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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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ATOMIC SAFETY AND LICENSING BOARD PARTIAL OFFICE OF SECRETARY
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BRANCH

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

Administrative Judge
Thomas D. Murphy, Special Assistant

In the Matter of)
)
HYDRO RESOURCES, INC.)
12750 Merit Drive)
Suite 1210 LB12)
Dallas, TX 75251)
_____)

Docket No. 40-8968-ML
ASLBP No. 95-706-01-ML

**PETITIONERS ENDAUM AND SRIC'S MOTION FOR LEAVE TO AMEND
REQUESTS FOR HEARING, PETITION TO INTERVENE,
AND STATEMENT OF CONCERNS
AND BRIEF IN SUPPORT OF MOTION**

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Table of Contents

I. INTRODUCTION	1
II. FACTUAL BACKGROUND	2
A. HRI License Application and Notice of Hearing	2
B. Requests for Hearing	3
C. HRI's Amendments and Supplements to Its License Application	4
D. Licensing Board Stays Proceeding	6
E. Petitioners' Continuing Review of Documents	7
III. ARGUMENT	8
A. Standard for Amendment of Requests	8
B. The Licensing Board Should Exercise Its Discretion to Admit Petitioners' Second Amended Request Because the Filing of that Request at This Time is Justified	10
1. The Second Amended Request Sets Out the Legal Basis and Further Explanation of Previously Stated Concerns, and Raises New Concerns Based on New Information	10
2. The Late Filing Is Excusable	16
a. The Filing is, In Effect, Timely	16
b. Substantial New Information has Emerged Since the Previous Requests Were Filed	17
c. The Delay Reflects Diligent Efforts to Obtain Legal and Expert Assistance, and Diligent Review by Attorneys and Experts	18
d. The Delay is Largely Attributable to HRI's Disjointed and Contradictory Application and Repeated Application Amendments	21

3.	No Other Participant Will be Unduly Prejudiced or Injured by Petitioners' Filing	22
4.	Admission of The Second Amended Request Would Materially Aid the Board To Make An Informed Determination	25
5.	Admission of Petitioners' Second Amended Request is Otherwise In the Public Interest	28
C.	The Licensing Board Should Exercise Its Discretion to Admit the Standing Affidavits Submitted by Petitioner SRIC	31
IV.	CONCLUSION	32

Table of Authorities

Statutes

16 U.S.C. §§ 470 <u>et seq.</u>	20
25 U.S.C. § 3001 <u>et seq.</u>	20
33 U.S.C. §§ 1342 and 1344	20
42 U.S.C. §§ 300f <u>et seq.</u>	20
42 U.S.C. §§ 2011 <u>et seq.</u>	20
42 U.S.C. §§ 4321 <u>et seq.</u>	20
42 U.S.C. §§ 7901 <u>et seq.</u>	20

Regulations

Subpart L of 10 C.F.R. Part 2	4,8
10 C.F.R. § 2.206	10
10 C.F.R. § 2.714(a)(3)	8
10 C.F.R. § 2.1205	32
10 C.F.R. § 2.1205(c)	9
10 C.F.R. § 2.1205(j)	9
10 C.F.R. § 2.1205(k)	1,9
10 C.F.R. § 2.1209	1,8,28,29,31
10 C.F.R. § 2.1213	9
10 C.F.R. § 2.1237(a)	1

Cases

Babcock and Wilcox Co., LBP-94-4, 39 NRC 47 (1994) 8,9,28

Babcock and Wilcox Co., LBP 92-24, 36 NRC 149
(1992) 9,10,25

Puget Sound Power and Light Company, et al., (Skagit
Nuclear Power Project, Units 1 and 2), ALAB-552,
10 NRC 1 (1979) 30

Puget Sound Power and Light Company, et al., (Skagit
Nuclear Power Project, Units 1 and 2), ALAB-559,
10 NRC 162 (1979) 30

Other

59 Fed. Reg. 56557 (November 14, 1994) 3

Regulatory Guide 3.46, Standard Format and Content
of License Applications, Including Environmental Reports,
For In Situ Uranium Solution Mining (June 1982) 21

Staff Technical Position Paper WM-3102, "Groundwater
Monitoring at Uranium In Situ Solution Mines"
(December 1981) 21

Staff Technical Position on Effluent Disposal at Licensed
Uranium Recovery Facilities, Division of Waste Management,
NRC (April 1995) 21

I. INTRODUCTION

Petitioners Eastern Navajo Diné Against Uranium Mining (hereinafter "ENDAUM") and Southwest Research and Information Center (hereinafter "SRIC"), by and through their attorneys, New Mexico Environmental Law Center (hereinafter "NMELC") and Harmon, Curran, & Spielberg, hereby move to amend their previous requests for hearing, petitions to intervene, and statements of concern by filing the affidavits of Raymond Morgan and LaLora Charles in support of SRIC's standing, and by substituting their Second Amended Request For Hearing, Petition to Intervene, and Statement of Concerns (hereinafter "Second Amended Request"), including exhibits cited therein and submitted herewith,¹ for all of their previously filed requests for hearing, petitions to intervene, and statements of concern pursuant to 10 C.F.R. §§ 2.1237(a), 2.1205(k)(1), and 2.1209.² The grounds for this motion are as

¹ Exhibits to ENDAUM's and SRIC's Second Amended Request For Hearing, Petition to Intervene, and Statement of Concerns, Volumes I, II, and III.

² Petitioners' previously filed requests and petitions are as follows: Letter from Bernadine Martin to John C. Hoyle, U.S. Nuclear Regulatory Commission (hereinafter "NRC"), December 13, 1994 (hereinafter "Martin's Request"); Letter from Wm. Paul Robinson and Chris Shuey, SRIC, to Secretary, NRC, December 14, 1994 (hereinafter "SRIC's Request"); Petitioner Eastern Navajo-Diné Against Uranium Mining Request for Evidentiary Hearing and Petition for Leave to Intervene, February 15, 1995 (hereinafter "ENDAUM's Amended Request").

ENDAUM's Amended Request amended Martin's Request, which was submitted on behalf of the group of concerned citizens that later took the name ENDAUM. ENDAUM Amended Request at 12; Martin's Request; Affidavit of Bernadine Martin, March 17, 1995 (hereinafter "Martin Affidavit"), attached as Exhibit B to Motion of Eastern Navajo Diné Against Uranium Mining to Respond to

stated below.

II. FACTUAL BACKGROUND

A. HRI License Application and Notice of Hearing

On April 25, 1988, Hydro Resources, Inc. (hereinafter "HRI") submitted an application for in situ leach (hereinafter "ISL") mining at Crownpoint, New Mexico, a rural, predominately Navajo, low-income community. Final Environmental Impact Statement to Construct and Operate the Crownpoint Uranium Solution Mining Project, Crownpoint, New Mexico, February 1997, NUREG-1508 (hereinafter "FEIS") at 1-1, 3-78 to 3-79. On May 8, 1989, HRI amended its application to include uranium recovery processing at Crownpoint. Id. at 1-1. HRI again amended its application on April 23, 1992, to include ISL mining on the allotted lands in the Crownpoint area referred to as Unit 1, and on July 31, 1992, to include ISL mining at Crownpoint. Id. Review was deferred at HRI's request during this four-year period of amendments "due to a tentative uranium market." Draft Environmental Impact Statement to Construct and Operate the Crownpoint Uranium Solution Mining Project, Crownpoint, New Mexico, NUREG-1508, October 1994 (hereinafter "DEIS"), at 1-3.

the Request of Hydro Resources Inc. to Deny All Petitions for an Evidentiary Hearing (hereinafter "ENDAUM's Motion/Response"), ¶¶ 9-10. Bernadine Martin authorized ENDAUM to represent her in this licensing proceeding. Martin Affidavit at 14.

A significant portion of the Second Amended Request consists of issues and facts raised in the earlier statements of concerns. However, these concerns have been clarified and amended. Petitioners believe that confusion is best avoided by substituting the Second Amended Request for the original requests.

The review process was resumed in 1992 when "HRI committed to pursuing the license and leases." Id.

On November 14, 1994, the NRC published a notice of the availability of the DEIS and the opportunity for members of the public to request a hearing. 59 Fed. Reg. 56557. Nothing in the notice indicated that requestors needed to base a request for hearing on a review of the license application or any document other than the DEIS. The notice provided information on how to obtain a copy of the DEIS (id.), and ENDAUM and SRIC did so. No NRC local public document room was opened, and thus no copy of the license application was locally available for review. See Second Amended Request at 176-177.

B. Requests for Hearing

Based on their review of the DEIS, Petitioners submitted requests for hearing, including statements of their concerns within the 30-day time limit imposed by 10 C.F.R. § 2.1205(c). See supra note 2. See also Memorandum and Order (Setting Schedule for Filings) January 9, 1995, at 1-2 and n.1 (hereinafter "Order of January 9, 1995"). These pleadings were prepared without benefit of legal representation, because Petitioners were not able to obtain counsel. See infra note 7. Five other groups and individuals filed requests for a hearing. Order of January 9, 1995, at 1-2 and n.1.

Recognizing that most of these requestors' ability to comply with ASLB procedures and pleading requirements was hindered by lack of experience with Subpart L of 10 C.F.R. Part 2, the Licensing Board subsequently afforded requestors an opportunity to amend their petitions. Id. at 3-4. Along with several other petitioners, ENDAUM filed an amended petition pursuant to the Presiding Officer's Order of January 9, 1995 and Memorandum and Order (Revising Schedule for Filings) of January 20, 1995 (hereinafter "Order of January 20, 1995"). See ENDAUM's Amended Request, supra note 2. SRIC did not file an amended Petition, but elected to stand on the petition it had previously filed.

On February 25, 1995, HRI filed a lengthy response to the original and amended requests for hearing by Petitioners and other requestors, opposing all requests. Response of Hydro Resources, Inc. to Requests for Hearing, February 25, 1995. ENDAUM responded to HRI on March 20, 1995, pursuant to the Order of January 20, 1995, answering HRI's arguments, and providing clarification and elaboration of its concerns. See ENDAUM's Motion/Response, supra note 2, at 1-2.

C. HRI's Amendments and Supplements to Its License Application

Beginning one year after filing its application, HRI has repeatedly amended and supplemented its application, mostly through correspondence with the NRC. See supra p. 2; Second Amended Request at 17-22. Since the first round of pleadings ended in March 1995, the NRC Staff has requested additional information from HRI on 99 discrete issues in at least six rounds of requests, to which HRI has responded

with thousands of pages of new information that amends and purports to support the license application with respect to a host of issues. See Second Amended Request at 18-19 and citations therein. Thus, as shown by the Index of Docket No. 40-8968-ML (submitted herewith as Exhibit 1), since March 1995, the docket in this matter has grown from about 175 documents to almost 500, comprising many thousands of pages of information.

As a result of the voluminous correspondence between HRI and the NRC Staff regarding changes to the application, there is no single document or set of documents to which one can refer in order to understand the contents of the license application. Rather, as a practical matter, the application itself is now spread out over thousands of pages of documents. This is further complicated by the many internal contradictions within HRI's documents, and contradictions between HRI documents and NRC documents. See Second Amended Request at 22-26 and citations therein.

At several points in the process of reviewing the license application, the NRC Staff has pointed out the disorganized and confusing state of the license application. See id. at 20-22 and citations therein. In response, in May 1997, HRI submitted its Consolidated Operations Plan Revision 1.0 (hereinafter "COP Revision 1.0") intended to "extract, and combine the information in previously submitted documents into one consolidated specification report. . . . [that] will contain all the specifications, and representations which have been articulated to NRC in the past under one cover." COP Revision 1.0 at 2, submitted herewith as Exhibit 9. However, COP Revision

1.0 fails to achieve its stated purpose in that it excludes significant information that was previously submitted by HRI, and omits or modifies previous commitments by HRI. See Second Amended Request at 23-25. These omissions and contradictions concern matters of substantial importance to the protection of health and safety, including but not limited to the quantification of hydrologic and geologic parameters, the design of the ground water monitoring program, and the methods and specifications for waste water disposal. See id. Concerns 1 and 2 at 17 and 29.

D. Licensing Board Stays Proceeding

On September 13, 1995, the Licensing Board issued an order staying the proceeding until the Staff completes its review of the license application and makes a decision to grant or deny the application, and the hearing file is updated to reflect the Staff's conclusions. Memorandum and Order (Proceeding Status), September 13, 1995. The Licensing Board observed that the hearing file would be incomplete until completion of the Staff's review, which was scheduled to occur some time after issuance of the FEIS. Id. at 2-3. As the Board explained, "[b]ecause the hearing file forms the basis upon which potential litigants contest the licensing action, there is little merit to moving forward with this proceeding at this time on the basis of an incomplete record." Id. at 3 (citations omitted). Staying the proceeding "remove[d] any possibility that issues developed on the basis of an incomplete hearing file would have to be relitigated as the hearing file is updated with new information" Id.

The NRC Staff issued the FEIS on or about March 14, 1997. The Staff's

Safety Evaluation Report ("SER") has not been issued yet, but the Staff stated in March 1997 that it expected to complete the SER by August of 1997. NRC Staff's Supplemental Status Report Concerning Its Review of the In Situ Leachate Mine Application filed by Hydro Resources, Inc., March 14, 1997, at 2.

E. Petitioners' Continuing Review of Documents

Since the first round of pleadings ended in March 1995, ENDAUM and SRIC have obtained copies of the license application and most of the voluminous accompanying correspondence. Petitioners have also obtained legal representation in this proceeding from the New Mexico Environmental Law Center and the firm of Harmon, Curran & Spielberg. In addition, Petitioners have retained expert consultants who are highly qualified by education, experience, and training in the fields of hydrology, geochemistry, economics, financial analysis, and radiation science.

Petitioners' counsel, with extensive involvement of Petitioners, has closely reviewed the license application, the FEIS, the voluminous correspondence between HRI and the NRC Staff, and other relevant materials in and outside the docket. Petitioners' counsel needed the better part of eight months to obtain copies of documents in the docket, review HRI's application, attempt to sort out inconsistencies in the application and other relevant documents such as the FEIS, and identify the numerous ways in which the application fails to comply with applicable laws, regulations, guidances, and policies. In addition, Petitioners required time to raise

funds to retain experts, and Petitioners' counsel needed to review portions of the license docket in order to determine the types of expert consultants needed. Identifying and retaining qualified experts also required several months, and each expert spent dozens of hours over three to five months commencing in February 1997. See infra notes 7-10 and accompanying text for further discussion. Petitioners' Second Amended Request further clarifies and expands upon the statements of concerns previously filed by ENDAUM and SRIC, based upon the review of the record by Petitioners, their counsel, and their experts.

III. ARGUMENT

A. Standard for Amendment of Requests

The NRC's procedural regulations governing informal adjudications in source and byproduct materials licensing proceedings such as this one are found in 10 C.F.R. Part 2, Subpart L. These rules do not address amendments to requests for hearing or leave to intervene.³ However, a presiding officer may exercise his general powers under 10 C.F.R. § 2.1209 to allow amendment, Babcock and Wilcox Co., LBP-94-

³ By contrast, under the Subpart G rules governing formal proceedings, persons seeking leave to intervene may amend their petitions without leave of the presiding officer prior to a final ruling on their standing, Babcock and Wilcox Co., LBP-94-4, 39 NRC 47, 48-49 (1994), citing 10 C.F.R. § 2.714(a)(3), and thereafter with leave of the presiding officer on the basis of a balancing of the factors weighed in determining whether to accept nontimely petitions or requests pursuant to 10 C.F.R. § 2.714(a)(3).

4, 39 NRC at 49,⁴ and "retains that discretion at least up through the point at which he or she makes a final ruling upon the sufficiency of the hearing request." Babcock and Wilcox Co., LBP 92-24, 36 NRC 149, 152 (1992).

The Licensing Board has previously explained that "[a]n amended petition containing new areas of concern would have to satisfy the provisions of 10 C.F.R. § 2.1205(k)(1) and (2) pertaining to untimely requests for hearing." Babcock and Wilcox Co., LBP-94-4, 39 NRC at 53 n.8. Subsection 2.1205(k)(1) provides:

A request for a hearing or a petition for leave to intervene found by the presiding officer to be untimely under paragraph [10 C.F.R. § 2.1205](c) or [10 C.F.R. § 2.1205](j) will be entertained only upon determination by the Commission or the presiding officer that the requestor or petitioner has established that --

- (i) The delay in filing the request for a hearing or the petition for leave to intervene was excusable; and
- (ii) The grant of the request for a hearing or the petition for leave to intervene will not result in undue prejudice or undue injury to any other participant in the proceeding, including the applicant and the NRC staff, if the staff chooses or is ordered to participate as a party in accordance with § 2.1213.

10 C.F.R. § 2.1205(k)(1). Subsection 2.1205(k)(2) simply directs that requests that do not meet the standard under 10 C.F.R. § 2.1205(k)(1) be treated as requests for

⁴ As the presiding officer reasoned in Babcock and Wilcox Co., "Subpart L rules, by their very definition, are intended to be informal. My primary duty at this stage of the proceeding is to treat the hearing request fairly. If the hearing request is otherwise meritorious . . . I may excuse unskilled pleading and inexperience and provide another opportunity to have their worries and concerns heard." LBP-94-4, 39 NRC at 49.

action under 10 C.F.R. § 2.206 and referred for appropriate disposition. Therefore, the petitioner must show that the delay in amending is excusable and that no other participant is unduly prejudiced or unduly injured.

Moreover, because granting an amendment entails the exercise of the Presiding Officer's discretionary authority, the Presiding Officer may also consider whether allowing the submission of additional information by amendment would materially aid in the fulfillment of his or her responsibility to make an informed determination about whether Petitioners have standing and whether they have presented litigable issues.

Babcock and Wilcox, LBP-92-24, 36 NRC at 152. As discussed below, Petitioners meet the Commission's standard for late-filing of amended statements of concern.

B. The Licensing Board Should Exercise Its Discretion to Admit Petitioners' Second Amended Request Because the Filing of that Request at This Time is Justified

1. The Second Amended Request Sets Out the Legal Basis and Further Explanation of Previously Stated Concerns, and Raises New Concerns Based on New Information

As discussed below, the late filing of Petitioners' Second Amended Request is justified. At the outset, however, it is important to point out the nature of the amendments contained in the Second Amended Request. In their filings of December 14, 1994, and February 15, 1995, ENDAUM and SRIC set forth most of the areas of concern that appear in the Second Amended Request. The Second Amended Request primarily clarifies and amplifies those concerns, reflecting the benefit of review by attorneys and experts. New concerns set forth in the Second Amended Request

pertain to new information, and to a more limited extent, to highly technical violations that lay Petitioners should not be expected to identify and articulate.

The amendments presented in the Second Amended Request essentially fall into four categories: (1) amendments describing the laws, regulations, and policies applicable to each area of concern and restating the concerns to allege violations of law, which lay Petitioners were not able to provide originally, (2) amendments reflecting concerns identified by expert consultants, (3) amendments pertaining to new information contained in the FEIS, and (4) amendments pertaining to new information appearing in correspondence and licensing documents that were not previously available, such as the COP Revision 1.0 (Exhibit 9 submitted herewith). However, as explained below, many of the 13 areas of concern in the Second Amended Request include amendments falling into more than one category.

The substance of most of the areas of concerns in the Second Amended Request was raised in Petitioners' previous requests, but has been reorganized and explained by Petitioners' counsel with the assistance of expert consultants. For instance, Concerns 3 and 4 in the Second Amended Request, pertaining to ground water impacts of mining at the Crownpoint and Church Rock sites, respectively, restate Concern 1 in ENDAUM's Amended Request, which primarily pertained to ground water impacts of mining at the Crownpoint and Unit 1 sites but also expressed concern for groundwater restoration at Church Rock. Concern 6 in the Second Amended Request, regarding insufficient financial assurance, corresponds to Concern

6 in ENDAUM's Amended Request. Second Amended Request Concern 7, regarding the Applicant's lack of experience and training, corresponds to Concerns 2 and 7 in ENDAUM's Amended Request. Concern 8, regarding the transportation of uranium and hazardous chemicals, corresponds to paragraph 4 in ENDAUM's Amended Request. Concern 12, violations of environmental impact statement and environmental report requirements, largely reiterates the issues raised by most of the nine concerns stated in ENDAUM's Amended Request and by SRIC's Request, but separates the EIS and ER issues from the concerns pertaining to violations of substantive licensing requirements. See e.g., ENDAUM Amended Request, supra note 2, at 6-7 (stating concerns that the DEIS did not demonstrate that the Crownpoint water supply was adequately protected) and at 8 (stating concern that the NRC and HRI failed to address the need for the project); Second Amended Request at 132 (FEIS and HRI's environmental reports do not adequately consider impacts on drinking water) and 150-159 (inadequate statement of purpose and need/cost benefit analysis). Concern 12.1, environmental justice, corresponds to Concern 9 in ENDAUM's Amended Request.

To a limited extent, the Second Amended Request raises new concerns identified by Petitioners' counsel and experts that lay Petitioners could not be expected to identify or articulate. For example, while Petitioners did state their concern for protection of ground water (see ENDAUM Amended Request at 6-7, SRIC Request at 2-3), Petitioners did not specifically state a concern for the

protection of ground water from surface impoundment leaks or land application of waste water. ENDAUM did, however, explain in its Motion/Response that its stated areas of concern included concern for exposures of people from the operation of waste disposal ponds and land application areas. ENDAUM's Motion/Response at 18. Although this concern could be viewed as an aspect of Petitioners' previously stated concerns, Petitioners have separately stated it as part of Concern 5 in their Second Amended Request because different legal requirements apply to protection of ground water from mining than apply to protection of ground water from surface impoundment leaks. See Second Amended Request at 76-94.

Similarly, with the benefit of expert consultant advice, Petitioners have elaborated in Concern 9, inadequate air emissions control, on ENDAUM's previously expressed concern for exposures of people from operation of the processing plants. See Second Amended Request at 109-115; ENDAUM's Motion/Response at 18. Concern 12.j, failure to consider other applicable approvals and requirements, was also previously raised by ENDAUM. See Second Amended Request at 164-167; ENDAUM Amended Request at 11 (noting the DEIS' lack of consideration of Navajo Nation jurisdiction).

New concerns are stated in Concerns 1, 2, 11, and portions of 12 based on events that have occurred and information that has become available since the previous requests. Concern 1 pertains to HRI's failure to comply with requirements to, inter alia, provide accurate and complete information and specifically state

information needed by the Commission to determine HRI's technical and financial qualifications, by submitting an incoherent and disjointed application. See Second Amended Request at 17-28. This problem with HRI's application emerged after the previous requests were filed. See id.

Concern 2 pertains to the evasion of hearing on material health and safety issues by deferring the submittal and evaluation of plans and specifications pertinent to such issues until after the license is issued, and by allowing HRI to unilaterally change operations and procedures with significant health and safety impacts pursuant to performance-based licensing (hereinafter "PBL"). See id. at 29-32. This concern has arisen recently with the disclosures that these issues would be deferred and that the license would contain PBL clauses. See id.

Concern 11 pertains to violations of the Native American Graves Protection and Repatriation Act (25 U.S.C. § 3001 et seq.) (hereinafter "NAGPRA") with respect to the treatment of human remains and other cultural items and the obligations to consult with affected tribes. See Second Amended Request at 127-131. The likely presence of human remains and associated burial items in the project area was not disclosed in the DEIS issued in 1994,⁵ but came to Petitioners' attention through the FEIS issued in March 1997.

⁵ DEIS Section 3.13 "Cultural Resources" does not mention burial sites, and concludes that the "inventories" of the project sites collected by HRI "did not result in any sites or cultural resources being identified within the lease areas that are potentially eligible for listing on the National Register of Historic Places." DEIS at 3-30.

Portions of Concern 12, including 12.c, reliance on inaccurate and incomplete information, 12.d, failure to provide adverse information, 12.e, inadequate consideration of cumulative impacts, 12.f, improper segmentation of impact assessment, and 12.k, failure to designate the Navajo Nation Environmental Protection Agency (hereinafter "NNEPA") a cooperating agency, raise issues that did not arise until after the previous requests were filed. For instance, Concern 12.k arose upon the NRC's denial of NNEPA's October 1996 request to be a cooperating agency. See Second Amended Request at 171. Concern 12.c pertains to the inaccurate, incomplete and self-contradictory nature of HRI's application that has come to light since the previous requests were filed. See id. at 141-142 (incorporating by reference the facts of Concern 1). Similarly, Concerns 12.e and 12.f involve new information such as the facts that HRI may conduct additional mining in the area of the proposed project and may build additional electric power infrastructure. See id. at 144-147 and 148-150. Petitioners also raise concern for the inadequate evaluation of the impacts of aspects of the project that were not previously disclosed, such as the disposal of waste water by deep well injection and surface discharge. See id. at 133-134.

In addition, Concern 10 both elaborates on ENDAUM's previously stated concern for protection of traditional cultural practices involving medicinal plant gathering (see ENDAUM Amended Request at 8) by discussing the legal basis for this concern, and states new concerns for failures to take into account the project's

impacts on historic properties (including traditional cultural properties) based on information that has become available and events that have occurred since the previous requests were filed. See Second Amended Request at 120-122. Neither the DEIS nor HRI's submittals prior to Petitioners' previous requests disclosed the significant historic properties in the area. The reports with respect to which Petitioners allege deficiencies were submitted later, and the consultation and evaluation efforts with respect to which Petitioners raise concerns were commenced subsequently and are ongoing. See id.

Thus, for the most part, Petitioners' Second Amended Request sharpens and explains issues already introduced into the proceeding. To the extent that it contains new concerns -- as distinguished from supporting legal and factual discussion -- those new concerns are necessarily raised in amendments because they arose in response to information available after the previous requests for hearing were filed.

2. The Late Filing Is Excusable

On a number of grounds, the late filing is excusable:

a. The Filing is, In Effect, Timely

The Second Amended Request is only "late" in the sense that it is being filed after the December 14, 1994, deadline established in the notice of opportunity to request a hearing and the February 15, 1995, deadline for filing amended requests set by the Licensing Board. As the Licensing Board later implicitly recognized in its order staying the proceeding, the proceeding was commenced prematurely in early

1995, because the FEIS had not been prepared and the Staff's review was incomplete. See Memorandum and Order (Proceeding Status), September 13, 1995, at 2-3.⁶ The Licensing Board took no action on the requests for hearing prior to staying the proceeding. See Memorandum and Order (Proceeding Status), September 13, 1995, at 1. There has still been no ruling on the previous requests, and the proceeding remains stayed. Consequently, the clock in this proceeding has been stopped, in effect, since the previous requests for hearing were filed.

Petitioners have used this time well by retaining the experts and attorneys they needed to thoroughly evaluate the license application, and by preparing a comprehensive Second Amended Request that clarifies issues previously raised by Petitioners and adds new issues that Petitioners could not reasonably have raised previously.

b. Substantial New Information has Emerged Since the Previous Requests Were Filed

Much of the documentation which Petitioners reviewed in order to prepare their Second Amended Request was not available in early 1995, when they filed their original requests for hearing. As discussed above, although Petitioners obtained copies of the DEIS, there was (and still is) no local public document room at which members of the community could review the license application. See supra p. 3;

⁶ The FEIS was not issued until March 1997, and the SER is expected sometime this month. NRC Staff's Supplemental Status Report Concerning Its Review of the In Situ Leachate Mine Application Filed by Hydro Resources, Inc., March 14, 1997, at 1-2.

Second Amended Request at 176-177. Moreover, HRI and the NRC Staff have generated a very large amount of material since the filing of the original application, including the FEIS, the COP Revision 1.0, and voluminous correspondence clarifying and amending the application. See supra pp. 4-6; Second Amended Request at 17-22. Thus, an enormous volume of material was not available until after the original deadline for filing Statements of Concern had passed. Significant portions of the Second Amended Request are based on this new information. See supra pp. 13-16.

c. The Delay Reflects Diligent Efforts to Obtain Legal and Expert Assistance, and Diligent Review by Attorneys and Experts

At the time the notice of hearing was issued, Petitioners were not able to retain lawyers to represent them or experts to aid them in the review of the application.⁷ Petitioners are nonprofit organizations with very limited financial

⁷ Petitioners sought legal advice during the period for amending requests established by the Order of January 9, 1995, and the Order of January 20, 1995. See letter from Chris Shuey, SRIC, to the Hon. B. Paul Cotter, Jr., Administrative Law Judge and Presiding Officer, Atomic Safety and Licensing Board Panel, January 19, 1995, at 1-2. They obtained very limited informal advice, and continued to participate in the proceedings pro se.

Petitioner SRIC also provided some technical assistance to ENDAUM by reviewing the DEIS and helping ENDAUM to write its Amended Request. See ENDAUM's Amended Request at 6. Members of SRIC's senior staff, who have master degrees and/or bachelor degrees, have studied and commented on numerous environmental impact statements and permit applications for a variety of industrial facilities. However, no one on SRIC's staff has an advanced degree in the fields necessary to provide expert opinions on the technical issues raised by an ISL mining source and byproducts materials application such as HRI's. Nor is anyone on SRIC's staff a lawyer. Thus, while SRIC has endeavored to provide information and to interpret technical materials for Navajos that would be affected by HRI's proposed

resources, and hence could not afford at that time or now to hire counsel.⁸ Thus, they conducted their initial review without the necessary level of legal and technical expertise.

Petitioners made diligent efforts to obtain assistance, and retained counsel in August 1996 and experts in February to March 1997.⁹ Subsequently, these lawyers and experts began to devote significant time to reviewing the voluminous licensing documents in this docket. As discussed below, that review has taken over seven

project, including ENDAUM members, SRIC has not provided expert opinions.

⁸ SRIC and ENDAUM sought legal representation while preparing ENDAUM's Amended Request. See letter from Chris Shuey, SRIC, to Hon. B. Paul Cotter Jr., Administrative Law Judge and Presiding Officer, January 19, 1995, at 1-2. However, they were not successful in obtaining representation at that time because they could not afford to pay attorneys.

⁹ Petitioners continued to seek legal representation after ENDAUM's Amended Request was filed. However, the attorneys they contacted advised them that they could not take the case on contingency because attorneys fees would not be recoverable from the NRC or the Applicant, and because Petitioners could not afford to pay their fees. In 1995 and 1996, Petitioners attempted to raise money through several grant proposals to foundations and appeals to donors for the purposes of hiring counsel and retaining experts, but they were unable to raise the substantial sums required.

Petitioners informally contacted NMELC (a nonprofit law firm) in 1995 to request free legal representation, but NMELC was unable to accept their case due to its existing caseload. In late August 1996, anticipating hiring an additional attorney the following month who would be able to gradually take on Petitioners' case, NMELC accepted representation of ENDAUM and SRIC in this matter. That attorney was primarily occupied with the litigation of an administrative hearing in another matter -- which was ongoing when she was hired in September 1996 -- through December 1996. Following NMELC's acceptance of the responsibility of lead attorney, the firm of Harmon, Curran and Spielberg agreed to join in representing Petitioners at the end of February 1997.

months due to the voluminous and disorganized state of the record.

Moreover, the law governing HRI's license application is extremely complex, and hence has required extensive and time-consuming review by attorneys. It includes numerous statutes -- the Atomic Energy Act, 42 U.S.C. §§ 2011 et seq., the Uranium Mill Tailings Radiation Control Act, 42 U.S.C. §§ 7901 et seq., the National Environmental Policy Act, 42 U.S.C. §§ 4321 et seq. (hereinafter "NEPA"), the National Historic Preservation Act, 16 U.S.C. §§ 470 et seq., NAGPRA, the Clean Water Act 33 U.S.C. §§ 1342 and 1344, the Safe Drinking Water Act, 42 U.S.C. §§ 300f et seq. (hereinafter "SDWA"), and codes of the Navajo Nation and the State of New Mexico. For citations to Navajo Nation and State of New Mexico codes, see, e.g., Second Amended Request at 34, 92, n.50, and n.51. In addition, each statute is accompanied by an extremely technical set of regulations,¹⁰ some of which involve overlapping jurisdiction by NRC and the United States Environmental Protection Agency (hereinafter "USEPA"). For example, HRI must obtain underground injection control permits from the USEPA pursuant to the SDWA and USEPA implementing regulations, which impose ground water protection measures and restoration standards in addition to those required by NRC regulations. See Second Amended Request at 37-40.

The mines and processing facilities are also governed by numerous NRC

¹⁰ See, e.g., Second Amended Request at 76, 81-85, and 89, and citations therein.

regulatory guidances and position papers, including but not limited to: Regulatory Guide 3.46, Standard Format and Content of License Applications, Including Environmental Reports, For In Situ Uranium Solution Mining (June 1982), Staff Technical Position Paper WM-8102, "Groundwater Monitoring at Uranium In Situ Solution Mines" (December 1981), Staff Technical Position on Effluent Disposal at Licensed Uranium Recovery Facilities, Division of Waste Management, NRC (April 1995). Petitioners' counsel had to reconcile these NRC guidances and position papers with the governing statutes and regulations, with which the NRC documents disagree in various respects. See, e.g., Second Amended Request at 17-22.

Hence, Petitioners have responsibly used the time while this proceeding has remained at a standstill to obtain legal and expert assistance, and to clarify the issues on which they seek a hearing.

d. The Delay is Largely Attributable to HRI's Disjointed and Contradictory Application and Repeated Application Amendments

Because of its size and disorganized state, the license application is confusing and unwieldy, and therefore very time-consuming to review. The NRC Staff itself has expressed concerns to HRI about the "disjointed documents" and "conflicting statements" in the license application. See id. at 20-21 and citations therein.

Although the COP Revision 1.0, submitted by HRI in May of 1997, purports to resolve these concerns (COP Revision 1.0 at 2, Exhibit 9 submitted herewith), it still has substantial information gaps. See id. at 23-25.

As a result of the voluminous and confusing state of the license application, reviewing and evaluating the application has taken Petitioners, their lawyers, and their experts over seven months of concerted effort. In addition, as discussed above, some key documents like the COP Revision 1.0 were not available until mid-1997. Considering the voluminous and disorganized state of the application, and the steady flow of new documents into the docket, the seven months taken by Petitioners' attorneys and experts to prepare this Second Amended Request is justified.

3. No Other Participant Will be Unduly Prejudiced or Injured by Petitioners' Filing

No other participant will be unduly prejudiced or injured by Petitioners' filing of their Second Amended Request. As discussed above, the Board has determined that litigation of this case prior to completion of the Staff's review would be premature, and the Staff has yet to complete its review and issue the SER. See supra at 6. In addition, HRI only recently submitted its COP Revision 1.0, in which it attempted to summarize and succinctly describe the contents of its voluminous and unwieldy license application, such that it could be effectively reviewed by the Staff or Petitioners. See Second Amended Request at 30-32. Thus, Petitioners' Second Amended Request is being filed at an appropriate juncture that is not prejudicial to any party because the litigation has not yet begun, the application remains incomplete, and the Staff's review continues.

Moreover, to any extent that the Applicant may be prejudiced by this late

filing, the prejudice is largely of the Applicant's own making. HRI submitted its license application far before it was actually complete, because it has prompted approximately 100 requests for additional information (hereinafter "RAIs") from the Staff, and led to innumerable changes and clarifications. See supra pp. 4-5; Second Amended Request at 18-19. As the Staff explained:

several other requests [in addition to those concerning ground water restoration] by the NRC for clarification, or additional information, have resulted in numerous iterations of interactions between the staff and HRI in order to resolve particular issues - most of which was due to incomplete, or inadequate technical submittals.

Letter from Joseph Holonich, NRC, to Richard F. Clement, Jr., HRI, November 1, 1996, at 1, submitted herewith as Exhibit 8 and incorporated herein by reference.

These changes and clarifications are so voluminous and confusing as to make reviewing the application a massive and very time-consuming undertaking for the NRC Staff: "[t]he SER [Safety Evaluation Report] review effort had been significantly impacted by the disjointed organization and contradictory technical information contained in the application." Letter from Joseph Holonich, NRC to Richard F. Clement, Jr., HRI, June 17, 1996, at 1, submitted herewith as Exhibit 7, and incorporated herein by reference.¹¹

Largely because of the voluminous and disorganized state of the application, it

¹¹ See also RAI 37 in Enclosure 1 to letter from Daniel M. Gillen, NRC, to Mark Pelizza, HRI, January 11, 1996, at 7-8 ("[t]he entire package of documents that comprise the Crownpoint project application contain[s] many conflicting statements").

has also taken Petitioners and their attorneys and experts -- like the Staff -- months to decipher the contents of the applications and sort out the many contradictions. See supra pp. 19-20. Thus, any prejudice to HRI caused by Petitioners' delay in deciphering HRI's license application cannot be considered "undue."

Nor is any other party prejudiced by Petitioners' filing at this date. Because the Staff has elected not to participate as a party,¹² prejudice to the Staff need not be considered in ruling on this motion.¹³ All other parties who requested a hearing have raised health and safety concerns in opposition to the licensing similar to the concerns raised by Petitioners. Hence, the interests of the other requesting parties are advanced, not prejudiced, by Petitioners' filing their Second Amended Request to clarify and expound on their concerns.

Finally, all participants have been on notice since March 1995 that the areas of concern ENDAUM intends to litigate in this proceeding include virtually all of the issues stated in the Second Amended Request, with the exceptions of the concerns arising from the FEIS and other new information generated by the Staff or submitted by the Applicant, and certain technical legal aspects of their concerns. See supra at 11-12.

¹² Letter from Sherwin E. Turk, to B. Paul Cotter, Jr., Esq., Presiding Officer and Administrative Judge, Atomic Safety and Licensing Board Panel, March 8, 1995.

¹³ Even if the Staff were a party, it would not be prejudiced by Petitioners' delay because it has not completed its own review, the application remains incomplete, and the litigation remains in abeyance.

**4. Admission of The Second Amended Request Would
Materially Aid the Board To Make An Informed
Determination**

Admission of the Second Amended Request would materially aid the Licensing Board to make an informed determination about whether Petitioners have standing and whether they have presented litigable issues (Babcock and Wilcox, LRP-92-24, 36 NRC at 152) in the following respects.

First, with the aid of their lawyers and experts, Petitioners have clarified the concerns raised in their earlier pleadings, as well as concerns prompted by new information, which will make it easier for the Licensing Board to rule on whether Petitioners have presented litigable issues. The Second Amended Request cites applicable laws, regulations, guidances, and policies, and explains how Petitioners' concerns pertain to compliance with them. The Second Amended Request further facilitates the determination of admissibility by more appropriately grouping the concerns into relatively discrete legal and factual issues.

For example, issues concerning compliance with NEPA are set out separately from substantive licensing requirements. See Second Amended Request at 132-182 (Concern 12). Petitioners' concern that license approval would violate the NRC's trust obligation to the Navajo Nation and individual members of the tribe is also separately stated. Compare ENDAUM's Amended Request, supra note 2, at 11 (Concern 9) with Second Amended Request at 164-171 (Concern 13). Petitioners' concerns for mining impacts on groundwater in the Church Rock area, which was

previously subsumed in their concern for mining impacts on groundwater in the Crownpoint area, is stated as a distinct concern. Compare ENDAUM's Amended Request at 6-7 (Concerns 1 and 2) with Second Amended Request at 70-75 (Concern 4). This reorganization further assists the Board by suggesting ways of dividing the hearing into groups of issues for a more efficient proceeding.

Second, by better explaining Petitioners' previously stated concerns, the Second Amended Request would materially aid the Licensing Board in ruling on Petitioners' standing. For example, ENDAUM and SRIC stated the concern that HRI's proposed project would contaminate Crownpoint's drinking water supply. ENDAUM's Amended Request, supra note 2, at 7 (Concern 1); SRIC's Request, supra note 2, at 3 (Concern 6.c). ENDAUM members supplied affidavits demonstrating that they used water from the Crownpoint public water supply system for their drinking water. See, e.g., Affidavit of Mitchell W. Capitan, March 19, 1995, ¶ 17 (hereinafter "Capitan Affidavit"), attached as Exhibit A to ENDAUM's Motion/Response, supra note 2; Affidavit of Grace A. Tsosie (hereinafter "Tsosie Affidavit"), March 19, 1995, ¶ 11, attached as Exhibit C to ENDAUM's Motion/Response, supra note 2. Thus, ENDAUM previously demonstrated that contamination of the Crownpoint water supply system by HRI's proposed project would cause injury to its members.¹⁴ The Second Amended Request further assists

¹⁴ ENDAUM members also authorized ENDAUM to represent them in this proceeding in their sworn affidavits. See, e.g., Capitan Affidavit ¶ 24; Tsosie Affidavit ¶ 12. Affidavits demonstrating that members of SRIC's staff and board of

the Licensing Board in ruling on Petitioners' standing by explaining how a violation of applicable NRC regulations and other requirements by HRI would result in this injury. Second Amended Request at 33-67 (Concern 3).

Similarly, ENDAUM stated the concern that HRI's proposed project would interfere with the gathering of medicinal plants, a traditional cultural practice in which ENDAUM members engage. ENDAUM's Amended Request at 8 (Concern 3). ENDAUM attached the Affidavit of ENDAUM President Mitchell Capitan stating that he uses these herbs, and thus demonstrated its standing. Affidavit of Mitchell Capitan, ¶ 5, attached to ENDAUM's Amended Request, supra p. 1, as Exhibit A; Capitan Affidavit, supra p. 26, ¶ 10 (reaffirming his previous affidavit). The Second Amended Request explains how this concern is germane to this proceeding by setting forth the legal bases for the concern: the failure of the Staff and HRI to adequately consider these impacts in the FEIS and the Applicant's environmental reports in violation of NEPA and NRC regulations, and the failure of the Staff to make a reasonable and good faith effort to identify traditional cultural resources and to properly assess the project's adverse effects on those resources. Second Amended Request at 116-126 (Concern 10) and 127-131 (Concern 11).

directors would be harmed by contamination of the Crownpoint water supply have been submitted herewith. See infra pp. 31-32.

Finally, Petitioners' statements of their new concerns would also assist the Licensing Board in determining their standing. For example, Petitioners explain how HRI's disjointed, contradictory, and incomplete application has hindered their participation in this proceeding. Id. at 26-27. See also id. at 17-26. Petitioners also explain how the Staff's failure to supplement the DEIS to address deficiencies raised by Petitioners and others in comments and in Petitioners' formal request to the Staff for a supplemental DEIS injures them by frustrating their opportunity to make informed comments and hence to participate in the decisionmaking process. Id. at 177-179.

Accordingly, admission of the Second Amended Request would materially aid the Licensing Board to make an informed determination about whether Petitioners have standing and whether they have presented litigable issues.

5. Admission of Petitioners' Second Amended Request is Otherwise In the Public Interest

A presiding officer may exercise his general powers under 10 C.F.R. § 2.1209 to allow amendment of a hearing request. Babcock and Wilcox Co., LBP-94-4, 39 NRC at 49. That section provides, in pertinent part:

A presiding officer has the duty to conduct a fair and impartial hearing according to law, to take appropriate action to avoid delay, and to maintain order. The presiding officer has all powers necessary to those ends, including the power to --

... (1) Take any other action consistent with the [Atomic Energy] Act and this chapter.

10 C.F.R. § 2.1209. Thus, one purpose of the presiding officer's discretionary authority is to serve the public interest in ensuring a fair hearing, and his power to achieve that end is broad. In this proceeding, especially, admission of Petitioners' Second Amended Request is essential to ensuring that Native American petitioners receive a fair hearing.

As set forth in the Second Amended Request, HRI's license application raises serious issues concerning the health and safety of the predominately Navajo, low income communities of Crownpoint and Church Rock. Second Amended Request at 171-177. Residents of those communities include Navajo members of ENDAUM, as well as Raymond Morgan and LaLora Charles of SRIC, both of whom are Navajo and obtain their drinking water from the water supply that would be affected by HRI's proposed project. See e.g., Capitan Affidavit, supra p. 26; Tsosie Affidavit, supra p. 26; Declaration of Raymond Morgan, August 14, 1997, submitted herewith as Exhibit 43, ¶¶ 1 and 3; Declaration of LaLora Charles, August 15, 1997, ¶¶ 1 and 10 submitted herewith as Exhibit 42. Serious environmental justice concerns are raised by the substance of the application and by the Staff's failure to date to adequately consider the impact on the affected communities as minority communities or to adequately provide for their informed participation in the licensing process. See Second Amended Request at 171-177 (Concern 12.1). In addition, the Staff has not complied with its federal trust duty toward the individual Navajos who would be adversely affected by HRI's proposed project, including members of ENDAUM, M.

Morgan, and Ms. Charles. See id. at 184-186 (Concern 13).

The Presiding Officer acknowledged the importance of "taking every reasonable precaution" to ensure the participation of Native Americans in this proceeding:

several of the Petitioners are either Native Americans or groups representing the interests of Native Americans. The NRC has for years recognized a unique relationship with Native American peoples and this special status should be considered in adjudicative decisions. See Puget Sound Power and Light Company, et al., (Skagit Nuclear Power Project, Units 1 and 2), ALAB-559, 10 NRC 162, 173 (1979). While this special status is not of itself sufficient foundation for ignoring the Commission's rules, "every reasonable precaution should be taken to insure that [Petitioners are] not excluded from this proceeding simply because of ignorance of the ingredients of the demonstration required. . . ." Puget Sound Power and Light Company, et al., (Skagit Nuclear Power Project, Units 1 and 2), ALAB-552, 10 NRC 1, 10 (1979).

Order of January 9, 1995, supra p. 3, at 4. The Licensing Board further acknowledged that the initial petition setting forth standing arguments and areas of concern is "extremely important," and that if the petitioner's "concerns are not articulated, they will not be litigated." Id. Thus, providing an opportunity to Native American petitioners to fully state their concerns is also extremely important to ensuring that they are not excluded from the licensing proceeding.

In this case, providing Petitioners an opportunity to fully state their concerns requires that they have the opportunity to amend their concerns to state new concerns raised by the significant amendments to the Application and additions to the docket since the initial round of pleadings ended in March 1995. See supra pp. 4-6, and 30.

Moreover, as discussed above, Petitioners filed their previous requests without benefit of legal representation, despite their diligent efforts to obtain legal representation. See supra pp. 18-19. Hence, providing them the opportunity to submit their Second Amended Request ensures that they have stated their concerns that may be litigated in this proceeding with the benefit of legal representation. Otherwise, Petitioners could be denied a full and fair hearing of their legitimate concerns for health, safety, and environmental justice.

Therefore, the Licensing Board should exercise its discretionary authority to allow the filing of the Second Amended Request to promote a fair hearing.

C. The Licensing Board Should Exercise Its Discretion to Admit the Standing Affidavits Submitted by Petitioner SRIC

The Licensing Board should exercise its discretion under 10 C.F.R. § 2.1209 to admit the declarations of LaLora Charles and Raymond Morgan filed herewith. See Exhibits 42 and 43 submitted herewith, and the original Declaration of LaLora Charles filed as a separate document herewith. Those declarations are submitted for the purpose of supporting SRIC's standing in this proceeding. See Second Amended Request at 8-12. They show that these individuals, who are members of SRIC's staff and board of directors, respectively, would be injured by HRI's proposed project in that, inter alia, their water supply would be adversely affected, they may be injured by trucks hauling yellowcake for HRI on roads they regularly travel, and/or their land may be contaminated or damaged by a truck accident on the yellowcake haul route.

Exhibit 42, ¶¶ 6, 10, and 11; Exhibit 43, ¶¶ 3, 5 and 6. The declarations also show that these individuals authorize SRIC to represent them in this proceeding. Exhibit 42, ¶ 13; Exhibit 43, ¶ 8.

As discussed above, amendments to Petitioners' requests for hearing -- including supporting declarations -- at this time do not prejudice any other participant in this proceeding because the Staff's review remains incomplete and this proceeding remains stayed. See supra pp. 22-24. In addition, although SRIC does have experience participating in administrative proceedings, SRIC does not have lawyers on staff and was not represented by counsel at the time it filed its request for hearing. See supra notes 7 and 8 and accompanying text. Nothing in 10 C.F.R. § 2.1205 states that hearing requests must include affidavits to demonstrate standing, and no lay petitioner could be expected to discern that submitting standing affidavits with hearing requests in Licensing Board proceedings is advisable. Finally, the admission of the Charles and Morgan affidavits would materially aid the Commission in determining SRIC's standing by providing sworn testimony that corroborates the standing allegations clearly stated in SRIC's original request. See SRIC request at 2.

Accordingly, the Presiding Officer should exercise his discretionary authority by accepting the declarations of LaLora Charles and Raymond Morgan.

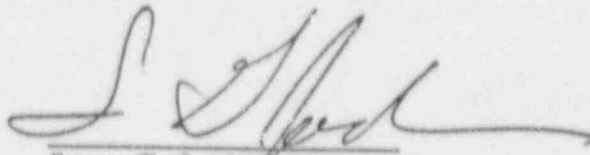
IV. CONCLUSION

For the foregoing reasons, Petitioners respectfully request that the Hearing Officer accept Petitioners ENDAUM and SRIC's Second Amended Request, including

the exhibits submitted herewith, and the standing affidavits filed herewith.

Dated: August 19, 1997

Respectfully submitted,

A handwritten signature in dark ink, appearing to read 'S. Jordan', with a long horizontal flourish extending to the right.

Susan G. Jordan
Douglas Meiklejohn
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