . prior to issuance of any license or permit," the next sentence in the same section provides that the ACHP "does not interpret this language . . . [as] prohibit[ing] phased compliance at different stages in planning." 36 C.F.R. §§ 800.3(c). Moreover, the immediately preceding subsection (800(b)) states that the ACHP "regulations may be implemented . . . in a flexible manner . . . as long as the purposes of section 106 . . . and these regulations are met." 36 C.F.R. § 800.3(b).

²² Regulations describe the methods by which Section 106 review is to be conducted. See generally, 36 C.F.R. § 800. When the effect of the proposed action is adverse, the agency is required to notify the Advisory Council on Historic Preservation ("Council") and consult with the SHPO "to seek ways to avoid or reduce the effects on historic properties." 36 C.F.R. §800.5(e). The accuracy of this description of the process was reaffirmed in a telephone conversation between Blinman and Dr. Lynne Sebastian, New Mexico State Historic Preservation Officer, December 21, 1998.

concerning NHPA issues and process. The only context in which the Advisory Council would have been notified of these consultations is if there had been a finding of adverse effect by either of the HPOs. Id. This is standard policy and Dodge's lack of knowledge of the policy is remarkable for an expert.

III. THE NRC STAFF COMPLIED WITH THE NATIVE AMERICAN GRAVES PROTECTION AND REPATRIATION ACT

Intervenors ENDAUM's and SRIC's next claim is made under the Native American Graves Protection and Repatriation Act ("NAGPRA"), 25 U.S.C. § 3001, et seq. ENDAUM's and SRIC's claim is that because NRC Staff failed to seek the consultation and concurrence of the appropriate tribes prior to the issuance of HRI's license, it violates NAGPRA and is unlawful. ENDAUM and SRIC Phase III Brief at 45-49. Here again, Intervenors misinterpret and misapply the law.

Congress enacted NAGPRA in 1990 to achieve two principal objectives: to protect Native American human remains, funerary objects, sacred objects and objects of cultural patrimony presently on Federal or tribal lands; and to repatriate Native American human remains, associated funerary objects, sacred objects, and objects of cultural patrimony currently held or controlled by Federal agencies and museums. H. R. Rep. No. 101-877, 101st Cong., 2d Sess. 1990, reprinted in 1990 U.S.C.C.A.N. 4367, 4368. The legislation and subsequent regulations, 43 C.F.R. §§ 10.1 - 10.17, provide a methodology for identifying objects; determining the rights of lineal descendants, Indian tribes and Native Hawaiian organizations; and retrieving and repatriating that property to Native American owners. NAGPRA's reach in protecting against further desecration of burial sites and restoring countless ancestral remains and cultural and sacred items to their tribal homes warrants its aspirational characterization as "human rights legislation." Jack F. Trope & Walter R. Echo-Hawk, *The Native American*

Graves Protection and Repatriation Act: Background and Legislative History, 24 Ariz. St. L.J. 35, 37 (1992). Indeed, a Panel of National Dialogue on Museum-Native American Relations, which was convened to address the divergent interests of the museum and Native American communities, reported to Congress that "respect for Native human rights is the paramount principle that should govern resolution of the issue when a claim is made." 1990 U.S.C.C.A.N. 4369-70; see United States of America v. Corrow, 119 F.3d 796, 1997 U.S. App. LEXIS 17408 (10th Cir. 1997).

Nevertheless, as stated above, NAGPRA only applies to the disposition of Native American cultural items that are "excavated or discovered on federal or tribal lands" and the repatriation of Native American objects in possession of federal agencies and museums. (emphasis added).²³ Federal lands are defined in relevant part as "land other than tribal lands which are controlled or owned by the United States." 25 U.S.C. § 3001(5); id. As Section 8 is neither "federal" nor "tribal lands," NAGPRA is inapplicable. To the extent Intervenor's attempt to urge a broad construction of "control" to include the NRC Staff's issuance of HRI's license, Intervenor's claim fails.

Such a broad reading is not consistent with the statute, which exhibits no intent to apply the Act to situations where federal involvement is limited as it is here to the issuance of a license. See e.g., The Abenaki Nation of Mississquoi, et al. v. Hughes, et al., 805 F. Supp. 234, 1992 U.S.

²³ NAGPRA Regulations are subdivided into two distinct subparts that separately address repatriation and ownership. Subpart B concerns the disposition of Native American items discovered or excavated, either inadvertently or intentionally, on federal lands after November 16, 1990. 43 C.F.R. §§ 10.3(a) & 10.4(a) (1995). Subpart C addresses repatriation of Native American objects in possession of federal agencies and museums. 43 C.F.R. §§ 10.8 - 10.10 (1995). Regulations concerning repatriation do not contain a limiting date. Pueblo of Ildefonso v. Ridlon and Regents of the University of California, 103 F.3d 936; 1996 U.S. App. LEXIS 33490, 11 (10th Cir. 1996); The Abenaki Nation of Mississquoi, et al. v. Hughes, et al., 805 F. Supp. 234, 1992 U.S. Dist. LEXIS 17156, *51-53 (D.VT 1992), aff'd, 990 F.2d 729 (2nd Cir. 1993).

Dist. LEXIS 17156, *51-53 (D.VT 1992) ("[NAGPRA] exhibits no intent to apply the Act to situations where federal involvement is limited as it is here to the issuance of a permit).²⁴

As yet there have been no cultural or funerary items discovered at the Section 8, though the possibility of their existence exists according to Intervenor. ENDAUM and SRIC Brief at 47. However, NAGPRA applies to cultural and funerary objects already possessed or under the control of a Federal agency or museum, §§ 3003 and 3004, or those already discovered or excavated, § 3002. Therefore, as to Intervenor's claim, the Presiding Officer must hold that even if NAGPRA were to apply, which it does not, the claim is premature. The Abenaki Nation of Mississquoi, et al. v. Hughes, et al., 805 F. Supp. 234, 1992 U.S. Dist. LEXIS 17156, *51-53 (D. VT 1992).

IV. THE FINAL ENVIRONMENTAL IMPACT STATEMENT ADEQUATELY ADDRESSES THE IMPACTS ON CULTURAL RESOURCES

On February 28, 1997, NRC Staff, in accordance with the National Environmental Policy Act, 42 U.S.C. §§ 4321, et seq. ("NEPA"), issued a Final Environmental Impact Statement ("FEIS") for the Crown Point Uranium Project ("CUP") based on the requirements of NEPA, NRC's "Environmental Protection Regulations for Domestic Licensing and Related Regulatory Functions," 10 C.F.R. Part 51, the Bureau of Land Management's ("BLM") "Surface Exploration, Mining, and Reclamation of Lands," 25 C.F.R. Part 216, and "Solid Minerals Exploration and Mining Operations," 43 C.F.R. Part 3590.²⁵ In sum, the NRC Staff concluded

²⁴ The legislative history of the statute repeatedly uses the language "federal lands." See 1990 U.S. Code Cong. & Admin. News at 4367-4392. To adopt such a broad reading of the Act would invoke its provisions whenever the government issued permits or provided federal funding pursuant to statutory obligations.

²⁵ NUREG-1508, "Final Environmental Impact Statement to Construct and Operate the Crownpoint Uranium Solution Mining Project, Crownpoint, New Mexico," Feb. 1997 ("FEIS"). NRC published a "Notice of Availability of Draft Environmental Impact Statement: Notice of Opportunity for Hearing" in the Federal Register on November 14, 1994, more than two years prior to the issuance of the FEIS. See, Hydro Resources, Inc., LBP 98-9, 47 NRC 261, 264

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in the FEIS that the potential significant impacts of the CUP could be mitigated through license conditions; therefore, NRC determined that HRI should be issued a combined source and 11e.(2) by-product material license from NRC and mineral operating leases from BLM and the Bureau of Indian Affairs ("BIA").²⁶

Intervenors ENDAUM and SRIC complain, in sum, that the FEIS was "drafted and published while the NRC's Section 106 was in the initial identification phases" and "defers consideration of impacts on TCPs that may be identified." Such deferral, Intervenors claim, "violates NEPA because the same deficiencies in the Section 106 process, examined above, apply to the FEIS." ENDAUM and SRIC Phase III Brief at 52.

HRI has agreed to the recommendations made in the FEIS by the NRC. In the FEIS, the NRC Staff recommended that HRI implement a final cultural resources management plan for all mineral operating lease areas and other lands affected by license activities pursuant to National Historic Preservation Act-Section 106 review and consultation processes. FEIS at 4-111, 112. The NRC Staff's recommended cultural resources management plan would include archaeological and traditional cultural property surveys of lease areas, identification of protection areas where human activity would be prohibited, and archaeological testing before subsurface disturbance occurs. The plan would also include archaeological monitoring during ground disturbing construction, drilling and operation activities. If unidentified cultural resources or human remains are found during project activities, the activity would cease, protective action and

(Footnote continued from previous page)

(1998) ACN No. 9703200270. Notably, Environmental Impact Statements generally have not been required in connection with ISL mining operations. In this case, allottees' land is under the jurisdiction of the Bureau of Indian Affairs ("BIA"), and BIA required that an EIS be prepared. Letter from Area Director, Bureau of Indian Affairs (June 18, 1992).

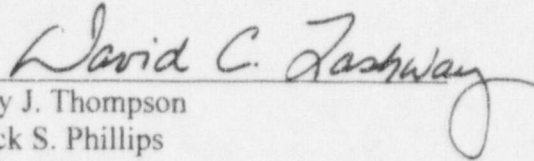
²⁶ FEIS at xxi.

consultation would occur, and artifacts and human remains would be evaluated for their significance. Id. HRI agreed to these recommendations. FEIS at 4-111, see also COP Rev. 2.0 at 23. Moreover, for the reasons discussed at length above, there were no "deficiencies" in the Section 106 process for Church Rock Section 8; Intervenor merely refuse to accept the "phased review" of the project which is permitted by law.

CONCLUSION

HRI has satisfied all requirements for obtaining the Materials License at issue. For all the aforementioned reasons, Intervenor's request that the Presiding Officer revoke HRI's license to operate at Churchrock Section 8 should be DENIED.

Respectfully submitted this 11th day of January, 1999.



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