UNITED STATES OF AMERICA
RAS 12674 NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

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Dale E. Klein, Chairman
Edward McGaffigan, Jr.
Jeffrey S. Merrifield
Gregory B. Jaczko
Peter B. Lyons

In the Matter of	)	
HYDRO RESOURCES, INC. (P.O. Box 777, Crownpoint, NM 87313)	)	Docket No. 40-8968-ML

CLI-06-29

MEMORANDUM AND ORDER

In this decision, we consider a petition for review filed jointly by Intervenors Eastern Navajo Diné Against Uranium Mining ("ENDAUM"), Southwest Research and Information Center ("SRIC"), Grace Sam, and Marilyn Morris. Intervenors seek review of LBP-06-19, the Presiding Officer's Final Partial Initial Decision in this lengthy materials license proceeding. The Presiding Officer's decision addresses the adequacy of the Final Environmental Impact Statement's ("FEIS") analysis for the Hydro Resources Inc. ("HRI") Crownpoint Uranium Solution Mining Project. The decision focuses on the FEIS insofar as it relates to the Church Rock Section 17, Unit 1, and Crownpoint sites.[1] HRI and the NRC Staff oppose Intervenors' petition for review.

[1] The HRI license, issued by the NRC in 1998, authorizes HRI to conduct *in situ* leach uranium mining at four sites in McKinley County, New Mexico: Church Rock Section 8, Church Rock Section 17, Unit 1, and Crownpoint. Earlier decisions by the Presiding Officer and Commission rejected Intervenor arguments on the adequacy of the FEIS analysis as it relates to the Church Rock Section 8 site. *See* LBP-99-30, 50 NRC 77 (1999), *aff'd* CLI-01-04, 53 NRC 31 (2001). The first portion of this proceeding ("Phase I") focused on Church Rock Section 8. Issues specific to the other three mining sites – Church Rock Section 17, Unit 1, and Crownpoint, have been litigated in this second portion ("Phase II") of the proceeding.

The Commission carefully has considered the Intervenors' petition, but finds that it does not identify any "clearly erroneous" factual finding, significant legal error, or any other reason warranting plenary review.[2] For the reasons outlined below, we deny the petition.

I. FEIS Supplement

The Intervenors argue that the NRC must supplement the FEIS to address a "change in the legal status of HRI's proposed mining project."[3] Specifically, they state that the Diné Natural Resources Protection Act ("DNRPA"), passed by the Navajo Nation Council in 2005, "definitively prohibits uranium mining or processing within Navajo Indian Country," and that Section 17, Unit 1, and part of the Crownpoint site are "Indian Country."[4] They therefore claim that "HRI is prohibited by law from mining on at least two of its four proposed sites," and that an FEIS supplement is necessary because the DNRPA is a "significant change in the legal requirements affecting the HRI mine."[5] According to Intervenors, by rejecting their argument on the need for an EIS supplement, the Presiding Officer violated 10 C.F.R. § 51.71(d).[6]

But as the Commission explained earlier in this proceeding, not all new information that

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[2] *See* 10 C.F.R. § 2.786(b)(4)(2004). The NRC has amended its adjudicatory procedural rules in 10 C.F.R. Part 2. *See* Final Rule: "Changes to Adjudicatory Process," 69 Fed. Reg. 2182 (Jan. 14, 2004). For cases docketed prior to February 13, 2004 (such as this case), the previous procedural rules, including the former 10 C.F.R. § 2.786, continue to apply. A substantially equivalent new rule now appears in 10 C.F.R. § 2.341(b)(4).

[3] Intervenors' Petition for Review of LBP-06-19 (Sept. 11, 2006)("Petition") at 3.

[4] *Id.*

[5] *Id.*

[6] Intervenors' petition does not explain their reference to section 51.71(d), an NRC regulation on the contents of a draft environmental impact statement. We assume they mean to reference the provision's statement that "[d]ue consideration will be given to compliance with . . . requirements that have been imposed by Federal, state, regional, and local agencies having responsibility for environmental protection . . . ." The regulation emphasizes that "irrespective" of any such requirements, the NRC will consider the environmental impacts of the proposed action.

might emerge following issuance of an environmental impact statement requires a supplement to the impacts analysis. The new information must present a "'seriously different picture of the environmental impact of the proposed project from what was previously envisioned.'"[7] Here, the Presiding Officer found that the Intervenors "fail[ed] to provide evidence or argument to suggest that the DNRPA calls into question any of the environmental conclusions in the FEIS."[8] Concluding that there was no "indication that the DNRPA will result in a significantly new potential impact not considered in the FEIS," the Presiding Officer rejected the Intervenors' argument on the need for an FEIS supplement.[9]

The Presiding Officer did note that HRI must comply with all applicable legal requirements, including obtaining any necessary underground injection control permit and aquifer exemption. He therefore stated that resolution of "whether the sites on which HRI proposes to conduct NRC-licensed mining operations are in 'Indian Country' . . . . may affect HRI's ability to mine," just as whether HRI can obtain necessary permits or exemptions would affect its ability to mine.[10] Pursuant to license condition, HRI must "obtain all necessary permits and licenses from the appropriate regulatory authorities" prior to injecting lixiviant.[11]

To the extent that the DNRPA presents another "legal requirement[] affecting the HRI mine," the Presiding Officer's decision itself effectively supplements the FEIS, thereby updating the FEIS description of the Navajo Nation's position on uranium mining activities and making

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[7] CLI-04-39, 60 NRC 657, 659 (2004)(quoting *Sierra Club v. Froehlke*, 816 F.2d 205, 210 (5th Cir. 1987)).

[8] LBP-06-19, 64 NRC __ (2006), *slip op.* at 59.

[9] *Id.* at 59.

[10] *Id.* at 59 n.40.

[11] *See* License Condition 9.14.

clear the DNRPA's enactment and HRI's need "to ensure its operations do not run afoul" of the DNRPA.[12] However, it is beyond the NRC's authority or the scope of this proceeding to resolve jurisdictional questions that ultimately may determine whether HRI is able to proceed with the uranium mining project. While the NRC recognizes the tribal sovereignty of the Navajo Nation, it is not the function of the EIS process to resolve existing or potential jurisdictional disputes.[13] The FEIS notes expressly that resolution of which proposed project areas are Indian Country and related jurisdictional questions "may ultimately be determined through litigation" outside of the EIS process.[14] Simply put, if HRI cannot satisfy applicable Federal, State, and Navajo Nation requirements, it cannot go forward with the project.

Ultimately, at issue is whether the DNRPA significantly alters the FEIS's findings on environmental impacts. In their petition for review, Intervenors simply call "the effects of the DNRPA on the FEIS . . . major and obvious,"[15] and then go on to suggest that because of the DNRPA, the FEIS requires a new cost-benefit analysis, a new analysis of project "alternatives,"

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[12] LBP-06-19, *slip op.* at 59 n.40 (quoting LPP-06-01, 63 NRC 41, 71 n.29 (2006)). At the time the FEIS was issued, there was an ongoing moratorium on uranium mining activity on Navajo lands. The Navajo Nation issued the moratorium in 1983, and renewed it by tribal executive order in 1992. *See* NUREG-1508, "Final Environmental Impact Statement to Construct and Operate the Crownpoint Uranium Solution Mining Project, Crownpoint, New Mexico" (February 1997)("FEIS") at 3-87. The FEIS nonetheless noted that many individuals ("allottees") had agreed to lease their land to HRI, and that a conflict existed between the Navajo Nation moratorium on uranium mining and the "individuals' decisions about their land." *Id.* at 4-120. In light of unresolved conflicts over applicability of the moratorium to allotted lands, the FEIS describes that the NRC chose to proceed "with the EIS process and with a Safety Evaluation Report" to determine the potential impacts of HRI's proposed project and alternatives. *Id.; see also id.* at A-54.

[13] *See e.g.*, FEIS at 4-114 to 4-115 (regarding "competing jurisdictional claims" over "which sovereign – the Navajo Nation or the State of New Mexico – can administer the utilization of water rights"; *see also, e.g.*, *id.* 1-5 ("there are disputes over the jurisdictional status of some of the project area, and similar conflicts may arise regarding other project areas"); 4-115; A-54 to A-55.

[14] *See id.* at 4-101; *see also id.* at 5-4, A-54 to A-56.

[15] Petition at n.3.

and a new analysis of the environmental effects of liquid waste disposal.[16]

As a threshold matter, we note that these arguments were not part of the Intervenors' original NEPA presentation to the Presiding Officer, and are therefore impermissibly late.[17] The Commission deems waived arguments or legal theories not raised before a Presiding Officer or Licensing Board,[18] or only introduced in a reply filing which opposing parties did not have the opportunity to address.[19] In any event, Intervenors' broad-brushed calls for "revisit[ing]" or "re-evaluat[ing]" the FEIS cost-benefit analysis, analysis of alternatives, and liquid waste disposal analysis do not indicate how the DNRPA significantly alters the FEIS's findings and conclusions.

Intervenors' petition for review suggests that the HRI project is "effectively halved" because "at least two of [HRI's] proposed sites"[20] are Indian Country and cannot be mined under the DNRPA. Thus, they claim that the cost-benefit analysis must be redone. But Intervenors have had the opportunity to litigate the adequacy of the FEIS's analysis of potential environmental impacts at all four proposed sites: Church Rock Section 8, Church Rock Section

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[16] *Id.*

[17] *See* Intervenors ENDAUM's, SRIC's, Grace Sam's and Marilyn Morris's Written Presentation in Opposition to HRI's Application for a Materials License With Respect to NEPA Issues for Church Rock Section 17, Unit 1, and Crownpoint (June 24, 2005) at 50-51.

[18] *See* CLI-04-33, 60 NRC 581, 592 (2004).

[19] *See Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-04-25, 60 NRC 223, 225 (2004)("[i]n Commission practice, and in litigation practice generally, new arguments may not be raised for the first time in a reply brief"). In replying to the NRC Staff and HRI, Intervenors introduced a claim that the FEIS cost-benefit analysis requires revision because the Navajo Nation would not receive tax or other benefits from the HRI project. *See* "Reply to HRI's and the NRC Staff's Responses in Opposition to Intervenors' Written Presentation With Respect to NEPA Issues for Church Rock Section 17, Unit 1, and Crownpoint" (Aug. 19, 2005) at 21. Intervenors' arguments on a need for new analyses of alternatives and liquid waste disposal impacts appear to be entirely new claims raised on appeal before the Commission.

[20] *See* Petition at 3.

17, Unit 1, and Crownpoint. In the event that HRI proceeds with a much smaller project with two fewer sites, the estimated environmental impacts from mining at the two eliminated sites would not occur. Potential project benefits (*e.g.* amount of domestically produced uranium to offset imports, new local jobs, and new additional county and state tax revenues) also would be reduced correspondingly.[21] It is not apparent, however, why the overall conclusions of the cost-benefit analysis would significantly change, and the Intervenors do not suggest how they would.[22] Of course, if in the end HRI cannot proceed or chooses not to proceed with the proposed project because of the DNRPA, there would be *no* project impacts or benefits at all. Such a result would be equivalent to the "no action" alternative discussed in the FEIS.

II. Cumulative Impacts to Air Quality and to Groundwater Resources

Cumulative impacts are "the impact on the environment which results from *the incremental impact* of the [proposed] action, when added to other past, present, and reasonably foreseeable future actions."[23] Thus, a cumulative impacts analysis will consider whether the incremental impacts from an action will combine with pre-existing environmental impacts in a

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[21] *See, e.g,* FEIS at 5-1 to 5-7 (cost-benefit analysis); 4 -97 to 4-105 (socioeconomic impacts).

[22] *See, e.g.*, LBP-06-19, *slip op.* at 43 (summarizing general cost-benefit conclusions). Nor do we find persuasive Intervenors' new claims that the DNRPA requires additional FEIS analysis of project "alternatives" and of liquid waste disposal options. The FEIS provides an extensive analysis of alternatives and their potential impacts, examining a variety of alternative sites for mining (including the options of only mining at one or two of the proposed sites), alternative sites for yellowcake drying and packaging, and various liquid waste disposal options. *See, e.g.* FEIS at 2-31, 4-13, 4-58, 4-60, 4-65, 4-80 to 4-81, 4-83, 4–86 to 4-88, 4-94, 4-110 to 4-111. In light of these comprehensive analyses, the Intervenors fail to identify what other "range of alternatives" must be considered. An agency need not "undertake a 'separate analysis of alternatives which are not significantly distinguishable from alternatives [already] considered, or which have substantially similar consequences.'" *Westlands Water Dist. v. United States Dept. of the Interior*, 376 F.3d 853, 871-72 (9th Cir. 2004), *quoting Headwaters, Inc. v. Bureau of Land Mgmt.,* 914 F.2d 1174 (9th Cir. 1990).

[23] 40 C.F.R.§1508.7 (emphasis added).

"fashion that will enhance the significance of their individual effects." [24] Intervenors argue that the Presiding Officer erred when he found adequate the FEIS's cumulative impacts analyses for radiological air impacts and groundwater impacts.

The Presiding Officer's cumulative impacts findings rest heavily upon his analysis of technical and fact-intensive arguments presented by the parties. On such fact-specific technical issues, where a Presiding Officer has reviewed an "extensive record in detail, with the assistance of a technical advisor," the Commission is disinclined to upset the Presiding Officer's findings and conclusions, particularly where the submissions of experts have been weighed.[25] While the Commission on occasion may chose to make its own *de novo* findings of fact, we generally do not exercise that authority where a Presiding Officer or Licensing Board has issued "'a plausible decision that rests on carefully rendered findings of fact.'"[26] Intervenors' petition does not identify any clear error or other reason warranting review of the Presiding Officer's findings on cumulative air impacts or cumulative groundwater impacts, and we therefore decline to review them. Below we provide additional brief comment on the Intervenors' claims.

A. Cumulative Air Impacts

Intervenors argue that the FEIS evaluates only the expected "incremental" airborne radiological emissions expected from the HRI project, but not the "*combined* impacts of airborne radiological emissions from HRI's operation and residues of past mining."[27] The Presiding Officer rejected this argument, explaining that the incremental increase in radiological air

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[24] CLI-01-4, 53 NRC at 57.

[25] CLI-06-1, 63 NRC 1, 2 (2006), *quoting* CLI-00-12, 52 NRC 1, 3 (2000).

[26] CLI-06-1, 63 NRC at 2, *quoting Private Fuel Storage*, *L.L.C.* (Independent Spent Fuel Storage Installation), CLI-03-8, 58 NRC 11, 25-26 (2003).

[27] Petition at 5 (emphasis added).

impacts due to the HRI project is so "de minimis" or "negligible" that it would not significantly enhance already existing environmental effects from background airborne radiation.[28] Intervenors provide us with no reason to question that conclusion. As we stated in Phase I of this proceeding regarding expected environmental impacts at Church Rock Section 8, "Intervenors understandably . . . focus upon the adverse effects of former mining, but they have not explained why [an] additional, and expected to be negligible, radiation impact . . . would have any public health and safety significance." [29]

Intervenors also argue that the FEIS inappropriately averaged background radiation levels for Church Rock and Crownpoint, when Church Rock has significantly higher radiation levels. But the Presiding Officer acknowledged "the existence of discrete sources of higher background radiation in Church Rock."[30] Indeed, he noted that background doses as high as 1,000 mrem/year are not unusual in the United States.[31] He concluded, however, that the actual "typical background radiation level for the general public at Church Rock is *closer* to the 225 mrem/year estimated in the FEIS, rather than the 1000 mrem/year alleged by the Intervenors."[32] Intervenors' petition does not suggest otherwise.

B. Cumulative Groundwater Impacts

Intervenors argue that the FEIS fails to take a hard look at the potential for groundwater contaminants to migrate from HRI's proposed mine. Their particular concern is the presence of

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[28] *See* LBP-06-19, *slip op.* at 15-16, 19-20, 27.

[29] CLI-01-04, 53 NRC at 69.

[30] LBP-06-19, *slip op.* at 13; *see also id.* at 14-15.

[31] *See id.* at 14; *see also* LBP-06-01, 63 NRC at 61 n.16 (Phase II Radiological Air Emissions Challenges), *aff'd* CLI-06-14, 63 NRC 510 (2006).

[32] LBP-06-19, *slip op.* at 15 (emphasis added).

underground mine workings (from a previous underground mining operation) located in the southern end of the Church Rock site, and the potential for these mine workings to form preferential pathways for lixiviant (mining solutions) to move away from the well field. Such pathways could lead to "excursions," which are "unanticipated releases of mining solutions that move beyond the well field area."[33]

Specifically, Intervenors argue that the Presiding Officer erred by "accepting the FEIS's unexplained and unjustified failure to model the acknowledged potential for excursions in the old mine workings."[34] They claim that by finding the FEIS discussion of the mine workings adequate, the Presiding Officer "violated" 10 C.F.R. § 51.71, an NRC regulation which calls for environmental impacts to be quantified to the "fullest extent practicable."[35] They further claim that the Presiding Officer "lacked any rational basis" for assuming that HRI is capable of correcting an excursion if one were detected.[36]

The FEIS discusses the potential for horizontal and vertical excursions during HRI's proposed mining operations extensively, particularly focusing on the underground mine workings in Church Rock.[37] Contrary to Intervenors' claims, we see no indication that the Presiding Officer relied upon "unexplained and unjustified" discussion in the FEIS, or that he lacked any reasonable basis for concluding that the FEIS provides adequate consideration of the old mine workings and the potential risks they pose to groundwater impacts.[38]

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[33] FEIS at 4-15 (internal quotation omitted).

[34] Petition at 7.

[35] *Id.* at 7 (quoting 10 C.F.R. § 51.71).

[36] Petition at 7.

[37] *See* FEIS at 4-54 to 4-56.

[38] *See* LBP-06-19, *slip op.* at 22-25. We find unpersuasive Intervenors' claim that the Presiding Officer lacked "any rational basis" to assume that an excursion can be corrected. In

Referencing the FEIS, the Presiding Officer notes that there are established methods in *in situ* leach mining for detecting and correcting horizontal and vertical excursions, that HRI has a sensitive excursion monitoring program, and that HRI would employ pre-mining testing and particular drilling methods to minimize the risk of excursions.[39] In the event of an excursion, HRI must follow procedures mandated by license condition, including notifying the NRC by telephone within 24 hours.[40] If HRI cannot correct an excursion within 60 days, it must either terminate injection of lixiviant within the well field until aquifer cleanup is complete, or increase its surety amount to cover the full third-party cost of correcting and cleaning up the excursion.[41]

In short, the record amply supports the Presiding Officer's finding that the FEIS "adequately considers the cumulative impact of HRI's proposed mining operation on groundwater contamination *vis a vis* the old mine workings."[42] Intervenors have not shown the Presiding Officer's fact-based findings to be unreasonable.[43]

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addressing potential vertical excursions, the FEIS states that it "should be possible" to mine in the Westwater Canyon aquifer without creating a vertical excursion, but notes that HRI has not actually "specifically demonstrated" how it would accomplish this. *See* FEIS at 4-56. Therefore, the FEIS does not exclude the possibility that there could be a vertical excursion. That HRI has not provided a specific "demonstration" of how it would mine in the Westwater Canyon without creating an excursion, however, does not by itself suggest that HRI would be incapable of correcting an excursion if one were detected.

[39] *See* LBP-06-19, *slip op.* at 23-24; *see also* FEIS at 4-16 to 4-17.

[40] *See* License Condition 12.1; *see also* FEIS at 4-21 to 4-22.

[41] *See* License Condition 10.13; *see also* FEIS at 4-21 to 4-22.

[42] LBP-06-19, *slip op.* at 25.

[43] Intervenors' arguments on the underground mine workings are not entirely clear. In one part of their argument they apparently challenge the Presiding Officer's discussion of potential horizontal excursions, *see* Petition at 7 (quoting the Presiding Officer's discussion of horizontal excursions at LBP-06-19, *slip op.* at 23), but then in another part of the argument go on to quote parts of the Presiding Officer's decision and FEIS that specifically address vertical excursions. *See* Petition at 7 (quoting LBP-06-19, *slip op.* at 24 and FEIS at 4-56). Regardless, their petition does not present any clear error or other reason for revisiting the Presiding Officer's fact-based evaluation of groundwater impacts.

III. Mitigation Measures for the Crownpoint Municipal Water Wells

The FEIS identifies potentially significant groundwater impacts associated with HRI's proposed mining at the Crownpoint site.[44] Under a conservative analysis, the NRC Staff found a potential risk that the local water supply at Crownpoint could be contaminated by excessive amounts of uranium. Therefore, the Staff has imposed a license condition requiring HRI to move the town of Crownpoint's existing water supply wells and water delivery system prior to injecting any lixiviant at Crownpoint.[45]

Specifically, HRI's license requires it to replace the town of Crownpoint's water supply wells, construct the necessary water pipeline, and provide funds so that the existing water supply systems of the Navajo Tribal Utility Authority ("NTUA") and the Bureau of Indian Affairs ("BIA") can be connected to the new wells. The license further requires that "[a]ny new wells, pumps, pipelines, and other changes to the existing water supply systems . . . shall be made such that the systems can continue to provide at least the same quantity of water as the existing systems."[46] Moreover, water quality at each individual well head must "not exceed the EPA's primary and secondary drinking water standards."[47] To determine "the appropriate placement of the new wells," HRI must "coordinate with the appropriate agencies and regulatory authorities," including the BIA, the NTUA, the Navajo Nation Department of Water Development and Water

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[44] *See* FEIS at 4-48 to 4-49; 4-113; 4-122 to 4-123; 5-7.

[45] *See* License Condition 10.27; *see also* FEIS at 4-62, A-1 to A-2.

[46] License Condition 10.27(A).

[47] *Id.* Placement of new water wells and implementing details relating to the requirement that the new water supply systems provide "at least the same quantity of water as the existing systems" would implicate the jurisdiction of other agencies and regulatory authorities as indicated in license condition 10.27. For example, local authorities may confront issues, such as planned water usage or population growth issues, relating to the sustainable yield of a different aquifer if one were chosen for a new water supply.

Resources, and the Navajo Nation Environmental Protection Agency.[48]

The Presiding Officer found that the FEIS adequately addresses mitigation measures for replacing the Crownpoint water supply wells.[49] Intervenors challenge this ruling, arguing that the mitigation measures are "insufficiently discuss[ed]" and must be supported by "scientific studies and substantial evidence."[50] In particular, they claim that while the replacement wells must provide the same quantity of water as existing wells and must meet specific drinking water standards, "this mitigation measure is not supported by any data as to whether there are other locations in or near Crownpoint that might meet these criteria, which regulatory agency, if any, will be responsible for well relocation or oversight of well relocation, whether existing water infrastructure or new infrastructure will be needed and whether building such infrastructure is even feasible."[51]

Intervenors, however, demand a level of detail not required by NEPA. The purpose of addressing possible mitigation measures in an FEIS is to ensure that the agency has taken a "hard look" at the potential environmental impacts of a proposed action.[52] An EIS therefore must address mitigation measures "in sufficient detail to ensure that environmental consequences have been fairly evaluated."[53] An EIS need not, however, contain "a complete mitigation plan," [54]

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[48] *Id.*; *see also* FEIS at 4-113.

[49] LBP-06-19, *slip op.* at 44-47.

[50] Petition at 8.

[51] *Id.*

[52] *Westlands Water Dist.*, 376 F.3d at 872, *citing Robertson v Methow Valley Citizens Council*, 490 U.S. 332, 352 (1989).

[53] *Robertson*, 490 U.S. at 352.

[54] *Id.*

or "a detailed explanation of specific measures which will be employed." [55] Indeed, a mitigation plan "'need not be legally enforceable, funded or even in final form to comply with NEPA's procedural requirements.'"[56] As long as the potential adverse impacts from a proposed action have been adequately disclosed, it is not improper for an EIS to describe "mitigating measures in general terms and rel[y] on general processes . . . ."[57]

At bottom, Intervenors fear that HRI may be unable to meet the "criteria" specified in the license condition. But if HRI cannot meet the specified water quantity and quality and related requirements for the replacement water supply wells, it will *not* be able to begin mining at Crownpoint. In short, the mitigation measures set forth specific goals that are a *condition* that HRI must meet prior to injecting lixiviant at Crownpoint.

IV. Land Use Impacts and Mitigation Measures

Intervenors argue that the Presiding Officer erred when he found adequate the FEIS discussion of potential land use impacts. They claim that the Presiding Officer ignored evidence they presented on the impacts that HRI's mining project would have on the Navajo people who live and work in Church Rock Section 17, and that by "failing to examine the environmental impacts of HRI's operation on the specific locale of Section 17, the Presiding Officer violated 40

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[55] *Id.* at 353.

[56] *Okanogan Highlands Alliance v. Williams*, 236 F.3d 468, 473 (9th Cir. 2000), *quoting National Parks & Conservation Ass'n v. United States Department of Transp.*, 222 F.3d 677, 681 n.4 (9th Cir. 2000). We find unpersuasive Intervenors' argument that mitigation measures set forth in an EIS must be "supported by scientific studies." *See* Petition at 8. The case cited by Intervenors for that proposition did not involve an EIS, but instead mitigation measures relied upon to avoid the need to prepare an EIS. *See Wyoming Outdoor Council v. Corps of Engineers*, 351 F. Supp. 2d 1232, 1250 (D. Wy. 2005).

[57] *Northern Alaska Envtl. Ctr. v. Kempthorne*, 457 F.3d 969, 979 (9th Cir. 2006). Moreover, HRI will need to coordinate the placement of the new water wells with various specified authorities. Consequently, numerous details that will bear on potential well placement are simply not yet know, and may not be known until HRI has been able to survey potential locations for replacement wells.

C.F.R. § 1508.27."[58] They also argue that the Presiding Officer ignored their evidence showing that the mitigation measures for land use impacts are inadequate.

We find no indication that the Presiding Officer failed to address or "ignored" evidence that the Intervenors presented. Instead, he rejected their claims, agreeing instead with HRI and the NRC Staff in concluding that the FEIS adequately discusses the land use impacts. To be sure, HRI's proposed mining project necessarily would cause adverse land use impacts at all of the proposed mining sites.[59] These include temporarily disrupting livestock grazing, which "'would adversely affect Navajo who have grazing permits for the land and rely on livestock as an important economic resource.'" [60] The mining activities also would force the relocation of particular individuals or families that are Navajo "allottees" (owners of surface and mineral rights) or their tenants. But as the FEIS notes, the allottees were "voluntary signatories" to leases negotiated by HRI. They were informed as a condition of the leases that there would be a need for relocation and access restrictions during HRI's mining. Among those forced to relocate, however, there may be individuals who were not actual signatories to a lease, but are living on allotted lands (*e.g.* as tenants).

To help mitigate land use impacts, HRI is to compensate those individuals who hold livestock grazing permits that would be interrupted:

> HRI should compensate these permittees directly (for private lands) or indirectly through the relevant tribal [authority] (for tribal lands) or

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[58] Again, the Intervenors cite to a regulation without identifying their precise argument. Section 1508.27 sets forth the Council on Environmental Quality's definition of the word "significantly" as used in the NEPA process to describe the significance of environmental impacts. It provides that the significance of an action must be analyzed in several contexts, including the "locality." *See* 40 C.F.R. § 1508.27.

[59] *See* FEIS at 92-96.

[60] LBP-06-19, *slip op.* at 29 (quoting FEIS at 4-94). The FEIS notes that under the Federal General Mining Law of 1872, "mineral rights owners [HRI has secured mineral leases] can disrupt surface grazing permits in order to remove minerals." *See* FEIS at 4-94.

> Federal agency (BIA for allottee lands). Staff recommend that the Navajo Nation negotiate compensation arrangements for lands where grazing permits are held in tribal trust, and that BIA negotiate compensation arrangements for lands where allottees have grazing permits.[61]

In addition, HRI is to provide direct compensation to any residents of allotted lands who were not signatories to leases, but are forced to relocate during project construction and operation.[62]

These are measures "to help mitigate"[63] impacts that understandably would bring hardship to the individuals affected. The FEIS does not purport to claim that the mitigation measures would relieve all difficulty. Intervenors claim that the Presiding Officer "violated NEPA by accepting the adequacy of monetary compensation and relocation as mitigation measures."[64] Intervenors believe that "monetary compensation does not suffice," and that it is unacceptable for any potentially affected individuals to have to relocate. [65] Whether there is *any* mitigation measure that they would find adequate is not apparent because they do not suggest one. But NEPA does not guarantee that federally-approved projects will have no adverse impacts at all. Nor does it require an agency to select the most environmentally benign alternative. While the HRI FEIS might have said more about those who may be affected by HRI's project, the Presiding Officer found that it sufficiently discusses potential impacts and mitigation measures. Intervenors provide us with no reason to revisit that conclusion.[66]

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[61] FEIS at 4-95.

[62] *Id.*

[63] *Id.*

[64] Petition at 9.

[65] *See id.* at 9-10.

[66] Intervenors also claim the FEIS is inadequate because it does not specifically address "the logistical matters" involved with the relocations, including "how tribal members unwilling to be relocated will be treated." *See* Petition at 8. But as we stressed previously, *see supra* pp. 13-14, mitigation measures need not include a complete plan with all details. The FEIS

V. Conclusion

For the reasons given in this decision, we *deny* the Intervenors' petition for review of LBP-06-19.

IT IS SO ORDERED.

For the Commission

/RA/

Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, Maryland
this 14th day of December 2006.

stresses that "it would not be possible to determine how many individuals or families might have to be relocated until well drilling began." *See* FEIS at 4-94.