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August 9, 2000

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
BEFORE THE COMMISSION

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In the Matter of)	
)	
HYDRO RESOURCES, INC.)	Docket No. 40-8968-ML
P.O Box 15910)	
Rio Rancho, NM 87174)	ASLBP No. 95-706-01-ML
)	

**INTERVENORS' RESPONSE TO THE COMMISSIONERS'
QUESTIONS IN THE JULY 10, 2000 ORDER**

Introduction

Pursuant to the Commission's Memorandum and Order, CLI-00-12 (July 10, 2000), Intervenor Eastern Navajo Diné Against Uranium Mining ("ENDAUM") and Southwest Research and Information Center ("SRIC") hereby respond to the Commissioners' questions regarding the effect of Hydro Resources, Inc. v. EPA, 198 F.3d 1224 (10th Cir. 2000), rehearing en banc denied, No. 97-9566 (March 30, 2000) (hereinafter "HRI v. EPA") on the Presiding Officer's decision regarding groundwater protection issues in LBP-99-30, 50 NRC 77 (1999).

In this responsive pleading, Intervenor will show the Presiding Officer relied on an invalid aquifer exemption and Underground Injection Control permit. Further, Intervenor will show that the Commission should reverse the Presiding Officer's technical finding that no drinking water will be contaminated as Church Rock Section 8 must be considered a protected aquifer and a source of drinking water unless and until an appropriate regulatory entity determines otherwise. Intervenor will demonstrate that it is necessary for both the Presiding Officer and the Commissioners to address whether Hydro Resources Inc.'s ("HRI") proposed

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project would comply with the Safe Drinking Water Act ("SDWA"). Finally, Intervenors will show that the Commission should tentatively revoke HRI's license for the Crownpoint Project because the 10th Circuit's decision, HRI v. EPA, confirmed that EPA's July 14, 1997 letter removed the legal basis for LBP-99-30.

Background

As described in previous filings before the Commission, HRI has applied for and obtained a license to build and operate several in situ leach mines and a uranium mill in Church Rock and Crownpoint, New Mexico, a project known as the "Crownpoint Project." The Nuclear Regulatory Commission ("NRC") Staff issued a Final Environmental Impact Statement ("FEIS") for the entire Crownpoint Project in February 1997, and a Safety Evaluation Report ("SER") in December 1997. HRI received an operating license from the Staff on January 5, 1998. License No. SUA-1508. The license allows mining on all four sites for which HRI seeks permission (Church Rock Sections 8 and 17, Unit 1, and Crownpoint), conditioning operations on compliance with certain license conditions. Intervenors challenged the validity of HRI's license in an evidentiary proceeding before a Presiding Officer of the Atomic Safety & Licensing Board.

In 1989, under its program for administration of the federal SDWA, the New Mexico Environmental Improvement Division (currently the New Mexico Environment Department ("NMED")) approved a "discharge plan" for underground injection by HRI on property located within Church Rock Section 8 of the Crownpoint Project. Later that year, the United States Environmental Protection Agency ("EPA") approved New Mexico's request for an aquifer exemption for HRI's Section 8 mine site. At that point in time, according to New Mexico and the EPA, HRI had met its requirements under the SDWA.

During 1995 and 1996, EPA, NMED, and the Navajo Nation discussed a hybrid joint permitting scheme. These discussions resulted in an EPA July 14, 1997 letter that gave rise to the central dispute in HRI v. EPA. 198 F.3d at 1235. The letter, sent to NMED and copied to HRI, stated EPA's position requiring federal permitting under the SDWA for both Section 17 and Section 8. Id. EPA's letter stated that "EPA believes that Section 17 is clearly Indian country," but would continue to treat the status of Section 17 as in dispute, requiring federal permitting but not requiring NMED to concede jurisdiction. Id. Further, based on its determination that "the Navajo Nation has presented substantial arguments to support its claim that Section 8 is within Indian country," EPA would treat Section 8 as in dispute under the dispute rule of the Indian lands UIC rule preamble. Id. EPA also noted that it had not taken a final position on the Indian country status of Section 8, only that the status is in dispute. Id.

The practical effect of EPA's July 1997 letter was to nullify HRI's aquifer exemption and UIC permit for Section 8 under the SDWA. As set forth in the letter, until EPA ultimately resolves the disputed status of Section 8, HRI must obtain an aquifer exemption and UIC permit from either EPA or the Navajo Nation to mine in compliance with the SDWA.¹

In August of 1997, HRI and NMED challenged EPA's treatment of Section 8 and Section 17 as disputed Indian lands in the United States Court of Appeals for the 10th Circuit.

Approximately one year later, with SDWA permitting for the Crownpoint Project in

¹ EPA has assumed the role of administrator of the UIC program for those lands where the Navajo Nation has not yet assumed primacy in SDWA enforcement and for disputed "Indian country" lands. See 198 F.3d at 1232-33. The Navajo Nation has not yet assumed primacy in SDWA enforcement for those lands for which its Treatment as State ("TAS") application was approved (Indian tribes may be treated as states for SDWA purposes. 42 U.S.C. § 300h-1(e)).

mind, the Commission issued guidance to the Presiding Officer in this proceeding stating that non-NRC permits are the responsibility of bodies that issue such permits, not the responsibility of the NRC. CLI-98-16, 48 NRC 119, 121 (1998). The Commission added an explicit, cautionary note:

[O]ur decision ought not to be understood to mean that environmental or other permits issued by other regulatory bodies have no bearing on NRC licensing decisions We hold simply that our adjudicatory tribunal is not the proper forum for litigation and resolution of controversies about other agencies' permitting authority.

Id. at 122, n. 3 (emphasis added).

In early 1999, Intervenors presented evidence before the Presiding Officer regarding HRI's failure to adequately protect the groundwater at the Crownpoint Project. In addition to numerous technical infirmities in HRI's groundwater protection plan, Intervenors notified the Presiding Officer of EPA's assertion of jurisdiction over Sections 8 and 17, and attached a copy of EPA's July 14, 1997 letter. See Intervenors Amended Written Presentation in Opposition to HRI's Application for a Materials License with Respect to: Groundwater Protection, at 14-15, Exhibit 8 (January 18, 1999) (hereinafter "Intervenors Amended Groundwater Presentation"). Intervenors also demonstrated that HRI would not qualify for an aquifer exemption. Id. at 63-65.

In August of 1999, approximately one year after the Commission issued its above-mentioned guidance and eight months after he had been clearly alerted to EPA's position on the state of the Section 8 aquifer exemption and UIC permit, the Presiding Officer issued LBP-99-30. 50 NRC 77 (1999). Taking the word of both HRI and the Staff at face value and ignoring Intervenors' evidence of EPA's assertion of jurisdiction, the Presiding Officer stated that HRI had a valid aquifer exemption and UIC permit: "Section 8 is not required to be an area where

subsurface water must be potable by EPA standards." 50 NRC at 102. Later in the opinion, the Presiding Officer noted:

Intervenors claim that underground injection violates the Safe Drinking Water Act (SDWA). Contrary to this assertion, the Environmental Protection Agency has granted an aquifer exemption for the Church Rock Section 8 site. This exemption means that EPA has determined, pursuant to its authority, that there is no drinking water to be protected at this site. Thus, the allegation is groundless.

Id. at 108. The Presiding Officer's last statement on the issue came one page later:

For these reasons, I conclude that HRI's project does not violate the SDWA at Church Rock Section 8, nor has there been a showing that the license should be invalidated because of a serious problem under the SDWA at Crownpoint. In reaching this conclusion, I note again that *the portion of the aquifer* in which the Church Rock ore is found has been exempted. It is not necessary that the whole aquifer qualify for an exemption. It is enough that the ore-bearing portion of the aquifer qualify. EPA has granted an exemption for this section.

Id. at 109 (emphasis in original). The Intervenors sought review in Intervenors' Petition for Review of Partial Initial Decisions LBP-18, LBP-19, LBP-99-30 (September 3, 1999).²

On January 6, 2000, the 10th Circuit decided HRI v. EPA and found, among other things, that EPA did not violate the law or abuse its discretion in determining that Section 17 constitutes Indian country and Section 8 lands are subject to a jurisdictional dispute under the SDWA. The Court then remanded the Section 8 issue to EPA for a final determination as to whether that land is "Indian country." As a result, "HRI must now obtain a permit from EPA prior to commencing underground injection on Section 8." 198 F.3d at 1237.

Intervenors moved this Commission to take judicial notice and supplement the record of this proceeding with HRI v. EPA on January 27, 2000. Both HRI and the NRC Staff objected to

² Intervenors addressed the issue of EPA's jurisdictional claim in the Petition for Review of Partial Initial Decisions LBP-18, LBP-19, LBP-99-30 at 26-28 (September 3, 1999).

Intervenors' motion. See NRC Staff's Response to Motion to Supplement the Record (February 3, 2000) and Hydro Resource Inc.'s Response to Motion to Supplement the Record (February 7, 2000). Subsequently, in CLI-00-12 the Commission posed four questions to the parties regarding the relevance of HRI v. EPA to the instant proceeding.

I. Response to Question 1.

Question 1 states as follows:

Did the Presiding Officer rely upon a current valid aquifer exemption or UIC permit for any of his technical groundwater findings?

This question contains two subsidiary inquiries: (a) whether HRI's UIC permit was valid at the time that LBP-99-30 was issued, and (b) whether the Presiding Officer based his technical findings on the presumed existence of a valid UIC permit. The short answers to these questions are "no" and "yes."

A. HRI's UIC permit was invalid when LBP-99-30 was issued.

The 10th Circuit's decision in HRI v. EPA establishes that the aquifer exemption and UIC permit on which the Presiding Officer relied in LBP-99-30 were not valid at the time that LBP-99-30 was issued. The decision upholds the assertion of jurisdiction over Section 8 that EPA made in its letter of July 14, 1997, two years before LBP-99-30 was issued. 198 F.3d at 1241-43. In that letter, EPA issued a "tentative revocation" of the UIC permit that had been issued to HRI, and required HRI to re-apply to EPA for permission to mine at Section 8. Id. at 1243.

The Court also specifically rejected HRI's argument that the NMED permit program must govern HRI until the Navajo Nation assumed primary responsibility for the underground injection control program, finding that this interpretation "mischaracterizes the scope of EPA's

authority.” Id. at 1241-42. As the Court reasoned, if Section 8 indeed constitutes Indian Country, then the NMED never had jurisdiction to issue the UIC permit in the first place, and the New Mexico program “cannot be ‘currently applicable’ within the meaning of the statute.” Id. at 1242.

At the time he issued LBP-99-30, the Presiding Officer had been given notice of EPA’s jurisdictional assertion over Section 8. The Intervenor had provided the Presiding Officer with a copy of EPA’s July 14, 1997 letter which unambiguously instructed HRI that it “must obtain its federal SDWA permit for Section 8 from EPA.” See letter from Felicia A. Marcus, Regional Administrator for EPA Region 9, to Mark E. Weidler, Secretary of NMED, attached as Exhibit 8 to Intervenor’s Amended Groundwater Presentation. Nevertheless, the Presiding Officer ignored the EPA letter. This not only violated the Commission’s instructions in CLI-98-16, but also ignored the well-established doctrine that considerable weight should be accorded to an agency’s construction of a statutory scheme it is entrusted to administer. See Aluminum Co. of America v. Central Lincoln Peoples’ Util. Dist., 467 U.S. 380, 389 (1984); Blum v. Bacon, 457 U.S. 132, 141 (1982).

B. The Presiding Officer relied on the invalid UIC permit for his technical findings.

In LBP-99-30, the Presiding Officer explicitly relied on the presumption of a valid UIC permit for Section 8 in support of his technical findings. See 50 NRC at 102, 108, 109. On this basis, the Presiding Officer concluded that he need not be concerned about whether water in Section 8 was and should remain potable, or whether it could be restored to baseline conditions.

Id at 103.³ Similarly, the Presiding Officer's technical conclusions about the likelihood that mining in Section 8 would adversely affect other portions of the Westwater Aquifer must be rejected because they result from the faulty premise that it is lawful to mine in Section 8. See, for example, 50 NRC at 102 (finding that the Westwater aquifer can withstand limited areas of toxicity and not pollute the larger aquifer); 50 NRC at 102-105 (finding that pollution will not spread from those limited areas because of a combination of geochemical forces and HRI's alleged ability to restore the aquifer to at least the secondary groundwater restoration goals for some parameters); 50 NRC at 103-5 (finding that uranium is unlikely to move through the aquifer after mining).

At the present time, the application of the SDWA to Section 8 legally invalidates these technical conclusions. Church Rock Section 8 must be considered a protected aquifer and a source of drinking water until it is determined otherwise by a valid decision from the appropriate regulatory body.⁴ Unless and until an aquifer exemption and UIC permit are granted to HRI, the

³ The Presiding Officer concluded that it is unlikely that groundwater activities at the Church Rock site will achieve baseline concentrations for all groundwater parameters. Id. Further, the Presiding Officer notes that it is questionable if even all of the secondary groundwater restoration goals will be met. Id.

⁴ As Intervenors have noted in their groundwater presentation, an aquifer qualifies as an underground drinking water source if it (1) supplies any public water system, or it (2) contains enough groundwater to supply a public water system and either currently supplies drinking water for human consumption or contains fewer than 10,000 mg/l total dissolved solids and which is not an exempted aquifer. 40 C.F.R. § 144.3. The portion of the aquifer underlying Church Rock Section 8 meets the second definition of an underground source of drinking water. See Intervenors' Amended Groundwater Presentation, at 60-65 (January 18, 1999). Further, federal regulations are clear on this point: "[e]ven if an aquifer has not been specifically identified . . . it is an underground source of drinking water if it meets the definition in § 144.3." 40 C.F.R. § 144.7.

Presiding Officer's decision to allow HRI to contaminate any portion of the aquifer violates the SDWA. 42 U.S.C. § 300h(d)(2); 40 C.F.R. § 144.11, 144.12 ("Any underground injection, except into a well authorized by rule or except as authorized by permit issued under the UIC program is prohibited.").

Moreover, as the agency principally responsible for administering the SWDA, the EPA has the prerogative of addressing these groundwater contamination issues in the first instance. Unless and until EPA relinquishes its authority to decide whether to allow mining in the Westwater aquifer, these technical findings by the Presiding Officer can have no binding legal effect.

In ruling on the legal status of the Presiding Officer's technical findings, the Commission should be guided by the 10th Circuit's treatment of the UIC permit issued to HRI by NMED. The 10th Circuit has approved EPA's "tentative revocation" of the NMED permit, pending its determination of whether Section 8 falls within Indian country. See 198 F.3d at 1243. Because the Presiding Officer's technical findings erroneously rely on the existence of a valid aquifer exemption, their legal status should be accorded the same legal status as the NMED permit, that is, they must be held to be tentatively revoked. Under the 10th Circuit's decision, currently there is no lawful basis for the Presiding Officer's conclusion that groundwater quality in Section 8 need not be protected. Similarly, there is no lawful basis for the Presiding Officer's conclusions about whether groundwater outside of Section 8 would be affected by mining in Section 8, because these findings rest on the presumption that HRI is authorized to mine in and contaminate Section 8.

Whether the Presiding Officer's findings are permanently revoked or reinstated ultimately

will depend on EPA's determination of whether Section 8 falls within Indian Country. If EPA determines that Section 8 does lie within Indian country, then HRI must obtain an aquifer exemption and UIC permit from EPA or the Navajo Nation. The Presiding Officer's technical findings would not be binding in such a proceeding.

Conversely, if EPA determines that Section 8 does not lie within Indian country, then the NMED may have an opportunity to restore HRI's aquifer exemption and UIC, or it may order the company to apply for the exemption and the permit. In either case, the validity of the Presiding Officer's technical findings may be relevant if NMED were to find that the initial aquifer exemption and UIC permit were acceptable as written in 1989. At present, the Presiding Officer's conclusions are not consistent with the law and must be reversed.

II. Response to Question 2.

Question 2 states as follows:

If so, would any of these findings be undermined if Section 8 ultimately were found conclusively to fall within "Indian country" and thus within the jurisdiction of the federal UIC program?

Whether the Presiding Officer's technical findings would be undermined if Section 8 were found conclusively to fall within Indian country is unclear, but would likely depend upon a SDWA permitting process by EPA or the Navajo Nation.

If EPA determines conclusively that Section 8 is "Indian country," that determination means that Section 8 has no valid aquifer exemption and UIC permit. What was a "tentative revocation" of the 1989 aquifer exemption and UIC permit would, from that point forward, be permanent. Under those circumstances, HRI must obtain an aquifer exemption and UIC permit from the EPA or Navajo Nation.

The Presiding Officer's technical findings would be irrelevant if EPA or the Navajo Nation denied HRI's application for an aquifer exemption and UIC permit as no mining in Section 8 would be permitted. If EPA or the Navajo Nation were to grant an aquifer exemption and UIC permit, the relevance of the Presiding Officer's technical findings in LBP-99-30 would depend on whether the permit conditions were more or less restrictive than those now incorporated into HRI's license.⁵ As discussed later in this brief, (*supra.* at 12-13) the conditions most protective of human health will govern regardless of which entity imposes those conditions.

III. Response to Question 3.

Question 3 states as follows:

Was it even necessary for the Presiding Officer to address whether the HRI project would comply with the Safe Drinking Water Act?

It was, and remains, necessary for both the Presiding Officer and the Commission to address whether HRI's proposed project would comply with the SDWA. Under clear statutory mandate, the NRC may not license a project that would violate the SDWA. The Atomic Energy Act ("AEA"), 42 U.S.C. § 2011 et. seq., as amended requires the NRC to guard against danger to human health, safety, and the environment when it issues a materials license. The AEA states:

The Commission shall not license any person to transfer or deliver, receive possession of or title to, or import into or export from the United States any source material if, in the opinion of the Commission, the issuance of a license . . . would be inimical to the common defense and security or the health and safety of the public.

⁵ The Presiding Officer chose not to add any additional protective conditions to the HRI license, in large part because of his technical findings. However, an EPA or Navajo Nation UIC permit could easily contain substantially more restrictive conditions. For example, EPA may conclude, as Intervenors did, that restoration of the aquifer to non-ore zone water quality levels will require far more than the nine (9) pore volumes recommended by the Staff and approved by the Presiding Officer.

Id. at § 2099. See also 10 C.F.R. § 40.32(c)(d) (“(c) a specific license will be approved if: the applicant’s proposed equipment, facilities and procedures are adequate to protect health and minimize danger to life or property”).

Along with the requirements of its organic act, the NRC is required to comply with the pollution control standards in the SDWA. Under Executive Order 12088 (1978), 43 Fed. Reg. 47707, reprinted at 42 U.S.C.A. § 4321, all federal agencies must comply with the Safe Drinking Water Act. EO 12088 provides in relevant part:

1-102 The head of each Executive agency is responsible for compliance with applicable pollution standards, including those established pursuant to, but not limited to, the following:

.... (c) Public Health Service Act, as amended by the Safe Drinking Water Act (42 U.S.C. 300f et seq.)

Together, these requirements compel the NRC, to the extent of its regulatory authority, to disallow any action which would be inimical to public health. One such action that would be inimical to public health is a violation of the SDWA. Intervenors are in no way suggesting that the Presiding Officer has the requisite jurisdiction to decide whether HRI should or should not be granted an aquifer exemption or UIC permit. Such a decision is the responsibility of the appropriate administering agency. See CLI-98-16, 48 NRC 119, 121, 122, n.3 (1998).

Where two agencies have responsibility to protect human health and the environment through the SDWA, the agency with primary responsibility for SDWA enforcement (EPA) must make the appropriate determination in the first instance. However, even with an appropriate exercise of authority by EPA, the NRC may not abandon its responsibility to protect public health although it lacks primary enforcement authority under the SDWA. See Executive Order

12088 (1978), 43 Fed. Reg. 47707, reprinted at 42 U.S.C.A. § 4321 at Section 102(c). As a result, both agencies need to review whether the proposed Crownpoint Project will comply with the law and impose any protective measures deemed necessary to ensure compliance. Whichever entity is most protective must govern as both agencies carry out their statutorily mandated responsibility to protect human health and the environment.

Moreover, the NRC has no grounds to continue supporting the existence of HRI's license for the Crownpoint Project as no appropriate administering agency for the SDWA has spoken to the issue of whether Section 8 is a protected aquifer. HRI's license must be tentatively revoked because the 10th Circuit's decision confirmed that EPA's July 14, 1997 letter removed the legal basis for LBP-99-30. See response to Question 1, *infra* at 6-10. Since July 14, 1997, when EPA revoked the original 1989 aquifer exemption, HRI has not had an aquifer exemption or UIC permit for Section 8. It will, at a minimum, be many months before HRI obtains a valid aquifer exemption and UIC permit — if it ever obtains such permission.

Unless and until HRI obtains the appropriate permits and exemptions, it must comply with the law as it currently exists.⁶ The NRC may not license the company to do otherwise and, therefore, should tentatively revoke HRI's license. Executive Order 12088 (1978), 43 Fed. Reg. 47707, reprinted at 42 U.S.C.A. § 4321.

⁶ Several courts, including the Supreme Court, have held that "a polluter is subject to existing requirements until such time as he obtains a variance," and "during its pendency, the original regulations remain in effect, and the polluter's failure to comply may subject him to a variety of enforcement procedures." Train v. Natural Resources Defense Council, 421 U.S. 60, 92 (1975). See also Student Public Interest Research Group of New Jersey v. Monsanto Co., 600 F. Supp. 1479, 1486 (D. N.J. 1985) (holding that NPDES permit requirements are not stayed pending a permit modification hearing).

IV. Response to Question 4.

Question 4 states as follows:

What practical effect does the Tenth Circuit's decision have upon HRI's schedule or plans for mining Section 8?

The practical effect of HRI v. EPA on HRI's schedule is that HRI may not mine until it has a valid UIC permit and aquifer exemption. As the 10th Circuit noted: "HRI must now obtain a permit from EPA prior to commencing underground injection on Section 8." 198 F.3d at 1237. At present, Intervenor's are unaware of any application filed by HRI with EPA for a UIC permit or aquifer exemption. If HRI has no intention of filing an application with EPA, then EPA must first make the determination whether Section 8 is Indian country. Once that determination has been made, Section 8 will either be under the federal UIC program or under the jurisdiction of New Mexico. Then, if HRI files an application with the appropriate entity, a determination must be made whether Section 8 can qualify for an aquifer exemption and a UIC permit. There seems little reason to speculate on possible timelines for these decisions, other than to note that further delays continue to cast doubt on the financial viability of the company.⁷ The essential fact is that HRI may not presently mine, nor may it mine until it has obtained a valid UIC permit and aquifer exemption.

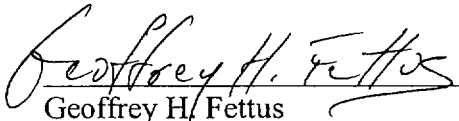
Conclusion

For the foregoing reasons, the Commissioners should find that the Presiding Officer

⁷ HRI's uncertain financial status, as well as the poor operating history of its parent company, Uranium Resources, Inc., raises significant questions about HRI's ability to decommission the Crownpoint Project safely. See ENDAUM's and SRIC's Written Presentation on Hydro Resources, Inc.'s Lack of Technical and Financial Qualifications, at 16-24 (January 11, 1999).

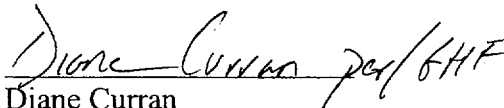
relied on an invalid aquifer exemption and Underground Injection Control permit. Further, the Commission should reverse the Presiding Officer's technical finding that no drinking water will be contaminated as Section 8 must be considered a protected aquifer and a source of drinking water until an appropriate regulatory entity determines otherwise. The Commission should also find that it remains necessary for both the Presiding Officer and the Commission to address whether HRI's proposed project would comply with the Safe Drinking Water Act. Finally, the Commission should tentatively revoke HRI's license for the Crownpoint Project because the 10th Circuit's decision, HRI v. EPA, confirmed that EPA's July 14, 1997 letter removed the legal basis for LBP-99-30.

Respectfully submitted,



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August 9, 2000

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
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HYDRO RESOURCES, INC.)	Docket No. 40-8968-ML
P.O. Box 15910)	ASLBP No. 95-706-01-ML
Rio Rancho, NM 87174)	
)	

CERTIFICATE OF SERVICE

I hereby certify that on August 9, 2000, I caused to be served copies of the foregoing:

**INTERVENORS' RESPONSE TO THE COMMISSIONERS'
QUESTIONS IN THE JULY 10, 2000 ORDER**

upon the following persons by U.S. mail, first class, and in accordance with the requirements of 10 C.F.R. § 2.712. Service was also made via e-mail to the parties marked below by an asterisk. The envelopes were addressed as follows:

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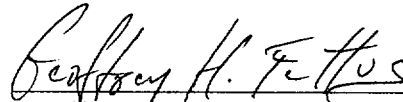
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Dated at Santa Fe, New Mexico,
August 9, 2000



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